Siobhian Brown MSP
Convenor, COVID-19 Recovery Committee
Scottish Parliament

By email only.

24 February 2022

Dear Ms Brown

Coronavirus (Recovery and Reform) (Scotland) Bill

I refer to the Coronavirus (Recovery and Reform) (Scotland) Bill ("the Bill") recently laid before the Scottish Parliament and the subsequent Call for views issued by the Committee. ICAS is pleased to provide the following comments which I hope the Committee will find helpful.

ICAS previously responded to the Scottish Government paper, Covid recovery: a consultation on public health, services, and justice system reform. Our detailed response is available here.

In responding to this Call for views we have restricted our comments to those aspects which impact on the areas of bankruptcy directly and indirectly.

Sections 15-17 of Part 3 relating to bankruptcy are broadly welcomed. We would wish to ensure that as the temporary provisions are transferred onto a permanent footing that legislation is clear, effective and any unintentional consequences are minimised. We therefore make the following observations:

Service of documents

As with the temporary provision introduced by the Coronavirus (Scotland) (No.2) Act 2020, the wording of the proposed new Section 224A of the Bankruptcy (Scotland) Act 2016 ('the 2016 Act') does not appear to allow a trustee to rely on presumed consent for electronic communication with creditors because of the debtor's dealings with their creditors pre-insolvency.

The new section 224A (4) as drafted states *"electronic transmission of a document must be effected in a way that the recipient has indicated to the sender that the recipient is willing to receive the document, the recipient's indication of willingness to receive a document in a particular way may be…….. inferred from the recipient having previously been willing to receive documents from the sender in that way and not having indicated unwillingness to do so again"* (emphasis added)

The equivalent provision brought in for corporate insolvency procedures recognises the introduction of the office holder 'in place of' the insolvent as far as communications are concerned. As an example r1.41(4) of the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 ("the 2018 Rules") states *"…..an intended recipient is deemed to have consented to the electronic delivery of a document where the intended recipient and the company who is the subject of the insolvency proceedings had customarily communicated with each other by electronic means before the insolvency proceedings commenced".*

The approach taken in corporate insolvency has many advantages, most significantly as it adopts the 'digital first' approach which is favoured by Government and ensures that costs of administering bankruptcy estates can be reduced. It is unclear from a policy perspective why there would be a divergent approach between personal and corporate insolvency in Scotland.

The emphasised text above could more usefully say something along the lines of "*from the recipient having previously been willing to receive the documents from the debtor who is the subject of the insolvency proceedings in that way, or from the sender, and not having indicated unwillingness to do so again."*

The language "*service of documents*' may be somewhat confusing given its more usual usage in connection with legal processes. While we note that the proposed s224A clarifies that "*service*" of a document captures

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the terms "*serve", "give", "send"* or any other expression used, again borrowing from corporate legislation, perhaps '*delivery of documents'* would lessen the legal connotations associated with "*serving*" while achieving the same effect.

Proposed s224(4)(c) usefully permits the use of websites, a provision widely used within corporate insolvency. Unfortunately, as drafted, the Bill seems to suggest that *"a notification that the document has been uploaded in that way*" would require to be sent to the recipients on each and every occasion a document is uploaded. This of course somewhat defeats the intended purpose of the provision, particularly in personal insolvency when it is rarely voluminous reports that are being issued.

Again, the corporate provisions may be worth echoing more closely if this change is to make a material difference on a permanent basis. As an example, r1.45(1)(a) of the 2018 Rules states *"The office-holder may deliver a notice to each person to whom a document will be required to be delivered in the insolvency proceedings which contains— (a)a statement that future documents in the insolvency proceedings other than those mentioned in paragraph (2) will be made available for viewing and downloading on a website without notice to the recipient and that the office-holder will not be obliged to deliver any such documents to the recipient of the notice unless it is requested by that person"*. The Rule then goes on to state further conditions.

Qualified creditors

Our response to the earlier Covid recovery consultation paper highlighted several issues for consideration in relation to the possible raising of minimum debt level for a creditor to seek sequestration through the courts. We note the consultation analysis and Government responses published on 26 January. While we retain reservations that the proposed increase from £3,000 to £5,000 is being made with a limited evidential base and consideration of the potential impact with the potential of unintended consequences, we consider that by limiting the increase to £5,000 the risks have been somewhat mitigated.

While the primary impact of the increased debt in the definition of qualified creditor and qualified creditors would be in the context of individuals, it should be bourne in mind that the increase would also affect the threshold for non-natural persons to access bankruptcy including partnerships, trust estates and unincorporated entities, albeit the number of such sequestrations is not significant on an annual basis.

Remote meetings of creditors

The Bill proposes that Schedule 6 of the 2016 Act is to be amended to allow meetings of creditors in bankruptcy to take place using electronic means, as well as in person. However, the Bill does not propose setting out further detailed provisions regarding minimum standards of access or notification as has been done in equivalent corporate insolvency legislation. The proposed change would simply allow any meeting of creditors to be held *"by such electronic means as would, in the opinion of the person calling the meeting, be most convenient to allow the majority of the creditors to participate in the meeting without being together in the same place".*

While meetings of creditors in bankruptcy are not commonplace, they do take place on occasion. At those meetings there may be the requirement for a decision (e.g. a trustee vote per S49 of the 2016 Act or a decision of commissioners on the performance of the trustee's functions). If there are no provisions setting out the mechanics of how the meetings are to take place and decisions taken at them, then it seems to leave significant scope for disagreement and ambiguity. It would seem appropriate to make provisions, either as part of the amended primary legislation or within secondary legislation, similar to those noted below from r8.4 and r8.5 of the 2018 Rules.

Electronic voting

8.4. Where the decision procedure uses electronic voting—

(a)the notice delivered to creditors in accordance with rule 8.8 must give them any necessary information as to how to access the voting system including any password required;

(b)except where electronic voting is being used at a meeting, the voting system must be a system capable of enabling a creditor to vote at any time between the notice being delivered and the decision date; and

(c)in the course of a vote the voting system must not provide any creditor with information concerning the vote cast by any other creditor.

Virtual meetings

8.5. Where the decision procedure uses a virtual meeting the notice delivered to creditors in accordance with rule 8.8 must contain—

(a)any necessary information as to how to access the virtual meeting including any telephone number, access code or password required; and

(b)a statement that the meeting may be suspended or adjourned by the chair of the meeting (and must be adjourned if it is so resolved at the meeting).

Other relevant areas

In general terms we support the proposed arrangements in respect of electronic signature of documents in relation to the Register of Inhibitions (Clause 25) and the disapplication of physical presence requirements (Clause 30).

We note the provisions contained within the Schedule in relation to the operation of court procedures. We would highlight our previous consultation response in this area which highlighted that there would be benefit in excluding from the general presumption of non-physical attendance in Court for certain matters where there is sufficient gravity of the situation to be maintained. This may include for instance public and private examinations under sections 118 and 199 of the Bankruptcy (Scotland) Act 2016, Inquiry into company's dealings, etc under section 236 Insolvency Act 1986, proceedings under the Company Director Disqualification Act 1986, etc.

I shall be pleased to provide any further information or clarification should this be of assistance.

Yours sincerely

David Menzies
Director of Practice