

moneyadvicescotland
Scotland's Money Charity

RESPONSE

**ACCOUNTANT IN BANKRUPTCY
DILIGENCE REVIEW 2016**

30 November 2016

About Money Advice Scotland

Money Advice Scotland is Scotland's Money Charity.

We are the national umbrella organisation in Scotland which promotes and champions financial inclusion and the development of free, independent, impartial, confidential money advice.

Our mission is to be the driving force towards financial wellbeing for the people of Scotland.

Background

On 21 November 2016, Money Advice Scotland held a consultation event with its members at our offices in Glasgow.

The session was opened with a presentation from Carol Kirk, Policy Review Team Leader at the Accountant in Bankruptcy, who provided invaluable oversight of the ongoing review of diligence.

Over the remaining part of the day, members split into groups to discuss the key areas within the consultation. The views and comments offered by our membership – which included advisers from CABs, local authorities and other advice agencies, as well as delegates from the private sector, including insolvency practitioners and one sheriff officer – helped form the basis of this response.

We note our gratitude to Carol Kirk and Erin McCreadie from the AiB who were present throughout our consultation event and offered helpful insight into the ongoing diligence review.

Question 1(a): Do you consider exceptional attachment to be an effective diligence?

Yes

No

Question 1(b): If you answered “No” to question 1(a), why not?

Members were of the view that insufficient data was available on exceptional attachment. For example, it was noted that 15 exceptional attachments were executed in the last year, but no details were available on how many were attempted. Partly due to the low numbers involved, it was considered that this was an ineffective diligence.

A sheriff officer in attendance described exceptional attachment as the “last chance saloon” and was also critical of the lack of consistency applied across certain courts. For this reason, it was noted that creditors often lacked confidence in pursuing exceptional attachment. The costs of doing so were also considered prohibitive both

on the creditor and in terms of the costs passed to the debtor. Also, the costs could be disproportionate to the debt claim in many cases.

One positive singled out in terms of exceptional attachment was that it often provoked the nudge necessary to ensure that debtors seek out advice on a debt problem and come to a resolve with the creditor that should in turn halt the diligence.

Overall, however, it was considered that exceptional attachment was not an effective diligence.

Question 1(c): Have you identified any improvements that you consider are necessary to exceptional attachment?

Yes No

Question 1(d): If you answered “Yes” to question 1(c), what improvements do you consider are needed?

The application process was described as cumbersome and required improvement. As mentioned in the previous answer, it was also considered that more data needs to be made available on exceptional attachment to help better understand the outcomes of using this form of diligence. This also provides the opportunity to monitor whether there are particular trends emerging that in turn can influence future policy making.

Question 1(g): Do you consider the application process and timescales involved for exceptional attachment to be reasonable?

Yes No

Question 1(h): If you answered “No” to question 1(g), why do you consider the application process and timescales involved unreasonable?

Our members put forward the view that timescale for auction should be extended and moved in line with other diligences.

2. ADJUDICATION FOR DEBT

Question 2(a): Do you agree that adjudication for debt should be abolished?

Yes No

Attendees at our consultation event were in near unanimous agreement that adjudication for debt should be abolished. In many cases, sequestration or a DPP was considered a more effective preference.

3. INHIBITION

Question 3(a): Do you consider inhibition in its current form to be an effective diligence?

Yes No

Inhibition was considered effective as above all else it brings clients into money advice services. Advisers noted more clients seem to be presenting to agencies with enquiries related to this type of diligence, however, the statistics present a different picture.

Question 3(c): Have you identified any improvements that you consider are necessary to inhibition?

Yes No

Question 3(d): If you answered “Yes” to question 3(c), what improvements do you consider are necessary?

Advisers noted that more clarity was required in terms of the situation with the Debt Arrangement Scheme. Many were of the view that DAS cannot stop inhibition but suggested that definitive guidance was required from AiB.

It was also noted that inhibition removes certain options for debtors that may help them take control of the debt problem.

Again, it was noted that more statistical information was required on inhibition to help determine the effectiveness of this diligence.

Question 3(g): An inhibition prevents the debtor from entering into any dealings with their heritable property for a period of 5 years, after which time, the inhibition has no effect. Do you agree that 5 years is an appropriate period for an inhibition?

Yes No

A period of 5 years was considered a fair and appropriate time for a review involving all parties.

Question 3(i): Should inhibition be a diligence option after securing a summary warrant?

Yes No

Question 3(j): If you answered “No” to question 3(i), why not?

This question received a mixed response from our members but on balance it was considered that this should not be an option. It was felt that the case had not yet been made for why this should be considered a diligence option and that alternative court procedures were more appropriate.

4. DILIGENCE ON THE DEPENDENCE

Question 4(a): Do you consider diligence on the dependence to be an effective diligence, in its current form?

Few members in attendance at our consultation event had experience of diligence on the dependence given that this tends to concern commercial debtors rather than individual debtors.

5. INTERIM ATTACHMENT

Question 5(a): Do you consider interim attachment to be an effective diligence in its current form?

Again, advisers in the room had insufficient experience of this diligence to comment on its effectiveness.

6. MONEY ATTACHMENT

Question 6(a): Do you consider money attachment to be an effective diligence, in its current form?

This question divided opinion amongst delegates at our consultation event and we were unable to agree on a definitive response either way.

Again, money advisers in attendance had limited experience of money attachment given that it tends to concern commercial operations. However, from a sheriff officer point of view, the restrictions on when money attachments take place could have an impact on the effectiveness of such a diligence.

Question 6(c): Have you identified any improvements that you consider are necessary to money attachment?

Yes

No

Improvements identified included the introduction of a protected amount for attachment. The example was given of a money attachment being carried out to the detriment of staff working in a business.

It was noted that it is not uncommon for staff working in the retail or hospitality sector to be paid out of the till at the end of a shift. If money attachment without a protected amount is carried out in these circumstances, staff may be affected. This in itself could ultimately lead to debt and financial difficulty for people (typically in low income employment) who bear no responsibility for the original debt.

Members from across the sector – whether money advisers, IPs or sheriff officers – were all in agreement that the publication of additional data around money attachment would help better understand the efficacy of this option and whether any further improvements were necessary.

Question 6(e): Would you continue to use money attachment as a diligence in its current form?

Yes No

As we note in the previous answer, certain improvements could be made.

Question 6(f): Do you agree that the timings for executing a money attachment diligence should be extended?

Once again, our members were split over this question. Advisers were in broad agreement that any extension should be restricted to trading hours. It was also stressed that any extension to hours should also be undertaken only if certain protections are put in place.

In our view, it would be helpful to be provided with further data on the success or otherwise of this type of diligence compared across different timings.

Question 6(i): Do you agree that definition of “money” for the purposes of the money attachment diligence should be extended to include the attachment of debit and credit card counterfoils?

Yes No

Members noted that this would likely introduce a further layer of complexity and uncertainty with concerns about issues such as chargebacks.

7. DILIGENCE AGAINST EARNINGS

Question 7(a): Do you consider diligence against earnings to be an effective diligence, in its current form?

Yes No

Attendees agreed that this was an effective diligence which worked well.

Again, this option works by prompting debtors to seek out advice – many individuals do not want their employer to know about a debt problem.

Question 7(c): Have you identified any improvements that you consider are necessary to diligence against earnings?

Yes No

A review of how the protected amount is calculated was suggested as a potential improvement. This was in response to the growing prevalence of debts that are a result of failure to meet basic living costs in a period of stagnating real wage growth and the falling value of benefits.

Members noted that certain employers can encounter difficulty with this diligence, particularly where there are conjoined arrestments. It was also agreed across the room that this diligence could be improved if better communication was achieved between employers, sheriff officers and creditors.

Question 7(e): Would you continue to use diligence against earnings as a diligence in its current form?

As we note, diligence against earnings is an effective diligence but certain improvements would be welcome.

Question 7(f): In relation to Conjoined Arrestment Orders, should there be a minimum amount of earnings recovered before employers are required to pay the earnings collected to the sheriff clerk? For example, where £4 is being arrested from an employee each week and a minimum threshold of £20 is in place, an employer would send payment to the sheriff clerk after 5 weekly collections.

Yes No

Question 7(i): Should there be a defined timeframe for an employer to advise if an earnings arrestment has been successful?

Yes No

Three weeks was considered an appropriate timescale.

8. ARRESTMENT IN EXECUTION AND ACTION OF FURTHCOMING

Question 8(a): Do you consider arrestments in execution and actions of furthcoming to be effective diligences, in their current form?

Yes No

Our members were of the view that the effectiveness of arrestment is that it prompts early intervention and encourages debtors to seek advice.

Question 8(c): Have you identified any improvements that you consider are necessary for arrestments in execution and actions of furthcoming?

Yes No

Advisers voiced concerns that the protected minimum balance was not always enough, especially in the case of large families.

The onset of changes to universal credit (whereby claimants will be paid monthly rather than weekly or fortnightly) also opens up the possibility of relatively large sums of money resting in accounts which is due to be paid out in rent or other outgoings. If these funds are arrested, this will only exacerbate a person's debt problem.

With that in mind, our membership agreed that where it could be provable that any funds were from social security payments, then under no circumstances should this be arrested.

Question 8(g): Should an arrestee have to respond to the arrestment where no funds are attached?

Yes No

Members were inclined to support this suggestion. It was noted that this would provide useful information both for the creditor and also for the AiB in its own attempts to collect and monitor data.

Question 8(i): Do you agree that an additional copy of an arrestment schedule should be sent by recorded delivery when the arrestee is a bank or other financial institution?

Yes No

This was considered an unnecessary duplication of work.

9. LANDLORD'S HYPOTHEC

Our consultation event did not consider this diligence.

10. MAILLS AND DUTIES

Our consultation event did not consider this diligence.

11. ADMIRALTY ACTIONS AND ARRESTMENT OF SHIPS

Our consultation event did not consider this diligence.

12. ACTIONS FOR REMOVING FROM HERITABLE PROPERTY

Question 12(a): Do you consider actions for removing from heritable property to be an effective diligence, in its current form?

Advisers had limited experience of this type of diligence and were of the view that more information was required in terms of its prevalence.

Question 12(c): Have you identified any improvements that you consider are necessary to actions for removing from heritable property?

Yes No

Pre-action requirements were considered as overly wordy. More protections were also considered necessary in terms of possessions.

Question 12(e): Do you agree that regulations should prescribe how effects left at a property after an ejection are to be disposed of?

Yes No

Question 12(f): If you answered “Yes” to question 12(e), how do you think the effects should be disposed of?

The effects should be placed in storage for a period of time which allows the debtor to retrieve – the example was provided of a debtor being in hospital and the local authority disposed of the items before there was any opportunity to resolve the situation.

Question 12(g): Do you agree that regulations should prescribe the timescale for the disposal of effects after an ejection?

Yes No

Question 12(h): If you answered “Yes” to question 12(g), what do you consider to be a reasonable timescale for disposal of effects left in a property after an ejection?

Four weeks with the possibility of a four-week extension in exceptional circumstances.

13. SUMMARY WARRANTS (TIME TO PAY AND CHARGES TO PAY)

Question 13(a): Do you consider the summary warrant process to be an effective diligence?

Yes No

Again, it was agreed that this was an effective diligence in terms of driving clients towards advice. That said, it was noted that summary warrants can almost be too effective in this respect. Advisers explained that the issuing of summary warrants can often saturate smaller advice agencies and this underlines the requirement for these services to be adequately funded.

Question 13(b): Have you identified any improvements that you consider necessary to the summary warrant process?

Yes No

Concerns were raised over cases of maladministration from local authorities where summary warrants were executed in error. In that respect, members noted that the review process prior to executing summary warrants could be refined. One adviser cited the example of one client who had an inhibition placed on their property after the local authority had not followed the correct review process before proceeding with a summary warrant.

The introduction of pre-action requirements was also considered a potential improvement, although to counter that point, some members were concerned that this would place an unmanageable burden on the courts.

Question 13(d): Do you agree that summary warrants should contain authority to execute an inhibition?

Yes No

Our members were of the view that the case for summary warrants to contain authority to execute an inhibition had not been made. The consultation document outlines that feedback from messengers at arms and sheriff officers suggest that this would be an improvement, but the reasons that inform this view are not included.

Question 13(f): Do you agree that charges to pay should contain details of multiple summary warrants incurred by the same debtor?

Yes No

Sheriff officers in attendance confirmed that this already happens as a matter of good practice.

14. LAND ATTACHMENT

Question 14(a): Given that land attachment was intended to replace adjudication for debt, is there a need for something that operates like adjudication for debt?

Yes No

As the consultation document notes, this is perhaps the most controversial point of the review. Former First Minister, Alex Salmond, previously raised concerns that creditors may use the threat of homelessness to force vulnerable debtors to pay.

In our view, that threat remains unresolved. Land attachment was also considered to blur the line between secured and unsecured debts.

One attendee noted that a potential exception may be cases where a debtor has a second home or even where there is substantial equity in an expensive sole residence. On the balance of views, however, it was considered that there is no need to commence land attachment or indeed something that operates like adjudication for debt.

15. DISCLOSURE OF INFORMATION

Question 15(a): Do you consider that there is a need for disclosure of information to facilitate diligence?

Yes No

Attendees at our consultation event were of the view that there is not a need for disclosure of information to facilitate diligence.

Members raised concerns about whether this information would be used in terms of debt and debt alone. It was also noted that the penalty for non-disclosure is two-years imprisonment which is extreme to say the least.

16. RESIDUAL ATTACHMENT

Our consultation event did not consider this diligence.

17. DILIGENCE STATISTICS

Question 17(a): Do you find the diligence statistics helpful in their current format?

Yes No

The selected statistics that are available were considered to be helpful as presented in the current format. However, a recurring view throughout the day was that the lack of certain data made it difficult to comment fully on the effectiveness of certain diligences.

Question 17(c): Is there anything that you would like to see incorporated into the diligence statistics?

Yes No

As outlined in our response to Question 1(b), it would be useful to incorporate statistics on attempts as well as executions. Members also considered it important to measure outcomes as well as outputs, particularly around how the debtor ultimately addressed the debt problem.

18. DEBT ADVICE AND INFORMATION PACKAGE

Question 18(a): Do you consider the issuing of a DAIP to debtors to be effective?

Yes No

Question 18(c): Have you identified anything that would improve the process of issuing the DAIP, or have you identified anything that could be incorporated into the DAIP which would help debtors?

Yes No

Despite acknowledging that the DAIP was effective in ensuring that debtors seek advice, it was agreed that this could take a simpler format. Members noted that the purpose of this package should be to provide the debtor with the spur to seek advice. The DAIP was considered text-heavy and members noted that people tend to lose interest when they have to process large amounts of written information. It was agreed

that the primary aim should be for a debtor to seek advice in the first instance and then the more complex issues can be explained by the adviser.

19. ANY ADDITIONAL COMMENTS

Please use the box below for any other comments you may have, or anything you feel is not covered in the consultation questions.

Members questioned what was meant by the definition of effectiveness – was this deemed as effectiveness for creditors, debtors, advisers, or so on. Attendees from the AiB at our consultation event offered clarity, noting that we should remark on effectiveness from our own remit and perspective. Nonetheless, this could have been made clear in the consultation document where effectiveness seems to be defined from the perspective of messengers at arms and sheriff officers alone.

Whilst the feedback from the messengers at arms and sheriff officers was considered to provide useful insight, members were concerned that the reasons why certain diligences were considered effective were not always provided within the consultation document. It was also considered that framing the review around the context of the prior consultation phase with messengers at arms and sheriff officers could influence responses.

In the interests of transparency, our members took the view that additional information about the initial consultation phase in 2015 should be published. Similarly, in respect of the current consultation process, we are of the view that individual responses should be published (where permission is given) alongside the summary of responses that is typically drawn together by the AiB.

RESPONDENT INFORMATION FORM

Please note that this form must be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

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Please tick as appropriate

Sheriff Officer & Messenger at Arms

Creditor

Advice Sector

Local Authority

Solicitors/Advocates

Insolvency Practitioners

Judiciary

Debtor

Other If other please specify _____

4. Permissions - I am responding as...

Individual / **Group/Organisation**
Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

Please return your response to AIB_Policy_Development_Enquiries@gov.scot or to: Carol Kirk, AiB, 1 Pennyburn Road, Kilwinning, Ayrshire, KA13 6SA by 30 November 2015