SUBMISSION

CONSULTATION ON BANKRUPTCY LAW REFORM – SCOTLAND
18 May 2012

Executive Summary

Introduction

1. ICAS regulates 75% of insolvency practitioners (IPs) who take appointments in Scotland and we have in depth knowledge and expertise of bankruptcy law and procedure. ICAS retains in-house insolvency expertise, provides training in insolvency law and procedure and regularly engages in bankruptcy discussions with other stakeholders who have an interest in insolvency matters.

2. The ICAS Insolvency Committee comprises ten experienced insolvency practitioners. That Committee oversees the development of ICAS responses on insolvency matters. ICAS also provides the secretariat function for the R3 Scottish Technical Committee which comprises insolvency practitioners licensed by ICAS, accredited insolvency specialists who are members of the Law Society of Scotland, insolvency practitioners licensed by the Insolvency Practitioners Association and an academic who specialises in insolvency law and procedure.

3. ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all the implications, that alleged failings within the process are supported by evidence, and that appropriate weighting is given to the responses that are submitted. We understand that a weighting system is not habitually employed.

Comments on the consultation

4. ICAS welcomes this review of personal insolvency and we will work with the Scottish Government to identify appropriate revisions to legislation. There are implications for the family home or an individual's sole or main dwelling house in the current consultation. It is unfortunate therefore that this consultation fails to address this single most problematic issue in personal bankruptcy, the treatment of the family home, which was expected to be the subject of a separate consultation in autumn 2010 and has again been postponed.

5. ICAS has endeavoured to respond to the consultation in a manner which reflects the public interest. This is an ambitious and wide ranging Consultation and while we support its stated aims of providing access to debt solutions for all, ensuring that those who can pay do pay and improving returns to creditors, it is not clear to us how all aspects of the Consultation link to the stated aims. We consider that in certain respects the Consultation document fails to articulate what problems and solutions the questions are trying to address. Whilst we are not averse to change we would caution against change for the sake of it, particularly since Scotland already has a well established and respected Personal Insolvency regime.

6. The consultation papers acknowledge that legislation has on occasion in the past been enacted despite warnings from the profession and other interested parties of the unintended consequences that could arise[1] we trust that in this consultation cognisance will be taken of any such warnings submitted by stakeholders.

7 ICAS recognises the importance of financial education and in June 2008 launched a **Debt is Dangerous Teachers' Pack and DVD** for schools. ICAS, together with Glasgow City Council and the Scottish Borders Council, felt that a contribution could be made to increasing basic financial understanding from an early age.

[1] E.g. Landlord's hypothec; the ability of a trustee to enforce an IPA

8. The consultation raises many issues and proposals which if adopted go to the very heart of individual choice. It seeks to introduce new products to the debt and bankruptcy regime which will increase the complexity of an already specialist system. In our view the introduction of new products is totally unnecessary.

9. The bankruptcy regime in Scotland is a mature one which has relied where appropriate, and with good reason, on the involvement of the judiciary. We caution against the idea that a substantial volume of applications to the courts should be replaced with a requirement that those documents should be submitted to the Accountant in Bankruptcy. The distinction between judicial and administrative functions should not be taken lightly. Many of the applications are dealing with the fundamental rights of individuals and could result in Human Rights issues arising. ICAS considers that consideration could instead be given to extending the role of the Sheriff Clerks, many of whom already have relevant expertise, and perhaps limiting the submission to specified courts. It is likely that this would be a more cost effective solution and it would retain the independence of the judiciary.

10. There appear to be numerous proposals within the consultation which if adopted would result in extra cost to the Accountant in Bankruptcy. Given that the Agency is working towards a total cost recovery model it would necessitate the imposition of fees on numerous fronts which ultimately would be borne by creditors. This is counter-intuitive to the stated aim of improving returns to creditors.

11. In recent months, ICAS has been engaged with other Recognised Professional Bodies (RPBs) and the Insolvency Service (UKIS) over reforms which are due to be implemented by the UK Government following the recent review of the regulation of insolvency. Many aspects of Part 15 of the current consultation on bankruptcy reform appear to have been drafted in relation to the existing arrangements, with only a passing reference, in paragraph 15.7.1, to the fact that it is under review.

12. On close inspection, many of the proposals at Part 15 of this consultation will sit unhappily with the future UK position and, if implemented, will almost certainly lead to unsatisfactory levels of inconsistency of approach in the respective legal jurisdictions. That is unsatisfactory for debtors and their creditors and unhelpful for RPBs and IPs.

13. At a time when the UKIS is to cease to have any direct supervisory powers over IPs due to a perceived conflict of interest with the UKIS oversight function (Consultation on Reforms to the Regulation of Insolvency Practitioners, Summary of Consultation Responses, December 2011) the AiB is seeking enhanced supervisory powers and new information gathering/sharing powers in relation to the regulation of Insolvency Practitioners.

14. In light of the current position of the UK Government, ICAS believes that there is a high risk of a perception of conflict of interest insofar as the AiB acts as a trustee in some 87.5% of bankruptcy cases in Scotland and that it would be inappropriate to seek to extend the AiB's powers.

Responses to specific questions

15. Our detailed responses to specific questions posed in Annex B to the Consultation document are set out in the attached appendix.

In conclusion

16. We urge the Scottish Government to only make changes to bankruptcy legislation where there is evidence to support the need for such change and where the costs of implementing the changes are demonstrably in the interests of the country.

17. We also call on the Scottish Government, as we have been doing since 2005, to ensure that the amendments that are required to corporate insolvency Rules are not side-lined any longer in favour of amending bankruptcy law, but that a programme of review and implementation is commenced as a matter of urgency in relation to corporate insolvency.

Annex B

Consultation on Bankruptcy Law Reform

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

ICAS

Title **Mr** ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Dr** ☐ ***Please tick as appropriate***

Surname

Forename

2. Postal Address

CA House		
21 Haymarket Yards		
EDINBURGH		
Postcode **EH12 5BH**	**Phone** 0131 347 0100	**Email** acondick@icas.org.uk

3. Permissions - I am responding as…

Individual ☐ / **Group/Organisation** ✓

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(c) The name and address of your organisation ***will be*** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your ***response*** to be made available?

Please tick as appropriate ✓ **Yes** ☐ **No**

(d) 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?

Please tick as appropriate ✓ **Yes** ☐ **No**

CONSULTATION QUESTIONS

Part 6 Advice

Question 6.1 - Do you think that money advice should be compulsory for those considering any form of statutory debt relief?

Yes ☐ No ✓

Question 6.1a - If yes, who should give this money advice?

Money advice needs to be sought at an earlier date; by the time financial difficulties arise debt advice is what is required and such advice should only be given by those who have the necessary qualifications and practical experience so that the debtor is made aware of the available options and of the consequences of opting for a particular process. Money advice should be provided to individuals who seek credit, as part of the process.

Question 6.2 - Should AiB have a role in the provision of money advice?

Yes ☐ No ✓

There are a number of both public and private sector organisations that provide advice. We consider that it is inappropriate for the AiB to have responsibility for providing money advice alongside administering bankruptcy cases, formulating bankruptcy policy, supervising the performance of insolvency practitioners, making decisions about the fate of debtors etc. as there is a conflict of interest and even if AiB considers that this conflict can be managed the perception of conflict will remain. In our view the resource that would be needed to equip the AiB with the necessary expertise should be applied by the Scottish Government to the advice agencies that are already operating and which are short of resource.

Question 6.2a – If yes, what format should that take?

See 6.2 above

Question 6.3 – Would you support a 'triage' system to signpost individuals to possible debt relief or debt management options available to them?

Yes ✓ No ☐

A triage system already operates through the money advice sector and insolvency practitioners. Where the money advice official is not able to make the necessary financial assessment he will refer a debtor to a qualified insolvency practitioner. Insolvency practitioners (IPs) have received extensive training before being qualified to act as insolvency practitioners and ICAS IPs are required to demonstrate annually their on-going expertise and they are subject to monitoring inspections. We can see no benefit in a debtor having to go through a second tier of assessment as referred to in section 6.3 of the consultation.

Question 6.3a – If yes, what format should this 'triage' system take?

See response to 6.3

Part 7 Education

Question 7.1 - Should financial education be an integral part of any Scottish statutory debt relief option?

Yes ☐ No ✓

We understand objective however individuals fall into debt for various reasons; not necessarily due to a lack of financial know how. Financial education could be offered as an option. The cost/ benefit of providing FE would need to be determined. Debtors should be made aware of the effect debt relief has on the ability to obtain future credit. There must be creditor responsibility when providing credit. Full implications of taking on credit and consequences of falling into debt must be explained.

Question 7.1a - If yes, who should deliver financial education?

N/A

Question 7.2 - Should this financial education be mandatory for all those who access a statutory debt relief option?

Yes ☐ No ✓

The question assumes that all debtors accessing a statutory debt relief option do not possess any financial awareness. There will be a cost associated with providing FE.

Question 7.2a – If yes, what format should the financial education take?

N/A

Question 7.3 - Should financial education be optional based on specific criteria, such as where the individual has previously been bankrupt?

Yes ✓ No ☐

Question 7.3a – If yes, what should that criteria be?

Those in a constant circle of debt should be offered financial education.

Question 7.4 - Should participation in financial education be linked to discharge from debt?

Yes ☐ No ✓

No, but with the possible exception of serial bankrupts. There are however issues of related costs, how to enforce this in practice, whether there will be any real benefit to the individual and in the definition of 'serial' bankrupt.

Question 7.5 - How could the effectiveness of financial education be evaluated?

This will not be an easy task and requires separate detailed consideration. There could be a follow up process for individuals; note any changes to the number of recurring debtors. Long term monitoring of statistics on debt relief.

Part 8 Common Financial Tool

Question 8.1 - Should a single common financial tool be used to calculate an appropriate contribution from individuals?

Yes ✓ No ☐

A single common financial tool would be helpful to ensure a level of consistency. ICAS disagrees that it should be mandatory believing that it should take the form of a guide so as to allow an element of flexibility where it can be demonstrated that its use is inappropriate. In the ICAS response to the Consultation on Protected Trust Deeds we took the view that a 'one size fits all' approach removes trustee discretion which is detrimental to the whole process.

Question 8.1a – If yes, should the same common financial tool be used in the determination of contributions in the Debt Arrangement Scheme, Protected Trust Deeds and Bankruptcy?

Some of our Members consider that the common financial tool should vary according to whether the product is one of full debt repayment or one of debt relief. Having guidelines will address this issue by allowing for trustee discretion.

Question 8.1b – If no, how should contributions be calculated?

N/A

Question 8.2 - Should AiB, in conjunction with key stakeholders, develop a specific Scottish Common Financial Tool to calculate the appropriate contribution from an individual?

Yes ✓ No ☐

Developing in discussion with key stakeholders a Scottish Common Financial Tool, as a guide, would provide a level of consistency amongst its users. The tool should be used as a starting point for assessing disposable income but the Trustee must be allowed to take account of changing circumstances.

Question 8.2a – If no, what figures should be used to calculate the appropriate amount of contribution from an individual?

☐ A) CCCS guidelines
☐ B) BBA CFS figures

☐ C) Other figures, please specify_____
☐ D) A percentage of the individual's income

N/A

Question 8.2b - If a contribution is based on a percentage of an individual's income, what should that percentage be?

☐ A) fixed percentage – 9%
☐ B) fixed percentage – 12%
☐ C) sliding scale percentage based on the individual's income
☐ D) other percentage, please specify_____

The view that a percentage of income is an appropriate measure of determining the amount of contribution payable is unsound. It does not take account of individual circumstances which affect ability to pay. Contributions should be set following a proper assessment of an individual's circumstances.

Question 8.3 - Should legislation be amended to allow an assessed contribution to be deducted directly from an individual's wages?

Yes ☐ No ✓

Privacy issues arise. Individuals do not want to involve their employers in personal financial matters. There is also an inherent cost to employers to administer the deductions. The Income Payment Agreement provisions have not been found to be effective which calls into question this proposal. People could be deterred from signing trust deeds.

On the other hand used as a last resort it would deal with persistent defaulters and the 'can pay won't pay' debtor.

Part 9 Application Process

Question 9.1 – If money advice should be sought prior to entering any statutory debt relief or debt management product, should applications only be made to AIB through an electronic web portal?

Yes ☐ No ✓

It will exclude individuals who do not have access to a computer. As indicated at 6.1 not all individuals may wish to receive money advice. In addition the use of electronic debtor applications raises issues around proof of identity and verification of the information provided.

Question 9.1a If yes, should an electronic application web portal be accessed only by authorised money advisers?

Yes ☐ No ☐

N/A

Question 9.2 -Should applicants be able to submit paper application forms?

Yes ✓ No ☐

Question 9.2a – If yes, should the applicant demonstrate that they had money advice prior to submitting their application?

Yes ☐ No ✓

Question 9.3 - Where money advice is provided by authorised money advisers, should evidence of apparent insolvency still be required?

Yes ☐ No ✓

Question 9.4 - Where money advice is provided should the authorised money adviser still certify that the individual cannot pay their debts as they become due?

Yes ✓ No ☐

Thoroughness is required in evaluating a debtor's circumstances so as to be able to provide appropriate advice.

Question 9.5 – Should a moratorium period be introduced for bankruptcy?

Yes ☐ No ✓

The effect of a moratorium on a trading business may disadvantage the business as suppliers may not co-operate. There would also be issues around who has control of trading during a moratorium and responsibility for costs incurred.

Question 9.5a – If yes, what should the proposed moratorium period be?

- ☐ A) 4 weeks
- ☐ B) 6 weeks
- ☐ C) 8 weeks
- ☐ D) other period, please specify_____.

There should be no moratorium

Question 9.6 – Should the individual only be able to access one moratorium period in a 12 month period?

Yes ✓ No ☐

If it is decided to introduce a moratorium period then the limit should be one moratorium in a period of 12 months.

Question 9.6a – If no, how many moratorium periods should the individual be allowed?

- ☐ A) 2
- ☐ B) 3
- ☐ C) 4
- ☐ D) other, please specify_____.

N/A

Question 9.7 – Where an individual intends to apply for bankruptcy, should information about the individual be displayed in a public register during the moratorium period?

Yes ✓ No ☐

ICAS does not agree with the introduction of a moratorium but if one is introduced there should be a mechanism to remove the information if bankruptcy is not awarded.

Question 9.7a – If yes, should access to the information on the register be restricted to those parties that have an interest?

Yes ☐ No ✓

In principle this appears logical initially however the information is relevant to creditors who may be considering lending to the individual/business.

Part 10 Solutions for Individuals

Question 10.1 – Where it is assessed that an individual could repay their debts within a fixed period (such as 8 years), should DAS be the default option for the individual?

Yes ☐ No ✓

ICAS is fundamentally opposed to the introduction of legislation which would effectively force the debtor into a lengthy repayment plan which may be contrary to best advice. Making DAS the default option removes individual choice and DAS would be the only option. Decisions should be taken based on best advice from experienced and suitably qualified professionals.

Creditor interest is being ignored; e.g. if a debtor has equity a creditor should be given the opportunity to recover his debt without having to wait 8 years. Circumstances are subject to change within 8 years thus if an individual becomes insolvent he should be able to access bankruptcy.

Question 10.1a – If yes, should the period that is used be 8 years?

Yes ☐ No ☐

N/A

Question 10.1b – If no, what should the period be?

☐ A) 4 years
☐ B) 6 years
☐ C) 10 years
✓ D) another period, please specify__6 years.

DAS should not be the default option. ICAS considers that the maximum period for a DAS scheme should be 6 years. If a debtor is going to take 8 years to pay off a debt he should be offered debt relief to allow him to get on with his life.

Question 10.2 - Should the mechanism for charging for a DAS Application be aligned to other statutory debt relief options and an up-front fee charged?

Yes ✓ No ☐

Introducing a fee to the DAS Administrator for a DAS application would be in line with statutory debt relief options.

Question 10.2a – If yes, what should the fee cover?

Application and cost of administering the DAS.

Question 10.3 – Should AiB be able to charge any other fees for the administration of the debt payment programme?

Yes ☐ No ✓

AiB should be able to assess with a fair degree of accuracy the cost of administering the programme and recover this through the up-front fee.

Question 10.4 - Should another appeal or review process in DAS be created to allow an individual or creditor to appeal a decision made by the DAS Administrator?

Yes ☐ No ✓

An independent review of the DAS Administrator's decision is currently available through an appeal to the court.

Question 10.4a – If yes, should these appeals be made to an independent panel?

Yes ☐ No ☐

N/A

Question 10.4b – If these appeals are not made to an independent panel, where should these appeals go?

Sheriff Court

Question 10.5 – Should the Debt Arrangement Scheme have an option of composition for individuals in DAS programmes?

Yes ☐ No ✓

A distinction should exist between DAS and bankruptcy processes including Protected Trust Deeds. DAS is a process for those debtors who can repay their debts in full. It does not and should not offer debt relief.

Question 10.5a – If yes, should composition only be available where the programme has successfully run for over a fixed period, for example 12 years?

Yes ☐ No ☐

N/A

Question 10.5b - If yes, what should that fixed period be?

- ☐ A) 10 years
- ☐ B) 12 years
- ☐ C) 15 years
- ☐ D) another period, please specify_____.

N/A

Question 10.6 - Should composition only be available where the individual in the programme has paid a fixed percentage of the debt due?

Yes ☐ No ☐

N/A. DAS is a process for those who can pay their debts in full.

Question 10.6a – If yes, what should that percentage be?

- ☐ A) 50%
- ☐ B) 60%
- ☐ C) 70%
- ☐ D) another percentage, please specify_____.

N/A

Question 10.7 - If composition was available, should this only be with the agreement of the creditors?

Yes ✓ No ☐

Ultimately the decision to write off debts should rest with the creditors.

Question 10.7a – If no, should an automatic revocation of the outstanding balance be available where the individual has paid the agreed percentage?

N/A

Question 10.8 – Should there be a minimum debt level for entry into a protected trust deed?

Yes ☐ No ✓

The matter to be addressed is whether an individual is insolvent or not, a question which is assessed by the insolvency practitioner. Setting a minimum debt level for Protected Trust Deeds could encourage individuals who are insolvent but who do not meet the minimum debt level to take on additional debt which would not be in anyone's interests.

Question 10.8a - If yes, what should the level be?

- ☐ A) £3,000
- ☐ B) £4,000
- ☐ C) £5,000
- ☐ D) another amount, please specify_____.

N/A

Question 10.9 – Where an individual is in employment, should provision be made for a statutory notice to be issued to their employer allowing the deduction of the agreed contribution direct from the individual's salary?

Yes ☐ No ✓

Not in all cases. Provision should be made in sequestration cases where it can be demonstrated that the debtor has failed to co-operate with the trustee. A remedy is already in place in Protected Trust Deeds and DAS to deal with non co-operative debtors i.e. the trustee can petition for sequestration/termination of PTD and the DAS can be revoked.

Question 10.9a – If yes, who should notify the employer?

The Trustee

Question 10.10 – Should there be a minimum dividend proposed in a trust deed for it to be eligible for protection?

Yes ☐ No ✓

This proposal was put forward in the discussions that were held prior to the enactment of the Bankruptcy & Diligence etc. Act 2007. Stakeholders were opposed to the imposition of a minimum dividend in a Trust Deed. That view persists. Trust Deeds are voluntary and creditors have the right to decide whether the Deeds should achieve protection.

Question 10.10a - If yes, is 50p in the £ an appropriate minimum amount?

Yes ☐ No ✓

During the 2006 discussions a minimum amount of 30p in the £ was proposed and rejected. The matter was also considered during the recent Protected Trust Deed consultation in which creditors did not support the imposition of a set dividend recognising that each case must be administered on its own merits. Current practice determined by market forces requires a minimum dividend of 10p in the £ to be offered if a Trust Deed is to achieve protection. In extenuating circumstances creditors permit exceptions. Creditors influence whether or not protection is achievable.

Question 10.10b- If not 50p in the £, what would be an appropriate minimum amount?

☐ A) 40p in the £
☐ B) 30p in the £
☐ C) 20p in the £
✓ D) another amount, please specify____Nil

No amount should be specified. A lot of time and effort was expended by stakeholders during the PTD discussions and consultation and the outcome is a Trust Deed protocol which the market has effectively implemented. There is no advantage to being too prescriptive in a voluntary process.

Question 10.11 – Should there be a fixed term for completion of a protected trust deed?

Yes ☐ No ✓

The duration of a Trust Deed is largely determined by the level of contributions and by the incidence of any complicating factors. The flexibility in a Trust Deed, which is a key factor, will be removed if a fixed term is introduced.

Question 10.11a - If yes, what should this period be?

- ☐ A) 3 years
- ☐ B) 4 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

The flexibility that currently exists should be maintained. Trustees should be allowed flexibility of a period between 3 and 5 years, to allow for unforeseen circumstances, with a requirement that they should report to creditors on the reasons for delay in concluding the Trust Deed.

Question 10.12 – Should there be a link between the term of the protected trust deed and the delivery of the minimum dividend originally proposed?

Yes ☐ No ✓

There are differing views amongst our Members. On the one view an individual's circumstances may change e.g. loss of employment, reduced earnings, which will impact on the debtor's ability to meet the original level of contribution. There is general agreement however that creditors should have the choice on whether the Trust Deed should proceed and discharge be deferred, or whether to end the TD and discharge the debtor.

Question 10.13 – Should the current process that deems consent to a trust deed becoming protected continue?

Yes ✓ No ☐

Creditors should however be encouraged to use their existing powers and engage more in the process.

Question 10.13a – If yes, are the current thresholds correct?

Yes ✓ No ☐

Question 10.13b – If the thresholds are not correct, what should they be?

N/A

Question 10.14 – If the current deemed consent process is not appropriate, what should replace it?

N/A

Question 10.15 – Where a trustee in a protected trust deed applies to make an individual bankrupt as a result of their non-compliance, should the trustee in the bankruptcy take the non-compliance into consideration when agreeing the individual's discharge from debt?

Yes ☐ No ✓

There were some differing views expressed. It is the case that in sequestration cases the date of automatic discharge is a year after the date of sequestration and the general view is that the debtor's conduct during the sequestration is all that should be considered when deciding on the date of discharge. It should be left to the discretion of the trustee in sequestration to consider all relevant factors.

Question 10.16 – If the protected trust deed fails due to an individual's refusal to comply with the terms, should it be mandatory that the trustee applies to make the individual bankrupt?

Yes ☐ No ✓

There is a cost involved in petitioning for sequestration which may not be justified. Also mandatory sequestration on the failure of a trust deed overlooks the creditors' interests. The trustee should be allowed to use his discretion in deciding whether or not to petition for sequestration.

Consideration should be given to whether provisions are needed to deal with cases in which non co-operating debtors are able to benefit by obtaining discharge through bankruptcy.

Question 10.17 - Should the requirement for an individual to prove apparent insolvency be removed as a route into bankruptcy?

Yes ☐ No ✓

Question 10.18 - Should the minimum debt threshold for an individual be increased?

Yes ✓ No ☐

The current level has been in place for a considerable period of time.

Question 10.18a – If yes, should this level be £3,000?

Yes ✓ No ☐

This would align the levels for debtor and creditor applications. There is a concern however that an increase in the level would limit the choice for those with minimal debt.

Question 10.18b – If no, what should this level be?

- ☐ A) £1,500
- ☐ B) £2,000
- ☐ C) £5,000
- ☐ D) another amount, please specify_____.

To address the concern about those with minimal debt not being able to access bankruptcy the level to seek a Certificate for Sequestration could be set at £1,500.

Question 10.19 - Should there be different minimum debt thresholds for the different debt relief products?

Yes ☐ No ✓

This is similar question to 10.8. The level of debt is not relative to income or to the ability to pay a dividend.

Question 10.20 - Should the minimum debt threshold for an individual applying to become bankrupt be the same as that for creditors?

Yes ✓ No ☐

Question 10.21 - Should the minimum debt threshold for creditor petitions increase?

Yes ☐ No ✓

£3,000 is reasonable. An increase would be detrimental to creditors.

Question 10.21a - If yes, what should that level be?

- ☐ A) £3,500
- ☐ B) £5,000
- ☐ C) £7,000
- ☐ D) another amount, please specify_____.

N/A

Question 10.22 - Should a new No Income product be developed for individuals who are assessed as being unable to make a contribution and who are in receipt of social security benefits only?

No. The LILA and Certificate for Sequestration processes are relatively new and they are still bedding down. They are available to those on benefits and provide routes to sequestration. Introducing yet another product would complicate matters unnecessarily.

Question 10.23 - In order to access this product should the maximum level of assets be limited, for example to £2,000?

Yes ☐ No ☐

N/A the product is not necessary.

Question 10.23a – If yes, what should this maximum level of assets be?

- ☐ A) £1,000
- ☐ B) £2,000
- ☐ C) £5,000
- ☐ D) another amount, please specify_____.

N/A

Question 10.24 - Should an individual who owns heritable property be able to access this product?

Yes ☐ No ☐

N/A the product is not necessary.

Question 10.24a – If yes, should there be any restrictions on the value of the property or, perhaps, equity?

N/A

Question 10.25 - As the individual is in receipt of social security benefits only, should they be discharged after 6 months, where they co-operate with their trustee?

Yes ☐ No ✓

One must not lose sight of the fact that circumstances may change and that additional information may come to light after the 6 month period. The system should encourage debtor responsibility whereas this proposal may lead to irresponsible borrowing by debtors who have no intention of repaying their debts

Question 10.25a – If no, what should the period be?

- ☐ A) 9 months
- ☐ B) 12 months
- ☐ C) 18 months
- ☐ D) another period, please specify_____.

There should be consistency in discharge for all bankruptcy products. In section 13.1 we state our reasons for advocating a return to an automatic discharge period of 3 years with the option at the instance of the Trustee to allow for the debtor's discharge after 12 months.

Question 10.26 - To be eligible to apply for a No Income product, should there be a maximum debt level?

Yes ☐ No ✓

Whilst we do not agree that there is a need for a no income product if one were to be introduced we offer this comment. We do not see the relevance of the level of debt as the debts could have been incurred when the debtor was gainfully employed.

Question 10.26a – If yes, should the maximum debt level be £17,000?

N/A.

Question 10.26b – If no, what should the level be?

- ☐ A) £10,000
- ☐ B) £15,000
- ☐ C) £20,000
- ✓ D) another amount, please specify_____.

No level should be set.

Question 10.27 - Where an individual has no income and is discharged after 6 months, should they be subject to a default credit restriction for a set period post discharge?

Yes ☐ No ✓

Such decisions should rest with credit providers who should make enquiries into the individual's circumstances.

Question 10.27a - If a credit restriction is appropriate, what should the period be?

- ☐ A) 3 months
- ☐ B) 6 months
- ☐ C) 12 months
- ☐ D) another period, please specify_____.

N/A

Question 10.28 - If a credit restriction is appropriate, should there be a specific value attached to this restriction, for example no credit over £3,000?

Yes ☐ No ☐

N/A

Question 10.29 - Should the period for an individual to apply for a subsequent No Income product be extended?

Yes ✓ No ☐

Whilst we do not agree that there is a need for a no income product if one were to be introduced we offer the comment that such an extension could curb abuse of the system.

Question 10.29a – If yes, what should the period be?

- ☐ A) 7 years
- ☐ B) 10 years
- ☐ C) once in lifetime
- ✓ D) another period, please specify__5 years.

This would be consistent with existing debtor application criteria

Question 10.30 - Where an individual has accessed debt relief through the No Income product once, should the individual's discharge for any subsequent bankruptcy be delayed?

Yes ☐ No ✓

Members have differing views but are agreed that decisions should be made on an informed basis thus the reasons for the debtor being in a cycle of debt should be determined on case by case basis. However steps are required to be taken to prevent potential abuse of the system.

Question 10.30a - If yes, what should the period be?

- ☐ A) 1 year
- ☐ B) 2 years
- ☐ C) 3 years
- ✓ D) another period, please specify_____.

If a delay is imposed then we recommend a period between 1 and 3 years depending on assessment.

Question 10.31 – Should a new Low Income product be developed for individuals who are assessed as unable to make a contribution?

Yes ☐ No ✓

There is no need for a new low income product given the existing routes of LILA and the Certificate for Sequestration.

Question 10.32 - In order to access this Low Income product should the maximum level of assets be limited?

Yes ☐ No ☐

N/A.

Question 10.32a - If yes, what level should it be?

- ☐ A) £5,000
- ☐ B) £7,000
- ☐ C) £10,000
- ☐ D) another amount, please specify_____.

N/A

Question 10.33 - As the individual in this product is not making any contributions should they be discharged after 12 months, where they co-operate with their trustee?

Yes ☐ No ✓

There is a mistaken assumption that the level of debt is related to income, with no responsibility being placed on the individual and no recognition that circumstances change. Someone who has entered a Low Income Product could start earning within the twelve month period and therefore could be assessed as able to make a contribution. As with other bankruptcy processes ability to pay should be regularly reviewed and the decision on discharge should be taken by the Trustee as recommended in section 13.1

Question 10.33a – If no, what should the period be?

- ☐ A) 6 months
- ☐ B) 9 months
- ☐ C) 18 months
- ✓ D) another period, please specify____.

All bankruptcy processes should have the same discharge provisions and period. See 13.1

Question 10.34 - Do you think that this product should be available to individuals who own heritable property?

Yes ☐ No ✓

Question 10.34a – If yes, should this be restricted to properties that have been repossessed or have negative equity?

N/A

Question 10.35 - Should there be a maximum debt limit to access a Low Income product?

Yes ☐ No ✓

Question 10.35a - If yes, where should this maximum total unsecured debt limit be set?

- ☐ A) £20,000
- ☐ B) £30,000
- ☐ C) £50,000
- ☐ D) another amount, please specify_____.

N/A

Question 10.36 - Where an individual needs debt relief and cannot access any other bankruptcy product, they should be able to access the last resort debt relief product?

Yes ☐ No ✓

All debtors can access a debt relief product through the existing LILA and Certificate for Sequestration routes it is misleading to suggest otherwise. There is no requirement to further complicate matters by introducing this product.

Question 10.37 - Where the individual had previously been bankrupt or has accessed another statutory debt relief product within the previous 5 years, should their discharge period be extended?

Yes ☐ No ✓

Deferral of discharge should not automatically be used as punishment to the debtor. The current legislation provides for deferral on cause shown which is as it should be.

Question 10.37a - If yes, what period should their discharge be?

- ☐ A) 6 months
- ☐ B) 12 months
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

N/A

Question 10.38 - Should a new Payment product be developed for individuals who are assessed as able to make a contribution?

Yes ☐ No ✓

Sequestration and Protected Trust Deed processes are available to individuals who are able to make a contribution.

Question 10.39 - Should the Payment product be available to individuals who are currently trading or who have traded within the preceding 5 years?

Yes ☐ No ✓

ICAS does not consider that this product is required. These individuals are catered for in current processes.

Question 10.40 - Should this product be unavailable to individuals who have debts exceeding a fixed sum?

Yes ☐ No ☐

N/A. There is no requirement for an additional product.

Question 10.40a - If yes, what should this sum be?

- ☐ A) £250,000
- ☐ B) £500,000
- ☐ C) £750,000
- ☐ D) another amount, please specify_____.

N/A. There is no requirement for an additional product.

Question 10.41 - Do you think the contribution should be for a fixed period?

Yes ☐ No ☐

N/A. There is no requirement for an additional product.

Question 10.41a - If yes, for what period?

- ☐ A) 3 years
- ☐ B) 4 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

N/A. There is no requirement for an additional product.

Question 10.42 – Where monies have been ingathered, should creditors receive regular dividend payments?

Yes ✓ No ☐

There is an acceptance that funds should be distributed to creditors as soon as it is practical to do so, taking into account the cost of so doing. It may not be cost effective to pay dividends at regular intervals unless the circumstances of the case make this possible. It would be wrong to legislate on regular payments as to do so is likely to increase the cost of the process. What can be considered is the timing of the first dividend.

Question 10.42a - If yes, at what intervals?

- ☐ A) quarterly
- ☐ B) 6 monthly
- ☐ C) annually
- ✓ D) another period, please specify_____.

This matter formed part of the Protected Trust Deed consultation in 2011. Discussions with creditors and through the working party resulted in agreement that where funds allow it a first dividend should be paid after 18 months. ICAS considers that this agreement should be followed.

It is difficult to tie dividends in to specific periods when it is not known what level the funds will reach at a specific point in time. After the first dividend the trustee should exercise discretion on the timing of subsequent distributions after consultation with creditors.

Question 10.43 – Should both insolvency practitioners and the Accountant in Bankruptcy be the trustee in Payment product cases?

Yes ✓ No ☐

If such a product is introduced insolvency practitioners should act as trustees. The Accountant in Bankruptcy should only be eligible to act if no insolvency practitioner consents to act.

Question 10.44 - For clarity for applicants and creditors, should there be a fixed charge for administering this Product?

Yes ☐ No ✓

The amount of work required to be done will vary from case to case. Fees should be approved in accordance with the Rules for other bankruptcy processes and the creditors should have the right of appeal.

Question 10.45 – If the monies ingathered are insufficient to pay a dividend to creditors, should the individual's discharge be deferred until the costs of the administration of the bankruptcy are met?

Yes ☐ No ✓

This proposal does not recognise changes in individual circumstances. It would not be cost effective to keep cases open indefinitely and in any event if the debtor has paid all that he can pay it is difficult to see where he would get the funds to meet these costs.

Question 10.46 - Should a new High Value product be developed for individuals who are currently trading or have traded in the past 5 years or who have debts in excess of a fixed amount?

Yes ☐ No ✓

Existing products are capable of catering for such cases and Insolvency Practitioners have the necessary expertise to administer these high value trading entities.

Question 10.46a - If yes, what should this fixed amount be?

- ☐ A) £250,000
- ☐ B) £500,000
- ☐ C) £750,000
- ☐ D) another amount, please specify_____.

N/A

Question 10.47 – Where the common financial tool assesses that a contribution should be made, should this be for a fixed period?

Yes ☐ No ✓

Question 10.47a - If yes, for what period?

- ☐ A) 3 years
- ☐ B) 4 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

N/A

Question 10.48 – If the monies ingathered are insufficient to pay a dividend to creditors, should the individual's discharge be deferred until the costs of the administration of the bankruptcy are met?

Yes ☐ No ✓

This proposal does not recognise any changes in individual circumstances. If the debtor has paid all that he can pay he has no other means of meeting the administration costs. It would not be cost effective to keep cases open indefinitely and the Trustee would want to obtain his discharge but this would leave the debtor without a trustee if the debtor's discharge were to be delayed.

Question 10.49 – Should there be a mechanism to transfer an individual from one bankruptcy product to another?

Yes ☐ No ✓

ICAS does not consider that any change is required. Current practice provides flexibility to cater for changes in circumstances.

Transferring between products would incur additional costs.

Part 11 Solution for Sole Traders and Partnerships

Question 11.1 - Should a new Business DAS be developed for sole traders and non-limited liability partnerships where the business is assessed as viable?

Yes ☐ No ✓

ICAS does not believe that there is a demonstrable need for a separate product. The current DAS system is capable of being used for trading businesses. It is more a matter of ensuring that those charged with advising the debtor have the breadth of knowledge and experience to properly advise the debtor or refer him to someone who can. For those trading businesses requiring a measure of debt relief to enable them to survive the advice given should channel the individual/business into a product that offers a composition.

Question 11.2 – Should Business DAS exclude non-business debts?

Yes ☐ No ✓

It is in practice extremely difficult to distinguish between personal and business debts, and there is huge scope for abuse by the individual not properly separating the estates. In addition lenders habitually take account of an individual's assets when lending to the business, the two estates being inextricably linked.

Question 11.3 - Prior to entering Business DAS, should business advice be compulsory?

Yes ☐ No ✓

Not as a matter of course. To be effective business advice would be required at a much earlier stage than at the point when consideration is being given to whether or not to enter a DAS scheme. Frequently the cause of the debt crisis is not of the debtor's making. An assessment should be made on whether or not the individual would benefit from business advice and if so and the debtor wants to take advantage of advice, it should be offered. Such advice should be offered to those who have had previous debt problems.

Question 11.3a – If yes, who should provide that advice?

Debt advice should only be given by insolvency practitioners and by other properly qualified and regulated advisors.

Question 11.4 - Should debt relief or composition be incorporated into Business DAS and agreed with creditors at the proposal stage?

Yes ☐ No ✓

Other bankruptcy processes offer debt relief. Debt relief or composition should not be available under DAS which ought to remain as a scheme for those who can pay their debts.

Part 12 Removal of Non-Contentious Creditor Petitions from Court

Question 12.1 - Should all creditor bankruptcy applications to make an individual bankrupt be submitted to the AiB?

Yes ☐ No ✓

ICAS has not seen any empirical evidence to demonstrate to what extent, if any, non-contentious creditor applications exist. By their very nature a large percentage of creditor applications will be contentious. Petitions for bankruptcy affect an individual's rights and should be considered by the courts.

ICAS believes that providing for all creditor petitions to be submitted to AiB would introduce delay, an unnecessary layer and additional cost. ICAS makes this comment based on the observation that debtors frequently only take any action on receipt of notice from a court, thus many petitions would still have to go through the courts having first been submitted to AiB.

Our Members report that they regularly have cases in which the debtor challenges service on them of the creditors' application, claiming ignorance of it and sometimes of the debt itself. Submitting these applications to AiB would likely increase such claims.
Were all creditor applications to be submitted to AiB there is the potential for an increase in bankruptcies due to debtors not responding to correspondence from AiB who would then award sequestration; there could also thereby be an increased number of recall

applications.

Question 12.1a – If no, should only non-contested creditor applications be considered for award by AiB?

Yes ☐ No ✓

If a clear and agreed definition of a non-contested creditor application was developed and enshrined in legislation then there may be merit in such applications being dealt with solely by AiB, for example where a Council applies for an individual's bankruptcy and submits irrefutable evidence that the sum is due. However the possibility that the application will be contested cannot be ruled out.

Question 12.2 – Where an application is submitted to AiB and the individual contests this, who should submit the application to the Sheriff Court for consideration?

It would be inequitable in such instances for the creditor to have to bear such costs and there will be instances in which the debtor does not have the wherewithal to do so. Given that the debtor submits the objection to AiB a system whereby the debtor is required to simultaneously submit a copy to the Sheriff court could be considered. However such objection would have to be in prescribed form and supported by documentary evidence so as to ensure that the Court is provided with what it needs to give the matter proper consideration.

Question 12.3 - Where a creditor notifies an individual of their intention to make them bankrupt, what should the minimum period be that the creditor must wait before submitting the bankruptcy application to AiB?

- ☐ A) 14 days
- ☐ B) 21 days
- ☐ C) 28 days
- ☐ D) another period, please specify_____.

ICAS does not support the proposal that creditor applications should be made to AiB. Existing procedure allows the debtor 21 days in which to pay prior to an application being made to the court for sequestration. ICAS sees no need for change.

Question 12.4 –Should the process of an executor petitioning to bankrupt the estate of an insolvent deceased individual be removed from the court, and replaced with an application to the AiB?

Yes ☐ No ✓

Different people will be affected by and entitled to a part of the deceased's estate. Complex considerations may ensue requiring determination which should be the preserve of the Courts.

Part 13 Debtor Co-operation

Question 13.1 – Should the co-operation of a bankrupt individual be linked to discharge?

Yes ✓ No ☐

Yes but this is not as straightforward as it first appears. A distinction has to be drawn between on the one hand degrees of non co-operation, and on the other hand bad conduct by the debtor. Bad conduct cases should be subjected to the penalty regimes (BRU/BRO).

The current system of discharge after a year is too lenient and a number of debtors "play" the system. Debtors need to be incentivised to co-operate with their Trustees.

ICAS advocates a return to automatic discharge after 3 years unless:

i. The Trustee has in month eleven confirmed to the AiB in writing that the debtor has co-operated, in which case automatic discharge of the debtor would take effect after 12 months
ii. The debtor challenges the Trustee's statement in (i) above that he has not co-operated and is able to show otherwise. In such cases the court should be responsible for considering whether or not the debtor should be discharged and when.

Our Members report that they experience practical difficulties when they apply to defer a debtor's discharge and that the current system does not work. It therefore requires review.

Question 13.2 - If an individual has not co-operated, should there be a maximum period that discharge could be deferred?

- ☐ A) 1 year
- ☐ B) 3 years
- ☐ C) 5 years
- ✓ D) another period, please specify_____.

The period of deferral should be decided by the Courts. A disincentive to non co-operation and to bad conduct should be built in to the system. If discharge is to be linked to these aspects then consideration should be given to a range for the period of deferral similar to the range employed in disqualification proceedings against directors.

Question 13.3 - Where an individual cannot be located should discharge be deferred indefinitely?

Yes ☐ No ✓

Not as a matter of course. Just because an individual cannot be located does not indicate that he would not co-operate. Consideration has to be given to whether the Trustee has been able to deal with the estate effectively for the benefit of the creditors. Each case has to be considered on its own merits.

Delay incurs more cost. The Trustee would not wish to remain in office if the debtor cannot be located. One has to consider therefore who would deal with the debtor if the Trustee obtains his own discharge but the debtor's discharge is delayed.

Consideration should be given to instances in which the debtor only lived in Scotland for a short qualifying period, declared themselves bankrupt and then returned to their country of origin.

Question 13.3a – If no, what period should the deferral of discharge be?

- ☐ A) 1 year
- ☐ B) 3 years
- ☐ C) 5 years
- ☐ D) another period, please specify_____.

In cases of non co-operation the default automatic discharge period of 3 years should be re-instated unless it can be shown that the debtor has carried out conduct which would take him into a penalty regime BRU/BRO.

Question 13.4 – Should the AiB have the power to defer discharge where an individual has not co-operated, without the need to refer to case to a sheriff?

Yes ☐ No ✓

The deferral of discharge must be seen to be independent which is achieved through the court.

Question 13.5 – Who should provide an appeals process?

- ✓ A) the Sheriff Court
- ☐ B) an independent tribunal
- ☐ C) AiB's Policy and Cases Committee
- ☐ D) other, please specify_____.

The court should consider appeals

Question 13.6 - Should other types of unsecured debts be excluded from the discharge?

Yes ☐ No ✓

There should be no additions to the current list of debts that survive bankruptcy in Scotland.

Question 13.6a – If yes, what other types of unsecured debts should not be discharged and your reasons why?

N/A

Question 13.7 - Where an individual has incurred a debt within a specified period prior to their application for bankruptcy or trust deed, should this debt be excluded from discharge?

Yes ☐ No ✓

Question 13.7a – If yes, should this be limited to debts for non-essential, luxury items or where it is proven that the individual had no intention to repay?

N/A

Question 13.8 - Where an individual has incurred a debt within a specified period prior to their application for bankruptcy or the granting of a trust deed and it is agreed that this debt will be excluded from discharge, what should the specified period be?

- ☐ A) 4 weeks
- ☐ B) 8 weeks
- ☐ C) 12 weeks
- ☐ D) another period, please specify_____.

N/A these debts should not be excluded.

Question 13.9 - Should the child maintenance arrears continue to be claimable and to be discharged in bankruptcies and protected trust deeds when the individual is discharged?

Yes ✓ No ☐

The position of debtors who cannot afford to pay child maintenance must be considered. The priority should be to establish whether the debtor can maintain the payments. The system should seek to write off debt where necessary and rehabilitate the debtor in cases where they can afford to pay. Repeat offenders should face penalties.

Question 13.10 – Should credit union debts continue to be discharged in bankruptcies and protected trust deeds when the individual is discharged?

Yes ✓ No ☐

This issue was the subject of a relatively recent consultation. If the credit union model is not working one solution is to allow them to charge higher rates of interest and change their lending criteria.

Question 13.11 – Should only credit union debts that were incurred by the individual within a specified period prior to them entering bankruptcy or granting a trust deed be excluded from discharge?

Yes ☐ No ✓

Question 13.11a – If yes, how long should this specified period be?

- ☐ A) 4 weeks
- ☐ B) 8 weeks
- ☐ C) 12 weeks
- ☐ D) another period, please specify_____.

N/A

Part 14 Modernisation of Legislation

Question 14.1 – Where material policy changes are identified by the Scottish Law Commission as part of their consultation on bankruptcy consolidation, should any recommendation they make regarding these be incorporated where appropriate?

Yes ✓ No ☐

Such recommendations would need to be discussed with and agreed upon by relevant key stakeholders including ICAS and the Law Society of Scotland.

Question 14.2 - Do you agree that a consolidation Bill follow the programme Bill through Parliament?

Yes ✓ No ☐

Yes on the understanding that there are no changes envisaged on which there has been no previous consultation and that sufficient time is allowed for detailed consideration of the actual draft provisions. Where changes are to be made it is imperative to achieve clear law.

Question 14.3 - Should creditors be required to submit a claim within a specified timescale?

Yes ✓ No ☐

Yes, and claims should be supported by documentary evidence.

Question 14.3a - If so, what should this timescale be?

- ☐ A) 60 days
- ☐ B) 90 days
- ☐ C) 120 days
- ☐ D) another period, please specify_____.

The suggestion is a period of 6 months to be in keeping with the timescale in corporate cases. Some of our Members consider that 120 days is appropriate.

Question 14.3b – If the creditor does not submit a claim within the agreed timescale, what should the penalty be?

As in the current legislation. They should not be allowed to rank for dividend until a claim is submitted.

Question 14.4 - Should there be a defined habitual residence test for individuals who wish to apply for statutory debt relief in Scotland?

Yes ☐ No ✓

It is practically impossible to achieve a definition. We consider that the issue can be

addressed through case law which is extensive.

There are concerns that the provisions under S9(5) of the Bankruptcy (Scotland) Act 1985 as amended should be revisited.

Question 14.4a - If yes, what aspects should be taken into account?

N/A

Question 14.5 - Should the power to determine the form of the Register of Insolvencies (ROI) be moved from the Act of Sederunt to regulations made under the Bankruptcy (Scotland) Act 1985?

Yes ☐ No ✓

Question 14.6 - Should the ROI be updated after the award of bankruptcy to include the individual's current address where they have moved?

Yes ☐ No ✓

It depends on what the main purpose of the ROI is perceived as being. Once a debtor has entered an insolvency process, creditors & third parties should communicate with the Trustee, thus publication of a current address may in some circumstances be counter-productive. Last known address should always be shown.

Question 14.7 - What, if any further information should be included on the ROI?

The date of birth on the ROI may be useful subject to concerns about Data Protection. Where the debtor has had several addresses they should also be shown to enable identification by creditors.

Question 14.8 - Should some details of an individual who is at risk of violence be withheld from the ROI?

Yes ✓ No ☐

Yes provided there is clear evidence of such risk; refuge addresses should never be published. Trustees currently report confidentially, but there may be a need for more formal procedure. There is a need to ensure that the Trustee and his staff have protection where appropriate.

Question 14.9 - Are there any other categories of individuals whose details should be withheld from the ROI? Please specify.

Yes ☐ No ✓

The Trustee has to make a judgement based on information and evidence that is provided. There should be a requirement for the debtor to demonstrate a valid reason for excluding a debtor's details.

Question 14.10 - Is the supplementary questionnaire effective as an interview aid, or is something else required to replace it?

Yes ✓ No ☐

The supplementary questionnaire contains much more information than the application document though there is an element of duplication. It is considered to be a useful interviewing tool in creditor petition cases.

Question 14.11 - Would the use of a common financial tool remove the need to collect further information on a supplementary questionnaire?

Yes ☐ No ✓

Question 14.12 - Where a recall of bankruptcy is granted, should the distribution process be clarified?

Yes ✓ No ☐

Consideration should be given to the timescales for settling the fees and costs, and of returning the estate to the debtor.

Question 14.13 - Should the legislation be amended to ensure that the final interlocutor in a recall is withheld by the Court until it is confirmed that all relevant costs and creditors have been paid?

Yes ☐ No ✓

It must be recognised that the Courts have discretion, and rightly so, to enable account to be taken of different circumstances.

Question 14.14 - Should the current prescribed rate of interest be retained?

Yes ☐ No ✓

No, the rate is out of date but the requirement is sound. It should be regularly updated through legislation

Question 14.15 - Should all post-procedure interest and charges be frozen on statutory debt relief products?

Yes ☐ No ✓

Question 14.15a - If not, should the interest rate be linked to the Bank of England base rate?

Yes ✓ No ☐

If the law were to be changed then any interest should be linked to the Bank of England base rate. A rate at 1.5% above Bank of England rate would not be unreasonable.

Question 14.16 - Should the requirement to keep a hard copy of a sederunt book be removed?

Yes ✓ No ☐

The incidence of interested parties inspecting Sederunt books is minimal

Question 14.16a – If yes, should the key documents be retained electronically?

Yes ✓ No ☐

This would be advantageous. Confirmation should be sought from the Courts on whether or not electronic copies of key documents will be acceptable if for any reason court actions on cases arise in the future and the outcome should be communicated to stakeholders. It may be that certified copies produced from electronic copies will suffice.

Question 14.16b – What should the key documents include?

They should be as laid down in current legislation plus: the documents listed in Appendix A to the AiB letter to Trustees dated 9 September 2011, any confirmations signed by the debtor, approvals granted, independent valuations etc. Each case will be different thus an element of discretion is required.

Question 14.17 - Should the date of sequestration be the award date in both debtor applications and creditor petitions?

Yes ☐ No ☒

This issue requires detailed consideration. The advantage of the date of sequestration being the date of award is that it provides clarity on the fate of debts incurred between the date of the warrant to cite and the award. Practical difficulties are currently encountered where there is a warrant to cite and the debtor has incurred additional debts after the warrant to cite date. These are rarely paid which results in a loss to creditors. However steps may require to be introduced to protect creditors from debtors who wilfully incur credit after warrant to cite in order to have these debts included in the discharge.

Delays occasioned by the courts should be addressed as they should not result in

prejudice to creditors.

Question 14.17a – If no, should the discharge date be linked to the date the award was made by the sheriff?

Yes ☒ No ☐

The solution to the problem of debtors getting automatically discharged before the Trustee can reasonably consider deferral of his discharge can be addressed by making provisions as suggested in 13.1 above ie Trustees should be required in month eleven to confirm whether or not discharge should be granted. Where no such confirmation is received there would be no automatic discharge. However the counter argument is that a debtor should not be prejudiced by a situation which is not of his making. Thus careful consideration is required.

Question 14.18 - Should the ability to apply for a payment holiday be introduced to all statutory debt relief products?

Yes ☐ No ✓

If a debtor is able to pay he should pay. The current system allows such decisions to be made by the Trustee having reviewed the debtor's circumstances which he is required to do 6 monthly.

Question 14.19 - Should the period of the payment holiday be fixed at 6 months as it is in DAS?

Yes ☐ No ✓

No, there should not be a fixed period, it should depend on circumstances.

Question 14.20 - If a payment holiday is granted, should this period be added onto the length of the period before discharge?

Yes ☐ No ✓

No, such a move assumes that the debtor is not able to make up the payments, which is not necessarily the case. This should be left to the discretion of the Trustee.

Question 14.21 - Should the criteria for a payment holiday be the same for all statutory debt relief products?

Yes ☐ No ✓

No. A “one size fits all” attitude should have no place in a modern system.

Question 14.22 - Should bankruptcy processes be removed from the Sheriff Court where the process is mainly administrative?

Yes ☐ No ✓

The definition of an “administrative process” in this context is not clear. A number of S63 applications are clearly administrative and there is merit in defining the term and specifying particular applications that are to be classed as administrative, which could then be considered for removal from the courts. However we consider that the courts should retain responsibility for the consideration of BROs and IPOs since we believe that a court order has more influence over the behaviour of a debtor, without the need for further process.

Question 14.22a - If yes, should AiB have the power to make orders for these mainly administrative processes, with disputed decisions being referred to a sheriff?

Yes ☐ No ☐

N/A

Question 14.23 - Should a panel, separate from the decision maker, decide the outcome of more complex applications and review disputed decisions?

Yes ☐ No ✓

No, all other processes should be considered by a court

Question 14.23a - If yes, should the panel have the power to make the final decision in low value, straightforward cases?

Yes ☐ No ☐

N/A

Question 14.24 - Should the make-up of this panel include representatives of a cross-section of stakeholders, such as insolvency practitioners, Recognised Professional Bodies, money advisers, solicitors, etc?

Yes ☐ No ✓

There is already a tried and tested court system and we are not aware of any evidence having been put forward to demonstrate either that it is not working or that it is unduly expensive. We can see no need for a panel as is proposed. It would be better to utilise the services of a small number of courts that are well versed in handling insolvency matters.

Question 14.25 - Should all bankruptcy processes currently dealt with by the Sheriff Court be removed to AiB, subject to appropriate appeals?

Yes ☐ No ✓

Question 14.26 - If all bankruptcy processes were removed from the Sheriff Court, should an independent adjudicator or tribunal be formed to review disputed decisions?

Yes ☐ No ☐

N/A. However in any fair process there must be an independent and transparent appeal process built in; setting up a tribunal of this nature would be costly and staffing it would be difficult due to apparent conflicts.

Part 15 AiB Role and Powers

Question 15.1 - Does the AiB acting as trustee in approximately 59% of bankruptcy cases, excluding LILA cases, have a positive impact on the existence of a healthy and competitive insolvency sector in Scotland?

Yes ☒ No ☐

AiB carries out a necessary role. The ability to contract out work has a positive impact on price but does not affect how other cases are handled as insolvency practitioners are bound by a code of ethics, statements of insolvency practice and rules and regulations.

There are real concerns of the apparent conflict of interest arising from the various roles fulfilled by AiB in formulating bankruptcy policy, supervising the duties of insolvency

practitioners and issuing directions to trustees whilst acting as trustee herself.

Question 15.1a – If no, should the AiB continue to act as a trustee in bankruptcies in Scotland?

Yes ☐ No ☐

N/A

Question 15.1b – If the AiB should continue to act as trustee, should she act only as trustee of last resort?

Yes ☒ No ☐

Yes as a trustee of last resort and in LILA cases. The AiB's supervisory powers should not be extended

Question 15.2 – Where the AiB is trustee and asset realisations and contributions in a bankruptcy case do not meet the cost of case administration, how should any shortfall be funded?

Any shortfall would require to be met from public funds.

Question 15.2a – Where the AiB is trustee, should bankruptcies which can cover the costs of administration subsidise those which cannot?

Yes ☐ No ☒

We strongly believe that those cases where the AiB acts as trustee should not be capable of different treatment than any other insolvency case. The net funds ingathered in a case must be available for the creditors of that case; transferring funds from one case to another is unacceptable. Those cases where the AiB acts as trustee which have insufficient assets or contributions require to be funded from public funds.

Question 15.2b – If no, should bankrupts be required to cover the minimum costs of administration?

No. An individual who has been deemed unable to pay a contribution to his creditors should not be required to fund the AiB's administration costs. If the process is run properly the debtor will have contributed what he is able and required to contribute. To require a debtor to meet these costs may restrict access to the appropriate debt procedure.

Question 15.3 - Should AiB to have a more proactive role in the supervision of all debt management products?

Yes ☐ No ☒

It is the role of the authorising bodies to monitor whether or not statutory obligations are being met and that insolvency cases are being administered in accordance with agreed standards. If AiB identifies major failings in this respect then the proper course of action is for the matter to be referred to the relevant authorising body for action to be taken. Given

the level of the AiB's operational responsibilities we do not believe that enhanced supervision by that agency is the most appropriate direction; it would add to additional conflict of interest.

Paragraph 15.6.5 states that "*…there is no mechanism to gather information from bankruptcy cases where the trustee is an IP. As a result no robust information is ingathered on, for example, how many cases contain heritable property.*" This is simply not correct. Such information can be obtained from the Statements of Affairs and receipts and payments accounts that have to be submitted to AiB.

We recognise that there is a growing need for enhanced transparency, accountability and regulation of debt management companies in the United Kingdom.

Question 15.4 - Where the AiB makes a direction which is not adhered to by the trustee, should an AiB panel decide on an appropriate course of action?

Yes ☐ No ☒

It is unclear to what extent there is a failure by trustees to adhere to AiB directions. In the few instances that have come to the attention of ICAS there appeared to be reasons why the trustee had entered into a dialogue with AiB. The first action that should be taken by AiB is to raise the matter with the relevant authorising body. We note that paragraph 15.6 8 of the consultation document refers to the AiB taking regulatory action against a trustee (the given example is censure). We do not accept that the AiB would have any regulatory powers over an Insolvency Practitioner (see answer to Question 15.5 below). In exceptional cases which cannot be resolved we consider that the Courts should determine the outcome independently.

Question 15.5 - Should Scottish Ministers have the power to regulate Scottish Insolvency Practitioners ?

Yes ☐ No ☒

The consultation document does not articulate the basis upon which the Scottish Government believes the current regulatory arrangements are unsatisfactory, save than to refer to the AiB's limited status within the current regulatory structure.

We believe that the AiB's role in relation to regulatory matters is limited at this time because each of the seven RPBs, including ICAS, derives its statutory functions from the Insolvency Act 1986 rather than from the Bankruptcy (Scotland) Act 1985 (as amended). Similarly, Insolvency Practitioners are licensed to carry out insolvency work, and to accept insolvency appointments, in the UK in accordance with the Insolvency Act 1986.

We acknowledge that the outcome of a referendum on Scottish independence could have consequences for the regulation of insolvency, but in the interim there is an existing system for the regulation of Insolvency Practitioners, and/or the supervision of the Recognised Professional Bodies who licence them, which rests with UK Government

Question 15.5a - If yes, should this be managed through Recognised Professional Bodies who would monitor and regulate Insolvency Practitioners?

Yes ☐ No ☐

N/A

Question 15.6 - Do you think that the current Memorandum of Understanding between the UK Insolvency Service and Recognised Professional Bodies should be redrafted to allow the provision of information to AiB on regulatory activity related to Scottish cases?

Yes ☐ No ☒

The purpose of the Memorandum of Understanding is to enable the Secretary of State to monitor the effectiveness of each Recognised Professional Body. As the AiB does not have a role in the regulation of the RPBs we cannot see the basis upon which it would be appropriate for the AiB to be given comparable powers to UKIS.

There also appears to be a possible misunderstanding over the purpose of the information sharing arrangements set out in the Memorandum of Understanding. The Recognised Professional Bodies provide information to the UK Insolvency Service in its oversight capacity; the Department for Business Innovation and Skills has primary responsibility for the regulation of insolvency in the UK and for the supervision of the Recognised Professional Bodies.

The RPBs rarely if ever provide information to the UKIS in relation to the operation of individual insolvency cases because our regulatory objectives are to assess, monitor and enforce acceptable levels of fitness and propriety, competency and ethical standards. The information provided to UKIS under the Memorandum of Understanding therefore relates to the discharge of these functions and our effectiveness as a Recognised Professional Body. In this respect, we do not believe the UKIS would ever seek to rely upon the terms of the Memorandum of Understanding for the purposes which are set out in Paragraph 15.7 of the consultation, namely to acquire information pertaining to individual IPs who have been appointed to act as trustees in bankruptcy.

We consider that all information which the AiB requires to discharge the existing supervisory role over trustees is available under the existing arrangements.

We note that the regulatory processes of the Recognised Professional Bodies are to be further enhanced by the changes under consideration by UKIS and all relevant regulatory information ought to be available via the UKIS website (including details of disciplinary or regulatory action) or could be made available to the AiB where the UKIS considers that it is in the public interest to disclose such information. We would suggest that going forward this is a more appropriate interface.

Question 15.7 – Should there be an information sharing agreement between AiB and the Recognised Professional Bodies which have members who take on personal insolvency work from clients based in Scotland?

Yes ☐ No ☒

As outlined above, the information which the Recognised Professional Bodies hold relates to our regulatory responsibilities. We do not believe that it is appropriate for any Recognised Professional Body to enter into an information sharing arrangement with the AiB, but we accept that there may be occasions where relevant regulatory information would be disclosed by the UKIS to the AiB where it was in the public interest to do so.

Question 15.8 – Should there be an office of the Official Receiver in Scotland?

Yes ☐ No ☒

This matter has been addressed in previous consultations. It is not clear from the consultation document how the figures quoted have been arrived at and it is our view that the benefits of having an Official Receiver have been overstated.

We recognise that there may be a limited role for an administrative function to deal with appointments of last resort in Scotland which are currently paid for from public funds through the appointment by HMRC of insolvency practitioners to such cases. This model could be extended.

In the absence of a clear cost/benefit analysis we cannot support the need for such an office. There would potentially be a significant cost to the public purse in creating one.

Question 15.9 - If the role of the Official Receiver in Scotland is devolved to the Scottish Government, should this role be carried out by Accountant in Bankruptcy?

Yes ☐ No ☒

To avoid the perceived conflict of interest and in light of the extensive mixture of operational and supervisory powers already assigned to the AiB

Question 15.9a - If no, who should carry out this role?

We consider that if an Official Receiver role is to be created there should be a separate appointment. The cost of setting up the function would be contrary to current spending cuts.

Question 15.10 - If there was an office of the Official Receiver in Scotland, how should this be funded?

We consider that an appropriate administrative charge to each case, and the costs of dealing with cases which have insufficient assets should be met from public funds. Inevitably the costs would reduce any return that may be available to creditors.

Arguably, a proportion of these cases are being funded in this way as HMRC regularly meet the costs of appointing an IP as liquidator in cases where it is a creditor of a company with no apparent realisable assets and considers the appointment to be necessary.