**Review of Scotland’s statutory debt solutions**

**Stage 3 Consultation – March 2025**

**Response – June 2025**

This response is provided by Dr Alisdair MacPherson and Professor Donna McKenzie Skene, who are both members of the Centre for Scots Law at the University of Aberdeen.

**Q1.1 Do you agree that the aim, set out in the 2014 Act, for the insolvency regime is still appropriate, with the amendments suggested?**

Yes, we broadly agree with the specified aim; however, we should note that it was not set out in the 2014 Act. Rather, as per the above citation, it was stated to be the legislation’s aim in a Ministerial Foreword to a Scottish Government consultation of November 2019, reflecting on changes introduced by the 2014 Act. To some extent, the ethos was also captured in the Scottish Government’s *Consultation on Bankruptcy Law Reform* (2012), which ultimately led to the 2014 Act reforms. This all demonstrates that a guiding aim can be identified and may support reform, even if it is not legally enshrined via legislation. Our preference would be for such an aim not to be included in legislation itself.

**Q1.2 Are the four principles set out above appropriate?**

We generally agree with the first three principles set out above. As with the above aim, they are not included in the 2014 Act itself. The cited source is the same 2019 consultation, but we should also note that an earlier version was provided in the 2012 consultation preceding the reforms (see the discussion in D McKenzie Skene, *Bankruptcy* (2018), para 3-16). We previously expressed our support for using those as a starting point for the development of principles in the current project and reaffirm that now. We understand the reasons given for the inclusion of the fourth principle. However, we have some concerns that it may be unrealistic to refer to “a safe route out of debt”, as there will almost certainly be a continuing need for parties to have and/or incur some debt, especially in the case of those with a negative budget. If this principle is to be included, perhaps it would be more appropriate to refer instead to “a safe route out of current debt problems”.

We note the replacement of “debtors” with “consumers” in the principles and we understand why this has been proposed. This terminology will usually be suitable, given that the great majority of debtors are individuals who can be considered consumers. In the Consumer Rights Act 2015, “consumer” means “an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession”. However, the use of “consumers” in the principles excludes businesses and other entities of various types which are also dealt with in the bankruptcy legislation (including partnerships, trusts and even sole traders, on one view). As such, it indicates that the focus of the review is on individuals and that, in the main, businesses and other entities are not being considered. We do not, therefore, consider that this change in terminology is appropriate in a general sense, at least for so long as entities (and sole traders) remain within the same legislation as “true” consumers.

Again, our preference would be to use the principles as guidance for reform, rather than being included in any legislation.

**Q2.1 Do you agree these alternative measures should be taken forward? Are there any implementation considerations that should be taken into account?**

While we consider that a Single Gateway solution would have various advantages, and would not necessarily have to take “the human element” out of the process, we acknowledge that there does not seem to be general support for introducing it in the foreseeable future.

In principle, we broadly agree with the alternative measures but reserve our final judgement until we have further details as to what precisely is proposed, including what the time period would be for the proposed moratorium and what is meant about taking account of payments made to date, as these will in fact be reflected in a subsequent solution in so far as the debt has been reduced.

**Q2.2 What are your views of this proposal?**

We can understand the reasons for the proposal to raise the MAP upper debt limit to £50,000. However, we wonder if there is a specific reason why this figure has been chosen. We feel this is a substantial figure and there is a public interest element to having an upper limit as well as the issue of whether the debtor is in a position to repay which justifies the institution of a full administration bankruptcy where there is a high level of debt. We would therefore only support such a substantial increase if there is compelling evidence to support it.

Regarding the proposal to allow for an individual to access a MAP every 5 years, we have certain reservations about this, unless other underlying issues are addressed. We accept that there are circumstances in which it could be justifiable (e.g. if someone has encountered unforeseen financial problems outside their control), yet there may also be other more appropriate ways, including beyond bankruptcy law, to deal with relevant situations. Perhaps a person could be permitted to enter another MAP within 10 years if they can show cause for doing so.

If it is decided to allow for access to a second MAP after less than 10 years since the first, then it may be desirable to provide that a person is not permitted to enter a further (third) MAP until at least 10 years have expired since the second one. This could help address fears of “revolving-door bankruptcies” and the potential for misuse of the procedure.

We agree that if the minimum time period between MAPs is to be reduced to five years, and the upper debt limit for the first MAP is to be raised to £50,000 (or another figure), then the current limit of £25,000 should remain for subsequent MAPs.

**Q2.3 Do you agree with this conclusion?**

We agree with the desire to avoid complexity here and that no change should therefore be made.

We do, however, wonder whether there is a need to retain an individual asset limit of £1,000. It seems reasonable to simply have an overall asset limit instead.

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**Q2.4 Do you think that interest, fees and charges should be removed on revocation? If not, why not?**

We think it may be reasonable for interest, fees and charges to be removed on revocation in some circumstances. However, perhaps it should depend on the reasons for the revocation and should not be automatic. This could also act as an incentive for compliance with the terms of the DPP.

**Q2.5 Do you agree that a different approach is required outside of the Common Financial Tool? If yes, would you agree that the Joseph Roundtree’s Minimum Income Standard should be adopted?**

We do not have any comments on this. As academic lawyers, we do not have the relevant experience. However, in principle, we consider that some form of generally applicable framework would be beneficial in seeking to promote consistency.

**Q2.6 Do you agree with the proposed 50/50 split of any increased income?**

We agree that some form of split is appropriate and the proposed approach seems not unreasonable to us. It balances the interests of the parties and would minimise the complexity that may arise from other approaches.

**Q2.7 Please tell us your views on this approach of dis-regarding some of the equity in the family home and, in particular, any unintended consequences. What should the level of equity dis-regard be?**

Consideration needs to be given to what should constitute a family home and who should be protected by a relevant protection. Under the current law, the family home is defined (in the Bankruptcy (Scotland) Act, s 113(7)) as a house occupied immediately before the date of sequestration by:

* The debtor and their spouse/civil partner
* The debtor’s current or former spouse/civil partner; or
* The debtor and a child of the family

A home is therefore not protected if a debtor lives there alone or if they live there with a cohabitant or a friend or a family member other than a spouse/civil partner or a child of the family. Should protection of the family home continue to depend solely on these parties or should it be extended to the debtor even if they live alone or if they have other dependents? Should it continue to protect a child of the family who is an adult? We think that this might usefully be reviewed.

Of course, even if the family home test is met, the property can be sold with:

1. The consent of the debtor’s spouse or civil partner (if resident in the home)
2. The debtor’s consent, if a) does not apply but the debtor lives in the home with a child of the family, or
3. The sheriff’s consent, if a relevant consent under a) or b) cannot be obtained, with various factors taken into account, including: needs and financial resources of any child of the family and current or former spouse/civil partner; interests of creditors; and the length of time it has been used as a family home.

Would the intention be to replace the discretionary element in c) with a rule based on “equity value” of the family home? The reference to setting a level of equity to be “disregarded due to the costs of selling the family home, including solicitor’s fees, home reports, removal costs, and potentially disruption to the family unit” is not entirely clear. For example, if the relevant value is set at £20,000 and the market value of the property is £100,000, then can a trustee sell the property (without the need for a sheriff to exercise discretion in consenting) but must release £20,000 of proceeds to the debtor? This obviously would not stop the property from being sold. Perhaps the equity level (or specifically the costs that the consultation paper mentions) should instead be included in the sheriff’s considerations under c). And where the example is modified to include a secured creditor for a debt of £50,000 and the property is sold by them, then must they give £50,000 to the trustee (expenses are ignored for simplicity), who will then set aside £20,000 for the debtor, with £30,000 to be available for the creditors? Again, this would not stop the sale of the property, and should the debtor be entitled to the funds in the circumstances?

In any event, we have concerns about a solution based on equity value for a number of reasons. How will the value be assessed and at what point? What if there is a disagreement regarding value and what will happen if the value changes as a result of market fluctuations or otherwise? How will this fit in with the provisions on re-vesting (which might also usefully be reviewed since there also seems to be some concern that these have not operated as intended)? Finally, there is the risk that the figure chosen may be seen as arbitrary.

Issues involving the family home also need to be resolved in relation to the law of diligence. The family home situation is currently the principal hurdle to reforming the law to introduce a new, effective diligence against land (land attachment or an equivalent). More generally, diligence has not been included to any substantive degree in the consultation, despite the desirability of various reforms and our understanding that diligence would be included in the review. We would welcome greater clarity as to whether and how this review will give further consideration to the law of diligence and whether relevant recommendations will be made.

In addition, it may be noted that the definition of a home which may be excluded from a protected trust deed differs from the definition of a family home as noted above, and we believe that this should also be addressed.

**Q2.8 Please tell us your views on this option. Please tell us any issues you see in its operation.**

This “alternative solution” would lead to a significant proportion of the estate being shielded from creditors in many cases. There would be various complexities with such an approach, and we would require further information to express a concluded view. We also note the suggestion that this is “the approach taken in Scandinavia”. It would be useful to know more about this, including which Scandinavian countries are being referred to, how the household size is calculated, how the property size is calculated (e.g. value, floor space, number of rooms etc) and how is the normal size of property for the relevant household size determined?

In order to learn more, we asked legal scholars in Sweden and Norway to explain the relevant law.

**Sweden**

Kristian Gustafsson (Lund University, Sweden) and Professor Göran Millqvist (Stockholm University, Sweden) kindly provided a research note, and the following material on Swedish law is principally derived from that.

Bankruptcy is available as a procedure in Swedish law; however, it does not involve debt relief in the same way as Scots law. In bankruptcy, the trustee must nevertheless consider the basic protection of the debtor’s rights (Bankruptcy Act (1987) Ch 3, Sec 5; [Swedish: konkurslagen], which refers to the Enforcement Act (1981) Ch 5, Secs 1, 2 and 4; [Swedish: utsökningsbalken]). The debtor has the right to obtain personal belongings that are reasonably necessary in a household. Also, if they live in a rented apartment, this is fully protected in almost every case. If the debtor owns the apartment, the legislation indicates that it may be exempt based on the debtor’s needs and the property value, and if there is a family then their needs are also to be considered. In practice, the protection will only exist if the value is low (the size of the apartment, in terms of area, has less relevance). A Swedish Supreme Court case from 2004 (Supreme Court reference: NJA 2004 p. 373 – <https://www.domstol.se/hogsta-domstolen/avgoranden2/2004/40839/>) set a limit of 300,000 Swedish Krona (around £23,500, without adjusting for inflation). The Court contended that the limit is applicable if it is an apartment of a normal size for a family. However, as stated by Gustafsson and Millqvist in their note:

“the limit is so low, that it almost never becomes applicable due to the rise of price on the housing market since 2004. Today, you could argue that the limit is slightly higher – the Supreme Court opened up for considering inflation in the case from 2004, which of course has been considerable since then.”

They speculate that the limit would not exceed 500,000 SEK today (around £39,130), albeit that they acknowledge that this has not been tested in court. They suggest that the exemption will only protect some housing in rural areas as apartments in major cities are worth considerably more than this. They also note that the protection only applies to apartments and not to real estate more broadly. We understand that if the property is sold, there is no protected amount that the debtor obtains from the proceeds. A debtor will only receive proceeds if there is a surplus after creditors are paid in full.

The above rules also apply outside bankruptcy in the context of debt enforcement by creditors. There is also a proportionality test regarding enforcement against a debtor’s housing (immoveable property). The debtor’s right to private and family life (Art 8 ECHR) and the best interests of the child (Art 3.1 CRC) are considered in opposition to the creditors’ need for swift payment and the general situation involving the debtor and their family. If the amount to be gained from selling the property is low, they may have to obtain payment through seizure of a debtor’s salary instead. It may be contended that the proportionality test also applies in bankruptcy but that is not clear and has not been determined.

Debt restructuring (skuldsanering) is available in Sweden, and operates like bankruptcy in certain respects. In order to obtain debt restructuring, a debtor must have made all efforts to pay their debt, but without success. This procedure involves an insolvent person living on a level of minimal wages for three to five years (salary and other surplus income is used to pay debt). The person is subsequently relieved from debts, subject to a few exceptions. When a decision is being made regarding debt restructuring, attention is given as to whether it is reasonable and the debtor’s living arrangements are considered. As Gustafsson and Millqvist comment, “it is important to note that if the debtor owns his housing, and there is considerable value for the creditors, it needs to be sold and the creditors get paid”.

**Norway**

In relation to Norwegian law, Professor Hans Fredrik Marthinussen (Bergen University, Norway) has provided helpful comments, on which the following material is based.

There is some protection of a debtor’s home in Norway in the Creditors’ Seizure Act (dekningsloven), but it is not particularly substantial. Prof Marthinussen translates the relevant provision, § 2-10, as follows:

“If enforcement by forced sale or compulsory use of real property, a housing cooperative share, or a tenancy right in real property (including shares, certificates of participation, mortgage deeds, or other access documents associated with a tenancy right) would result in the debtor losing the right to necessary housing for themselves or their family, the district court may, upon petition and by ruling, decide that enforcement can only be carried out if another dwelling is provided for the debtor or their family which, in terms of location, size, cost, and other circumstances, meets reasonable requirements.”

It appears that the debtor only needs to be provided with alternative housing, which would enable creditors to propose appropriate housing for rent that the debtor can afford on their level of income in the wake of bankruptcy. Prof Marthinussen has informed us that in practice an owned family home of some value will be sold during bankruptcy procedures, or by a secured creditor (albeit that the courts will oversee that the debtor and their family are provided with alternative accommodation). He further notes that the commentary on the Norwegian provision on the protection of the residence states that there is no similar protection in Denmark and Sweden, and he has been unable to locate an equivalent in Finland.

**USA**

It is also worthwhile to consider the approaches in other jurisdictions, to identify how the law in Scotland could be usefully reformed. There is merit in paying attention to the USA, given the wide variety of approaches across the various states.[[1]](#footnote-2) We are grateful to Professor Chris Odinet (Texas A&M University) for helping us identify relevant sources for the USA.

Almost all of the states have some form of “homestead exemption” in bankruptcy (and often outside bankruptcy too), with New Jersey and Pennsylvania as exceptions. There is also a federal homestead exemption in bankruptcy (available where states do not opt out of it – see 11 US Code § 522(b)(2)), which protects the debtor’s “aggregate interest, not to exceed [$31,575][[2]](#footnote-3) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence…” (11 US Code § 522(d)(1)). “Dependent” here includes a spouse “whether or not actually dependent” (§ 522(a)(1)). Depending upon the relevant state, a debtor will ordinarily have the option of choosing between the federal exemption or the relevant state exemption. For further details, see E Warren et al, *The Law of Debtors and Creditors: Text, Cases and Problems*, 7th edn (2014) pp 79-128.

In terms of individual states with homestead exemptions, there is a multiplicity of approaches (see e.g. National Consumer Law Center, *Collection Actions*, 6th edn (2024), §§ 16.2.1-16.2.5.1, and Appendix H, updated at [www.nclc.org/library](http://www.nclc.org/library); *In re Pace*, 521 B.R. 124 (Bankr. N.D. Miss. 2014)). Some states have a relatively low protected amount, which may be under $10,000 (e.g. Arkansas, Kentucky) but in many states it is in the tens of thousands of dollars (e.g. Georgia, Indiana, Louisiana). There are also states with exemptions which stretch beyond $100,000 (e.g. New York) and sometimes into the hundreds of thousands of dollars (e.g. Minnesota, Nevada). There are even states with no value limit for homestead exemptions, where there is instead a limit based on the geographical size of the property (acreage) (e.g. Florida, Texas), usually with larger exemptions for rural property in comparison to urban property. Some states give larger exemptions for older or disabled individuals or where the debtor is the “head of household” (the term may be misleading, as it simply means the person is married and/or is supporting a dependent). Exemptions normally depend upon the property being occupied as a home, or with the intention to make it a home.

The homestead exemptions in the USA usually refer to equity held by the debtor in the relevant property. Normally, the property can be sold and the debtor will be given the exemption amount from the proceeds of sale, unless another option like division and sale is possible (see e.g. *Cole v PRN Real Estate & Invs*., 829 Fed. Appx. 399 (11th Cir. 2020); *In re Bradley*, 294 B.R. 64 (B.A.P. 8th Cir. 2003)). In a reference book by leading commentators it is stated that with “partially exempt” property “in most cases the property can be levied on and sold”, with the exemption attaching “up to its dollar limit, but to the net proceeds after sheriff sale, rather than the property itself” (E Warren et al, *The Law of Debtors and Creditors: Text, Cases and Problems*, 7th edn (2014) 100).

We hope that the above material is useful for considering how the law in Scotland could be positively reformed if it is decided that reform is in fact desirable. Of course, we would be happy to discuss it further, if that would be of assistance.

**Q2.9 Do you agree that the current limit for vehicles should be increased?** **What is a reasonable level?**

Yes, we agree. Threshold amounts for asset values, including vehicles, should be increased periodically in line with inflation and ought to take account of policy intentions. The current limit of £3,000 replaced the previous £1,000 limit in 2010, as per the Bankruptcy (Scotland) Amendment Regulations 2010 (SSI 2010/367). We are assuming that the current figure was a reasonable amount in 2010. According to the Bank of England’s inflation calculator (https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator), which uses Consumer Price Index (CPI) data, £3,000 in 2010 is the equivalent of around £4,566 in March 2025. A £5,000 limit therefore seems reasonable. Ideally, such a limit would increase annually to take account of inflation. However, if this is not achievable and further increases will be unlikely for several years, then a higher amount such as £6,000 could be adopted to enhance the future-proofing of the limit.

**Q2.10 Do you agree with this proposal?**

Yes, we agree. All reasonably required health or disability aids, including a mobility scooter, should be exempt from statutory debt solutions and diligence.

**Q2.11 Do you agree that to improve access to bankruptcy the levels of funds allowed in a current account should be increased? What is a reasonable level?**

We would not have a strong objection to the policy aim here. However, there are different ways of achieving it, not only increasing the amount of funds allowed in a bank account (to e.g. £2,000). If the single asset threshold for MAPs is removed, then the funds in the account would simply have to be under the overall asset threshold of £2,000. Alternatively, it could be provided that funds in an account deriving from social security payments are not included in the determination of asset threshold amounts.

On a related note, it would be desirable to have legislative clarity regarding whether and how funds deriving from social security payments are excluded from bankruptcy. See the equivalent issues in the context of bank arrestments – *McKenzie v City of Edinburgh Council* 2023 SLT (Sh Ct) 127; A MacPherson and A Sweeney, “The Arrestment of Benefits: McKenzie v City of Edinburgh Council” 2024 Juridical Review 16; and the discussion during the passage of the Bankruptcy and Diligence (Scotland) Act 2024.

In addition, there is currently a protected minimum balance for bank account funds in relation to arrestments (currently £1,000, as per s 73J of the Debtors Scotland Act 1987). However, there would be value in making express provision regarding the application of such a balance in bankruptcy too. It is assumed that there is some desirability in a debtor having a small amount of protected funds in sequestration.

**Q2.12 Do you agree that there should be an annual review as a minimum, and build on existing quarterly review meetings**

While we see the merit in regular reviews, we wonder whether an annual review is too frequent and a 3-year period for routine review would be more appropriate (depending on the nature of the review). In particular, we feel that changes in the law need time to settle down in order to be properly evaluated and that it is important to avoid reactive changes which are resource-intensive and where there is not full consideration of the wider implications.

**Q3.1 Are there any further amendments to either insolvency rules or procedures that you think should be included to enable access for people with deficit budgets?**

We have no further amendments to propose here. We do, however, think that it must be acknowledged that the real solution to this issue lies elsewhere. We consider that there are limits to what changes can or should be made to bankruptcy law to address this issue to avoid unbalancing the law, which must be able to deal appropriately with debtors in a wide variety of circumstances.

**Q3.2 Please can you provide examples of where money advisers and welfare rights advisers work closely together to find solutions for individual clients with deficit budgets and the general lessons that can be learnt from the collaboration**

As academic lawyers, we have no comment to make here.

**Q3.3 Can you provide examples of where full income maximisation has been successfully integrated into debt advice services?**

As academic lawyers, we have no comment to make here.

**Q3.4 What change to the system, if any, is needed to deal with this situation?**

See our proposed changes above. We have nothing further to add here.

**Q3.5 Do you agree that the AiB should ensure that creditors are aware of their responsibilities in relation to DAS DPPs. Would an AiB notice that money advisers and insolvency practitioners can send to creditors when they approach them for details of claims, meet this need?**

We do not have a strong view on this.

**Q3.6 Do you agree that the AiB should** **be more proactive in collecting information from advisers and insolvency practitioners about creditors that repeatedly fail to fulfil their responsibilities and reporting these creditors to regulators as proposed above?**

This seems reasonable. However, the creditors should only be reported to regulators where there is evidence that they have repeatedly failed to fulfil their responsibilities and they can be expected to be aware of them, where e.g. they have been directly informed of their responsibilities.

**Q3.7 In the light of the experience of previous marketing campaigns, is there compelling evidence for the Scottish Government funding another?**

We acknowledge the points made regarding this in the consultation paper and there may be value in the funding of another campaign. However, at a time of significant fiscal challenges and constraints, other matters may be prioritised.

**Q3.8 What are your views on these recommendations to change the language used?**

We understand the motivation here and would not object to the AiB and Scottish Government using “consumer” rather than “debtor” in various places in their documents and websites. However, as noted previously, “consumer” does not capture all debtors, and so if a wider meaning is meant, another term may have to be used. There would also need to be clarity that despite this use of “consumer”, in legislation and elsewhere in the law of debt and insolvency that “debtor” is the appropriate term.

We would strongly disagree with an attempt to remove the use of “debtor” in legal sources, given its longstanding use, expansive meaning (which distinguishes it from “consumer”), its clear connection to debt (which is well understood) and its connection with the counterpart term “creditor”. Of course, the principal legislation in the area is the Bankruptcy (Scotland) Act 2016. Again, we would not object to avoiding the term “bankruptcy” on websites and in documentation. However, it is unavoidable in law and has a long and substantial pedigree, so its use in the legal context may need to be referred to and briefly explained.

**Q3.9 Do you foresee any problems arising from amending the Debt Advice and Information Package in this way?**

No, we have not been able to identify problems that may arise from such an amendment.

**Q3.10 Please may we have your views of this suggestion and details of which standards do not currently cover this issue.**

We are unable to comment on this without further evidence of the specific standards referred to.

**Q3.11 Do you agree with our conclusion? If not do you have any suggestions on how the difficulties faced by small creditors might be overcome?**

We agree with the conclusion reached. It is valuable for people engaging with an individual or relevant entity, or considering doing so, to know whether a debt solution applies to that person, as there are various consequences that arise from this. The most straightforward way to achieve the aim is by using a freely accessible public register. We do, however, disagree with the statement that “someone needs to have a good deal of information about a person to be able to find them in the register”. Someone’s name is usually sufficient and will almost invariably be enough if paired with an address. Yet this ease of searching helps meet the purpose of the register.

**Q3.12 Would allaying consumer fears about anyone being able to access the registers in the Debt Advice and Information Package serve any useful purpose?**

No, as this would be incorrect or at least misleading. As it is a freely accessible register, anyone with sufficient information does have the ability to access the registers, and so stating something to the contrary in the Debt Advice and Information Package would be inappropriate.

**Q3.13 Do you agree that this issue can be satisfactorily dealt with by an AiB notice to creditors?**

We agree that there is no case for legislating here and the proposal would seem to address the issue to some extent. The alternative would likely be difficult to achieve and would place limitations on the rights of others, raising broader issues. However, we would need further details about such proposals before having a firm view. We would add that, more generally, the 2007 Act contained provision for a review of the restrictions flowing from bankruptcy which has never been carried out but which should, perhaps, be carried out now.

**Q3.14 Are you able to provide detailed examples of joined-up services of this kind that could be rolled out more generally?**

We agree with the proposed approach in principle. However, as legal academics, we have no relevant examples here.

**Q3.15 Are there new ways of joining up services that should be considered?**

We have no suggestions to make here.

**Q3.16 Do you support the development and promotion of such a register to support a ‘no wrong door’ approach? If so, who should be responsible for compiling it and keeping it up to date? Can you provide details of any current or previous attempts to do this?**

Yes, we support this in principle. In the absence of any other suitable party being identified, perhaps the AiB could be responsible for compiling such a register and keeping it up to date.

**Q3.17 Do you envisage any other routes to achieving a ‘no wrong door’ approach for people seeking debt advice?**

We have no further suggestions here.

**Q3.18 Do you support the development of a ‘just tell us once’ facility? If so, how do you think this could be best achieved?**

Yes, this is sensible and desirable in principle, but we have some concerns as to how it could be made to work in practice. We have no strong views regarding the best way to do it. Therefore, perhaps the approach that is the cheapest and easiest to complete ought to be selected.

**Q3.19 Do you think that broader advice on money management and budgeting should be built into pre-insolvency money advice?**

Yes, this would be helpful. However, it will depend upon sufficient resources being available.

**Q3.20 Should money advice, including money management and budgeting be required prior to a Protected Trust Deed?**

Yes, we agree. However, once again, it will depend upon sufficient resources being available.

**Q4.1 What is needed to ensure a healthy, vibrant and ethical market for for-profit firms could be enabled for the medium to long term.**

As academic lawyers, there is not anything that we can usefully add here.

**Q4.2 Tell us if, and how, provision of repayment solutions could be maintained if the for-profit sector exited the market.**

Again, as academic lawyers, there is little we can say here. However, presumably AiB would have to be further involved in the provision of repayment solutions (as default provider), if the for-profit sector exited the market and there was no increased involvement by the non-profit sector.

**Q4.3 Tell us if, and how, the Scottish Government could effectively carry out a study of the level of debt adviser provision needed to meet known demand for debt advice? Are there others sources of information that should be considered in setting funding levels?**

We do not have sufficient information to effectively respond to this.

**Q4.4 Please tell us your views about whether these measures will be effective. What would you propose to ensure these measures are effective / what alternatives would you propose?**

The proposed measures have some merits. However, there are various issues that would need to be considered. In terms of the debt advice levy, how would this work beyond financial services and to whom would it apply? Regarding making debt advice a statutory requirement for local authorities to provide, this would have resource implications which may impact upon other services. For the suggested legislative change to make debt advice a statutory right when people seek an insolvency service, who will such a right be exercisable against and what happens if such advice is not provided?

**Q4.5 Please tell us your views and key considerations about the proposal for Scottish Government to investigate and provisionally fund a programme of investment in the sector.**

The points made in the consultation paper seem reasonable. However, financial constraints may limit what the Scottish Government is willing to do in the foreseeable future.

**Q4.6 Do you have views on whether a marketing campaign around debt advice and insolvency should prioritise not-for-profit provision?**

We agree that it would be appropriate to highlight the existence of not-for-profit provision, but would have reservations about prioritising this. In any event, will sufficient resources be available to deal with any increased demand?

**Q4.7 If the marketing campaign was to attract more clients suited to repayment solutions to not-for-profit providers, is there appetite in the sector to play a greater role in those solutions?**

As academic lawyers, we have no comment to make here.

**Q4.8 Please share with us any experience you have of AiB evidence checks resulting in you having to change the CFT submitted and the reasons for this.**

As academic lawyers, we have no relevant experience here.

**Q4.9 Please share with us the evidence you have of inappropriately completed income and expenditure assessments and inappropriately recommended solutions. Please tell us the frequency you see cases like this.**

As academic lawyers, we have no relevant evidence here.

**Q4.10 Are there any other ways to promote appropriate use of technology in the debt advice / insolvency landscape in a coordinated way?**

The suggestions in the consultation paper seem reasonable. We have nothing further to add.

**Q4.11 Do you agree with our proposed approach to making debt advice available to people during and as they exit insolvency solutions? Are there broader considerations we should take into account?**

Yes, we agree.

**Q4.12 Do you have views on the proposals for broader money guidance being made available to people during and as they exit insolvency solutions? Do you have comments and / or evidence to support or challenge our concerns here?**

We do not have any further comments to make here.

**Q4.13 Do you agree that the Scottish Government should be tasked with assessing the number of money advisers required to deliver these two facets of advice as part of the broader exercise referenced in section 4.3?**

Yes, we agree.

**Q5.1 Please tell us your experience of any actual conflicts of interests in the current role the AiB has. Please provide any specific examples or evidence where this has created risks or issues.**

As academic lawyers, we have no direct experience or evidence on this point.

**Q5.2 If you believe the functions of the AiB should not all sit within one portfolio, please tell us your views about why as well as how and where they should best be delivered.**

As noted earlier in the consultation paper, there are some advantages to the AiB having various functions. We are unclear as to what the alternative approach(es) would be. It may be, however, that it would be useful to review the AiB’s statutory functions and its functions as an Executive Agency to ensure that any conflict or perception of conflict is minimised or eliminated.

**Q5.3 Please tell us your views on the role AiB should have in solution administration. If you think the AiB’s role should change or evolve in this sphere, please explain why and provide any evidence to support your position.**

As academic lawyers, we have no evidence here and, in the absence of compelling evidence from others, the AiB’s role should probably remain as it is.

**Q6.1 How might this reluctance best be addressed?**

The reluctance to enter insolvency procedures could be addressed by providing more information to increase knowledge levels, including offering greater clarity regarding relevant procedures, as well as by making available more suitable debt solutions for businesses.

**Q6.2 Do you agree small business debt advice should receive an increased level of funding through the debt advice levy administered by the Scottish Government?**

We are uncertain about this.

**Q6.3 Are there other funding sources which should be considered for increasing funding for small business debt advice?**

We have no suggestions here.

**Q6.4 What is the best way of meeting the need for specialist advice? Further funding to the main bodies currently working in this area? Or setting up a new, bespoke service?**

We have no strong views about this. However, it is probably more straightforward to provide further funding to the main bodies currently working in this area rather than setting up a new, bespoke service.

**Q6.5 Do you agree there is a need for new, or amended, insolvency solutions for self-employed people, small business owners and charities?**

Yes. Originally, the bankruptcy legislation was designed for business debtors, hence the inclusion of certain entities as well as individuals. The focus of the legislation has changed over time, with more and more emphasis on consumer debtors, and less emphasis on business debtors, especially sole traders, with the result that the legislation no longer sufficiently addresses the needs of the latter. In particular, despite the introduction of business DAS, there is no specific business rescue procedure for business debtors. With specific regard to charities, we would note that the solutions available to charities will depend on their legal form – while some may come within the compass of the bankruptcy legislation, some will be companies limited by guarantee and some will be SCIOs, for which there is a specific statutory regime.

**Q6.6 If yes, what should be the key features of these new or amended insolvency solution(s), noting the prevalence of highly variable incomes, the need to continue trading and difficulties separating out personal and business finances in this cohort?**

For individuals, i.e. sole traders, it would probably be sufficient to incorporate appropriate modifications to the existing legislation to make provision for issues such as those mentioned which are specific to trading debtors. For the entities currently covered by the bankruptcy legislation, it may be desirable for the solutions to reflect at least some of those available in the corporate insolvency context, albeit in modified form. For example, in England and Wales, there are modified forms of corporate insolvency procedures, including rescue procedures, available to partnerships. Thus, specific procedures for rescue of a business could be introduced, modelled on those in corporate insolvency. Alternatively, specific sections could be added to existing legislation to provide alternative approaches for individuals and entities engaged in trading.

**Q6.7 Do you think new or amended solutions sit better in the personal insolvency regime or the corporate insolvency regime? Please can you give the reasons for your response.**

While we think that any new solutions could usefully be modelled on those available in the corporate insolvency regime, there would be a need to modify them to take account of the types of entities to be included and how they differ from companies. As such, the regime would probably resemble a hybrid between the current corporate and personal insolvency regimes. Any new procedures could be contained in separate legislation or could be accommodated in new, separate parts or provisions of the existing legislation. In any event, the debtors identified are distinct from consumers, given that they are businesses and/or legal entities, yet also contrast with companies in structural and organisational terms, and some have no separate legal personality (e.g. trusts), unlike companies. However, we recognise that the businesses being considered here are varied and diverse and different rules may be necessary. In addition, while we accept that it may be difficult in practice to distinguish between business and personal assets and debts for sole traders, insolvency practitioners are used to having to do this in existing cases.

1. The Scottish Law Commission also previously examined the homestead exemptions in the USA when recommending the introduction of land attachment – see Scottish Law Commission, *Report on Diligence* (Scot Law Com No 183 (2001)), paras 3.23-3.27. However, they reached the conclusion that the homestead exemptions “did not provide a suitable model” (para 3.25) in the Scots law of diligence for practical and policy reasons. [↑](#footnote-ref-2)
2. The specified amount is adjusted for inflation every three years. This is the new amount as of 1 April 2025 – <https://www.federalregister.gov/documents/2025/02/04/2025-02207/adjustment-of-certain-dollar-amounts-applicable-to-bankruptcy-cases>. [↑](#footnote-ref-3)