

January 2024



Mental health moratorium: consultation

Response from ICAS



Scottish government: Mental health moratorium consultation

About ICAS

- 1.1. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants. We represent over 23,000 members working across the UK and internationally. Our members work in the public and not for profit sectors, business and private practice. Approximately 11,000 of our members are based in Scotland and 10,000 in England.
- 1.2. We are one of the four Recognised Professional Bodies (RPBs) regulating insolvency practitioners (IPs) who can take appointments in the UK. We have an in-depth knowledge and expertise of insolvency law and procedure. We also have experience in other areas of regulation, as a recognised supervisory body (RSB) for statutory audit, and a professional body supervisor (PBS) for anti-money laundering.
- 1.3. Our charter requires us to primarily act in the public interest. Our responses to consultations and calls for views are therefore intended to place the public interest first. Our charter also requires us to represent our members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
- 1.4. We, like our members and the public, are interested in ensuring that any changes to legislation and procedure are made based on a comprehensive review of all options, supported by evidence, with reasonable confidence that the changes will bring benefits to all stakeholders.
- 1.5. We are pleased to have the opportunity to submit our views in response to the Scottish Government's consultation on the implementation of a mental health moratorium (MHM). We would be happy to discuss any of the matters raised in this response in further detail with the Committee.

General comments

- 2.1. We remain broadly supportive of the aims behind the introduction of an MHM.
- 2.2. An overarching question which we believe remains unanswered, or at the very least lacks clarity, is what is the policy objective of an MHM? Setting this out clearly, would help ensure that those who could benefit from a MHM are defined and allow the most appropriate eligibility criteria to be drawn up.
- 2.3. Based on the consultation proposal to restrict eligibility to those in mental health crisis, it is admitted that “*eligibility will at least initially be very limited*”. However, it may have been useful to provide statistical analysis to allow respondents to better understand just how limited eligibility will be and at least an attempt to forecast the numbers likely to make use of the moratorium. A comparison of the eligibility criteria against those for the mental health breathing space in England & Wales would have been useful.
- 2.4. In view of the very limited scope proposed and the likely number of individuals who may benefit from the MHM, and assuming the outcome of the consultation does not substantially change this, the cost to introduce the MHM and administer them may not be value for money at a time when Scottish Government and public bodies finances are under severe strain.
- 2.5. Answers to specific questions posed in the call for views follow.

19 January 2024

Direct contact for further information:

David Menzies
Director of Practice

E-mail: dmenzies@icas.com
TEL: +44 (0)131 347 0242

Specific Questions

Q1. Do you agree with the proposed initial mental health eligibility criteria?

A: Neither agree nor disagree

Further comments:

We would refer to our general comment in paragraph 2.2 above.

As stated in the consultation paper, defining the eligibility criteria requires a fine balance.

The benefits of using existing mental health legislation as the parameter for setting the eligibility criteria are acknowledged and clearly there require to be sufficient safeguards to prevent abuse and protect creditors.

We acknowledge that by including a very narrow definition which will severely limit the likely number of individuals who can access the MHM, this will leave others who are unable to address their debt issues because of their mental state, but not in compulsory treatment, without access to the MHM. While in theory they will still have access to the Section 195 Bankruptcy (Scotland) Act 2016 moratorium, there is a high risk that they are not able to access this moratorium as it requires 'intent' to apply for sequestration, enter a trust deed or apply for a debt arrangement scheme. It is difficult to see how they can in all honesty commit to 'intend to apply' if they are not capable of addressing their debt issues due to their mental state. Even if this could be overcome, the limited time period of the moratorium (currently 6 months) may not be sufficient for recovery to such a stage where dealing with problem debt is possible.

Q1a. If you believe the proposed mental health criteria are too narrow, please suggest an alternative that could be measured fairly and easily implemented.

Comments: We would refer to our general comment in paragraph 2.2 above.

Q2. Do you agree that no minimum debt level should be set for the eligibility criteria?

A: Agree

Further comments:

Any minimum debt level would be arbitrary and work contrary to the policy intention behind this proposal.

Q3. Do you agree that there is no need to establish the individual's financial position at the application stage?

A: Agree

Further comments:

We agree that the risk of abuse appears minimal and to require a debt adviser to confirm '*the applicant is unable, or is unlikely to be able, to repay some or all of their debt as it falls due*' may place an unnecessary barrier to a vulnerable individual accessing the moratorium. For individuals, debt tends to be accrued in one of two categories – consumer debt and public authority debt. We consider that there is unlikely to be any significant impact of a moratorium being granted on consumer creditors (banks, credit cards, etc) as the vast majority of these are required to operate under the FCA's consumer duty. Any change in legislation is therefore likely to impact public authority creditors (HMRC, local authorities, DWP, etc) who we believe should approach debt recovery against vulnerable individuals in a similar approach to that required under the FCA consumer duty.

Q4. Do you think the proposed role of the Mental Health Professional at the application stage is appropriate?

A: Yes

Further comments:

We note that this will place an additional budget on an already strained health service, however we consider that the approach proposed approach is the minimum required and is proportionate in response.

Q4a. Do you think the proposed role of the Mental Health Professional at the application stage is practical?

A: Don't know

Further comments:

The question of practicalities would be best addressed by mental health professionals. A simple application form submitted electronically appears to be a reasonable proposal. However, the key will be messaging to mental health professionals so they are aware of the availability of the moratorium and the efficiency of the application process.

Q5. Do you think the proposed role of the debt adviser at the application stage is appropriate?

A: No

Further comments:

The proposed role of the debt adviser appears to encompass four aspects:

- explain the MHM
- ascertain that there is consent for an application to be proceeded with
- commit to provide debt advice at a future suitable date
- submit the application (implied but not stated in the consultation)

The 1st, 2nd and 4th aspects are appropriate where the debtor is represented. However, where the debtor is unrepresented, given their mental health status, and notwithstanding that the debtor may have capacity from a legal perspective, their ability to fully engage, appreciate and take a decision is likely to be severely hampered. It is not appropriate to place an advisor in a position to undertake such aspects as part of the application stage where the debtor is unrepresented.

Whether the debtor is represented or unrepresented, it is not appropriate to require the debt advisor to commit to providing debt advice at a future date when it is unknown what the true wishes of the debtor will be, at what point in the future this may be, or what the circumstances of the debtor or the debt advisor may be at that time. For instance, in the intervening period the debt advisor may no longer be active or could have lost their qualification. Clarification is also required as to whether it is the debt advisor as an individual or as a representative of their organisation that would be making the commitment.

Furthermore, while it is important to explain the MHM without an understanding of the implications of the MHM it is difficult to obtain appropriate consent. Where the debtor is represented then this may be possible. Where unrepresented, then for the reasons set out above this is unlikely to be possible due to the debtor's state of mind.

It may therefore be necessary for the debt advisors role to be differentiated depending upon whether the debtor is represented or not, or for an appropriate legal mechanism to be put in place for the debtor to be represented or to make an appointment of a representative for this very limited purpose (that they agree that a MHM would be appropriate in the circumstances) given that they will already have been assessed as having legal capacity.

Q5a. Do you think the proposed role of the debt adviser at the application stage is practical?

A: No

Further comments:

See comments at Q5 including interaction between explaining and obtaining appropriate consent, and commitment to provide debt advice in the future.

Q6. Connecting the Mental Health Professional to the debt adviser - which option would you choose?

A: AiB acts as a link

Explain reason for answer:

We recognise that there would be substantial benefit in having a commissioned debt advice agency or third party due to efficiencies in process for the commissioned party, deep knowledge and understanding of the requirements and ability to deal with extremely vulnerable individuals. Such benefits are most likely to materialise where there is an appropriate volume to drive efficiencies of scale, however, it is anticipated that the MHM may only attract very small numbers and therefore such benefits are unlikely to materialise in practice. In addition, the cost of procurement may be a barrier to both the AiB and parties interested in being commissioned given the anticipated low volume requirement.

We consider that the most practical and proportionate response initially, if the MHM was proceeded with, would be to facilitate the connection between the mental health professional and money advisers. As noted in the consultation document this could be no more than maintaining a list and contact details which would be appropriate for the small number anticipated and cost effective in its implementation and delivery.

Q7. Do you believe that specialist debt advice and support is required for frontline debt advisers for their involvement with the Mental Health Moratorium process?

A: Yes

Explain reason for answer:

Given that the role of the debt adviser will encompass providing advice to, and assessing the circumstances of, very vulnerable individuals (as well as dealing with their representatives and requiring awareness of powers of attorney, guardianship orders etc.), we anticipate specialist advice and support will be required.

Q8. Do you agree that a Mental Health Moratorium application should only be consented to by the individual, a power of attorney or guardianship?

A: Disagree

Further comments:

While acknowledging the certainty of this route, it will leave some of the most vulnerable individuals (i.e. those who have been deemed not to have capacity or who do not have an existing power of attorney or guardianship in place) without access to the moratorium. This would severely limit the policy impact of the MHM.

Q8a. If you disagree, we would be grateful for your views on how a Mental Health Moratorium application is made available to those who do not have the capacity to consent.

Further comments:

If a mental health professional is willing to state that an individual's financial circumstances are either a contributory factor to the individual's poor mental health or are capable of hindering recovery, then it seems reasonable that a moratorium can be put in place regardless of formal consent. While noting that the working group had concerns over an individual enduring "further compulsion over their financial affairs", the moratorium should be a very light-touch step in practical terms and it is difficult to see the negative impact on an individual, particularly if interest and charges cannot be levied.

Q9. Do you have any other comments on the proposed application process?

Comments:

In addition to identified creditors being notified directly by the AiB, we consider that the moratorium should be added to the public register of moratoriums in order to mitigate against creditors not being identified.

Overall, it is likely that the setup costs of the MHM scheme will be fairly significant. No financial impact statement has been produced alongside the consultation covering set up and ongoing operational costs for a process which is heavily administrative. We note there is no proposed fee for the MHM and the take-up is anticipated to be very low in number. We have set out in response to Q3 the background to individual's debt and the impact of the FCA consumer duty meaning the MHM impact is likely to be limited, even more so if public authorities apply a similar approach to the FCA consumer duty. Taking all of this into account, it is questionable whether the MHM would be effective or provide value for money as a new initiative given current constraints on public finance.

Q10. Do you agree with the proposed period of protection?

A: Agree

Further comments:

While we note that the proposed approach to the period of protection would introduce a differentiation in approach against the standard moratorium for those subject to compulsory mental health treatments from those who either have mental health issues but don't require compulsory treatment or those who have no mental health concerns, we believe the differentiation in approach is justified and proportionate.

However, having a moratorium in place indefinitely for someone subject to indefinite compulsory mental health treatment does not seem to be an appropriate solution for those cases. There is a case for considering whether a mechanism should be introduced to access a debt solution in these circumstances rather than continuing temporary relief in a permanent timescale.

Q11. Do you agree with the proposed approach to the qualifying debts?

A: Disagree

Further comments:

Utilising the definition of debts under Debt Arrangement Scheme legislation would require some further amendments to be provided for. In particular, it is not clear why excluded debt under the definition should be excluded from the MHM protection. The rights of debt to secured creditors may be appropriately excluded from the MHM protection as it is likely that there are sufficient other protections available generally in secured creditor enforcement actions. Reference to money adviser fees in relation to debt payment programmes also would not be applicable in a MHM situation.

We also understand that issues have been encountered in the operation of the mental health crisis breathing space in England and Wales in relation to the operation of bank accounts which are in an

overdraft position. The overdraft will be a qualifying debt for the MHM but it may be that the debtor continues to receive income during the period of moratorium and has ongoing liabilities to be met. If the bank account were to be frozen to protect the debt position this may cause difficulties for the debtor both in terms of receipt of income and meeting ongoing required liabilities. The practical impact of this should be considered in the MHM scheme design.

Q12. Do you agree that interest and charges should not be added to the individual's debt during the full period of their Mental Health Moratorium, i.e. frozen?

A: Agree

Further comments:

As one of the policy goals is to prevent the individual's financial position from getting worse before they are able to take advice and deal with their debts, and given the potential long-term nature of a MHM, it is important that interest and charges are frozen.

We would however note that this prejudices the position of creditors, particularly where there is a lengthy MHM initial period. The views of creditors are important in this aspect but recognising that a balance may require to be struck between the rights of the debtor and the creditor consideration may wish to be given to the freeze on interest and charges either being capped or only taking effect after a set period. Such an approach would largely achieve the policy objective of ensuring the debtors financial position does not get worse while they are not in a position to obtain advice or deal with their problem debt while also ensuring that creditors rights to recompense for unpaid debt are acknowledged and provided for.

Q12a. We would be grateful for your views on the possible costs to creditors by the freezing of interest and charges on debts during the Mental Health Moratorium period.

Comments:

We are unable to comment or assess the likely costs. However, aside from local authority debt such as council tax and other governmental debt such as HMRC, most of the debt in personal insolvency situations comes from regulated credit. As a result of FCA requirements on the regulated credit sectors to treat customers fairly, we would anticipate that creditors will be keen to take the necessary steps to ensure this requirement is met (in relation to what may amount to a handful of individuals) regardless of the complexity and cost in these cases.

It is also worth noting that the mental health crisis breathing space freezes interest and charges so the vast majority of creditors involved must already have experience of this requirement.

Q13. We would be grateful for your views on the possible practicalities of limiting creditors from contacting the individual during the Mental Health Moratorium period.

Comments:

Limiting creditor contact is clearly one of the fundamental distinctions between the proposed MHM and existing standard moratorium and is key to achieving the stated policy goals. Regardless of the practicalities, it is difficult to see how this can be achieved without direct creditor notification, as is the case in England and Wales. It is further difficult to envisage how this would be achieved via any form of public register.

Even with direct notification it is likely that some creditors will be missed from the identification process and in other circumstances they may be notified but unable to identify the debtor on their systems (either insufficient information provided or change of addresses not notified, etc). In these situation, ongoing contact would appear likely. To rectify, this would then require some further intervention either by the debtor or their representative, if they have one appointed.

Whether through wilful neglect or unintentional, we think it likely that some ongoing creditor contact will continue to occur.

Q14. Do you agree with the proposed approach to the protections against diligence?

A: Neither agree nor disagree.

Further comments:

We acknowledge the eviction protections already in place in Scotland for tenants in rent arrears, and consideration of further protections in the future. However, existing protections do still result in a degree of uncertainty and it seems unlikely that someone who qualifies for a MHM will have the capacity to deal with such pressures and interactions. To not include a definitive protection from eviction for a period does seem to have the potential to undermine the policy intentions of the MHM.

The MHM should, as much as possible, be a 'one stop shop' for individuals to gain relief from their financial pressures. Clearly such protection could not be indefinite out of fairness to landlords impacted, so any protection would have to come with an ultimate review process as for a mental health crisis breathing space, where, although any scheduled eviction cannot take place, that is reviewed by a judge if suspended beyond 6 months.

We agree that where joint and severally liable debts are included in an MHM, the diligence protections should not extend to those jointly and severally liable for those debts.

Q15. Do you agree with the proposed position on creditor consequences for not adhering to a Mental Health Moratorium?

A: Agree

Further comments:

Q16. Do you agree with the proposed position on the creditor's right to challenge the granting of a Mental Health Moratorium?

A: Disagree

Further comments:

Where creditors rights are being impinged then there should be provision for challenge as part of the safeguards against abuse, however small that risk may be.

Creditors should be able to challenge the granting of the MHM in the following circumstances:

- where there has been misrepresentation by the mental health professional
- where the debtor can be shown not to have had capacity
- where there is a representative of the debtor and they can act in accordance with their powers in dealing with the debtor's financial affairs without unfair prejudice to the debtor
- where the MHM will result in substantial unfair prejudice to the creditor
- the debt due is because of fraud or other criminal activity.

Q16a. Do you think creditors should be able to request the cancellation of an approved Mental Health Moratorium?

A: Yes

Explain reason for answer:

We assume the right to challenge the granting of a MHM would be time limited. Information may come to light or a new creditor only be identified after such a period and the right to request a cancellation should therefore be available in such circumstances and for the same reasons as above.

Q16b. If you answered yes to question 16a, in what circumstances could the creditor request a cancellation?

Comments: See response to Q16a above.

Q16c. Further to question 16b, we would be grateful for your views on how a cancellation process could work.

Comments:

We would suggest that any cancellation process application would be considered by the AiB with representations invited from the mental health professional and debt advisor prior to determination. If agreed to then the AiB would notify the debt advisor, the debtor and creditors.

Q17. Do you agree with the proposed approach to the obligations on the individual?

A: Agree

Further comments:

We agree that individuals who have a MHM should be under obligations not to dispose of assets and not to incurring significant new borrowing.

Q18. Do you believe penalties should be applied to the individual for not following the rules of the Mental Health Moratorium?

A: Neither agree nor disagree

Further comments:

Where there are obligations then it is only appropriate that there are potential sanctions for failing to adhere to such obligations. If there is no such sanction, then it seems futile to require the obligation in the first instance.

Q18a. If you answered yes, we would be grateful for your views on what kind of penalty would be appropriate.

Comments: N/A

Q19. Do you agree there is insufficient justification to place restrictions on the individual's access to credit?

A: Agree

Further comments:

Agreed this would be inappropriate for the reasons outlined in the paper.

Q20. Do you believe other obligations should be placed on an individual in a Mental Health Moratorium?

A: No. The process should be as 'light touch' as possible for the individuals involved.

Explain reason for answer:

Q21. Which of the following options would you choose as the delivery mechanism for the Mental Health Moratorium?

A: Option 1 - Clone the underlying IT system in place for the Debt Arrangement Scheme to administer the Mental Health Moratorium

Explain reasons for answer:

Obviously, the method chosen should be the one that will practically deliver what is required as cost-effectively as possible. Proportionality, in view of the likely number of cases, must be factored in when considering the scope and development of the moratorium and its delivery.

That being said, entering someone into a Debt Payment Plan (DPP) under DAS would be totally inappropriate, being a debt relief solution the individual has not signed up for. As well as prejudging the individual's rights to make their own choice of how best to proceed, the conflation of the two processes could lead to a whole host of unintended consequences that would need to be considered in significant detail.

The 'failing' of a DPP may impact on the debtor's credit position going forward and/or require credit reference agencies to make changes to IT systems to take account of this so as not to impact the debtors credit rating.

In the absence of an alternative, the option to clone the underlying IT system seems to be the most appropriate solution.

We assume that the possibility of amending the DAS IT system to functionally only deliver the elements of the MHM for appropriately flagged MHM records has been considered and dismissed for technical reasons but its absence of being presented as an option leaves this question open. This approach would utilise the system but not set up a DPP and without having to 'clone' and result in 2 system to maintain.

Q21a. If you selected neither option, we would be grateful for your views on a workable alternative which would meet the Mental Health Moratorium requirements.

Comments: N/A

Q22. Do you agree with the proposed position on how the Mental Health Moratorium will interact with a standard moratorium?

A: Agree

Further comments:

Q23. We would be grateful for your views on how best to promote the Mental Health Moratorium.

Views:

There will already be significant awareness among debt advisers so we would suggest that promotion is concentrated on mental health professionals.

Q24. We would be grateful for any further comments you have about the Mental Health Moratorium which has not been raised in this consultation.

Comments: N/A

Q24a. Would you be happy for officials to contact you to discuss your response if we want to explore your comments in more detail?

A: Yes

Mental Health Moratorium Consultation

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

ICAS

Phone number

0131 347 0242

Address

CA House, 21 Haymarket Yards, Edinburgh

Postcode

EH12 5BH

Email address

dmenzies@icas.com

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



CA House, 21 Haymarket Yards, Edinburgh, UK, EH12 5BH
+44 (0) 131 347 0100
connect@icas.com
icas.com

 @ICASaccounting

 ICAS – The Professional Body of CAS

 ICAS_accounting

 ICAS_accounting