



## Association of Business Recovery Professionals

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Tuesday 11 February 2020

Dear Sir/Madam,

### **Review of changes introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 – Response from insolvency and restructuring trade body R3**

I write as Chair of the insolvency and restructuring trade body R3's Scottish Technical Committee, in response to the Scottish Government's review of the changes introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 ('BADAS').

By way of background, R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from the global legal and accountancy firms through to smaller, local practices.

The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals deal with problem debt.

This response has been prepared by R3's Scottish Technical Committee ('STC') which considers issues of general importance and significance to the profession in Scotland, keeping under review all UK and EU legislation, and other matters relating to insolvency law and practice in Scotland specifically. The Committee is multi-disciplinary and represents the full breadth of the insolvency and restructuring profession.

R3 would be delighted to discuss this response with officials in more detail. If you would like to meet us or if you have any other queries, please contact R3's Technical Manager, Ben Luxford, at [ben.luxford@r3.org.uk](mailto:ben.luxford@r3.org.uk) or 020 7566 4218.

## OVERVIEW

We welcome the Scottish Government's review of the changes introduced by BADAS, and the opportunity to contribute the views of our members. The Act came into law at a time when both personal and corporate insolvency numbers were falling, and it introduced a number of important changes to Scotland's framework for resolving personal debt.

With insolvency numbers now rising, and the level of personal debt increasing, it is an opportune time to review the effectiveness of the BADAS changes. The review also comes at a time when the UK Government has confirmed plans for two new measures to deal with personal debt – Breathing Space and the Statutory Debt Repayment Plan – in England and Wales. These will influence the development of the personal insolvency framework across the UK in the years to come.

While this inquiry is welcome, we believe that a wider review of Scotland's personal insolvency framework is required. In addition to the factors outlined above, there have also been recent interim changes to the Debt Arrangement Scheme, for example, and the Scottish Parliament's Economy, Energy and Fair Work Committee is also reviewing the efficacy of Protected Trust Deeds. Given this review's remit, we note that no views are sought on whether the 48-month Debtor Contribution Order (DCO) is effective or about the removal of the one-year automatic discharge, for example. In particular, we believe that the relationship of one solution to another, and the ability or inability to move between them, requires examination.

An overarching review which considers the current economic climate, the changes introduced by BADAS and other interim measures, as well as the development of the personal insolvency framework in England and Wales, would be a positive step and one welcomed by the Scottish insolvency and restructuring profession.

## RESPONSE TO CONSULTATION QUESTIONS

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

No.

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

Although we think that the moratorium process works well, and that six weeks is long enough to allow the individual to take advice and make a decision, given the upcoming introduction of the 'Breathing Space' policy in England and Wales, which will have a 60-day moratorium, we would support an equivalent moratorium period in Scotland to ensure consistency across the UK.

*Q1b. If you selected "less than 6 weeks" or "other" in Q1a how long do you think is appropriate and please explain the reasons why?*

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

No.

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

Currently interest, default fees and charges are not frozen at the time of the commencement of the moratorium, and we see no reason for this to change. Further diligence is prevented by the moratorium whereas the costs of existing diligence have already been incurred.

We also understand that a significant proportion of creditors will already voluntarily freeze the account at the date of the moratorium, so there is less reason to introduce a statutory freeze.

Further, debts are admitted to the solution at a specific date set out in law (e.g. date of sequestration, date of the Debt Payment Programme (DPP) commencing) and having a second earlier date at which debt could have been frozen or quantified could lead to some confusion. It could also potentially add cost to the process of adjudication and agreeing claims where there was more than one possible date at which creditors could claim.

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

No. We think that the moratorium process works well.

*Q3a. If you answered “yes” to Q3 which of the following areas should the Scottish Government explore?*

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

R3 supports the principle that there should be further provisions in the moratorium for those receiving mental health crisis care.

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

R3 would support both of the principles (removal of the restrictions on accessing the moratorium once within a 12-month period, and the period of the moratorium protection being extended) for those receiving mental health crisis care. It is right that those experiencing a mental health crisis should qualify for additional support.

However, the Scottish Government will need to give careful consideration to the practicalities of this aspect of the moratorium. In response to the UK Government’s consultations on the Breathing Space scheme in England and Wales, R3 sought clarification as to how the mental health provision will be accessed (defining what a mental health crisis constitutes exactly) and the role of health care professionals in supporting those who may require access to the moratorium in this way.

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

The duration of the mental health crisis care.

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

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

Yes.

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

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

Yes.

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

The Standard Financial Statement (SFS).

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

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*Q6. 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?*

No.

*Q6a. If you answered “no” to Q6 what would be a sufficient timescale?*

There should be no time limit, although there should be a requirement to report progress at regular intervals.

*Q6b. If you answered “other”, what would be a sufficient timescale?*

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

No

*Q7a. If you answered “yes” to Q7, what level should it be increased to?*

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*Q7b. If you answered “other” to Q7a please specify the amount*

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

No. Although there is an argument that the level could be increased to match what is in place in England & Wales (£5,000), R3, while supportive of the 2015 decision to increase the England & Wales threshold (from £750), only called for an increase to £3,000.

*Q7d. If you answered “yes” to Q7c, what level should it be increased to?*

*Creditor Petition Debt Level: -*

*Full Administration Debtor Application Debt Level: -*

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

Yes.

*Q8a. If you answered “yes” to Q8, at what level should the debt ceiling be set?*

£20,000.

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

Yes, and so should all debts from which a debtor is not discharged by statute.

*Q9a. If you answered “no” to Q9 please explain why?*

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

No.

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

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

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

No.

*Q11a. If you answered “no” to Q11 what improvements would you suggest?*

The modules are well-intentioned and have a role to play in supporting indebted individuals to manage their finances more effectively in future. However, by their very nature, these modules can only help those who have already encountered financial difficulties.

To help improve financial education *before* individuals face money problems, we would strongly support the inclusion of financial education in the wider Scottish curriculum. A national financial education programme available online and through schools, local libraries, as well as Revenue Scotland and the money advice sector, would make a real difference in helping to prevent individuals from entering financial distress in the first place.

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

Yes.

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

We are concerned that an increased category of debts exempted from discharge will undermine the concept of debt relief. If an individual seeks, and requires, debt relief, then debt relief should be granted where appropriate. In circumstances where a creditor’s right to reclaim is either postponed until discharge, or continues in parallel with a contribution, the individual faces arrears of child

maintenance immediately on discharge. No statistics are provided on what level of arrears in child maintenance this relates to, nor what the financial impact this has on individual families.

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

No.

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

The Bank of England Base Rate plus 2%.

We would also suggest that there should be an agreed ceiling, which the rate would not exceed to address unexpected or wild fluctuations of the base rate.

We would also suggest that the Accountant in Bankruptcy tracks and documents the relevant interest rate applicable for ease of reference by trustees in the event that interest becomes payable.

*Q13b. If you have answered “other” to Q13a, what alternative option would you suggest?*

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*Q14. Do you consider that the currently prescribed 8% judicial rate of interest remains appropriate?*

No.

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

As per our answer to Q13a., we would recommend the applicable interest rate to be the Bank of England Base Rate, plus 2%. We also reiterate our recommendations in respect of an agreed ceiling, and the Accountant in Bankruptcy tracking and documenting the relevant applicable interest rate.

*Q14b. If you have answered “other” to Q14a, what alternative option would you suggest?*

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## **Other Issues**

### *Technical review*

We are aware that there is intended to be an accompanying technical review of the Bankruptcy (Scotland) Act 2016 and we will have a number of recommendations to make in relation to the Debtor Contribution Order (DCO), discharge and recall processes. We look forward to engaging with officials to this end and would be grateful for an update as to when this review will take place.

### *DCO*

In relation to DCOs we are of the view that the current legislation is deficient in capturing bonuses or undeclared earnings in retrospect, and existing DCOs are not variable or extendable in these situations.

### *Financial limits*

We think there is an argument for all financial limits in the statute to be index-linked and reviewed annually.

### *Vesting and assets*

The role of the family home (and its definition) in personal bankruptcy (sequestration and PTD should be reviewed.

Non-vested contingent assets being formally and fully defined.

There should be a review of the rules on vesting of personal pensions in light of the recently-introduced draw down provisions.

Consideration should also be given as to the extent of damages for personal injury vesting.

#### *Unimplemented provisions in the Bankruptcy and Diligence (Scotland) Act 2007*

There still remain unimplemented provisions, including land attachment and residual attachment, of the Bankruptcy and Diligence (Scotland) Act 2007. There has been a diligence review, but it is still unclear what changes may be made in this respect. Land attachment is linked to the issue of the family home and therefore the results of the diligence review needs to be factored into this review.

#### *Money advice sector*

Funding for money advice sector is an integral part of the system. We would support increased access to money advice in the public sector, but it must be adequately funded and reviewed regularly for competency.

#### *Other areas*

Following the recent Supreme Court decision in *MacDonald and another v Carnbroe Estates Ltd*, the law relating to remedies where there is a successful challenge of a gratuitous alienation or unfair preference has been revisited. The approach adopted in this case may result in uncertainty in any given case and it may be useful to consider whether the chance should be taken to clarify exactly how this should be approached in future to minimise or eliminate such uncertainty.

It would also be helpful for the Scottish Government to consider clarification of the payment of interest on recall, clarification of claims relating to council tax, reviewing the discharge of a trustee where a debtor refuses to co-operate, and reviewing the discharge and re-opening of cases.

We hope that this response is helpful to the Scottish Government's review of the BADAS Act changes and we would be very happy to discuss these matters in greater detail. As above, please contact R3's Technical Manager, Ben Luxford, at [ben.luxford@r3.org.uk](mailto:ben.luxford@r3.org.uk) or 020 7566 4218, if a meeting would be helpful. Yours faithfully,

**Iain Fraser**

R3 Scottish Technical Committee Chair