

Scottish Consumer Council

response to personal
bankruptcy in Scotland: a
modern approach

February 2004

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry in consultation with the Secretary of State for Scotland. Future appointments will be in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

Please check our web site at www.scotconsumer.org.uk for news about our publications.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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INTRODUCTION

The Scottish Consumer Council welcomes the opportunity to respond to the Scottish Executive consultation paper *Personal Bankruptcy Reform in Scotland: a modern approach*.

The purpose of the Scottish Consumer Council is to make all consumers in Scotland matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change.

We have a particular interest in the implications of the proposals for individual debtors, rather than for small businesses. We do not therefore propose to respond to all of the consultation questions in detail, but will concentrate on those which are likely to have a particular impact on individual debtors. We will not respond to some of the more technical procedural questions, as we do not consider that we are in a position to do so.

ANSWERS TO SPECIFIC CONSULTATION QUESTIONS

1a Do you support the introduction of a one year bankruptcy period for all bankrupts?

We consider that reducing the bankruptcy period to one year would be much fairer on individuals and small businesses who find themselves insolvent through no fault of their own. Consideration will require to be given, however, as to how the proposals will fit with the proposals for a debt arrangement scheme for those with multiple debts, particularly as no maximum length of time is prescribed in relation to that scheme.

1b Do you think that such a change might carry significant risks and disadvantages for others, even if there are safeguards and provisions for ongoing payments to creditors? If yes, please explain.

2b Are there other categories of bankrupts for whom a one year bankruptcy period would also be inappropriate?

It is important that there are adequate safeguards in place to protect consumers against bankrupt businesses which have acted fraudulently. While there are proposals later in the paper to introduce controls on such bankrupts once they are discharged, consideration should also be given to whether the bankruptcy period itself should be longer in respect of this category of bankrupts.

3b Do you think that £1500 is an appropriate debt level for creditor led bankruptcy petitions? If not, what should the amount be?

We consider that the level for creditor led petitions should be increased to £3000 in line with inflation. The present limit has remained unchanged since 1985, and a debtor can easily find him/herself in this amount of debt after missing a few loan repayments for example, following a change in circumstances.

3c Do you think that £1500 is an appropriate debt level for debtor led sequestration petitions? If not, what should the amount be?

Logic would suggest that if the debt level for creditor led petitions is increased to £3000 in line with inflation, the same increase should apply to debtor led petitions. However, we would be concerned if someone with debts of, say, £2000, who has very little disposable income or assets and would therefore be unable to access the debt arrangement scheme, was denied the option of sequestration, which is currently available to them.

4a Do you think that income payments should be made by a bankrupt after his/her discharge?

We agree in principle that debts should be paid where the debtor is able to do so. Where a bankrupt has adequate income, we think s/he should be required to make payments towards reducing that debt after they are discharged.

How 'adequate income' is to be defined will require careful consideration however, to ensure that the discharged bankrupt is adequately protected.

4b Do you think the period for contribution orders should be fixed or variable?

4c If you support a fixed period for contribution orders, what do you think it should be?

4d If you support a variable period, what do you think a reasonable maximum would be?

We would suggest that the period must be flexible, depending on the debtor's individual circumstances. There would, however, be a need to impose a reasonable maximum period of time, to ensure that the debtor is not required to continue making payments indefinitely.

6a Do you think establishing apparent insolvency can be problematic? Do you have examples of circumstances in which difficulties arise?

6b Do you think it would be useful to allow apparent insolvency to be constituted for a debtor's purpose when a summary warrant is issued?

In 1997, we expressed concern that apparent insolvency could not be constituted where a poinding had been instructed, but could not be completed because there were no goods available to poind. This situation has now of course been resolved, and we believe that the major area of difficulty in establishing apparent insolvency is now in relation to summary warrant.

We therefore agree that apparent insolvency should be extended to include debtors who have been served with a summary warrant, particularly in relation to council tax.

We would also agree with the proposal that a debtor should be able to demonstrate apparent insolvency where they have applied for a debt arrangement scheme and it fails.

6c Do you think it would be useful to allow apparent insolvency to be constituted for creditor purposes when a summary warrant is issued and 14 days lapse without payment?

We are concerned that 14 days is an insufficient period of time to allow the debtor to make payment. We understand that this period correlates to that allowed in relation to a charge for payment before apparent insolvency is constituted. However, a debtor in a non-summary warrant case will already have had a court decree passed against him/her, and will therefore have had some advance warning. Where there is a summary warrant, however, fourteen days may not be long enough for a debtor to become fully aware of his/her situation, to seek advice and/or take some form of action.

6d Do you think it could be useful to allow a debtor flexibility in the evidence he/she produces in court to demonstrate apparent insolvency?

We agree with this proposal. An individual in a debt situation may misplace the charge document, for example, and may therefore require to produce some other evidence of his/her situation.

7a Do you think it would be useful to divert people with adequate income away from bankruptcy to the new debt arrangement scheme?

We agree that it would be better for most debtors, where they have any surplus income, to use the DAS scheme, rather than sequestration. Sequestration has very serious consequences for the debtor, including the possible loss of their home.

However, we have already expressed concerns, in relation to the proposed debt arrangement scheme, that some heritable creditors might

choose to call up their securities, leaving the debtor homeless.² While creditors will be encouraged not to do so where the debtor is meeting their liabilities, they retain their legal right to enforce their security. Moreover, while bankruptcy will have a detrimental effect on a debtor's credit rating, those who enter a DAS may well already have a court decree or decrees against them.

7b Do you think that we should go further than encouraging a debtor to seek money advice before petitioning for his/her sequestration? If yes, what do you think should be done?

We consider that debtors should be given as much encouragement as possible to take money advice, and that every effort should be made to ensure that sufficient, easily accessible advice is available. Research suggests that some people are currently deterred from taking advice due to practical difficulties they encounter, such as difficulty in getting to the nearest advice agency, limited opening hours, and difficulty in getting through to advice agencies by phone.³

However, we do not think that debtors can or should be forced to seek money advice. We would suggest that there should be a duty on insolvency practitioners to ensure that sources of advice are accessible.

7c Do you support the idea of a creditor sending a debt advice booklet to a debtor before petitioning for his/her sequestration?

We support this proposal. We assume that the intention is to produce a standard booklet for distribution by creditors, along similar lines to the booklet produced by the Executive in relation to attachment orders. It is important that the booklet issued should conform to agreed standards.

8a Do you think that debtor petitions for sequestration could be processed and decided by the AiB? If you foresee any difficulties with this please explain.

Provided that the debtor has had comprehensive advice and fully understands the nature and consequences of sequestration, we do not see any reason why debtor applications should not be dealt with by the AIB.

8b Would removal of a local court process function present difficulties for some debtors?

We can see no reason why this should present a difficulty for debtors.

² *Response to Secondary Consultation by the Scottish Executive on Draft Regulations for a Debt Arrangement Scheme*, Scottish Consumer Council, October 2003

³ See for example *Paths to Justice Scotland: what people in Scotland do and think about going to law*; Hazel Genn and Alan Paterson with National Centre for Social Research, 2001

8c Do you agree that the determination of creditor petitions should remain with the courts?

We agree that creditor petitions should continue to be heard in court. A debtor must have the opportunity to receive a fair hearing of his/her case should s/he wish to challenge the petition.

9 Do you think there are certain people for whom the range of current and planned debt management tools does not provide an effective solution to their debt problems? If so please provide information about the nature and scale of the situations you have in mind.

We are concerned that, although the Executive intends to run a pilot scheme involving low-income debtors, the proposed debt arrangement scheme will not be extended to such debtors. We believe that if the scheme is not extended to them, they may be left vulnerable to exceptional attachment orders under the Debt Arrangement and Attachment (Scotland) Act.

Such debtors will have no ability to apply for a diligence stopper, and may therefore be faced with the threat of attachment, just as many such debtors previously had their goods poinded under threat of a warrant sale. One criticism of the system of poinding and warrant sale was that some creditors misused poinding as an easy and cheap threat to make debtors pay up. This criticism was most often levelled at local authorities pursuing council tax arrears.

It must be ensured that attachment orders and exceptional attachment orders cannot be abused to intimidate debtors, either by local authorities or other creditors. Debtors should not be penalised because local authorities have not used their council tax collection powers as effectively as they could have done.

10 Do you agree it could be useful to introduce a three-year time limit for trustees to address the issue of a bankrupt's home?

We agree that a bankrupt's family home should not be sold unless absolutely necessary. Where the home must be sold, the bankrupt and their family should be given sufficient warning to find somewhere else to live. They do need some certainty, however, as to what is to happen in relation to their home and when it will happen.

11a In principle, do you think there should be a time limit on a trustee's right to claim inheritances and legal rights?

Yes. The current situation, where the bankrupt's inheritance or legal right is transferred to the trustee even where s/he has been discharged for many years seems very unfair. There should therefore be a time limit after

which the bankrupt is allowed to keep the inheritance. After some consideration, we do not, however, have a particular view on how long this period should be.

13a Do you support the introduction of a BRO regime?

Yes, we would support this in the interests of protecting members of the public. There is a need to ensure that consumers are not disadvantaged by the actions of businesses run by bankrupts who have behaved in a fraudulent or culpable manner. That said, it is equally important that individuals who have become bankrupt through no fault of their own are protected from being branded as fraudulent bankrupts.

14a Are you in favour in principle of a more focused approach to disqualifications for bankrupts?

Yes.

14b Would you support the removal of the automatic disqualification, which prevents an undischarged bankrupt from serving as a Justice of the Peace or a member of a local authority in Scotland?

We would support this proposal.

15a Do you think there should be an upward adjustment of the credit limit applied to bankrupts?

We support an increase in the current credit limit, which has remained unchanged for almost twenty years. We consider that the limit should be increased to £500 in line with inflation, as in England and Wales.

15b Do you think there should be a total credit limit applied to a bankrupt? If yes, what do you think is appropriate?

We would not support a particular credit limit. In our view, disclosure by the bankrupt is the primary consideration here. We believe that so long as the bankrupt discloses his/her bankruptcy status, it should be for the prospective lender to decide whether to grant him/her credit and if so, how much.

15c Do you think that payments for essential utilities such as gas, electricity, water and council tax should be excluded from any credit restriction applied to a bankrupt?

We consider that a bankrupt should be able to pay for these essential utilities through payment plans. Such plans make it easier to spread the cost of bills over the year, and can reduce the overall charges which the user has to pay. Bankrupts should be entitled to take out such plans, as other users can.

16a Would you be in favour of consolidating all bankruptcy proceedings within the Sheriff Court?

We consider that this proposal seems sensible, reducing the costs of bankruptcy both to the public purse and to the debtor.

16c Do you think it would be useful to combine the roles of interim trustee and permanent trustee?

This seems to be a sensible proposal, which will streamline the sequestration procedure.