Economy, Energy and Tourism Committee

13th Report, 2013 (Session 4)

Stage 1 Report on the Bankruptcy and Debt Advice (Scotland) Bill
Economy, Energy and Tourism Committee

13th Report, 2013 (Session 4)

Stage 1 Report on the Bankruptcy and Debt Advice (Scotland) Bill

Published by the Scottish Parliament on 3 December 2013
## Remit and membership

| SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS | 1 |
| INTRODUCTION | 12 |
| **The purpose of the Bill** | 12 |
| **Parliamentary scrutiny** | 13 |
| **Our approach** | 13 |

## Current statutory debt solutions

| Debt Arrangement Scheme | 14 |
| Protected Trust Deed | 14 |
| **Bankruptcy** | 15 |
| **Compulsory sequestration** | 15 |
| **Voluntary sequestration** | 15 |
| **Trends** | 16 |

## ADVICE AND EDUCATION

### Money advice

| Objectives in the Bill | 18 |
| Making it mandatory | 18 |
| Cost of providing advice and the potential impact on resources | 19 |
| Advisers: Definition, quality and qualifications | 22 |

### Financial education

| Objectives in the Bill | 24 |
| Should it be mandatory? | 25 |
| Financial education at school | 27 |
| Cost of providing financial education | 28 |
| Discharge | 30 |
| Online provision | 30 |

## PAYMENTS BY DEBTOR FOLLOWING BANKRUPTCY

### Common Financial Tool

| Objectives in the Bill | 32 |
| How does it work? | 32 |
| Flexibility of the tool | 33 |
Economy, Energy and Tourism Committee

Remit and membership

Remit:

The remit of the Committee is to consider and report on the Scottish economy, enterprise, energy, tourism and renewables and all other matters within the responsibility of the Cabinet Secretary for Finance, Employment and Sustainable Growth apart from those covered by the remit of the Local Government and Regeneration Committee and matters relating to the Cities Strategy falling within the responsibility of the Cabinet Secretary for Infrastructure, Investment and Cities.

Membership:

Christian Allard (from 7 November 2013)
Marco Biagi
Chic Brodie
Murdo Fraser (Convener)
Alison Johnstone
Mike MacKenzie
Hanzala Malik
Mark McDonald (until 7 November 2013)
Margaret McDougall
Dennis Robertson (Deputy Convener)

Committee Clerking Team:

Clerk to the Committee
Stephen Imrie

Senior Assistant Clerk
Fergus D Cochrane

Assistant Clerk
Diane Barr

Committee Assistant
Jonas Rae
Stage 1 Report on the Bankruptcy and Debt Advice (Scotland) Bill

The Committee reports to the Parliament as follows—

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

ADVICE AND EDUCATION

Money advice

Making it mandatory [paragraphs 27-34]

1. The Committee is aware that money advice is already a mandatory requirement in other statutory debt solutions. As such, the Committee reflected on a situation where money advice was mandatory for one debt solution but not another which, in the words of Money Advice Scotland, would lead to a situation where policies “are out of kilter with each other”.

2. On balance, the Committee supports the principle of ‘completeness’ across the debt solutions. The Committee agrees that there should be a requirement for debtors to obtain mandatory money advice from an approved money adviser prior to entering bankruptcy. We do not believe this would be an unnecessary burden on the debtor. Whilst we recognise that while some debtors may consider they are familiar with the range of debt solutions, and what the most appropriate solution for them may be, that may not in reality be the correct solution. The provision of mandatory advice would increase the opportunity for the right debt solution being offered under the right circumstances.

3. In those situations where the debtor is in fact ‘well informed’ then the provision of money advice from the approved adviser may be relatively quick and straightforward.

4. Finally, whilst we recognise that some debtors may choose to ignore the advice given, we do not accept that that is a reason why it should not always be given.
5. It has not been possible to establish whether or not the mandatory provision of money advice will place an additional financial and resource burden on the advice sector. This is because of the lack of quantitative data on increased client numbers and on the potential complexity of the new case load. The Committee therefore asks the Scottish Government to indicate—

- what the impacts on the ‘free money advice sector’ of a 6-8% increase in cases would mean with regards actual client numbers and the time spent by debt advisers with clients, factoring in the complexity of cases involved;
- whether it estimates that the mandatory provision of money advice will lead to a reduction in cases in the ‘free money advice sector’ and, if so, when it would expect to see such a reduction; and
- what other factors it took into consideration for example, increased work for the ‘free money advice sector’ as a result of welfare reform, when it made its decision not to make specific funding available as a consequence of this Bill; and whether, in the light of concerns expressed in evidence, it will make additional funding available to the ‘free money advice sector’.

6. The Committee invites the Scottish Government to put in place processes to—

- assess the direct impact of this requirement on the free money advice sector (once it is in force) and any increase in workload for the sector; and
- monitor, either through case recording systems or specific research, what advice is given by approved money advisers and whether this is accepted or ignored by the debtor (and, if possible, for what reason). This could assist in testing the quality of the advice given, gauging the performance of money advisers, and tracking the progress of debtor cases. This information should be reviewed independently and published as part of the Accountant in Bankruptcy annual report.

7. Finally, the Committee invites the Scottish Government to enter into discussions with the UK Government and the financial/credit industry to gauge whether to increase the levy and contributions paid by the industry to the debt/monetary advice agency to help meet any increased costs.

8. The Committee understands that the definition of a money adviser, which will be set out in Regulations, will be the same at that currently provided for in relation to the Debt Arrangement Scheme. However, the Committee asks the Scottish Government to confirm that those currently categorised as money advisers under the Debt Arrangement Scheme will similarly be classed as money advisers in respect of the requirements under this Bill and that this will include insolvency practitioners.
9. The Committee invites the Scottish Government to indicate when Regulations on this matter will be laid before the Parliament.

10. The Committee urges the Scottish Government to consider that the minimum requirement for an adviser across all debt solutions and in both the free and fee charging sectors should be to have attained type 2 of the Scottish National Standards for Advice and Information. We also invite the Scottish Government to set out how it will monitor/audit all sectors of the industry to ensure that all approved money advisers meet this standard.

11. The Committee invites the Scottish Government to detail how it will ensure there will be a minimum standard with respect to the quality and content of online advice tools and how such tools used across debts sectors will be monitored/audited and regulated.

12. The Committee further invites the Scottish Government to outline what safeguards it will put in place to minimise instances of conflicts of interest when advisers suggest particular debt solutions which are not in the best interest of the debtor or creditor but of the trustee.

Financial education

_Should it be mandatory? [paragraphs 65-74]_

13. The Committee recognises the variance in the degree of support for the mandatory provision of financial education and that, where there is support, this is not overwhelming and without some reservation. However, on balance, we support the mandatory provision of financial education in the circumstances set out in the Bill although we suggest that the Scottish Government and the Accountant in Bankruptcy consider some form of monitoring or pilot project to provide the necessary assurances that this provision is working and planned before being fully implemented across the country.

Financial education at school [paragraphs 75-82]

14. As highlighted above, the Accountant in Bankruptcy is developing a module and a National Standard for Financial Capability Education in conjunction with Money Advice Scotland. The Committee understands that Money Advice Scotland is hosting a consultation day on 2 December 2013 which will allow interested groups (e.g. local authorities, housing associations, Money Advice Service, Citizens Advice Scotland, Money Matters, Scottish Government and the Improvement Service) to discuss the proposed standard and related competencies.

15. We further understand that Accountant in Bankruptcy, with Money Advice Scotland, will seek to pilot the module and the Standard ahead of their roll out.

16. The Committee invites the Scottish Government to outline—
what system of monitoring and review it will put in place with regards the content of the module and the Standard and which external bodies will be involved; and

its approach to teaching financial education in schools.

Cost of providing financial education [paragraphs 83-92]

17. The Committee considers there is a preventative aspect to the provision of financial education in that such education can prevent people getting into future financial difficulty. However, that aim must be supported through appropriate resources and while there is funding in the Financial Memorandum for development of financial education there is no additional money for delivery.

18. The Committee invites the Scottish Government to assess the direct impact of this requirement (once it is in force) on the free money advice sector and any increase in workload for the sector.

19. The Committee welcomes the comments of the Minister that the Scottish Government is in close contact with the free money advice sector. As such, we hope that he will react swiftly and positively to any calls from the sector, once the provision of financial education is underway, for additional funds to properly support the provision of such education if these prove necessary. We invite the Minister to clarify his intent in this matter.

20. The Committee also further invites the Scottish Government to outline how it will monitor the efficacy and ‘success’ of the provision of financial education, for example, reductions in the number of people getting into debt as a direct result.

21. Finally, the Committee recommends that the Scottish Government enters into discussions with the UK Government and the financial/credit industry to gauge whether to increase the levy and contributions paid by the industry to the debt/money advice agency to help meet any increased costs from the provision of financial education.

Online provision [paragraphs 94-100]

22. The Committee is of the view that the provision of financial education in e-format may offer ease and efficiency to some debtors, for example, being able to run through the module at their own pace and at home. However, care must be taken that the provision in e-format does not overshadow its provision in hard copy format for those who do not own, have access to, or do not know how to use a computer.

23. The Committee asks the Scottish Government to detail its strategy for making the module available to those who require financial education in both e-format and hard copy and how it will ensure that no individual is excluded or disadvantaged as a result of them not being able to access, use, or complete the module through a lack of availability in the format they require.
24. While provision has been made for the development of financial education, the Committee invites the Scottish Government to specify what the cost of making the financial education module available will be in (a) e-format and (b) hard copy printing and distribution.

25. The Committee asks the Scottish Government to specify what other formats (e.g. audio, large print) and languages the financial education module will be available in.

26. The Committee invites the Scottish Government to confirm the eventual costs of development and delivery of the module once such figures are available.

PAYMENTS BY DEBTOR FOLLOWING BANKRUPTCY

Common Financial Tool

Flexibility of the tool [paragraphs 109-123]

27. The Committee recognises the concern and the desire that the new Common Financial Tool retains flexibility which allows money advisers to amend, qualify and justify the data around the debtors' income and expenditure which they input into the Tool. The application of such judgements is important and the Committee is pleased that the Scottish Government will prepare guidance around this particular issue.

28. On balance, whilst we note the views expressed by Step Change Debt Charity Scotland regarding its own financial tool, the Committee supports the adoption of the Common Financial Statement as the single, mandatory, Common Financial Tool.

29. The Committee invites the Scottish Government to outline how it will prepare guidance to sit alongside the Tool and which organisations will be involved in its preparation. We recommend that as wide as possible cross-section of interested parties, including StepChange Debt Charity Scotland, are involved.

30. The Committee further invites the Scottish Government to outline how it will monitor whether and how such guidance is then used by debt advisers.

Debtor contribution orders

The 48 month payment period [paragraphs 125-137]

31. The Committee notes the strong views expressed by a cross-section of organisations regarding the proposal to increase the debtor payment period to 48 months from the current 36 months. We further note that the specific proposal of extending to 48 months was not included in the Scottish Government's initial consultation on bankruptcy law reform.
32. On balance, however, the Committee supports the proposal to extend the debtor payment period to 48 months.1

Deductions from the debtor’s wages [paragraphs 138-149]

33. The Committee considers that further assurances from the Scottish Government are needed to clarify the circumstances in which deductions from a debtor’s income will be made. We trust that the regulations which the Scottish Government will bring forward (through amendment to the 1985 Act) can provide that clarity.

34. However, we note that the Delegated Powers and Law Reform Committee has raised this provision with the Scottish Government and is seeking further information on the use of the negative procedure (as an appropriate level of parliamentary scrutiny) and an explanation of the consequences or sanctions which might be imposed under this power.

35. The Committee invites the Scottish Government to indicate whether it intends the new provisions to enable sources of income beyond employment, for example, in relation to pension income, rental income or self-employed income to be deducted from a debtor’s income.

36. The Committee further invites the Scottish Government to detail how any associated administrative costs for an employer will be minimised.

Permitted 6 month payment break

Payment break [paragraphs 150-159]

37. Diverse views have been expressed to the Committee on the merits of a payment break for debtors and the circumstances in which one can be applied for. The Committee recognises the comments made about the flexibility within the existing system and the judgement which trustees can exercise in response to a change in a debtor’s circumstances. However, on balance, the Committee supports its introduction.

38. However, the Committee invites the Scottish Government to clarify whether there is sufficient flexibility in the system proposed to allow for the granting of a payment break to a debtor in response to unforeseen emergencies (e.g. boiler breakdown).

Other issues

Undischarged bankrupts and bank accounts [paragraphs 160-164]

39. The Committee welcomes the engagement by the Minister on this issue and his consideration of “whether there is something that we are usefully able to do as part of the Stage 2 Bill process”. The Committee recommends that an amendment to the Bill is made to make it easier for

---

1 Agreed to by division: For 5 (Christian Allard, Marco Biagi, Chic Brodie, Mike MacKenzie, Dennis Robertson), Against 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall), Abstention 1 (Murdo Fraser). There was a vote on an amendment to this recommendation. The detail of this vote is included in Annex A
undischarged bankrupts to hold a bank account provided that this issue is within the scope of the Bill and the Scottish Parliament’s legislative competence.

BANKRUPTCY WHERE DEBTOR HAS FEW ASSETS

Minimal Assets Process and Low Income Low Asset debtors

Six month discharge period [paragraphs 171-178]

40. The Committee recognises the well-intentioned purpose behind the introduction of a six-month discharge process under the new Minimal Assets Process and that there is support for this in the evidence received. However, it should be noted that this support is not absolute and that there are reservations about what is proposed amongst some of those that gave evidence to us. As such, we consider a cautious approach should be adopted by the Scottish Government at this time, particularly as the new Process will apply to arguably the most vulnerable of debtors.

41. On balance, the Committee supports the provision of a six-month discharge under the new Minimal Assets Process but invites the Scottish Government to publish, one year after the introduction of the Process, a report on the impact of this new ‘early’ discharge provision and what actions it will take if further improvements are needed.2

Fee levels [paragraphs 179-191]

42. The Committee recognises that the setting of a fee to enter into bankruptcy can deter applications from debtors who seek to benefit from the new Minimal Asset Process but who are not in fact eligible.

43. The Committee notes the comments of the Accountant of her desire to set the Minimal Assets Process fee to below £100 if this can be achieved and we support this aim.

44. Whilst we do recognise the problems that can be faced by some debtors in paying this fee, we nevertheless support the need for the Accountant in Bankruptcy to cover its costs.3

Debt level [paragraphs 192-196]

45. The Committee recognises the concerns expressed by a cross-section of organisations in evidence about the £10,000 maximum debt level for entry to the Minimal Assets Process and how this may prevent intended beneficiaries from accessing this route into bankruptcy. Given the evidence

---

2 Agreed to by division: For 6 (Christian Allard, Marco Biagi, Chic Brodie, Murdo Fraser, Mike MacKenzie, Dennis Robertson), Against 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall). There was a vote on an amendment to this recommendation. The detail of this vote is included in Annex A

3 Agreed to by division: For 6 (Christian Allard, Marco Biagi, Chic Brodie, Murdo Fraser, Mike MacKenzie, Dennis Robertson), Against 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall). There was a vote on an amendment to this recommendation. The detail of this vote is included in Annex A
presented to the Committee, we ask the Scottish Government to respond, in
the Stage 1 debate, as to whether it will increase this figure.  

46. If the Scottish Government is not minded at this stage to increase the
maximum debt level, we invite the Scottish Government to detail in its
response to this report how the £10,000 figure will be monitored and what
‘triggers’ would cause it to increase the level at a future point.

FUNCTIONS OF SHERIFF AND ACCOUNTANT IN BANKRUPTCY IN
BANKRUPTCY

The Accountant in Bankruptcy lacks the necessary expertise to adjudicate on such
matters/The potential for conflict of interests/Costs [paragraphs 211-250]

47. The Committee recognises the strong concerns expressed by some
regarding the proposed transfer of certain functions from the courts to the
Accountant in Bankruptcy. We also understand why such concerns were
expressed given the importance of protecting the rights of individuals –
debtors, creditors, trustees – when deciding on such matters. In our view,
the provision of a “fair and just” process is a fundamental principle which
must be, and seen to be, at the core of the decision-making process and that
the transfer of these functions should in no way erode or diminish such
rights.

48. At this stage, the Committee is content to give its approval in principle
to the proposal set out in the Bill. However, we invite the Scottish
Government to respond to a number of issues.

49. With regards to costs, the Committee notes that a fees Order, in due
course, will be brought forward. Consideration therefore of the level of the
fees to be charged, for what, and how these compare with existing fees
charged may be a matter for this Committee, or whichever committee is
designated to consider that Order, to consider at that time. However, we
believe that some additional information from the Scottish Government at
this time would be helpful.

50. The Committee invites the Scottish Government to indicate whether
any additional funds will be required by the Accountant in Bankruptcy to
cover its costs as a result of any increase in staff, training, seeking external
legal and/or insolvency advice to deal with the increase in workload and
responsibility.

51. Furthermore, the Committee invites the Scottish Government to report
before the conclusion of Stage 1 on the outcome of any meeting it has with
the Sheriffs’ Association and outline what actions are to be taken, and when,
as a result.

4 There was a vote on an amendment to this conclusion. The detail of this vote is included in Annex A
52. The Committee further invites the Scottish Government to seek the views of key organisations, such as the Sheriffs’ Association, Law Society of Scotland, Insolvency Practitioners Association, Institute of Chartered Accountants in Scotland, the Association of British Credit Unions Ltd. StepChange Debt Charity Scotland, and Money Advice Scotland on what internal mechanisms the Accountant in Bankruptcy should put in place to guarantee the required separation of staff responsibilities, negate conflicts of interest, ensure there is openness in the internal decision-making process, and how that process itself, and the decisions made, will be clearly and properly publicised and recorded on the Accountant in Bankruptcy website.

53. The Committee also asks the Scottish Government to outline what monitoring the Accountant in Bankruptcy will put in place to assess whether there has been any diminution with respect to the overall process of decision-making and in the quality of the decisions made and how it will publicly report (in the Accountant in Bankruptcy annual report) on performance in relation to the exercise of these new functions.

54. Finally, the Committee asks the Scottish Government to confirm that all information relating to those functions currently dealt with by sheriffs and which is publicly accessible will also be made publicly available should the proposed functions be transferred.

MORATORIUM ON DILIGENCE
[paragraphs 254-261]

55. The Committee is broadly satisfied with these provisions which, as witnesses highlighted, may provide valuable ‘breathing space’ to debtors. However, we would like to see clarity from the Scottish Government on a number of points.

56. The Committee invites the Scottish Government to confirm whether applications under bankruptcy will be treated in the same way as those under the Debt Arrangement Scheme where the moratorium continues until a final decision to grant or refuse the programme is made.

57. The Committee also invites the Scottish Government to clarify—

- what “protection” the Bill provides when the debtor application is incomplete; and
- the position in relation to any funds held in a bank account which might be frozen when the intimation is made and whether there could be some unintended consequences as a result.
DISCHARGE FOLLOWING BANKRUPTCY

Removal of automatic discharge/Debtor co-operation/Interaction between discharge and the requirement to make payments for 48 months/Financial education and discharge [paragraphs 267-281]

58. The Committee accepts that discharge should be linked to the debtor's co-operation as this enables a better balancing of the interests of debtors and creditors. However, the Committee is also persuaded that the ending of automatic discharge is a significant change which may have unintended consequences and is not persuaded by the case for the ending of automatic discharge as proposed in the Bill.

59. The Committee heard evidence that uncooperative debtors may currently be retained under restrictions of bankruptcy for two to 15 years by way of a bankruptcy restriction order obtained through the court. In addition discharge may be deferred beyond the existing period of sequestration if that will benefit the creditor.

60. Should the Scottish Government remain minded to remove automatic discharge, the Committee calls on the Scottish Government to clarify the circumstances in which a debtor would be assessed as not having “co-operated with the trustee”; and, to confirm how a debtor who has remained cooperative but who has not “complied with the statement of undertakings” as a result of changing circumstances could be confident of discharge.

MISCELLANEOUS AMENDMENTS
[paragraphs 282-285]

61. The Committee is content with the objectives of these provisions as set out in the Bill and the Policy Memorandum.

ACCOMPANYING DOCUMENTS AND GENERAL PRINCIPLES
[paragraphs 286-293]

Policy Memorandum

62. The Committee considers the Policy Memorandum provides adequate detail on the policy intention behind the Bill and explains why alternative approaches considered were not favoured. We are also content with the consultation conducted by the Scottish Government prior to introduction of the Bill although we note the proposal to extend the debtor payment period was not consulted upon.

Financial Memorandum

63. Notwithstanding the conclusions we have reached in this report, and the request for further information relating to certain costing, we are content with the level of detailed provided in the Financial Memorandum.
Delegated powers

64. The Committee notes that the Delegated Powers and Law Reform Committee is awaiting further information from the Scottish Government in respect of these provisions. We await that response, and the subsequent consideration and views of that Committee.

General principles

65. The Committee supports the general principles of the Bill. However, as set out in this report, there are a number of areas where we request further information and clarification before the Bill completes its passage through the Parliament.
BANKRUPTCY AND DEBT ADVICE (SCOTLAND) BILL

1. This report sets out the conclusions and recommendations of the Economy, Energy and Tourism Committee’s Stage 1 scrutiny of the Bankruptcy and Debt Advice (Scotland) Bill.

INTRODUCTION

2. The Bill was introduced in the Parliament by the Scottish Government on 11 June 2013. The lead Minister is Fergus Ewing, Minister for Energy, Enterprise and Tourism.

3. The Committee was designated by the Parliamentary Bureau as lead committee for Stage 1 consideration of the Bill. No committees were designated as secondary committees. The Delegated Powers and Law Reform Committee considered and reported on the delegated powers provisions in the Bill while the Finance Committee considered and reported on the Bill’s Financial Memorandum.

The purpose of the Bill

4. The purpose of the Bill is “to amend the Bankruptcy (Scotland) Act 1985; and for connected purposes”. The Policy Memorandum sets out the key principles of the Bill which, the Scottish Government considers, aims to ensure that “appropriate, proportionate, debt management and debt relief mechanisms are available to the people of Scotland which are fit for the 21st Century”. In addition, the Bill seeks “to support the AiB [Accountant in Bankruptcy] in improving its services underpinned by the following principles:

- ensuring that the people of Scotland have access to fair and just processes of debt advice, debt relief and debt management;
- those individuals who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses; and
- securing the best return for creditors by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses”.

5. The Bill proposes a number of changes to the personal bankruptcy regime including:

- providing for compulsory money advice;

---

5 Bankruptcy and Debt Advice (Scotland Bill and accompanying documents. Available at: www.scottish.parliament.uk/parliamentarybusiness/Bills/64534.aspx
6 Delegated Powers and Law Reform Committee. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/69328.aspx
7 Finance Committee. Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/65981.aspx
9 Policy Memorandum, paragraph 3
requiring financial education in certain circumstances;
introducing a "common financial tool" to be used to calculate the payment a
debtor may be expected to make to their creditors;
introducing a new route into bankruptcy for those with little by way of
income and assets – the “Minimal Assets Process”;
extending the period for which the practical consequences of bankruptcy
may be felt to four years;
removing automatic discharge from bankruptcy; and
transferring a number of functions from the sheriff court to the Accountant in
Bankruptcy.

Parliamentary scrutiny

Our approach
6. The Committee issued a call for evidence seeking views from key
individuals and organisations. We held a series of oral evidence sessions and
were ably assisted throughout the process by our adviser, Nicholas Grier, to whom
the Committee is greatly indebted. We are grateful to those who provided written
and oral evidence and helped develop our understanding of this complex area.

7. We also wish to thank the debt advisers and individuals who met with us at
our external event in Irvine and who spoke so openly and ably about their
individual experiences. The Committee appreciates the contribution they each
made to our scrutiny of this Bill. We also wish to thank the advisers at the Money
Matters team at North Ayrshire Council for their worthwhile demonstration and
briefing on the workings of the common financial statement.

8. Copies of the written evidence and Official Reports of the oral evidence
sessions are available on the Bill webpage.10

Current statutory debt solutions

9. The Bill deals with a number of issues relating to bankruptcy and debt
advice. However, it may be helpful to first of all set out some background to the
bankruptcy process. In particular it should be explained that although the words
“bankrupt” (to describe an individual who is unable to pay their debts) and
“bankruptcy” are used throughout this document, technically the words used in
Scots law are “debtor” and “sequestration”. However, in the interest of intelligibility,
the word “sequestration” has been reserved for the specific legal processes of
being declared bankrupt by the courts or the Accountant in Bankruptcy, and the
word “bankruptcy” has generally been used throughout this report in a wider sense
to cover the overall process undertaken by the debtor.

10. The term “statutory debt solution” is used to describe the three legislative
options available to someone who cannot pay their debts: the Debt Arrangement
Scheme, a protected trust deed, and bankruptcy.

10 Economy, Energy and Tourism Committee. Bankruptcy and Debt Advice (Scotland) Bill.
Available at: www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/65168.aspx
**Debt Arrangement Scheme**

11. This enables a debtor to make reduced payments towards their debts under a “debt payment programme” while being protected from court action by creditors. It was introduced by the Debt Arrangement and Attachment (Scotland) Act 2002 and can be described as a form of debt management rather than debt relief as debts are not automatically written off as a result of participation. Rather, it is designed to allow debtors to fully repay their debts over a longer period of time. As a result, those with insufficient disposable income to fully repay their debts (e.g., because they have a low income or a high level of debt) are not usually able to use the Scheme and must consider another way to deal with their debt situation. When a debtor enters the Scheme, interest and charges accruing on their debts are frozen for as long as the programme remains in operation. Debts can be written off where creditors agree and a debtor has participated in the Scheme for 12 years and paid off 70% of what they owe.

12. The Scheme is administered by the Accountant in Bankruptcy. Access is free to debtors but both the Accountant in Bankruptcy and the agencies responsible for distributing payments to creditors take a percentage of the funds distributed to cover their costs. Where creditors object to a debtor’s repayment proposal, the Accountant in Bankruptcy applies a “fair and reasonable” test to decide whether to give approval to the debt payment programme. Unlike other statutory debt solutions, debtors are not required to sell significant assets (such as a home or valuable car) to participate.

13. The debtor must receive advice from an “approved” money adviser before they can enter. The Accountant in Bankruptcy identified that access to an approved adviser was acting as a barrier to debtors’ using the Scheme therefore the law was amended in 2011 to allow a wider category of people to act as advisers, including insolvency practitioners (who charge for their services), Citizens Advice Bureau advisers and local authority staff.

**Protected Trust Deed**

14. This is a voluntary agreement between debtor and creditors in which their income and assets are administered by an insolvency practitioner (known as a trustee) for the benefit of creditors. It is a form of personal insolvency and is regulated by the Bankruptcy (Scotland) Act 1985 (the “1985 Act”). When a trust deed becomes protected, creditors are prevented from taking court action against the debtor. To become protected, a majority of creditors are required to consent to the proposals contained in the deed (in practice, such consent is sometimes “deemed” because a creditor has not responded).

15. Protected trust deeds generally cover a period of three years (to be extended to four years), during which a debtor is expected to make contributions

---


13 The Protected Trust Deeds (Scotland) Regulations 2013. Available at: www.legislation.gov.uk/sdsi/2013/9780111021361
to their debts from income and assets. After the agreed period, if the debtor has co-operated with the trustee, most outstanding debt (not, for example, court fines or student loans) is written off. This makes the deed a form of debt relief. The insolvency practitioner will usually sell any assets of value, including a family home (although the Home Owner and Debtor Protection (Scotland) Act 2010\(^\text{14}\) made it possible to exclude the family home in certain circumstances).

16. The trustee will charge a fee for administering the deed which is paid out of the debtor’s estate (income and assets). This reduces the money available to be distributed to creditors. It also means that a debtor has to have some disposable income (or other assets) to enter otherwise an insolvency practitioner will not be prepared to administer it as they will not get paid. Thus, those on low incomes may not be able to access protected trust deeds.

**Bankruptcy**

17. When a debtor cannot pay debts of £1,500 or more, and they meet other criteria specified in the 1985 Act, they are able to apply for personal bankruptcy. In addition, creditors can, in certain circumstances, force a debtor into bankruptcy. In either case, the debtor’s assets are administered by a trustee (an insolvency practitioner or the Accountant in Bankruptcy) for the benefit of creditors. It is also usual for the trustee to seek a contribution from income. Bankruptcy currently lasts for a period of one year in most circumstances (the Bill seeks to increase the practical impact of bankruptcy to four years). A contribution from income is usually made for three years. The trustee can generally sell any valuable assets, including a family home in order to release funds to pay creditors.

18. The costs of administering a bankruptcy are met from the debtor’s estate and, where there is insufficient money, by the trustee. Therefore, insolvency practitioners are unlikely to be willing to take the role of trustee unless they are sure that they can realise sufficient funds in the estate to meet their fees and costs. In most bankruptcies, the Accountant in Bankruptcy is the trustee and any shortfall in administration costs is met by the public purse.

19. The current routes into bankruptcy are explained in more detail below.

**Compulsory sequestration**

20. A debtor may be compulsorily sequestrated by a creditor following a petition by a creditor to the sheriff court, or by petition by the trustee of a protected trust deed for a debtor when the debtor has not been abiding by the terms of the deed. This Bill does not deal with these routes into bankruptcy.

**Voluntary sequestration**

21. A debtor may (since the Bankruptcy and Diligence etc. (Scotland) Act 2007\(^\text{15}\)) apply for their own sequestration to the Accountant in Bankruptcy. This is relatively cheap, quick, and avoids appearing in the sheriff court. There are three ways this may be done:

---

\(^{14}\) Home Owner and Debtor Protection (Scotland) Act 2010. Available at: www.legislation.gov.uk/asp/2010/6/part/1

\(^{15}\) Bankruptcy and Diligence etc. (Scotland) Act 2007. Available at: www.legislation.gov.uk/asp/2007/3/contents
apparent insolvency route;
- Low Income Low Asset Route (known as “LILA”); and
- certificate route.

22. All three routes require the completion of the same form by the debtor. A debtor with substantial assets but many debts would use the apparent insolvency route; a debtor with few assets and debts within certain parameters would use the Low Income Low Asset route; and a debtor with some assets and income, but nevertheless unable to pay their debts as they fell due, and who would not fit the administration route, could use the certificate route. This requires the debtor to be certified by a money adviser or an insolvency practitioner as being unable to pay their debts as they fall due, and to be aware of the consequences of being sequestrated. The debtor has 30 days after certification to apply for sequestration or the certificate lapses.

Trends

23. The graph below look at recent trends in the use of the three debt options:

![Graph showing trends in bankruptcy, protected trust deeds, and debt arrangement scheme from 2009/10 to 2012/13.]

Source: Accountant in Bankruptcy

Note: the Low Income Low Asset route was introduced in April 2008 and is likely to have contributed to the steep rise in bankruptcies at this time as there was believed to be

---

16 Apparent insolvency is a complex term of law (Bankruptcy (Scotland) Act 1985 s.7) and broadly speaking means that the debtor has been unable or has refused to pay his creditors, usually after a court decree, even if technically his/her assets are greater than his/her liabilities.
significant pent-up demand for this route into bankruptcy from debtors who had previously been unable to access bankruptcy.

24. The remainder of the report sets outs the Committee's consideration of the evidence presented on the Bill.
ADVICE AND EDUCATION

Money advice

Objectives in the Bill
25. The Bill (section 1) proposes that those seeking bankruptcy would have to obtain prior advice from an approved money adviser. Currently, entry into bankruptcy only requires advice to be taken when entering bankruptcy through the Certificate of Sequestration route, the Debt Arrangement Scheme, or the protected trust deed. The intention is to ensure that money advice is taken prior to entering all forms of debt relief and debt management solutions.

26. Money advice differs from financial education (see paragraphs 62-100). It would be given by an approved money adviser to an individual facing debt problems and would be more immediate and particular to the individual’s situation. It would assist in identifying what the right debt solution is for the debtor based on their circumstances.

Making it mandatory
27. Most debtors already obtain money advice. The intention of the Scottish Government is to ensure that all debtors receive advice. There was support for the requirement from, for example, Citizens Advice Scotland, StepChange Debt Charity Scotland, Lloyds Banking Group, Money Advice Trust, and the Association of British Credit Unions Ltd.

28. However, some support was more for the idea in principle rather than for the substance of the proposal. The point was made to the Committee that a well-informed debtor, who knew perfectly well what they were doing when applying for bankruptcy, could not so apply until they had obtained advice. Money Advice Scotland recognised that there “may be people who feel they don’t need the advice, or indeed who do seek advice and then take action to do something else other than what was advised”.

29. In addition, while the Law Society of Scotland recognised that advice was a “good idea in principle” and “should be available” it was “not convinced that such advice should be mandatory”. In oral evidence, it said—

“it should be the choice of the debtor. Making it mandatory is quite a big step to take in impinging on people’s rights.”

30. Similarly, the Institute of Chartered Accountants in Scotland stated that “there are very few individuals who enter into a statutory debt relief arrangement

---

17 Citizens Advice Scotland. Written submission (page 3)
18 StepChange Debt Charity Scotland. Written submission (page 1)
19 Lloyds Banking Group. Written submission (page 1)
20 Money Advice Trust. Written submission (page 2)
21 Association of British Credit Unions Ltd. Written submission (page 3)
22 Money Advice Scotland. Written submission (page 2)
23 Law Society of Scotland. Written submission (page 3)
without obtaining advice from an appropriate source and therefore it is unclear why there is a requirement to introduce this requirement into legislation”. KPMG stated that the lack of an ‘opt out’ “arguably restricts access to debt relief”. This ‘opt out’ was supported by the Institute of Chartered Accountants in Scotland.

31. The Committee is aware that money advice is already a mandatory requirement in other statutory debt solutions. As such, the Committee reflected on a situation where money advice was mandatory for one debt solution but not another which, in the words of Money Advice Scotland, would lead to a situation where policies “are out of kilter with each other”.

32. On balance, the Committee supports the principle of ‘completeness’ across the debt solutions. The Committee agrees that there should be a requirement for debtors to obtain mandatory money advice from an approved money adviser prior to entering bankruptcy. We do not believe this would be an unnecessary burden on the debtor. Whilst we recognise that while some debtors may consider they are familiar with the range of debt solutions, and what the most appropriate solution for them may be, that may not in reality be the correct solution. The provision of mandatory advice would increase the opportunity for the right debt solution being offered under the right circumstances.

33. In those situations where the debtor is in fact ‘well informed’ then the provision of money advice from the approved adviser may be relatively quick and straightforward.

34. Finally, whilst we recognise that some debtors may choose to ignore the advice given, we do not accept that that is a reason why it should not always be given.

Cost of providing advice and the potential impact on resources
35. A key concern expressed by some was the cost impact which the mandatory provision of debt advice will have. In the Financial Memorandum to the Bill, the Accountant in Bankruptcy estimates that “only between 6-8% of current applications that take either the Apparent Insolvency or LILA routes are made without the debtor having had access to money advice”. It also believes that “a proportionate increase of this scale will have a manageable impact on money advisers’ capacity and caseload, particularly as the range of channels available to money advisers to provide advice is expanding” (for example, the telephone or via online advice tools such as StepChange’s ‘Debt Remedy’ tool).

36. It should be noted that the Financial Memorandum makes no provision for additional funding to support mandatory debt advice by, for example, the ‘free

---

25 Institute of Chartered Accountants in Scotland. Written submission (page 5)
26 KPMG. Written submission (page 4)
27 Institute of Chartered Accountants in Scotland. Written submission (page 3)
29 Financial Memorandum, paragraph 53
money advice sector' across local authorities, debt charities and local citizens advice offices.

37. Regarding this point, Citizens Advice Scotland said it was—

“disappointed that theAiB does not think that the requirement for mandatory advice will have an impact on the money advice sector. Such a requirement, in addition to mandatory financial education, will have an impact on free advice services. It needs to be matched with adequate resources to ensure that we can provide that advice without having waiting times that are weeks long”.

38. It went on to say that “if you want quality advice it needs to be funded”.

39. Similar points were made by StepChange Debt Charity Scotland which was “concerned about the detrimental impact on the advice sector of access to free advice, at a time where more and more people are seeking assistance and resources are being cut”. Haddington CAB referred to the “additional pressures this will put on an already overstretched service which is working near to over capacity” and went on to state that if advice is mandatory “then it must be properly resourced and not in the ad hoc way that it is currently”. Further, Falkirk Council had calculated that the Accountant in Bankruptcy’s figure of 6-8% could mean an additional 48-64 clients which, coupled with the provision of financial education, would require “at least one additional team member to meet this increased demand”.

40. The Committee, however, notes the conclusion of Highland Council that while this requirement will be an “additional pressure on our resources” the provision of money advice prior to an application for bankruptcy “will hopefully cut down on the cases we in The Highland Council encounter who have been or are still bankrupt and are again failing to maintain their current liabilities”.

41. Lloyds Banking Group stated that while the banks do not provide a direct aid programme to Citizens Advice Bureaux, which it saw as “the Government’s responsibility” they did “play” their part. Similarly the Consumer Finance Association confirmed that larger lenders of shorter-term finance work with debt advice agencies, for example, by offering funding and working with them on exchange schemes and learning how one another’s businesses work.

42. The Committee raised the cost of providing money advice with insolvency practitioners. The Insolvency Practitioners Association said that “most”

---

32 StepChange Debt Charity Scotland. Written submission (page 1)
33 Haddington CAB. Written submission (page 2)
34 Falkirk Council. Written submission (page 1)
35 Highland Council. Written submission (page 1)
practitioners currently offer “at least a one-hour free consultation” and at times this can be “considerably more”. When asked whether such advice in the future would also be free it said it could “see no reason for that ever to change”.\(^{37}\)

43. A related point was made by Carrington Dean, which drew attention to the free advice sector. It stated that—

> “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”.\(^{38}\)

44. The Committee raised this issue, and the additional “pressure” which the provision of money advice may place on money advisers and citizens advice bureaux, with the Bill team. When asked how the free money advice sector will cope “with all this additional work with no more resources” the Bill team replied that it did—

> “not think that the measure adds a new burden on the advice sector, as we believe that the relevant group of clients will already be known to the money advisers, so it will not increase their work”.\(^{39}\)

45. The Committee raised the issue of resources and the ‘burden’ this requirement will place with the Minister who said that the Scottish Government had “clear information on the additional burden on the money advice sector”. In elaboration, he said that before the Scottish Government decided that mandatory advice would be required before entry into sequestration, it “wanted to ascertain the likely additional burden on the money advice sector” which estimated that advice was not taken in “between 6-8% of current applications” and, as such, “the additional burden will be relatively modest”.\(^{40}\)

46. It has not been possible to establish whether or not the mandatory provision of money advice will place an additional financial and resource burden on the advice sector. This is because of the lack of quantitative data on increased client numbers and on the potential complexity of the new case load. The Committee therefore asks the Scottish Government to indicate—

- what the impacts on the ‘free money advice sector’ of a 6-8% increase in cases would mean with regards actual client numbers and the time spent by debt advisers with clients, factoring in the complexity of cases involved;


\(^{38}\) Carrington Dean. Written submission (page 1)


whether it estimates that the mandatory provision of money advice will lead to a reduction in cases in the ‘free money advice sector’ and, if so, when it would expect to see such a reduction; and

what other factors it took into consideration for example, increased work for the ‘free money advice sector’ as a result of welfare reform, when it made its decision not to make specific funding available as a consequence of this Bill; and whether, in the light of concerns expressed in evidence, it will make additional funding available to the ‘free money advice sector’.

47. The Committee invites the Scottish Government to put in place processes to—

- assess the direct impact of this requirement on the free money advice sector (once it is in force) and any increase in workload for the sector; and
- monitor, either through case recording systems or specific research, what advice is given by approved money advisers and whether this is accepted or ignored by the debtor (and, if possible, for what reason). This could assist in testing the quality of the advice given, gauging the performance of money advisers, and tracking the progress of debtor cases. This information should be reviewed independently and published as part of the Accountant in Bankruptcy annual report.

48. Finally, the Committee invites the Scottish Government to enter into discussions with the UK Government and the financial/credit industry to gauge whether to increase the levy and contributions paid by the industry to help meet any increased costs.

Advisers: Definition, quality and qualifications

49. As referred to earlier, the law in relation to “approved” money advisers was amended in 2011\(^\text{41}\) to allow a wider category of people to act in relation to the Debt Arrangement Scheme and now includes insolvency practitioners, Citizens Advice Bureau advisers and local authority staff.

50. A concern raised in evidence to the Committee was that “more important than simply access to debt advice is that debtors should be able to access suitable quality debt advice”.\(^\text{42}\) The Institute of Chartered Accountants in Scotland believed that the “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 [insolvency practitioners]”.\(^\text{43}\)


\(^{42}\) Institute of Chartered Accountants in Scotland. Written submission (page 3)

\(^{43}\) Institute of Chartered Accountants in Scotland. Written submission (page 3)
51. Citizens Advice Scotland believed that the advice received by debtors should be “suitable and appropriate for their needs”. It highlighted concerns over the qualifications of advisers and that money advice can be provided by organisations or individuals “working towards type 2 of the Scottish National Standards for Advice and Information whereas previously attainment of type 2 was the minimum standard, if the organisation was not a CAB, local authority, insolvency practitioner or authorised by the DAS Administrator”.44

52. In oral evidence, it said “we worry that that is somewhat open-ended, so we would prefer the bill to mention a higher standard”. StepChange Debt Charity Scotland supported “the idea that money advisers should have qualifications up to type II of the Scottish national standards”.45

53. StepChange Debt Charity Scotland also sought clarification on the issue of online advice and what standards would be set with regards quality, relevance etc.46 The Association of British Credit Unions Ltd wanted to ensure that the quality of advice given “is monitored and inspected”.47

54. Views were expressed that insolvency practitioners should be included as approved money advisers. The Committee asked witnesses whether insolvency practitioners should be included in the list of organisations that can provide money advice. Alison Anderson of Armstrong Watson believed that insolvency practitioners “should be included in the list of money advisers. We are highly regulated, experienced and highly qualified to give that money advice”. This view was supported by Wylie & Bisset and Max Recovery Ltd.48

55. A further issue raised with the Committee was safeguards. The Association of British Credit Unions Ltd believed that advisers giving money advice must be independent from the person or company which then manages the recommended debt relief or debt management solution to ensure there are no suggestions of conflicts of interest or “steering” towards a particular debt solution which delivers the biggest profit to the trustees.49

56. Max Recovery Ltd felt there was a need for proper regulation by regulators who are aware of what is going on. It said that “if we said that IPs [insolvency practitioners] could not take on such cases, my concern would be that cosy arrangements might arise whereby people might say, “Okay, I will not take the case, but Fred down the road will take it, and I know that I will get his cases.”” It recognised there would still be scope for abuses, although it did “not think that that would be widespread”. It also questioned whether something might be done during the six-week moratorium period although it did admit that it was “not quite sure

44 Citizens Advice Scotland. Written submission (page 4)
47 Association of British Credit Unions Ltd. Written submission (page 3)
49 Association of British Credit Unions Ltd. Written submission (page 1)
how that would work if people had already acted on the advice when they entered
the moratorium, but perhaps some sort of cooling-off period could be built in”.

57. The Committee understands that the definition of a money adviser,
which will be set out in Regulations, will be the same at that currently
provided for in relation to the Debt Arrangement Scheme. However, the
Committee asks the Scottish Government to confirm that those currently
categorised as money advisers under the Debt Arrangement Scheme will
similarly be classed as money advisers in respect of the requirements under
this Bill and that this will include insolvency practitioners.

58. The Committee invites the Scottish Government to indicate when
Regulations on this matter will be laid before the Parliament.

59. The Committee urges the Scottish Government to consider that the
minimum requirement for an adviser across all debt solutions and in both
the free and fee charging sectors should be to have attained type 2 of the
Scottish National Standards for Advice and Information. We also invite the
Scottish Government to set out how it will monitor/audit all sectors of the
industry to ensure that all approved money advisers meet this standard.

60. The Committee invites the Scottish Government to detail how it will
ensure there will be a minimum standard with respect to the quality and
content of online advice tools and how such tools used across debts
sectors will be monitored/audited and regulated.

61. The Committee further invites the Scottish Government to outline
what safeguards it will put in place to minimise instances of conflicts of
interest when advisers suggest particular debt solutions which are not in the
best interest of the debtor or creditor but of the trustee.

Financial education

Objectives in the Bill

62. The intention of the Bill (section 2) is “to introduce a financial education role,
as part of the Financial Health Service”. The Accountant in Bankruptcy is seeking
to provide support to debtors to help them avoid financial problems in the future
and is developing a National Standard for Financial Capability Education in
conjunction with Money Advice Scotland.

63. This education would not be mandatory in all cases but only when the
trustee considers the debtor meets one or more of the following criteria and it
would be “appropriate” for the debtor. The—

   a) person has been made bankrupt (anywhere) in the previous five years;

Col.3443
51 Policy Memorandum, paragraph 29
52 Policy Memorandum, paragraph 32
b) person has signed a trust deed or Individual Voluntary Arrangement in England & Wales or Northern Ireland (whether completed or failed) within the last five years or similar arrangement;

c) person has been in a debt management programme (this should encompass a Debt Payment Programme under the DAS Scheme, any contractual scheme agreed with creditors, or any informal agreement where regular payments have been made) within the last five years;

d) person has been issued with a Bankruptcy Restrictions Order (BRO) (or Bankruptcy Restrictions Undertaking (BRU), though only for transitional purposes as they are being repealed) or are currently under investigation for a BRO. The trustee can check on the Accountant in Bankruptcy website or the UK Insolvency Service website if there is a BRO or BRU, or ask the debtor if an investigation is ongoing;

e) trustee has identified a pattern of issues, or course of conduct, which would indicate that the individual would benefit from this education (i.e. insolvency is due to poor money management or reckless spending); and

f) person believes they would benefit from financial education and volunteers to participate in the programme.

64. Financial education aims to provide more long-term and general support to a debtor by promoting good money management and would seek to ensure that when a debtor comes out of their debt management or debt relief solution they have the rights skills and knowledge to avoid ending up in debt again.

Should it be mandatory?

65. During our evidence taking, similar concerns were expressed about the mandatory requirement of financial education (and money advice).

66. The Money Advice Service “strongly” supported the inclusion of financial education into the statutory debt process. The Association of British Credit Unions Ltd supported mandatory provision while Citizens Advice Scotland believed that financial education “could have a beneficial impact for debtors” although it did refer to “the lack of detail” in the Bill and drew attention to issues around delivery, provision and participation which “makes this impact difficult to judge.” It also considered that the Bill “leaves significant questions about who will provide the training, what format it will take, who will provide evidence of completion, who will enforce it and what the consequences will be if the person does not take up the financial education”.

67. The Law Society of Scotland believed that financial education was a “good idea in principle”. Similar ‘in principle’ support was expressed by Money Advice

---

53 Money Advice Service. Written submission (page 2)
54 Association of British Credit Unions Ltd. Written submission (page 3)
55 Citizens Advice Scotland. Written submission (page 2)
57 Law Society of Scotland. Written submission (page 3)
Scotland. Lloyds Banking Group was supportive, albeit it was concerned about “demand and capacity”.\(^{59}\)

68. Carrington Dean stated it was “cautious” about this proposal\(^{60}\) while StepChange Debt Charity Scotland stated there was “still uncertainty” around what would be required of the debtor, who would deliver the financial education who would bear its cost.\(^{61}\)

69. Other evidence ‘questioned’ the mandatory nature and whether a voluntary approach might be more productive. For example, Max Recovery Ltd drew attention to the report by the International Association of Restructuring, Insolvency and Bankruptcy Professionals\(^{62}\) which “makes the point that such counselling processes are equally valid if they are offered on a voluntary basis”.\(^{63}\)

70. The voluntary element was highlighted by the Money Advice Trust which does “not support a compulsory element of any kind” and which believes that for financial education to work it is important that “the person taking part is a willing participant” and that the compulsory nature of the education could be seen as a “punishment for indebtedness”.\(^{64}\) In oral evidence, the Institute of Chartered Accountants in Scotland said it did not support the mandatory requirement.\(^{65}\)

71. When asked whether financial education will make any difference, the Bill team referred to the opportunity which financial education will have to “create a preventative solution for assisting people who are in debt”.\(^{66}\)

72. The Accountant (the Chief Executive of the office of the Accountant in Bankruptcy) said that “we are failing some debtors because that education is not available” and that “it is evident that a person who repeatedly experiences bankruptcy needs to understand budgeting and financial management, so we need to help them by providing that education”.\(^{67}\)

73. The Accountant also drew attention to the particular circumstances in which financial education would be mandatory. She said—

> “when the trustee feels that it is warranted. Some people become bankrupt because of a failure in business or whatever, and not because of a lack of

---

\(^{58}\) Money Advice Scotland. Written submission (page 3)

\(^{59}\) Lloyds Banking Group. Written submission (page 1)

\(^{60}\) Carrington Dean. Written submission (page 1)

\(^{61}\) StepChange Debt Charity Scotland. Written submission (page 1)

\(^{62}\) International Association of Restructuring, Insolvency and Bankruptcy Professionals. Consumer Debt Report. Available at: www.insol.org/pdf/consdebt.pdf

\(^{63}\) Max Recovery Ltd. Written submission (page 1)

\(^{64}\) Money Advice Trust. Written submission (pages 2 and 3)


financial education, so there would be no additional benefit in forcing them to go to financial education. We are trying to target the provision.”

74. The Committee recognises the variance in the degree of support for the mandatory provision of financial education and that, where there is support, this is not overwhelming and without some reservation. However, on balance, we support the mandatory provision of financial education in the circumstances set out in the Bill although we suggest that the Scottish Government and the Accountant in Bankruptcy consider some form of monitoring or pilot project to provide the necessary assurances that this provision is working and planned before being fully implemented across the country.

Financial education at school
75. A number of witnesses highlighted their belief that financial education would serve a more effective purpose were it part of the school curriculum. For example, Carrington Dean “strongly” believed that it should be introduced in schools as did the Institute of Chartered Accountants in Scotland which believed that “the most significant impact of financial education can be achieved through delivery much earlier in life and not after bankruptcy”.

76. The Money Advice Service referred to research it had commissioned which found that “the timing of such educational interventions is crucial”.

77. However, there was also recognition of the need to ‘target’ people who were no longer in school. Money Advice Scotland said—

“many people might say, “Let’s have it in schools.” That is fine—let us have it in schools—but there are a whole lot of people who are well beyond school age who could perhaps benefit from it”.

78. The Bill team envisaged “its use in money advice and in a bankruptcy process, once there is a national standard to govern how a certain topic can be taught, or once people can be trained, there is no reason why it cannot be used in other circumstances as well, for example in early years education”.

---

69 Institute of Chartered Accountants in Scotland. Written submission (page 5)
72 Money Advice Service. Written submission (page 2)
79. The Committee raised this matter with the Accountant who said she “would fully support financial education being given a higher profile in the education system, but that would not remove the need for us to address the people who have left school”.75

80. As highlighted above, the Accountant in Bankruptcy is developing a module and a National Standard for Financial Capability Education in conjunction with Money Advice Scotland. The Committee understands that Money Advice Scotland is hosting a consultation day on 2 December 2013 which will allow interested groups (e.g. local authorities, housing associations, Money Advice Service, Citizens Advice Scotland, Money Matters, Scottish Government and the Improvement Service) to discuss the proposed standard and related competencies.

81. We further understand that Accountant in Bankruptcy, with Money Advice Scotland, will seek to pilot the module and the Standard ahead of their roll out.

82. The Committee invites the Scottish Government to outline—

- what system of monitoring and review it will put in place with regards the content of the module and the Standard and which external bodies will be involved; and
- its approach to teaching financial education in schools.

Cost of providing financial education

83. As with the provision of money advice, concerns were expressed at the cost of providing financial education and at the lack of resources made available in the Bill’s Financial Memorandum to deliver this.

84. A number of representations, from a cross section of organisations, were made around the uncertainty of what the cost of providing financial education would be and who would absorb that cost. For example, StepChange Debt Charity Scotland, Money Advice Scotland, the Law Society of Scotland, the Institute of Credit Management and Yuill & Kyle each identified the need for suitable resources in their written submissions. In oral evidence, Citizens Advice Scotland said that the provision of mandatory financial education “will have an impact on free advice services”.76

85. The Committee asked Money Advice Scotland and Citizens Advice Scotland whether they had estimated how much additional resource they will need to deal with the consequences of the Bill.77 Money Advice Scotland did “not know exactly how much funding we need” but did believe that it “will need more funding

---

going forward”. Similarly, Citizens Advice Scotland had not made any predictions but was concerned that, as a result of welfare reform, more people will fall further into debt and that “the number of debt clients will go up anyway”. In addition, StepChange Debt Charity Scotland said that it had seen an increase in demand for advice from its advisers with figures up “60% on last year”. It said it was—

“potentially taking on another six to eight staff to cope with increased demand. We are taking on people now because we want them to be trained up and in a position to help when the legislation changes”. 78

86. The Bill team was unable to give “categoric assurance” that there would be no cost implications but that it was “working hard to minimise the costs”. It stated that, at present, the development costs of the national standard for money advisers and the module are being met within existing budgets”. 79

87. The Minister said that the Scottish Government was “aware of the pressures that they [the free money advice sector] are under” 80 and that it was “in virtually constant contact with the money advice sector, so we hear almost immediately if there are any significant changes”. 81

88. The Committee considers there is a preventative aspect to the provision of financial education in that such education can prevent people getting into future financial difficulty. However, that aim must be supported through appropriate resources and while there is funding in the Financial Memorandum for development of financial education there is no additional money for delivery.

89. The Committee invites the Scottish Government to assess the direct impact of this requirement (once it is in force) on the free money advice sector and any increase in workload for the sector.

90. The Committee welcomes the comments of the Minister that the Scottish Government is in close contact with the free money advice sector. As such, we hope that he will react swiftly and positively to any calls from the sector, once the provision of financial education is underway, for additional funds to properly support the provision of such education if these prove necessary. We invite the Minister to clarify his intent in this matter.

91. The Committee also further invites the Scottish Government to outline how it will monitor the efficacy and ‘success’ of the provision of financial education, for example, reductions in the number of people getting into debt as a direct result.

92. Finally, the Committee recommends that the Scottish Government enters into discussions with the UK Government and the financial/credit industry to gauge whether to increase the levy and contributions paid by the industry to the deb/monetary advice agency to help meet any increased costs from the provision of financial education.

Discharge
93. During the Committee’s consideration of the evidence received, some concerns were expressed about the issue of financial education and discharge from bankruptcy. These are dealt with this matter later in this report (see ‘Discharge Following Bankruptcy’ chapter below).

Online provision
94. The Financial Memorandum states that “Financial Capability Education” has a cost of £8,300 to develop a national standard and £13,000 to develop training modules. However, the Committee recognises the point made by Citizens Advice Scotland that the online provision of financial education—

“may be inappropriate for many debtors. A recent survey of bureaux found that over half of clients seeking advice on benefits did not have access to the internet at home. We therefore suggest that the financial education will need to be in a number of flexible formats that are accessible to all debtors. The detail of these proposals, currently lacking, will determine whether this is a successful policy.”

95. The Committee raised this with the Bill team who said that “there will be the possibility of a paper-based module for people who cannot do it online, but in general we hope that it will be available electronically”.

96. The Committee is of the view that the provision of financial education in e-format may offer ease and efficiency to some debtors, for example, being able to run through the module at their own pace and at home. However, care must be taken that the provision in e-format does not over-shadow its provision in hard copy format for those who do not own, have access to, or do not know how to use a computer.

97. The Committee asks the Scottish Government to detail its strategy for making the module available to those who require financial education in both e-format and hard copy and how it will ensure that no individual is excluded or disadvantaged as a result of them not being able to access, use, or complete the module through a lack of availability in the format they require.

98. While provision has been made for the development of financial education, the Committee invites the Scottish Government to specify what

---

82 Financial Memorandum, Table 5
83 Citizens Advice Scotland. Written submission (page 4)
the cost of making the financial education module available will be in (a) e-format and (b) hard copy printing and distribution.

99. The Committee asks the Scottish Government to specify what other formats (e.g. audio, large print) and languages the financial education module will be available in.

100. The Committee invites the Scottish Government to confirm the eventual costs of development and delivery of the module once such figures are available.
PAYMENTS BY DEBTOR FOLLOWING BANKRUPTCY

Common Financial Tool

Objectives in the Bill
101. The Bill (section 3) seeks to create a “Common Financial Tool”, the purpose of which would be to assess what (if any) contribution from their income a debtor is able to make to pay to their creditors. The Accountant in Bankruptcy believes the provision of the Tool fits in with one of the Bill’s key principles, that those who can pay should pay, and that the Tool will ensure that all individuals “are treated the same providing consistency, transparency and clarity for individuals across all debt relief and debt management solutions”.\(^{85}\)

How does it work?
102. There are currently two ‘systems’ used by the money advice sector to assess clients’ disposable income. The Common Financial Statement\(^{86}\) is used by many advisers and has the backing of the British Bankers’ Association and the Finance and Leasing Association (representing most mainstream lenders which are not banks). The other tool is used by StepChange Debt Charity,\(^{87}\) one of the UK’s biggest providers of debt advice and set up and supported by the credit industry.

103. Both systems however work largely in the same way and get broadly to the same point. The adviser would input the debtor's income then subtract necessary expenditure (mortgage/rent, food shopping or fuel bills etc.) to see what is left over (known as ‘disposable income’). That disposable income may then be used to pay creditors.

104. The Scottish Government set up the Common Financial Tool Working Group which recommended (July 2013) that the Common Financial Statement is adopted as the single mandatory tool.\(^{88}\) There was evidence to suggest that the benefits of adopting the Common Financial Statement system are more than the benefits of adopting the StepChange system.\(^{89}\)

105. The Statement is seen as being mutually beneficial in that offers from money advisers are dealt with quicker and with greater consistency than has been the case hitherto while creditors benefit from efficiency savings in having standard processes in place. It contains standard headings for household expenditure and uses figures (the “trigger figures”) from the Living Costs and Food Survey (a UK Government survey carried out by the Office for National Statistics) which indicates average low income household expenditure in certain categories. As long as the standard format is followed and the expenditure indicated is not higher

\(^{85}\) Policy Memorandum, paragraph 34
\(^{87}\) StepChange Debt Charity. Available at: [www.stepchange.org/Debtremedy.aspx](http://www.stepchange.org/Debtremedy.aspx)
than the average in that area from the Survey, creditors agree to accept the calculation of disposable income without further enquiry. This speeds up the process for both debtors and creditors.

106. The Statement currently provides some flexibility in relation to a debtor’s expenditure. It is open to a debtor/money adviser to put forward expenditure above the average (“trigger”) figures and provide an explanation for this, for example, where a debtor spends money beyond what is average on a car which they need to travel to work (perhaps in rural areas). It is then up to the creditors whether they agree to accept the calculation on this basis. Debtors may also put forward expenditure which is below average in any area and use the surplus to make bigger payments to their debts.

107. By introducing one mandatory system, the Scottish Government hopes to create transparency and consistency in the way debtors are treated so that, regardless of which organisation they approach or statutory debt solution they opt for, the assessment will be the same. The Tool will also be used to assess which debt solution is the most appropriate for the debtor (although there may be other factors which impact on the debt option chosen). Its use would also ensure that the debtor pays the same contribution from income, regardless of the statutory debt option they chose.

108. The Minister outlined reasons for choosing the Statement, one of which was that “it is slightly more generous to debtors”. In addition, the method of assessing contributions “will be more consistent, because it will be based on one set of guidance”.  

Flexibility of the tool

109. There was broad support for the provision of a single Common Financial Tool and recognition of the benefits which this could bring. For example, the TDX Group said—

“we welcome a standardised CFT. The purpose of which should be to improve standardisation across providers and debt solutions and thereby improving transparency and reducing cost”.  

110. Carrington Dean also supported a single Tool although it did believe that it “cannot be a one size fits all tool” and there must be a continuation of the “discretion” which exists within the current Statement.

111. There was also support expressed by the Association of British Credit Unions Ltd which believed that the single Tool “could potentially remove

---

91 TDX Group Ltd. Written submission (page 1)
92 Carrington Dean. Written submission (page 2)
competition between providers”\textsuperscript{93} while the Money Advice Trust was “very pleased” with the decision to adopt the Statement as the single mandatory Tool.\textsuperscript{94}

112. However, there were also notes of caution expressed in some of the evidence we received. For example, the Institute of Chartered Accountants in Scotland, while welcoming the Tool “in principle”, wanted “much more detail on how this will function before fully committing our support to the proposals”\textsuperscript{95} while the Law Society of Scotland felt that the proposed Tool was “too rigid and prescriptive and there should be some latitude allowed to the insolvency practitioner to allow for unusual circumstances”.\textsuperscript{96}

113. From the money advice sector, Citizens Advice Scotland, while “broadly supportive”, highlighted concerns around flexibility. It stated that it “is imperative” that the Tool “strikes the right balance between debtors and creditors, as a tool that favours unrealistically high contributions would lead to missed payments and debtors falling out of debt solutions”.\textsuperscript{97}

114. Strong concerns were expressed by StepChange Debt Charity Scotland which considered its tool was “well respected and received by creditors”, that the decision by Accountant in Bankruptcy to adopt the Statement was based “on limited analysis” and was “puzzled why both tools cannot be used in parallel.” It stated that this would “mitigate any risk to the Scottish Government should there be a problem with either tool”.\textsuperscript{98}

115. It also stated that the decision to use the Statement will require it “to fundamentally change our money adviser IT system” at “considerable time and a cost to the charity which we expect to be tens of thousands of pounds”.\textsuperscript{99}

116. Money Advice Scotland did not support having two tools and its view was that “we should keep it simple and have one tool that seems to work”.\textsuperscript{100}

117. As highlighted above, a concern across the evidence was that of flexibility which is regarded as a key element of both current systems and which must be maintained as part of the new Tool.

118. The Committee raised this matter with both the Bill team and the Minister. In response to the question whether there is “sufficient flexibility” to accommodate vastly different circumstances the Bill team confirmed—

“there is flexibility in the tool and it is important to remember that some of the elements are discretionary. The trigger figures are just that; they are

\textsuperscript{94} Money Advice Trust. Written submission (page 1)
\textsuperscript{95} Institute of Chartered Accountants in Scotland. Written submission (page 6)
\textsuperscript{96} Law Society of Scotland. Written submission (page 3)
\textsuperscript{97} Citizens Advice Scotland. Written submission (page 4)
\textsuperscript{98} StepChange Debt Charity Scotland. Written submission (page 2)
\textsuperscript{99} StepChange Debt Charity Scotland. Written submission (page 2)
triggers for further consideration. It would be for the trustee to make a case if there were particular circumstances, and that case could be considered, as happens now; there is flexibility for the trustee”.

119. On the issue of flexibility, the Minister said that he wanted—

“to be sure that the common financial tool takes account of the differing circumstances of people throughout Scotland, including people in rural Scotland and the Highlands and Islands. For example, the costs of transport—the costs of getting to and from work—need to be measured in a sufficiently flexible way to cater for people who might live a long distance away from their work. I will personally ensure that issues of that nature are raised”.

120. The Committee recognises the concern and the desire that the new Common Financial Tool retains flexibility which allows money advisers to amend, qualify and justify the data around the debtors’ income and expenditure which they input into the Tool. The application of such judgements is important and the Committee is pleased that the Scottish Government will prepare guidance around this particular issue.

121. On balance, whilst we note the views expressed by Step Change Debt Charity Scotland regarding its own financial tool, the Committee supports the adoption of the Common Financial Statement as the single, mandatory, Common Financial Tool.

122. The Committee invites the Scottish Government to outline how it will prepare guidance to sit alongside the Tool and which organisations will be involved in its preparation. We recommend that as wide as possible cross-section of interested parties, including StepChange Debt Charity Scotland, are involved.

123. The Committee further invites the Scottish Government to outline how it will monitor whether and how such guidance is then used by debt advisers.

Debtor contribution orders

Objectives in the Bill

124. The Bill (section 4) allows the Accountant in Bankruptcy to make an order which fixes the debtor’s contribution to be paid towards their bankruptcy. The Accountant in Bankruptcy considers this to be a largely administrative change as a result of the use of the Common Financial Tool to calculate appropriate payments.

---

The 48 month payment period

125. It is proposed that a debtor contribution order will last for four years (currently three years) although this could be shorter, where a debtor makes sufficient payments (from income or assets) to settle their debts in full, or longer, either because the debtor has taken a payment break or because they agree to make payments for a longer period.

126. Concerns were expressed by some about the rationale for the extension of the payment period to four years. Citizens Advice Scotland, for example, was concerned that increasing the contribution period “may result in a growing number of debtors who are unable to maintain those contributions, resulting in increased hardship”. Its understanding of this proposal was that it was “aimed at supporting the full costs recovery policy of the Accountant in Bankruptcy.” Its view was that “ultimately debt relief is for people who have no other way of managing their debts and increased failures will have an impact on both debtors and the Accountant in Bankruptcy’s costs”.103

127. Money Advice Scotland believed that the 48 month period “is too long” and questioned whether there was sufficient evidence that the existing system was not working for creditors and debtors. It also highlighted that whilst “there will be a better return for creditors it may result in less, as there will be trustees’ fees over 48 months and not 36 months”.104

128. The Association of Business Recovery Professionals R3 Scottish Technical Committee questioned whether the increase would “improve returns to creditors” and highlighted there may be an additional cost of monitoring, gathering and distributing a fourth year of contributions. In its experience, “the longer the process, the more likely it is to fail”.105 Similarly, Carrington Dean did not consider the proposal to increase from 36 months to 48 was “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”. It also highlighted the possibility of “a significant increase in returns to creditors” and would lead “to more debtors defaulting on payments and disputes arising”.106

129. The Institute of Chartered Accountants in Scotland stated that whilst it could “see the initial attractiveness of the duration of debtor contributions being extended”, it questioned 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”.107

130. The Insolvency Practitioners Association, on the other hand, was “broadly content with the proposal”.108

---

103 Citizens Advice Scotland. Written submission (page 5)
104 Money Advice Scotland. Written submission (page 3)
105 Association of Business Recovery Professionals R3 Scottish Technical Committee. Written submission (page 2)
106 Carrington Dean. Written submission (page 3)
107 Institute of Chartered Accountants in Scotland. Written submission (page 6)
108 Insolvency Practitioners Association. Written submission (page 2)
131. In its evidence to the Committee, Citizens Advice Scotland questioned why there was a need for change and stated that the proposals seemed “to be a bit out of left field and it was not consulted on, but it is in the bill”. It said that “the AiB did not appear to have done any research to show that the longer period would increase returns to creditors.” It said—

“Indeed, it could decrease the returns, if more breakages occurred. We are concerned that no research has been done into whether the proposal has any benefits”. 109

132. This view was supported by Lloyds Banking Group which said that “the proposal was not in the consultation.” If it had been, the Bank’s view was that it would not have pushed for 48 months because “bankruptcy is about wiping the slate clean and 36 months is an adequate payment period”. 110

133. Money Advice Scotland said that “extending the period to 48 months will involve more trustee fees”. This view was supported by StepChange Debt Charity Scotland which referred to research it had carried out and which looked at the difference between cases which lasted three years and cases which lasted four years. This showed that if a case “goes up an extra year, there is a 15 per cent increase in breakages of payment arrangements”. 111

134. During his evidence to the Committee, the Minister said that the Scottish Government thought that “48 months is about right and that there should be consistency across the piece”. 112 He also stated that the Scottish Government did consult 113 “with stakeholders on the repayment period with regard to whether five years was an arbitrary timescale and stakeholders agreed that fixing the period at four years would better balance the needs of debtors and creditors” although he was “aware that the 48-month period was not unanimously supported”. 114

135. Overall, the Minister considered the system “will also be slightly less harsh to debtors overall, which will mean that there are likely to be fewer defaults, with all the problems that those entail.” His view was that “if debtors fail to make the payments, that triggers enforcement action, with all the corresponding unpleasantness and pressure” and that “in the round, I think that we have struck the right balance”. 115

---

113 Scottish Government, Consultation on Bankruptcy Law Reform. Available at: www.scotland.gov.uk/Publications/2012/02/6283
136. The Committee notes the strong views expressed by a cross-section of organisations regarding the proposal to increase the debtor payment period to 48 months from the current 36 months. We further note that the specific proposal of extending to 48 months was not included in the Scottish Government's initial consultation on bankruptcy law reform.

137. On balance, however, the Committee supports the proposal to extend the debtor payment period to 48 months.\textsuperscript{117}

\textit{Deductions from the debtor’s wages}

138. The Bill proposes that it will be possible to require a third party, including an employer, to make payment to the trustee of any money owed by the debtor. In the case of an employee, this is equivalent to an “earnings arrestment” where an employer is required to pay a proportion of the debtor’s salary to a creditor.

139. In some types of employment, for example certain financial services, it is possible to dismiss an employee if they have debt problems. Debtors in this situation will usually be keen to keep their financial problems hidden from their employer. Under the Bill, it will only be possible for a trustee to require contributions to be deducted from the debtor’s salary by an employer if the debtor fails to make the contribution themselves on two occasions. The trustee will also have discretion in relation to whether to approach an employer directly.

140. It will be possible for a debtor to request that the Order is varied because they have had a change of circumstances. It will be up to the trustee to decide whether to grant a variation. In most circumstances, the trustee will be the Accountant in Bankruptcy (or someone acting on her behalf), although it is also possible for the trustee to be an insolvency practitioner in private practice. It will be possible for the debtor, or any other interested party, to request that the Accountant in Bankruptcy reviews any decision regarding a variation. Thereafter, it will be possible to appeal to a sheriff.

141. The Association of British Credit Unions Ltd agreed that the law should be changed to allow an assessed contribution to be deducted directly from an individual’s wages as this should reduce the instances of payment programmes failing.\textsuperscript{118} Similarly, the Insolvency Practitioners Association was “broadly content”.\textsuperscript{119}

142. Citizens Advice Scotland stated that while “we understand the reasoning for this proposal, we would argue that this should only be used as a method of last resort.” Its view was that debtors may be in employment where disclosure of their debts through this method may put their position at risk, as for example, a debtor who works for a financial institution or who handles a large amount of money at

\textsuperscript{117} Agreed to by division: For 5 (Christian Allard, Marco Biagi, Chic Brodie, Mike MacKenzie, Dennis Robertson), Against 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall), Abstention 1 (Murdo Fraser). There was a vote on an amendment to this recommendation. The detail of this vote is included in Annex A

\textsuperscript{118} Association of British Credit Unions Ltd. Written submissions (page 3)

\textsuperscript{119} Insolvency Practitioners Association. Written submission (page 2)
work. It stated that debtor contribution orders “must therefore only be used where all other routes of payment have been exhausted”.

143. Money Advice Scotland was similarly “concerned” the proposal “may be counter productive, as it could result in dismissal and in which case no one gets paid”. Likewise, StepChange Debt Charity Scotland believed that deductions “should only be allowed with the express permission of the individual”.

144. KPMG stated that it was “important that there is clarity” that a trustee will only notify a debtor’s employer if the debtor does not comply with the Order otherwise debtors could be concerned about the impact on their current employ and also their ability to change employment in the future. It also drew attention to the proposed provision which only applies where a debtor “has an employer” and that there may, “potentially” be “a gap where employers are not in Scotland”. It stated that in its experience, there “has been resistance from employers” to collecting payments from an employee’s income as it can add administrative costs.

145. A similar point was made by the Institute of Chartered Accountants in Scotland which, while it considered the proposal to be “a welcome addition for trustees”, expressed “caution as a result of the imposition of cost and bureaucracy on employers”. It also believed that further provisions are required to enforce contributions from income sources beyond employment, for example in relation to pension income, rental income or self-employed income”. KPMG also drew attention to this.

146. The Committee considers that further assurances from the Scottish Government are needed to clarify the circumstances in which deductions from a debtor’s income will be made. We trust that the regulations which the Scottish Government will bring forward (through amendment to the 1985 Act) can provide that clarity.

147. However, we note that the Delegated Powers and Law Reform Committee has raised this provision with the Scottish Government and is seeking further information on the use of the negative procedure (as an appropriate level of parliamentary scrutiny) and an explanation of the consequences or sanctions which might be imposed under this power.

148. The Committee invites the Scottish Government to indicate whether it intends the new provisions to enable sources of income beyond employment, for example, in relation to pension income, rental income or self-employed income to be deducted from a debtor’s income.

---

120 Citizens Advice Scotland. Written submission (page 5)
121 Money Advice Scotland. Written submission (page 4)
122 StepChange Debt Charity Scotland. Written submissions (page 2)
123 KPMG. Written submission (page 3)
124 Institute of Chartered Accountants in Scotland. Written submission (page 4)
125 Delegated Powers and Law Reform Committee. 54th Report, 2013 (Session 4). Bankruptcy and Debt Advice (Scotland) Bill (SP Paper 412)
149. The Committee further invites the Scottish Government to detail how any associated administrative costs for an employer will be minimised.

Permitted 6 month payment break

Payment break

150. The Bill enables debtors in bankruptcy to apply for a “payment break” similar to that permitted under the Debt Arrangement Scheme. Such breaks can be for up to six months and applied for, in certain circumstances, where the debtor’s disposable income (the income available to pay creditors) has been reduced by at least 50% (calculated using the Common Financial Tool). It will only be possible to apply for one payment break during the course of a bankruptcy. The criteria to be used when a break can be applied for are where—

the debtor is:

- experiencing a period of unemployment or a change in employment;
- on leave from employment due to the birth or adoption of a child, or the need to care for a dependant;
- ill;
- going through a divorce or dissolution of a civil partnership;

or:

- someone who shared the care of a dependant with the debtor has died.

151. It will be up to the trustee to decide whether to grant a payment break if, in their opinion, it is fair and reasonable. The trustee will usually be the Accountant in Bankruptcy (or someone acting on her behalf) but may also be an insolvency practitioner in private practice. The debtor, or any other interested party, may ask the Accountant in Bankruptcy to review any decision in relation to a break. Thereafter, it will be possible to appeal the decision to a sheriff. Where a break is granted, additional contributions will be expected at the end of the four year contribution period to cover the payments missed as a result. Its effect will therefore be to extend the length of time a debtor is expected to make contributions towards their debts in bankruptcy.

152. The Association of British Credit Unions Ltd supported the six month payment break as did Citizens Advice Scotland, StepChange Debt Charity Scotland, Max Recovery Ltd, and Highland Council.

153. Carrington Dean, however, was “concerned that the circumstances in which a debtor may apply for a payment break are overly restrictive” and believed that a break should be allowed in respect of “unforeseen emergencies such car or boiler breakdown that leads to unexpected costs for the debtor.” A similar point was made by Money Advice Scotland which, while in principle it welcomed the break, believed that—

---

126 Association of British Credit Unions Ltd. Written submissions (page 3)
127 Citizens Advice Scotland. Written submission (page 5)
128 StepChange Debt Charity Scotland. Written submission (page 3)
129 Max Recovery Ltd. Written submission (page 2)
130 Highland Council. Written submission (page 2)
131 Carrington Dean. Written submission (page 3)
“the current system allows for peaks and troughs for individuals and if they have an emergency etc. and trustees can be flexible. In the new system, the payment break is only triggered under certain circumstances. It considers this proposal could lead to “severe consequences” for debtors”.

154. The Money Advice Trust welcomed the break but queried the proposal that one of the eligibility criteria is “a reduction of at least 50% in their disposable income” which it considered to be “an unrealistic proposal” and could mean that “either the contribution to bankruptcy would cease, with all the related consequences, or the bankrupt would have to fall behind on essential household bills such as rent, mortgage and council tax in order to keep up with the required payments”.

155. The Association of Business Recovery Professionals R3 Scottish Technical Committee was “not sure why a break should be restricted to 6 months.” It stated that it had already raised concerns that re-commencing contributions after a break period is notoriously difficult. The same point was made by the Law Society of Scotland.

156. City of Edinburgh Council regarded the break as “a pointless tool as a debt variation is more realistic and advantageous to the client”. Similarly, Alison Anderson of Armstrong Watson did not consider “that payment breaks in debtor contribution is required” and that “the present current practice of informal payment breaks works well”.

157. The Royal Faculty of Procurators in Glasgow stated that it was “not entirely clear why a debtor would wish to apply for such a break” and it felt that a break may be “appropriate” where the debtor experiences some unforeseen circumstances (car breakdown or home repairs for example). It “respectfully submitted that it would be just for the law to allow a payment break in certain “crisis” situations”.

158. Diverse views have been expressed to the Committee on the merits of a payment break for debtors and the circumstances in which one can be applied for. The Committee recognises the comments made about the flexibility within the existing system and the judgement which trustees can exercise in response to a change in a debtor’s circumstances. However, on balance, the Committee supports its introduction.

159. However, the Committee invites the Scottish Government to clarify whether there is sufficient flexibility in the system proposed to allow for the
granting of a payment break to a debtor in response to unforeseen emergencies (e.g. boiler breakdown).

Other issues

Undischarged bankrupts and bank accounts

160. Citizens Advice Scotland was “disappointed” that the Bill makes no mention of the problems that undischarged bankrupts experience retaining their bank account. Its view was that the majority of debtors lose their bank account after being made bankrupt and struggle to open a new account. Citizens Advice Scotland stated that this “goes against the principle of financial rehabilitation outlined in the Bill, as a bank account is an essential service in today’s society”.139

161. The Committee is aware that the draft Deregulation Bill, which is currently under consideration by the UK Parliament, contains an amendment which would reduce the risk to banks of operating bank accounts for undischarged bankrupts. This provision would apply to England and would amend the Insolvency Act 1986.

162. The Law Society of Scotland said that a similar amendment to this Bill “would be useful” and that “it would seem sensible to consider the same approach up here to ensure that there is no distinction north and south of the border”.140 A similar view was expressed by Money Advice Scotland that “such a measure would be completely congruent with the concept of a Scottish financial health service.” Money Advice Scotland thought that “it is imperative to address the matter”.141

163. When questioned, the Minister said that the Scottish Government was “quite clear that the stakeholder opinion is in favour of something being done in Scotland”. He indicated that the Scottish Government was considering issues around whether such an amendment to this Bill would be within scope and competency and that he was “expecting further advice on the matter”.142

164. The Committee welcomes the engagement by the Minister on this issue and his consideration of “whether there is something that we are usefully able to do as part of the Stage 2 Bill process”.143 The Committee recommends that an amendment to the Bill is made to make it easier for undischarged bankrupts to hold a bank account provided that this issue is within the scope of the Bill and the Scottish Parliament’s legislative competence.

---

139 Citizens Advice Scotland. Written submission (page 2)
BANKRUPTCY WHERE DEBTOR HAS FEW ASSETS

Minimal Assets Process and Low Income Low Asset debtors

Objectives in the Bill

165. Currently, debtors with little in the way of income or assets can access a route into bankruptcy known as the “Low Income Low Assets” route. The rationale behind its introduction was that there was a group of low income debtors who could not, at the time, access bankruptcy because they could not demonstrate “apparent insolvency” (this usually requires a creditor to take court action to enforce a debt). Creditors are often reluctant to take court action against low income debtors because, if the debtor has little in the way of income or assets, they will be unable to recover their debt or the associated costs of court action and enforcement.

166. This route into bankruptcy is only open to debtors who meet certain criteria in relation to income and assets. There is no requirement to demonstrate “apparent insolvency”. The Accountant in Bankruptcy is always the trustee in these cases.

167. The Bill proposes to replace the Low Income Low Assets route with a new Minimal Assets Process which would be used by a similar group of debtors, although the entry criteria will be more restrictive. The Scottish Government believes that the criteria will be clearer, ending alleged confusion among stakeholders. Its view is that in the years since the Low Income Low Asset route was introduced, it has been necessary to transfer a number of cases from the route to full bankruptcy because the criteria for accessing the route were not met (see below).

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of LILA cases transferred to full bankruptcy</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009-10</td>
<td>1,024</td>
</tr>
<tr>
<td>2010-11</td>
<td>1,311</td>
</tr>
<tr>
<td>2011-12</td>
<td>1,076</td>
</tr>
<tr>
<td>2012-13</td>
<td>774</td>
</tr>
</tbody>
</table>

168. The Minimal Assets Process bankruptcy will last for six months, although a debtor will be restricted in accessing further credit for an additional six months. The Accountant in Bankruptcy will act as trustee in all such bankruptcies. The Bill seeks to minimise the administration requirements for such bankruptcies so, for example, the Accountant in Bankruptcy will not have to contact creditors as there will be no dividends to distribute. The Bill enables a Minimal Assets Process bankruptcy to transfer to a full bankruptcy (where the normal administrative requirements would apply) should this be necessary. Such action may need to be taken where, for example, it is discovered that a debtor has (or has acquired since the bankruptcy was originally dealt with) assets above the maximum value.

\[144\] Policy Memorandum, paragraph 76
\[145\] Policy Memorandum, paragraph 77
The effects of full bankruptcy are, broadly speaking, the same. However, there will be a heavier administrative burden on the trustee as there may be income and assets which can be released for the benefit of creditors. The Minimal Assets Process bankruptcy process contains more restrictions than the Low Income Low Asset route, thus, fewer people will be eligible to use it. The table below compares the two processes:

**Comparison between the Low Income Low Asset route into bankruptcy and the proposed “Minimal Assets Process”**

<table>
<thead>
<tr>
<th>ENTRY CRITERIA</th>
<th>LILA</th>
<th>MINIMAL ASSETS PROCESS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum debt level</td>
<td>£1,500</td>
<td>£1,500</td>
</tr>
<tr>
<td>Maximum debt level</td>
<td>None</td>
<td>£10,000</td>
</tr>
<tr>
<td>Can the debtor own land?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Can the debtor own assets?</td>
<td>Assets of up to £10,000 with no single asset worth more than £1,000*</td>
<td>Assets of up to £2,000, with no single asset worth more than £1,000*</td>
</tr>
<tr>
<td>What are the income requirements?</td>
<td>Social security benefits or income below £247.60 (2012/13 levels) per week</td>
<td>Social security benefits (which must have been in payment for at least six months) or assessed as having no disposable income using the &quot;common financial tool&quot;</td>
</tr>
<tr>
<td>How is insolvency demonstrated?</td>
<td>No requirement to demonstrate insolvency</td>
<td>“Certificate for Sequestration” issued by adviser</td>
</tr>
</tbody>
</table>
| Are there other restrictions? | • must be habitually resident in Scotland  
• must pay the fee  
• must not have successfully applied for own bankrupt in the past five years | • must be habitually resident in Scotland  
• must pay the fee  
• must not have successfully applied for own bankrupt in the past five years  
• must not have had a “Minimum Assets Process” bankruptcy in the past ten years  
• must have received money advice  
• must have signed a “statement of undertakings” |
| When will the debtor be discharged from bankruptcy? | After one year | After six months (although credit restrictions will remain in place for a further six months) |

*A car worth up to £3,000 which is “reasonably required” for the use of the debtor is excepted from this total.

Source: Scottish Parliament Information Centre. Briefing on the Bankruptcy and Debt Advice (Scotland) Bill

---

146 Scottish Parliament Information Centre. Briefing on the Bankruptcy and Debt Advice (Scotland) Bill. Available at: [www.scottish.parliament.uk/parliamentarybusiness/67601.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/67601.aspx)
170. In evidence received by the Committee, there was broad support for the introduction of the Minimal Assets Process from a cross section of organisations. For example, from the Association of Business Recovery Professionals R3 Scottish Technical Committee, Citizens Advice Scotland, TDX Group Ltd, Yuill & Kyle, Insolvency Practitioners Association, Law Society of Scotland, and the Money Advice Trust all indicated a degree of support. However, again, this support was qualified and there remained some concerns on a number of key issues. These are set out below.

**Six month discharge period**

171. The Association of Business Recovery Professionals R3 Scottish Technical Committee stated that the six month period for bankruptcy in the Minimal Assets Process was “too short”. Its view was that the proposal was—

“inconsistent however that a MAP debtor should be discharged after just 6 months, albeit with the possibility for that period to be extended to 12 months. In a full sequestration, discharge is no longer to be automatic. It is our view that the discharge policy should be the same in all bankruptcy processes”.

172. In oral evidence, it referred to this as an “unfeasibly short space of time”.

173. Similarly, TDX Group Ltd stated that “the debtor requires a period longer than 6 months to rehabilitate and remain protected within the solution”. Alison Anderson of Armstrong Watson agreed with the TDX Group Ltd. The Law Society of Scotland also did not agree that a Minimal Assets Process debtor should be discharged after six months, with the possibility for that period to be extended to 12 months and believed that the period of sequestration for the Process should be the same as the ordinary sequestration procedure, namely 12 months.

174. The Institute of Chartered Accountants in Scotland felt that—

“in general, the MAP will just lead to confusion. The detail of it, whereby someone is discharged after six months but has restrictions imposed on

---

147 Association of Business Recovery Professionals R3 Scottish Technical Committee. Written submission (page 2)
148 Citizens Advice Scotland. Written submission (page 5)
149 TDX Group Ltd. Written submission (page 1)
150 Yuill & Kyle. Written submission (page 2)
151 Insolvency Practitioners Association. Written submission (page 2)
152 Law Society of Scotland. Written submission (page 4)
153 Money Advice Trust. Written submission (page 4)
154 Association of Business Recovery Professionals R3 Scottish Technical Committee. Written submission (page 2)
156 TDX Group Ltd. Written submission (page 1)
158 Law Society of Scotland. Written submission (page 4)
them for 12 months, is even more confusing. There is a general difficulty with the MAP”.159

175. Others took a different view. Money Advice Scotland recognised the concerns of others that it could be a disincentive to someone who ended up out of work because they might have to stay out of work to continue to be eligible to stay within the process. It stated that “six months seems a reasonable way to allow them to get back on the route again” but it also warned of the potential for “unintended consequences”.160

176. The Accountant in Bankruptcy’s view was that where it was not receiving any contribution from a debtor then it should be able to state that such a person has demonstrated that they cannot make further contributions to paying off their debts and that, in those circumstances, it was better to “rehabilitate that individual so that they can move back into society faster”. The Accountant in Bankruptcy concluded that this “can be done within six months”.161

177. The Committee recognises the well-intentioned purpose behind the introduction of a six-month discharge process under the new Minimal Assets Process and that there is support for this in the evidence received. However, it should be noted that this support is not absolute and that there are reservations about what is proposed amongst some of those that gave evidence to us. As such, we consider a cautious approach should be adopted by the Scottish Government at this time, particularly as the new Process will apply to arguably the most vulnerable of debtors.

178. On balance, the Committee supports the provision of a six-month discharge under the new Minimal Assets Process but invites the Scottish Government to publish, one year after the introduction of the Process, a report on the impact of this new ‘early’ discharge provision and what actions it will take if further improvements are needed.162

Fee levels
179. The Bill provides for a fee in the region of £100 to be charged for the new Minimal Assets Process through subsequent regulations. Citizens Advice Scotland expressed its concern that “there will still be a fee for MAP” although it did “welcome” that the fee will be £100. However, it believed that some debtors “will still struggle to afford the fee” and cited evidence that the Low Income Low Asset fee “already acts as a barrier to debt relief for many low income debtors, and will continue to do so under the new regulations”. Its evidence shows that since the introduction of the £200 fee for bankruptcy in June 2012, it has—

162 Agreed to by division: For 6 (Christian Allard, Marco Biagi, Chic Brodie, Murdo Fraser, Mike MacKenzie, Dennis Robertson), Against 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall). There was a vote on an amendment to this recommendation. The detail of this vote is included in Annex A
“recorded 796 issues in which the debtor has been unable to afford to pay the fee. This figure is based on statistical recording from around 85% of bureaux, which suggests that the actual figure will be higher than this. Comparing year-on-year figures (Jan-Mar 2012 compared to Jan-Mar 2013), shows that cases in which the debtor had been unable to afford the fee increased by 59%, suggesting that the increase in the fee from £100 to £200 has increased this barrier”.  

180. In oral evidence, Citizens Advice Scotland said that “somebody should be able to pay half the fee up front and pay the rest in instalments but be unable to get discharged unless they pay all the instalments”. In relation to the option currently provided by the Accountant in Bankruptcy to pay the fee in instalments before becoming bankrupt, it pointed out that “very few people manage to save up money for the fee and that people are stuck in the situation of being unable to pay.” Its views were that the fee needs to be reduced and that it would also welcome any alternative way of paying it.  

181. Carrington Dean was similarly concerned at the level of the proposed fee and stated that 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 believed that “the new procedure will only cause further confusion, possibly disincentivising some debtors from seeking remunerative work”.  

182. The Committee sought views on whether administration costs associated with the Minimal Assets Process would be lower, hence the proposed lower fee. The Institute of Chartered Accountants in Scotland said that administration costs would be lower “because less work will be done”. It, however, questioned whether debtors would be able to afford the £100 fee and that “it might be better to use any savings to make it possible for those people not to have to pay a fee”.  

183. Money Advice Scotland believed that “if people are so hard pushed, the fee should be waived, as happens in England and Wales”.  

184. The Law Society of Scotland also questioned what the purpose of the fee was and whether it was “to allow the Accountant in Bankruptcy to be self-funding”.

---

163 Citizens Advice Scotland. Written submission (page 6)  
165 Carrington Dean. Written submission (page 4)  
185. The Bill team indicated that the current £200 fee was “precisely one of the reasons” why it had introduced the new Minimal Assets Process for debtors unable to make a contribution and whose circumstances and debt levels are such that Accountant in Bankruptcy feels “they should have a simpler, less administratively complex and most likely cheaper route into bankruptcy”.

186. When the fee level was raised with the Accountant she acknowledged that “one of the big criticisms is that debtors in a state of extreme hardship cannot afford the £200 LILA application fee.” She considered that the Accountant in Bankruptcy will be able to deliver the minimum asset process cheaper and therefore make it more accessible to such debtors. She also said that her “target is to make the process as accessible as possible”. She stated that—

“People who apply for the minimal asset process are having significant debt written off; we are taking away the need to make significant repayments to that debt, so something in the region of £80 to £100 is not insignificant”.

187. However, she also acknowledged that “with reducing budgets, my organisation has to cover its costs”. As such, it would appear to the Committee that one of the reasons for the use of an application fee under the new Minimal Assets Process is to ensure that the office of the Accountant in Bankruptcy, as an executive agency, will be self-funding. In response to questioning on the level of any new fee, the Accountant said she was keen “to get to a final estimate for the fee” and was “keen to bring the fee down to below £100 if I can”. It is perhaps worth noting here that the Committee understands that the fee for a debt relief order in England and Wales (similar to the Process route proposed in the Bill) is £90.

188. According to the Bill’s Financial Memorandum, the estimated cost of administering the new Minimal Assets Process, based on the 3,481 Low Income Low Asset applications (2012-13), will be £348,100, with associated development and delivery costs of £135,000-£180,000.

189. The Committee recognises that the setting of a fee to enter into bankruptcy can deter applications from debtors who seek to benefit from the new Minimal Asset Process but who are not in fact eligible.

190. The Committee notes the comments of the Accountant of her desire to set the Minimal Assets Process fee to below £100 if this can be achieved and we support this aim.

---

173 Financial Memorandum, Table 5
191. Whilst we do recognise the problems that can be faced by some debtors in paying this fee, we nevertheless support the need for the Accountant in Bankruptcy to cover its costs.  

Debt level

192. StepChange Debt Charity Scotland was concerned that the eligibility criteria for the Minimal Assets Process, and in particular the level of debt fixed at £10,000, will “reduce access to this route for some clients”. It stated that the “average debt of a Scottish StepChange Debt Charity client in 2012 was £14,506, which would result in around 50% not being eligible for MAP” and that the “Accountant in Bankruptcy’s own data shows that nearly 65% (2,262) of current LILA clients (3,481) would not be eligible for MAP”.  

193. Carrington Dean believed that the figure 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”. The Money Advice Trust also queried whether the £10,000 debt limit “is too low and will not capture the intended beneficiaries of the MAP process.” It commented that—

“If someone is on benefit level income they may easily have debts over £10,000 but will not have the income available to make payments under the formal bankruptcy route. We would suggest the debt limit should be £20,000 or above if any debt limit is required”.  

194. The Committee asked the Bill team whether £10,000 was “the right figure”. In response, the Bill team drew attention to the principles behind the figure which were—

“to set it at a level that will be of use to debtors in the kind of circumstances that we are trying to address through the minimal asset process; and, secondly, to focus the criteria so that we reduce the number of transfers and are confident that the people who go into the minimal asset process and have the benefits of a simpler and less administratively complex route into bankruptcy will remain in that process. We do not want cases that we discover after a short period ought to go through the full administration process”.  

195. The Committee recognises the concerns expressed by a cross-section of organisations in evidence about the £10,000 maximum debt level for entry to the Minimal Assets Process and how this may prevent intended beneficiaries from accessing this route into bankruptcy. Given the evidence

---

174 Agreed to by division: For 6 (Christian Allard, Marco Biagi, Chic Brodie, Murdo Fraser, Mike MacKenzie, Dennis Robertson), Against 3 (Alison Johnstone, Hanziela Malik, Margaret McDougall). There was a vote on an amendment to this recommendation. The detail of this vote is included in Annex A

175 StepChange Debt Charity Scotland. Written submission (page 3)

176 Carrington Dean. Written submission (page 4)

177 Money Advice Trust. Written submission (page 4)

presented to the Committee, we ask the Scottish Government to respond, in the Stage 1 debate, as to whether it will increase this figure.\textsuperscript{179}

196. If the Scottish Government is not minded at this stage to increase the maximum debt level, we invite the Scottish Government to detail in its response to this report how the £10,000 figure will be monitored and what ‘triggers’ would cause it to increase the level at a future point.

\textsuperscript{179} There was a vote on an amendment to this conclusion. The detail of this vote is included in Annex A
Role of the Accountant in Bankruptcy

197. The office of Accountant in Bankruptcy was created by the Bankruptcy (Scotland) Act 1856. The Accountant in Bankruptcy’s duty was to supervise all bankruptcy proceedings. In the intervening years, the office was merged with that of the Accountant of Court. The Accountant in Bankruptcy was given new duties to act as trustee in cases where the debtor’s estate was likely to be insufficient to cover the cost of administering the bankruptcy by the Bankruptcy (Scotland) Act 1993. This led to the office being re-constituted as a separate person. The Accountant remains an officer of the court, although the office also has executive functions conferred on it by Scottish Ministers. The Accountant appoints staff and agents to carry out work on her behalf.

198. The Committee understands that a function of these agents (Wylie & Bisset LLP, Insolvency Support Services and KPMG) is to supply professional insolvency advice, when asked, to Accountant in Bankruptcy. They are also members of the Accountant in Bankruptcy’s Policy and Cases Committee, which provides advice on challenging cases and policy issues and can provide insolvency training to staff.

199. The Accountant in Bankruptcy currently has the following duties under the 1985 Act:

- supervision of trustees and commissioners in bankruptcy – and trustees in protected trust deeds – in carrying out their legal functions;
- acting as trustee in certain bankruptcies;
- auditing the accounts of trustees (in both bankruptcy and protected trust deeds) and fixing their fees and outlays where requested to do so;
- determination of debtor applications for bankruptcy;
- applying to a sheriff for a bankruptcy restriction order to be imposed on a debtor (although the Bill proposes to give the Accountant in Bankruptcy this power without the need to apply to a sheriff);
- maintenance of the Register of Insolvencies; and
- provision of an annual report to the Court of Session and Scottish Ministers.

200. Where the Accountant has reason to believe that a trustee is not performing their legal duties, she must report the matter to the sheriff (who can take steps to censure or remove the trustee from office). If she suspects a criminal offence has been committed by a trustee, debtor or third party, she must report the matter to the Lord Advocate.

201. Under the Debt Arrangement and Attachment (Scotland) Act 2002, the Accountant in Bankruptcy is responsible for the administration of the Debt Arrangement Scheme, including the approval of debt payment programmes.
Objectives of the Bill

202. The Bill makes provision to transfer a number of functions currently carried out by the courts to the Accountant in Bankruptcy. The powers which may be gained are to:

- grant a debtor contribution order (previously a sheriff would set required contributions from income if necessary);
- deal with an application from an executor to make a deceased debtor’s estate bankrupt;
- re-open cases where assets which should have vested in the trustee are discovered after the debtor has been discharged;
- discharge debtors (previously, discharge was automatic with trustees able to apply to the sheriff if they wished discharge to be delayed);
- deal with applications by trustees for directions on how to deal with a case;
- recall a bankruptcy where a debtor can repay their debts in full (along with the administration costs of the bankruptcy). Recalls for other reasons (e.g. errors in the original award) will remain with the sheriff;
- decide on any objections to the appointment of a replacement trustee;
- replace a trustee acting in multiple bankruptcies where that trustee dies or ceases to be qualified to act as a trustee (the current procedure requires an application to the Court of Session);
- remove a trustee from office where the Accountant in Bankruptcy is “satisfied that there are reasons to do so” or, specifically, where the trustee is unable to act or has conducted themselves in a manner which means they should no longer act;
- extend the time a trustee has to decide whether to continue with a contract entered into by the debtor. A trustee may choose to continue contracts where it would be beneficial to the interests of creditors. Where the Accountant in Bankruptcy is trustee, an application must still be made to the sheriff;
- make bankruptcy restrictions orders (which extend the restrictions which apply during bankruptcy for a longer period). These are used where a debtor has behaved dishonestly or uncooperatively;
- convert a trust deed to bankruptcy where proceedings are underway in another European Union country;
- cure defects in the bankruptcy procedure where these relate to clerical errors or a failure to comply with any time limit laid down in the Bankruptcy (Scotland) Act 1985 (where no alternative procedure for dealing with the time limit is laid down in the legislation). The Sheriff will remain responsible for dealing with other defects in procedure including those relating to documents lodged with the court or time limits in court proceedings; and
- value “contingent” debts (i.e. debts which are dependent on some future event such as the outcome of a court case).

203. In each case, it will be possible to apply to the Accountant in Bankruptcy for a review of any decision and, thereafter, appeal the matter to the sheriff.

204. A number of organisations made arguments to the Committee that it is inappropriate to remove the courts’ role in adjudicating over bankruptcy disputes.
There was particular concern that the various roles which the Accountant in Bankruptcy plays in the bankruptcy process may result in a conflict of interest.

205. The Scottish Government argues that removing the proposed processes listed above from court will reduce the courts’ workload, potentially resulting in quicker decision-making and reducing the duplication of work between the Accountant in Bankruptcy and the Scottish Court Service. A number of the procedures are characterised by the Scottish Government as “administrative”.¹⁸⁰

206. Whilst there was broad support in the evidence received that certain administrative functions could and should be transferred, there were disagreements in respect of those functions which the Accountant in Bankruptcy regarded as administrative.

207. For example, in its evidence, the Law Society of Scotland said that it was—

“not suggesting that administrative matters should not be dealt with by the Accountant in Bankruptcy, but anything that is of a legal nature or could have a considerable impact on an individual’s status deserves proper judicial scrutiny. The point that we are trying to make is not that administrative matters should not be dealt with by the Accountant in Bankruptcy. However, it is not straightforward or easy to say what is administrative and what is a legal matter. As drafted, the bill does not clearly address how it will be decided whether something is administrative or legal”.¹⁸¹

208. In its oral evidence, the Institute of Chartered Accountants in Scotland said it was “not making a blanket statement that we do not want the AiB to do things— we are talking about certain instances”.¹⁸²

209. In a letter received by the Committee, the Sheriffs Association stated that it viewed—

“with concern many of the proposals which should not be regarded as solely administrative in nature but involve issues of the rights and obligations of both debtors and creditors and indeed possibly third parties. The court plays an important role in overseeing the conduct of a number of important decisions and the interpretation of the legislation. We would suggest that particular scrutiny might be applied to those functions which are judicial rather than purely administrative”.¹⁸³

210. The main areas of concern expressed in the evidence received by the Committee are set out below.

¹⁸⁰ Policy Memorandum, paragraph 226
¹⁸³ Sheriffs’ Association. Written submission (page 1)
The Accountant in Bankruptcy lacks the necessary expertise to adjudicate on such matters

211. Some stakeholders argued that the Accountant in Bankruptcy has insufficient expertise in the areas of law or insolvency practice to take on some of the roles proposed by the Bill. For example, the Law Society of Scotland was “concerned that the Accountant in Bankruptcy will not have the appropriate qualifications and expertise”\footnote{Law Society of Scotland. Written submission (page 6)} while a similar point was made by the Association of Business Recovery Professionals R3 Scottish Technical Committee which did not support the transfer of functions as “such work needs to be done by those with appropriate qualifications and experience.” Its view was that “this experience exists in the courts and the accountancy, insolvency and legal professions”.\footnote{Association of Business Recovery Professionals R3 Scottish Technical Committee. Written submission (page 4)}

212. Others concerned at a lack of experience and expertise within the Accountant in Bankruptcy included the Insolvency Practitioners Association which said “we question significantly whether the AiB would ever have the level of expertise that would satisfy either the trustee or the creditors concerned”.\footnote{Scottish Parliament Economy, Energy and Tourism Committee. \textit{Official Report, 9 October 2013}. Col.3415}

213. The Law Society of Scotland stated that if “complex matters are referred to someone who does not have the necessary qualifications and expertise, they will take longer to deal with them and people will be unhappy with the decision.” Its view was that cases involving multiple parties with differing views need “to go through an appeal process and the whole thing will take a lot longer and be more costly”.\footnote{Scottish Parliament Economy, Energy and Tourism Committee. \textit{Official Report, 30 October 2013}. Col.3495}

214. The Institute of Chartered Accountants in Scotland suggested an alternative to moving functions from the sheriffs to the Accountant in Bankruptcy would be “to consider extending the role of Sheriff Clerks, many of whom already have relevant expertise, and perhaps limiting submissions to specific courts”.\footnote{Institute of Chartered Accountants in Scotland. Written submission (page 4)}

The potential for conflict of interests

215. The Accountant in Bankruptcy is currently responsible for policy development in relation to insolvency, general supervision of trustees and making a number of bankruptcy-related decisions, as well as acting as the trustee in the majority of bankruptcies. It was argued by some that the transfer of powers from the courts to the Accountant in Bankruptcy will only exacerbate the potential for conflicts of interests to arise. For example, the Accountant in Bankruptcy’s role in supervising (and, under the Bill’s provisions, giving directions to) trustees while also acting as a trustee, and also its role in investigating and then awarding bankruptcy restrictions orders.

216. It should be noted that the Bill introduces provisions (into the 1985 Act) for decisions made by the Accountant in Bankruptcy to be the subject of an internal

\begin{footnotes}
\item[184] Law Society of Scotland. Written submission (page 6)
\item[185] Association of Business Recovery Professionals R3 Scottish Technical Committee. Written submission (page 4)
\item[188] Institute of Chartered Accountants in Scotland. Written submission (page 4)
\end{footnotes}
review in most cases. Generally, parties must apply to the Accountant to review her decision before they can take the matter to the courts. It has been argued by some that the introduction of a review process adds unnecessary cost and delay, especially where the situation requires a quick resolution.

217. The Law Society of Scotland was concerned at the impact which the proposed transfer of some functions would have. Its view was that—

“giving the Accountant in Bankruptcy a 'quasi-judicial' role, as well as administrative functions, creates a conflict in the Accountant in Bankruptcy's responsibilities between the legal rights and interests of debtor and creditors (which must have priority) and considerations of administrative efficiency (which must be subordinate).”\(^{189}\)

218. It believed that the Accountant in Bankruptcy “should be free to concentrate on administrative efficiency and not be put in the position of having to balance conflicting priorities”.\(^{190}\)

219. It also believed that the “self-review proposal simply adds an extra layer of administration, an extra layer of cost and an extra delay, and that does not serve anybody's interest”.\(^{191}\)

220. The Institute of Chartered Accountants in Scotland believed that the Bill would “engrain” conflicts of interest.\(^{192}\) It was also concerned at the public perception. It said—

“I accept that different individuals would no doubt review decisions that had been made, but I remember saying last week that there is obviously an inherent temptation that, if people in a person's organisation made the decision, that person would start from the point of view that the decision is probably right and will look only for something that is wildly wrong, rather than take a totally independent view. The public perception is that, on the face of it, someone who reviews a decision of their own organisation does not seem to be independent at all”.\(^{193}\)

221. The Insolvency Practitioners Association said that “no matter how much effort is put into the separation of functions, inevitably, one decision-making body will be reviewing its own decisions”.\(^{194}\)

222. It should be noted that such views were not expressed by the ‘free money advice sector’ and other witnesses. For example, the Association of British Credit Unions Ltd drew attention to its consultation process in which it suggested that an

---

\(^{189}\) Law Society of Scotland. Written submission (page 6)

\(^{190}\) Law Society of Scotland. Written submission (page 6)


\(^{192}\) Institute of Chartered Accountants in Scotland. Written submission (page 1)


independent review panel should be established. It understood that the argument against that was “mainly about the cost, but the cost of going to court for a creditor is also significant, especially for credit unions, which do not have the budget to pursue court actions.” The Association of British Credit Unions Ltd indicated that it would value having a review function and that its idea was for that to be completely independent, but it was “satisfied to see how that worked out as part of the AiB’s compliance unit”. 195

223. Similar comments were made by StepChange Debt Advice Charity Scotland which had “some concerns about the impartiality of the Accountant in Bankruptcy when undertaking some of these functions” and had previously sought assurances on this i.e. that the arrangements which the Accountant in Bankruptcy puts in place—

“should make people confident that the same people will not review a case and that a decision by one part of the organisation should be reviewed by another part. The organisation needs to have distinct and separate sections that do not have a cozy relationship with one another. They should work alongside one another almost as if they were external to the organisation”. 196

224. The Money Advice Trust stated that it believed that “most of these proposals make sense and will streamline the application process”. 197 StepChange Debt Charity Scotland agreed that taking some administrative processes out of the court “makes sense, because it would help the decisions for a client or debtor to be processed as quickly as possible”. 198

225. Max Recovery Ltd said it had “no real issue with the AiB acting in the proposed way” although it did have two provisos – that the Accountant in Bankruptcy “needs to be properly resourced to carry out the function, which raises the question of how the function would be funded.” Secondly, that adequate checks and balances are needed to ensure that anything that the Accountant in Bankruptcy does is done in the correct manner. It indicated that “there is a bit more work to do on that”. 199

226. The view of Money Advice Scotland was that “complete separation of powers would be needed” and that it had concerns about “the agency having powers at all the different levels”. It stated that the—

“presentation of the arrangements should make people confident that the same people will not review a case and that a decision by one part of the organisation should be reviewed by another part. The organisation needs to

197 Money Advice Trust. Written submission (page 6)
have distinct and separate sections that do not have a cosy relationship with one another. They should work alongside one another almost as if they were external to the organisation”. 200

227. It believed the arrangement was workable “if it is managed properly” and the necessary “checks and balances” are in place and “seen to be in place, so that the public have confidence in the system”. StepChange Debt Charity Scotland agreed with this position and indicated that the Accountant in Bankruptcy “must report on its decisions, to ensure that it is open and transparent.” It believed that, if possible, “a neutral person should also be involved in the decision-making process”. 201

228. In a letter received by the Committee, the Chief Executive of the Scottish Court Service stated that—

“we support the transfer of administrative and non-contentious functions from the sheriff to the Accountant in Bankruptcy as set out in the Bill. The transfer of these functions will allow decisions to be made at the appropriate level and improve the efficiency of the process, freeing up time in the court programme to deal with matters which require judicial consideration and decision.” 202

229. For the Committee, this letter raised the issue of who would decide what was a “non-contentious function” and sought clarification from the Accountant on who ultimately will make the decision about whether something is an administrative matter or a legal matter. The Accountant said that—

“my agency and senior staff will: that is who will make the decision on matters relating to the transfer of functions that is proposed in the bill. We will retain the right to seek direction—if we feel we need to—from the sheriff and the courts”. 203

230. In her written response received by the Committee on the transfer of functions, the Accountant stated that “nothing in this Bill removes the individual’s right of ultimate appeal to the courts.” and that “this is a fundamental right” and “one which Accountant in Bankruptcy absolutely supports and it is not something that I would ever wish to see revoked”. 204

231. In her evidence, the Accountant highlighted the internal “or self-review procedures” which existed in other public sector bodies, for example, local authorities (council tax liabilities) and the NHS (decisions about care, treatment and services). With specific reference to the issue of conflicts of interest, the

---

202 Scottish Court Service. Written submission (page 1)
204 Accountant in Bankruptcy. Written submission (page 1)
Accountant considered that organisations and public bodies such as these “manage this without significant difficulties”.

232. On the issue of review, the Accountant stated that she was “quite clear that members of the reviewing team must have no previous involvement in the original decision” and that arrangements to make sure this happens “are already in place and are used to carry out analogous reviews of decisions under the Debt Arrangement Scheme”.

233. The Accountant also responded to the concerns expressed to the Committee about the expertise of the Accountant in Bankruptcy to make decisions. She stated that she “absolutely” stood by the ability of staff to “take on these new responsibilities and carry out their work to the required standards”. Furthermore, the Accountant drew attention to the situation when a complex matter is brought to them, indicating that “my staff will do exactly as a sheriff might do” and that “when they are required to make a determination on such matters, they will often seek advice”.

234. The Accountant considered there were certain “advantages” to these transfers with a centralised decision making process providing an opportunity for more consistency. She highlighted that “since bankruptcy decisions moved to the sheriff” (under the Bankruptcy and Diligence etc. (Scotland) Act 2007), different sheriffs have, at times, made different decisions where the circumstances of the case have been the same.

235. Finally, the Accountant noted in her letter to the Committee that this is not the first time that functions have been transferred from the judiciary to Accountant in Bankruptcy. She stated that the 2007 Act removed the process for debtor applications from the courts to Accountant in Bankruptcy and indicated that it was her view that no one “would reasonably argue that this transfer has not been a success.”

236. During his evidence on the matter, the Minister acknowledged that the Scottish Government and the Accountant in Bankruptcy needed “to engage a little bit more with stakeholders and the committee to ensure that we are getting it right, as we believe we are” and indicated he would offer to meet the Sheriffs’ Association to discuss its concerns.

237. He also stated that he made it clear that if the Bill as drafted in any way fails to temper the principle, he would amend it, concluding that—

“we will tidy up the bill if we need to do so. However, I am not persuaded that that is necessary. That is the first substantive point to be made. The
transfer of functions is not new: it has already started, it is working well, and there is no fundamental removal of the right of access to the courts”.\(^\text{211}\)

**Costs**

238. The Committee notes that the Financial Memorandum states that costs associated with this change will be “cost neutral” and that the Accountant in Bankruptcy will recover the costs of operating the new functions through fees charged (such fees will be set by Order). The Accountant in Bankruptcy informed the Committee that it was unable, at this time, to estimate what the costs would be but “expects to be able to make information on costs available when it brings forward the relevant fees order”.\(^\text{212}\)

239. As a result, it has not been possible for us to identify what the costs of the transfer of functions to the Accountant in Bankruptcy from the courts will be. The Committee has also not been able to identify whether any costs will be new, or an increase in existing costs. For example, will the Accountant in Bankruptcy require additional staff to deal with this increased workload, will appropriate training be required to allow staff to properly fulfil the new function, and might Accountant in Bankruptcy require additional external legal and/or insolvency advice as a result?

240. In his evidence to the Committee, Joel Martin Conn, a solicitor and notary public, stated he had a “significant concern” about Accountant in Bankruptcy’s ability to fund the dispensing of such powers. He said that matters concerning whether or not to grant a discharge, approve a contribution, give directions, or grant recall of sequestration, require quasi-judicial determination and that it—

“is not yet possible to assess whether the Accountant in Bankruptcy as a department holds sufficient expertise so as to provide such quasi-judicial decision making. If it does not, the estimates for resourcing must be considered critically as significant training or recruitment shall be required to give effect to these new roles. Alternatively, external legal support will need to be obtained and there appear to be no costings in regards to procurement of such legal support”.\(^\text{213}\)

241. The Accountant’s view was that the “fair and just processes of debt advice, debt relief and debt management” would—

“eliminate duplication, enable swift and appropriate decision-making and minimise costs for all parties – debtors, creditors and the public purse. It is in pursuit of exactly these ambitions that our Bill proposes to move certain functions from the courts to Accountant in Bankruptcy – because we believe that this transfer will support decisions that are fair, that can be made expediently and that come at less cost”.\(^\text{214}\)


\(^\text{212}\) Financial Memorandum, paragraph 41

\(^\text{213}\) Joel Martin Conn. Written submission (page 1)

\(^\text{214}\) Accountant in Bankruptcy. Written submission (page 1)
242. In addition, the Minister stated “I strongly believe that the proposals are fair, will lead to greater efficiency and will cost less to the taxpayer”.\textsuperscript{215}

243. The Committee recognises the strong concerns expressed by some regarding the proposed transfer of certain functions from the courts to the Accountant in Bankruptcy. We also understand why such concerns were expressed given the importance of protecting the rights of individuals – debtors, creditors, trustees – when deciding on such matters. In our view, the provision of a “fair and just” process is a fundamental principle which must be, and seen to be, at the core of the decision-making process and that the transfer of these functions should in no way erode or diminish such rights.

244. At this stage, the Committee is content to give its approval in principle to the proposal set out in the Bill. However, we invite the Scottish Government to respond to a number of issues.

245. With regards to costs, the Committee notes that a fees Order, in due course, will be brought forward. Consideration therefore of the level of the fees to be charged, for what, and how these compare with existing fees charged may be a matter for this Committee, or whichever committee is designated to consider that Order, to consider at that time. However, we believe that some additional information from the Scottish Government at this time would be helpful.

246. The Committee invites the Scottish Government to indicate whether any additional funds will be required by the Accountant in Bankruptcy to cover its costs as a result of any increase in staff, training, seeking external legal and/or insolvency advice to deal with the increase in workload and responsibility.

247. Furthermore, the Committee invites the Scottish Government to report before the conclusion of Stage 1 on the outcome of any meeting it has with the Sheriffs’ Association and outline what actions are to be taken, and when, as a result.

248. The Committee further invites the Scottish Government to seek the views of key organisations, such as the Sheriffs’ Association, Law Society of Scotland, Insolvency Practitioners Association, Institute of Chartered Accountants in Scotland, the Association of British Credit Unions Ltd. StepChange Debt Charity Scotland, and Money Advice Scotland on what internal mechanisms the Accountant in Bankruptcy should put in place to guarantee the required separation of staff responsibilities, negate conflicts of interest, ensure there is openness in the internal decision-making process, and how that process itself, and the decisions made, will be clearly and properly publicised and recorded on the Accountant in Bankruptcy website.

249. The Committee also asks the Scottish Government to outline what monitoring the Accountant in Bankruptcy will put in place to assess whether there has been any diminution with respect to the overall process of decision-making and in the quality of the decisions made and how it will publicly report (in the Accountant in Bankruptcy annual report) on performance in relation to the exercise of these new functions.

250. Finally, the Committee asks the Scottish Government to confirm that all information relating to those functions currently dealt with by sheriffs and which is publicly accessible will also be made publicly available should the proposed functions be transferred.
MORATORIUM ON DILIGENCE

Objectives in the Bill
251. The Bill (section 8) proposes to introduce a “moratorium on diligence”. Diligence is the technical term for action a creditor can take (after they have been to court) to enforce a debt, such as seizing wages in the hands of an employer or money in a bank account. The Bill proposes that a creditor’s ability to use diligence against a debtor will be frozen for an initial period of six weeks if a debtor intimates to the Accountant in Bankruptcy that they intend to apply for a statutory debt solution. The intention is that the debtor will have time to get money advice and consider the most appropriate course of action without threat of their creditors taking action against them.

252. A moratorium currently exists for those applying to the Debt Arrangement Scheme. The Bill will introduce a similar facility for those applying for bankruptcy or a trust deed which may become protected.

253. Under the Bill, where a debtor gives notice in writing to the Accountant in Bankruptcy that they intend to apply for a statutory debt solution, the Accountant in Bankruptcy must record this in the Register of Insolvencies (or the Debt Arrangement Scheme Register) so that creditors are able to check whether a debtor comes under the Bill’s protections when considering enforcement action. A debtor will only be able to apply for one moratorium in any 12 month period (this is to prevent a debtor being able to extend a freeze on creditor action indefinitely, thus defeating a creditor’s right to payment). Where a debtor applies for a statutory debt solution during the moratorium period, the freeze will be extended until the outcome of the application is decided. If, at the end of the process, the application is unsuccessful, a creditor will be able to take enforcement action once more. However, Debt Arrangement Scheme, bankruptcy and protected trust deeds all work to prevent a creditor taking enforcement action while a debtor is participating in the arrangement. Thus, if an application is successful, protection from diligence will continue under whichever statutory debt solution the debtor has entered.

Issues raised in evidence
254. The Association of Business Recovery Professions R3 Scottish Technical Committee said it “supported the idea that if we are looking for commonality across the various processes, a six-week moratorium period might be appropriate” although it did consider that “it might be a bit confusing and we wondered how it would interact with the provisions of section 37 of the 1985 act, which deals with diligence”.

---

216 A publicly available register in which certain details about bankruptcies and trust deeds are recorded. Creditors and credit reference agencies use the information in the Register to update the details they hold in relation to individuals. The Debt Arrangement Scheme Register performs the same function for Scheme applications.
217 Policy Memorandum, paragraph 93
255. The Institute of Chartered Accountants in Scotland indicated that the proposed moratorium “might not be used in a lot of cases but if it helps some people, we would not be against it”. This view was supported by the Insolvency Practitioners Association. Max Recovery Ltd believed that a moratorium “allows the debtor to get their head around what they are going into, which is a fairly complex and traumatic experience for them.” They felt it was “right to have a moratorium up front to allow things to progress and to allow everyone to get their head around the process”. A similar point was made by the TDX Group Ltd that “there is a quite complex process of bringing a lot of things together in a short period of time, and the moratorium allows that to happen.”

256. StepChange Debt Charity Scotland welcomed the moratorium although it believed that there was “a small risk that some people may use this to disperse assets” although this was “minimal in comparison to the safeguards it provides clients whilst they are seeking advice”. However, it did feel that applications under bankruptcy “should be treated in the same way as those under the Debt Arrangement Scheme, where the moratorium continues until a final decision to grant or refuse the programme is made”. It also stated that “it does not appear that the Bill provides similar protection.” StepChange Debt Charity Scotland stated that the Bill appears to be silent where the debtor application is incomplete and that any debtor in these circumstances should “provide additional information to the Accountant in Bankruptcy within 21 days”.

257. Money Advice Scotland supported the proposed six week moratorium although it highlighted a concern where funds held in a bank account could be frozen when the intimation is made and that there could be “some unintended consequences of this”.

258. The Minister referred to the “protections for debtors” which the moratorium could provide. He said that debtors will have an additional period of relief at the time of maximum stress when they are really up against it”. He said that the moratorium in particular “will make a significant impact for the better”.

259. The Committee is broadly satisfied with these provisions which, as witnesses highlighted, may provide valuable ‘breathing space’ to debtors. However, we would like to see clarity from the Scottish Government on a number of points.

260. The Committee invites the Scottish Government to confirm whether applications under bankruptcy will be treated in the same way as those
under the Debt Arrangement Scheme where the moratorium continues until a final decision to grant or refuse the programme is made.

261. The Committee also invites the Scottish Government to clarify—

- what “protection” the Bill provides when the debtor application is incomplete; and
- the position in relation to any funds held in a bank account which might be frozen when the intimation is made and whether there could be some unintended consequences as a result.
DISCHARGE FOLLOWING BANKRUPTCY

Objectives in the Bill

262. The current law allows automatic discharge from bankruptcy after one year. The effect of discharge is that the debtor is no longer subject to the restrictions which apply under bankruptcy (such as a limit on credit which can be sought and debarment from certain positions) and is relieved of the obligation to pay the debts covered by the bankruptcy (debt relief).

263. At present, assets which the debtor acquires after discharge do not usually vest in the trustee. However, the requirement to make payments from income (either by agreement or as a result of the court making an income payment order) can last for three years and therefore continue after discharge. It is possible for a trustee or creditor to apply to the sheriff to defer a debtor’s discharge.

264. The Bill proposes (sections 16 to 18) changes to the discharge process to ensure that discharge is linked to debtor co-operation. It will therefore no longer be automatic. The process proposed varies depending on whether the trustee is an insolvency practitioner or the Accountant in Bankruptcy. The trustee, the debtor or creditors may make representations to the Accountant in Bankruptcy which is responsible for making the decision as to whether discharge is appropriate and may also request the Accountant in Bankruptcy reviews any decision and, thereafter, may appeal the matter to a sheriff.

265. Any application by an insolvency practitioner trustee for a debtor’s discharge must be accompanied by a declaration (or, in circumstances where a declaration is not appropriate, a report) from the trustee stating that:

the debtor has:
- complied with any requirement to make contributions from income;
- co-operated with the trustee;
- complied with the “statement of undertakings” (which outlines a debtor’s obligations in the bankruptcy process);
- surrendered all assets to the trustee (including any rights the debtor may have to claim against others);
- given the trustee all relevant documentation relating to their financial affairs;
- fulfilled their functions, including realising the debtor’s assets, distributing funds to creditors and ascertaining the reasons for the debtor’s insolvency.

266. The Bill also makes provision for situations where a debtor who has been made bankrupt cannot be found and for the repeal of discharge on “composition” (where a debtor reaches agreement with their creditors for the debts to be written off on repayment of only part of the debt). These are not discussed further in this report.

Removal of automatic discharge

267. The current discharge process, whereby discharge is automatic unless the trustee applies to the court for it to be delayed, was created by the 1985 Act.
Witnesses explained that this move was welcomed at the time. The Association of Business Recovery Professionals R3 Scottish Technical Committee noted—

“when the Bankruptcy (Scotland) Act 1985 was introduced, it was extremely welcome in as much as it did away with the idea that, in every case, the debtor had to earn a discharge. The concept of automatic discharge was introduced for the first time in that act; we remain supportive of the notion of automatic discharge with provisions in place to deal with debtors who do not co-operate or comply with statute during the course of their sequestration.”

The Law Society of Scotland offered similar support—

“when the Bankruptcy (Scotland) Act 1985 said that people could have automatic discharge after three years, it was seen as a huge step forward that would stop people ending up in bankruptcy in perpetuity for various reasons, which is undesirable.”

The advantages of automatic discharge were thought to include a reduction in bureaucracy and costs by a number of those responding to the Committee’s call for evidence, for example Alison Anderson of Armstrong Watson, the Institute of Chartered Accountants in Scotland, and Joel Martin Conn.

However, several creditor respondents welcomed the link between discharge and co-operation. The Association of British Credit Unions Ltd believed it was “important that debtor behaviour must be a relevant factor in determining an individual’s right to benefit from debt relief” and that if a debtor does not co-operate with their bankruptcy or cannot be located then “their discharge should be deferred indefinitely. We therefore welcome this proposal”. The Institute of Credit Management and debt recovery solicitors Yuill and Kyle welcomed the creation of a mechanism whereby creditors could object to the discharge of a debtor.

The Minister argued that “it is right that the debtor co-operates and that there is more emphasis on that”. He also noted that the proposal that a debtor’s discharge should be linked to their co-operation had received widespread support in the consultation.

Debtor co-operation

Citizens Advice Scotland was concerned that debtors would be considered to not have co-operated with their trustee in situations where their life

---

227 Alison Anderson, Armstrong Watson. Written submission (page 3)
228 Institute of Chartered Accountants in Scotland. Written submission (page 9)
229 Joel Martin Conn. Written submission (page 5)
230 Association of British Credit Unions Ltd. Written submission (page 4)
231 See written submissions from both organisations at page 3
circumstances made it difficult for them to make payments. In oral evidence, it said—

“we are concerned that the criterion that the debtor must have co-operated is too broad, because it does not say what co-operation means. If the person had problems with money and had to take a payment holiday period, would that mean that they had not co-operated? If it was difficult to get money from them, would they not have co-operated? It seems to be up to the trustee whether a person gets discharged, which is too vague for us.”

273. City of Edinburgh Council raised similar concerns about how the co-operation of those with mental health problems would be judged.

274. When asked whether co-operation should be more clearly defined in the Bill, the Minister responded—

“the matters in respect of which the debtor has to co-operate are set out in the statutory undertaking in annex A to the policy memorandum. About 10 or 15 issues are set out where the debtor is signing, ‘I will co-operate; I will tell you what my assets are; I won’t hide them; I will tell you if I move address.’ If the debtor signs that document, as they will be required to do […] there can really be no excuse for the debtor not to co-operate‖.

Interaction between discharge and the requirement to make payments for 48 months

275. The Bill provides that a debtor who is co-operating can be discharged after 12 months. However, they will still be expected to make payments from income to their trustee for 48 months. They will also be expected to notify the trustee of any property they acquire within the 48 month period. Money Advice Scotland felt that this situation was confusing for debtors—

“for us, the issue is debtors who have been discharged having to make payments beyond the discharge period. That confuses people.”

276. Several insolvency practitioner organisations such as Carrington Dean, the Institute of Chartered Accountants in Scotland and KPMG also raised concerns that, while the Bill allows for discharge after 12 months, in reality, trustees may not be prepared to apply for discharge until the end of the 48 month period. This was because the trustee was required to sign a declaration

---

234 City of Edinburgh Council. Written submission (page 2)
237 Carrington Dean. Written submission (page 3)
238 Institute of Chartered Accountants in Scotland. Written submission (page 5)
239 KPMG. Written submission (page 5)
that the debtor had complied with any income payment requirements as part of the discharge process. The Institute of Chartered Accountants in Scotland noted—

“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.”

Financial education and discharge

As discussed above, the Bill contains provisions which will enable a trustee to “require” a debtor to undergo financial education. The Bill contains no direct penalties for those who might refuse to participate in financial education. Instead, it is envisaged that such a refusal can be considered to be a failure to co-operate with the trustee, with the potential that discharge is delayed as a result. The Bill team noted—

“There is no penalty, as such, aligned to financial education, but the bill provides that people must co-operate with their trustee. If the financial education programme was not completed, that could be deemed to be non-co-operation with the trustee, so the trustee could determine to delay the individual’s discharge until such time as they had completed the programme.”

The Association of Business Recovery Professionals R3 Scottish Technical Committee said it was “not against financial education per se. We are saying that it should not necessarily be linked to discharge of the debtor because there will be cases in which debtors have found themselves in financial distress through no fault of their own and not through deficiencies in their ability to budget. In some cases, people simply do not earn much money” while Max Recovery Ltd said—

“I simply cannot see the rationale behind such a measure. I suspect that the people who need financial education are those who are least deserving of punishment. They might just be financially inept and it seems unfair to punish them by delaying their discharge.”

The Committee accepts that discharge should be linked to the debtor’s co-operation as this enables a better balancing of the interests of debtors and creditors. However, the Committee is also persuaded that the ending of automatic discharge is a significant change which may have unintended consequences and is not persuaded by the case for the ending of automatic discharge as proposed in the Bill.

240 Institute of Chartered Accountants in Scotland. Written submission (page 5)
280. The Committee heard evidence that uncooperative debtors may currently be retained under restrictions of bankruptcy for two to 15 years by way of a bankruptcy restriction order obtained through the court. In addition discharge may be deferred beyond the existing period of sequestration if that will benefit the creditor.

281. Should the Scottish Government remain minded to remove automatic discharge, the Committee calls on the Scottish Government to clarify the circumstances in which a debtor would be assessed as not having “co-operated with the trustee”; and, to confirm how a debtor who has remained cooperative but who has not “complied with the statement of undertakings” as a result of changing circumstances could be confident of discharge.
MISCELLANEOUS AMENDMENTS

282. The Bill as introduced makes a series of other amendments to the current law on Bankruptcy such as:

- the requirement for debtors entering bankruptcy to sign a “Statement of Undertakings”, the purpose of which is to ensure that a debtor has a clear understanding of their obligations during bankruptcy;
- the introduction of provisions to the 1985 Act to enable the Accountant in Bankruptcy to request further information from a debtor, where an incomplete debtor application has been received, and to refuse an award of bankruptcy where Accountant in Bankruptcy considers the award may not be appropriate (these powers currently appear in the Bankruptcy (Scotland) Regulations 2008);
- changing to the way that estates are administered;
- removing the power to prescribe the form of the Register of Insolvencies from the Act of Sederunt to regulation made by the Scottish Ministers under the 1985 Act; and
- removal of requirement to publish various pieces of information in the Edinburgh Gazette.

283. The Bill also makes the following miscellaneous amendments to the 1985 Act:

- failure to send statements of assets and liabilities;
- time limits for sequestration of limited partnership;
- petition for sequestration by trustee under a trust deed;
- effect of sequestration: renewal of period of inhibition etc.;
- division and sale of debtor’s family home;
- effect of discharge of debtor;
- bankruptcy restrictions undertaking: repeal; and
- offence of obtaining credit: increase in amount.

284. Finally, the Bill includes certain minor amendments in schedule 3 to implement in the 1985 Act a number of recommendations from the Scottish Law Commission on the framing of the Act as part of its project in working towards its consolidation. The intention is to modernise the legislative framework for bankruptcy, and to make these technical amendments which can be reviewed and incorporated as part of a consolidation Bill in due course.

285. The Committee is content with the objectives of these provisions as set out in the Bill and the Policy Memorandum.

---

ACCOMPANYING DOCUMENTS AND GENERAL PRINCIPLES

Policy Memorandum

286. The role of the lead committee at Stage 1 is to consider and report on the general principles of the Bill. The lead committee is required under Rule 9.6.3 of Standing Orders to report also on the Policy Memorandum which accompanied the Bill. 245

287. The Committee considers the Policy Memorandum provides adequate detail on the policy intention behind the Bill and explains why alternative approaches considered were not favoured. We are also content with the consultation conducted by the Scottish Government prior to introduction of the Bill although we note the proposal to extend the debtor payment period was not consulted upon.

Financial Memorandum

288. The Finance Committee’s report on the Financial Memorandum highlighted a number of issues identified in written evidence to that committee. These issues related to the cost associated with the mandatory provision of money advice, the Common Financial Tool, and the Minimal Assets Process. These are issues which we have addressed in this report.

289. Notwithstanding the conclusions we have reached in this report, and the request for further information relating to certain costing, we are content with the level of detailed provided in the Financial Memorandum.

Delegated powers

290. The Bill makes a number of amendments to the Bankruptcy (Scotland) Act 1985. The Delegated Powers and Law Reform Committee reported on the Bill’s delegated powers and drew attention to sections as below—

Section 3: new section 5D of the 1985 Act: Debtor’s contribution: common financial tool: prescribing method used to assess debtor’s contribution and amending section 7(2) of the 2002 Act
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure for 1985 Act; negative procedure for 2002 Act

The Committee finds the power acceptable in principle but recommends that, consistent with its approach to new section 5D of the 1985 Act, the proposed new power in section 7(2)(bd) of the 2002 Act should be subject to the affirmative procedure.

245 Standing Orders of the Scottish Parliament. Available at: www.scottish.parliament.uk/parliamentarybusiness/26514.aspx
Section 4: new section 32D(5) of the 1985 Act: Debtor contribution order: provision about deduction from earnings
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: the negative procedure

The Committee accepts that the power to make provision about instructions to make deductions from debtors’ earnings is acceptable in principle since flexibility may be required to make changes over time. However, the Committee considers that the power to make provision about the manner in which such an instruction affects an employer and the consequences for employers of failing to comply with instructions is not merely an administrative matter. Accordingly the Committee recommends that the power in section 32D(5) should be subject to the affirmative procedure in this respect.

Section 34: new section 71C of the 1985 Act: Applications to the Accountant in Bankruptcy
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: the negative procedure except where regulations textually amend any part of an Act when the affirmative procedure applies

The Committee recommends that the 1985 Act is amended to expressly provide that the power in section 71C(1) is subject to the affirmative procedure when it is used to textually amend ASPs. The Committee notes that the Scottish Government has agreed to consider lodging an appropriate amendment.246

291. The Committee notes that the Delegated Powers and Law Reform Committee is awaiting further information from the Scottish Government in respect of these provisions. We await that response, and the subsequent consideration and views of that Committee.

General principles

292. Under Rule 9.6.1 of Standing Orders, the lead committee is required to report to the Parliament on the general principles of the Bill.

293. The Committee supports the general principles of the Bill. However, as set out in this report, there are a number of areas where we request further information and clarification before the Bill completes its passage through the Parliament.

246 Delegated Powers and Law Reform Committee. 54th Report, 2013 (Session 4). Bankruptcy and Debt Advice (Scotland) Bill (SP Paper 412)
ANNEX A – OFFICIAL REPORTS AND EXTRACTS FROM MINUTES OF THE ECONOMY, ENERGY AND TOURISM COMMITTEE

20th Meeting, 2013 (Session 4) Wednesday 19 June 2013

1. Decision on taking business in private: The Committee agreed to take items 3 and 5 in private.

5. Work programme (in private): The Committee agreed its approach to scrutiny of the draft budget 2014-2015 and the Bankruptcy and Debt Advice (Scotland) Bill at Stage 1.

22nd Meeting, 2013 (Session 4) Wednesday 4 September 2013

Bankruptcy and Debt Advice (Scotland) Bill (in private): The Committee agreed its preferred candidate for appointment as adviser in connection with its forthcoming scrutiny of the Bill at Stage 1.

27th Meeting, 2013 (Session 4) Wednesday 2 October 2013

Bankruptcy and Debt Advice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Chris Boyland, Head of Strategic Reform, Claire Orr, Executive Director Policy and Compliance, and Elizabeth Wilson, Strategic Reform Team, Accountant in Bankruptcy;
Graham Fisher, Scottish Government Legal Directorate.

28th Meeting, 2013 (Session 4) Wednesday 9 October 2013

Bankruptcy and Debt Advice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Eileen Blackburn, Partner, French Duncan LLP, Chair, R3 Scottish Technical Committee;
David Hill, Partner BDO LLP, previous ICAS Insolvency Committee Chair;
Maureen Leslie, Council Member, Insolvency Practitioners Association;
Frank McKillop, Policy & Relations Manager (Scotland), Association of British Credit Unions Limited;
Alison Anderson, Insolvency Director, Armstrong Watson;
Donald McKinnon, Partner, Wylie & Bisset;
Mike Norris, Executive Director, Max Recovery Ltd;
Martin Prigent, Head of Insolvency Management, TDX Group Ltd.
Bankruptcy and Debt Advice (Scotland) Bill (in private): The Committee reviewed the evidence heard earlier in the meeting.

29th Meeting, 2013 (Session 4) Wednesday 30 October 2013

Bankruptcy and Debt Advice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Sharon Bell, Head, StepChange Debt Charity Scotland;
Keith Dryburgh, Policy Manager, Citizens Advice Scotland;
Rachel Grant, Member of the Insolvency Law Committee, Law Society of Scotland;
Russell Hamblin-Boone, Chief Executive, Consumer Finance Association;
Yvonne MacDermid OBE, Chief Executive, Money Advice Scotland;
Euan McPherson, Head of Credit Operations Strategy, Lloyds Banking Group.

Bankruptcy and Debt Advice (Scotland) Bill (in private): The Committee reviewed the evidence heard earlier in the meeting.

30th Meeting, 2013 (Session 4) Wednesday 6 November 2013

Bankruptcy and Debt Advice (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Rosemary Winter-Scott, the Accountant in Bankruptcy and Agency Chief Executive, and Claire Orr, Executive Director Policy and Compliance, Accountant in Bankruptcy;
Graham Fisher, Scottish Government Legal Directorate;

and then from—

Fergus Ewing, Minister for Energy, Enterprise and Tourism, Scottish Government;
Chris Boyland, Head of Strategic Reform, and Claire Orr, Executive Director Policy and Compliance, Accountant in Bankruptcy;
Graham Fisher, Scottish Government Legal Directorate.

Bankruptcy and Debt Advice (Scotland) Bill (in private): The Committee reviewed the evidence heard earlier in the meeting.

33rd Meeting, 2013 (Session 4) Wednesday 27 November 2013

Bankruptcy and Debt Advice (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to, some by division, and the report was agreed for publication.
Record of divisions in private:

Margaret McDougall proposed the following paragraphs after paragraph 136. The proposal was disagreed to by division: For 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall), Against 5 (Christian Allard, Marco Biagi, Chic Brodie, Mike MacKenzie, Dennis Robertson), Abstention 1 (Murdo Fraser).

The Committee considers that it is important that the move from 36 to 48 months does not have unintended consequences, such as an increase in the number of debtors breaking agreed payment schedules.

On the balance of evidence received, the Committee does not support the proposed increase in the debtor payment period to 48 months and invites the Scottish Government to withdraw the provision at Stage 2.

Margaret McDougall proposed the following paragraphs after paragraph 177. The proposal was disagreed to by division: For 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall), Against 6 (Christian Allard, Marco Biagi, Chic Brodie, Murdo Fraser, Mike MacKenzie, Dennis Robertson).

The Committee welcomes the principle that vulnerable debtors such as those with minimal assets should not be forced into a process for any longer than is necessary where it is clear that they can make no further contribution to paying off their debts. On the other hand, a fair balance needs to be struck between the needs of the debtors and those of creditors. It is unclear to the Committee on the balance of the evidence received whether the new six-month discharge period introduced by this Bill is too short.

Consequently, we recommend that the Scottish Government introduces an initial trial of the six month discharge period as an opportunity to identify any unintended consequences and allay concerns about inconsistency with the twelve month discharge period which exists across other debt solutions. Once the trial has been in operation, the Accountant in Bankruptcy should report on its findings and seek (through delegated powers) the power for provide the six month discharge on a permanent basis.

Margaret McDougall proposed the following paragraphs after paragraph 188. The proposal was disagreed to by division: For 3 (Alison Johnstone, Hanzala Malik, Margaret McDougall), Against 6 (Christian Allard, Marco Biagi, Chic Brodie, Murdo Fraser, Mike MacKenzie, Dennis Robertson).

We are not necessarily convinced that the relatively small sums of money that will be raised through the £100 application fee for the new Minimal Assets Process offset the problems that arise with this fee being a real barrier which discourages some of the most vulnerable debtors with low or minimum assets from entering some form of relief from their debts.
The Committee believes that it would be more appropriate for the Accountant in Bankruptcy to have the powers to introduce a full exemption for those individuals who meet certain criteria around ability to pay.

Margaret McDougall proposed replacing “we ask the Scottish Government to respond, in the Stage 1 debate, as to whether it will increase this figure” with “we ask the Scottish Government to remove the maximum debt level for the Minimal Assets Process” in paragraph 195.

The proposal was disagreed to by division: For 2 (Hanzala Malik, Margaret McDougall), Against 6 (Christian Allard, Marco Biagi, Chic Brodie, Murdo Fraser, Mike MacKenzie, Dennis Robertson), Abstention 1 (Alison Johnstone).

ANNEX B: WRITTEN EVIDENCE

Written submissions:
- Alan Adie (242KB pdf)
- Alison Anderson Armstrong Watson (153KB pdf)
- Association of British Credit Unions Ltd (140KB pdf)
- Association of Business Recovery Professionals R3 Scottish Technical Committee (167KB pdf)
- Callcredit (246KB pdf)
- Carrington Dean (171KB pdf)
- Christians Against Poverty (80KB pdf)
- Church of Scotland (153KB pdf)
- Citizens Advice Scotland (173KB pdf)
- City of Edinburgh Council (211KB pdf)
- Evangelical Alliance (69KB pdf)
- Falkirk Council (81KB pdf)
- Haddington Citizens Advice Bureau (153KB pdf)
- Highland Council (203KB pdf)
- Institute of Chartered Accountants in Scotland (258KB pdf)
- Insolvency Practitioners Association (286KB pdf)
- Institute of Credit Management (135KB pdf)
- Joel Martin Conn (101KB pdf)
- KPMG LLP (104KB pdf)
- Law Society of Scotland (239KB pdf)
- Lloyds Banking Group (315KB pdf)
- Max Recovery Limited (KB pdf)
- Money Advice Scotland (243KB pdf)
- Money Advice Service (151KB pdf)
- Money Advice Trust (169KB pdf)
- Nicola Birrell (77KB pdf)
- Peter Rorke (8KB pdf)
• Royal Faculty of Procurators in Glasgow (146KB pdf)
• Scottish Independent Advocacy Alliance (101KB pdf)
• StepChange Debt Charity Scotland (87KB pdf)
• TDX Group Ltd (122KB pdf)
• Yuill & Kyle (136KB pdf)

Follow up written evidence:
• Accountant in Bankruptcy on the Minimum Asset Process (65KB pdf)
• Institute of Chartered Accountants in Scotland on the proposed transfer of functions (192KB pdf)
• Insolvency Practitioners Association on the proposed transfer of functions (276KB pdf)
• Scottish Court Service on the proposed transfer of functions (56KB pdf)
• Sheriffs’ Association on the proposed transfer of functions (121KB pdf)
• Accountant in Bankruptcy on the proposed transfer of functions (2.38KB pdf)
• Accountant in Bankruptcy on the Common Financial Tool working group (7.91KB pdf)
• Scottish Government Minister for Energy, Enterprise and Tourism on 48 months proposal (168KB pdf)
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.