



Bankruptcy and Debt Advice (Scotland) Act 2014 Review

February 2020

Scotland's Citizens Advice Network empowers people in every corner of Scotland through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

Summary

- *In 2018-19, the Citizens Advice Service network helped over 270,000 clients in Scotland and dealt with almost 750,000 advice issues. With support from the network, clients had financial gains of over £131 million and our self-help website Advice in Scotland received approximately 3.7 million page views.*
- *The CAS network dealt with 110,439 debt issues and gave advice regarding DAS and bankruptcy solutions on 18,495 occasions. Local Citizens Advice Bureaux are the main agency that helps people apply for bankruptcy in Scotland.*
- *We represent two major stakeholders - our clients and the CAB advisers who support them. We welcome the opportunity to respond to this consultation on their behalf and in the wider public interest.*

Key Issues

- This response highlights the need for Scotland's statutory debt solutions to become better at providing realistic outcomes for indebted people.
- CAS would like to see shorter, and more efficient engagement with people in bankruptcy, resulting in an earlier fresh start that benefits them and, in the longer term, the wider economy.
- The consultation provides a platform for making a few adjustments to the bankruptcy regime, but the scope of some of the issues requires a more comprehensive review of all the statutory Scottish debt solutions. They do not exist in isolation from each other and we need consistency of approach to make sure that individual clients are getting the right debt solution for them, when they need it.

Recommendations

Based on an adviser day consultation¹ and network research, the Citizens Advice Network advocates:

- The time period for the moratorium being extended and increased in scope by including all the proposed breathing space protections, with increased availability to people with a mental health crisis.
- The Common Financial Statement (CFS) should remain as the Common Financial Tool (CFT) for assessing debt options for a temporary period. However CAS thinks that the methodology that lies behind it, and that of the Standard Financial Statement (SFS), are deficient in providing a sufficiently flexible tool for the increasingly fluid nature of peoples' incomes and therefore they should only be seen as short-term interim solutions.
- Recognition that a change of Common Financial Tool methodology is both necessary and will take time to develop. An alternative requires more detailed discussion and should not be rushed. The principals of an alternative model are set out elsewhere in this response.
- The inefficient application of the CFT in the statutory processes needs to be addressed, because it is quite differently applied by creditors, advisers in non-statutory debt solutions and in the English equivalent processes.
- The Minimum Asset Process (MAP) minimum debt threshold should remain the same and there should be no maximum debt threshold.
- Child Maintenance should continue to be discharged but given primary preference in the distribution of any ingathered funds.
- The MAP fee should be subject to the same exemptions as apply to court fees.
- Child maintenance, bursaries and benefits income sources should be discounted from the debtor contribution order calculation.
- The debtor contribution payment period, acquirenda period and debtor discharge, should be aligned, and should all be concluded two years after the date of sequestration. This provides a consistent and simpler approach to the different periods which impact on the debtor and allows for a clean break bankruptcy discharge.

¹ CAS held an adviser day consultation event on 27th November 2019 with 8 bureaux represented by 9 advisers.



Response to consultation

Q1. Do you consider the current six week period of protection afforded by the moratorium process to be sufficient?

No

Q1a. If you answered “no” to Q1 what do you consider the appropriate time for a moratorium in Scotland?

12 Weeks

Q2. Do you believe that interest, default fees and charges in respect of debts at the time of the moratorium application should be frozen during the moratorium period?

Yes

Q2a. Please provide a reason for your answer to Q2?

Our advisers state that freezing charges and interest stabilises the debt balance allowing a smooth transition to the chosen debt solution. Not freezing charges and interest at the outset leads to additional work whereby new balances must be sought prior to submission of an application, meaning more unnecessary administrative tasking and delay. Freezing charges and interest at the outset also takes creditor pressure off clients allowing them to make better informed and rational decisions.

Q3. Do you believe the Scottish Government should explore further provisions in the moratorium, similar to those in the UK Breathing Space scheme, which have a reserved competency?

Yes

3a. If you answered “yes” to Q3 which of the following areas should the Scottish Government explore?

All of the above.



Q4. Do you believe that the Scottish Government should consider further separate provisions in the moratorium, similar to those in the UK Breathing Space scheme, for those receiving mental health crisis care?

Yes.

While we support this proposal, we have concerns that there may be practical barriers in Scotland to getting a medical professional to sign off the moratorium. There are well documented issues surrounding obtaining medical reports, including charging fees for medical reports - a practice which ended in England in early 2019.

Many of the non-fee related difficulties outlined in our 2017 report 'Burden of Proof: The role of medical evidence in the benefits system'² are equally applicable to clients needing to evidence their health problems to creditors and agencies. CAS would like to see a cost free and easy to access breathing space process in place for clients suffering mental ill health and the Scottish Government should consider how this would work in conjunction with health professionals and their representative bodies.

Q4a. If you answered “yes” to Q4, which of the following principals for those receiving mental health crisis care should be given consideration?

Both of the above options.

Q4b. If you ticked the box for extending the period of protection how long should the period of protection last?

Other

Q4c. If you answered “other” to Q4b what period of protection should apply?

We think that 12 weeks from the end of the crisis would allow the client some time to recover and to resume payments or seek further advice.

² Burden of Proof p 40 Adviser Survey graph on advisers' ease of obtaining reports from mental health service providers - 59% with difficulty and 18% with great difficulty.

Q5. Do you think the provision of a CFT to provide a consistent approach to the assessment of contributions remains an appropriate feature within insolvency legislation?

Q5a. If you answered “no” to Q5, what approach should be adopted to assess the contributions in statutory debt solutions?

Q5b. If you have answered “yes” to Q5, should the CFT be an income and expenditure tool designed to assess individual circumstances?

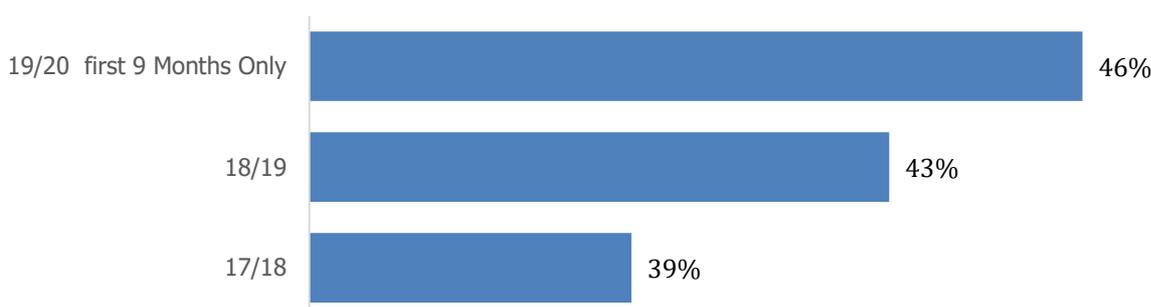
Q5c. If you answered “yes” to Q5b, which tool should be adopted as the CFT?

Q5d. If you answered “no” to Q5b, what model should be adopted to assess the contributions in statutory debt solutions?

(We have chosen to answer these questions together as the structure provided is not helpful and the issues are worthy of wider consideration)

We agree that a common financial tool can provide a consistent approach and the CFT has been somewhat successful in reducing disagreements between advisers and trustees regarding the level of contribution. The issue is whether the currently available tools (i.e. CFS or SFS) are fit for purpose in assessing the real-world economic realities faced by clients. We know that developments in employment contracts (zero hours),³ means tested benefits (tax credits with reporting and annual adjustments), real time adjustments to peoples’ Universal Credit⁴ and increasing (low paid) self employment, have resulted in more clients with regularly fluctuating and generally lower incomes. A recent Citizens Advice (England and Wales) report has found around 40% of their clients have a deficit budget⁵. We think this is significant and this led us to look at our own client group and the graph below illustrates a review of financial statements entered on Citizens Advice Scotland’s Castle debt module from October 2017 to December 2019, showing 46% of debt clients now have no disposable income.⁶

Financial Statements with no disposable income



³ Zero hours contracts account for 2.6% of employment in Scotland (UK Economic Research Council 2019).

⁴ At 2nd September 2019 there were 180,000 provisional tax credit claims in Scotland (see HM Revenue and Customs Child and Working Tax Credit Statistics December 2019). At August 2019 there were just over 192,000 Households on Universal Credit in Scotland (DWP Universal Credit Dashboard August 2019)

⁵ Negative Budgets: A new perspective on poverty and household finances, Jasmin Matin and Joe Lane (Feb 2020)

⁶ Note this only covers the bureaux using the Castle debt module. The module only retains the client’s latest statement.



This confirms what advisers had been telling us anecdotally for some time, that they were seeing increasing numbers of clients with no disposable income and indeed deficit budgets, which makes securing any debt solution difficult. For these clients the choice of SFS or CFS as the CFT is immaterial as there are more fundamental economic issues at work, which Citizens Advice has made recommendations for tackling⁷. We believe that this deficit budgets work underlines the need for our debt solutions to be more responsive to the real-world situations that people find themselves in. We anticipate that more people will need to access debt relief in future who are unlikely to be able to contribute towards their debts and to whom the current application fees for accessing bankruptcy may be a significant barrier. We would be happy to work with the AiB on developing a response to this issue.

In terms of people who can pay a contribution, we have been conducting a joint survey on the living standards of people in debt with one of our CAB members and their clients in the statutory debt options of DAS and Bankruptcy. Preliminary results indicate that their clients are struggling irrespective of the length of time they have been engaged in either a debt payment plan or paying a contribution in a sequestration (50% of respondents had been paying contributions for more than three years and 22% for 2 years or less). 20% of clients said they were finding it difficult, 69% of clients felt they were coping, whilst only 8% were comfortable. However when we looked further into the preliminary findings it became clear that the reality behind "coping" was a considerable struggle to keep the solution in place. We found:

- 41% of clients had only had a single increase in income while they had been in their debt solution, whilst 44% had no rise at all. Of those 28% had lost income on 1 occasion and 16% between 2 and 3 times. In other words, incomes were not keeping up with inflation.

- 70% had not missed any of their debt solution payments. But when asked "have you or your family had to go without or miss anything since engaging in the solution?"
 - 36% replied food for the household
 - 45% appropriate clothing
 - 18% basic toiletries,
 - 95% a short break or holiday
 - 55% a significant social event and
 - 14% a school event.

⁷ Negative Budgets: A new perspective on poverty and household finances, Jasmin Matin and Joe Lane (February 2020)

- Respondents were also asked “Have you been late or missed payments for any of the items listed;”
 - 30% said council tax,
 - 25% mortgage or rent,
 - 20% each for fuel and telephone.

We think this is a strong indication that current tools based on the spending of the lowest quintile of the ONS household survey are not effective at ensuring people have a socially acceptable standard of living, nor at rehabilitating them to be able to manage household expenses going forwards.

We think that detailed work over a longer term is required to develop a suitable tool. The underlying principles of any new CFT should be:

- to allow for a socially acceptable standard of living,
- realistic payments that can be maintained over time,
- rehabilitation so that people get used to managing bills again,
- to simplify the process as much as possible.

Simplification should also address the process of lodging proof of expenditure along with debtor applications. Money and Pensions Service figures reveal that Scotland has one of the worst provisions of debt advice against demand⁸. Some of the explanation for this may lie with the transfer of administration that took place from AiB to advisers through the introduction of the BADAS act, coinciding with a reduction in debt advice funding through local government. In order to increase the capacity for debt advice provision the AiB should look at whether the current checking process adds any value and whether a random checking regime would be a better use of resources. We note that proof of expenditure is not required by creditors in non-statutory solutions. Neither is it required by the Insolvency Service regarding Debt Relief Order applications. In England and Wales the role of a money adviser is one of trusted intermediary. This does not seem to be the case in Scotland where the professional status of the debt adviser is held in low regard. As the workforce strategy in the debt route map is implemented, we would ask the AiB to reconsider their working relationship with debt advisers to increase the capacity of debt advice in Scotland.

Whilst a new CFT is being developed our adviser network would prefer to continue with the CFS as the basis for the CFT. Our advisers tell us that the CFS is known and the rationale is recognised by them and it has an historical pedigree which commands universal trust in its methodology. Additionally the allocation for expenditure groups seems more appropriate to clients in Scotland e.g. higher on food and clothing, lower on telecoms. There is little buy in to

⁸ <https://www.moneyadvice.service.org.uk/en/corporate/a-picture-of-over-indebtedness-in-the-uk>



the SFS by advisers and a not insubstantial amount of scepticism regarding the trigger figures set, especially after the significant increases that followed the negative outcome on the "Future of the Common Financial Tool" consultation.

Whatever CFT is chosen, some thought should also be given to a de minimis contribution level. This would have several benefits: first, it reduces the cost of collecting and distributing small contributions which can cost more in transaction fees than the payment itself. Second it allows for people to have a buffer to smooth out the peaks and troughs in expenditure, which every household experiences. We think a de minimis contribution of £100 per month should be considered.

Finally this issue can't be looked at as a bankruptcy problem in isolation from the other statutory debt options. Our CAB client living standards survey results also indicate the need for a review of DAS contributions too. We need to look at all the debt solutions regarding their effectiveness at providing realistic and efficient debt relief and repayment options for the worst off in our society.

Minimal Asset Process (MAP) Bankruptcy

Q7. Do you believe that the minimum debt allowed for MAP application should be increased?

No

Q7c. Should the debt threshold for creditor petition or full administration debtor application bankruptcy be increased (currently £3,000)?

No

Q8. Do you think that there should still be a maximum debt threshold in a MAP application?

No

If you answered "no" to Q8 please explain why?

The overall circumstances of the case are likely to be a better indicator than relying on a single maximum debt figure, which creates "winners" and "losers". An over simplified indicator also results in unnecessary time and cost being spent on scrutinising cases that have all the characteristics of MAP, were it not for the debt threshold. The AiB's own figures show that



between 2015/2016 and 2017/2018 no dividends were paid in 2/3rds or more of non-MAP/LILA cases.⁹

There is no logical reason to have a maximum debt threshold qualification for MAP when access is already limited by income type and (lack of) assets. The often-stated reason for having a threshold is that a high debt level is an indicator that the case is likely to be more complex requiring extra time to investigate. We note there is no evidence to properly evaluate this assumption, nor is it clear why the current level of £17,000 is the appropriate threshold for complexity. However, our anecdotal experience is that £0 contributions are typically set in many of the MAP cases where additional debts are discovered, and which are subsequently converted to full administration bankruptcy. And, the change in status often causes additional financial difficulty for the debtors involved, who have had to find another £110 to cover the difference in application fee, for little perceivable gain to any party.

Q9. Do you think student loan debt that is not discharged in bankruptcy, should be excluded from the maximum debt criteria in MAP?

Yes (if there is still a maximum debt criteria)

Q10. Do you think the total asset and individual asset limits should be increased?

Yes

Q10a. If you have answered “yes” to Q10, what limit should be applied?

Combined Assets

Other

Individual Asset

Other

Q10b. If you answered “other” to either part of Q10a what amount do you think the combined and individual asset limits should be increased to?

A £6,000 limit should be applied to combined assets. This links to the lower amount of savings that can be held under social security legislation.¹⁰ The individual asset limit should be set in line with the minimum debt threshold for MAP (currently £1,500) both to simplify the scheme

⁹ AIB Annual reports; 2015/16 P82, 2016/2017 P90, 2017/18 p97.

¹⁰ For example, Regs 18 & 72 of the Universal Credit Regulations 2013.

and to avoid people inadvertently being excluded from MAP by a last minute backdate of benefits or salary on the date of application. In addition, the current £3,000 allowance for a vehicle should be reconsidered separately from the combined asset total. Bearing in mind that polluting vehicles are increasingly becoming the subject of legislation to ban their use, £3,000, which has been the limit for some time, may not be enough to purchase or retain a second hand vehicle capable of passing stricter emissions tests or exceeding new limits based on the age and fuel type of vehicles being proposed by some Scottish cities.

Q11. Do you believe that the current content of the financial education modules is sufficient to meet the policy intention of promoting financial capability?

We are comfortable that the current content of the financial educational modules meets the purpose that they were intended for, i.e. to financially educate people who are interested in learning about topics that are relevant to them. We think that Money Advice Scotland has done a good job in producing these and in developing financial education in Scotland.

However the policy intention appears to be to tick the box of promoting financial capability for the least amount of expenditure. The current modules are not suitable for all people. Some people are not able to use the online modules, others have been referred inappropriately to them who are well used to budgeting money, but just do not have enough to get by. We think that financial capability should be more tailored to individual need for people to get the most out of it and this requires appropriate funding.

Q12. Should the remaining balance of any outstanding child maintenance arrears be discharged following the conclusion of bankruptcy and protected trust deed procedures in Scotland?

Yes

Q12a. Please explain the reason for your response at Q12.

Often the reasons for child maintenance arrears are likely to lie in an inability to pay, or the highly emotive personal issues surrounding the non-financial aspects of a relationship breakdown. Our advisers state that a fresh start allows the debtor to concentrate their efforts on stabilising ongoing maintenance payments. If the already harsh sanctions of loss of licence, or passport suspension and imprisonment are not effective prior to the bankruptcy then the non-discharge of arrears is unlikely to be any more effective in recovering arrears. There is also no data currently available about post-bankruptcy recovery of undischarged child maintenance in England and Wales to form any view of how effective it is in realising any benefit for the child or parent with care.



A more effective solution would be for maintenance debts to have first preference in the distribution of any realised assets and funds in-gathered from debtor contribution order. However the purpose of doing this should not be to fund administration costs at the DWP – the funds should be distributed to the parent with care.

An in-process solution as described above maximises realisation to whatever extent possible. It is also a more proactive approach than exemption from discharge, which may lead to the piling up of unrepayable debt, with no reasonable prospect of recovery, or benefit to the intended recipient.

Q13. Do you consider that the currently prescribed 8% rate of interest for dividends in bankruptcy is appropriate?

No

Q13a. If you have answered “no” to Q13, what interest rate do you think should be applied?

BoE Rate

14. Do you consider that the currently prescribed 8% judicial rate of interest remains appropriate?

No

Q14a. If you have answered “no” to Q14, what interest rate do you think should be applied?

BoE Rate



Other Issues

Please feel free to include below any other matters that should be considered as part of this policy review.

We think that the MAP fee should be means tested, for example, on the same basis as court fee exemptions.¹¹

At our adviser day other issues raised were:

- Child maintenance and social security benefits should be excluded from the CFT calculations. Neither should a DCO be possible where total income is below state benefit levels, where there is a mix of benefits and earnings/private pensions.
- Payment holidays should be abandoned as an unnecessary process. The same effect can be achieved by setting a nil contribution DCO based on the prevailing personal and financial circumstances of the debtor.
- The DCO and acquirenda period should be aligned with a shorter discharge set at 2 years. This allows for less costly administration and a more realistic alignment between payments return, administration time and discharge of debt.
- Overall the application and administration of debt relief must be centred on providing a suite of solutions fit for modern economic reality. To achieve this we need shorter active participation in the solutions. This is likely to lead to quicker turn over, less cost, smoother processes, and quicker debt relief for people who, as our evidence shows, are barely coping with meeting their living expenses.

¹¹ The Sheriff Court Fees Order 2018



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