



WRITTEN RESPONSE TO THE STAGE 1 CALL FOR EVIDENCE

Bankruptcy and Debt Advice (Scotland) Bill

Executive Summary

Introduction

1. The Institute of Chartered Accountants of Scotland (ICAS) regulates circa 75% of insolvency practitioners (IPs) who take appointments in Scotland and we have an in-depth knowledge and expertise of bankruptcy law and procedure. ICAS regulated IPs will play a key role in delivering a robust debt management and debt relief regime for the people of Scotland.
2. ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.
3. ICAS is pleased to have the opportunity to submit its views on this Bill to the Economy, Energy and Tourism Committee and welcomes the invitation to supplement this written evidence by providing oral evidence at a meeting of the Committee on 9 October 2013.

Comments on the Bill

Policy objectives

4. The Bill aims to ensure that appropriate, proportionate debt management and debt relief mechanisms are available to the people of Scotland and that these are fit for the 21st Century. This is an objective which ICAS fully supports.

Accountant in Bankruptcy conflict of interest

5. ICAS is concerned that the conflicting roles and responsibilities of the Accountant in Bankruptcy (AIB) as Scottish Government policy advisor, supervisor of debt management/debt relief services and supplier of debt management/debt relief services is not addressed by this Bill. Indeed, many of the provisions within the Bill will simply engrain these conflicts of interest. In our opinion this is a significant barrier to achieving an effective debt management and debt relief mechanism for the people of Scotland which is fit for the 21st Century.
6. At a time when the UK Insolvency Service (UKIS) is divesting itself of powers due to perceived conflicts of interest with the UKIS oversight function, it is concerning that the Scottish Government is proposing legislation which will put the AIB into areas of further conflict through increased decision making powers of a quasi-judicial nature. While it is proposed that provisions to review the AIB decisions shall be available, we remain to be convinced that sufficient and appropriate safeguards can be put in place to ensure that the conflict of interest position can be dealt with or that the provision of a further appeal process to the courts ensures appropriate and proportionate access to review.
7. ICAS believes that there is a high risk to conflict of interest insofar as the AIB acts as Trustee in nearly three quarters of all bankruptcy cases in Scotland. As a result it is inappropriate to extend decision making powers of the AIB.

Effectiveness of consultation

8. ICAS has actively engaged in all stages of consultation relating to the proposed reform of bankruptcy legislation. Whilst we are pleased that some of our comments throughout the consultation process have been acted upon and reflected within the Bill, a significant number of our comments and concerns raised throughout the consultation process have not been reflected within the Bill.
9. ICAS is concerned that there is little evidence of an appropriate weighting of responses to the Consultation on Bankruptcy Law Reform. As a result a number of proposals within the Bill are perhaps being pursued where there is little evidence of widespread agreement to such proposals.

10. Throughout the consultation, and in particular at stakeholder events, a number of policy areas and questions were raised by stakeholders which would have a significant effect on the effectiveness of the proposals. We feel that insufficient detail was available or policy developed sufficiently prior to those events to ensure that the questions and concerns raised during the stakeholder events could be adequately addressed.

Failure to address significant issues

11. One of the primary objectives for this Bill is to ensure that the system of debt management and relief is fit for the 21st Century. ICAS believes that this Bill does not take the opportunity to deal with some of the real issues which affect both debtors and those involved in the bankruptcy process. Some examples are provided below:

Family home

12. Throughout the consultation process, areas were identified where there were implications for the family home or an individual's sole or main dwelling house. It is unfortunate that the Bill fails to address this issue which is the single most problematic and emotive issue in personal bankruptcy. This was expected to be the subject of a separate consultation in autumn 2010 but which has yet to take place.

Access to bank accounts

13. Many debtors face significant problems once bankrupt with accessing appropriate banking facilities. This issue arises due to bank concerns that they would be liable to account to a Trustee for funds caught under the acquirenda principle which was subsequently divested by the debtor. This issue has been recognised at UK level and is being addressed as part of the UK Government's Red Tape Challenge and resultant Deregulation Bill. It is unfortunate that this Bill does not address the issue for the people of Scotland.

Response to Bill

14. Our detailed consideration of each of the Bill sections is attached in Appendix 1. We would highlight the following matters in particular:

Effectiveness will depend on detail

15. A number of proposals contained within the Bill require significant further detail to be provided in order to evaluate the effectiveness of proposals within the Bill. Consequently, our support or reservations on a number of provisions within the Bill are subject to evaluation of further detail to be provided.
16. We have already identified a number of issues within the detail of the Bill and while this is not the subject of Stage 1 scrutiny we take this opportunity to highlight that we have some significant reservations in relation to certain matters and would reaffirm our commitment to assisting the Scottish Government to ensure that any Bill enacted will be fit for purpose.

Lack of advice or poor advice

17. ICAS fully supports the principle that debtors should have access to sufficient debt advice. We believe however that more important than simply access to debt advice is that debtors should be able to access suitable quality debt advice.

18. It is unclear what issue is trying to be addressed as AIB statistics suggest that there is only a small percentage of debtors who do not obtain debt advice prior to entering a debt management or debt relief plan. The inference is that there are debtors who are perhaps entering one debt product when others may be more appropriate. The matter to be addressed is then perhaps whether debtors are accessing good quality debt advice rather than whether they are accessing debt advice at all. The Bill does not specifically address this issue.
19. We believe that best advice is obtained from those who are sufficiently experienced and qualified to take into account all the circumstances of an individual. It is essential therefore that the definition of a Money Adviser includes IPs.
20. We also consider that an individual should retain the choice of whether to obtain advice or not. While we support the principle that advice should be sought due to the potential serious implications and that there should be a presumption that debt advice is to be sought, the ability of an individual to opt out of debt advice should be retained with an appropriate declaration that they understand the potential consequences of not obtaining appropriate advice.

Post-bankruptcy financial education likely to be effective?

21. ICAS has significant concerns that a system of post-bankruptcy financial education will be costly to develop and implement but with very limited impact and effectiveness. ICAS fully supports the principle of financial education to assist in the avoidance of debt problems; however we believe that resources for such education would be more beneficially directed to early life education.
22. There is little evidence to suggest that there are a significant number of debtors who become serial bankrupts as a result of poor financial education. Wider issues concerning welfare reform, a sustainable living wage, and housing are likely to be of more significance to reducing serial bankruptcies.

Payments by debtors following bankruptcy must be sustainable

23. ICAS supports the principle of “debtors who can pay should pay” and that there should be consistency of assessment of the ability of a debtor to pay.
24. We are however concerned that insufficient information is available at this stage on how the proposed common financial tool will operate. We are of the view that IPs can add significant value to the process of assessing the ability of a debtor to contribute to pay and in ensuring that such contributions are sustainable. We believe that a common financial tool should assist in this process but that this is best used as guidance alongside the experience and knowledge of a trustee and that the use of a common financial tool which is prescriptive in its outcome will be counterproductive to achieving a balanced approach to debtor responsibility and creditor outcome.
25. We would urge that prior to Stage 2 of this Bill that further analysis and research is undertaken on the effectiveness of payment breaks and whether this is necessary with an effective system of variation. Further analysis is also required to assess the net benefit of extending contributions from 3 years to 4 years as well as the extension of acquirenda to 4 years.
26. ICAS believes that efforts to increase the effectiveness of payments by debtors following bankruptcy should be focussed on improving the ability to enforce situations where a debtor can pay but refuses to pay. The current proposals to allow deductions from debtor’s employment earnings would be a welcome addition for trustees but we would balance that with caution as a result of the imposition of cost and bureaucracy on employers.

27. We also consider that if enforcement options are to be extended then this should be extended further than currently proposed. We believe that further provisions are required to enforce contributions from income sources beyond employment, for example in relation to pensions income, rental income or self-employed income.

Caution to removal of functions from the court

28. The bankruptcy regime in Scotland is a mature one which has relied where appropriate, and with good reason, on the involvement of the judiciary. The distinction between judicial and administrative functions should therefore not be taken lightly as many of the issues subject to the various processes deal with fundamental rights of individuals and could result in Human Rights issues arising.

29. We support the principle that where a process is administrative and does not require judicial oversight that the involvement of sheriffs could be removed.

30. We would caution against moving all such functions to the AIB as this will give rise to conflicts of interest where the AIB is trustee (see comments above) and results in additional and unnecessary layers of appeal, potentially limiting access to justice.

31. ICAS considers that an alternative approach to moving functions from the sheriffs to the AIB would be to considering extending the role of Sheriff Clerks, many of whom already have relevant expertise, and perhaps limiting submissions to specific courts. It is likely that this would be a more cost effective solution and it would retain the independence of the judiciary.

32. We note that a significant number of proposals within the Bill will result in increased workloads on the office of the AIB. The AIB is working towards a full cost recovery model and as a result it appears inevitable that many of the processes will ultimately attract fees to be paid. We are concerned that this will result in additional costs to the insolvent estate resulting in a reduced return to creditors. This is counterproductive to a key principle underpinning the delivery of the Bill objectives, to secure the best return for creditors.

Unintended consequences of discharge amendments

33. ICAS supports the principle that the discharge of a debtor should be linked to co-operation with their trustee. We are however concerned that the proposed amendment to make the discharge process one of application rather than the current automatic provisions taken together with other proposed changes to debtor contribution and acquirenda periods will result in unintended consequences.

34. The proposals shall not only result in additional time and cost administering the discharge process by the trustee and the resultant lower return to creditors, but it is highly possible that debtors shall not receive their discharge until the end of their contribution period in order that the trustee can make the relevant declaration that the contribution order has been complied with and that the debtor has co-operated with the trustee.

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Appendix 1 – Commentary on Bill sections

Advice and Education

1. ICAS fully supports the principle objective that individuals should seek appropriate advice prior to obtaining access to any form of statutory debt relief. We believe that this advice should be debt advice given by those who have the necessary qualifications and practical experience to ensure that a debtor is made aware of the available options and the consequences of opting for a particular process.
2. The AIB's own estimates suggest that there are very few individuals who enter into a statutory debt relief arrangement without obtaining advice from an appropriate source and therefore it is unclear why there is a requirement to introduce this requirement into legislation.
3. ICAS believes that a more robust solution to debt advice issues would be to address the issue of circumstances where poor advice is being provided.
4. ICAS supports the policy objective of seeking to prevent individuals from repeated financial difficulties and believe that a 'Financial Health Service' should be based around prevention. ICAS recognises and supports the importance of financial education and in June 2008 launched a Debt is Dangerous Teachers' Pack and DVD for schools. We believe that the most significant impact of financial education can be achieved through delivery much earlier in life and not after bankruptcy.
5. We have significant concerns that the provisions within the Bill requiring financial education to be undertaken will, whilst commendable in principle, require a significant cost to develop and deliver an appropriate financial education system with very limited effect. There is little evidence to suggest that there are a significant number of debtors who become serial bankrupts as a result of poor financial education. Wider issues concerning welfare reform, a sustainable living wage, and housing are likely to be of more significance to reducing serial bankruptcies.

Payments by debtor following bankruptcy

6. ICAS supports the principle of the Bill that debtors who can pay should pay, and that there should be consistency of that principle across all debt relief solutions. As a result we would welcome the introduction of a Common Financial Tool (CFT) in principle but would wish to obtain much more detail on how this will function before fully committing our support to the proposals. We believe that a CFT should act as a guideline/trigger only, as individual debtors' circumstances can vary widely. A degree of judgement should remain available to take account of individual circumstances, subject to appropriate controls. We also believe that any CFT should take into account the duration and nature of the debt relief solution to ensure that any contributions assessed are sustainable throughout its duration.
7. We believe that contribution levels can be enhanced through skilled assessment and negotiation of insolvency professionals. This ensures not only that there is the best possible return for creditors but that the debtor is part of the contribution setting process and as a result the contributions are more likely to be maintained. We have reservations that if contributions are simply assessed via a CFT without skilled input the sustainability of contributions will be affected. We are also concerned that greater enforcement of debtor contributions will be required as a result of the proposals to issue assessment of contributions by the AIB at the time of awarding a sequestration application. It is also unclear from the Bill whether the intention is that a Debtor Contribution Order (DCO) will be made in all cases where sequestration is awarded following a petition. We do not believe that this would be necessary in all cases as in many cases a debtor will willingly make their contribution having agreed this with their trustee. There does not appear to be provision for any form of appeal to a DCO made by the AIB.

8. ICAS supports in principal moving the administrative function of granting a DCO from the Courts to the AIB. While we can see the initial attractiveness of the duration of debtor contributions being extended from 3 years (from the date of insolvency) to 48 months (beginning with the first payment), we would question whether there has been any analysis carried out of debtor contribution breakage timescales or the cost benefit to a sequestration estate of this extended time period .
9. We are concerned that, when taken with the proposed amendment to debtor discharge and payment breaks, debtors are unlikely to be discharged until after 5 years from their date of sequestration. This is a significant movement from the current position (only introduced in 2008) of 12 months discharge. We are concerned that this may be a barrier to entrepreneurship.
10. We are supportive of the ability to have debtor contributions deducted from earnings, but believe that this should only be used where the debtor consents or as a last resort where a debtor is a persistent defaulter on a contribution order. Failure to ensure that debtors have privacy in their financial affairs from their employers in other than extreme circumstances is a significant concern. Furthermore, there is an inherent cost to employers to administer deductions from payroll.
11. We believe that provisions for enforcement of debtor contributions could be significantly enhanced over and above the provisions to allow deductions from employment income. Provisions should be extended to allow deduction at source from other income sources such as pensions, self-employment/partnership income, and rental income amongst others.
12. The provision of payment breaks in debtor contributions already operates in practice currently without significant issues arising. It is therefore unclear why there is a requirement to introduce this aspect of legislation and how this is fundamentally different from the variation of a contribution order being proposed. The conditions required to provide a payment break are significantly restricted and we are concerned that payment breaks will only provide a temporary relief and extend the period under which a debtor is under a contribution requirement when they would be best served by varying their existing contribution order. Evidence should be obtained from DAS to assess whether payment holidays have resulted in contributions being re-established at the same level after the payment break period has ended.

Bankruptcy where the debtor has few assets

13. ICAS supports the policy objective of providing a debt relief solution to those individuals who have little by way of assets and are unlikely to be able to make a contribution into their sequestration. We however do not believe that there are benefits in those who are provided with debt relief in this form from being discharged after only 6 months and that such a difference from all other debt relief procedures is unnecessary. We note the proposal to place restrictions on debtors for a further period after discharge and we believe that the proposals as set out will lead to confusion in the minds of the public and businesses when a debtor is discharged from their bankruptcy and the conditions attached to such discharges.
14. We further do not believe that it is appropriate to have a maximum debt limit applicable for those accessing the few asset procedure as debts could have been accrued for instance whilst a debtor was previously gainfully employed and therefore could be above the proposed level.

Moratorium on diligence

15. ICAS supports in principle the policy objectives within the Bill relating to a moratorium on diligence.

Application for bankruptcy

16. ICAS supports the policy objectives contained within the Bill as they relate to Applications for Bankruptcy.

Administration of estate

17. ICAS fully supports the proposal to require creditors to submit claims within a defined period. We note the policy objective is to enable the Trustee to establish as soon as possible the debt owed by the debtor and this is one which we would support. We are not however convinced that the Bill sufficiently achieves this objective. It would be preferable that creditors seek permission to submit a claim late before the expiry of the statutory period rather than. Alternatively, a late claim should only be permitted in exceptional circumstances rather than on the basis of reasonableness.
18. ICAS supports the policy objective and proposals to enable a reduction in the first accounting period and enable earlier distribution of funds from the estate where appropriate. We remain cautious on whether the proposed amendments will be utilised to any significant degree or result in earlier dividends being paid.
19. We are concerned about the lack of consultation on the proposed amendment to the vesting of estate after sequestration and that the proposal does not primarily address the principle within the policy objective of 'those who can pay should pay'. The proposal seeks to extend the period under which assets acquired by the debtor after sequestration would vest in the trustee from the current 12 month period to 4 years. We are concerned that the consequence of this is that debtors shall not be able to move on from their bankruptcy for a significant period of time. For example, they shall not be able to change their motor vehicle, purchase a house, etc. notwithstanding that they may be in a position to do so after taking into account their contribution or that they may be gifted such assets from family members. It appears that the proposed amendment seeks to act as a penalty to bankruptcy rather than having anything to do with debtors being able to pay doing so. Furthermore, we are concerned about the practicality of such a lengthy period of co-operation and whether there will be any significant return to creditors arising from this change.

Discharge following bankruptcy

20. ICAS fully supports the link between a debtor's co-operation and their discharge. We do not however agree with the proposals within the Bill and do not consider that there has been adequate consultation on how the discharge should be granted. The proposals within the Bill advocate that where the AIB is not the trustee a debtor has to apply to the trustee for their discharge while a debtor whose trustee is the AIB does not require to apply for discharge. The processes also differ in relation to the timing and input of creditors. We do not consider that there should be any fundamental difference in process solely as a result of difference in trustee.
21. We believe that the system of discharge should be automatic to minimise bureaucracy and costs but incentivise debtors to co-operate with their trustee. This could be achieved by providing for a longer period before automatic discharge but with a shorter period of automatic discharge where the trustee confirms that the debtor has co-operated.
22. We are also concerned that there is a conflict between the debtor's right to apply for discharge after 10 months and the trustee's requirement to ensure continued co-operation from the debtor in relation to debtor contributions for a significantly longer period.
23. ICAS supports the repeal of discharge on composition.
24. ICAS does not support the indefinite deferral of discharge for debtors who cannot be located. There is a distinction between deliberate attempts to avoid being located and someone who simply cannot be located. This needs to be tempered also with the trustee's ability to effectively deal with the debtor's estate. We believe that a more balanced approach would be to place an extended limit on discharge where the debtor cannot be located. Any indefinite period of discharge should be subject to specific application and we would suggest subject to judicial scrutiny given the serious implications of this.
25. Furthermore, it is unclear why there is a requirement to include this element of legislation if, as proposed, it is a requirement of the debtor to apply for their discharge. If the debtor has not been

able to be located then presumably they will not be in knowledge of their position to apply for their discharge. There does not appear to be any particular purpose of restricting the period during which the trustee could apply for the deferral of discharge although we agree with a minimum period to allow adequate attempts to be made to trace the debtor.

26. We do not agree that where the AIB becomes the trustee when the debtor is untraced that the costs of the original trustee can only rank as a claim in the sequestration. This appears an attempt to encourage creditors to appoint the AIB as trustee as some IPs may not be willing to act speculatively. We have concerns about the resource implications for the AIB and the effectiveness of attempts to trace debtors.
27. ICAS supports the proposals within the Bill dealing with unclaimed dividends and unapplied balances.
28. ICAS is concerned with the proposals to deal with assets discovered after the trustee is discharged. The ability to deal with undiscovered assets should be restricted to situations where a debtor has concealed assets. We however support the principle that the re-appointment of a trustee in such circumstances should be dealt with by the AIB rather than the courts.

Records

29. ICAS supports the proposed amendments to deal with the Register of Insolvencies. We however believe that opportunity should be taken at this stage to extend the proposals to prevent disclosure of information which may jeopardise the safety or welfare to other areas of bankruptcy (e.g. to redact information within the Sederunt Book). We believe that the provisions within the Bill require to be extended to set out the process of application under which information would be withheld.
30. ICAS supports the moves to modernise the Sederunt Book process, however we would wish to ensure that adequate safeguards are in place to ensure the non-disclosure of sensitive personal information (e.g. NI number, children's names, salary details, etc.) while the Sederunt book is made available as part of the Register of Insolvencies during the process to discharge the AIB as trustee.
31. ICAS supports the provisions contained within the Bill relating to certain requirements in the Edinburgh Gazette.

Functions of Sheriffs and Accountant in Bankruptcy in bankruptcy

32. ICAS supports the principal objective of removing unnecessary burdens on the courts in order that their resources can be best applied to matters which require judicial input. We therefore support that where a process is purely administrative that this should be carried out by the AIB. We believe however that the following processes would be better served remaining with the courts as these are not administrative in nature and should be the subject of judicial consideration:
 - Application for directions
 - Contractual powers of a trustee
 - Bankruptcy Restriction Orders
 - Power to cure defect (where the AIB is trustee)
 - Valuation of debt depending on contingency

Review of decisions made by Accountant in Bankruptcy

33. ICAS is against the principal of a system of internal review of AIB decisions. We believe that independence and freedom from conflict of interest should form the fundamental principal of appeal systems. We believe that an internal AIB review adds an unnecessary layer of bureaucracy and will act as a barrier to justice and appeals being progressed to the courts.
34. The proposals highlight again that the functions of the AIB require to be fundamentally reformed in order that their conflicting interests as Governmental advisor, provider of insolvency services, and supervisory functions are resolved.

Miscellaneous amendments

35. ICAS has no comment to make in relation to the miscellaneous amendments.