



Scotland's statutory debt solutions and Diligence - policy review response: consultation

ICAS response

October 2022

Introduction

The Institute of Chartered Accountants of Scotland (ICAS) is the world's oldest professional body of accountants and represents over 23,000 members who advise and lead businesses across the UK and in almost 100 countries across the world. ICAS is one of the four Recognised Professional Bodies (RPB) 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 an RSB for statutory audit, and a PBS for anti-money laundering.

ICAS' Charter requires it to primarily act in the public interest. Our responses to consultations are therefore intended to place the public interest first. Our Charter also requires ICAS to represent its 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.

ICAS, like its members and the public, is 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.

ICAS is pleased to have the opportunity to submit its views in response to the Scottish Government's 'Scotland's statutory debt solutions and diligence: policy review response' consultation. We would be happy to discuss any of the matters raised in this response in further detail with the Scottish Government.

Our approach to the consultation

While we are responding to each of the questions, we also include an Executive Summary below to highlight our key comments, in the hope of producing a more accessible submission:

Executive summary

Our responses to the questions posed in the consultation are set out in Appendix 1. We would however like to highlight within this Executive Summary our key comments:

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

- While we have some recommendations on the specific proposals, ICAS is fully supportive of any steps that help to ensure that all individuals are supplied with enough information, in as understandable a format as possible, to allow them to make an informed decision on how to deal with their debts.
- We are concerned that references to leaflets and the presumption of written material being provided is overly restrictive and does not aid the overall objective of ensuring a debtor understands the information they are being provided with. It is now well understood that individuals have different communication preferences. Written information may not be inclusive where for instance dyslexia or other impairments exist. Such factors need to be given higher priority in formulating proposals and legislative drafting. The use of technology in a variety of different formats and innovative methods of communication should be part of a digital first approach, with other communication channels permissible where appropriate. Such an approach would not only contribute to net zero sustainability targets but also allow innovative developments which might also facilitate checking of understanding should this be desirable rather than just ensuring that information is provided.

Theme 2 - Debt solutions – entry criteria

- ICAS is supportive of measures that allow access to debt relief for people who require a resolution to problem debt and agrees that, within the current framework of debt solutions available, the criteria for entry should be such that, where possible, individuals have a range of options.

Theme 3 - Administration of debt solutions

- As set out in previous consultations, ICAS considers the model designated by the Common Financial Tool ('CFT') should be replaced by one which is based on income. This would address the issues being encountered with the current CFT model which have not resulted in consistency of application and are administratively burdensome for debtors, insolvency practitioners, third sector money advisers and the AiB.

The Stage 2 Working Group which considered the CFT noted that an income-based model was more appropriate where the policy approach was to ensure consistency in assessment of contributions. This was the policy of the Scottish Government when the CFT was introduced under the Bankruptcy and Debt Advice (Scotland) Act 2014. The working group noted that the currently applied income and expenditure model was more appropriate where flexibility and nuance of individuals situations were to be recognised as the primary policy driver behind the CFT.

The consultation response does not set out either a confirmation that the pre-existing policy is still the policy of the Scottish Government or that there is a case for a new policy to be pursued. It must therefore be assumed, in the absence of a clearly stated position, that the existing policy position – that contributions should be assessed on consistent basis – is the primary policy position to be achieved in legislation. The Working Group were clear that to achieve this policy objective it is an income-based model CFT that is required. It is therefore impossible to reconcile the Scottish

Government's proposal with their policy position, and in doing so ignoring the recommendation of the Stage 2 working group and without explanation.

- We strongly welcome the commitment given in the consultation that the operational practices and guidance in using the SFS will be pragmatic and avoid any unnecessary administrative burden on advisers. It is vital that the views of those impacted by the operation of the CFT are consulted and have meaningful input into the design and implementation of the guidance and administrative processes, recognising that those who operate the CFT are highly regulated, skilled and knowledgeable professionals.
- We strongly disagree that provisions currently within the PTD Protocol should be enshrined in legislation. This is completely contrary to the Better Regulation principles where intervention should only be undertaken where it is proportional to do so. We do not believe that there has been a case set out for further legislative intervention as being a proportionate response. Indeed, the justification – that the voluntary PTD Protocol is working and over 90% of new PTDs are covered by the Protocol suggests that the voluntary measures are having the desired impact, specifically supporting the view that legislation is not required.

The proposed imposition of Protocol processes, particularly in relation to dividend payments and discharge of the debtor will have a disproportionate effect on trustees who undertake PTD appointments on an occasional basis and do not operate 'volume' systems. While it is suggested that no practical difficulties have been encountered with the Protocol requirements this is because those operating under the Protocol operate 'volume' processes. It is inappropriate and indeed incorrect to assume that the same outcome will be achieved in smaller trustee firms.

Current legislation permits dividends to be paid at an earlier stage and there is no evidence that debtors are being refused discharge other than in appropriate circumstances. Indeed, the recent evidence gathered by the Accountant in Bankruptcy positively supports the proposition that debtors being refused discharge are being refused in appropriate circumstances.

There are already significant concerns about the impact that a small number of volume operators is having on the debt relief landscape. In addition to failing to drive a competitive marketplace, it risks driving potential trustee providers from the market even further which in due course leaves a high reliance on a small number of providers. The Accountant in Bankruptcy has already expressed concern about the lack of private trustees in bankruptcy cases and the precarious position that this leaves.

- We do not agree with the Scottish Government's proposal to retain the current process of taking the full surplus income from contributions. The Stage 2 Working Group which considered this issue recommended that the full surplus contribution should not be required to be taken in all cases. The consultation response has not adequately addressed the recommendation of the working group and explained why it is not appropriate to take that recommendation forward. While we note that the working group was not able to determine a best alternative approach, we would suggest that combined with a move to an income-based model for the CFT, the objectives of both policy areas could be achieved.

Theme 4 – Exit from debt solutions

- We do not agree with the suggestion that the revocation of a Debt Payment Plan under DAS on the death of a debtor should be amended. Doing so would result in rights of creditors being compromised in favour of beneficiaries of the individual's estate.

Despite the rhetoric behind DAS being a non-insolvency debt solution the reality is that this is not the case. An individual is having to enter this debt solution because they are unable to pay their debts as they fall due – a classic definition of insolvency.

The policy approach proposed to be pursued seems contrary to the policy approach proposed in situations where a debtor dies whilst subject to a PTD. There is no logical explanation why different policy approaches are being adopted in broadly the same situations.

- We welcome the proposal to link the prescribed statutory rate of interest to the Bank of England base rate of interest, a call which ICAS has been making for some considerable time.

Theme 5 - Improvements to debt recovery mechanisms (diligence)

- Due to the general scope of the work of our Members and Affiliates, we have not significantly commented on theme 5 surrounding improvements to debt recovery mechanisms. However, we once again take the opportunity to reiterate that ICAS strongly agrees with, and has long advocated for, a full review of how a debtor's heritable property, specifically a family home, should be dealt with across all debt payment and debt relief solutions. This issue is at the heart of all personal insolvency procedures and should be a priority of the Scottish Government.

We look forward to engaging with the Scottish Government and officials at the Accountant in Bankruptcy to develop and take forward the final proposals arising from this consultation.

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Direct contact for further information:

David Menzies

Director of Practice

E-mail: dmenzies@icas.com

TEL: +44 (0)131 347 0242

Appendix 1 - Consultation questions

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

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

Proposal 1.1 - Agree

ICAS supports the introduction of a specific mental health process as part of the statutory moratorium provisions. Recognition of the specific challenges and assistance requirements of those facing mental health issues is a welcome and necessary step in a progressive and modern society. Those who face such challenges are in a vulnerable position, and often at a point when they don't have capacity to engage with their creditors or in court proceedings.

As the consultation paper points out, the current moratorium provisions in Scotland benefit from simplicity of operation. Given the characteristics of those likely to be impacted by the new process it is important to keep this philosophy in the design of the new process. We support the view that the scope of those who may benefit from such a new process should be wider than those covered under the mental health crisis provisions in England and Wales however the difficulties in providing an accessible process alongside appropriate safeguards and protections for other stakeholders including creditors is likely to require careful balancing. ICAS would be pleased to engage further in discussions on the design of any additional process.

Proposal 1.2 - Disagree

While supportive of the intention to provide clear and succinct information to those considering entering a trust deed, the proposal to introduce a new information leaflet seems highly incompatible with the proposal to streamline the Debt Advice and Information Package ('DAIP') due to its "*extensive content*". The proposal if carried through would introduce yet another leaflet to a process already overburdened with paperwork. The consultation paper states that the leaflet will form "*part of the package of information supplied prior to the granting of the trust deed*" which already requires the DAIP to be provided. This would seem to negate any benefits derived from the streamlining of that document.

We would respectfully suggest that the underlying recommendation of the Economy, Energy and Fair Work Committee was ill conceived. The Committee did not have a full understanding of the process and the full extent of information already provided to debtors considering a trust deed. In addition to the DAIP, debtors are required, under Statement of Insolvency Practice 3.3, to be provided with a range of information and more importantly to have procedures in place to ensure the debtor understands the process and their commitment to it. Furthermore, it is worth noting that documents such as the AiB's 'Debt and the consequences' are also available. The addition of another layer of information will not aid clarity for debtors, indeed is likely to add to confusion.

In a much wider context, we are concerned that references to leaflets and the presumption of written material being provided is overly restrictive and does not aid the overall objective of ensuring a debtor understands the information they are being provided with. It is now well understood that individuals have different communication preferences. Written information may not be inclusive where for instance dyslexia or other impairments exist. Such factors need to be given higher priority in formulating proposals and legislative drafting. The use of technology in a variety of different formats and innovative methods of communication should be part of a digital first approach, with other

communication channels permissible where appropriate. Such an approach would not only contribute to net zero sustainability targets but also allow innovative developments which might also facilitate checking of understanding should this be desirable rather than just ensuring that information is provided.

Proposal 1.3 – Agree

See comments in response to proposal 1.2 above regarding the wider context of information provision and understanding.

In relation to the DAIP, individuals may be put off to some degree by the size of the document, but that appears to be more of a formatting issue. Only 5 pages (5-10) of the 16-page document contain information of real relevance to individuals. A return to something akin to the format of the DAIP when it was first introduced may be appropriate.

Proposal 1.4 - Agree

Any move to simplify language and make it more accessible and easily understood by all stakeholders is welcomed. It will be vital however in doing so that care is taken to ensure that the information supplied remains technically accurate. There is a risk that in making information accessible to a wide range of stakeholders with varying degrees of capacity that nuances, of what is after all highly complex and legal processes, can be omitted or reduced in importance to level which causes unintended consequences.

We highlight also our comments above in response to proposal 1.2 regarding the wider context of information provision and understanding.

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

The intention behind the proposals is correct i.e., to ensure that vulnerable individuals have a mechanism for protection and that all individuals are supplied with enough information, in as understandable a format as possible, to allow them to make an informed decision on how to deal with their debts.

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

No.

Theme 2 - Debt solutions – entry criteria

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

Proposal 2.1 - Agree

As the consultation points out, the number of people applying for Minimal Asset Process (MAP) bankruptcies with debts of between £1,500 and £2,500 is very small. While the number of individuals who might access MAP with debt below £1500 is unknown it seems unlikely that this is likely to be a large number. In any case, the rationale for setting entry barriers should not be driven by numbers but by whether there is a requirement for individuals to access debt relief. The original rationale for setting a minimum debt level was to counter against individuals writing off small levels of debt when it was inappropriate to do so. We do not consider that there is a significant risk of such situations arising. There are several safeguards within the bankruptcy framework to mitigate such risks and to respond to inappropriate use if this took place. We recognise that there are individuals who in their circumstances will realistically struggle to ever repay even a relatively small amount of debt and that there is benefit in providing a route for unsustainable debt to be resolved irrespective of a de minimis value. We would therefore be supportive of the proposal to remove the minimum debt threshold under MAP.

Proposal 2.2

We agree with the simplification of the entry criteria to MAP on asset thresholds. We however do not agree that it is appropriate to review and update the total asset value threshold at this time.

We are surprised that the consultation document did not elaborate on this aspect further and include a specific proposal. The Stage 2 Working Group 3 report specifically highlighted that there was difficulty in establishing a recommendation for the total asset value threshold and recommended that this be subject to further consultation. It is disappointing that the Scottish Government have not taken this opportunity to consult on proposals that they will bring forward into legislation. We would concur with the view of the Stage 2 Working Group 3 that MAP is intended to be a simplified bankruptcy process for those with no discernible assets. The current total asset threshold of £2,000, which excludes assets which would not vest in the trustee, seems appropriate (it is still a substantial asset value in context) and there is no evidence that we are aware of which indicates any specific issue or benefit to amending this value. Any increase is likely to be arbitrary and without substantial benefit to any stakeholder.

Proposal 2.3 - Agree

We agree with the proposal not to increase the minimum debt level for a protected trust deed at this time. We consider that there is no strong evidence that an increase in the minimum debt would present significant benefits or address any perceived harms in the current system. We consider that there is a need to consider protected trust deeds in a much wider context as part of the Stage 3 review and that any further amendments to protected trust deed legislation would be best met following the outcome of that review.

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

We are supportive of measures that allow access to debt relief for people who require a resolution to problem debt and agree that the criteria for entry, under the current debt relief solutions framework, should be such that, where legislation permits, individuals have a range of options.

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

No.

Theme 3 - Administration of debt solutions

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

Proposal 3.1 - Disagree

As set out in previous consultations, we consider that the model designated by the Common Financial Tool ('CFT') should be replaced by one which is based on income. We believe that it is possible to create a model which can be based on a scaled percentage of income while being reflective of essential expenditure and a reasonable standard of living based on household composition. This would address the issues being encountered with the current CFT model which have not resulted in consistency of application and are administratively burdensome for debtors, insolvency practitioners, third sector money advisers and the AiB.

The Stage 2 working group which considered the CFT noted that an income-based model was more appropriate where the policy approach was to ensure consistency in assessment of contributions. This was the policy of the Scottish Government when the CFT was introduced under the Bankruptcy and Debt Advice (Scotland) Act 2014. The working group noted that the currently applied income and expenditure model was more appropriate where flexibility and nuance of individuals situations were to be recognised as the primary policy driver behind the CFT.

We note that the consultation response does not set out either a confirmation that the pre-existing policy is still the policy of the Scottish Government or that there is a case for a new policy to be pursued. It must therefore be assumed, in the absence of a clearly stated position, that the existing policy position – that contributions should be assessed on consistent basis – is the primary policy position to be achieved in legislation. The Working Group were clear that to achieve this policy objective it is an income-based model CFT that is required. It is therefore impossible to reconcile the Scottish Government's proposal with their policy position, and in doing so ignoring the recommendation of the Stage 2 working group without explanation.

Proposal 3.2

We highlight our disagreement with the proposal to retain an income and expenditure based CFT as set out in our response to proposal 3.1. Subject to that underlying disagreement, if the proposal set out in 3.1 is pursued, we would be supportive of the proposal to replace the Common Financial Statement (CFS) with the Standard Financial Statement (SFS) as the CFT.

We strongly welcome the commitment given in the consultation that the operational practices and guidance in using the SFS will be pragmatic and avoid any unnecessary administrative burden on advisers. It is vital that the views of those impacted by the operation of the CFT are consulted and have meaningful input into the design and implementation of the guidance and administrative processes, recognising that those who operate the CFT are highly regulated, skilled and knowledgeable professionals.

Proposal 3.3

We do not agree with the Scottish Government's proposal to retain the current process of taking the full surplus income from contributions. The Stage 2 Working Group which considered this issue recommended that the full surplus contribution should not be required to be taken in all cases. The consultation response has not adequately addressed the recommendation of the working group and explained why it is not appropriate to take that recommendation forward. While we note that the working group was not able to determine a best alternative approach, we would suggest that combined with a move to an income-based model for the CFT, the objectives of both policy areas could be achieved.

We agree that support payments issued by government to help people through a cost-of-living crisis or similar should not be treated as windfalls and should instead be retained by the individual for their specific targeted purpose. We believe that the existing legislation would currently permit this without further amendment as such crisis support payments would not meet a normal definition of 'income' which itself is not defined in The Common Financial Tool etc. (Scotland) Regulations 2014. We do however agree that it is more appropriate to clarify this in legislation and provide for future flexibility.

Proposal 3.4 – Agree

The appropriate levels of sacrifice by distressed debtors, and the appropriate levels of compromise by their creditors, are sensitive matters of social policy which must be addressed balancing the competing interests of different stakeholders, such as debtors and creditors.

The contribution payment period in bankruptcy was increased to four years to bring it into line with PTDs with the intention of increasing the returns paid to creditors. While we, in principal, support the view that debtors should not remain in an insolvency process longer than is necessary and that insolvency should allow debtors a 'fresh start' at the earliest opportunity, there is a need to fully work through the potential impact and unintended consequences of any proposed reduction, particularly where the reduction in period would create a differential across debt relief solutions. Any consideration of a return to a three-year repayment period should therefore be applied across both debt-relief products with due analysis of the impact on debtors and creditors. We would strongly recommend that this matter is considered again as part of the wider Stage 3 review.

Proposal 3.5

We agree that mobility scooters, and indeed all mobility aids, where required should not vest in a trustee. However, we are somewhat perplexed by the suggestion that there is a need to legislate further on this as it is our understanding that existing legislation covers this - and indeed covers a much wider application which is appropriate.

Vesting of an estate is provided for in section 78 of the Bankruptcy (Scotland) Act 2016. This states:

78 Vesting of estate at date of sequestration

- (1) The whole estate of the debtor vests for the benefit of the creditors in the trustee in the sequestration, by virtue of the trustee's appointment, as at the date of sequestration.*
- (2) But subsection (1) is subject to section 88....*

The relevant provisions of section 88 are:

88 Limitation on vesting

- (1) The following property of the debtor does not vest in the trustee in the sequestration—*

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- (b) any property—
- (i) kept inside a dwellinghouse, and
 - (ii) not a non-essential asset for the purposes of Part 3 of that Act,

(Reference to the 2002 Act is to the Debt Arrangement and Attachment (Scotland) Act 2002.)

While we note that the Bankruptcy (Scotland) Act 2016 does not generally define a dwellinghouse, a definition of dwellinghouse is included as part of section 228 (3) (“a dwellinghouse (including any yard, garden, outbuilding or other pertinents)”) and it is difficult to see how the extent of a dwellinghouse might or could be interpreted as meaning different things in different parts of the Act.

Section 45 of the 2002 Act sets out that Schedule 2 of the 2002 Act sets out what is and what is not “non-essential assets” for the purposes of Part 3 of the 2002 Act. The relevant sections of Schedule 2 are:

SCHEDULE 2

Non-essential assets

(introduced by section 45)

- 1 For the purposes of Part 3 of this Act, “non-essential assets” are, subject to paragraph 2 below, corporeal moveable property of the debtor’s which is kept in a dwellinghouse.
- 2 None of the following is a non-essential asset for the purposes of Part 3 of this Act—
 - (a) an article specified in paragraph 3 below;
- 3 The articles referred to in paragraph 2(a) above are—

.....

 - (c) medical aids or medical equipment reasonably required for the use of the debtor or any member of the debtor’s household;

A mobility scooter is clearly a medical aid and therefore would be excluded from vesting by virtue of the above provisions. The protections from vesting extend beyond just the debtor themselves – so for instance if a debtor legally owned a mobility scooter but it was used by another member of the household then the mobility scooter would still not vest. The protection from vesting extends beyond mobility scooters to all medical aids reasonably required which we consider appropriate.

Proposal 3.6 - Agree

We have no objection to the commissioning of further work to inform the work of the wider Stage 3 review and its consideration of the treatment of motor vehicles. We support evidence-based decision making and policy and this proposal would assist in meeting that objective.

Proposal 3.7 - Agree

We agree that it is appropriate for the Scottish Government to review and update the existing vehicle threshold. We support evidence-based decision making and agree with the recommendation of the Stage 2 Working Group that expert opinion should be sought in determining the reasonable average value of a modern mid-sized family car as an interim measure pending the wider Stage 3 review.

Proposal 3.8 - Disagree

In accordance with Better Regulation principles, intervention should only be undertaken where it is proportional to do so. We do not believe that there has been a case set out for further legislative intervention as being a proportionate response. Indeed, the justification – that the voluntary PTD Protocol is working and over 90% of new PTDs are covered by the Protocol suggests that the voluntary measures are having the desired impact, specifically supporting the view that legislation is not required.

Of those PTDs which are not covered by the Protocol, the trustees in such cases are typically smaller firms and will only be trustee in a very low number of PTDs. The proposed imposition of Protocol processes, particularly in relation to dividend payments and discharge of the debtor will have a disproportionate effect on these trustees as they do not operate 'volume' systems. While the trustees who have signed up to the Protocol have indicated that no practical difficulties have been encountered with the Protocol requirements, we would suggest that this is because of their 'volume' processes and as such it is inappropriate and indeed incorrect to assume that the same outcome will be achieved in smaller trustee firms with minimal value.

Current legislation (Section 176 of Bankruptcy (Scotland) Act 2016) does not preclude a trustee from paying a dividend to creditors at an earlier stage. A further administrative process where it is proposed that a debtor discharge be refused is another step to an already quite convoluted and 'form-heavy' process, as is the requirement for further reporting on the dividend position. The evidence from the Protocol on debtor discharge has reinforced the stated position of us and others to the Economy, Energy and Fair Work Committee that debtors are only refused discharge from their PTD where they have been un-cooperative and there is no evidence that debtors are being refused discharge other than in appropriate circumstances.

There are already significant concerns about the impact that a small number of volume operators is having on the debt relief landscape. In addition to failing to drive a competitive marketplace, it risks driving potential trustee providers from the market even further which in due course leaves a high reliance on a small number of providers. As these volume providers tend to be from a non-traditional insolvency firm structure, they are viewed as high failure risks. The Accountant in Bankruptcy has already expressed concern about the lack of private trustees in bankruptcy cases and the precarious position that this leaves. This of course was highlighted as a consequence of decisions of previous Administrations and Accountants in Bankruptcy, and which have resulted in an increasing number of bankruptcy appointments being held by the Accountant in Bankruptcy and managed by only 2 case management providers. It is unsurprising that the potential consequences previously highlighted have come to bear. We would counsel against the same mistakes continuing to happen.

Proposal 3.9 - Agree

We are supportive of any measures aimed at reducing administration costs, increasing efficiencies and improving returns to creditors. We would be happy to take part in the working group established.

Proposal 3.10 - Agree

It would be inappropriate for any changes to be made to improve the interests of beneficiaries where a debtor dies during a PTD. To do so would afford beneficiaries in those circumstances a higher priority than beneficiaries of an individual who does not die during a PTD, which would be inequitable. Furthermore, we do not believe that there is any widespread issue. We believe that the concerns raised by the Economy, Energy and Fair Work Committee Report were based on an isolated example. We appreciate and understand that those who perhaps expect to inherit an estate can sometimes be surprised and disappointed when they discover unexpectedly that the deceased estate was insolvent, but it is a well-established principle in succession under Scots law that creditors of the deceased are paid in priority to beneficiaries. There seems no clear rationale to provide for insolvency legislation to alter the principles in succession law.

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

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

No.

Theme 4 – Exit from debt solutions

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

Proposal 4.1 - Agree

We have no objection to further investigation into a formal legislative form of composition for PTDs and bankruptcy. We are aware of multiple situations where it would be just and equitable for an earlier exit from the debt relief solution than is permitted under existing legislation. Composition may be one way in which such situations could be resolved. However, equally the issues encountered may be possible to be addressed through other avenues, for example if it were possible and easier to move from one debt relief or debt management solution to another.

The form of composition that previously existed for bankruptcy, per Schedule 4 of the Bankruptcy (Scotland) Act 1985, was little used but was a useful option in occasional bankruptcy cases. Its removal is, anecdotally, considered by some within the profession to have been a misstep.

Proposal 4.2 Agree

See response to proposal 4.1

Proposal 4.3 Agree

We agree that legislation should be amended to allow for the trustee to apply for the refusal of a debtor's discharge. The process should allow the trustee to initiate the refusal of discharge at any time without the request first being initiated by the debtor. The current drafting of legislation in this area is overly restrictive leading to inefficient case management and unnecessary costs.

Proposal 4.4 Neither agree nor disagree

We consider that, pending the wider Stage 3 Review, there is no urgency for substantial reform of the current trustee report and discharge process in bankruptcy and would be content to consider reform as part of the wider discussion. We consider proposal 4.5 to be the most pressing issue in relation to discharge.

Proposal 4.5 Agree

We agree that legislative amendment should be brought forward as a matter of urgency and prior to the wider Stage 3 Review to address the issue of trustees being unable to obtain their discharge where a debtor is unable to be traced or in circumstances where a debtor is non-cooperative long term and avenues to obtain cooperation have been exhausted or impractical to pursue further.

Proposal 4.6 Agree

We agree that it would be inappropriate to consider any further changes to the composition process in DAS. To do so would be a further move towards making DAS explicitly a debt relief product. As things stand creditors receive 78% of their debt and no interest. Any further compromise would be inappropriate for something badged as a debt management product.

Proposal 4.7 - Disagree

While understanding the sentiment of the proposal and the sensitivities in these circumstances, if an individual dies during the period of his or her DAS and the scheme is revoked, it does not seem equitable that the rights of creditors are compromised in favour of beneficiaries of the individual's estate.

Despite the rhetoric behind DAS being a non-insolvency debt solution the reality is that this is not the case. An individual is having to enter this debt solution because they are unable to pay their debts as they fall due – a classic definition of insolvency.

As with the matter discussed at proposal 3.10, this proposal would afford beneficiaries of an individual who died during a DAS a higher priority than beneficiaries of an individual not subject to DAS and cuts across the law of succession under Scots law.

Proposal 4.8 Agree

We agree that it would be appropriate to link the prescribed statutory rate of interest to the Bank of England base rate of interest. While there has been significant movement in the Bank of England base rate since the consultation was published, even more so since a revision of the calculation was first proposed, the principle and logic applied to the proposal remains sound. Statutory interest in the context of an insolvency should be against the principle of compensating the creditor for their loss of funds to which they were entitled at an earlier date. Pegging against a well established rate used in many commercial contracts remains an appropriate outcome.

Notwithstanding the current interest rate position, fixing the statutory interest at the date of bankruptcy would generally be appropriate within a medium and long term stable economy.

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

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

No.

Theme 5 - Improvements to debt recovery mechanisms (diligence)

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

Proposal 5.1 - Agree

We agree that there would be benefit in the introduction of Information Disclosure Orders where their use is accompanied by appropriate safeguards including consideration of data protection principles and effective operational and administrative procedures.

Proposal 5.2 - Agree

We strongly agree with, and have long advocated for, a full review of how a debtor's heritable property, specifically a family home, should be dealt with across all debt payment and debt relief solutions. This issue is at the heart of all personal insolvency procedures and should be a priority of the Scottish Government.

Proposal 5.3 - Agree

We agree with the proposals to increase the value of sentimental items excluded from exceptional attachment to £500 and with the proposed amendments of timescales within which the exceptional attachment goods cannot be sold.

Proposal 5.4 – Agree

We agree with the proposed amendments to forms to be sent to the Registers of Scotland which appears to be a minor technical amendment. We agree that the period of inhibition is appropriate at 5 years and should be retained.

Proposal 5.5 - Agree

We agree with the Diligence Working Groups recommendation and subsequent Scottish Government proposal that no changes are required to interim attachment.

Proposal 5.6 - Agree

We agree with the proposal that a DAIP should be provided when an application is made by a creditor for diligence on dependence. We would however draw attention to our earlier comments in relation to proposals in connection with the DAIP (see proposal 1.3) and wider comments regarding information provision (see proposal 1.2).

Proposal 5.7 - Agree

We agree that the time periods during which money attachments can be carried out are overly restrictive, particularly where they relate to business trading which is normally carried on outwith the current prescribed times, and should be revised.

We also agree that it is appropriate to review and consider further whether further amendments are require in light of a changing society where cash is becoming less well used.

Proposal 5.8 - Agree

We agree with the proposals to provide for employers to confirm an earnings arrestment has been successful within 21 days and for the flexibility for employers to remit quarterly which would reduce the administrative burden, particularly for smaller employers.

We also agree that it may be more appropriate for the AiB to be involved in the collection and distribution of conjoined arrestments rather than the Court.

Proposal 5.9 - Agree

We agree that banks should be required to report where a bank arrestment has been unsuccessful. The proposed period of 21 days appears appropriate.

We would support the advancement of technology in this area to make the process more efficient and reduce administrative burdens. As such attachments typically involve larger financial institutions and sheriff officers who process large volumes of information and data in any case there would appear to be benefits to all parties in identifying appropriate digital solutions.

Proposal 5.10 - Agree

We welcome the commitment to take forward the Diligence Working Group's recommendation that inhibitions should be extended to summary warrants. In the area of inhibitions this aspect is perhaps the most significant, offering the ability to keep asset rich but cash poor individuals in their home whilst at the same time balancing the right of creditors to secure their debt for a longer-term payment. Where creditors are willing to forebear this must be a better outcome for all than bankruptcy.

We agree with the proposal that a DAIP should be provided at the earliest stage when a summary warrant is being contemplated. We would however draw attention to our earlier comments in relation to proposals in connection with the DAIP (see proposal 1.3) and wider comments regarding information provision (see proposal 1.2).

Proposal 5.11 - Agree

We agree that the restriction against arrestment of a ship on a Sunday appears to be an anomaly and is an unnecessary impediment. We therefore agree with the proposal to remove this restriction.

Proposal 5.12 - Agree

We agree with the Diligence Working Groups recommendations and welcome the Scottish Governments proposals to take this forward.

Proposal 5.13 - Agree

We agree with the principle that data should be collected to evidence and inform future reform. We support evidenced-based decision making and this amendment will assist with that objective. It will however be necessary to ensure that data collection is integrated into processes such that it is not a burdensome requirement which will add significantly to the administration or costs of a process.

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?

No.

Appendix 2 – Respondent information form



Scottish Government
Riaghaltas na h-Alba
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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

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

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Contact us

CA House, 21 Haymarket Yards, Edinburgh, UK, EH12 5BH
+44 (0) 131 347 0100
connect@icas.com | [icas.com](https://www.icas.com)

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