

A CONSULTATION ON PUBLIC SERVICES, JUSTICE SYSTEM AND OTHER REFORMS

DEADLINE: 9 NOVEMBER 2021

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Topic P2 – Bankruptcy: debt level that enables creditors to pursue the bankruptcy of a debtor through the courts (page 25)

Legislative reference: Part 5 of schedule 1 of the Second Scottish Act
(legislation.gov.uk) (paragraph 10)

64.The proposal is to strengthen the protections available for those dealing with problem debt by making permanent measures that increase the minimum debt level a creditor must be owed to petition for bankruptcy through the courts.

65.Paragraph 10 of schedule 1 of the Second Scottish Act modifies the definitions of “qualified creditor” and “qualified creditors” in section 7(1) of the Bankruptcy (Scotland) Act 2016 by raising the amount of money a creditor or a group of creditors must be owed in order to be “qualified” from £3,000 to £10,000. A qualified creditor has the right to petition the court for a debtor’s bankruptcy in terms of section 2(1)(b)(i) of the Bankruptcy (Scotland) Act 2016, where the debtor is apparently insolvent.

66.The volume of creditor petitions has reduced significantly since April 2020 as compared with previous years. For example, the provisional figures highlighted in the published statistics for quarter 4 2020/21 show that there were 169 creditor petitions for the full year 2020/21 - compared with 910 submitted in 2019/20.

There will be a range of factors involved, including the limitations provided by the increased creditor petition debt level, increased creditor forbearance during the pandemic and the protections provided by the moratorium described earlier in this memorandum.

67.In common with the stakeholder views set out in relation to the moratorium, there is a recognition that the protection afforded through the increased creditor petition threshold is very likely to be required beyond March 2022. This reflects the significant uncertainty over the timing and scale of demand for debt solutions that will arise. There have however been questions raised as to whether the £10,000 minimum debt level introduced on a temporary basis is appropriate for the longer term.

It was suggested that such an amount would frustrate smaller creditors as it would prevent them from initiating sequestration proceedings. Equally, stakeholders have suggested that a reversion to the previous £3,000 minimum debt level might not afford sufficient protection as the economic consequences of the pandemic emerge. This consultation seeks views on the appropriate debt level that should enable creditor petition bankruptcy to be pursued through the Scottish courts, including whether a figure of £5,000 would strike a more appropriate balance between the interests of debtors and creditors were the provision to be placed on a permanent footing.

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Question 6:

It is proposed that the provisions for Topic P2 (Bankruptcy: debt level that enables creditors to pursue the bankruptcy of a debtor through the courts) as described will be made permanent. Which of the following best describes what you think about this?

1. I think the provisions for Topic P2 should be extended beyond March 2022 and made permanent (i.e. with a creditor petition debt level of £10,000 as per the current provisions)
2. I think the provisions for Topic P2 should be extended beyond March 2022 and made permanent with an amended creditor petition debt level of £5,000
3. I think the provisions for Topic P2 should be extended beyond March 2022 (i.e. with a creditor petition debt level of £10,000 as per the current provisions), but not made permanent
4. I think the provisions for Topic P2 should be extended beyond March 2022 with an amended creditor petition debt level of £5,000, but not made permanent
5. I do not think the provisions for Topic P2 should be extended or made permanent
6. Unsure
7. I have no view

If you have any comments on either the provisions for Topic P2, or the proposal for permanence, please write them below

Further comment -

The £3,000 debt level has been in place for many years and an increase would seem appropriate now.

However, we believe that a level of £10,000 would be too high as it would potentially exclude too many smaller creditors from seeking sequestration as a remedy. We feel that £5,000 is a more acceptable level, which will better balance the interests of creditors and debtors.

A petitioning debt level of £10,000 is not aligned with the breathing space provisions. Furthermore, it would not be optimal to raise the limit above £5,000 as the risk of petition for sequestration as debtors approach the debt limit can encourage the debtor to repay their debts where they can and give them an opportunity to manage their debts if they cannot repay in terms of the normal contractual agreement.

It will not assist debtors to increase the level to £10,000 and it will adversely affect creditors.

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Topic P3 – Bankruptcy: electronic service of documents Legislative reference: Part 5 of schedule 1 of the Second Scottish Act (legislation.gov.uk) (paragraph 8) (page 27)

68.The proposal is to improve the use of technology in bankruptcy proceedings by permitting documents required during bankruptcy administration to be transmitted to a person electronically.

69.Paragraph 8 of schedule 1 of the Second Scottish Act makes modifications to section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 as that section applies to documents which are authorised or required to be sent by or under the Bankruptcy (Scotland) Act 2016. The effect of the amendment is to permit a document to be transmitted to a person electronically and also to modify the rules which apply in relation to the circumstances in which willingness to receive a document electronically may be given or inferred.

70.The provisions have been widely used by the insolvency profession, for example in issuing circulars to the creditors involved in insolvency proceedings. Electronic delivery provides for more efficient process, ensuring quicker delivery of information to recipients and reduced costs of administration. Electronic submission also addresses issues that have arisen during the pandemic including uncertainty over home-working and whether mail delivered to business premises will be received.

These measures have been supported by the insolvency profession and there is a recognised continuing requirement for these provisions. Feedback suggests that the insolvency profession would consider permanent provision for electronic delivery of documents a welcome modernising reform.

Question 7:

It is proposed that the provisions for Topic P3 (Bankruptcy: electronic service of documents) as described will be made permanent. Which of the following best describes what you think about this?

1. I think the provisions for Topic P3 should be extended beyond March 2022 and made permanent
2. I think the provisions for Topic P3 should be extended beyond March 2022, but not made permanent
3. I do not think the provisions for Topic P3 should be extended or made permanent
4. Unsure
5. I have no view

If you have any comments on either the provisions for Topic P3, or the proposal for permanence, please write them below.

Further comment –

This is a welcome, modernising reform in the digital workplace.

Electronic transmission of documents became an essential part of working from home and removed many of the uncertainties regarding issue and delivery when offices were not generally open to the public.

Even as workforces return to the office, this reform will still be beneficial and will make communication easier. Completing forms and transmitting them electronically will be less time consuming, more straightforward, and less costly for consumers and businesses alike.

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Topic P4 – Bankruptcy: moratoriums on diligence

Legislative reference: Schedule 2 of the First Scottish Act (legislation.gov.uk)

71. The proposal is to protect those with unsustainable debt by increasing the length of the moratorium against diligence. This topic follows on from the discussion of AiB's specific consultation earlier in this Chapter.

72. Schedule 2, paragraphs 1 and 4 of the First Scottish Act increased the length of the moratorium against diligence established under sections 195 to 198 of the Bankruptcy (Scotland) Act 2016 ('the 2016 Act') from a period of six weeks to a period of six months. The rationale behind the provisions was to extend the period during which individuals with financial difficulties could secure protection from creditors taking action against them, allowing such individuals more time to find advice on how best to deal with their debts as well as to recover from time limited income shocks. The provisions in the 2016 Act allow for a 'breathing space' in which the debtor can seek money advice, and find the right longer term solution for their circumstances.

73. The new provisions have been used and there were 2,152 applications for moratoriums granted in the 12 months to April 2021 (inclusive) compared with 1,060 for the previous 12 months.

74. While the provisions have been welcomed and representations have been made from stakeholders mentioned earlier in this Chapter on the need for permanent provisions that provide enhanced protection, the general view is that the 6 month period provided for is not appropriate on a longer term basis. Concerns have been raised that a 6 month period may result in individuals losing that sense of urgency and disengaging from the advice seeking process to find a solution to their debt problems. In response to the previous consultations referenced earlier in this Chapter on the moratorium on diligence provisions, respondents have indicated that a 12 week period might be the preferred option and offer advantages over reverting to the earlier 6 week period prescribed in bankruptcy legislation prior to the amending provision brought forward by the First Scottish Act. This consultation aims to seek further views and confirm that this is still the case.

Question 8:

It is proposed that the provisions for Topic P4 (Bankruptcy: moratoriums on diligence) as described will be made permanent. Which of the following best describes what you think about this?

1. I think the provisions for Topic P4 should be extended beyond March 2022 and made permanent (i.e. with a moratorium period of 6 months as per the current provisions)
2. I think the provisions for Topic P4 should be extended beyond March 2022 and made permanent with an amended moratorium period of 12 weeks
3. I think the provisions for Topic P4 should be extended beyond March 2022 (i.e. with a moratorium period of 6 months as per the current provisions), but not made permanent
4. I think the provisions for Topic P4 should be extended beyond March 2022 with an amended moratorium period of 12 weeks, but not made permanent
5. I do not think the provisions for Topic P4 should be extended or made permanent
6. Unsure
7. I have no view

If you have any comments on either the provisions for Topic P4, or the proposal for permanence, please write them below.

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Further comment –

During the pandemic it was recognised that distressed debtors needed additional breathing space to deal with an uncertain situation. However, the resulting 12 month moratoriums have been introduced to the potential detriment of creditors who have been unable to take any action and have seen their position drift. There is a need to balance the importance of dealing with a situation urgently and allowing enough time for an individual to find an appropriate solution to their debt problems. A 6-month moratorium, which could be extended to 12 months, has allowed too much time, and not enough incentive, for debtors to take action to deal with problem debt.

Anecdotally we have heard of instances where debtors have abused the moratorium, deliberately delayed making payment, and used the breathing space provided to dispose of assets to the detriment of creditors.

A 12-week moratorium would be consistent with the moratorium length across the rest of the UK and strikes the correct balance between creditor and debtor interests.

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Topic P5 – Bankruptcy: virtual meetings of creditors Legislative reference: Part 5 of schedule 1 of the Second Scottish Act (legislation.gov.uk) (paragraph 12)

75. The proposal is to improve the use of technology in bankruptcy proceedings by enabling meetings of creditors to take place by virtual means rather than in a physical environment.

76. Paragraph 12 of schedule 1 of the Second Scottish Act modifies the Bankruptcy (Scotland) Act 2016 to allow meetings of creditors to take place using electronic means. Although creditors' meetings in personal insolvency proceedings are now infrequent there are circumstances that give rise to them being convened and with the onset of the pandemic-related restrictions it was essential that provision was introduced to allow those to take place in a virtual environment. This rationale remains and the provisions will be required beyond March 2022. There now appears to be broad consensus that a permanent change to allow virtual meetings would be welcomed should the opportunity exist. This is not only in response to the Covid pandemic, but as a longer term modernising change to the insolvency process that would improve efficiency and reduce the costs – potentially increasing the returns paid to creditors.

Question 9:

It is proposed that the provisions for Topic P5 (Bankruptcy: virtual meetings of creditors) as described will be made permanent. Which of the following best describes what you think about this?

1. I think the provisions for Topic P5 should be extended beyond March 2022 and made permanent
2. I think the provisions for Topic P5 should be extended beyond March 2022, but not made permanent
3. I do not think the provisions for Topic P5 should be extended or made permanent
4. Unsure
5. I have no view

If you have any comments on either the provisions for Topic P5, or the proposal for permanence, please write them below.

Further comment –

This is a sensible proposal which will improve efficiency, save costs and align personal insolvency to the corporate insolvency procedures.

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Topic J1 – Courts and tribunals: conduct of business by electronic means Legislative reference: Part 1 of schedule 4 of the First Scottish Act (legislation.gov.uk) (paragraphs 1, 5 and 6 - excluding paragraph 1A which is within Topic P8 (Courts: intimation, etc. of documents))

145. It is proposed that the provisions around electronic signing and sending of documents in courts and tribunals should be extended beyond March 2022.

146. Those provisions provide:

- that documents which would normally have to be signed in ink can instead be signed electronically;
- that documents which would normally have to be physically delivered can instead be transmitted electronically (for example by email);
- that documents which would normally have to be sent to a party in a case can instead be sent to the person's solicitor;
- that the head of the Scottish courts (the Lord President of the Court of Session, known as the Lord Justice General as regards the criminal courts) can direct that there should be exceptions to the rules described above so that for some types of document, or in certain cases, electronic signing and sending will not be appropriate and physical documents and signatures should instead be used.

147. The use of written submissions, the digital transmission of documents and the use of electronic signatures have enabled swift process changes that have enabled court services to operate more efficiently.

Question 23: It is proposed that the provisions for Topic J1 (Courts and tribunals: conduct of business by electronic means) as described will be extended beyond March 2022. Which of the following best describes what you think about this?

1. I think the provisions for Topic J1 should be extended beyond March 2022 and made permanent

2. I think the provisions for Topic J1 should be extended beyond March 2022, but not made permanent

3. I do not think the provisions for Topic J1 should be extended or made permanent

4. Unsure

5. I have no view

If you have any comments on either the provisions for Topic J1, or the proposal for extension beyond March 2022, please write them below.

Further comment -

This is a modernising proposal which allows people to work remotely and still be able to sign documents, mitigating the practical difficulties that have arisen with document signing during remote and hybrid working. It will allow documents to continue to be executed in a quicker, more efficient, and less costly fashion.

As a separate point, while written submissions are useful as a signpost for the argument which is going to be made, the use of oral submissions is fundamental to effective representation of a client's position and should not be replaced wholly by written submissions.

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Topic J2 – Courts and tribunals: virtual attendance Legislative reference: Part 1 of schedule 4 of the First Scottish Act (legislation.gov.uk) (paragraphs 2 to 5 and 6 - excluding paragraph 1A which is within Topic P8 (Courts: intimation, etc. of documents))

148. It is proposed that the rules allowing people to attend a court or a tribunal by electronic means (for example, by live video link) should be extended beyond March 2022.

149. Those provisions provide:

- that by default anyone who would normally have to physically attend a court or tribunal (other than a trial) can attend by electronic means, but the court or tribunal has the power to require a person to physically attend in a particular case;
- that by default people who have to physically attend a trial will still have to do so, but the court has the power to allow a person to attend a trial by electronic means in a particular case;
- that where someone is to attend a hearing by electronic means, the court or tribunal will set out how that is to happen in a direction.

150. The Scottish Government supports an extension to ensure that courts and tribunals can continue to function as efficiently as possible in a way which does not impede access to Justice. The proposal is to retain the default position in which requirements for physical attendance at any court or tribunal hearings will not apply, except for trial diets, where the default is that a person will physically attend hearings. The presumption for non-trial diets can be overridden by the court or tribunal, where it considers that the default position would prejudice the fairness of proceedings, or would otherwise be contrary to the interests of justice. A court or tribunal can allow a person to appear by electronic means for a trial diet, provided that doing this would not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice.

151. These provisions have been utilised to good example, most particularly through the remote jury model, and have enabled the justice sector to respond to wider challenges out with their control in order for business to continue and adapt.

152. These provisions have enabled a systemic response to the impact of public health restrictions. The systemic response often represented improvements previously identified as features of a modern criminal justice system and something that should be retained in the immediate term.

Question 24:

It is proposed that the provisions for Topic J2 (Courts and tribunals: virtual attendance) as described will be extended beyond March 2022. Which of the following best describes what you think about this?

I think the provisions for Topic J2 should be extended beyond March 2022 and made permanent

I think the provisions for Topic J2 should be extended beyond March 2022, but not made permanent

I do not think the provisions for Topic J2 should be extended or made permanent.

Unsure

I have no view

If you have any comments on either the provisions for Topic J2, or the proposal for extension beyond March 2022, please write them below.

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Further comment –

Physical attendance should be the default and the court should have discretion to allow remote attendance. Accordingly, the position regarding personal attendance at court or a tribunal should be returned to the pre-Covid-19 provision.