



RESPONSE TO

CONSULTATION ON THE FUTURE OF
THE COMMON FINANCIAL TOOL

ACCOUNTANT IN BANKRUPTCY

Introduction

- 1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 21,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.
- 2 ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
- 3 ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all the implications and that alleged failings within the process are supported by evidence.
- 4 ICAS is pleased to have the opportunity to submit its views in response to the Accountant in Bankruptcy (AiB) consultation on the future of the Common Financial Tool. We shall be pleased to discuss in further detail with the AiB any of the matters raised within this response.

Response

The future of the CFT

- 5 As a matter of policy, ICAS does not take a view on the appropriateness or otherwise of the Standard Financial Statement (SFS) as compared to the Common Financial Statement (CFS). We recognise that there will be debtors who will see assessed contributions being either higher or lower using each alternative.
- 6 While this consultation is focussed on whether the SFS should replace CFS as the CFT, we highlight our opposition to the CFS expressed during the progress of the Bankruptcy and Debt Advice (Scotland) Bill through the Scottish Parliament. Our concerns were around the consistency in application that could be achieved and the increased administrative burden that the use of CFS would entail. We would respectfully suggest that these issues have been borne out following the commencement of the Bankruptcy and Debt Advice (Scotland) Act 2014.
- 7 In light of the insight from using the CFS for a reasonable period, we would suggest that the consultation is addressing the wrong issue. Whether the CFS or SFS is used is largely immaterial as the model and its application is broadly similar. Whether a change is made or not in this aspect will not address the issue that the CFT under either model does not deliver consistency in its application (which was the primary objective of the CFT) or reduce the high administrative burden.
- 8 We would strongly encourage the AiB and Scottish Government to defer any decision on the use of CFS or SFS and instead urgently carry out an assessment of the policy effectiveness behind the CFT.
- 9 We consider that any change to the CFT would be best served by replacing the model designated by the CFT to one which is based on a scaled percentage of income (after deduction of essential expenditure). This would address the issues being encountered with the current CFT model which have not resulted in consistency of application and are administratively burdensome for debtors, insolvency practitioners, third party money advisers and the AiB. The end result would be to increase the returns to creditors.
- 10 In addition to the benefits highlighted above, the approach of a fixed scale would mean that there would be minimal (if any) ongoing maintenance or support required to ensure that the expenditure allowances were reflective of current day prices and therefore would substantially reduce the costs and funding required to maintain a CFT.

CFS or SFS

- 11 Notwithstanding that we do not consider CFS or SFS as being the most appropriate method for the CFT, we provide comment below relevant to the consideration of these two alternatives.
- 12 Where considering the alternatives of CFS and SFS, the central issue in determining the amount payable under a debtor contribution order is that individual circumstances can be considered where trigger figures are breached. We agree with the statement in the consultation document (para 17) that 'Applied appropriately, either tool should produce the same outcome.' We have concerns about how achievable this is.
- 13 We note the statistical analysis referred to in the consultation document (para 21 and 22). That analysis concludes that the SFS will, all other things being equal, result in a greater number of trigger breaches than under the CFS. It can therefore be expected that more work will require to be carried out by debtors, insolvency practitioners and third sector money advisers to gather evidence to assess and support (where appropriate) the view that additional expenditure is necessary and appropriate in the circumstance. Based on the analysis carried out by the AiB, this increased workload will be felt in 12 out of every 100 cases.
- 14 The consultation document does not contain any assessment of the cost associated with the additional work which would be incurred in these circumstances. We estimate conservatively that, based on current insolvency and DAS activity levels, a switch to SFS would result in additional annual costs in the region of £450,000 being incurred relating to the additional trigger breaches.
- 15 We would urge the AiB to urgently review its processes and procedures for the determination of the DCO and the way in which they seek to verify evidence of income and expenditure under the CFT.
- 16 Our members report that the level of evidence required to be provided in support of a DCO assessment, and time spent dealing with subsequent queries raised by AiB staff is often significant. The resultant determination is often ultimately agreed or is not materially different. We would therefore question whether costs could be reduced and resources better utilised.
- 17 We consider that further analysis is required to determine the effect on contributions taking into account whether trigger figure breaches can be justified or not. The statistical analysis of the effect on contributions did not consider this vital aspect and therefore we do not believe that any valid conclusion can be drawn from the current analysis available.
- 18 We anticipate that as the SFS is being widely adopted in other parts of the UK that there would be ongoing benefit by using SFS compared to CFS as questions will arise as to the ability of CFS to be maintained in the long-term other than by the AiB. That would of course require acquiring the intellectual property of the CFS as well as incurring ongoing costs of maintenance.
- 19 Any change to the CFT will require changes to be made to software, procedures and documentation. We would suggest that a minimum period of 4 months should be allowed between the announcement of any change in the CFT to its effective date.

Inappropriate regulation of money advisers and lack of control over Scottish debt procedures

- 20 We take this opportunity to highlight further relevant issues which we have raised in previous consultations and in particular in relation to the Bankruptcy and Debt Advice (Scotland) Bill and the Bankruptcy (Scotland) Regulations 2016 (the 2016 Regulations). Any change to the CFT will by necessity require changes to the Bankruptcy (Scotland) Regulations 2016. The opportunity therefore will exist to address some fundamental issues in the Regulations should a decision be taken to prescribe SFS as the CFT.
- 21 At present, the 2016 Regulations transfer control on a practical level over who may operate as a Money Adviser in Scotland to the Money Advice Trust ("MAT"), a charity established in England and Wales, rather than retaining this within the realm of the AiB and its supervisory functions or the regulatory regime of recognised professional bodies under the Insolvency Act 1986.

- 22 The 2016 Regulations require all Money Advisers to have a licence to use the CFS from MAT. There are no safeguards that MAT is required to provide a licence to approved Money Advisors. In addition, the licencing for the CFS is provided at an organisation level, but Money Advisor is an individual status. This results in a significant disconnect between the legislative requirements and the legal licencing position.
- 23 Without appropriate safeguards being written into regulations, or an alternative approach being adopted, there is the possibility of the loss of a CFS licence through one individual's actions within an organisation could result in implications for many individuals.
- 24 Concerns which we previously expressed regarding the undesirable position in legislation where an unelected and unaccountable body is dictating elements of the Scottish debt management and debt relief framework are borne out now. The planned move at a UK level to SFS as a common model with the resultant withdrawal of CFS at a future date means that the devolved area of personal insolvency legislation is being largely dictated to by external parties.
- 25 In our view, the arrangements between MAT and the Scottish Government for the use of the CFS offer inadequate protection to the Scottish debt management and relief legislative framework.
- 26 We do not consider that the above issues are sustainable and that if the same approach was adopted with SFS and Money Advice Service (MAS) who produce the SFS then these undesirable consequences will continue to exist.
- 27 We would highlight specifically the following in relation to the SFS:
- the SFS is provided to firms rather than individuals with the resultant disconnect between the SFS regime and the regulatory regime
 - the SFS Code of Conduct provides MAS with the absolute right to grant, refuse or withdraw entitlement to use SFS thereby bypassing the regulatory system for insolvency practitioners and money advisers
 - the SFS Code of Conduct sets out the relationship between MAS and the SFS Governance Group. The terms of reference for the SFS Governance Group permit it to determine how adherence to the code of conduct will be monitored and the process to be followed where a failure is identified. This again hands responsibility for monitoring and any resultant consequences flowing from that outwith the legislative regulatory regime and to a third party not under the control of Scottish legislation, the AiB or the Scottish Government.
 - Responsibility for complaints regarding the conduct of insolvency practitioners is with their licencing body (Recognised Professional Body) in accordance with the provisions of the Insolvency Act 1986. The code of conduct provides for a complaints route outwith the regulatory structure over which there is no control.
- 28 Should a decision be taken to redetermine the CFT as the SFS, we consider it essential that the relationship between MAS, the AiB, the Scottish Government, insolvency practitioners, Recognised Professional Bodies and money advisers be set on an appropriate footing in the regulation amendments. We consider that many of the issues can be easily addressed through a licence agreement between MAS and the AiB/Scottish Government for the use of SFS and for the SFS to be made freely available without unnecessary contractual conditions to insolvency practitioners and money advisers.
- 29 We have set out our response to the consultation questions in Appendix 1.

5 October 2017

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Appendix 1 – RESPONSE TO CONSULTATION QUESTIONS

1. Do you agree that the Standard Financial Statement (SFS) should be adopted in Scotland as the new Common Financial Tool?

Yes No Don't know

2. If introduced, should the SFS be used in the review of existing contributions which were not originally determined using the SFS?

Yes No

We agree with the statement at paragraph 17 of the consultation document that 'Applied appropriately, either tool should produce the same outcome.' On this basis, it would not seem sensible for two separate systems to be maintained. We would favour a transitional provision that gives effect to the SFS being used in all assessments where the CFT is required to be used from the date of change.

For the avoidance of doubt, we do not consider that existing contributions should automatically be re-assessed using the SFS. The SFS should be used only at the time of the first assessment or re-assessment where there is a change in financial circumstances for the debtor.

If you answered 'No' to Q2, what would be the appropriate method for reviewing the contribution amount?

Answer: _____

3. For what reason(s) do you believe the SFS is not the appropriate tool for all Scottish statutory debt management and debt relief solutions?

While this consultation is focussed on whether the SFS should replace CFS as the CFT, we highlight that our opposition to the CFS expressed during the progress of the Bankruptcy and Debt Advice (Scotland) Bill through the Scottish Parliament. Our concerns were around whether consistency in application was achievable and the increased administrative burden that the use of CFS would entail. We would respectfully suggest that these issues have been borne out following the commencement of the Bankruptcy and Debt Advice (Scotland) Act 2014.

Considering the experience of using the CFS now for a reasonable period, we would suggest that the consultation is addressing the wrong issue. Whether the CFS or SFS is used is largely immaterial as the model and its application is broadly similar. Whether a change is made or not in this aspect will not address the issue that the CFT under either model does not deliver consistency in its application (which was the primary objective of the CFT) or reduce the high administrative burden.

We would strongly encourage the AiB and Scottish Government to defer any decision on the use of CFS or SFS and instead urgently carry out an assessment of the policy effectiveness behind the CFT.

We consider that any change to the CFT would be best served by replacing the model designated by the CFT to one which is based on a scaled percentage of income (after deduction of essential expenditure). This would address the issues being encountered with the current CFT model which have not resulted in consistency of application and are administratively burdensome for debtors, insolvency practitioners, third party money advisers and the AiB. The end result would be to increase the returns to creditors.

We would also highlight comments in the body of our consultation response at paragraphs 20 to 28 regarding the legal arrangements for the use of SFS which would require to be addressed.

Please provide information and any evidence that supports your reason(s).

Answer: This has been the subject of much discussion at the AiB Stakeholder meetings, DISSF and other such meetings. The views strongly expressed are that CFS is burdensome, especially where triggers are breached, and that the use of the CFT is not achieving consistency in application. Specific examples can be provided from our members if required.

4. What do you consider an appropriate method for determining a debtor's contribution for a Scottish statutory debt management and debt relief solution?

See response to Q3.

Please provide information and any evidence that supports this and detail who you consider should manage and fund this process.

Answer: See response to Q3. The approach suggested would not require ongoing maintenance and therefore the question of managing and funding would be eliminated.

5. If the SFS is to be introduced from 1 April 2018, will you be able to make any required changes to your IT and other operating systems, in time to use the SFS from this date?

Yes No

Our members will require a period for software, procedures and documentation to be updated prior to implementation. It is difficult to state whether this can be achieved in time for 1 April 2018 as this will depend on how much notice is given of the change prior to implementation. We would suggest that a minimum of 4 months should be available to allow appropriate system changes to be made.

If you answered 'No' to Q5, how long after 1 April 2018 do you believe you will be ready to use the SFS?

Up to 3 months 3 to 6 months a longer period (Please specify) _____

See response above.

Appendix 2 - 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

ICAS

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Menzies

Forename

David

2. Postal Address

CA House

21 Haymarket Yards

Edinburgh

Postcode EH12 5BH

Phone 0131 347 0242

Email dmenzies@icas.com

3. Sector

Please tick as appropriate

- | | | |
|-------------------------------------|-------------------------------------|-----------------------------|
| Advice Sector | <input type="checkbox"/> | |
| Creditor | <input type="checkbox"/> | |
| Local Authority | <input type="checkbox"/> | |
| Solicitors/Advocates | <input type="checkbox"/> | |
| Insolvency Practitioners | <input type="checkbox"/> | |
| Debtor | <input type="checkbox"/> | |
| Sheriff Officer & Messenger at Arms | <input type="checkbox"/> | |
| Judiciary | <input type="checkbox"/> | |
| Other | <input checked="" type="checkbox"/> | If other please specify RPB |

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 website)?
- (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 website). 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 OPC@aib.gsi.gov.uk or to: Graeme Perry, AiB, 1 Pennyburn Road, Kilwinning, Ayrshire, KA13 6SA by 27 October 2017.