

Scottish Government Consultation

**Scotland's statutory debt solutions and
diligence: policy review response**

August 2022



Scottish Government
Riaghaltas na h-Alba
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1. Ministerial foreword



Countries around the world have been facing unprecedented challenges and a strain on their economies in recent times, and Scotland has not been immune to this. The COVID-19 pandemic introduced huge uncertainty – with a far-reaching impact on business and employment arrangements for thousands of people in Scotland. Now we are in the midst of a cost of living crisis, exacerbated by the pandemic related uncertainty and placing many households under extreme financial difficulty. Unfortunately, for many, unsustainable debt will be the regrettable consequence.

It is therefore essential that we look to maximise the effectiveness of our systems that provide the necessary protection and support to help people navigate their way out of the pressure of problem debt. We have good mechanisms in Scotland – with far-sighted reforms introduced in 2015 placing high quality consumer debt advice at the centre of the system. The Debt Arrangement Scheme has been a major success and remains the UK's only statutory debt repayment solution – reforms introduced immediately before the on-set of the pandemic have been an enabler for the scheme to grow, allowing more people to take control of their debt through a manageable payment programme.

It is important that we continue to build on our current debt solutions and I am therefore grateful to the many professionals who have given their time and commitment to help the Scottish Government review our solutions and mechanisms to ensure they are fit for purpose. They have worked together to bring forward a number of recommendations which drew on a wide range of evidence, including case studies and statistics, with the aim of building on improvements which we introduced in response to the pandemic.

The information in this consultation provides the Scottish Government's response to the recommendations put forward and outlines the work that will be taken forward as a result. I would encourage anyone interested in our debt solutions and debt recovery mechanisms to provide feedback on these proposals. My intention is that these proposals are considered either for inclusion in a future Bill before the Scottish Parliament or to be implemented through secondary legislation or administrative measures, where appropriate.

We look forward to receiving your views on this consultation and I thank you for taking the time to contribute.

Tom Arthur MSP

Minister for Public Finance, Planning and Community Wealth

2. Introduction

The Scottish Government committed to a policy review of both formal debt recovery mechanisms (known as diligence) and 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.

[The Ministerial Working Group on Statutory Debt Solutions](#) discussed the approach to the policy review at a meeting in October 2020 and it was agreed that the review should consist of three stages:

- Stage 1 – priority steps to be taken to help address the immediate impact of the COVID-19 pandemic
- Stage 2 – a wider review looking at the operation of existing statutory debt solutions, aimed at providing recommendations and options for improvement
- Stage 3 – a longer term strategic review to assess if the current range of statutory solutions meet the needs of the economy

The review of diligence was taken forward separately through the [Diligence Working Group](#) which has produced and published its report and recommendations.

Stage 1 of the review was completed in the latter part of 2020 with a number of immediate priorities identified. This work, in particular, focused on aspects of the emergency legislation, introduced through the Coronavirus (Scotland) (No.2) Act 2020 which were identified as appropriate for permanent implementation. Stage 1 culminated in the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021 which were approved by the Parliament, and came into force on 29 March 2021. These reforms included lowering the cost of access to bankruptcy where it is identified as the right mechanism to resolve debt issues and removed all fees for the most financially vulnerable.

This consultation sets out the Scottish Government's response to the second stage of the review. [Stage 2 of the review](#) has been stakeholder led and involved the creation of three dedicated working groups to look at key aspects of current statutory

debt solutions. The working groups drew on a wide range of expertise and knowledge from representatives from all sectors involved in the debt landscape. Each working group produced a paper outlining its considerations and recommendations. Some of the issues considered were complex in that there were strongly opposing views amongst stakeholders - it was not always possible to reach a consensus on the best way forward. Where that was the case, the key arguments and information discussed were set out for ministers to consider further.

In light of the consultation and work undertaken to date, the Scottish Government's response to these policy reviews, and its proposals for future action contained in this document are being opened to consultation over an abbreviated timeframe of eight weeks.

The feedback received during this consultation will enable us to finalise changes and plan for these to be taken forward, either through legislation, guidance or working with stakeholders.

The third and final stage of the review will be taken forward separately. The timescale and format of this has not yet been finalised but is expected to conclude with a report of recommendations being presented to ministers.

3. Responding to this consultation

We are inviting responses to this consultation by 7 October 2022.

Please respond to this consultation using the Scottish Government's consultation hub, Citizens Space at - [Scotland's statutory debt solutions and diligence: policy review response consultation](#). You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 7 October 2022.

If you are unable to respond using our consultation hub, please complete and return the Respondent Information Form in this document to:

Policy Development
Accountant in Bankruptcy
1 Pennyburn Road
Kilwinning
KA13 6SA

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

To find out how we handle your personal data, please see our [privacy policy](#).

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at [Citizen Space](#). If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to policy@aib.gov.uk.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online at [Citizen Space](#). Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Implementation of any reforms that may arise following consideration and analysis of the responses to this consultation may involve primary legislation. These will be subject to Parliamentary process and identification of an appropriate opportunity to bring forward a Bill. There may also be opportunities to address the issues raised in secondary legislation and these may be enacted over a shorter timescale. The consultation response will provide more detail on these matters.

4. Consultation

Theme 1 - protections, information and advice prior to debt solutions

Statutory moratorium on diligence – mental health provisions

1. In April 2015, the Bankruptcy and Debt Advice (Scotland) Act 2014 introduced a statutory moratorium on diligence providing protection for those who required time to seek advice and resolve their problems with debt and consider the most appropriate solution.
2. A moratorium is a period of debt relief during which creditors cannot take action against you for debts you owe them.
3. In May 2021, the UK Government introduced a similar form of protection (Debt Respite Scheme or “Breathing Space”) and with it specific additional protection targeted at individuals receiving mental health crisis treatment. The [mental health crisis breathing space regulations](#) provide a period of protection for the term of the crisis treatment with an additional 60 days (the standard breathing space period) once the crisis treatment has ended.
4. There is no limit to the number of times an individual can apply for a mental health crisis breathing space, however, the application must include certification by an Approved Mental Health Professional that the applicant is receiving mental health crisis treatment.
5. The working group’s discussions on this issue reinforced the importance of recognising the clear link between problem debt and mental health and that there is a need for further support and protection. Poor mental health can make managing money much harder and the extreme worry caused by financial issues can have a seriously detrimental effect on mental well-being.
6. The working group has recommended that options for enhanced protection be investigated – learning from the experience of the operation of the system in England

and Wales and considering further how the systems of health care and debt advice delivery in Scotland could provide for this.

Scottish Government proposal

7. The Scottish Government considers that the introduction of additional moratorium protection for those facing financial difficulties and a mental health crisis should be taken forward.

8. The Scottish Government proposes to bring together specialists in the provision of debt counselling, delivery of mental health care provision and other key stakeholders to devise a system that would be tailored for Scotland – with the aim of providing efficient access to protection for those that require it, taking account of the challenging circumstances they are facing. This work will consider access to moratorium protection, the operation of a scheme during the period involved and the arrangements for exit.

Moratorium on diligence

9. The statutory moratorium on diligence provides a period of protection during which creditors cannot take any formal recovery action (diligence) against a debtor for debts owed.

10. The working group discussions on the operations of the existing moratorium focussed on two areas – the time period and whether any additional protections or features should be introduced. Although there was no consensus from the group on the moratorium period, there was a suggestion of 60 days - with the potential option of an extension of protections under certain circumstances. There was also a recommendation to freeze interest and charges on debt during the moratorium period.

11. Having considered the working group and further stakeholder comments the Scottish Government has already made further provision for the moratorium period to be set at six months through the [Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#), making permanent the temporary provisions introduced in response to the

pandemic. This Act also includes provision to enable the moratorium period to be varied through regulations in the future and a commitment was made by ministers to review this period when the cost of living crisis subsides.

Scottish Government proposal

12. The Scottish Government has considered further the views presented by stakeholders at the Ministerial Working Group on Statutory Debt Solutions. While the Scottish Government recognises that introducing further reform to the moratorium, including freezing of interest and charges on debts during the protection period would be welcomed by some stakeholders, it is clear that the current arrangements in Scotland benefit from simplicity of operation and ease of access to protections when they are needed.

13. The Scottish Government considers that further reform to the moratorium may dilute the benefits of the administratively light and highly effective existing operation. Additional measures on interest and charges would require identification of, and communication with, all creditors resulting in additional complexity, creating additional burden on the advice sector and would require the development of costly IT systems to support the process.

14. The Scottish Government's main priority has been, and continues to be, to ensure the moratorium is set at the appropriate period. This enables clients to seek advice and gather all of the evidence needed to ensure that a fully informed decision can be made on the right solution. We have listened to the evidence from a wide range of stakeholders, which indicates the current cost of living crisis will result in an influx of demand on the advice sector, with many people who have previously been able to manage their budgets coming under increased pressure, resulting in their debt potentially becoming unsustainable.

15. For this reason, the Scottish Government chose to retain the existing enhanced protection on a permanent basis but with a commitment to review and introduce an amended timeframe when the current risks hopefully subside in the months to come. The regulation making power will enable flexible and rapid

response to changing economic circumstances. The proposal therefore is to maintain the six months moratorium on diligence until the current economic situation improves.

Improving information and understanding of solutions

16. A number of issues have emerged through working group discussions and the Parliament's inquiry into Protected Trust Deeds (PTDs) which have highlighted the need for clear information and high quality advice being accessible to everyone, which must consider all the options available to resolve issues of problem debt.

Money advice

17. The Economy, Energy and Fair Work (EEFW) Committee's recommendations on PTDs included the consideration of clients receiving free independent money advice before entering any statutory debt solutions - including PTDs. This was in response to concerns heard on the extent to which some individuals with problem debt are being mis-sold PTDs in favour of alternative solutions that would better suit their needs and the interests of the creditors involved.

18. The working group focussing on PTDs and the EEFW Committee's recommendations concluded that it was not feasible, at this stage, to have pre-trust deed advice provided by the free money advice sector. This is due to a lack of resources which would be required to meet the envisaged demand.

19. The group highlighted several recent areas of targeted action aimed at improving the regulation of pre-trust deed advice. The Financial Conduct Authority (FCA) has taken steps to tackle the practices of some advice providers (such as lead generator/debt packager companies) who may be promoting PTDs due to the financial incentives involved.

20. The working group highlighted the voluntary PTD protocol that has been introduced since the EEFW Committee's recommendations and, for those who sign up to the protocol, includes an expectation for trustees to consider the professional or regulatory status of any introductory firm. This has followed similar requirements

set out by the Recognised Professional Bodies (RPBs) responsible for the oversight of insolvency practitioners.

Information leaflet and cooling off period

21. The EEFW Committee recommended that the Scottish Government should develop a new leaflet, presented in clear and easily accessible language covering the risks and benefits of solutions, to be provided to clients prior to the granting of a trust deed.

22. It further recommended a cooling off period allowing reconsideration for a period following an individual receiving this leaflet and signing a trust deed.

23. The working group considered the recommendation made on a cooling off period. In considering the point at which a cooling off period would apply, the group noted the existing requirement for clients to be given adequate time to think before granting a trust deed. This is set out in the overarching guidance that all insolvency practitioners are required to follow and the working group recommended that the wording within this guidance be strengthened to provide a more definite cooling off period.

24. The working group contemplated a cooling off period applying after the granting of a trust deed which would reflect the process that applies to other complex financial products. However, the group highlighted the difficulties in implementing this provision in trust law (a trust deed takes effect on signing) and for this reason they recommended that any action on this could only be considered as part of a more strategic review on the appropriateness of existing debt solutions.

25. The working group did support the development of a new leaflet designed to cover key information in a clear and accessible manner, that would form part of the package of information supplied prior to the granting of the trust deed.

Clear and accessible messages

26. The Diligence Working Group has recognised the importance of ensuring anyone subject to formal debt recovery action understands the implications and where to get appropriate help and advice.

27. It highlighted concerns about the extensive content within the existing Debt Advice and Information Package (DAIP) and dangers that the key messages are lost. They have recommended that this be streamlined and available to the person with debt at the earliest stage - prior to formal debt recovery action.

28. It also highlighted concerns about the complexity of the language and terminology used in diligence and asked for this to be simplified, helping to remove the stigmatisation associated with debt.

Scottish Government proposal

29. The Scottish Government agrees with the working group's view that high quality advice by appropriately skilled people in advance of entering any debt solution is of critical importance – irrespective of whether this is provided through the free, charitable or fee charging sector.

30. The Scottish Government agrees with the working group's conclusions that it would not be feasible to mandate free money advice sector involvement in advance of the granting of each trust deed. This would place further considerable pressure on the advice sector and create discrepancy between trust deeds and other solutions.

31. For example, reforms to the Debt Arrangement Scheme (DAS) introduced in 2019 have served to enable more private sector advisers and insolvency professional firms to facilitate clients' access to that scheme without the requirement for free sector advice.

32. While the Scottish Government does not propose to introduce the requirement for free sector advice prior to a trust deed, it is committed to working with the FCA and the RPBs to continue the drive for improvements in the operation of PTDs.

33. The Scottish Government recognises that clarity and transparency in the information that is provided to those seeking a solution to problem debt is extremely important. Consequently it proposes to take forward simplification of language utilised in the DAIP, which is a key document, and act on the recommendations to introduce a clear and succinct information leaflet for those considering granting a trust deed.

34. The Scottish Government is grateful to the working group for its work in developing a draft leaflet and the Scottish Government will investigate how this can be embedded into operational practice. The implementation of a cooling off period in relation to trust deeds will be further considered at stage 3 of the review of Scotland's debt solution landscape.

35. The Scottish Government will also seek to address the concerns raised by the Diligence Working Group over the complexity of the language and terminology used in relation to diligence on our websites and publications not being generally understood by the public and will take action to simplify this wherever possible.

Summary of Scottish Government proposals under theme 1 – protections, information and advice prior to debt solutions

Proposal 1.1

Design detailed proposals for the introduction of a specific mental health process as part of the statutory moratorium – in collaboration with mental health and debt specialists.

Proposal 1.2

Introduce a new requirement to provide an individual with a clear and succinct information leaflet for those considering a trust deed. This should form part of the process required for a trust deed to gain protection.

Proposal 1.3

Take action to streamline the Debt Advice and Information Package to ensure key messages are clear and available to the person with debt at the earliest stage prior to formal debt recovery action.

Proposal 1.4

Simplify the language and terminology used in relation to diligence on our websites and publications wherever possible.

Theme 1 questions

Question 1a. What are your views on each of the proposals?

Proposal 1.1 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 1.2 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 1.3 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 1.4 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Question 1b. In general, what do you like about the proposals set out in theme 1?

Question 1c. Do you have any other comments or suggestions for improvement on the proposals set out in theme 1?

Theme 2 - debt solutions – entry criteria

Minimal Asset Process bankruptcy – minimum debt threshold

36. The entry requirement for self-initiated bankruptcy in Scotland requires a minimum level of debt to be owed at the date of application. For the Minimal Asset Process (MAP) bankruptcy option the debt level is currently fixed at £1,500. Following detailed discussions, the working group considering this issue recommended the removal of the debt threshold for MAP bankruptcy application, with the retention of the existing debt level for other (non-MAP) bankruptcy applications.

37. The working group considered that the £1,500 threshold could prevent some people from being able to obtain debt relief for deeply worrying and unsustainable debt, particularly where there is no surplus income that would enable other solutions to become viable. It was noted that less than 1% of total MAP bankruptcy applications submitted between 2018 and 2021 involved debts of between £1,500 and £2,500 and while this indicated that the numbers accessing bankruptcy for lower

levels of debts would likely be small, the impact of carrying this unsustainable debt for this group of people could be significant.

38. The Social Justice and Social Security Committee, while carrying out its Inquiry into Low Income and Problem Debt also heard that the minimum debt threshold in MAP of £1,500 could be a significant burden for some people, leaving them trapped in poverty, and impacting on their mental health and available budget. The Committee recommended that the minimum debt threshold should be removed.

Scottish Government proposal

39. The Scottish Government recognises the concerns expressed that the existing minimum debt threshold may act as a barrier to debt relief for a limited number of people seeking resolution to problem debt. While it is acknowledged that bankruptcy is a serious step involving far-reaching consequences which could arguably provide justification for minimum debt figure, it does acknowledge the compelling arguments made for those who may find lower level debt insurmountable.

40. It therefore proposes to remove the minimum debt threshold for MAP bankruptcy.

41. In 2015, the Scottish Government introduced debt advice as a mandatory requirement in accessing any of Scotland's statutory debt solutions. This requirement will mitigate against inappropriate applications for bankruptcy involving very low sums of debt. Current legislation also allows the Accountant in Bankruptcy (AiB) to refuse bankruptcy where it is considered inappropriate in the given circumstances.

Access to bankruptcy – asset thresholds

42. The MAP bankruptcy entry criteria includes asset thresholds in addition to the minimum and maximum debt threshold levels. The prescribed asset limits that would currently preclude entry to MAP bankruptcy are:

- the total assets held are valued in excess of £2,000 and
- a single asset held is valued in excess of £1,000

43. The working group considered this issue and analysed data on those denied access to bankruptcy based on one of the criteria above. While the asset threshold is considered an appropriate gateway criteria, they concluded that there appears to be no strong policy rationale for both the single and combined asset thresholds to be considered separately.

44. They recommended that the combined asset threshold be retained as the single entry criteria. This would provide greater flexibility on the issue of funds retained in a client's bank account which may breach the individual asset threshold at set times based on payments of income received. In many cases this will not reflect a true position of assets held by clients.

Scottish Government proposal

45. The Scottish Government believes it would be beneficial to simplify the entry criteria on asset thresholds and supports the recommendations made.

46. The Scottish Government proposes the removal of the single value asset threshold when applying for a MAP bankruptcy. It also proposes to review and update the current total assets threshold.

Minimum debt level – Protected Trust Deeds

47. The issue of minimum debt level for entering a PTD, currently fixed at £5,000, is amongst the most contentious issues under discussion across any of Scotland's debt solutions.

48. The issue featured amongst the EEFW Committee's recommendations where it concluded that an increase should be introduced to ensure that more surplus income is available to repay the debt. However, the Committee did recognise the restrictive effect of this change and the possibility that more people might be forced into bankruptcy.

49. The detailed discussions and factors considered by the working group on this issue bring into clear focus the sharply opposing views depending on stakeholder perspective. The case for increasing the debt threshold arises from two main concerns expressed over PTDs and their operation.

- Firstly, the returns provided to creditors in lower debt level PTDs are more significantly impacted by the level of administration costs applied – with a higher proportion of the contribution paid being utilised to meet these costs
- Secondly, the total payments made during the lifetime of lower debt level PTDs in certain cases would approach the total level of debt, calling into question whether a PTD represented the best solution for creditors or those granting a trust deed

50. The contrary view is that intervention on the minimum debt level could deny access where a PTD is the appropriate debt solution.

51. Increases in the entry debt level risks impinging on individual choice and undermining the basic position that trust deeds are voluntary in nature and only come into force if designated consent criteria are met.

52. The working group were unable to reach a consensus on the issue of minimum debt level. The report sets out in some detail both the case for change and the arguments for retaining the status quo, including all of the statistical information that has been collected during the consideration of this issue.

Scottish Government proposal

53. The Scottish Government recognises fully the challenging issues that are under consideration on the subject of entry debt level and PTDs. It has considered carefully the recent developments in this area that have had direct impact on the number of lower debt level PTDs.

54. Amongst those have been the reforms to DAS which have resulted in a broader range of organisations providing this solution where it is the appropriate and viable option for the individual involved.

55. The Scottish Government notes that the percentage of PTDs with debts of less than £6,000 as compared to all those protected has fallen from 2.3% in 2018-19 to 0.6% in 2020-21. The percentage with debts of less than £7,500 has dropped from 10.9% in 2018-19 to 6.3% in 2020-21.

56. Additional factors, including steps to ensure the trustee considers the professional or regulatory status of any introductory firm, as well as tighter regulation over debt packaging organisations, all aim to improve the initial advice provided and direct clients to the solution that best meets their circumstances and balance those with the interests of the creditors involved.

57. In light of these issues, the Scottish Government considers that although a minimum debt level remains appropriate, it does not propose to increase this beyond the existing £5,000 level.

58. This issue will be kept under close review and future action will be considered where evidence suggests that a higher gateway debt level is required in addition to the other actions taken to improve pre-trust deed advice and broaden access to DAS.

Summary of Scottish Government proposals under theme 2 - debt solutions – entry criteria

Proposal 2.1

Remove the minimum debt threshold for Minimal Asset Process bankruptcy.

Proposal 2.2

Remove the single value asset threshold when applying for a Minimal Asset Process bankruptcy and review and update the current total assets threshold.

Proposal 2.3

Retain the £5,000 minimum debt level for accessing PTDs.

Theme 2 questions

Question 2a. What are your views on each of the proposals?

Proposal 2.1 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 2.2 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 2.3 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Question 2b. In general, what do you like about the proposals set out in theme 2?

Question 2c. Do you have any other comments or suggestions for improvement on the proposals set out in theme 2?

Theme 3 - administration of debt solutions

Common Financial Tool

59. The Common Financial Tool (CFT) is the statutory method used to assess income and expenditure and determine the contributions that may be paid in Scotland's statutory debt solutions. The tool currently used by Scottish money advisers and insolvency practitioners is the Common Financial Statement (CFS) – this is used under licence from the Money Advice Trust. A similar tool, the Standard Financial Statement (SFS), was introduced for use in the rest of the UK and is operated by the Money and Pensions Service under the oversight of a governance group.

60. The policy review working group considered the merits of the income and expenditure method for the CFT as compared with alternative models including those that operate only on the basis of income received. There was no clear consensus on the most appropriate approach. They recognised that the income and expenditure model (which is the model utilised for Scotland's statutory debt solutions) provides the most accurate assessment of an individual's circumstances whereas the income only based model provides for simpler administration.

61. In the event that an income and expenditure model continues to operate, the working group considered whether the CFS or SFS would be the more appropriate tool for future use. They highlighted that the CFS is now operated as a legacy tool for Scottish statutory debt solutions only. Consequently, it is not underpinned by the comprehensive governance arrangements that apply to the SFS, which could see this tool better placed to align with changes in the economy. They also recognised that the majority of creditors are UK based and having a single tool would provide a level of uniformity across debt solutions operating elsewhere.

Scottish Government proposal

62. The Scottish Government considers that the CFT should continue to deliver an accurate picture of an individual's circumstances as this is fundamental to receiving best advice on budgeting, identification of the most appropriate solution and the determination of an appropriate amount of surplus income. The Scottish Government proposes that the Scottish CFT retains the income and expenditure approach that is currently applied.

63. The Scottish Government recognises there were previous concerns raised by some stakeholders about a possible move from the CFS to the SFS as the statutory tool. However, both tools have progressed since those concerns were raised. The Scottish Government also recognises that the SFS offers advantages in terms of consistency for debt advisers and insolvency practitioners engaging with clients across the UK and for creditor organisations. The governance arrangements underpinning the SFS, which includes strong Scottish representation, see it well equipped to respond to changes in the economy.

64. The Scottish Government proposes that the SFS should now be adopted in legislation and, in taking that forward, the Scottish Government would seek to ensure that the operational practices and guidance in using the SFS are pragmatic and avoids any unnecessary administrative burden on advisers.

Surplus income and contribution

65. In bankruptcy and PTDs, the trustee is required to set an individual's full surplus income, as calculated by the CFT, as their contribution level.

66. The working group considered whether this approach remained appropriate. In particular, the potential for this restricting an individual's incentive to work overtime or receive a bonus.

67. Encouraging financial resilience was highlighted as important by the working group and they recommended that flexibility is built into whichever tool is used, removing the need for the full surplus income to be taken as a contribution and more

flexibility should be afforded to the trustee. They could not reach a consensus on the appropriate alternative approach. Two options were suggested:

- a percentage of the surplus income is taken
- a fixed amount is excluded from the surplus income

Scottish Government proposal

68. While the Scottish Government acknowledges the potential issues with overtime and bonuses, it does not believe a comprehensive change to the contributions assessment would be the appropriate approach to address those concerns.

69. The proposed move to the SFS for the CFT builds in a fixed savings allowance of £25 per month which can be excluded from a debtor's contribution (as opposed to 10% up to a maximum of £20 currently allowed under the CFT), and a more flexible approach to the operational practices of the CFT. The Scottish Government considers deriving the contribution from the full surplus income remains the most appropriate approach.

70. The one-off payments to help people through the current cost of living crisis have also highlighted the need to ensure our legislation allows us to deal fairly with one-off crisis support payments, ensuring these are retained by the debtor for the specific intended purpose. The Scottish Government therefore proposes to insert a provision to enable the necessary flexibility.

Repayment periods

71. The funds collected and returned to creditors in Scotland's debt solutions involve realising assets and/or setting up some form of repayment schedule/contribution from income.

72. The period of the repayment schedule varies depending on the debt solution and the individual's circumstances. Where contributions from income can be made in bankruptcy, the period over which these are collected is fixed at 48 months.

73. A standard 48 month repayment period applies in PTDs, although this can be varied – as an example the period can be extended to allow additional contributions that are paid in lieu of the value of equity held in property. This type of solution prevents properties being sold for the benefit of creditors and allows more people to remain in their homes.

74. The repayment period in DAS is flexible and allows debts to be repaid over a period that is manageable for those paying and considered fair and reasonable for the creditors involved.

75. The working group realised the benefits in having flexibility to the repayment periods in DAS and did not propose any amendments to that process.

76. Similarly they did not recommend any change to the repayment arrangements in PTDs.

77. They did, however, recommend the repayment period in a bankruptcy, where this is required, be reduced from 48 months to 36 months. Although the group recognise the 48 month period has provided a small increase in dividend to creditors, on balance, they did not believe this justified the additional contribution period for the bankrupt individual.

Scottish Government proposal

78. While the Scottish Government acknowledges there may be arguments for reducing the repayment period in bankruptcy to 36 months, it does not propose to introduce this change.

79. The current 48 month timescale provides consistency across insolvency solutions and, as acknowledged by the working group, statistics demonstrate a small increase in dividends to creditors with the 48 month repayment period.

80. It is important to consider the repayment period in conjunction with the approach taken when calculating a debtor's surplus income as these both impact on

fairness and balance in the system. Having proposed to set a fixed savings allowance and a flexible approach in the use of the CFT, the Scottish Government considers that the 48 month repayment period in bankruptcy remains appropriate and achieves the right balance between the respective interests involved.

Assets transferring to the trustee in bankruptcy – exclusion of essential assets

81. The working group considered the issue of essential assets which should not vest with the trustee in bankruptcy and would, therefore, be disregarded for the entry criteria of the bankruptcy application process. The group highlighted one particular issue concerning mobility scooters which the group considered are not clearly catered for within existing legislation. The recommendation is that legislation is amended to provide greater clarity on the exclusion of mobility aids – including mobility scooters – within relevant legislation.

Scottish Government proposal

82. The Scottish Government recognises that mobility scooters are essential assets to those needing to use them and should therefore be disregarded for the entry criteria of the bankruptcy process. They should also not vest with the trustee. The Scottish Government will consider what legislative changes are required to put this beyond doubt.

Asset valuation – vehicles

83. The working group considered the asset threshold for vehicles of £3,000, which it felt was not representative of an average mid-sized family car. The increasing purchase cost of cars, the need for manufacturers to adhere to stricter emission standards, improved safety features and greater durability were all cited as factors pointing to the requirement to review the current statutory threshold.

84. There was particular concern that a vehicle valued marginally in excess of £3,000 could prevent someone with no surplus income or other assets from accessing MAP bankruptcy.

85. The working group recommended that an expert opinion should be sought to help determine the reasonable average value of a modern mid-sized family car before considering a revised asset value for vehicles. This should take account of changes in the way people purchase vehicles. They also recommended revised guidance was needed to ensure a consistent approach when dealing with vehicles.

Scottish Government proposal

86. The Scottish Government agrees with the working group's assessment and will commission further work to help inform Stage 3 of the review where further consideration can be given to how to treat vehicles in bankruptcy in the future. AiB will also review the guidance to provide further clarity for trustees.

87. The Scottish Government also proposes to review and update the existing vehicle threshold while consideration is given to whether a more fundamental change is necessary.

Bankruptcy administrative procedures

88. The policy review of debt solutions has helped identify some of the administrative arrangements in bankruptcy which are unwieldy and which have created practical difficulties in putting existing legislation into practice.

89. Amongst those issues is the timescale provided for in legislation for trustees to submit proposals to AiB on the level of contribution from income to be fixed during bankruptcy. These timescales were extended through the Coronavirus (Scotland) Act 2020 (from six weeks to 12 weeks) and have now been made permanent through the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021 with effect from 29 March 2021.

90. The working group recommends that further action is taken to remove this fixed timescale in view of the complexities that can arise in gathering all of the evidence and information needed.

91. Additionally, the working group supports a further technical review to identify changes that can be made to improve the bankruptcy process while ensuring that there are no negative consequences or removal of protections for parties involved.

Scottish Government proposal

92. The Scottish Government recognises the importance of ensuring that the administrative processes underpinning all Scottish statutory debt solutions are as efficient as possible for all involved. Reducing administrative burden can drive associated cost reductions which can in turn increase returns to creditors.

93. It welcomes the views of the working group and would welcome further suggestions and support further work to identify improvements in current operational practice - while ensuring that these do not remove any safeguards or create unintended negative consequences for those impacted by the bankruptcy process.

94. The Scottish Government therefore proposes that further work should be undertaken to explore other areas where more efficient processes might be adopted. It proposes that a dedicated technical review is taken forward, led by a short-life working group comprising of insolvency specialists.

95. The remit of this exercise would be to identify measures that have capacity to reduce administration costs (and resultant increase in creditor returns) with no detriment identified for any parties involved.

96. The Scottish Government also considered the working group recommendation to remove the fixed time limit on proposals for contributions in bankruptcy and recognise the difficulties that can arise. In light of the recent legislative change to this timescale, the Scottish Government considers that further evidence should be gathered in relation to the operation of the recently revised timeframe before any further reform is considered.

Protected Trust Deed Protocol

97. The voluntary PTD Protocol was created by AiB in conjunction with stakeholders to address some of the issues raised during the EEFW Committee inquiry into PTDs.

98. It was implemented in November 2021 and since this date, approximately 92% of trust deeds protected are now Protocol compliant.

99. The working group agreed that the Protocol represented progress in addressing a number of the EEFW Committee's recommendations and has recommended that it should be allowed to run for a reasonable period of time to gauge its effectiveness prior to considering any legislative amendment.

Scottish Government proposal

100. The Scottish Government welcomes the development and implementation of the voluntary Protocol and the high levels of uptake amongst trustees. The Protocol includes areas of good practice and strengthened protections for those involved where failure of the PTD is being considered.

101. Feedback on experience of those operating the protocol suggests that it creates no practical difficulties and it is important to ensure that all individuals involved in PTDs benefit from the same level of protection irrespective of their trustee's organisation.

102. Consequently, the Scottish Government proposes to place some of the processes laid out in the voluntary Protocol onto a statutory footing. In particular, it proposes to take action on the process and protections in instances where a debtor's discharge from a PTD is refused.

103. The Scottish Government also proposes to legislate for what is currently set out as best practice guidance under the Protocol regarding the payment of dividend to creditors at an earlier stage (after 12 months) rather than the timeframe currently set in legislation.

104. The Scottish Government further proposes that there should be a requirement to report on the dividend payment position on an annual basis from the first year anniversary of the protection of the trust deed.

Implications of an individual's death during a PTD

105. The EEFW Committee raised concerns about whether the current PTD process strikes a fair balance between interests of creditors and family members or beneficiaries when an individual dies while subject to a PTD.

106. The working group considered this issue carefully and concluded that the general principles of creditors being paid ahead of beneficiaries during the administration of estate are well established in succession and partnership law.

107. Where an individual dies while party to bankruptcy or PTD, the trustee remains in office and there is no change in the statutory position or requirement for them to deal with assets of the estate. This involves a requirement to deal with claims of creditors before recognising any rights or entitlements of beneficiaries.

Scottish Government proposal

108. The Scottish Government recognises the issues raised by the working group and the complex interaction between the laws of succession and the priority of distribution of funds in insolvency.

109. The Scottish Government does not propose making any changes to the process where an individual dies during the operation of a PTD. The Scottish Government is content that the current provisions achieve a fair balance between the respective interests and are consistent with similar executory estate arrangements that apply more generally.

Summary of Scottish Government proposals under theme 3 - administration of debt solutions

Proposal 3.1

The income and expenditure methodology remains as the framework for the Common Financial Tool.

Proposal 3.2

The Standard Financial Statement replaces the Common Financial Statement as the statutory Common Financial Tool for Scottish debt solutions.

Proposal 3.3

Retain the current process of taking the full surplus income for contributions in bankruptcy and to insert a provision to enable the necessary flexibility to deal with one-off support payments issued by government to help people through a cost of living crisis or similar.

Proposal 3.4

Retain the current repayment periods in debt solutions.

Proposal 3.5

Ensure mobility scooters are excluded from asset criteria for entry into bankruptcy and from vesting with the trustee.

Proposal 3.6

Commission further work to help inform Stage 3 of the review where further consideration can be given to how to treat vehicles in bankruptcy in the future. AiB will also review the guidance to provide further clarity for trustees.

Proposal 3.7

Review and update the existing vehicle threshold while consideration is given to whether a more fundamental change is necessary.

Proposal 3.8

Take forward legislation to provide for the best practice processes laid out in the Protected Trust Deed Protocol. This will include debtor discharge and payment of a dividend at 12 months - including a requirement to report on the position annually.

Proposal 3.9

To take forward a dedicated technical review through a short-life working group comprising of insolvency specialists to identify efficiency measures that have capacity to reduce administration costs (and resultant increase in creditor returns) with no detriment identified for any parties involved. No change is proposed to the existing timescales for setting out proposals for contributions in bankruptcy.

Proposal 3.10

To retain the existing arrangements where an individual dies while in a Protected Trust Deed.

Theme 3 questions

Question 3a. What are your views on each of the proposals?

Proposal 3.1 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.2 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.3 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.4 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.5 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.6 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.7 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.8 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.9 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 3.10 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Question 3b. In general, what do you like about the proposals set out in theme 3?

Question 3c. Do you have any other comments or suggestions for improvement on the proposals set out in theme 3?

Theme 4 - exit from debt solutions

110. Each of the statutory debt solutions operating in Scotland is designed to come to an end after a defined period - generally where debts are repaid in full or when all of the conditions attached to the solution have been met. There are provisions built into DAS which will allow it to end earlier than projected where certain criteria have been met.

PTDs

111. There is currently no provision in the operation of PTDs for the early discharge of an individual or trustee prior to the completion of the 48 month contribution period (aside from circumstances that result in all debts being paid in full).

112. The lack of legislative provision means that there is no scope for a repayment offer to be made to creditors during the PTD repayment period and for this to be considered and accepted (known as an offer of composition). Additionally there is no scope to progress early discharge from debts where other circumstances arise during the PTD (e.g. serious illness) which may give rise to creditors consenting to its early closure.

113. The working group recommended that the process be made more flexible and streamlined, particularly in response to the current economic climate, including reintroducing composition and simplifying the process for early exit from a PTD.

Scottish Government proposal

114. The Scottish Government recognises the benefit of introducing options to allow an individual to exit a solution and obtain debt relief more quickly where circumstances deem this is appropriate and creditor consent arrangements are in place.

115. The Scottish Government proposes to investigate this further and consider changes that might deliver this flexibility. This might include composition or, for

example, where a permanent change in financial or other circumstances occurs that would render continued contributions impossible.

116. The Scottish Government also recognises the issues raised on revising the process where it is clear the PTD is no longer suitable and the appropriate option is to refuse discharge.

117. The Scottish Government is considering taking forward reforms that would remove the current limitations and permit refusal of discharge of a debtor, and subsequent discharge of a trustee, prior to the completion of the 48 month contribution period. It will seek to ensure that appropriate protections are in place to ensure that this only occurs in appropriate circumstances.

Bankruptcy

118. In common with PTDs, there is no legislative process to allow for an individual to be discharged prior to completion of the prescribed contribution repayment period in a non-MAP bankruptcy - where contributions are assessed as payable.

119. Composition had previously existed in bankruptcy legislation but was repealed by the Bankruptcy and Debt Advice (Scotland) Act 2014 as it had been rarely used under the previous arrangements in place.

120. The working group recommended that a revised and streamlined composition process be reintroduced to bankruptcy - with the process being managed by AiB rather than the Scottish courts. This would enable earlier conclusion of bankruptcy proceedings where the circumstances are appropriate and where consent criteria are met.

121. The formal discharge process in non-MAP bankruptcy can be refused where a report prepared by the trustee 10 months after the award of bankruptcy highlights issues including non-cooperation with the trustee or bankruptcy processes. A report is submitted in all bankruptcy cases and where there have been no issues with

cooperation the discharge will normally be granted 12 months following the award of bankruptcy.

122. Statistics requested by the working group show that in the period reviewed 37.3% of creditor petition bankruptcy cases and 9.2% self-nominated bankruptcies involved the refusal of discharge based on the report submitted by the trustee. This is generally due to non-cooperation or in circumstances where a debtor cannot be traced.

123. In these cases debtor discharge is subsequently considered where cooperation has been secured. There are appropriate rights of review and appeal in place in relation to the current discharge provisions.

124. The working group recommended that the debtor discharge process should be reconsidered and revert to a position that would provide automatic discharge on the 12 month anniversary of the award of bankruptcy. The recommendation would see a provision to retain reports being submitted at the 10 month stage for non-cooperation and for discharge to be refused where good cause can be shown.

125. The working group further recommended that consideration is given to arrangements allowing transfer of the trustee to AiB where there are instances of continued non-cooperation, or where the debtor cannot be traced, resulting in discharge being refused on a longer term basis.

126. This would address issues of ongoing administration costs and payment of statutory fees that apply to private sector trustees where little or no progress can be made in the administration of the bankrupt estate.

Scottish Government proposal

127. The Scottish Government agree that options for further flexibility and composition be investigated, allowing an individual to exit bankruptcy and gain quicker access to debt relief where there may be funds available to pay some of their debt – subject to agreement of creditors. This investigation should consider

appropriate modernisation and streamlining of the process that applied prior to 1 April 2015, including appropriate review and appeal provisions.

128. The current provisions for debtor discharge were implemented in 2015 following extensive consultation with a clear policy rationale to encourage engagement with the bankruptcy process. The Scottish Government recognise the practical issues faced by trustees who may be unable to receive discharge in cases with continued non-cooperation.

129. While the Scottish Government proposes that no fundamental reform is made to the process of reporting and discharge, it will investigate an option to enable the appointment of a trustee of last resort (AiB) where there is continued non-cooperation or at an earlier stage than currently available where the debtor cannot be traced.

Debt Arrangement Scheme

130. In 2013 the facility for composition was introduced to the DAS process.

131. This allowed an individual to make an offer of composition to their creditors where repayments had been sustained over a period of 12 years from approval and where 70% of the total amount of debt due under a payment programme had been paid. Statistics show that since its introduction there have only been 13 cases where offers of composition have been made and in over 75% of these there has been at least one creditor objecting to the proposal. There is no option for composition in Business DAS.

132. The working group recommended that although appropriate at the time of implementation, there was now a stronger case to review composition arrangements, consult on revised criteria and consider similar provisions for Business DAS.

133. The working group considered the specific circumstances that apply where a person dies during the course of a DAS payment programme. Under the current legislation these circumstances result in the revocation of the programme, meaning

that creditors can legitimately reapply interest and charges that would have been accrued from the date of application, albeit they were frozen under the rule of the scheme.

134. The working group recommended that the Scottish Government considers the disapplication of retrospective interest and charges where the payment programmes ceases on the death of the debtor.

Scottish Government proposal

135. The Scottish Government has considered the recommendations made on revision to the arrangements for early exit from DAS on an offer of composition.

136. While the case for change is acknowledged, the Scottish Government is mindful of the significant success and reputation that DAS has established as a non-insolvency debt repayment product – it remains the only statutory mechanism of this kind currently operating in the UK.

137. These characteristics of DAS provide a clear distinction between DAS and insolvency solutions and should be retained. The Scottish Government believes that further reform to the composition process risks undermining the primary policy rationale that underpins DAS. It does not propose any reform to the existing DAS composition arrangements.

138. The Scottish Government recognises the merits of the case made to create a distinction between the normal DAS revocation process and the procedure that applies when an individual dies while the programme is ongoing. Consequently, we will investigate this further with a view to removing retrospective application of interest and charges in these circumstances.

Prescribed rate of interest

139. The prescribed statutory rate of interest is currently 8% (same as the judicial rate of interest). This rate was fixed through legislation in 1993 when the Bank of England (BoE) base rate was higher than it is at present.

140. Statutory interest is applied in personal insolvency where there are sufficient funds ingathered to pay the costs of insolvency and all of the debts in full with sufficient funds remaining to apply the payment of interest accruing on the debts up until the date of payment to creditors.

141. In 2019, the consultation on bankruptcy reforms introduced in 2015 sought views on whether the rate of interest should be retained or changed to a level which was linked to the BoE base rate of interest. The majority of respondents believed the rate should be lowered and that 8% was inconsistent with the prevailing rate of interest over several years.

142. However, there was no clear consensus on the level that should be applied. The most popular option was the BoE rate plus 2%. The issue was again raised by the EEFW Committee during their inquiry into PTDs.

143. It recommended that the rate be reviewed as it was deemed too high.

144. More recently, the matter was discussed by the policy review working group with an agreement that the rate of interest should be linked to the BoE base rate - however there was no clear consensus on how the rate would be set. It was suggested further consultation was required.

Scottish Government proposal

145. The Scottish Government proposes to reform the statutory rate of interest.

146. It considers that a reasonable approach would be to align the rate of interest to the prevailing BoE base rate and recommends the option favoured in the previous consultation exercise – fixing the level as the BoE base rate plus 2%.

147. In addition, the rate would be fixed as at the date of bankruptcy. The Scottish Government also proposes to explore further whether the judicial rate of interest could be aligned with the prescribed rate of statutory interest, to create greater consistency in application on debt related matters.

Summary of Scottish Government proposals under theme 4 - exit from debt solutions

Proposal 4.1

Composition process to be investigated for Protected Trust Deeds and bankruptcy.

Proposal 4.2

Explore options for greater flexibility to deliver early discharge from a Protected Trust Deed in specific circumstances – including the appropriate consent criteria.

Proposal 4.3

Removal of the current time limitations on the refusal of discharge process in a Protected Trust Deed in certain circumstances - meaning a trustee can investigate this process prior to the completion of the contribution period.

Proposal 4.4

Retention of the current trustee report and discharge process in bankruptcy.

Proposal 4.5

Consideration of limited reform that would enable appointment of trustee of last resort (AiB) in those instances of continued debtor non-cooperation or at an earlier stage than currently available where the debtor cannot be traced.

Proposal 4.6

No changes made to the existing Debt Arrangement Scheme composition process.

Proposal 4.7

Investigate the need to distinguish between the normal Debt Arrangement Scheme revocation process and the procedure that applies when an individual dies while the programme is ongoing, with a view to removing retrospective application of interest and charges in these circumstances.

Proposal 4.8

Reform the basis for the prescribed rate of statutory interest and link this to the Bank of England base rate plus 2% - fixed at the date of bankruptcy.

Theme 4 questions

Question 4a. What are your views on each of the proposals?

Proposal 4.1 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 4.2 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 4.3 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 4.4 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 4.5 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 4.6 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 4.7 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 4.8 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Question 4b. In general, what do you like about the proposals set out in theme 4?

Question 4c. Do you have any other comments or suggestions for improvement on the proposals set out in theme 4?

Theme 5 - improvements to debt recovery mechanisms (diligence)

Disclosure of information

148. Part 16 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 makes provision for the Disclosure of Information. This provides a power enabling Scottish ministers to make provision by regulations for creditors to obtain information about debtors by making an application to the sheriff for an Information Disclosure Order (IDO) and for the disclosure of that information to creditors.

149. This is to facilitate diligence to enforce payment of debts due by virtue of decrees and documents of debt.

150. The enabling power for the Scottish ministers to make provision, by regulations, for 'disclosure of information' have not been commenced and no regulations have yet been made. The Diligence Working Group agree there is a legitimate role for IDOs as part of the diligence landscape in Scotland and it would add to the already effective suite of measures currently available.

151. There is an appetite for IDOs provided that implementation is accompanied by appropriate safeguards in place covering appropriate consideration of data protection principles and effective operation.

152. The Diligence Working Group has identified how the IDO process could work and have recommend that the following measures should be incorporated.

- A creditor must be in possession of a decree or document of debt before they can apply for an IDO
- The debtor must have been served with a charge for payment, the days of the charge must have expired and they must have received a DAIP before proceeding with an IDO application
- Before applying for an IDO the creditor must consider the information they have about the debtor and whether the debt can be pursued without an IDO

- A creditor must seek advice from a professional e.g. a sheriff officer, a solicitor or an accountant who will assist with the application
- Investigations should continue to be carried out by a sheriff officer
- The name and address of debtor will be the minimum level of information required to make an application for an IDO. The application will contain space for additional information where it is known e.g. date of birth
- Applications should be accepted from a range of regulated professionals, including solicitors, accountants and sheriff officers and persons authorised by legislation to conduct proceedings. The application should be registered by the applicant in court
- Where an application is approved by the court this should be communicated by way of a standard interlocutor issued to the professional who registered the application
- The sheriff officer should have three months in which to submit the request for information from the third party (the organisation(s) named in the IDO)
- Fees involved to be set out in legislation - recommendation that the application should be in the region of £60/70 and the pursuing creditor should be liable for the cost
- The debtor will not be notified of an IDO application being made against them to prevent concealment of assets
- The sheriff to grant an IDO by way of a standard court interlocutor
- Initially public bodies will be exempt from IDOs. Consider further legislation to enable information to be sought from government bodies
- Data to be sent securely to ensure personal data is protected – this could be by secure email
- Sheriff officers will be responsible for keeping personal data secure

Scottish Government proposal

153. The Scottish Government agrees with the recommendations of the working group that IDOs should be enacted – ensuring that appropriate protections are in place to promote compliance with all data protection requirements.

154. The Scottish Government will investigate further how best to take this forward. The Scottish Government also recognises the view of the working group that introducing information disclosure for non-government organisations would allow this to be tested in practice and provide a platform for future inclusion of government bodies— this will lead to better intelligence led debt recovery processes in the future.

Family home

155. There are a number of diligence and insolvency measures that impact on the family home including - landlord hypothec, removal from heritable property (eviction), adjudication for debt and land attachment. The working group were aware of the sensitivities around this topic and recommend that the family home in diligence is considered alongside the treatment of the family home in bankruptcy. It recommends that this forms part of Stage 3 of the review of Scotland’s debt solution landscape.

Scottish Government proposal

156. The Scottish Government understands the sensitivities and far reaching implications that apply to diligence measures which affect the family home and agree that it would make sense to consider these in a holistic manner in the next stage of the policy review. The Scottish Government is keen to improve the processes without undermining the existing protection of the family home.

Exceptional Attachment

157. Exceptional Attachment allows non-essential items in a home to be attached and is therefore considered to be quite an intrusive diligence.

158. The working group recognised these sensitivities and therefore the need for a thorough application process. A previous consultation had highlighted concerns about the length of the current application process, particularly when a debtor does not attend court and the working group considered whether the court process should be amended.

159. The working group agreed there are a number of reasons why a debtor may not turn up to court and that changing the court process within this diligence without diluting debt protection is difficult. The group therefore agreed that no changes should be made to the court processes involved in Exceptional Attachment.

160. The working group recommended increasing the value of sentimental items which cannot be attached from £150 to £500, as this value had not been reviewed in many years.

161. The working group also considered the current timescale of seven days when assets which are attached can be sold. The group recognised that some assets are removed from the premises after they are attached, while others are left at the premises, and agreed that timescales should reflect the scenario.

162. They have therefore recommended that where assets are attached and not removed from the premises the redemption period should be extended to 14 days, bringing this into line with Attachment. However, where items are attached and removed from the premises the redemption period should remain at seven days to help limit the costs arising from sheriff officers having to store the assets.

Scottish Government proposal

163. The Scottish Government acknowledges the concerns highlighted around the administration of Exceptional Attachment and also recognises that this diligence has encouraged debtors to engage with sheriff officers.

164. The Scottish Government agrees with the recommendations of the working group and that the processes should not be changed. We propose to take forward the recommendation to amend the value of sentimental assets together with proposed changes to the timescales for redemption periods.

Inhibition

165. Inhibition is a preventative diligence measure rather than a direct debt recovery mechanism. It places a barrier on an indebted individual selling their home.

166. This form of diligence plays a big part in encouraging debtors to engage with their creditor to find a solution regarding the debt.

167. The working group's recommendations include retaining inhibition at five years as it saw no particular need for this to be extended. The working group also recommended that inhibition should be extended to summary warrant debt as this could potentially be less onerous than bankruptcy to recover debt.

168. The existing recall provision for inhibition would also apply to summary warrants. The group highlighted an issue with statutory forms being rejected by Registers of Scotland and advised a change is needed to allow both messengers at arms and sheriff officers to be able to complete the "Notice of Inhibition" form.

169. The group recommended the form be amended to include the wording "process server" in addition to "messenger at arms" and "sheriff officer" to help minimise forms being rejected.

Scottish Government proposal

170. The Scottish Government recognises that inhibition is considered to be an effective diligence and acknowledges the improvements suggested by the working group.

171. The Scottish Government will retain the length of inhibition at five years. We will also investigate extending inhibition to summary warrants and changes to administrative statutory forms to minimise forms being rejected.

Diligence on the dependence

172. Diligence on the dependence is a provisional diligence allowing the creditor to secure funds, goods and property while court action is ongoing.

173. The working group has recommended the debtor to be issued with the DAIP when an application for diligence on the dependence is made by the creditor.

174. Although the working group acknowledged that the debtor is likely to have received a DAIP during the course of previous contact, it emphasised the importance of debtors being encouraged to seek advice. The DAIP is seen as an effective means to highlight where this advice is available.

175. There is a court hearing in all diligence on the dependence cases and the group considered it was appropriate for this to be maintained as it offers an appropriate level of protection for the individual with debt.

Scottish Government proposal

176. The Scottish Government recognises and accepts the recommendations made on the administrative improvements that can be implemented with regard to diligence on the dependence. The Scottish Government agrees that the DAIP should be issued to debtors when an application is made and that court hearings should be maintained in all cases.

Interim Attachment

177. Interim Attachment is a provisional diligence allowing the creditor to attach assets before court action is started. This protects assets for the creditor. It works well and no changes are needed – the working group has made no recommendations for improvement to this diligence.

Scottish Government proposal

178. The Scottish Government acknowledges the views expressed that this mechanism works well and agrees that no reform is required at the present time.

Money Attachment

179. Money Attachment allows cash on business premises to be arrested. At present it is only possible to execute money attachment outwith the stated times with permission of the court. The working group recommend extending the times when money attachment can be executed, thereby reducing the burden on the Scottish courts.

180. The working group highlighted that the number of cash transactions in premises is reducing and there is a need to see if any lessons can be learned from other countries on how they are dealing with similar provisions in an increasingly cashless society. The working group agree this diligence still has a place in the debt recovery landscape at present although they consider that the mechanism will need to evolve if it is to remain relevant in a modern cashless economy.

Scottish Government proposal

181. The Scottish Government accepts this diligence could be modernised and proposes to take forward the working group's recommendation to amend the timings for executing a money attachment.

182. The current provision which states that money attachment can only be executed Monday to Saturday between 8am and 8pm will be re-examined with a view to better aligning this within the trading hours of the business involved, allowing the attachment to be executed during a business's specific operating times. This would help to reduce costs and the requirement to seek relevant authority through the Scottish courts to execute a money attachment outwith those stated times.

183. The Scottish Government will also carry out work to determine how equivalent provisions operate in other countries to establish if further changes are needed to money attachment.

Diligence against Earnings

184. Diligence against Earnings allow a proportion of debtor's wages to be arrested for the benefit of creditors.

185. While wage arrestments work well, recommendations for further improvements included:

- a requirement for employers to notify if an earnings arrestment is successful within 21 days
- enabling employers to forward funds recovered quarterly rather than monthly

- transferring the court role in collection and distribution of conjoined arrestments from the courts to AiB

Scottish Government proposal

186. While Diligence against Earnings is an effective diligence measure, the Scottish Government acknowledges there are a number of improvements that could make it more efficient.

187. The Scottish Government will look at options to implement recommendations on the introduction of a defined 21 day timescale for an employer to confirm that an earnings arrestment has been successful. It supports additional flexibility enabling employers to forward funds recovered quarterly rather than monthly and transferring the court role in the collection and distribution of conjoined arrestments to AiB.

188. The Scottish Government acknowledges that any changes introduced will impact on employers and will therefore seek to limit the burden on them while seeking to improve the effectiveness and efficiency of this diligence.

189. The Scottish Government is also aware of a call for creditors to be able to vary the amount repaid through an earnings arrestment rather than using the amounts determined in the tables set out in the schedule of the Diligence against Earnings (Variation) (Scotland) Regulations.

190. The intention here is for debtors to be able to approach a creditor and ask for greater flexibility with any agreed variation being issued to employers for deduction from wages. This may be because the debtor has other arrestments in place that run concurrently, for example, a Deduction from Earnings Order for child maintenance. The Scottish Government will explore the need and potential impact of such a change.

Arrestment in execution

191. Arrestment makes provision for funds to be taken from a bank account.

192. The working group considered it would be beneficial for all arrestees (those financial institutions on which an arrestment is served) to be required to notify where an arrestment is unsuccessful. Without this information the party pursuing the diligence could make assumptions about the debtor e.g. the debtor does not have a bank account with that bank, the funds held are under the protected minimum balance or that there is no money in the account.

193. If banks are required to provide this information it would allow a creditor to make more informed decisions on whether to pursue further action.

194. The working group recognised this additional action would have an impact on banks and it was agreed that it would be helpful to explore how this notification could be provided with minimum administrative impact on the clearing banks. It was agreed that 21 days was considered a reasonable timescale to provide this information.

195. The group also recommended that banks and sheriff officers should be able to make better use of technology and deal with arrestments in bulk where appropriate, for example, instead of issuing separate arrestments they should be able to group arrestments for the same bank together. This would help to improve efficiency and reduce administration costs.

196. The group acknowledged there are issues with universal credit and other benefits payments being caught when a bank account was arrested. This should not happen and causes hardship for those affected. The group recommended that work is carried out to identify a solution to prevent this from happening.

197. There was also a further recommendation to remove duplication involved in sending arrestment schedules by recorded delivery when the arrestee is a bank or other financial institution.

Scottish Government proposal

198. While arrestment is an effective diligence measure, the Scottish Government acknowledges there are a small number of improvements that would make it more efficient.

199. The Scottish Government will therefore seek to remove instances of duplication, such as the requirement to send an additional copy of an arrestment schedule by recorded delivery when the arrestee is a bank or financial institution. The Scottish Government will also consider the recommendation which requires arrestees to notify whether an arrestment has been unsuccessful.

200. The Coronavirus (Recovery and Reform) (Scotland) Act 2022 will introduce a change to the Protected Minimum Balance (PMB). This change de-couples the PMB from earnings arrestments and will mean that from 1 November 2022 the PMB will be increased from £566.51 to £1,000.

201. It also introduces a provision to allow this figure to be amended through regulations when considered appropriate. This is intended as an interim measure to increase protection to those hit by the cost of living crisis - £1000, for example, does not ensure full protection of a family's benefit income.

202. In the medium term, the system must allow creditors to take effective action against those who won't pay whilst ensuring necessary protection for those who can't pay, including a more rapid and efficient process for lifting arrestments where these are inappropriate.

203. The Scottish Government will carry out further work to determine what further changes should be made, including exploring the possibility of transferring functions from the courts to AiB.

Summary warrants

204. Summary warrants allow government bodies such as Local Authorities and HM Revenue and Customs streamlined access to diligence mechanisms. The

working group suggested that the DAIP should be issued before the summary warrant stage to ensure that a debtor receives key information and is encouraged to seek advice at the earliest opportunity.

205. It also recommends that summary warrants should be extended to inhibitions in execution with the existing recall provision for inhibition applying to summary warrants.

Scottish Government proposal

206. The Scottish Government acknowledges the summary warrant procedure is an effective diligence and recognises and welcomes the suggestions for improvement made by the working group. The Scottish Government agrees that the DAIP should be issued earlier in the process and that summary warrants should be extended to inhibitions in execution with the existing recall provision for inhibition applying to summary warrants.

Arrestment of ships

207. This diligence allows ships to be arrested. The working group advised there are issues with arrestment to found jurisdiction which prevent a ship arrestment taking place on a Sunday. They recommend that arrestment to found jurisdiction should be amended to allow arrestment of a ship to take place on a Sunday.

Scottish Government proposal

208. The Scottish Government acknowledges there is an issue which prevents ships being arrested on a Sunday and will investigate this further with a view to enabling arrestment on a Sunday.

Residual Attachment

209. Residual Attachment allows a wide range of attachments to take place which are not already covered in other diligences. Provisions related to residual attachment and land attachment are set out in the Bankruptcy and Diligence etc. (Scotland) Act 2007 but these parts of that Act have never been commenced.

210. The working group recommend that the residual attachment provisions should be commenced when an alternative to adjudication for debt and land attachment is identified. The working group recommend that there must also be scope for considering assets that should be excluded from attachment further guidance developed on which assets could be attached using this diligence.

Scottish Government proposal

211. The Scottish Government agrees with the recommendations of the working group that this should be taken forward once suitable alternatives to adjudication for debt and land attachment are found. This will be considered at stage 3 of the review.

Collection of statistics on diligence outcomes

212. Current legislation requires that sheriff officers provide information on diligence court actions and their official functions. At present limited information is recorded on a quarterly basis which is used to publish annual statistics. This information includes the numbers of summary warrants executed for council tax and other summary warrants by diligence.

Scottish Government proposal

213. The Scottish Government believes it would be helpful if additional information was captured to help with any future reviews of diligence. This would specifically be around trying to capture the outcome of diligence.

214. Not all diligence leads to the immediate recovery of the debt, for example, a diligence may encourage someone to contact the creditor to agree a repayment plan to repay the debt, or a creditor may need more than one bank arrestment to recover the full debt. Asking sheriff officers to capture the outcome of a diligence will provide invaluable information and the Scottish Government therefore proposes to work with sheriff officers to establish how this information can be captured, simply and effectively.

Summary of Scottish Government proposals under theme 5 – improvements to debt recovery mechanisms (diligence)

Proposal 5.1

Proceed with the introduction of Information Disclosure Orders – initially involving non-government organisations.

Proposal 5.2

Consideration of the family home and treatment in diligence and insolvency mechanisms to be further reviewed in the future review of Scotland's debt solution and recovery landscape.

Proposal 5.3

Exceptional Attachment - increasing the value of sentimental items which cannot be attached from £150 to £500; and extending the redemption period from seven days to 14 days where assets are not removed from the premises.

Proposal 5.4

Inhibition process - amending statutory forms to allow inhibition forms to include "process server" to ensure they can be submitted to Registers of Scotland by both sheriff officers and messengers at arms. The length of an inhibition will be retained at five years.

Proposal 5.5

Interim Attachment – maintain the current arrangements for interim attachment.

Proposal 5.6

Diligence on the dependence - ensuring the DAIP is issued when a diligence on the dependence application is submitted.

Proposal 5.7

Money Attachment - to remove restrictions on when a money attachment can be executed and greater flexibility by allowing this to be determined by a business's business hours. Carry out work to determine how equivalent provisions operate in other countries to establish if further changes would help to improve the effectiveness of this diligence.

Proposal 5.8

Diligence against Earnings – look at options for introducing a 21 day timescale for employers to confirm that an earnings arrestment has been successful; determine if there is scope for introducing flexibility to enable employers to forward funds recovered quarterly, rather than monthly; explore the possibility of transferring the court role in the collection and distribution of conjoined arrestments to AiB; and investigate the need and impact of introducing the ability to vary an earnings arrestment.

Proposal 5.9

Arrestment in Execution – consider introducing a requirement for banks to report where a bank arrestment is unsuccessful within 21 days; enable better use of technology; reduce duplication where arrestment schedules are sent recorded delivery; and carry out further work to determine what further changes should be made, including exploring the possibility of transferring functions from the courts to AiB.

Proposal 5.10

Summary warrant process - extend the summary warrant process to Inhibitions, ensuring existing recall provisions for inhibition apply to summary warrants, and ensure the Debt Advice and Information Package is issued earlier in the process.

Proposal 5.11

Arrestment of ships – investigate the position with the arrestment to found jurisdiction to enable arrestment of ships to take place on a Sunday.

Proposal 5.12

Residual Attachment – to be taken forward once a suitable alternative to adjudication of debt and land attachment is found which will be considered at Stage 3 of the review.

Proposal 5.13

Collection of statistical information – capture additional information to include the outcome of diligence to help inform future reviews.

Theme 5 questions

Question 5a. What are your views on each of the proposals?

Proposal 5.1 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.2 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.3 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.4 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.5 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.6 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.7 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.8 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.9 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.10 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.11 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.12 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Proposal 5.13 Agree Disagree Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Question 5b. In general, what do you like about the proposals set out in theme 5?

Question 5c. Do you have any other comments or suggestions for improvement on the proposals set out in theme 5?



Response to Policy Review of Scotland's Statutory Debt Solutions and Diligence

5. Respondent information form

Please note this form **must** be completed and returned with your response. To find out how we handle your personal data, please see our [privacy policy](#):

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email address

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Information for organisation:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published. If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

- Publish response with name
- Publish response only (without name)
- Do not publish response

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?

- Yes
- No



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Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80435-794-1 (web only)

Published by The Scottish Government, August 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1131262 (08/22)

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