

MONEY
ADVICE TRUST

BUSINESS
DEBTLINE

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Consultation Response:

Scottish Government Changes introduced by BADAS Act 2014

Response by the Money Advice Trust

Date: February 2020

Contents

- **Page 2** Contents
- **Page 3** Introduction / about the Money Advice Trust
- **Page 4** Introductory comment
- **Page 5** Responses to individual questions
- **Page 21** Contact details

Introduction

About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money with confidence.

The Trust's main activities are giving advice, supporting advisers and improving the UK's money and debt environment.

In 2019, our National Debtline and Business Debtline advisers provided help to more than 199,400 people by phone and webchat, with 1.97 million visits to our advice websites.

In addition to these frontline services, our Wiseradviser service provides training to free-to-client advice organisations across the UK and in 2019 we delivered this free training to over 981 organisations.

We use the intelligence and insight gained from these activities to improve the UK's money and debt environment by contributing to policy developments and public debate around these issues.

Find out more at www.moneyadvicetrust.org

Public disclosure

Please note that we consent to public disclosure of this response.

Introductory comment

We welcome the opportunity to contribute to the Scottish Government's review of the Bankruptcy and Debt Advice (Scotland) Act 2014.

We would like to see consideration given to whether there should be a fee charged for a MAPs application, or whether it is set at the right level.

We have set out our thoughts in our response to the individual questions below.

- ✓ We welcome the consideration being given to aligning processes in Scotland with England and Wales in relation to HM Treasury's statutory Breathing Space scheme launching in early 2021.
- ✓ We continue to support the transition to the use of the Standard Financial Statement (SFS) as the Common Financial Tool in Scotland. We consider the SFS to be a superior tool to the Common Financial Statement, which the Money Advice Trust is now only operating in Scotland as a legacy arrangement.
- ✓ We support increasing the creditor bankruptcy petition levels to £5,000 or more.
- ✓ We do not agree that the minimum debt allowed for MAP application bankruptcies should be increased. For someone with a very low income and no assets or savings, a debt of £1,500 can seem insurmountable.
- ✓ We would argue that there should be no requirement to have an upper debt limit for MAP applications. As the ability to apply for this procedure is predicated on people having no assets or available income, it is of no benefit to anyone to put an upper debt ceiling in place.
- ✓ It seems fair to exclude student loan debt from the maximum debt level criteria in MAP.
- ✓ We are not in favour of discharging child maintenance arrears in bankruptcy although we appreciate that there are points to be made on both sides.
- ✓ The statutory interest rates are set at too high a level. We believe that the judicial interest rate should be frozen for consumer credit debts that fall under the Consumer Credit Act 1974. The statutory bankruptcy interest rate should be set at the Bank of England rate.

Finally, we would like to express our concern that lead generation companies are not sufficiently regulated and may give misleading information to consumers that results in them taking out the wrong debt solution, perhaps where bankruptcy would have been a better option for their circumstances. This is an overriding issue for regulators to work together on to ensure that people can access free, accurate and expert debt advice – and we would welcome the Accountant in Bankruptcy raising this formally with regulators and exploring ways to tackle these problems.

Responses to individual questions

Question 1: Do you consider the current six week period of protection afforded by the moratorium process to be sufficient?

No

Question 1a: If you answered “no” to Q1 what do you consider the appropriate time for a moratorium in Scotland?

- ✓ Less than 6 weeks
- ✓ 60 days
- ✓ 10 weeks
- ✓ 12 weeks
- ✓ **Other x**

We would suggest that the moratorium period should at least match the breathing space that is under consideration in England and Wales. This would mean a 60 day breathing space. However, it is possible to look at the breathing space as a timescale to seek debt advice, assess financial circumstances and to decide on a suitable debt option. If this time period is added to the time for setting up at DAS or a PTD, then a suitable period for the moratorium begins to look more like 12 weeks.

When considering breathing space in England and Wales, the debt advice sector made a consistent argument for an extended period of breathing space. The final breathing space period in the regulations has settled at 60 days, but we think that this is unlikely to be long enough for many people to begin to resolve their financial situation, and we strongly recommend that this period is ‘extendable’, at the discretion of the adviser.

We would suggest that these points would have validity in Scotland when considering the suitable length of the moratorium.

Question 1b: If you selected “less than 6 weeks” or “other” in Question 1a how long do you think is appropriate and please explain the reasons why?

We have made an argument for an extended moratorium period in our response to question 1a above.

Question 2: Do you believe that interest, default fees and charges in respect of debts at the time of the moratorium application should be frozen during the moratorium period?

Yes

Question 2a: Please provide a reason for your answer to Question 2?

We would support freezing interest, default fees and charges on debts during the moratorium period. This allows a person in debt the breathing space to seek debt advice and make an informed decision as to the best debt option, without the extra stress and pressure of knowing that their debts are increasing constantly.

This freeze would apply to arrears only on continuing liabilities such as mortgage payments, not the on-going mortgage interest that forms part of a monthly mortgage payment.

We do not agree that creditors should be able to apply interest, fees or charges retrospectively where the moratorium period ends early. This is unnecessarily punitive for the client and does not take into account the many reasons that the moratorium might end.

Question 3: Do you believe the Scottish Government should explore further provisions in the moratorium, similar to those in the UK Breathing Space scheme, which have a reserved competency?

Yes

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

- ✓ Stopping creditor enforcement action (excluding a commenced earnings arrestment) during the moratorium period.
- ✓ Preventing creditors from contacting debtors in relation to repayment of a debt during the moratorium period.
- ✓ Preventing deductions from benefits during the moratorium period.
- ✓ Preventing the forced installation of pre-payment meters, or the disconnecting of fuel supplies during the moratorium period.
- ✓ Preventing the eviction of debtors for unpaid debts under section 19 of the Housing (Scotland) Act 1988 during the moratorium period.
- ✓ All of the above.

We would support the Scottish Government taking action to prevent all of these areas during the moratorium period. We can see no good reason for allowing any of these individual types of enforcement action to continue during the moratorium period.

Question 4: Do you believe that the Scottish Government should consider further separate provisions in the moratorium, similar to those in the UK Breathing Space scheme, for those receiving mental health crisis care?

Yes

Question 4a: If you answered “yes” to Question 4, which of the following principals for those receiving mental health crisis care should be given consideration?

- ✓ The removal of the restrictions on accessing the moratorium once within a 12 month period.
- ✓ The period of moratorium protection being extended.
- ✓ Both of the above options.

We would support both the removal of restrictions on accessing the moratorium only once within a 12 month period, and we would also support the period of moratorium protection being extended for people receiving mental health crisis care. However, it is vital that for any such scheme to be introduced, that this is devised extremely carefully and with full regard to the lessons from implementation of the mental health scheme in England and Wales. This could potentially be a very complex procedure with serious implications for mental health professionals, the debt advice sector and individual clients.

Question 4b: If you ticked the box for extending the period of protection how long should the period of protection last?

- ✓ Duration of mental health crisis care
- ✓ Other x

Question 4c: If you answered “other” to Question 4b what period of protection should apply?

We would suggest that the appropriate period of protection should be for the full duration of the mental health crisis. However, there should be an additional period of moratorium protection once the crisis ends, in order for the person in debt to seek debt advice and to receive comprehensive advice on their debt options. This should be an equivalent period to the usual moratorium period, whatever length it is decided to allow.

Question 5: Do you think the provision of a CFT to provide a consistent approach to the assessment of contributions remains an appropriate feature within insolvency legislation?

Yes

Question 5a: If you answered “no” to Question 5, what approach should be adopted to assess the contributions in statutory debt solutions?

n/a

Question 5b: If you have answered “yes” to Question 5, should the CFT be an income and expenditure tool designed to assess individual circumstances?

Yes

Question 5c: If you answered “yes” to Question 5b, which tool should be adopted as the CFT?

- ✓ CFS
- ✓ SFS X
- ✓ Other (Please explain below)

We continue to support the transition to the use of the Standard Financial Statement (SFS) as the Common Financial Tool at the earliest opportunity. We consider the SFS to be a superior tool to the Common Financial Statement (CFS), which the Money Advice Trust is now operating only in Scotland as a legacy arrangement.

Question 5d: If you answered “no” to Question 5b, what model should be adopted to assess the contributions in statutory debt solutions?

N/a

Question 6: Do you believe 6 weeks is sufficient period of time for a trustee to submit a DCO proposal to AiB in a creditor petition bankruptcy?

Yes/No

We are unable to express an opinion on this as we do not act as a trustee in creditor petition bankruptcies. We are not familiar with either the process or the length of time it would take for a proposal to be submitted.

Question 6a: If you answered “no” to Question 6 what would be a sufficient timescale?

- ✓ 8 weeks
- ✓ 10 weeks
- ✓ 12 weeks
- ✓ No time limit (with requirement to report progress at regular intervals)
- ✓ Other

We are unable to express an opinion on this as we do not act as a trustee in creditor petition bankruptcies.

Question 6b: If you answered “other”, what would be a sufficient timescale?

We are unable to express an opinion on this as we do not act as a trustee in creditor petition bankruptcies.

Question 7: Do you believe that the minimum debt allowed for MAP application should be increased?

No

We do not agree that the minimum debt allowed for MAP application bankruptcies should be increased. For someone with a very low income and no assets or savings, a debt of £1,500 can seem insurmountable. They need access to debt relief as swiftly and easily as possible. We see no evidence that a lack of a lower debt limit in England and Wales encourages people to go bankrupt without detailed consideration first. We cannot see why it would be at all helpful to increase the debt level required to access MAP to a higher amount.

Question 7a: If you answered “yes” to Question 7, what level should it be increased to?

- ✓ £2,000
- ✓ £2,500
- ✓ £3,000
- ✓ Other

We do not agree that the minimum debt allowed for MAP application bankruptcies should be increased.

Question 7b: If you answered “other” to Question 7a please specify the amount

We do not agree that the minimum debt allowed for MAP application bankruptcies should be increased.

Question 7c: Should the debt threshold for creditor petition or full administration debtor application bankruptcy be increased (currently £3,000)?

Yes

We would suggest that the debt threshold for creditor petitions should be increased at least to the same level as in England and Wales. The level was reviewed after many years, and increased to £5,000 from £750 in October 2015. It is arguable that this level in itself is due for a further review after five years. The review in Scotland might want to take the £5,000 level as a good point to start from and take a view as to whether this should be increased.

Question 7d: If you answered “yes” to Question 7c, what level should it be increased to?

✓ Creditor Petition Debt Level:

This should be set at £5,000 or above, as indicated in our response to question 7c.

✓ Full Administration Debtor Application Debt Level:

We understand that the lower debt level is currently set at a limit of £3,000. There is no lower debt limit to access bankruptcy in England and Wales. We do not understand why there needs to be a lower debt limit at all. It does not appear to have a clear purpose. If a limit is required, it would make sense to set this at £1,500 to match the MAP bankruptcy application limit.

Question 8: Do you think that there should still be a maximum debt threshold in a MAP application?

No

We would argue that there should be no requirement to have an upper debt limit for MAP applications. As the ability to apply for this procedure is predicated on people having no assets or available income, it is of no benefit to anyone to put an upper debt ceiling in place. The person in debt will not be in a position to pay a higher debt balance any more than they are able to pay a lower amount of debt. The upper debt limit merely serves to create a barrier preventing access to bankruptcy for people on low incomes.

In addition where someone has no surplus income or assets, there is no benefit in making them choose a bankruptcy application route that attracts a higher fee which they will not be able to afford to pay. Presumably the higher fee is chargeable because it is felt that there is a higher cost to the AiB for administering a full bankruptcy. However, where someone has no income or assets, the additional administration costs must surely be minimal.

It is clear from recent research¹ commissioned by the AiB that even finding the MAP application fee is a heavy burden on applicants. It would be worthwhile considering removing the MAP application fee altogether or at least considering a remission scheme. (However, it is hard to imagine under what circumstances you could qualify for the MAP application route but not qualify for fee remission.)

Question 8a: If you answered “yes” to Question 8, at what level should the debt ceiling be set?

- ✓ £17,000
- ✓ £20,000
- ✓ £25,000
- ✓ Other

We do not support a debt ceiling.

If you answer “no” to Question 8 please explain why?

We do not support a debt ceiling for a MAP application for the reasons set out in our response to question 8.

Question 8b: If you answered “other” to Question 8a what amount do you think it should be increased to?

We do not support a debt ceiling.

¹ https://www.aib.gov.uk/sites/default/files/ekos_final_report_-_map_bankruptcy_clients_experience.pdf

Question 9: Do you think student loan debt, that is not discharged in bankruptcy, should be excluded from the maximum debt criteria in MAP?

Yes

It seems fair to exclude student loan debt from the maximum debt level criteria in MAP for the reasons set out in the paper. It seems unfair to include a debt in the total where that debt is not going to be discharged in bankruptcy. It is also particularly unfair, when you consider that student loan debts are often for substantial sums and would take up a large element of the maximum level allowed, by their very nature.

Question 9a: If you answered “no” to Question 9 please explain why?

We agree that student loan debt should be excluded from the maximum debt criteria.

Question 10: Do you think the total asset and individual asset limits should be increased?

Yes

Question 10a: If you have answered “yes” to Question 10, what limit should be applied?

Combined Assets

- ✓ £3,000
- ✓ £4,000
- ✓ Other x

Individual Asset

- ✓ £2,000
- ✓ £3,000
- ✓ Other x

Question 10b: If you answered “other” to either part of Question 10a what amount do you think the combined and individual asset limits should be increased to?

We understand that the individual asset limit in a MAPs bankruptcy has stood at £1,000 for some time, and it would seem reasonable to review this amount. We are not convinced that there is a requirement for a single asset limit at all. It would seem to us that it is very easy to go over a £1,000 cash limit in your bank account, if you have just been paid, receive monthly Universal Credit, or have received a backdated benefit payment. This would only be a temporary situation, but could exclude you from a MAPs bankruptcy application.

We would also query whether the £3,000 limit for a car needs to be increased, to allow for a bit more leeway on retaining a reliable car, particularly for rural or island areas where a vehicle may be a necessity.

The combined asset limit needs to increase substantially to reflect the above points. Would it make sense to tie this into the lower capital limit for means-tested benefits, which stands at £6,000.

Question 11: Do you believe that the current content of the financial education modules is sufficient to meet the policy intention of promoting financial capability?

We are unable to comment on the content of the financial education modules that are being currently provided. We are unfamiliar with the content in any detail and cannot say whether it meets the policy intention of promoting financial capability. We would suggest that an independent evaluation of the effectiveness of the current financial capability intervention is carried out.

This should also take into account the Money and Pensions Service research into financial capability and debt advice. The Trust is currently taking part in a MaPS 'What works' funded project to evaluate the impact of our own financial capability offering to clients, along with those of three other participating organisations. We understand that the results of the project which is being conducted on behalf of MaPS by the independent research organisation IFF will be available later in the year.

We also note the note of caution in the paper, which states:

“International experience is that more demanding compulsory “debtor counselling” can lead to those unwilling to engage just going through the motions. Such intensive interventions are also hugely expensive.”

Question 11a: If you answered “no” to Question 11 what improvements would you suggest?

See our response to question 11.

Question 12: Should the remaining balance of any outstanding child maintenance arrears be discharged following the conclusion of bankruptcy and protected trust deed procedures in Scotland?

No

Question 12a: Please explain the reason for your response at Question 12.

We understand that this is a difficult issue to resolve, and there are “*differing and strongly held views*” as the paper says. However, in England and Wales, child maintenance arrears are not discharged at the end of bankruptcy, whilst in Scotland the remaining balance is discharged. We would query why maintenance for a child’s living costs is treated differently to a government debt such as a student loan which is not discharged in bankruptcy. It is arguable that the child maintenance is relatively more vital to be protected for the individual families concerned.

Question 13: Do you consider that the currently prescribed 8% rate of interest for dividends in bankruptcy is appropriate?

No

Question 13a: If you have answered “no” to Question 13, what interest rate do you think should be applied?

- ✓ BoE Rate
- ✓ BoE Rate + 1%
- ✓ BoE Rate + 2%
- ✓ Other x

Question 13b: If you have answered “other” to Question 13a, what alternative option would you suggest?

We agree that the current prescribed interest rate of 8% for dividends in bankruptcy is much too high given the Bank of England rate is so low. We would like to see no interest being added to bankruptcy dividends ideally, although most people in debt are unlikely to have sufficient assets to distribute to creditors in any case.

However, we appreciate that this approach may not be balanced when creditors' interests are taken into account. To reflect this, a low rate such as the Bank of England rate would seem to be most suitable to balance the interests of both parties here.

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

No

Question 14a: If you have answered “no” to Question 14, what interest rate do you think should be applied?

- ✓ BoE Rate
- ✓ BoE Rate + 1%
- ✓ BoE Rate + 2%
- ✓ Other x

Question 14b: If you have answered “other” to Question 14a, what alternative option would you suggest?

We believe that the judicial interest rate should be frozen for consumer credit debts that fall under the Consumer Credit Act 1974, as an equivalent to the way in which judicial interest is applied in England and Wales. In Scotland, we understand that the only way of freezing interest on a consumer credit debt is to apply for a Time Order, and that a Time Order is rarely granted.

In other cases, such as personal debts being recovered from landlords, estate agents, employers, businesses and so on, we would argue that the BoE rate plus a small percentage might be appropriate.

Other Issues

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

- ✓ We would suggest that the Scottish Government should take the findings from their study of MAP clients² to examine whether the fee of £90 is appropriate and affordable or acts as a barrier to access for MAP applicants. It may be time to consider whether a fee should be charged for MAP applications at all or whether a lower fee or remission system should be put in place.
- ✓ We would also suggest that consideration is given to reviewing the term “Minimal Asset Procedure” in bankruptcy to ensure that it has a name that is easy to understand and is easier to publicise and raise awareness for potential users of the process. It may be worth comparing how easy it is for people to recognise the term “debt relief order” in England and Wales as a comparison.
- ✓ We would suggest that the Scottish Government carries out a further examination of the bankruptcy periods and how these work differently under the MAP rules to discharge under normal bankruptcy rules. This should consider the fairness of the four year Acquirenda asset rules and how this interacts with the rules on client payment contributions.
- ✓ We have responded to the Economy, Energy, and Fair Work Committee short consultation on protected trust deeds. We believe that the Scottish Government, the AiB, and the FCA and Insolvency Service need to work together to ensure that everyone has access to expert, holistic and accurate debt advice. We are very concerned that lead generation companies are not sufficiently regulated and may give misleading information to consumers that results in them taking out the wrong debt solution, perhaps where bankruptcy would have been a better option for their circumstances.
- ✓ Much of this requires action from regulatory bodies. The FCA, AiB, Scottish Government, Insolvency Service and the debt management and insolvency sectors need to work together. To start with, the AiB and the Insolvency Service could develop stronger rules for insolvency practitioners who accept referrals from lead generation companies. The Recognised Professional Bodies should enforce these rules. The AiB and the Insolvency Service could make it compulsory for all IPs to ensure that the initial debt advice is provided by an FCA regulated debt advice firm rather than by an IP firm or lead generator.

² https://www.aib.gov.uk/sites/default/files/ekos_final_report_-_map_bankruptcy_clients_experience.pdf

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