Funding the Accountant in Bankruptcy

Consultation Report and Proposals
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Introduction

This paper provides a summary of the responses to the consultation by the Accountant in Bankruptcy (AiB) on behalf of the Scottish Ministers on funding the agency in 2018 – 19, proposing to introduce a fees regime that strikes a fair balance between debtors accessing the insolvency system, the creditors involved and the public purse.

1. Purpose

To provide:

- a summary of the outcome and responses from the consultation on ‘Funding the Accountant in Bankruptcy in 2018 – 19’, that concluded on 12 March 2018;

- details of proposals for the introduction of the revised fee structure from 1 June 2018.

2. Background

AiB funding comes from three sources: debtors, creditors and the public purse. The fall in the number of bankruptcy cases completing, together with the forecasted number of new cases means that AiB income is forecast to fall sharply in future years. The forecasted decrease in income means that without changes to fees and charges, AiB will not for the foreseeable future be able to cover its expenditure without an increasing call on the public purse.

In order to obtain the view of all those individuals and organisations that would in some way be affected by the proposed changes to the fees structure, a public consultation was conducted between 4 December 2017 and 12 March 2018.

The feedback received in this consultation strongly supported the view that it would be inappropriate to seek to raise fees and charges for debtor applications for bankruptcy at this time. In light of this, the response and proposals set out in this paper seek to strike the correct balance between the costs being met by funds collected that would otherwise pass to creditors and demands on the public purse.

3. Summary of Consultation Responses

A total of ten responses were received to the consultation. Six responses were received from individuals and organisations operating in the advice sector and four were received from other professional bodies representing the insolvency sector and the interests of creditors. The consultation sought views on eight different questions, with the summary of responses detailed below:
Funding the Accountant in Bankruptcy – Consultation 2018

Question 1. Do you agree that upfront debtor application fees should not be increased at this point?

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No respondent suggested that there should be an increase in debtor application fees. Some respondents highlighted that the existing bankruptcy application fees already acted as a barrier to accessing an appropriate solution. Two respondents suggested commissioning further research on how existing applicants are funding applications and the extent to which fee levels impact on appropriate access to debt relief.

Question 2. Do you think that the principle of full cost recovery is appropriate in the bankruptcy system?

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There was no clear consensus on whether the principle of full cost recovery is appropriate. One of the views expressed against full cost recovery highlighted that the achievement or otherwise of this aspiration was influenced primarily by external factors and it would not be desirable to have a system likely to result in significant annual fee revisions. Other responses highlighted that full cost recovery was a reasonable approach provided that the burden did not fall on those least able to afford it.

Question 3. Do you agree that it is right to seek to recover costs across the system as whole, so that there is a degree of cross subsidy between MAP, full administration bankruptcy and PTDs?

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The majority of respondents consider that it is appropriate to seek to recover the costs of the insolvency system as a whole, including a degree of cross-subsidy between separate insolvency products.

**Question 4. Do you agree that it is right to ask those bankruptcy cases administered by private trustees to make a contribution towards the costs of those cases which contain no funds?**

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The opinions expressed on this question were split between those operating in the advice sector who answered “yes” and those working in the insolvency profession who were not in favour of this form of cross-subsidy. Those against this cross-subsidy highlighted that there were cases administered in the private sector that did not raise sufficient funds to cover the trustee’s fees, and that private sector IPs were not allowed to cross-subsidise these cases to make up the shortfall. One alternative view was that private sector practitioners are only likely to take appointments in cases where funds will be available and it is therefore reasonable that these cases do contribute towards the operation of the insolvency system.

**Question 5. Do you agree that it is right that, of the predicted £4.2m shortfall in 2018-19, the public purse should meet the bulk of these costs, with fee increases designed to generate an additional £1m a year in the longer term?**

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There was no clear consensus on whether the public purse should meet the bulk of the predicted shortfall in 2018-19. Several responses raised concerns on further increases to debtor application fees which would act as a barrier to those accessing bankruptcy which would also result in future reduction in AiB income. Other responses highlighted that creditors were the main beneficiaries of debt advice and that the public sector funding of insolvency could not be viewed in isolation – it would be important to support front-line free sector advice services.
Question 6. Do you agree that the proposals set out in paragraph 29 represent a fair way of generating additional income?

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A majority of respondents considered that the proposals set out in the consultation document represented a fair way to generate additional income. One of the responses indicated that a more detailed independent review on future funding would be helpful with a view to consideration of more radical or innovative funding models.

Question 7. Do you agree with our assessment that the proposed increase in upfront creditor fees is unlikely to alter creditor behaviour except at the margin?

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A majority of respondents agreed that the proposed increase in upfront creditor fees is unlikely to alter creditor behaviour. One of the responses representing creditors’ interests did suggest that some creditors might be put off petitioning for bankruptcy.

Question 8. Are there any other points you would like to raise?

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The general issues and comments raised in the consultation are set out in the next section.
4. Consultation – Wider Issues Raised

The consultation responses included a number of general comments and observations in areas not covered by the specific consultation questions.

Responses from the money advice sector were broadly supportive of the proposals set out in the consultation. The views expressed relate to the ability of the most financially vulnerable to meet the costs of the debtor application fee. There were responses that suggested the introduction of fee remission and the removal of the Minimal Asset Process (MAP) bankruptcy fee.

The insolvency profession has raised a number of issues in the responses received - in particular:

- the policy development function of AiB should be funded by the public purse and not funded from fees and charges.

- AiB’s supervisory/investigatory functions incur an unnecessary cost as this duplicates some of the activity undertaken by the recognised professional bodies.

- Fee structure should ensure that there is no unnecessary drain on the public purse by ensuring AiB is not trustee by default but trustee of last resort.

- Cross-subsidy should be considered – taking account of Debt Arrangement Scheme (DAS) funding.

- AiB fee charged for the determination of outlays is unfair and not commensurate with work undertaken.

- In common with other agencies (e.g. Registers of Scotland), AiB could (if allowed) set aside funds in reserve in order to manage fluctuating income.

5. Consultation – Consideration of Issues Raised

**Debtor Application Fee Remission/Waiver**

The matter of debtor application fees has been considered very carefully and the comments raised in the consultation about the difficulties that raising these fees can cause are acknowledged. We maintain it is appropriate to retain the up-front fees for debtor applications with no further increases proposed. The fee regime for self-nominated bankruptcy in Scotland compares favourably with other systems operating within the UK. AiB’s total income from debtor application fees in 2017-18 is anticipated to total £0.4 million. This will represent only 3.5% of AiB’s total expenditure (excluding policy development functions) and 6.3% of expenditure on bankruptcy specific processes. With creditors meeting over 90% of the costs, this does not seem an unreasonable ask of debtors.
While it is important to minimise the fees payable, an application for bankruptcy and ultimately relief from debt is something that can bring significant benefit to the individual. In this context, our view is that the fees levied for MAP and full administration bankruptcy are reasonable and proportionate in recognition of the administrative processes involved. AiB has facilitated arrangements for payments to be made by instalments via the Royal Bank of Scotland.

In the coming year, AiB will commission research into the debtor experience of bankruptcy, focusing on MAP bankruptcy, which will include a suggestion made in response to the consultation to look at how debtors fund the upfront application fee. This will allow an evidence-based assessment of the extent to which, if any, such fees act as an obstacle to those needing debt relief. The results of the research will be published in advance of the next fees review.

**AiB Functions**

We have considered the points raised in relation to the functions undertaken by the agency and whether any of these are unnecessary given the regulatory activity delivered by other organisations including Recognised Professional Bodies. Having examined each of the fees charged in relation to AiB’s supervisory functions, the conclusion is that these are entirely consistent with the duties that are set out in current insolvency legislation and approved by the Scottish Parliament during the recent reforms. AiB has, for example, a duty to investigate instances of potential breach of insolvency legislation, whether this involves the trustee, the debtor or the creditors involved. These are legitimate activities for AiB to undertake. AiB will also refer matters to other bodies for investigation where the issues involved are beyond the Agency’s remit, including for example potential breaches of professional ethics or matters that would constitute a suspected criminal offence. AiB’s statutory supervisory functions could only be reviewed as part of a wider reform of insolvency legislation and this is beyond the scope of this particular review.

The proposals set out in the consultation will leave a shortfall to be met by the public purse significantly greater than the costs associated with AiB’s policy development functions, so that these costs will not be met by the proposed fees and charges. It is accepted that the aspiration to achieve full cost recovery is just that - a principle with limits in practice.

The Accountant in Bankruptcy is fully accountable to the Scottish Parliament and Ministers for every penny of money spent, and subject to scrutiny by Audit Scotland, internal and external auditors as are all public bodies. The agency’s Accounts were accepted as true and fair in accordance with the Public Finance and Accountability (Scotland) Act 2000.

The introduction of debtor-led bankruptcy application through AiB has been broadly welcomed. In particular, this facility has increased accessibility to debt relief for many vulnerable individuals dealing with an unsustainable financial position. There is no
immediate or obvious alternative to this service being provided by AiB, with the costs being met in part by reasonable debtor application fees, aside from these functions remaining within the Scottish Court system. There are other fees for which alternative providers and solutions are available. As an example, AiB fees levied for the audit and determination of trustee accounts only apply where there is no commissioner representing the creditors in place to undertake these functions. AiB only performs these duties in the absence of a commissioner. Additionally, the principles applied to the specified functions transferred to AiB from the Scottish Courts, along with the introduction of the associated fees, were accepted and introduced into legislation as part of the Bankruptcy and Debt Advice (Scotland) Act 2014.

**AiB’s Trustee Functions**

AiB’s statutory role as a trustee of last resort enables many individuals to access debt relief, where otherwise it would not be cost effective for a private insolvency practitioner to accept the appointment. This is clearly demonstrated in the case of MAP bankruptcy. The administration fee charged for full administration bankruptcy is set at a level commensurate with the costs involved in administration. The proposals set out in the consultation include an increase in the administration fee from £1,100 to £1,700 and these are considered as reasonable in the circumstances. The consultation responses were broadly supportive of this change.

**Cross-subsidy of products – the Debt Arrangement Scheme**

It is considered that the current approach to subsidy of insolvency, and the separate considerations that apply to DAS, are consistent with the functions set out in the relevant legislation and with the Scottish Public Finance Manual. At present, the income generated by DAS is not sufficient to fully meet the administration costs. The recent response to the separate consultation on DAS reforms run by AiB on Ministers’ behalf also set out future plans to reform the arrangements for funding the administrative and payments distribution functions associated with the programme. There are restrictions on applying cross-subsidies, and at the present time we do not consider that a case has been made out for considering cross-subsidy.

**AiB Audit Fees – Outlays**

We have considered the views expressed in the consultation that the fee charged for the determination of outlays is unfair and not commensurate with work undertaken.

First, as set out in the consultation, one aim here is to allow where appropriate and proportionate cases taken by private trustees to contribute to the overall costs of the system of supervising bankruptcy in Scotland, beyond the particular case. There will inevitably be winners and losers in any system of fee regulation. The consultation suggested that an alternative approach would be to see all such private cases paying a fixed fee – to deliver the same total income, this might need to be in the region of £1200. The paper suggested that it was not obvious that this would bring any greater fairness, and the current system has the benefit of being well understood.
We have also taken account of the concerns raised by the Economy, Jobs and Fair Work Committee during scrutiny of the previous fees proposals which included an overall cap on of the fee for an individual audit. We consider that the fees levied for audit of remuneration and outlays are appropriate - the Committee’s view was that it was fairer to maintain this element of the fees provided by the cases managed by private trustees, rather than introducing additional costs elsewhere in the system. Accordingly, it is now proposed that the existing audit fee regime without a cap should remain in place.

**AiB Accounting Process**

We have considered the suggestion that in common with some other agencies (e.g. Registers of Scotland), it could (if allowed) set aside funds in reserve in order to manage fluctuating income. Legislation does not currently provide for AiB to operate a trading fund and as a consequence this option is not available to the agency at present.

### 6. Proposals

As a result of this consultation the Scottish Ministers propose to:

- freeze debtor application fees for MAP and Full Administration bankruptcies so that low cost, effective and accessible debt relief remains available to those that need it most
- raise the standard administration fee from £1,100 to £1,700 (and for AiB acting as interim trustee where not subsequently appointed trustee from £200 to £300)
- increase the petition fee to £150 and the award fee subsequent to petition to £300
- increase the supervision of bankruptcy fee (with no commissioners) from £70 to £100 per annum
- increase the fee for advertising Protected Trust Deeds (PTDs) electronically in the Register of Insolvencies from £35 to £40 and from £90 to £100 for clerical notifications
- increase the fee for registering a PTD from £36 to £40
- clarify that the Part 2 fees are charged for “consideration” of applications submitted to AiB rather than only applying to making an “appointment”, “determination” or “order”
- increase the fee for registering a court order appointing a replacement trustee from £19 to £50
reinstate the provision previously made to enable AiB to recover costs paid to insolvency contract providers where additional hours have necessitated the payment in excess of the fixed fee rate chargeable under the Part 1 fee.

7. Conclusion

It is intended that the proposed revised Bankruptcy Fees (Scotland) Regulations 2018 are made and laid shortly, with a commencement date for the coming into force of 1 June 2018. The changes would not apply to bankruptcies petitioned for or applied for, or trust deeds executed before that date.

AiB will keep stakeholders updated on key issues and dates as matters progress.
ANNEX A: Organisations who responded to the consultation

Organisations

2. Yuill & Kyle Solicitors, Glasgow
3. City of Edinburgh Council Advice Shop
4. Advice Services, Inverclyde Council
5. Chartered Institute of Credit Management
6. Money Advice Scotland
7. North Lanarkshire Council
8. Institute of Chartered Accountants of Scotland
9. Citizens Advice Scotland
10. R3 Association of Business Recovery Professionals, Scottish Technical Committee