BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL: STAGE 1

SUBMISSION FROM CARRINGTON DEAN

The Carrington Dean Group is a personal financial solutions company and provides both personal and corporate insolvency services. Our Managing Director, Peter Dean, is both a qualified Chartered Accountant and a licenced insolvency practitioner with more than 30 years' experience.

We provide the full range of financial solutions for individuals and companies. We also offer approved money adviser services and are one of the three main providers of Debt Payment Programmes under the Debt Arrangement Scheme.

We are Approved Payment Distributors under the Debt Arrangement Scheme.

We welcome the laying of this Bill by the Scottish Government and are grateful for the opportunity to make a submission to the Committee to consider in relation to the Bill. For reasons of brevity we focus only on areas where we have concerns.

Advice
We broadly support the requirement that all debtors entering a formal statutory remedy will be required to first seek advice from an approved money adviser or licenced insolvency practitioner, including those debtors wishing to apply for their own sequestration.

We do have concerns, however, that there will be insufficient access to advice. For example, we understand that in Glasgow there are at least nine free sector agencies able to provide access to the Debt Arrangement Scheme. However there are currently only three advisers in the free sector doing so. We have also concerns from our own experience that if advice is a requirement for debtors going bankrupt, similar access issues may arise. For example, we understand that at present, despite the fact that many free sector advice agencies are able to sign certificates of sequestration, many are currently unwilling to do so.

Obviously as a commercial organisation, we are prepared to provide access to services, however, there are many clients on low income for whom it would be unethical for us to provide fee charging services. Although many private sector firms do undertake pro-bono, this cannot remove the need to have an adequately funded free advice sector.

Therefore we welcome the requirement that all debtors must seek advice. However we must caution that unless there is adequate access to services available these new provisions may actually prevent people accessing remedies.

Education
We are cautious about this innovation.

We accept education has a role to play in helping ensure debtors are rehabilitated and assisted to avoid repeating the mistakes of the past. However we strongly believe that more emphasis should be placed on preventative measures and introducing financial education into the school curriculum.

We are also at this stage concerned that trustees will be required to decide who should and should not have to undergo a course of financial education. This may become an area of dispute between trustees and debtors. The Bill is not clear how these disputes will be resolved and is silent on any review or appeal process against a trustee's decision.

We are also concerned that trustees will be required to determine whether debtors are fit to undertake a course of financial education for reasons of mental or physical health. Trustees are highly qualified, but not necessarily in these areas. Will expert advice be required before a trustee can make an assessment?

We are also concerned what form the financial education will take and how it will be funded. If it is merely an online box ticking exercise, any real benefit may be negligible.

It also appears to us that some of those who will not be required to undertake a course will be those who possibly should. For example those who have previously undertaken a course within the last five years: surely these are a group who should be required to undertake the course again, as it clearly failed the first time. While some of those who will be required to undertake a course, such as those being investigated for a bankruptcy restriction order, are possibly unlikely to benefit as often the issue involved is not a lack of education, but issues of dishonesty, recklessness and addiction.

Common Financial Tool

We support the introduction of a common financial tool for all statutory remedies, but believe this cannot be a one size fits all tool.

We are reassured by the Scottish Government's announcement that they will be adopting the Common Financial Statement, as this allows discretion and, we believe, sustainable payment plans.

We would only caution that the statement must be adopted and used in the spirit in which it is provided by the Money Advice Trust and additional guidance should not be provided that requires it to be used in a manner not intended.

Debtor Contribution Orders

In principle we support the introduction of the power for the Accountant in Bankruptcy to issue a Debtor Contribution Order when a sequestration is awarded and this will be legally enforceable. We believe with the adoption of the Common Financial Statement this will help reduce the possibility of disputes arising between debtors and trustees.

We are concerned, however, that although the Bill gives debtors the right to request a review and ultimately an appeal against any decision of a trustee to vary an order, it would appear there are no provisions to allow such a right against the original decision of the Accountant in Bankruptcy, leaving it unclear how such disputes where they arise will be resolved.

Payment breaks

We are concerned that the Bill is not clear whether debtors will be required to make 48 payments before a debtor contribution order is complete or whether the payment period will only be for 48 months, but not necessarily requiring 48 payments.

There will be circumstances where debtors' circumstances change and although they are not able to continue making payments, they are not refusing to co-operate. When this occurs the Bill only allows the debtor themselves to request a payment break for up to six months, extending the payment period to 54 months, but it is not clear to us why a debtor would do this when their circumstances have changed and they are not able to continue making payment. These debtors could not be accused of failing to co-operate, but it clearly would not be in their interests to apply for a payment break, as this would extend the payment period beyond 48 months. Nor does it appear logical to us why the payment period should be extended when there is no failure to co-operate. If someone cannot afford to make a payment, they cannot afford to make a payment.

We are also concerned that the circumstances in which a debtor may apply for a payment break are overly restrictive. Often when debtors do request a break in payments, this is not because a drop in income, but because of unforeseen circumstances, such as a car or boiler breakdown that leads to unexpected costs for the debtor. We believe the circumstances when payment breaks can be applied for should allow for these types of emergencies.

48 month payment period

We are concerned by the decision to lengthen the minimum contribution period in sequestration to 48 months, which will mean bankrupt debtors will pay longer in Scotland than anywhere else in the UK. This decision does not appear to be supported by any tangible evidence to show that the current 36 months period is too lenient or that debtors can afford to pay for longer. We are concerned that lengthening the period without such evidence, or evidence that it will result in a significant increase in returns to creditors, will only lead to more debtors defaulting on payments and disputes arising.

Automatic discharge

Related to the above issue we are concerned that the abolition of automatic discharge after one year will mean that it is not clear when a debtor should receive their discharge.

Assuming they have co-operated with their trustee, many debtors will expect a discharge as soon as a trustee is able to grant it, which will be after one year. However, many trustees may be reluctant to do so until the 48 month payment period expires, even if the debtor has co-operated. This could potentially cause dispute where debtors believe they should be discharged, which may result in requests for reviews or appeals to the sheriff. Some debtors may even refuse to co-operate with the trustee if they believe the trustee has been unreasonable in not allowing them a discharge after one year.

We believe this disparity between the payment period and the point when a discharge can be granted may also result in many debtors not appreciating they are required to pay for 48 months. We find this is often the case at present with the 36 month payment period and one year discharge.

We believe that, unless the debtor has failed to co-operate with the trustee, it should be clear when the debtor should be granted a discharge. We believe that this should be the same as the payment period. This would bring the law in relation to sequestration back into line with the law for protected trust deeds.

We are also conscious that automatic discharge was originally introduced with the Bankruptcy (Scotland) Act 1985 because of the number of debtors who were left un-discharged for lengthy periods of time and do not believe it would be desirable to return to this situation.

Minimum Asset Procedure

We also have concerns in relation to the new Minimum Asset Procedure that will be introduced to compensate for the removal of the Low Income Low Asset route into bankruptcy. With the introduction of the LILA route, many debtors were finally able to access a debt relief remedy if they could show they satisfied the income and minimum asset criteria, notwithstanding they were no longer entitled to a fee waiver and had to pay a £100 application fee.

However, since the bankruptcy application fee was doubled in June 2012, many of these debtors have now again been obstructed financially from accessing a debt relief remedy, evidenced by a 60% decrease in LILA applications in the first year of the increase.

It would now appear to us that the driving force behind introducing the new Minimum Asset Procedure is to introduce an administration light procedure to minimise cost and make debt relief accessible to low income debtors again.

However we believe the new procedure will only cause further confusion, possibly disincentivising some debtors from seeking remunerative work.

First is the issue of the six month automatic discharge. This appears unfair when other debtors will possibly not be discharged and will have to pay for 48 months. We also believe it is unfair that debtors under the new MAP will also be able to have individual assets valued up to £1,000 (with a maximum amount of assets of £2,000) and AiB will not be able to realise these during the procedure. In the case of a normal bankruptcy, such assets could potentially be realised, if they were not exempt (for example, company shares).

We recognise and fully support the need to have a debt relief remedy available for debtors on low incomes with minimum assets; however, we believe the proposed procedures are unnecessarily complex and confusing. We also believe the maximum amount of debt allowed for debtor's using this procedure is too low at £10,000 and should be closer to the average level of debts that debtors using the LILA Route have, which is approximately £17,000.

We believe the issue could be resolved by having one type of bankruptcy for all debtors, but introducing either a reduced fee or waiver for certain debtors who are either wholly dependent on social security benefits, have an income below a certain level or receive means tested benefits. This would ensure all debtors are treated fairly, albeit not equally.

Transference of power

We have concerns about the significant transference of powers from the courts to the Accountant in Bankruptcy that is proposed by the Bill.

We accept this is part of a process that began with the Bankruptcy and Diligence etc. (Scotland) Act 2007, when AiB was given power to award debtor applications. That reform has widely been welcomed and shown to be a progressive reform, so we accept there is a case for considering which other powers may be transferred.

We are concerned, however, that there is a risk that the role of the courts in bankruptcy law will be seen as an archaic throwback to the past. We do not accept this is the case and we believe there are dangers in transferring powers from the judiciary to the executive without proper consideration.

In relation to non-controversial matters, we have no objection to these powers being transferred, such as giving AiB power to cure defects or recall bankruptcies where debtors are able to pay off debts in full. We see these amendments as inherently sensible and in everyone’s interest.

Where we do have concerns is in relation to matters such as debtor contribution orders or bankruptcy restriction orders, which may be controversial and cause disputes. We have already touched on our concerns in relation to debtor contribution orders, but believe possibly with the introduction of the Common Financial Statement, this may ameliorate some of the issues.

We are concerned, however, about the proposal to give AiB the power to issue bankruptcy restriction orders.

Since 2008, when bankruptcy restriction orders and undertakings were introduced, there have been in excess of 60,000 sequestrations in Scotland. Despite this, AiB’s office has only found approximately 150 cases where the conduct of the debtor warranted some form of bankruptcy restriction to be applied. In 102 cases the debtors have voluntarily granted undertakings and in only 30 cases have AiB felt it necessary to apply to the court for a bankruptcy restriction order (at the time of writing 20 have been granted and 10 are still pending).

Given that such a small number of cases are involved, we are unclear why AiB now feel it necessary to request these powers are transferred to them. Bankruptcy Restriction Orders have a quasi-criminal nature to them, as often the conduct complained of could result in prosecutions. We believe that it is appropriate that requests for such orders are heard in front of a sheriff. We also believe this is desirable, as a court hearing emphasises the gravity of the issues involved.

We are concerned that if these powers are granted, there will be a dramatic increase in the number of Bankruptcy Restriction Orders being granted, and we would like to know if safeguards will be in place to prevent such an increase. We know debtors will be able to appeal against Orders; however, this will involve legal costs and from our experience the problem is the appeal process is rarely used by debtors in bankruptcy.

To put the effect of this proposal in context, it could be argued that the proposed changes would be tantamount to giving the police the powers to sentence criminals once arrested, denying them a fair hearing and telling them that if they believe they are innocent, it is up to them to appeal.

There is also a danger that the gravity of a Bankruptcy Restriction Order will be diluted as it will be the result of an administrative decision, rather than one made by a sheriff and the deterrent effect of such orders on debtors will be lessened.

In relation to Bankruptcy Restriction Undertakings, we believe these encourage debtors to acknowledge unacceptable conduct and give an undertaking as to their conduct going forward. We believe this is positive behaviour by debtors and should be encouraged.

For these reasons we oppose the repealing of those provisions relating to Bankruptcy Restriction Undertakings.