

Final Business and Regulatory Impact Assessment

Title of Proposal

The Bankruptcy Fees etc.(Scotland) Regulations 2012

Purpose and intended effect

- **Background**

Section 69A of the Bankruptcy (Scotland) Act 1985 allows for Scottish Ministers to prescribe the fees and outlays to be payable to the Accountant in Bankruptcy (AiB) in respect of the exercise of her statutory functions as described in the Act.

The current fee structure is based on a method developed in the early 1990's and has essentially stayed the same, with the occasional additional fee added as a consequence of new statutory functions. This was reflected in the introduction of the Bankruptcy Fees (Scotland) Regulations 1993 and its subsequent amendments. Due to the number of amending regulations, the Bankruptcy Fees etc. (Scotland) Regulations 2012 consolidates and up-dates these in a new instrument.

The purpose of the Bankruptcy Fees etc. (Scotland) Regulations 2012 is to stipulate the charges levied by the Accountant in Bankruptcy. The Table of Fees is divided into 2 parts. Part 1 lists the fees payable for the functions of the Accountant in Bankruptcy in respect of the functions carried out as interim and/or trustee in a bankruptcy. Part 2 lists the fees payable for all other statutory functions of the Accountant.

The fees are levied to recover part of the administration costs incurred by the Accountant in Bankruptcy in respect of the statutory duties undertaken by her. For cases where the Accountant in Bankruptcy is appointed as trustee, the fees are subsidised by the public purse as part of the overall Accountant in Bankruptcy (AiB) budget from the Scottish Government in those cases where the realisation of the debtor's estate does not hold sufficient funds. Where the Accountant is not appointed as trustee the fees stated in Part 2 of the Schedule are paid to the Accountant from the debtor's estate whether there is any realisation or not.

In recognition of the current economic climate, the majority of the fees in the Bankruptcy Fees etc. (Scotland) Regulations 2012 remain at 2009-10 levels. In line with the Accountant in Bankruptcy's policy to move further towards full cost recovery, it is essential that the fee structure accurately reflects the services provided and that the fees charged are both equitable and sustainable.

To achieve this, detailed process modelling was undertaken on the functions undertaken by the Accountant in Bankruptcy, which included identifying and making efficiencies. This modelling process has resulted in detailed costings which have been incorporated into the Bankruptcy Fees etc.(Scotland) Regulations 2012.

Bankruptcy background

Bankruptcy is the state of being legally and publicly declared to be unable to meet debts when they are due. It can apply to an individual, a partnership, a corporate body or an incorporated body. When the insolvent person is declared bankrupt, by a sheriff or the Accountant in Bankruptcy, their estate is removed from their control and set aside for the benefit of their creditors. Bankruptcy has the effect of permanently removing from the debtor any liability to pay any of the debts accumulated up to the date of their bankruptcy, with certain exceptions including student loans.

A trustee, either the Accountant in Bankruptcy or an insolvency practitioner, will be appointed or nominated to administer the bankrupt's estate. A bankrupt will be able to keep some things that are essential for everyday living, however they may be required to make some payment from their income. Where a debtor has sufficient surplus income, after their living costs have been taken into consideration, the trustee and the debtor usually reach an agreement for a contribution to be payable for a period of 36 months. If the debtor's financial circumstances change during this time, then the trustee may reassess the contribution payable.

It is the duty of the trustee to ingather funds, sell the debtor's non-essential assets or property and to use the money to:

- pay the costs of managing the bankruptcy; and
- pay creditors as much as possible of what the debtor owes them.

At the end of a bankruptcy where funds have been ingathered, the trustee will distribute these funds in order of priority laid out in Section 51 of the Bankruptcy (Scotland) Act 1985. This allows for the fees and outlays of the trustee and the expenses of the petitioning creditor to be paid prior to the payment of any dividend to creditors, subject to sufficient funds being available.

In cases where the Accountant is trustee and there are insufficient funds, the costs of administering the bankrupt's estate will fall to the public purse.

- **Objective**

As the current fee structure is based on a method developed in the early 1990's the AiB has undertaken a fees modelling exercise. This has meant that AiB has revised the methodology of charging administrative services to do away with historic anomalies. The new instrument reflects the changes to the fees which more accurately reflect the actual costs to the case. This fits with the Agency and Scottish Government policy to be self-funding.

The Bankruptcy Fees etc. (Scotland) Regulations 2012 will:

Consolidate the Bankruptcy Fees (Scotland) Regulations 1993 and its subsequent amendments. It provides clarification on who is liable to pay the supervision fee under a protected trust deed and when this fee is due. It will also introduce changes to the Table of Fees in Schedule 1 to reflect the revised methodology of charging

administrative service. This has resulted in the fee for some functions increasing, decreasing or being charged differently.

- **Rationale for Government intervention**

The proposal to amend the fees, including the revised method of charging administrative services, fits with the Agency and Scottish Government policy to be self-funding. The changes also supports AiB's vision for the fee charged to be more equitable and transparent and fully reflect the work carried out.

To ensure access to fair and just processes of debt advice and debt management for the people of Scotland while taking account of the rights and interests of those involved, aligned to the delivery of the following National Outcomes:

- Realising our full economic potential with more and better employment opportunities for our people.
- Tackling the significant inequalities in Scottish society.
- Having strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.
- Our public services are high quality, continually improving, efficient and responsive to local people's needs.

Consultation

- **Within Government**

There have been numerous discussions with the Scottish Government's Finance colleagues about the appropriate methodology for charging fees for services delivered. As a result of their input AiB analysed the current fees model and re-modelled to ensure that the fees charged reflect the service provided. This has resulted in some fees being modified.

- **Public Consultation**

There has been no formal consultation on the reforms in this instrument. These changes are predominately as a result of Accountant in Bankruptcy revising the methodology of charging administrative functions. The revised fee structure has been discussed with the AiB's Board, which includes representatives from the money advice and insolvency sectors. The Board agreed with the principles behind the methodology of determining the amended and additional fees.

- **Business**

AiB has a regular stakeholder discussion forum where a number of key stakeholders attend. These include:

- Lloyds Banking Group
- HMRC
- Royal Bank of Scotland
- Max recovery
- TDX Group – representing major creditors
- Scotwest Credit Union

The proposed changes to the methodology for charging fees was discussed with

these stakeholders.

Options

Option 1 – No change

- **Sectors and groups affected**

People indirectly affected. Some creditors and trustees would have to continue to pay more under the current arrangements.

The AiB would not be charging appropriate fees which fully reflect the work carried out. This results in public purse monies being used to subsidise services which should be paid by the individual.

- **Benefits**

To continue with the current level of fees would require no change in legislation, allowing stakeholders to maintain the status quo.

- **Costs**

Failure to increase the current fees charged for the functions provided by AiB would result in an increased cost to the Scottish Government, as additional resource funding would be required to cover the estimated shortfall of £1.5 million (based on 2011-12 figures). This would have an impact on services provided by the AiB, potentially resulting in the AiB restricting the number of people able to access bankruptcy through a debtor application, for example.

Option 2 - Introduce the Bankruptcy Fees etc. (Scotland) Regulations 2012

- **Sectors and groups affected**

The proposed fees structure will impact on the following groups:

- Debtors
- Creditors
- Insolvency Practitioners

- **Benefits**

The changes made to fee charging mechanisms will ensure that the appropriate fee is charged for the service provided. This ensures that AiB conforms to the Scottish Government's policy of being self-funding. It also ensures that the public purse funding is not being used to subsidise functions and services which should be paid by an individual. It minimises the requirement of resource funding from the Scottish Government, whilst maintaining a high quality service to the AiB's stakeholders. Some creditors and trustees will have less to pay under this instrument.

- **Costs**

There will be an increased cost on individuals who are applying to make themselves bankrupt using the debtor application fee. The Citizens Advice Service, may express concerns about their client's ability to pay the fee. However, there is no evidence

available, other than anecdotal, to substantiate claims that a £200 fee would in any way restrict access to bankruptcy. There were similar representations when the debtor application was first introduced in 2008 and over 12,500 applications were made that year. The AiB has measures in place to allow debtors to pay their application fee in instalments.

There may also be a cost to some insolvency practitioners about the changes to the protected trust deed supervision fee. However, this fee is normally recoverable from the insolvency practitioner's fees charged to the debtor's estate. In cases where the debtor does not comply with the conditions of the trust deed the insolvency practitioner would pay less fees than currently.

There may be a slight cost to creditors. The application fee is decreasing from £200 to £100, however where AiB is the trustee a deposit of £200 would be required. These fees are, however, recoverable where there is sufficient funds available in the bankrupt's estate.

Scottish Firms Impact Test

It is envisaged that implementation of the new Regulations will have a small impact on creditors as the fee to be paid to AiB by them for administering the petition is reduced from £200 to £100. However, a new £200 deposit (for the administration of the bankruptcy) will be payable where an award of bankruptcy is made and the Accountant in Bankruptcy is trustee. In bankruptcies where there are sufficient funds available this money will be reclaimable by the creditor.

Scottish Insolvency Practitioner firms will be liable for a trustee under a trust deed creditor petition fee. Currently the public purse subsidises this fee. Insolvency practitioners will also save on the fees they have to pay where a debtor does not comply with the terms of their deed. However, there may be some additional costs applied for the supervision of the protected trust deed.

AiB has a regular stakeholder discussion forum where a number of key stakeholders attend. The proposed changes to the methodology for charging fees was discussed with the following stakeholders:

- Lloyds Banking Group
- HMRC
- Royal Bank of Scotland
- Max recovery
- TDX Group – representing major creditors
- Scotwest Credit Union

The Scottish debtor application and creditor petition fees are very reasonable when compared to the fees charged in England & Wales and Northern Ireland. The up-front court and insolvency fees/deposits for a debtor petitioning to make themselves bankrupt in England & Wales and Northern Ireland is £175 and £525 respectively. Similarly, the creditor petition up-front court fee and insolvency fee/deposit is £220 and £700. (The Scottish Court creditor petition fee is £95.)

These firms agreed with the principles behind the methodology of determining these

fees. They also acknowledge the Agency's aim to be self-sufficient and agree that the fees charged have to reflect the work undertaken.

- **Competition Assessment**

There should be no competitive advantage to any particular individual or group, as a consequence of the amendments to the bankruptcy fees structure, as the increase in fees will apply equally to all.

- **Test run of business forms**

There is minimal impact of the business forms used as a result of the changes in the Bankruptcy Fees etc. (Scotland) Regulations 2012. There is a small consequential change to the debtor application form, where the new value of £200 replaces an existing value of £100. As this has minimum impact to the overall dynamics of the form this does not require testing.

Legal Aid Impact Test

There is no impact on Legal Aid as Legal Aid is not provided for the purposes of applying to become bankrupt.

Enforcement, sanctions and monitoring

The majority of the fees will only be collected where there are sufficient funds in the debtor's estate to recover the fees. Where there are insufficient funds available and the Accountant in Bankruptcy is the trustee the public purse covers the costs of the service provided. To mitigate the need to undertake enforcement, sanctions etc. some of the fees charged are required to be paid in advance of the service provided. However, where a fee is due and not paid within the specified term, the AiB will pursue the non payment through the Civil Court process.

Implementation and delivery plan

AiB requires to undertake technical updates to its IT system to reflect the revised fee rates for some of the fees, therefore two separate commencement dates have been set to allow for the updates to take place. Commencement of the up-dated Debtor Application fee and Basic Administration fee is 1st June 2012 and the remaining updated fees from 1st July 2012.

When commenced, the fees will apply to all cases where the account has been submitted for approval after 1st June or 1st July, as appropriate. The fees will not apply to trust deeds which were protected before 1st July 2012.

- **Post-implementation review**

The fees will be reviewed as part of our annual fee review in November 2012. They will also be considered as part of the review of the Consultation on Bankruptcy Law Reform. This is a public consultation which is looking at a full reform of the bankruptcy legislation in Scotland. This will impact the amounts and the methodology of charging all future fees for the statutory functions undertaken by AiB.

Summary and recommendation

It is recommended that **option 2** is implemented.

This ensures that AiB conforms to the Scottish Government’s policy of being self-funding. It also ensures that the public purse funding is not being used to subsidise functions and services which should be paid by an individual. It minimises the requirement of resource funding from the Scottish Government, whilst maintaining a high quality service to the AiB’s stakeholders.

• **Summary costs and benefits table**

Option	Costs	Benefits
1	AiB would have an estimated shortfall of £1.5 million (based on 2011-12 figures).	To continue with the current rate of fees would require no changes in legislation allowing stakeholders to retain the status quo.
2	<p>There will be an associated cost of approximately £1.5 million, which will be paid by numerous stakeholders:</p> <p>Individuals - who are applying to make themselves bankrupt using the debtor application fee.</p> <p>Insolvency practitioners - changes to the protected trust deed supervision fee.</p> <p>Creditors- creditor petition fee.</p>	By increasing the fees, so that they more reasonably represent the actual cost of the services provided by AiB, this will allow AiB to continue towards full cost recovery. This approach has significantly reduced the requirement for public funding. Thereby reducing the burden on the public purse, while continuing to deliver a high quality service.

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Fergus Ewing, Minister for Energy, Enterprise and Tourism

Scottish Government Contact point: