**Wider Review of Scotland’s Statutory Debt Solutions**

**Stage 2 Working Group 3 – Bankruptcy and Wider Issues - Recommendations**

**March 2022**

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# 1. Introduction

1.1 This group was set up to focus on specific areas primarily within the bankruptcy process and to consider issues which cross all debt solutions e.g. repayment periods and exit from solutions.

1.2 Wide ranging bankruptcy reforms were introduced through the Bankruptcy and Debt Advice (Scotland) Act 2014 (“the 2014 Act”), which came into force in April 2015. The Scottish Government consulted on these reforms in 2019 to gauge how they were working and this feedback was used to help determine which topics were to be considered within this wider review.

1.3 The group was initially allocated four key topics for discussion and following discussion at the first meeting this remit was extended. These are summarised as follows:

* Insolvency debt and asset thresholds
* Repayment periods in debt solutions
* Exit from solutions
* Prescribed rate of interest in bankruptcy and PTDs
* Administration in bankruptcy - circulars and fees

# 2. Insolvency debt and asset thresholds

## Introduction

2.1 Bankruptcy legislation sets out the minimum amount of debt a person must have before they can apply for their own bankruptcy and the minimum amount of debt necessary for a creditor petition for bankruptcy. The minimum debt level is one factor in determining which form of bankruptcy process debtors can apply for (either MAP or Full Administration). Eligibility for MAP bankruptcy is also restricted through a maximum level of debt and the level of assets owned by a debtor. There are also asset protections across the processes for items that are considered essential, including vehicles up to a certain value which are reasonably required. These financial thresholds have been considered by the group to determine if any amendment is recommended.

## Minimal Assets Process – Minimum Debt Threshold

2.2 The Bankruptcy and Diligence etc. (Scotland) Act 2007 (the 2007 Act) introduced the option for an individual to apply for their own bankruptcy through the Low Income Low Asset (LILA) process. LILA introduced a minimum debt threshold ensuring that such a person could not seek their own bankruptcy for a relatively low amount of debt. The 2014 Act effectively replaced LILA with MAP and the concept of a minimum debt threshold was maintained.

### Discussion

2.3 The group has considered whether any changes should be made to the current £1,500 minimum debt threshold that applies to MAP bankruptcy. In doing so they identified three potential options – to maintain the current minimum debt threshold, remove the threshold and increase the threshold.

Option 1 – Maintain current minimum debt threshold

2.4 The threshold of £1,500 helps prevent people who are struggling with relatively low levels of debt from taking the serious step of entering bankruptcy. There are other potential options for those with low debt levels which may be more suitable.

2.5 The 2014 Act introduced mandatory debt advice for individuals considering a statutory debt solution, including bankruptcy. This was designed to ensure that people were fully aware of all their options for dealing with unsustainable debt before entering a solution and this is achieved by receiving advice from an independent and qualified money adviser. The group recognised this requirement provides added protection to a debtor, helping to ensure a person does not go into bankruptcy if there is a more appropriate alternative to address their financial problems.

2.6 In considering the impact of maintaining or changing the current minimum debt threshold, the statistics highlighted only a small number of cases (52) over the past three years which included total debts of between £1,500 and £2,500. Although this suggests that bankruptcy is not routinely pursued in low debt level circumstances, it remains an important option for those who need to access debt relief. This would therefore support the retention of the £1,500 threshold as an appropriate pre-condition.

**Table 1 - Ad-hoc Statistics: Summary of statistics on MAP bankruptcies between 2018-19 to 2020-21 by financial year of the awarded date**

| **Financial year of the awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| **Number of MAP cases awarded** | **2,173** | **2,020** | **1,516** | **5,709** |
| of which: Debt level between £1,500 and less than £5,000 | 274 | 225 | 108 | 607 |
| of which: Debt level between £1,500 and less than £2,500 | 23 | 24 | 5 | 52 |
| of which: Debt level between £2,500 and less than £3,000 | 31 | 24 | 9 | 64 |
| of which: Debt level between £3,000 and less than £5,000 | 220 | 177 | 94 | 491 |
| of which: Debt level between £5,000 and less than £10,000 | 898 | 863 | 509 | 2,270 |
| of which: Debt level between £10,000 and less than £17,000 | 1,001 | 932 | 594 | 2,527 |
| of which: Debt level between £17,000 and £25,000 | n/a | n/a | 305 | 305 |
| **Median debt level for MAP cases (£) [note 4]** | **9,600** | **9,600** | **11,200** | **9,900** |
| of which: Debt level between £1,500 and less than £5,000 | 4,000 | 4,000 | 4,100 | 4,000 |
| of which: Debt level between £1,500 and less than £2,500 | 2,200 | 2,000 | 2,200 | 2,100 |
| of which: Debt level between £2,500 and less than £3,000 | 2,800 | 2,800 | 2,700 | 2,800 |
| of which: Debt level between £3,000 and less than £5,000 | 4,300 | 4,200 | 4,300 | 4,200 |
| of which: Debt level between £5,000 and less than £10,000 | 7,800 | 7,700 | 7,800 | 7,700 |
| of which: Debt level between £10,000 and less than £17,000 | 12,800 | 13,000 | 12,800 | 12,900 |
| of which: Debt level between £17,000 and £25,000 | n/a | n/a | 20,000 | 20,000 |
| **Number of refused applications for MAP [note 5]** | **90** | **68** | **43** | **201** |
| of which reason: Application withdrawn | 27 | 25 | 29 | 81 |
| of which reason: Unable to meet MAP criteria [note 6] | 29 | 24 | 7 | 60 |
| of which reason: Information not provided | 16 | 9 | 3 | 28 |
| of which reason: Subject to creditor petition or protected trust deed | 12 | 8 | 3 | 23 |
| of which reason: Other [note 3] | 6 | 2 | 1 | 9 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistical-release-id7).

Option 2 – Remove minimum debt threshold

2.7 While the group recognised that the threshold of £1,500 may be perceived as a low debt level, there remains the potential that even this threshold prevents some people from being able to get debt relief from some deeply worrying and unsustainable debt. The group heard anecdotal accounts of experiences where some people had found even such small amounts of debt impossible to repay. This was particularly the case for those on low incomes. In these situations, the threshold prevents people from entering bankruptcy, which can mean that they remain burdened with debt for a long time and thus trapped in poverty. The impact of this can be significant, preventing them from moving on with their lives and impacting on their health and wellbeing.

2.8 The impact of removing the threshold was thought to be small and was highly unlikely to result in a high number of additional bankruptcies, particularly since it is only one of the relevant criteria for MAP. The requirement to obtain advice from an independent qualified money adviser maintained a safeguard with a view to preventing a person from entering bankruptcy where there was a more appropriate solution.

Option 3 – Increase minimum debt threshold

2.9 Increasing the minimum debt level would result in less people being able to apply for their own MAP bankruptcy. While the statistics showed that the numbers of people would be likely to be relatively low, there was concern about removing bankruptcy as option for some of the most financially vulnerable people.

### Recommendation

* **Recommendation 1** - The group recommends the minimum debt threshold in MAP is removed. This recommendation was fully supported by all members who agreed the introduction of mandatory debt advice as well as the other MAP criteria provided protections from seeking bankruptcy for what can be perceived to be very low levels of debts. The group recognised that for those with no means to repay even small levels of debt, bankruptcy was the best option and access to this form of debt relief should not be denied. A MAP bankruptcy is a quick process and would allow a person a fresh start more quickly than any other alternative.
* **Recommendation 2** - The group also recommended, that should it not be considered acceptable to remove the minimum debt threshold from MAP, the current threshold of £1,500 should be retained.

## Full Administration Bankruptcy – Minimum Debt Threshold

### Background

2.10 The minimum debt threshold of £3,000 is in place to help ensure a person does not seek their own bankruptcy for a relatively low level of debt when there is another more suitable option. This higher minimum debt threshold recognises that Full Administration bankruptcy has more significant consequences than MAP bankruptcy, for example the realisation of assets.

### Discussion

2.11 The group has considered whether any changes should be made to the current £3,000 minimum debt threshold. In doing so, they identified three potential options – to maintain the current minimum debt threshold, remove the minimum debt threshold, and change the threshold.

Option 1 - Maintain current minimum debt threshold

2.12 The threshold of £3,000 helps prevent people who are struggling with relatively low levels of debt from taking the serious step of entering bankruptcy.

2.13 The 2014 Act introduced mandatory debt advice for individuals considering a statutory debt solution, including bankruptcy. This was designed to ensure that people were fully aware of all their options for dealing with unsustainable debt before entering a solution, and this is achieved by receiving advice from an independent qualified money adviser. The group recognised this new requirement provides added protection to a debtor, helping to ensure that a person does not go into bankruptcy where there is a more appropriate alternative, including a Debt Arrangement Scheme (“DAS”) or Protected Trust Deed (“PTD”).

2.14 Full Administration bankruptcy has more far-reaching implications for the debtor than MAP bankruptcy. This includes contributions from income towards the bankruptcy being paid for 48 months where these are assessed as being payable (no contribution is payable in MAP), the realisation of non-exempt assets where they exist (no asset realisation takes place in MAP) and discharge is normally granted after 12 months in a Full Administration bankruptcy as opposed to automatic discharge after six months in MAP. These factors must be taken into account when providing advice on the appropriate solution.

2.15 Statistics demonstrate that only a relatively small number of people enter Full Administration bankruptcy with relatively low levels of debt – 12 cases (over the past three years) had debts of less than £5,000, accounting for 2% of the total number of cases in the same period. A further 36 cases had debts of between £5,000 and £7,000, accounting for a further 6% of the total number of cases over the same period. This could be seen as a reason to increase the minimum debt threshold. However, the group considered that there may be people with relatively low levels of debt who are in need of debt relief but do not qualify for a MAP or other debt relief option, for whom this may be the only realistic option available.

**Table 2: Ad-hoc statistics: Number of Full Administration bankruptcies by debt level and financial year of the awarded date: Scotland, 2018-19 to 2020-21**

| **Financial year of the awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| **Number of FA cases awarded with debt level less than £17,000** | **246** | **236** | **87** | **569** |
| of which debt level: less than £5,000 | 5 | 5 | 2 | 12 |
| of which debt level: between £5,000 and £7,000 | 13 | 15 | 8 | 36 |
| of which debt level: between £7,000 and £10,000 | 49 | 40 | 20 | 109 |
| of which debt level: between £10,000 and £15,000 | 128 | 116 | 31 | 275 |
| of which debt level: between £15,000 and £17,000 | 51 | 60 | 26 | 137 |
| **Median debt level for FA cases with debt level less than £17,000 (£) [note 4]** | **12,300** | **12,400** | **11,900** | **12,300** |
| of which debt level: less than £5,000 | 4,300 | 4,100 | 4,300 | 4,200 |
| of which debt level: between £5,000 and £7,000 | 5,500 | 6,600 | 6,300 | 6,200 |
| of which debt level: between £7,000 and £10,000 | 8,700 | 8,700 | 8,600 | 8,700 |
| of which debt level: between £10,000 and £15,000 | 12,500 | 12,400 | 12,000 | 12,400 |
| of which debt level: between £15,000 and £17,000 | 16,000 | 16,100 | 15,800 | 16,000 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistics-release-id7-supplementary).

Option 2 – Remove minimum debt threshold

2.16 The group accepted that there is an argument for recommending the removal of the minimum debt threshold in Full Administration bankruptcy, which would be consistent with the recommended approach for MAP cases. This approach would address the gap which currently exists where a person is not qualified to apply for MAP bankruptcy but cannot enter a Full Administration bankruptcy because they have insufficient debt to meet the minimum debt threshold. It would also provide for greater consistency and ease of understanding amongst advisers and consumers.

2.17 Removing the minimum debt threshold in Full Administration cases could, however, lead to an increase in demand for Full Administration bankruptcy and associated debt advice from those who currently do not meet the minimum debt entry criteria. The numbers involved were, however, considered to be low and therefore manageable by the money advice sector.

2.18 The group also recognised that as acknowledged previously, the requirement for mandatory money advice is designed to prevent anyone entering bankruptcy for low levels of debt where it was not the best solution.

Option 3 – Change the minimum debt threshold

2.19 The group saw no significant benefits in adjusting the debt threshold to a lower fixed level – it considered the issue was whether it should be retained at the current level, increased or removed in line with the recommendation made for MAP bankruptcy. The group was concerned that increasing the threshold above £3,000 could have a detrimental impact on larger numbers of people who would no longer meet the minimum debt threshold and thereby reduce the options available to them. Table 2 above shows that increasing the threshold to £5,000 would have prevented 12 people from accessing Full Administration bankruptcy over the last three years and 48 people if the threshold was increased to £7,000. The group recognised that those with debts in excess of £3,000 can be more complex and flexibility needed to be retained. There was no support within the group for increasing the current threshold level of debt.

### Recommendation

* **Recommendation 3** - The group was not able to reach a consensus on whether a minimum debt level should be retained in Full Administration bankruptcies or removed.

* **Recommendation 4** - There were concerns that removing the threshold could result in more people seeking Full Administration bankruptcy. Retaining the threshold provides a very important protection against those with relatively low levels of debt taking the serious step of entering Full Administration bankruptcy with the significant consequences involved, notwithstanding that the introduction of mandatory money advice has helped to provide protection against this to consumers. Should a minimum debt threshold in Full Administration bankruptcy be retained, the group recommend this is retained at £3,000.

## Minimal Assets Process – Maximum Debt Threshold

### Introduction

2.20 The maximum debt threshold for MAP is currently £25,000 – this means that anyone with debt of more than £25,000 will not be eligible for MAP even if they have no assets or surplus income with which to make an income contribution. This maximum debt threshold was temporarily increased from £17,000 to £25,000 by the Coronavirus Scotland (No. 2) Act 2020 (“the second Coronavirus Act”). That change was subsequently made permanent through the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021 (“the 2021 Regulations”) which came into force on 29 March 2021. Although this change is in line with the views received from a consultation which sought feedback on the bankruptcy reforms that were introduced in 2015 through the 2014 Act, 45% of those who responded said there should not be a maximum debt threshold in MAP.

2.21 The group has considered whether any change should be made to the current maximum debt threshold. In doing so, they identified three potential options – to retain the current threshold, remove the threshold and increase the current threshold.

### Discussion

2.22 In considering the statistics the group noted that in 2020/21, 20.1% (305) of MAP bankruptcies had debts of between £17,000 and £25,000 – benefiting from the increased debt threshold for MAP. Although having higher levels of debt, this group had low or no assets and no surplus income to make an income contribution and will benefit from being discharged in six months, rather than the minimum 12 months for Full Administration.

**Table 3: Ad-hoc Statistics: Summary of MAP bankruptcies by financial year of the awarded date: Scotland, 2018-19 to 2020-21**

| **Financial year of the awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| **Number of MAP cases awarded** | **2,173** | **2,020** | **1,516** | **5,709** |
| of which: Debt level between £1,500 and less than £5,000 | 274 | 225 | 108 | 607 |
| of which: Debt level between £1,500 and less than £2,500 | 23 | 24 | 5 | 52 |
| of which: Debt level between £2,500 and less than £3,000 | 31 | 24 | 9 | 64 |
| of which: Debt level between £3,000 and less than £5,000 | 220 | 177 | 94 | 491 |
| of which: Debt level between £5,000 and less than £10,000 | 898 | 863 | 509 | 2,270 |
| of which: Debt level between £10,000 and less than £17,000 | 1,001 | 932 | 594 | 2,527 |
| of which: Debt level between £17,000 and £25,000 | n/a | n/a | 305 | 305 |
| **Median debt level for MAP cases (£) [note 4]** | **9,600** | **9,600** | **11,200** | **9,900** |
| of which: Debt level between £1,500 and less than £5,000 | 4,000 | 4,000 | 4,100 | 4,000 |
| of which: Debt level between £1,500 and less than £2,500 | 2,200 | 2,000 | 2,200 | 2,100 |
| of which: Debt level between £2,500 and less than £3,000 | 2,800 | 2,800 | 2,700 | 2,800 |
| of which: Debt level between £3,000 and less than £5,000 | 4,300 | 4,200 | 4,300 | 4,200 |
| of which: Debt level between £5,000 and less than £10,000 | 7,800 | 7,700 | 7,800 | 7,700 |
| of which: Debt level between £10,000 and less than £17,000 | 12,800 | 13,000 | 12,800 | 12,900 |
| of which: Debt level between £17,000 and £25,000 | n/a | n/a | 20,000 | 20,000 |
| **Number of refused applications for MAP [note 5]** | **90** | **68** | **43** | **201** |
| of which reason: Application withdrawn | 27 | 25 | 29 | 81 |
| of which reason: Unable to meet MAP criteria [note 6] | 29 | 24 | 7 | 60 |
| of which reason: Information not provided | 16 | 9 | 3 | 28 |
| of which reason: Subject to creditor petition or protected trust deed | 12 | 8 | 3 | 23 |
| of which reason: Other [note 3] | 6 | 2 | 1 | 9 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistical-release-id7).

2.23 In comparison, 14.9% (97) of those entering Full Administration bankruptcy in 2020/21 also had debts of between £17,000 and £25,000, but while their debt levels would have enabled this group to enter MAP, they will have had assets or surplus income which allowed them to pay a contribution, preventing them entering the MAP route.

**Table 4: Ad-hoc Statistics: Number of Full Administration bankruptcies between 2018-19 to 2020-21 by debt level and financial year of the awarded date**

| **Financial year of awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| **Number of FA cases awarded** | **1,694** | **1,805** | **648** | **4,147** |
| of which: Debt level less than £17,000 | 246 | 236 | 87 | 569 |
| of which: Debt level between £17,000 and £25,000 | 558 | 665 | 97 | 1,320 |
| of which: Debt level greater than £25,000 | 890 | 904 | 464 | 2,258 |
| **Median debt level for FA cases (£) [note 4]** | **25,700** | **25,000** | **30,900** | **26,300** |
| of which: Debt level less than £17,000 | 12,300 | 12,400 | 11,900 | 12,300 |
| of which: Debt level between £17,000 and £25,000 | 20,200 | 20,400 | 20,100 | 20,300 |
| of which: Debt level greater than £25,000 | 40,900 | 39,800 | 38,600 | 39,900 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistical-release-id7).

2.24 The group also considered the level of cases which were converted from MAP to Full Administration bankruptcies and the reason for the conversion. In the three years to 2020/21, 17% (41), 16% (37) and 8% (7) respectively of cases were converted from MAP to Full Administration. This showed that, following the increase in the maximum debt threshold to £25,000 for MAP, there were fewer circumstances where this conversion was needed. The group did note, however, that the primary reason for case conversion in each of the three years was the identification of surplus income leading to the ability to make a contribution.

**Table 5: Management Information: Number of Full Administration (FA) bankruptcies with debt level below £17,000 between 2018-19 and 2020-21 by reason for Full Administration and financial year of the awarded date**

| **Financial year of awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| **Number of FA cases awarded with debt level less than £17,000 [note 9]** | **246** | **236** | **87** | **569** |
| of which reason for FA: Conversion from MAP to FA | 41 | 37 | 7 | 85 |
| of which reason for FA: Assessed to have surplus income | 178 | 163 | 48 | 389 |
| of which reason for FA: Owned a single asset worth over £1,000 [note 4] | 67 | 40 | 19 | 126 |
| of which reason for FA: Owned any land or property | 61 | 41 | 10 | 112 |
| of which reason for FA: Owned assets with the total value of at least £2,000 | 59 | 27 | 8 | 94 |
| **Percentage of FA cases awarded with debt level less than £17,000 [note 9]** | 100% | 100% | 100% | 100% |
| of which reason for FA: Conversion from MAP to FA | 17% | 16% | 8% | 15% |
| of which reason for FA: Assessed to have surplus income | 72% | 69% | 55% | 68% |
| of which reason for FA: Owned a single asset worth over £1,000 [note 10] | 27% | 17% | 22% | 22% |
| of which reason for FA: Owned any land or property | 25% | 17% | 11% | 20% |
| of which reason for FA: Owned assets with the total value of at least £2,000 | 24% | 11% | 9% | 17% |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistical-release-id7).

Option 1 – Retain the current maximum debt threshold

2.25 There are a number of reasons to have an upper threshold for MAP bankruptcy including:

* the process should remain relatively straight forward for those with lower levels of debt, little or no assets and no ability to make an income contribution and the cost of administering MAP is low in comparison to Full Administration bankruptcy.
* the automatic debtor discharge at six months rather than the normal 12 months in Full Administration bankruptcy provides those with lower levels of debt, little or no assets and no ability to make an income contribution, an opportunity to move on with their lives relatively quickly and easily.
* the threshold allows for more investigation into bankruptcies where the debt levels are more significant notwithstanding that the debtor at the time of applying for bankruptcy has few or no assets and no ability to make an income contribution. A MAP bankruptcy can be seen as too light touch for these circumstances. Greater investigation may highlight any potential inappropriate behaviour such as taking on new debts with no intention of repaying these or concealment of income or assets or potential challengeable transactions.

2.26 There was also some concern for those who do not qualify for MAP who find themselves in a Full Administration bankruptcy despite not having any assets or being able to make a contribution. This was seen as having a big impact on people’s lives – not being able be discharged from the bankruptcy for 12 months, preventing the person from moving on with their lives.

2.27 The group noted that the maximum threshold had been increased by the second Coronavirus Act and subsequently made permanent in March 2021, therefore, the full impact of this change would not yet be known. Some of the support measures which had been available during the pandemic were also coming to an end which could continue to impact on individuals’ finances for a period of time. It was suggested that it may be prudent therefore to retain the maximum debt threshold at £25,000 for a further period in order to be able to fully assess the impact of the change and then reconsider it.

Option 2 – Remove the maximum debt threshold

2.28 As highlighted, 45% of those who responded to a consultation about the 2014 Act bankruptcy reforms said there should not be a maximum debt threshold for MAP bankruptcy. The primary argument presented is that if someone is on benefit only or cannot pay a contribution the level of debt involved is of little consequence and there are other criteria that prevent MAP bankruptcy where assets are held. The higher application fee for entering Full Administration bankruptcy despite not being able to make a contribution or having assets was highlighted as a further concern and considered unfair. The group did recognise the action that has been taken to remove all bankruptcy application fees for those in receipt of prescribed benefits.

2.29 Focusing on a person’s assets or ability to pay a contribution rather than the level of debt would help address concerns for those being pushed into Full Administration bankruptcy purely because they had high levels of debt. The group highlighted that the majority (71%) of those in Full Administration bankruptcies do not pay a contribution and debated whether they should therefore be MAP. They also highlighted the facility to convert a MAP bankruptcy to Full Administration where a person’s income and/or asset position changed.

**Table 6 – Ad-hoc Statistics: Number of statutory debt solutions by type of debt solution and grouped approximately monthly contribution level**

| **Financial year of the awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** | **Percentage of the overall figure** |
| --- | --- | --- | --- | --- | --- |
| Bankruptcy (excluding MAP) | 2,692 | 2,728 | 817 | 6,237 | 100% |
| of which: Balancing item to match the published statistics | -6 | 3 | 1 | -2 | n/a |
| of which monthly contribution level: £0 or no DCO was set | 1,909 | 1,952 | 585 | 4,446 | 71% |
| of which monthly contribution level: Less than £50 | 141 | 108 | 28 | 277 | 4% |
| of which monthly contribution level: £50 and less than £75 | 61 | 60 | 16 | 137 | 2% |
| of which monthly contribution level: £75 and less than £100 | 71 | 56 | 16 | 143 | 2% |
| of which monthly contribution level: £100 and less than £150 | 189 | 201 | 72 | 462 | 7% |
| of which monthly contribution level: £150 and less than £200 | 112 | 111 | 48 | 271 | 4% |
| of which monthly contribution level: £200 and less than £250 | 49 | 60 | 17 | 126 | 2% |
| of which monthly contribution level: £250 and less than £300 | 43 | 41 | 6 | 90 | 1% |
| of which monthly contribution level: At least £300 | 123 | 136 | 28 | 287 | 5% |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 10](https://www.aib.gov.uk/aib-ad-hoc-statistical-release-id-10).

2.30 Removing the maximum debt threshold would prevent the need for MAP bankruptcies being converted to Full Administration bankruptcies where debt levels are identified as being higher than originally assessed, although it was acknowledged this seldom happens with the most common reasons for conversion associated with surplus income enabling a contribution to be made or identification of assets or property that need to be administered.

2.31 There was concern that creditors could lose out where assets were not identified through the MAP route into bankruptcy and removing the maximum debt threshold would reduce the scope for investigation. The possibility of allowing a creditor to be able to ask for a MAP bankruptcy to be converted to Full Administration bankruptcy to allow an investigation to take place was considered but there was concern about the complexities of setting the criteria for this and how that process might operate in practice.

Option 3 – Increase the maximum debt threshold

2.32 The group discussed options including the impact of increasing the maximum debt threshold to £30,000 or £50,000. It noted the recent Insolvency Service consultation on its proposed maximum debt threshold of £30,000 for Debt Relief Orders in England and Wales (the nearest equivalent to MAP bankruptcy). Although competing views were reflected in the responses received, £30,000 is the level that has been adopted for Debt Relief Orders. The group welcomed the recent permanent change to the increased MAP threshold of £25,000 and considered that the primary rationale for any further increase would be to support those who had no disposable income and who may struggle to pay the application fee for Full Administration bankruptcy. In general, however, the majority of the group considered that further time would be needed to evaluate the impact of the recent increase before assessing whether a further change was necessary.

### Recommendation

* Recommendation 5 - The group recommends that the maximum debt threshold remains at £25,000 for the present at least. While some stakeholders would prefer to see this threshold removed and others would like to see a further increase, there was general consensus that maintaining the threshold at £25,000 would enable the impact of this increase to be assessed properly before increasing further - if deemed appropriate. Continuing with this threshold also ensures the ability to investigate bankruptcies with relatively high levels of debt continues.

## Assets Thresholds

### Introduction

2.33 MAP provides a streamlined and lower cost route to bankruptcy for those unable to pay a contribution and with assets valued below set statutory limits. The prescribed limits currently applying to MAP eligibility are that total assets must not have a total value in excess of £2,000 and no single asset owned should be valued in excess of £1,000. This calculation excludes a vehicle with a value not exceeding £3,000 where there is a requirement for its use.

2.34 Full Administration bankruptcy has the same rules in respect of a debtor’s vehicle.

2.35 The 2014 Act consultation sought views on whether the total and individual asset limits should be increased. The majority of those responding (64%) did not believe the total asset and individual asset limits should be increased. Of those who believed there should be an increase, their feedback can be summarised as follows.

| **Total Asset limits** | **Percentage of respondents** |
| --- | --- |
| £3,000 | 45% |
| £4,000 | 33% |
| Other amount not listed | 22% |

| **Individual Asset limit** | **Percentage of respondents** |
| --- | --- |
| £2,000 | 36% |
| £3,000 | 28% |
| Other amount not listed | 36% |

2.36 The group was asked to consider whether any change should be made to the current asset debt thresholds, including the maximum value of vehicles. They were also asked to consider whether mobility scooters should be considered as an essential vehicle.

### Discussion

#### Assets

2.37 The group considered the statistics covering the last three complete financial years which highlighted that 22% (126) of Full Administration bankruptcies with debts lower than £17,000 were excluded from MAP as they involved a single asset worth more than £1,000. This reduces to approximately 17% (94) when looking at the total value of the assets held worth over £2,000.

**Table 7: Management information: number of Full Administration bankruptcies with debt level of below £17,000 by reason for Full Administration and Scotland, 2018-19 to 2020-21.**

| **Financial year of awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| **Number of FA cases awarded with debt level less than £17,000** | **246** | **236** | **87** | **569** |
| of which reason for FA: Conversion from MAP to FA | 41 | 37 | 7 | 85 |
| of which reason for FA: Assessed to have surplus income | 178 | 163 | 48 | 389 |
| of which reason for FA: Owned a single asset worth over £1,000 | 67 | 40 | 19 | 126 |
| of which reason for FA: Owned any land or property | 61 | 41 | 10 | 112 |
| of which reason for FA: Owned assets with the total value of at least £2,000 | 59 | 27 | 8 | 94 |
| **Percentage of FA cases awarded with debt level less than £17,000** | 100% | 100% | 100% | 100% |
| of which reason for FA: Conversion from MAP to FA | 17% | 16% | 8% | 15% |
| of which reason for FA: Assessed to have surplus income | 72% | 69% | 55% | 68% |
| of which reason for FA: Owned a single asset worth over £1,000 | 27% | 17% | 22% | 22% |
| of which reason for FA: Owned any land or property | 25% | 17% | 11% | 20% |
| of which reason for FA: Owned assets with the total value of at least £2,000 | 24% | 11% | 9% | 17% |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistical-release-id7).

2.38 It was agreed that the purpose of the asset value threshold was simply to decide which process a person could enter. As such, it was the total value of the assets that was key, while taking account of any items which were specifically excluded from that calculation. The vesting and realisation of assets could still continue regardless of how the asset threshold was set.

2.39 The group also discussed a concern about MAP bankruptcy applications being rejected in cases where the debtor had over £1,000 in the bank at the time of application due to salary being paid or backdated benefit being paid in a lump sum, taking them above the asset threshold. It was recognised that while there were issues with this process, the discussion highlighted the importance of timing the submission of an application to prevent this from happening. It was agreed that proposed changes to the asset thresholds would help to address this issue.

2.40 The group considered the level at which the overall asset threshold should be set and reflected that MAP is intended to be for people who have no assets. However, the asset threshold is only one of the criteria to determine if a debtor qualifies for MAP bankruptcy, and would not necessarily prevent assets from being realised by the trustee – for example, setting the asset threshold at £3,000 would mean that anyone who entered MAP with assets of up to £3,000 could have these realised in the same way as if they had gone into a Full Administration bankruptcy. However, the underlying rationale of the simplified process was that there would be no assets to be realised. It was therefore difficult to set an appropriate threshold.

##### Recommendation

* **Recommendation 6** - The group recommends there should continue to be an overall asset threshold for entering MAP bankruptcy but no threshold for individual assets. They could not see any benefit to separate asset thresholds and considered that it was the overall total asset value that was important. Given that MAP bankruptcy is intended to be for those with no assets, and involve no asset realisation, the group did not feel able to make any specific recommendation as to an appropriate overall asset level, but considered this could be the subject of further consultation/consideration.

#### Vehicles

2.41 The group discussed how the value and ownership of cars had changed in recent years with fewer people owning cars in favour of using alternative finance options, such as leasing (paying for usage without vehicle ownership) or Personal Contract Purchase finance which provides for vehicle ownership through contractual payment including a balloon payment at the contract completion. The vehicle can be returned as an alternative to the final payment.

2.42 The group did not consider the current value of £3,000 applying to vehicles to be representative of an average mid-sized family car. The increasing purchase cost of cars, the need for manufacturers to adhere to stricter emissions standards, improved safety features and greater durability were all cited as factors pointing to the requirement to review the current statutory threshold. In particular, a vehicle valued marginally in excess of £3,000 could prevent someone with no surplus income or other assets from accessing MAP bankruptcy. The group did not, however, feel qualified to suggest an alternative value. Thought also had to be given to how cars which have been adapted for those with disabilities, but not purchased through a disability scheme, are treated.

2.43 The group also highlighted anecdotal evidence of inconsistency in dealing with vehicles depending on whether the vehicle was owned or financed as well as concerns about different approaches being adopted by different trustees including variance between Accountant in Bankruptcy (“AiB”) and private sector trustees.

##### Recommendation

* **Recommendation 7** - The group recommends that expert opinion should be sought on the reasonable average value of a modern mid-sized family car with a view to revising the current value and that further consideration should be given to how disability vehicles are treated. The group felt that the issues relating to vehicles could then be considered more fully at Stage 3 and the statutory asset value for a car should then be amended to take account of this assessment. Work should also be carried out to issue guidance to improve consistency in approach when dealing with vehicles in the meantime.

#### Mobility Scooters

2.44 The group noted that mobility scooters do not normally count as an asset for Debt Relief Order purposes in England and Wales and discussed whether there was a need to introduce similar provision in Scotland. The group agreed a firm position that mobility scooters are disability aids and therefore essential for those who use them. These should therefore be excluded from any assessment of asset value or in determining entry criteria for MAP bankruptcy.

##### Recommendation

* **Recommendation 8** - The group recommends that mobility scooters should be specifically exempt from any asset threshold calculation.

## Creditor Petition

### Background

2.45 A creditor, or group of creditors, can petition for a person’s bankruptcy provided they meet the statutory “qualified creditor” criteria. The minimum statutory debt level for “qualified creditor” is £3,000. This has been temporarily increased to £10,000 by the Second Coronavirus Act. This was seen as a necessary response to the pandemic to ensure people who have found themselves with unsustainable debt, particularly through an income or employment shock, are given sufficient time to seek advice and access the appropriate solutions.

2.46 This threshold was discussed further at the Wider Review Stage 1 meetings held in November 2020 and in a subsequent targeted consultation to determine the requirement for this temporary increase to be made permanent. Feedback suggested that although the measure was seen as necessary in response to the current crisis, £10,000 was generally considered too high for a permanent provision. Consequently, the minimum debt threshold for a creditor petition will return to £3,000 when the second Coronavirus Act expires (currently on 31 March 2022). This temporary provision is subject to regular review and there is scope for this to be extended further through to September 2022 should the Scottish Parliament consider it necessary.

2.47 Prior to the coronavirus pandemic, the 2014 Act consultation sought views on whether the minimum threshold for a creditor petition bankruptcy should be increased. The majority of those responding (76%) did not believe that debt threshold should be increased. Of those respondents who believed the creditor petition threshold should be increased, the majority (86%) believed it should be increased to £5,000.

2.48 The group was asked to consider and make recommendations on what the debt threshold levels should be for creditor petitions.

### Discussion

2.49 The group discussed the statistics which showed that some local authorities are more proactive in taking recovery action. They also highlighted that 60% of the petitioning creditors were public bodies.

**Table 8: Ad-hoc Statistics: Number of creditor petitions awarded in between 2018-19 and 2020-21 by petitioning creditor organisation: Scotland**

| **Creditor organisation** | **Number of creditor petitions** | **Median debt level (£)** | **Mean debt level (£)** |
| --- | --- | --- | --- |
| HMRC | 508 | 25,300 | 53,800 |
| Dundee City Council | 167 | 5,700 | 7,400 |
| West Lothian Council | 155 | 6,600 | 7,800 |
| South Lanarkshire Council | 116 | 8,200 | 21,400 |
| City Of Edinburgh Council | 65 | 9,300 | 26,700 |
| Scottish Water Business Stream | 56 | 5,800 | 15,600 |
| Santander Consumer | 55 | 12,100 | 21,900 |
| Jewson | 48 | 6,800 | 15,100 |
| West Dunbartonshire Council | 35 | 9,800 | 17,100 |
| Renfrewshire Council | 33 | 9,400 | 24,000 |
| Aberdeen City Council | 30 | 8,600 | 10,000 |
| Highland Council | 30 | 15,900 | 35,000 |
| Fife Council | 28 | 6,700 | 8,100 |
| Other | 745 | 12,200 | 41,300 |
| **Overall** | **2,071** | **10,600** | **34,100** |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistical-release-id7).

2.50 The statistics reviewed highlighted that the retrospective application of an increased petitioning level to £5,000 would have precluded 327 (15%) of petitions progressing, while an increase to £10,000 would have precluded 989 (47%) of petitions. It was not possible to confirm how many petitions actually proceeded to an award of bankruptcy.

**Table 9 - Ad-hoc Statistics: Summary of statistics on creditor petitions between 2018-19 to 2020-21 by financial year of the awarded date**

| **Financial year of awarded date** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| Number of creditor petitions | 994 | 908 | 169 | 2,071 |
| of which: Single creditor | 976 | 891 | 161 | 2,028 |
| of which: Joint creditors | 18 | 17 | 8 | 43 |
| of which: Prior to the Coronavirus (Scotland) (No.2) Act [note 13] | 994 | 908 | 139 | 2,041 |
| of which: Since the Coronavirus (Scotland) (No.2) Act [note 13] | n/a | n/a | 30 | 30 |
| of which: Debt level between £3,000 and less than £5,000 | 153 | 132 | 42 | 327 |
| of which: Debt level between £5,000 and less than £7,000 | 177 | 134 | 26 | 337 |
| of which: Debt level between £7,000 and less than £10,000 | 164 | 141 | 20 | 325 |
| of which: Debt level at least £10,000 | 500 | 501 | 81 | 1,082 |
| Median debt level for creditor petitions (£)[note 4][note 14] | 10,100 | 11,400 | 8,800 | 10,600 |
| of which: Debt level between £3,000 and less than £5,000 | 4,200 | 4,100 | 4,300 | 4,100 |
| of which: Debt level between £5,000 and less than £7,000 | 5,900 | 5,900 | 5,800 | 5,900 |
| of which: Debt level between £7,000 and less than £10,000 | 8,100 | 8,200 | 8,100 | 8,200 |
| of which: Debt level at least £10,000 | 27,300 | 22,400 | 20,600 | 24,600 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 7](https://www.aib.gov.uk/ad-hoc-statistical-release-id7).

2.51 The group recognised the rationale for the temporary increase currently in place. In the longer term, there was concern from some members that a high threshold would, in some cases, serve to allow a debtor to not take steps to address their debt problems – without the possibility of immediate action by a creditor, a debtor may not seek advice or take steps to address the problem. This could allow further debt to accumulate, in particular in relation to local authority debt continuing not to be paid. There was anecdotal evidence of creditors finding that the possibility of a creditor petition for bankruptcy can lead to debtors engaging with them and negotiating a repayment schedule. The group highlighted the importance of debtors seeking advice, but also of speaking to creditors when struggling to repay debt. Many creditors are supportive and work with the debtor to address issues that are being experienced. This becomes more challenging if not tackled at an early stage. Consequently, some members felt that maintaining the increased “qualified creditor” limit could increase the risk of inaction on debt, thereby perhaps ultimately putting more homes at risk. This would be contrary to the increased protection desired.

2.52 The group also reflected that setting the “qualified creditor” threshold at a high level could prevent a creditor from taking action for a long period of time. Statistics show that a high level of creditor petitions are presented by Local Authorities seeking to recover council tax debt. Most local authorities use a petition for sequestration as a last resort, especially as they need to fund the action. However, some members reported that local authorities have suggested this can sometimes be the only way for them to engage with a debtor. While there are no statistics to evidence this, it is understood that a number of local authority petitions raised do not actually proceed to sequestration as they manage to come to an arrangement with the debtor at that stage. A “qualified creditor” threshold fixed at £10,000 could prevent a local authority utilising bankruptcy during a continuous period of four or five years of non-payment of council tax and there was concern from some members this may make the local authority less likely to agree to a payment arrangement at the petition stage given the higher level of the debt. The group also questioned whether this represented a fair balance between the interest of creditors and debtors.

2.53 The group discussed maintaining the creditor petition level at the £3,000 limit prescribed prior to the temporary uplift, a moderate increase to £5,000 and the implications of retaining the temporary increase to £10,000 for the longer term. The group considered whether there was a need to keep the creditor petition level at £3,000 in line with the threshold for debtors accessing Full Administration bankruptcy, however they did not feel that this consistency was essential. It is estimated that raising the level to £5,000 might prevent around 15% of creditor petitions (based on the application to historical data). A permanent increase to £10,000 is forecast to have more significant prohibitive impact and could result in some unintended consequences of increased debtor risk as highlighted above. The group recognised that fixing the level at £5,000 would have the benefit of introducing consistency across the UK and would provide a proportionate option for creditors to recover their debts. On balance the group considered that the £5,000 level would create a better balance than a permanent increase to £10,000 or retention of the £3,000 limit.

### Recommendation

* **Recommendation 9** - The group recommends that the minimum “qualifying creditor” debt level required to give rise to creditor petition bankruptcy should increase from £3,000 to £5,000. This level is considered to strike a fair balance between the interests of creditors and debtors.

# 3. Repayment periods in debt solutions

## Introduction

3.1 Most of the debt solutions in Scotland aim to give some return to creditors in satisfaction of the debt they are owed. This is achieved by realising the non-exempt assets of the debtor and/or setting up some form of repayment schedule/contribution from income. The period of the repayment schedules varies depending on the debt solution and the debtor’s circumstances.

## Debt Arrangement Scheme

### Background

3.2 DAS allows a debtor to pay off their debt over an extended period and unlocks some debtor protection from enforcement and interest and charges. Repayment will generally be made from the debtor’s income only, although the debtor may also choose to realise some assets. The debtor’s circumstances are taken into account and repayment is based on what they can reasonably pay back given their disposable income. The CFT is used to help determine how much a debtor can reasonably afford to repay and a proposal is put to creditors – there is now no requirement to pay all surplus income in DAS. Once approved the debtor makes regular payments e.g. weekly or monthly until the debt is repaid or creditors agree to composition. There is no limit on the level of debt or the length of the repayment period. The length of time of a repayment period can be any reasonable length proportionate to the value of the debt.

### Discussion

3.3 The working group has considered the current repayment periods and arrangements that apply to bankruptcy and DAS. The issues associated with PTDs have been considered separately by the dedicated working group with a focus on the recommendations made by the Economy, Energy and Fair Work Committee following its inquiry. However, the working group has borne in mind the need for there to be a coherent approach across all debt solutions including PTDs.

3.4 The statistics considered by the working group show that the viability of DAS Debt Payment Programmes (“DPP”) declines over time. As an example, for cases approved in 2015-16, 84% of DPPs survived the first year with 61% going on to survive five years.

3.5 It was recognised that legislation introduced in 2018 provided more flexibility to debtors by removing the statutory requirement to pay all surplus income towards the DPP. DAS now operates on the basis that a lower, but more manageable contribution, can be offered with the decision on acceptance of the terms falling to the creditors involved and potentially the fair and reasonable test undertaken by the DAS Administrator. The aim of the legislative change was to help make DPPs more sustainable. The working group consider that it is too early to determine if this change in policy has had an impact on sustainability.

**Table 10: Number of Debt Payment Programmes (DPPs) under the Debt Arrangement Scheme by outcome, duration and length of survival**

| **Financial year of the approval date** | **2015-16** | **2016-17** | **2017-18** | **2018-19** | **2019-20** | **2020-21** |
| --- | --- | --- | --- | --- | --- | --- |
| Median expected duration for live DPPs (years) | 8.5 | 7.7 | 7.0 | 6.8 | 6.3 | 5.9 |
| Median actual duration for completed DPPs (years) | 3.4 | 2.9 | 2.3 | 1.8 | 1.0 | 0.5 |
| Median actual duration for revocation DPPs (years) | 1.3 | 1.3 | 0.9 | 0.8 | 0.7 | 0.4 |
| Number of approved DPPs | 2,043 | 2,233 | 2,318 | 2,544 | 3,130 | 3,677 |
| of which: Balancing item to match the published statistics | 1 | 2 | 4 | 1 | 0 | 0 |
| of which outcome: Live | 656 | 1,045 | 1,304 | 1,850 | 2,756 | 3,588 |
| of which outcome: Completed | 576 | 456 | 334 | 178 | 76 | 9 |
| of which outcome: Revoked | 810 | 730 | 676 | 515 | 298 | 80 |
| of which outcome: Live as percentage of all approved DPPs | 32% | 47% | 56% | 73% | 88% | 98% |
| of which outcome: Completed as percentage of all approved DPPs | 28% | 20% | 14% | 7% | 2% | 0% |
| of which outcome: Revoked as percentage of all approved DPPs | 40% | 33% | 29% | 20% | 10% | 2% |
| of which: Survived for one year | 1,715 | 1,937 | 1,936 | 2,230 | 2,909 | n/a |
| of which: Survived for two years | 1,482 | 1,696 | 1,732 | 2,069 | n/a | n/a |
| of which: Survived for three years | 1,342 | 1,568 | 1,658 | n/a | n/a | n/a |
| of which: Survived for four years | 1,278 | 1,523 | n/a | n/a | n/a | n/a |
| of which: Survived for five years | 1,246 | n/a | n/a | n/a | n/a | n/a |
| of which: Remains survived so far | 1,232 | 1,501 | 1,638 | 2,028 | 2,832 | n/a |
| of which: One-year survival rate | 84% | 87% | 84% | 88% | 93% | n/a |
| of which: Two-year survival rate | 73% | 76% | 75% | 81% | n/a | n/a |
| of which: Three-year survival rate | 66% | 70% | 72% | n/a | n/a | n/a |
| of which: Four-year survival rate | 63% | 68% | n/a | n/a | n/a | n/a |
| of which: Five-year survival rate | 61% | n/a | n/a | n/a | n/a | n/a |
| of which: Overall survival rate | 60% | 67% | 71% | 80% | 90% | n/a |
| of which: Revoked within one year | 327 | 294 | 378 | 313 | 221 | 80 |
| of which: Revoked within two years | 560 | 535 | 582 | 474 | 298 | n/a |
| of which: Revoked within three years | 700 | 663 | 656 | 515 | n/a | n/a |
| of which: Revoked within four years | 764 | 708 | 676 | n/a | n/a | n/a |
| of which: Revoked within five years | 796 | 730 | n/a | n/a | n/a | n/a |
| of which: Percentage of DPPs revoked within one year | 16% | 13% | 16% | 12% | 7% | 2% |
| of which: Percentage of DPPs revoked within two years | 27% | 24% | 25% | 19% | 10% | n/a |
| of which: Percentage of DPPs revoked within three years | 34% | 30% | 28% | 20% | n/a | n/a |
| of which: Percentage of DPPs revoked within four years | 37% | 32% | 29% | n/a | n/a | n/a |
| of which: Percentage of DPPs revoked within five years | 39% | 33% | n/a | n/a | n/a | n/a |

Full notes for the above table can be found on the AiB website at the following link: [Statutory Debt Solutions Statistics – April 2020 to March 2021](https://www.aib.gov.uk/statutory-debt-solutions-statistics-april-2020-march-2021).

3.6 The average length of a DPP remains around six to seven years although some are much longer. Experience from the group suggested that the longest DPPs tended to be from debtors who sought to protect equity in their property.

3.7 The working group discussed issues arising from placing a cap on the repayment period in DAS and also explored options to revise the current composition arrangements as these issues are linked.

3.8 The following factors were identified in relation to the implications of imposing a cap on the DAS repayment period.

Factors in favour of a cap on repayment period:

* A cap might help to ensure that debtors are not stuck in a long-term debt solution, improve sustainability and avoid longer lasting stress and mental health issues arising from problem debt.
* Although it was recognised that DAS was an effective solution to protect assets, there were concerns that DPPs of 12 years and beyond could be viewed as too long for a DPP – some members considered that a cap of eight to nine years might offer a fair compromise.
* A different solution might provide a more appropriate solution for those facing DPPs spanning a long period of time.

Factors against imposing a cap on repayment period:

* A cap would serve to remove individual choice and might place assets, including the family home, at risk in cases where the cap resulted in DAS being removed as a possible solution.
* The flexibility to retain some surplus income offered the potential to improve sustainability and so allow longer term repayment periods that were acceptable to creditors and fair and reasonable.
* Future consideration of a cap could be affected by reforms on the treatment of the family home across debt solutions – likely to be within the scope of the Stage 3 review.
* A cap would undermine one of the key elements of DAS and the flexibility offered to present terms that are acceptable to creditors or deemed fair and reasonable.

### Recommendation

* **Recommendation 10** - Having considered all of these factors, the working group concluded that flexibility over the duration of a DAS DPP should be retained. This would prevent individuals being forced into bankruptcy or a PTD where another option acceptable to creditors was available – particularly where this could impact on assets including the family home. It would be important for advisers and those with debt to consider the viability and sustainability of the DPP at the out-set as there would be no benefit and potentially significant detriment in embarking on a programme that could not be completed.

### Revision to Composition Arrangements

3.9 Given the qualifying conditions for composition in DAS, only a small number of cases have sought composition and it was noted that not all creditors had accepted the offers made.

**Table 11: Summary of statistics on offers of composition made to creditors for DPPs under DAS**

| **Application status** | **2018-19** | **2019-20** | **2020-21** | **Overall** |
| --- | --- | --- | --- | --- |
| Number of offers of composition issued to creditors | 2 | 1 | 10 | 13 |
| of which: All creditors approved or deemed to approve | 1 | 0 | 2 | 3 |
| of which: At least one creditor rejected | 1 | 1 | 8 | 10 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 9](https://www.aib.gov.uk/ad-hoc-statistical-release-id-9-final).

3.10 Statistics requested by the group highlighted that 43.8% of current DPPs would have repaid 70% of the total debt owed to creditors within the first five years of the DPP, and 93.4% would have repaid 70% of the total debt to creditors within the first 10 years of the DPP. These figures took into account a number of assumptions including no applications to apply for short-term crisis breaks or requests for variations and were therefore a guide only.

**Table 12 – Ad-hoc statistics: Number of DPPs under the DAS by expected time length to repay 70% of the total debt owed to creditors**

| **Time period to repay 70% of the total debt owed to creditors** | **Number of DPPs** | **Percentage of total number of live DPPs** | **Median years to repay the rest of the total debt** |
| --- | --- | --- | --- |
| Number of live DPPs included in this model | 13,547 | 100.0% | [not applicable] |
| of which: Duration of less than 5 years | 5,930 | 43.8% | 1.5 |
| of which: Duration of between 5 years and less than 7 years | 4,364 | 32.2% | 2.5 |
| of which: Duration of between 7 years and less than 10 years | 2,353 | 17.4% | 3.5 |
| of which: Duration of between 10 years and less than 12 years | 428 | 3.2% | 4.5 |
| of which: Duration of at least 12 years | 472 | 3.5% | 6.0 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 9](https://www.aib.gov.uk/ad-hoc-statistical-release-id-9-final).

3.11 The following issues were identified in relation to the current statutory composition arrangements and whether these should be reformed.

* Composition based on both a time period and percentage of debt repaid was generally considered appropriate – but the current provisions involving 12 year debt repayment and 70% of the debt was considered too high a threshold.
* The working group noted that the Scottish Law Commission Report on Diligence and Debtor Protection (Scot Law Com No 95, 1985) which included recommendations on the introduction of a form of debt arrangement scheme suggested that payments be made over three years and that composition should be part of the process. It also suggested that a longer period of five years could be considered in exceptional cases, but composition should still be an essential element.
* Aside from the statutory composition arrangements, on a practical level, the current operation of DAS enabled composition offers to be made with acceding creditors being removed from the DPP through variation – if all creditors agreed with early termination the DPP could be brought to a close effectively allowing composition.
* It was considered that creditors would be more likely to reject a DAS if they had to write off their debts after a set period of time and this might force more people into other solutions – it would be important to secure creditors’ support for any revised statutory provisions on composition.
* The working group could see stakeholder opposition to compelling creditors to write off part of the debt in a debt repayment solution – this blurred the lines between DAS and other insolvency solutions.
* Some creditors have adopted a general policy not to accept DPPs and some smaller creditors were likely to be wary of composition in a solution where the expectation is that all debts (less DAS costs) are repaid.
* The working group recognise that the scheme needs to protect small creditors – it is important that creditors have the right information to allow them to make informed decisions.
* The working group noted the position in relation to some other debt solutions across the UK and beyond, but noted these are not a direct comparison to DAS.

#### Recommendation

* **Recommendation 11** - The working group consider that statutory composition within DAS should be retained, but the existing parameters should be reviewed. The current arrangements for composition are considered to be overly stringent. The working group considers that this area should be consulted on more widely before firm recommendations on the composition arrangements are finalised. It would be important in particular to obtain wider creditor sector views on these composition criteria.

## Bankruptcy

### Background

#### Minimal Assets Process bankruptcy

3.12 In the MAP bankruptcy process, there is no repayment plan. This process is for debtors with low income and few assets. As such, they are deemed to be unable to afford income contributions and all debts are written off after six months. A MAP application can be transferred into Full Administration if it is discovered that a debtor does not in fact meet the MAP criteria and a Debtor’s Contribution Order (“DCO”) may then be put in place.

#### Full Administration bankruptcy

3.13 Although a debtor is normally discharged from Full Administration bankruptcy after 12 months (if the trustee recommends their discharge), in addition to the realisation of any non-exempt assets, a debtor may be subject to a DCO which requires them to make payments towards the bankruptcy from their monthly income and is based on the Common Financial Tool (“CFT”) assessment. The repayments depend on the debtor’s circumstances, for example, no DCO will be required from those solely in receipt of prescribed benefits. However, the debtor must contribute the whole of any income assessed as surplus by the CFT. The contributions under a DCO usually last for 48 months. This can be for a shorter period which is determined by the person making or varying the order as appropriate. A period longer than 48 months is also possible if payments have been missed during the repayment period.

### Discussion

3.14 The working group considered the statutory contribution repayment period applying to bankruptcy. This is currently four years and applies from the date of first payment where it is deemed that a contribution can be made from surplus income. The group also considered the associated issue of the acquirenda period in bankruptcy – the period of time during which any non-exempt assets (e.g. inheritance or wind-fall) acquired by the debtor post-bankruptcy vest in the trustee for the benefit of creditors.

3.15 Statistics show that contributions are only paid in one third of bankruptcies (1,433) and as a consequence the length of the contribution period did not impact on a large number of cases.

**Table 13: Ad-hoc statistics: Summary of statistics on debtor contribution order (DCO) for bankruptcies by type of bankruptcy and financial year of the awarded date**

| **Type of bankruptcy and debtor contribution order (DCO)** | **2018-19** | **2019-20** | **2020-21 [provisional]** | **Overall** |
| --- | --- | --- | --- | --- |
| Number of full administration cases | 1,694 | 1,805 | 649 | 4,148 |
| of which: Original DCOs set at £0 | 1,093 | 1,187 | 435 | 2,715 |
| of which: Original DCOs set at more than £0 | 601 | 618 | 214 | 1,433 |
| of which: No DCOs set | 0 | 0 | 0 | 0 |
| of which: Original DCOs set at £0 for more than 12 weeks | 1,070 | 1,154 | 431 | 2,655 |
| of which: Original DCOs set at £0 for up to 12 weeks | 23 | 33 | 4 | 60 |
| Number of creditor petitions (including trust deed petitions) | 1,004 | 918 | 166 | 2,088 |
| of which: Original DCOs set at £0 | 573 | 459 | 68 | 1,100 |
| of which: Original DCOs set at more than £0 | 187 | 154 | 19 | 360 |
| of which: No DCOs set | 244 | 305 | 79 | 628 |
| of which: Original DCOs set at £0 for more than 12 weeks [note 7] | 558 | 449 | 68 | 1,075 |
| of which: Original DCOs set at £0 for up to 12 weeks | 15 | 10 | 0 | 25 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 9](https://www.aib.gov.uk/ad-hoc-statistical-release-id-9-final).

3.16 Some working group members thought that a contribution period of four years remained appropriate. A contrary view highlighted that the repayment period in bankruptcy had previously been three years and was increased to four years to bring it into line with PTDs with the intention of increasing the returns paid to creditors.

**Table 14: Management Information: Number of bankruptcies concluded and mean dividend paid to creditors by whether a case was awarded prior to April 2015 or not**

| **Financial year of the awarded date** | **Number of cases** | **Mean dividends (pence in the £)** |
| --- | --- | --- |
| Total number of bankruptcy (excluding MAP) concluded in between 2017-18 and 2020-21 | 13,591 | 10.5 |
| of which: Balancing item to match the published statistics [note 4] | -57 | 10.5 |
| of which case: Pre-2015 cases (contribution repayment period of three years) | 7,236 | 13.2 |
| of which Pre-2015 cases: Original IPA (or IPO) set at more than £0 [note 5] | 3,005 | 7.1 |
| of which Pre-2015 cases: No contribution was set [note 5] | 4,231 | 17.6 |
| of which case: Post-2015 cases (contribution repayment period of four years) | 6,412 | 7.4 |
| of which Post-2015 cases: Original DCO set at more than £0 [note 5] | 1,110 | 9.0 |
| of which Post-2015 cases: No contribution was set [note 5] | 5,302 | 7.1 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 12](https://www.aib.gov.uk/aib-ad-hoc-statistical-release-id-12-final).

3.17 Statistics highlighted that in cases where a contribution was paid, creditors received on average an additional 1.9 pence in the pound (average dividend rose from 7.1 to 9.0) when the contribution period increased from three years to four years. It was noted, however, that this increase could have been influenced by other factors, including the realisation of assets. The group also acknowledged the increase was a relatively small amount and there was a need to consider other factors, including what is considered to be a reasonable period. The group also recognised the proportion of cases with a contribution was relatively low and there was a strong case to revert to a three year contribution period. The rest of the UK and the Republic of Ireland have a three year contribution period and it was considered unlikely that creditors would object to a three year contribution period in Scotland.

3.18 Concern was voiced on whether reducing the contribution period to three years would discourage insolvency practitioners from taking on new appointments. If this were to happen it could place increased pressure on the public purse with AiB being the trustee in more cases. Given insolvency practitioners had taken on cases when the contribution term had been three years previously, however, this was not considered to be a significant concern.

3.19 The acquirenda period in both MAP and Full Administration bankruptcies was considered, including whether this should continue to be linked to the contribution period or whether, as previously, it should be linked to the debtor’s discharge. There was a view that an acquirenda period of four years in MAP bankruptcy was too long, however, this was not fully supported with others considering it remained appropriate to enable post-bankruptcy assets to be recovered and made available to the estate for the benefit of creditors.

3.20 The group also considered the related point that the existing MAP bankruptcy legislation appeared to allow for the re-appointment of a trustee where a change in the debtor’s income then enabled a contribution from income to be made. The working group considered that this should be addressed and that there should be no provision to allow this – the discharge from a MAP bankruptcy at the six month stage should be conclusive as regards possible income contributions and offer no scope to have proceedings re-opened following a change of circumstances that could see a contribution become payable.

3.21 Acquirenda in Full Administration bankruptcies was considered to be appropriate in order to recover post-bankruptcy acquired assets and make these available to the estate for the benefit of creditors, however, there was no agreement on whether the period should be set at three or four years. It was, however, considered proportionate that provision should exist to have a trustee re-appointed following discharge where post-bankruptcy assets had become available to the estate.

3.22 The working group also discussed whether it is appropriate to link the debtor’s discharge to the period of acquirenda. Some members considered the existing bankruptcy discharge arrangements for MAP and Full Administration bankruptcy were reasonable and it was important that debtors were afforded with a “clean break” and the ability to embark on a fresh start within a relatively short period of time. This should be considered quite separately from both the applicable contribution period and the acquirenda period. However, a small number thought the discharge and contribution/acquirenda period should be realigned.

### Recommendation

* **Recommendation 12** - The group recommends that the repayment period in Full Administration bankruptcies is reduced to three years. While the statistics demonstrate a small increase in dividends for creditors with the four year repayment period, this needs to be balanced against the additional contributions required to be made by debtors. The group agreed this small increase did not justify retaining the longer contribution period and the repayment period should revert to three years.
* **Recommendation 13** - The group was not able to reach consensus on the acquirenda period for MAP or Full Administration and whether these should be aligned. In MAP there were concerns that a four year acquirenda period was excessive, putting an unreasonable burden on debtors, however, there was also recognition that it is reasonable that creditors can obtain a further return in dividends where post-bankruptcy assets are identified. The group agreed, however, that there should be no option to re-open a MAP bankruptcy in order to recover income contributions. In Full Administration bankruptcies there was agreement that acquirenda was appropriate and further consideration should be given to whether this should be set at three or four years and whether it should be aligned with discharge.

# 4. Exit from solutions

## Introduction

4.1 Each of the statutory debt solutions is designed to come to an end after a defined period, where debts are repaid in full or when all of the conditions have been met. They also have provisions built in which will allow the DPP, bankruptcy or PTD to come to an end earlier where certain criteria are met. The group has considered the criteria for DAS and bankruptcy.

## Debt Arrangement Scheme

### Background

4.2 A DPP under the DAS will come to an end once all repayments have been made in accordance with the plan. There is a provision which allows the DAS Administrator or a continuing money adviser, with the debtor’s consent, to make an offer of composition to the creditors included within the DPP. This is:

* after a period of 12 years beginning with the approval of the DPP (excluding any period during which payments were deferred through a variation for no more than six months and the DPP period has been extended as result of the debtor’s disposable income reducing by 50% or more); and
* where 70% of the total amount of debt due under the DPP when it was approved has been paid.

4.3 Where a creditor taking part in the DPP accepts the offer of composition or is deemed to have accepted it by failing to respond within 21 days of the offer being made, their debt is discharged and they no longer participate in the DPP.

4.4 Where all creditors agree or are deemed to have agreed to the offer of composition, the DPP comes to an end. Where any creditors refuse to accept the offer, the DPP continues in respect of their debt, but must be varied by the DAS Administrator to remove the creditors who have agreed to the offer. Composition is not available in a business DAS.

4.5 Although DAS was introduced in 2004, uptake was initially slow, and it is only in recent years that live DPPs have started to be in a position to meet the composition criteria. This means there are very few cases where composition has been approved.

4.6 A non-statutory form of composition has been developed over the years which has allowed some people to complete their DPP earlier. This tends to happen when a debtor inherits money and is able to repay the debt. There have also been instances when a money adviser has contacted a debtor’s creditors and negotiated a settlement. The money adviser obtains written confirmation from creditors who are content with the settlement and a variation is made to the DPP so it can continue for creditors who do not agree to the settlement.

4.7 The group considered whether the composition arrangements in DAS remain appropriate or whether any reform is required, and to consider if composition should be extended to other statutory debt solutions, or whether it would be appropriate in particular circumstances. Composition in DAS is also reflected within the repayment period at paragraph 3.9 of this report.

### Discussion

4.8 In considering the statistics, the group noted there was only a small number (13) of DPPs where composition had been sought. They also noted that in 76.9% of these cases at least one creditor rejected the offer of composition.

**Table 15: Ad-hoc statistics on offers of composition made to creditors for DPPs under DAS**

| **Application status** | **2018-19** | **2019-20** | **2020-21** | **Overall** | **Percentage of all offers of composition** |
| --- | --- | --- | --- | --- | --- |
| Number of offers of composition issued to creditors | 2 | 1 | 10 | 13 | 100.0% |
| of which: All creditors approved or deemed to approve | 1 | 0 | 2 | 3 | 23.1% |
| of which: At least one creditor rejected | 1 | 1 | 8 | 10 | 76.9% |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 9](https://www.aib.gov.uk/ad-hoc-statistical-release-id-9-final).

4.9 Statistics also highlighted that only 3.5% of cases would benefit from the possibility of composition based on the current statutory criteria. Reducing the timeframe to 10 years would mean a further 3.2% of cases would be eligible for composition and reducing it to 7 years would mean a further 17.4% would be eligible for composition. This could potentially save the debtor on average six years and 4.5 years of repayments, respectively.

**Table 16: Ad-hoc Statistics: Number of live DPPs under DAS by expected time length to repay 70% of the total debt owed to creditors**

| **Time period to repay 70% of the total debt owed to creditors** | **Number of DPPs** | **Percentage of total number of live DPPs** | **Median years to repay the rest of the total debt** |
| --- | --- | --- | --- |
| Number of live DPPs included in this model | 13,547 | 100.0% | [not applicable] |
| of which: Duration of less than 5 years | 5,930 | 43.8% | 1.5 |
| of which: Duration of between 5 years and less than 7 years | 4,364 | 32.2% | 2.5 |
| of which: Duration of between 7 years and less than 10 years | 2,353 | 17.4% | 3.5 |
| of which: Duration of between 10 years and less than 12 years | 428 | 3.2% | 4.5 |
| of which: Duration of at least 12 years | 472 | 3.5% | 6.0 |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 9](https://www.aib.gov.uk/ad-hoc-statistical-release-id-9-final).

4.10 The group also considered a case study provided by a group member which highlighted a need to acknowledge cases where debtors had made a significant contribution to their DPP but could not complete it due to a change in circumstances.

**Case Study**

A case study was provided where a couple had been paying a DAS for 10 years when their circumstances changed completely. As the couple were unable to continue with the agreed repayments or reduce the payments through a variation, the DAS DPP was revoked. Under the current provisions the couple did not qualify for composition and there was no mechanism in place which recognised the substantial amount that had been repaid.

4.11 The group agreed that while the current composition criteria were considered appropriate at the time of introduction, the current economic circumstances mean this should be reviewed. Comparison was made to County Court administration orders which exist in England and Wales, where debts of below £5,000 are written off after three or five years. The group agreed the current criteria for composition were too prohibitive and should be changed but acknowledged potential issues with changes to the current criteria.

Factors in favour of reducing the eligibility criteria for composition in DAS:

* In recent years, there has been a general concern about the viability and sustainability of DAS DPPs spanning longer than 10 years. The UK Insolvency Service is considering a maximum repayment period for the new Statutory Debt Repayment Plan of 10 years but with no composition.
* Money advisers have been using a work-around which enables early settlement where it is too early for composition - advisers write to creditors seeking agreement to a reduced amount, and it is for the creditor to decide whether they wish to accept this informal agreement. A statutory framework placed around these arrangements would be advantageous.
* From a debtor’s or an adviser’s perspective, this opens up the possibility of composition for more people, allowing an earlier exit from DPPs and potentially improving the sustainability of DPPs.

Factors against reducing the eligibility criteria for composition in DAS:

* Reducing the eligibility criteria too far could result in a fundamental change to the policy behind DAS - shifting to debt relief rather than debt repayment.
* This would represent a further reduction in returns for creditors, although this would bring about an earlier conclusion to the DPP which some creditors may welcome.

### Potential Solutions

4.12 The group discussed whether composition should be based on time, amount repaid or both. Considerations included:

* 10 years was seen as a more acceptable timescale, but seven years would mean composition would be available to more people.
* There may be two circumstances where composition could be appropriate:
  + A partial settlement after a period of time.
  + Where there is a negative change in circumstances the debtor could seek composition, in which case time was arbitrary – composition could then become an option where 70% of the debt repayments (or some other agreed figure) had been repaid.[[1]](#footnote-1)
* Allowing composition at any point – this would mean a proposal could be put to creditors and they would determine if it was accepted. There should be no opportunity for AiB to overrule. There were, however, some concerns regarding this facility in DAS.

4.13 The group agreed the solution developed would ultimately need to strike a balance between creditors’ and debtors’ interests. The group was mindful that there needs to be a recognition of negotiations between both parties, but felt a mechanism needs to be in place to deal with a situation where a creditor is being unreasonable.

4.14 Extending composition to other statutory debt solutions was considered. It was agreed composition is an important element offering a degree of flexibility and should therefore be factored into bankruptcy and PTDs.

### Recommendation

* **Recommendation 14** - The group recommends further consultation is carried out before a decision is made on whether any revised provisions on composition should be based on the amount paid, the time elapsed and/or a combination of these. It was agreed that the consultation should also seek views on different numbers of years and different percentages of debt repaid as appropriate.
* **Recommendation 15** - Composition and eligibility criteria should be considered for the other statutory debt solutions.

## Business Debt Arrangement Scheme

### Background

4.15 Business DAS is a statutory debt management tool which helps partnerships, trusts and unincorporated bodies or other entities who are in debt. It offers them an extended time to repay their debts, while giving them protection from creditors taking action against them to recover their debts.

4.16 Under Business DAS, a DPP can only last for a maximum of five years, but if approved, it works in the same way as a personal DAS in that it will freeze all interest, fees, penalties or other charges on the debt, resulting in them being written off if the debtor fully completes the programme.

### Discussion

4.17 The group acknowledged there is currently no form of composition in Business DAS. It was confirmed from information provided by AiB that this was considered by a working group at the time Business DAS was being developed, who determined it would not be appropriate. Viability of a business was considered to be important, and the working group determined that a maximum repayment period of five years should be introduced. Given this timescale, and concerns that introducing composition would change the nature of the product from debt management to debt relief, they agreed that composition should not be available.

4.18 The group discussed whether introducing composition to Business DAS could make it more attractive and help businesses who are struggling due to the Covid-19 pandemic.

4.19 There was some support for businesses being able to repay debts quicker if they had a windfall or became able to repay the debt but also a view that this was already possible in a Business DAS. It should be for creditors to determine what is acceptable but there was some concern this would result in creditors forcing businesses into insolvency.

### Recommendation

* **Recommendation 16** - The group recommends consideration should be given to exploring further whether there is now a case for extending composition to Business DAS. Any options should highlight concern regarding how setting a composition timescale would work and that there was already a partial settlement proposal built into Business DAS.

## Exit from Debt Arrangement Scheme – Deceased Debtor

### Discussion

4.20 Discussion took place around exit from DAS where a person dies – particularly the re-application of interest and charges in such cases. It was suggested that a longer transitional period was needed to allow the estate to be realised – the current 14 days is not long enough and executors need six months to wind up the estate or to apply for sequestration or pay the debtor’s debts.

4.21 It was the group’s view that a DPP should be revoked when the person in the DPP dies. This revocation should be dealt with differently from other revocations which are due to other circumstances such as missed payments – the outstanding debt should be the amount owed in the DPP at the time of death, with no interest and charges reapplied. The England and Wales breathing space scheme allows for interest and charges to be frozen with no respective interest being reapplied and this approach is also planned for their Statutory Debt Repayment Plan.

### Recommendation

* **Recommendation 17** - The group recommends that the rules regarding deceased debtors and the point at which interest and charges are written off should be revisited.

## Bankruptcy

### Background

4.22 The discharge of the debtor in bankruptcy is granted after the following periods (contingent on cooperation with the trustee):

* MAP – six months after the award of sequestration.
* Full Administration – one year from the award of sequestration.

4.23 Discharge in a Full Administration bankruptcy is not automatic and the trustee needs to prepare a report which includes information about the debtor’s assets, liabilities, financial and business affairs. It also includes information about the debtor’s conduct and whether they have cooperated with their trustee and complied with the statement of undertakings. This report is completed after 10 months from when the bankruptcy was awarded and enables AiB to determine whether the debtor should be discharged. If a debtor is not discharged, a subsequent report is required when the trustee considers it appropriate for the debtor to be discharged. Evidence is required to confirm the issues that resulted in discharge not being granted have been resolved.

4.24 Notwithstanding the debtor’s discharge, the trustee continues to administer the bankruptcy (including the statutory four year contribution period where appropriate) and realise the debtor’s estate and distribute this amongst creditors. Trustees apply for discharge on completion of this process and that brings the case to a final conclusion.

### Composition in Bankruptcy

#### Discussion

4.25 The group noted that discharge on composition previously existed in bankruptcy but had been rarely used and was therefore repealed. They discussed whether a form of composition should be reintroduced.

4.26 The process around the previous form of discharge on composition in bankruptcy was considered to be too long and complicated. Anecdotal instances where composition would have been ideal but failed to deliver were highlighted, particularly where there was equity in property but composition was not achieved as it failed to meet the settlement amounts set out in the trustee’s proposal on dealing with equity held in property in bankruptcy.

4.27 The group agreed there were definite benefits to having an option for discharge on composition and a number of improvements on the previous provisions were identified. In particular, it was considered that the following would help to streamline and modernise such a process.

* AiB should have the authority to approve composition rather than it being a court process. This would help to keep costs down.
* Creditors should have the ability to request a review of the decision to approve a composition agreement by the AiB and the right to appeal to the court.
* Creditors would need to consent to any composition proposals.
* Creditor consent could be qualified, for example two thirds of creditors, or be achieved through deemed consent.

4.28 The group discussed Group 2’s proposals for composition in PTDs and agreed that these provided a good format to follow in bankruptcy.

#### Recommendation

* **Recommendation 18** - The group recommends the re-introduction of discharge on composition in bankruptcy but with the eligibility criteria and processes modernised and streamlined. This should be an AiB process rather than a court process, with creditors having the right to request a review and where necessary appeal to the court. A similar format to proposed composition in PTDs should be followed for bankruptcy.

## Discharge Process - Uncooperative and Untraceable Debtors

### Background

4.29 In a Full Administration bankruptcy, the AiB can grant a debtor a discharge at any point after 12 months from the award of bankruptcy. The AIB base their decision on a report submitted by the trustee and any representation received from the debtor or creditors.

4.30 The trustee must submit this report following the 10th month after the award of bankruptcy and should include information on such matters as the level of assets and liabilities, asset realisations, and the conduct of the debtor. They must provide their opinion on whether the debtor has cooperated with the trustee, including providing information about the estate, creditors and documents when requested, and if they have complied with any DCO. The trustee must also confirm that they have carried out all of their functions as office holder.

4.31 At the same time as reporting to AiB, the trustee must send a copy of the report to the debtor and all known creditors advising that they can make representations to AiB within 28 days as to the content of the trustee’s report.

4.32 The AiB can decide to defer the discharge or grant the discharge, but this does not take effect until 14 days after the creditors and debtor have been notified of the decision.

4.33 The group discussed a number of concerns that had been identified with the current discharge process and the interaction between the discharge of the debtor and the trustee.

4.34 The trustee must remain in post until the debtor has been discharged, regardless of whether all assets have been realised and the administration of the bankruptcy is complete.

4.35 The group discussed the statistics which show that 37.3% of debtors in creditor petition cases do not receive their discharge, likely to be because they have not cooperated with the trustee or have not been traced. This compares with only 9.2% of Full Administration cases where the debtor has applied for their own bankruptcy.

**Table 17: Ad-hoc Statistics – Summary of statistics on debtor discharge from bankruptcies by financial year of the discharge date**

| **Type of debt solution and discharge process** | **2018-19** | **2019-20** | **2020-21 [provisional]** | **Overall** | **Percentage of bankruptcy cases** |
| --- | --- | --- | --- | --- | --- |
| Number of debtors discharged from bankruptcies | 4,195 | 4,330 | 3,872 | 12,397 | 100.0% |
| of which: Automatic discharge | 3,834 | 3,978 | 3,467 | 11,279 | 91.0% |
| of which: Originally deferral, but eventually discharged | 361 | 352 | 405 | 1,118 | 9.0% |
| Number of debtors discharged from Minimal Asset Process cases | 1,986 | 2,147 | 1,678 | 5,811 | 100.0% |
| of which: Automatic discharge | 1,986 | 2,147 | 1,678 | 5,811 | 100.0% |
| of which: Originally deferral, but eventually discharged | 0 | 0 | 0 | 0 | 0.0% |
| Number of debtors discharged from full administration cases | 1,493 | 1,600 | 1,668 | 4,761 | 100.0% |
| of which: Automatic discharge | 1,355 | 1,469 | 1,500 | 4,324 | 90.8% |
| of which: Originally deferral, but eventually discharged | 138 | 131 | 168 | 437 | 9.2% |
| Number of debtors discharged from creditor and trust deed petitions | 716 | 583 | 526 | 1,825 | 100.0% |
| of which: Automatic discharge | 493 | 362 | 289 | 1,144 | 62.7% |
| of which: Originally deferral, but eventually discharged | 223 | 221 | 237 | 681 | 37.3% |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 9](https://www.aib.gov.uk/ad-hoc-statistical-release-id-9-final).

4.36 The group considered that the discussions on the discharge of the debtor and how this impacted on the trustee’s discharge could be split into the following two strands:

* debtors who do not cooperate
* debtors who cannot be traced.

### Discussion – Uncooperative Debtors

4.37 The group highlighted that issues arise when a debtor does not cooperate – the trustee is put in a difficult position and is prevented from obtaining their own discharge. The ongoing need to administer the bankruptcy while the case remains open means the costs of the bankruptcy can continue to increase.

4.38 The bankruptcy reforms introduced through the 2014 Act allow AiB to grant a Bankruptcy Restriction Order (“BRO”) for up to five years without court proceedings. There was concern this provision was not being used sufficiently as a response to cases where a debtor does not cooperate, and the group identified the tension that exists between the BRO non-cooperation criteria and refusal of discharge for the same reasons. A BRO is seen as an effective action to address non-cooperation as it is reflected on credit files.

4.39 The group discussed the debtor’s discharge period generally, with suggestions made ranging from a period of one year up to three years, including whether this should be contingent on debtor cooperation. There was a view that discharge should not be used for what could be seen as a punitive purpose, and it was noted that in the UK and Ireland all bankruptcies involve a one year debtor discharge.

4.40 There was also a suggestion that the debtor’s discharge should be granted in one year after which the debtor should have a clean break without requiring to make further contributions or account for acquirenda. There would, however, still need to be a trustee to deal with the existing assets. This suggestion was not, however, agreed by the group.

4.41 There was a strong view that the trustee’s discharge should not be dependent on the debtor’s cooperation and it was also felt that the current situation where an uncooperative debtor is never discharged, is not appropriate. The majority of the group thought that further consideration should be given to whether non-cooperation should be addressed through delaying the debtor’s discharge or through a BRO.

### Discussion - Untraceable Debtors

4.42 Untraceable debtors become an issue as the debtor cannot receive their discharge and it is difficult for the trustee to obtain their discharge. There was a view that untraceable debtors should not remain undischarged indefinitely as is the case under the current provisions, and that a mechanism is needed to deal with the discharge of the debtor in these circumstances. It was suggested that the debtor should be discharged after a defined period of time. The defined period could, perhaps, be the same period as prescription (five years) or seven years (which would tie into the date that a missing person is declared dead). Legislation permits a trustee to transfer ownership of a case to AiB in the event that a debtor cannot be traced. The group recommended that the timescales involved in this process be revised, with the intention of allowing this transfer at an earlier stage.

### Recommendation

* **Recommendation 19** - The group recommends that trustee discharge should not be linked to debtor cooperation.
* **Recommendation 20** - The group believed that the current situation where discharge is deferred indefinitely due to non-cooperation is not appropriate. They recommend that further consideration should be given as to whether delayed discharge (with an agreed end period) or the use of BROs are more appropriate for dealing with non-cooperation.
* **Recommendation 21** - The group also recommends that further consideration should be given to debtor discharge where a debtor has not been traced at a timeframe to be agreed – this could potentially be after five or seven years. There should also be a revised mechanism in place to allow these cases to be returned to AiB at an earlier stage than at present.
* **Recommendation 22** - Should the requirement for the trustee to make representations on whether or not the debtor should receive their discharge be retained, the group recommends that consideration be given to simplifying and streamlining the administrative process. This is dealt more fully in the section below on “Administration in Bankruptcy - Circulars and Fees”.

# 5. Prescribed rate of interest

## Background

5.1 Bankruptcy legislation prescribes the rate of interest that is payable to creditors on the conclusion of insolvency proceedings where sufficient estate remains after payment of relevant expenses and the full settlement of preferred, ordinary and postponed debts. In these circumstances, interest is payable from the date of bankruptcy to the date of payment of the debt. This is known as the prescribed rate of interest (often referred to as the statutory rate of interest). The prescribed rate of interest is the greater of:

* the prescribed rate at the date of sequestration, or
* the rate applicable to that debt apart from the sequestration (i.e. the agreed contractual rate of interest).

5.2 Where a court decree for payment includes interest or states that interest is payable this is the judicial rate of interest.

5.3 Both the prescribed and judicial rates of interest are currently 8%.

5.4 The contractual rate is the rate of interest agreed between the parties when entering into a contractual transaction. This rate can vary significantly between contracts depending on the specific circumstances and is a private arrangement between the contracting parties.

5.5 The majority of respondents to a consultation carried out in 2019 into the 2014 Act considered that both the prescribed (77%) and judicial (76%) rates of interest were too high, but consensus could not be reached on what the appropriate rates of interest should be.

5.6 Both of these rates were set in 1993, when the Bank of England base rate was higher, and do not reflect the low base rates since 2009.

5.7 The group was asked to consider:

* what would be an appropriate prescribed rate of interest.
* whether the rate should be a fixed rate or a variable rate linked to the Bank of England base rate.
* where the rate is variable the date at which it should be set, for example, relevant date for claims, the date dividends are declared or paid or another date.
* what impact changing the prescribed rate of interest would have on the judicial rate of interest.
* whether the judicial rate of interest and prescribed rate of interest should be fixed at the same level or, alternatively, what approach should be taken to the judicial rate of interest.
* what impact changing the judicial rate of interest may have on other procedures and what other legislation may be impacted.

5.8 The group considered that discussions could be split into the following three strands:

* the prescribed rate of interest;
* the judicial rate of interest; and
* entitlement to the contractual rate of interest versus the prescribed rate of interest in bankruptcy.

## Discussion - Prescribed rate of interest

5.9 The statistics considered by the working group show that the prescribed rate of interest impacts on a limited number of cases – 6% of bankruptcies and 3% of PTDs.

**Table 18: Ad-hoc statistics: Number of statutory debt solutions by type of debt solution and whether statutory interest was paid or not**

| **Financial year of the trustee discharge date** | **2018-19** | **2019-20** | **2020-21** | **Overall** | **Percentage of the overall figure** |
| --- | --- | --- | --- | --- | --- |
| Discharges of bankruptcy (excluding MAP and recalls) | 3,579 | 2,735 | 2,509 | 8,823 | 100% |
| of which: Dividend payable to ordinary creditors in full | 195 | 176 | 125 | 496 | 6% |
| Protected trust deeds concluded | 7,849 | 4,744 | 2,519 | 15,112 | 100% |
| of which: Dividend payable to ordinary creditors in full | 182 | 130 | 83 | 395 | 3% |

Full notes for the above table can be found on the AiB website at the following link: [Ad-hoc statistical release ID 10](https://www.aib.gov.uk/aib-ad-hoc-statistical-release-id-10).

5.10 The group considered information collated in a report provided by AiB on the application of interest and rates of calculation for a wide range of countries. The methodologies and rates were varied - ranging from 1% to 8%. Some of the processes were similar to that operating in Scotland while others were very different. A summary of the differing rates and methodologies is provided at Annex A.

5.11 Creditors who have been disadvantaged by non-payment for long periods where no insolvency procedures have been invoked or where insolvency proceedings have continued for a long period can be compensated by way of interest. The group considered that it is reasonable to expect this position to apply in bankruptcy. There was consensus, however, amongst the group that the currently prescribed 8% interest rate is too high and should be reduced to a level which is compensatory rather than punitive.

5.12 Rather than the rate being set at a fixed percentage in legislation (as it is now), the group favoured the option of this being linked to a base rate and subject to regular review. This would have the advantage of providing a central reference point which would adjust to changing economic circumstances.

5.13 The group noted that the prescribed rate of interest is applied to creditors’ debts during bankruptcy where there are sufficient funds to settle debts in full, therefore it isn’t a new debt or post-bankruptcy debt impacting on the debtor.

5.14 The group considered options for the calculation of a variable prescribed rate of interest. It noted that the cost of credit is linked to the Bank of England base rate, and it was suggested that there could be a formula for calculating the prescribed rate of interest - for example, the average base rate over two to three years plus a fixed % (which would need to be agreed). This would be fixed until the next review. This average rate approach would help to flatten the effects of large increases or decreases, albeit it was acknowledged that the base rates had been stable for a number of years.

5.15 The 2019 consultation on the 2014 Act indicated support for the Bank of England base rate plus 2% (42% of respondents). 37% of respondents believed the Bank of England rate alone was the most appropriate interest rate. The group considered therefore, that a solution may be to use the suggested formula to calculate average interest rate and add 2%.

5.16 As there had been limited changes in interest rates for a number of years, the group considered that it would be reasonable that the rate be reviewed every two to three years. It could be reviewed in line with the Diligence against Earnings tables which are reassessed every three years.

5.17 While having a prescribed rate of interest on an average base rate subject to review could result in the interest rate changing over the course of a case, the group considered that it would be justifiable for the rate at the start of the bankruptcy to apply throughout the duration of the case. This would avoid the complexity and associated costs of applying different rates during the case and would be fairer for all impacted. Similarly, if the rate was entirely variable it would be complex and costly to establish and calculate the appropriate rate for each case. Consequently, adopting an approach that would see the rate fixed for a period of time was the preferred option.

5.18 The group also considered whether interest should be applied to creditors’ claims when the debtor sought a recall of sequestration. It was highlighted that a recent court ruling on this specific issue had found that interest was not payable in recall. It was also noted that general experience had shown that creditors were content to receive payment of the debt and do not seek the application of interest, preferring to be paid at an earlier date rather than delaying matters further.

### Recommendation

* **Recommendation 23** - The group recommends that the prescribed rate of interest be reduced to a level that is more compensatory. It should be fixed for a period of time and reviewed regularly (suggested every two to three years). The rate in force at the start of a bankruptcy should continue throughout the duration of the case irrespective of whether there is a rate change following review in the intervening period as this would avoid complexity and associated costs and be fairer to all those who were impacted. While the group considered various options to set the rate, they felt that further consultation was required. Their favoured option, however, was an average rate over a period of time (period to be agreed) + a % (to be agreed). The group considered that eligibility criteria for the application of the prescribed rate of interest should not be changed and that the requirement to pay interest should not extended to cases where the recall of sequestration was being sought.

## Discussion - Judicial rate of interest

5.19 Similar to the prescribed rate of interest, the group considered that the currently prescribed judicial rate of interest at 8% was too high and should be reduced.

5.20 The 2019 consultation on the 2014 Act indicated support for the Bank of England base rate plus 2% (37% of respondents). 33% of respondents believed the Bank of England rate alone was the most appropriate interest rate.

5.21 The group recognised that while the judicial rate of interest and prescribed rate of interest both related to debt, they covered different aspects and did not therefore necessarily require to be linked or be set at the same rate. The preference, however, was for consistency between the two rates as different rates could impact on the level of recoveries for creditors. An example was provided where, if the judicial rate of interest was higher than the prescribed rate of interest it could result in a creditor recovering less through a bankruptcy than they would through a court decree. Creditors taking legal action to enforce their debts often seek their contractual rate of interest rather than the judicial rate and these could be significantly different. The group were keen therefore to consider the application of the contractual rate of interest in bankruptcy.

5.22 It was highlighted that potential changes to the judicial rate of interest impacted on other situations including compensation/damages claims, corporate insolvency and late payment legislation. The group considered therefore that it could not simply be looked at as part of this review and would require wider consultation with input from interested parties - in particular, those with lead on Justice Policy and relevant stakeholders including the Scottish Civil Justice Council who had a key role in making the legislative provision.

### Recommendation

* **Recommendation 24** - The group recommends that the judicial rate of interest be reduced, preferably to a level consistent with the prescribed rate of interest, if this is possible. However, wider consultation should be carried out to establish the appropriate rate and the impacts on other legislation and stakeholders.

## Discussion - Contractual rate versus Prescribed rate in Bankruptcy

5.23 The group expressed concern over the current legislative position for application of interest where there is sufficient estate remaining after payment of relevant expenses which enables the full settlement of preferred, ordinary and postponed debts. In this circumstance, creditors automatically receive interest on their claims at the greater of the prescribed rate at the date of sequestration or the contractual rate (i.e. the rate which would have been payable if there was no bankruptcy). This can create a preference where some creditors are paid a higher rate of interest on their debts than other creditors which was not considered to be a fair outcome.

5.24 As highlighted, the current prescribed rate of interest at 8% was too high and the group has recommended action to see this reduced. It was highlighted that in certain instances the commercial contractual rate of interest charged by some creditors was significantly higher than the prescribed rate and could be excessive and penal in nature. An example was cited as providers of high-cost short-term credit. The group considered that enabling the application of contractual interest in a bankruptcy could be seen as encouraging creditors to charge high interest rates. The group agreed that the system should not support and reward lenders applying high interest rates.

5.25 The group considers that the system should be fair to all and not provide a preference to some. This could be achieved by changing the default position in the legislation to all creditors being entitled to interest at the prescribed rate. There could in addition be provision whereby if any creditor wished to be paid a different rate, they would be required to demonstrate just cause.

### Recommendation

* **Recommendation 25** - The group recommend that the current legislation should be reviewed, with the default being that post-sequestration interest payable on creditors’ claims be set at the prescribed rate of interest, possibly with individual creditors having to demonstrate good cause for any additional sums they wanted paid under a contractual rate of interest.

# 6. Administration in bankruptcy – circulars and fees

## Process for setting a Debtor Contribution Order in a creditor petition sequestration

### Background

6.1 The Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) requires the AiB to make an order fixing the debtor’s contribution. The DCO in a bankruptcy awarded following a petition presented by a creditor(s) or a trustee under a trust deed is based on proposals submitted by the trustee following information provided by the debtor.

6.2 The second Coronavirus Act temporarily extended the time for the trustee to submit these initial proposals from six weeks to 12 weeks following the award of sequestration. This change was made permanent by the 2021 Regulations.

6.3 If the trustee misses the submission deadline for any reason, they are required to submit a request to AiB for an order curing a defect in procedure. Notification of this application requires to be given to the creditors and debtor.

### Discussion

6.4 In creditor petition bankruptcy, it is fairly common for the debtor not to cooperate and provide the trustee with the information required to submit DCO proposals within the statutory timescale. The trustee is therefore often required to submit an application to cure a defect which comes with costs and additional administration.

6.5 While the statutory deadline encourages efficient administration of the estate, it can be unfair on the trustee and introduces cost implications for creditors in cases of non-cooperation.

6.6 The group suggested that it would be appropriate to remove the statutory deadline in favour of the trustee submitting proposals “forthwith” or “as soon as practicable” after receiving the required information – these terms are used elsewhere in the legislation and are seen as representing a reasonable requirement in this context. Trustee’s actions and performance in this area would be subject to the oversight of creditors and monitoring by their Recognised Professional Body and there would be reputational issues for trustees if there were undue delays in securing contribution recovery which could impinge on future appointments. Although it was recognised that creditors might favour fixed deadlines for making applications as opposed to less well defined periods, it is recognised that 12 weeks is not viewed an appropriate timescale. An extended period of six months was suggested if the option of a set statutory timescale is adopted.

6.7 An alternative solution could involve the introduction of a different process for obtaining an interim extension without the requirement to use the procedure to cure a defect where the application cannot be submitted within 12 weeks.

### Recommendation

* **Recommendation 26** - The group recommends that the current fixed time limit running from the date of appointment should be removed. The time limit should be replaced with a requirement for the trustee to submit the DCO proposals as soon as reasonably practicable on receipt of the information or forthwith (or similar wording). If this is not considered acceptable, consideration should be given to extending the current fixed time limit or introducing a simpler procedure for dealing with cases where the current limit cannot be met.

## Contribution variations

### Background

6.8 The 2016 Act enables the trustee to vary or quash a DCO:

* on the application of the debtor following a change in their circumstances;
* if the trustee considers it appropriate following the change in the debtor’s circumstances; or
* when sending a report for the debtor’s discharge.

6.9 Where a decision is taken to vary a DCO as a result of a change in the debtor’s circumstances the variation does not take effect until 14 days after the trustee’s decision.

6.10 The trustee requires to notify various parties including the debtor and any interested person following a variation or where an application has been refused.

### Discussion

6.11 There was concern over the requirement to circularise creditors (as an interested party) when a contribution is varied as this gives rise to appeal rights. It was highlighted that the trustee has to provide evidence supporting the variation to AiB who undertake further checks on the debtor’s income and expenditure as part of their supervisory role. Creditors do not have the ability to appeal the initial contribution proposals and the rationale for introducing appeal rights for a variation is unclear. There are split views on this issue as some stakeholders consider it right that creditors are given the opportunity to make representations as they have a legitimate interest. Consideration was given to the issue of consistency across the debt solutions, and also with other jurisdictions. In this context, it was noted that there is no requirement to circularise creditors for such changes in PTDs and while there is such a requirement in DAS, some consider it wrong to compare and align bankruptcy processes with those applied in DAS.

6.12 There was also comparison made to other functions of the trustee where input from creditors is not required (including the realisation of assets) and this raised questions on the ability to intervene in the area of DCO variations. It was noted that in practice, representations are rarely received from creditors and the circularisation creates additional costs of administration. The group agreed that the current process was not practicable, although in due course electronic communication with creditors could reduce the administration and associated costs.

6.13 There was a majority in favour of reviewing the requirement to circularise with a view to its removal, however, consensus could not be reached.

6.14 The group also considered the impact of the existing 14 day period to allow for objections to the DCO variation prior to it becoming effective which provided no facility for it to be backdated. This was problematic in certain circumstances, including downward variations arising through health grounds or a change in employment status. These could result in an immediate reduction in income and the debtor having to reduce or stop paying a contribution but there could be delays in the trustee being made aware of changes in the debtor’s circumstances and provided with information to vary the DCO. The group agreed that delays in these circumstances were not justifiable and could result in hardship arising from inability to maintain the existing DCO. Consequently, there should be the ability for a variation to be backdated.

### Recommendation

* **Recommendation 27** - The majority of the group recommended that the requirement to circularise creditors giving them the opportunity to make representations over variations should be reviewed with view to it being removed.
* **Recommendation 28** - The group unanimously recommended that where a variation is allowed there should be the ability for it to be backdated, particularly where there are downward variations arising from health grounds or a change in employment status where it would not be feasible or justifiable to maintain the DCO.

## Debtor Discharge

### Background

6.15 In a Full Administration bankruptcy, AiB can grant a debtor a discharge at any point after 12 months from the date of award of bankruptcy. This decision is based on a report submitted by the trustee along with any representations received from the debtor or creditors.

6.16 The trustee must submit this report following the 10th month from the date of award of bankruptcy. They must provide their opinion on whether the debtor has cooperated with the trustee including factors such as provision of information about the estate, existing creditors, compliance with any DCO fixed and requests for documentation. The trustee must also confirm that they have carried out all of their functions as office holder.

6.17 At the same time as reporting to the AiB the trustee must send a copy of the report to the debtor and all known creditors advising that they can make representations to AiB within 28 days as to the content of the trustee’s report.

6.18 The AiB can decide to refuse or grant a discharge, with discharge not taking effect for 14 days to enable representations to be made.

### Discussion

6.19 A discussion took place separately on the link between the discharge of a debtor and their cooperation. This is dealt with more fully above in Discharge Process Uncooperative and Untraceable Debtors at paragraph 4.29.

6.20 The debtor discharge process involves two circulars to creditors. After 10 months the trustee has to prepare a report on the debtor’s conduct and recommend whether or not they should be discharged. A circular is sent to the debtor and creditors giving them opportunity to object to the recommendation. AiB then decides whether the debtor should be discharged and if a discharge is to be granted, creditors are again circularised with the opportunity to request a review of AiB’s decision. It was not clear why there is a requirement to have two circulars. It was highlighted that the first circular after 10 months often causes confusion amongst creditors who conflate this process with the ultimate closure of the case and trustee discharge. Creditors do not always appreciate that the trustee remains in office to complete asset realisations.

6.21 The requirement to send two circulars increases the administration and costs to the estate.

6.22 A potential solution to reduce the number of circulars at the end of a case would be that the discharge process could be explained in the circulars at the start of the case, which could clearly lay out that the trustee has to recommend after 10 months whether or not the debtor should be discharged. The creditors would have the ability to submit any information to the trustee on aspects they feel may impact on the debtor’s discharge before the end of the 10 month period. This information could be considered by the trustee in making their recommendation. It was noted that trustees seldom receive representation from creditors during ongoing administration.

6.23 Although information could be provided at the initial stages, consideration would need to be given to whether re-circularisation on discharge was required - if there was effectively an automatic discharge creditors would not get a chance to object. Creditors should have a say on how the discharge process is notified to them to ensure they are aware of the process. It was suggested therefore that creditors should be consulted on the timing and of the level of notification required.

### Recommendation

* **Recommendation 29** - The group recommended that the number of circulars could be reduced and details of the discharge process be included in the first circular, but there would need to be further consultation on this, particularly with creditors. There are separate recommendations on the debtor discharge process - this recommendation will only stand if the current discharge process continues.

# 7. Group membership

7.1 With thanks to Donna McKenzie-Skene who led this group and to the members who provided their valuable time and expertise.

* Alan McIntosh Money Matters Advice Service
* Nanette Jantuah Nationwide
* Donna McKenzie-Skene, Aberdeen University
* Emma Jackson, Christians Against Poverty
* Gillian Murray, Anderson Strathern
* Jemiel Benison, CAS
* Karen Gilvear, HMRC
* Kelly Jones, Begbies Traynor
* Kevin Mapstone, AMI Financial
* Maureen Walls, Thomson Cooper
* Meg van Rooyen, Money Advice Trust
* Natalie McQuade, ABCUL
* Rachel Long, TDX Group

# Annex A – Interest on bankruptcy debt – country comparisons

The group requested information on how other countries deal with interest on debt within bankruptcy. To obtain as wide a view as possible of international rules and procedures, AiB sought this information from members of the International Association of Insolvency Regulators. Summarised below are the contributions received from a number of countries:

* Australia
* Canada
* England and Wales
* Hong Kong
* India
* Ireland
* Jersey
* New Zealand
* USA

## Australia – Australian Financial Security Authority

There is no general entitlement to having interest added to a debt.

Interest can only be claimed where the payment of interest was established between the creditor and debtor upon entering into the agreement that underlies the debt which created the ‘interest bearing debt’, or as the result of a court order which includes an interest component.

When such interest accrues after the date of bankruptcy it is only provable if the estate is annulled under section 153A of the *Bankruptcy Act 1966* (Cth). Annulment requires all costs, charges, remuneration and debts of the estate are paid in full, including interest on interest bearing debts

Contractual debts – For contractual debts in respect of which judgement has ***not*** been obtained - the rate of interest (if any) payable under the **contract.** It is payable from the date of bankruptcy and ends on the date the creditor received 100c/$1 for their proven debt (the proven debt does not include interest after the date of bankruptcy)

Judgment debts - **F**or **judgment debts** the interest rate generally is the Court rate which for post judgement interest under the [uniform Court rates](http://classic.austlii.edu.au/au/legis/nsw/consol_reg/ucpr2005305/s36.7.html) \* is 6% plus the [Official Cash Rate](https://www.rba.gov.au/statistics/cash-rate/) so the rate may vary from time to time during the bankruptcy if the cash rate changes (but see the note below). The current rate is 6.10% being the Official Cash rate (.10%) plus 6%. This rate applies to all judgment debts in Australia not just in bankruptcy matters

\* UNIFORM CIVIL PROCEDURE RULES 2005 - REG 36.7

**Payment of interest**

**36.7 Payment of interest**

(1) The prescribed rate at which interest is payable under [section 101 of the Civil Procedure Act 2005](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/cpa2005167/s101.html) is--

(a) in respect of the period from 1 January to 30 June in any year--the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced, and

(b) in respect of the period from 1 July to 31 December in any year--the rate that is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced.

(2) The Local Court may not order the payment of interest up to judgment in any proceedings in which the amount claimed is less than $1,000.

## Canada – Office of the Superintendent of Bankruptcy

At the conclusion of a bankruptcy proceeding where sufficient estate remains after payment of relevant expenses and the full settlement of preferred and ordinary debts, i.e., where creditors receive 100 cents on the dollar and additional estate funds are available, interest is payable to unsecured creditors at the rate of 5 per cent per annum from the date of bankruptcy to the date when they receive payment in full of their claims. (Section 143 of the *Bankruptcy and Insolvency Act.*) Dividends are applied first to payment of interest and then to payment of principal; this has the effect of making the creditors whole before the payment of the surplus to the bankrupt.

If, prior to the date of bankruptcy, a creditor has sued the bankrupt and obtained judgment, the creditor will be entitled to prove a claim for the amount of the judgment together with **interest** to the date of bankruptcy on the judgment as permitted by the civil rules of procedure. If, however, a creditor is given leave after bankruptcy to continue an action against the bankrupt, the creditor cannot prove a claim for **interest** that has accrued on the claim or under the judgment after the date of bankruptcy.

## England & Wales –Insolvency Service

Where debts are paid in full and funds remain, interest is applied from the date of the bankruptcy order to the date of the payment of the debt. Interest is paid in the same priority as debts and therefore interest on preferential debts will be paid in full first before interest is paid on the non-preferential debts.

The rate of interest is the greater of

* the rate specified in section 17 of the Judgments Act 1838 (currently 8%), or
* the rate applicable to the debt apart from bankruptcy

The rate of interest is therefore fixed at the date of the bankruptcy order.

## Hong Kong – Official Receiver

If there is any surplus after payment in full of the creditors and the costs, charges and expenses of the proceedings under the bankruptcy petition, it shall be applied in payment of interest. Interest on preferential debts ranks equally with interest on debts other than preferential debts. (Section 38(9) and 71(2) of Bankruptcy Ordinance).

The rate of interest is greater of (a) the rate on judgements at the commencement of the bankruptcy, and (b) the rate applicable to that debt apart from the bankruptcy (i.e. the contractual rate of interest). (Section 71(3) of Bankruptcy Ordinance)

The rate on judgements is such a rate as the Court of First Instance may order; or in the absence of such an order, at the rate determined from time to time by the Chief Justice by order.

The interest rate is determined at the commencement of the bankruptcy, however, the contractual rate of interest may be varied by the court under Section 71A, if the transaction is found to be an extortionate credit transaction. Interest is applied from the date of bankruptcy to the date of payment. The current rate is 8%.

## India – Insolvency and Bankruptcy Board of India

The provisions relating to personal/individual bankruptcy are provided in Part III of the Insolvency and Bankruptcy Code, 2016 (Code).

The Code provides waterfall mechanism for priority of payment of debts to the creditors u/s 178(1). This provides priority for distribution to secured creditors, workmen dues and employee wages, government dues and all other debts and dues including unsecured creditors.

Section 178(5) provides for payment of interest where debts are repaid in full. The relevant provision is extracted below-

“***Section 178(5).****Any surplus remaining after the payment of the debts under sub-section (1) shall be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the bankruptcy commencement date.*”

Section 178(5) of the Code provides for calculation of interest from the bankruptcy commencement date till the debts are repaid but the Code does not have any specific provision to determine the rate of interest.

In India, provisions for calculation and payment of interest are provided in the Code of Civil Procedure, 1908 (CPC). Section 34 of CPC defines ‘Interest’ as under:

 “***Section 34: Interest. -***

*(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such a rate as the court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit,[ with further interest at such rate not exceeding six percent, per annum as the Court deems reasonable on such principal sum], from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit*.

*Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent. per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions.*

*Explanation I.—In this Sub-section, “nationalised bank” means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970).*

*Explanation II.—For the purposes of this section, a transaction is a commercial transaction, if it is connected with the industry, trade or business of the party incurring the liability.*

*(2) Where such a decree is silent with respect to the payment of further interest 2 [on such principal sum] from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.*”

There is no specific judicial rate of interest prescribed in the CPC for the time being in force. However, general provision of section 34 of CPC authorises the Courts / Redressal Fora and Commissions to also grant interest appropriately under the circumstances of each case.

There is no specific rate of interest prescribed for the time being in force.

## Ireland – Insolvency Service of Ireland

Interest on bankruptcy debt is dealt with in section 86 of the Bankruptcy Act 1988, the Debtors (Ireland) Act 1840 and the Courts Act 1981.

Questions around Bills of Exchange, Interest under Late Payments Regulations, etc. mean this can be complicated depending on individual facts and court rulings. In simple terms the *Courts Act 1981 (Interest on Judgment Debts) Order 2016 (S.I. No. 624/2016)* reduced interest on judgment debts from 8 per cent to 2 per cent with effect from 1 January 2017 by amending the rate stated in section 26 of the [Debtors (Ireland) Act 1840](http://www.irishstatutebook.ie/1840/en/act/pub/0105/index.html). This has effect in section 86 of the Bankruptcy Act 1988:

*Section 86.— (1) If the estate of any bankrupt is sufficient to pay one euro in the euro, with interest at the rate currently payable on judgment debts, and to leave a surplus the Court shall order such surplus to be paid or delivered to or vested in the bankrupt, his personal representatives or assigns.*

The interest is calculated on Judgment Debts is calculated on a simple interest basis.

## Jersey – Royal Court of Jersey Viscount’s Department

Interest on debts may be paid where there is a surplus of assets, under Article 37 of the Bankruptcy (Désastre) (Jersey) Law 1990.

There is no statutory rate of interest. The Viscount (the administrator of bankruptcy proceedings in Jersey) has a discretion and may apply such rate of interest as seems reasonable having regard to the circumstances of the bankruptcy. The Viscount is likely to take in to account the applicable bank base rate at the time.

Before paying interest from any surplus, the Viscount must serve notice on the debtor and creditors advising them of the rate fixed. If a person is dissatisfied with the decision, they must notify the Viscount within 21 days that they wish an application to be made to the court for a variation of the decision.

Where a claimant has proved and the Viscount has admitted contractual interest, the Viscount would honour the contractual rate of interest for those creditors where there are sufficient funds available to make such a payment.

The rate would be calculated at the end of the bankruptcy once the amount of any surplus was known and then applied for the whole of the relevant period.

Interest would be calculated from the date of the bankruptcy to date of repayment of the debt.

Note: In cases where there is no surplus, interest is not normally paid by the Viscount from the date of the bankruptcy except where the debt is secured over immovable property. Interest accrued up to the date of the bankruptcy declaration is provable.

Will be reviewed on a case by case basis but the starting point at present is likely to be 3% over base rate for debts where there is no contractual provision.

When fixing the rate, the Viscount may consider any recent judgments of the Royal Court. In a recent case, the Royal Court, having taken into account the sharp decline in the base rate since 2008, and acknowledging that a creditor should still be awarded fair compensation, decided that 3% over base provided fair compensation and ordered interest at that rate up to judgment.

We would also consider the judicial rate of interest set out in Practice Directions at the relevant time.

Judicial Rate of interest - Determined by reference to base rate and set out in a Practice Direction. The Court rate for interest on judgment debts is 2% above the UK selected retail banks short term money rates (base rate) from time to time during the period for which interest shall run, calculated on a daily basis.

## New Zealand – Insolvency & Trustee Service

Interest paid to creditors in bankruptcy only. The prescribed rate used to be set and then adjusted from time to time. However, a new method was introduced to calculate interest on judgments called the Interest on [Money Claims Act 2016](https://www.legislation.govt.nz/act/public/2016/0051/latest/DLM6943345.html#DLM6943345) which prescribes the interest rate is to be an average of the six month term deposit rate published by the Reserve Bank plus a 0.15% premium. More information is available on the [Ministry of Justice website](https://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt/interest-on-civil-debt/).

New Zealand also has a section in bankruptcy which allows creditors with contract interest higher than the prescribed rate to be topped up if there is funds available after the prescribed rate has been paid.

## USA – Office of the General Counsel

The payment of postpetition interest on bankruptcy claims is permissible under certain circumstances. The United States’ Bankruptcy Code provisions regarding payment of interest have their roots in the English system, which permits interest to accrue on bankruptcy claims where the debtor is solvent, meaning having the ability and enough assets to pay all claims in full.

In the United States, consumer debtors have the option of filing for chapter 7 or chapter 13 bankruptcy relief. In chapter 7 bankruptcies, the debtors’ assets are liquidated to pay their debts. In chapter 13 bankruptcies, the debtor proposes a plan that must be approved by the bankruptcy court setting forth payments (funded by future wages) of debts over the course of time (usually three years).

In chapter 7 bankruptcies, the statute specifically states that after the full payment of claims, postpetition interest must be paid to creditors, including unsecured creditors, before any amount is returned to the debtor. In chapter 13 bankruptcies, a plan cannot be approved by the court unless it provides unsecured creditors with as much value as they would receive in chapter 7. As such, creditors in a chapter 13 who would be entitled to postpetition interest in a chapter 7 will have to receive at least the same amount under the chapter 13 plan. Additionally, under the Bankruptcy Code, secured creditors are allowed to collect postpetition interest when the collateral's value is sufficient to cover both the principal and postpetition interest.

The Bankruptcy Code states that interest is paid at the “legal rate” but does not define the term. Because of ambiguity in the statute, courts have differing interpretations as to what constitutes the “legal rate.” The majority of courts interprets the “legal rate” to mean the federal judgment rate, which is set by federal statute. These courts find that the following factors weigh in favor of applying the federal judgment rate: (1) principles of statutory interpretation, (2) uniformity within federal law, (3) equitable treatment of creditors, and (4) judicial efficiency.

Some courts, however, have interpreted the “legal rate” to be the effective rate under state law, which would either be calculated by the contract rate or under state statute for claims reduced to judgment. Courts reaching this conclusion take the view that where there is a surplus, creditors should get the full benefit of their bargained-for rights before the debtor can receive any distribution.

The federal judgment rate is set by federal statute, which provides that interest shall be calculated “at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.” As a result, the rate is variable, depending on the rate from Treasury bonds.

The Bankruptcy Code provides that the interest shall be calculated “at the legal rate from the date of the filing of the petition.”

The statute is silent as to the end date for calculating interest. As a result, courts have set end dates based upon repayment date, the confirmation date of a plan, and the effective date of a plan.

The federal judgment rate changes on a weekly basis. *See* 28 U.S.C. § 1961. As of August 13, 2021, the rate was 0.08%. Throughout 2021, the federal post-judgment rate has ranged from 0.05% to 0.11%.

1. While administration costs were not discussed at the meeting, allowing composition where 70% of the debt repayments had been repaid, would result in creditors receiving less than this due to administration costs of up to 22%. [↑](#footnote-ref-1)