

The Bankruptcy (Scotland) Amendment Regulations 2024

Business and Regulatory Impact Assessment

February 2024



Scottish Government
Riaghaltas na h-Alba
gov.scot

Table of Contents

Title of proposal.....	1
Purpose and Intended Effect.....	1
Consultation	3
Options.....	7
Sectors and Groups Affected	8
Benefits	8
Costs	11
Regulatory and EU Alignment Impacts.....	13
Intra-UK Trade	13
International Trade	13
EU Alignment	14
Scottish Firms Impact Test.....	14
Competition Assessment.....	14
Consumer Assessment	15
Test Run of Business Forms	15
Digital Impact Test.....	15
Legal Aid Impact Test.....	15
Enforcement, Sanctions and Monitoring.....	15
Implementation and Delivery Plan.....	16
Post-implementation review	16
Summary and Recommendation.....	17
Declaration and Publication.....	21

Title of proposal

1. The Bankruptcy (Scotland) Amendment Regulations 2024

Purpose and Intended Effect

2. To update the Bankruptcy (Scotland) Regulations 2016 (S.S.I. 2016/397) (the “2016 Regulations”) which prescribes the rate of interest payable on creditors’ claims in bankruptcy under section 129(10)(a) of the Bankruptcy (Scotland) Act 2016 (the “2016 Act”), where there are sufficient funds to settle these claims in full.
3. It amends the methodology for calculation of the rate of interest to reflect the prevailing rate of interest more accurately at the date of sequestration by linking it to the Bank of England base rate.

Background

4. Section 129 of the 2016 Act, in particular Section 129(1)(h), provides that interest is payable to creditors in a prescribed order, where sufficient estate remains after payment of relevant expenses and the full settlement of preferred and ordinary (non-preferential) debts (excluding any accrued interest to the date of sequestration). In these circumstances, interest is payable from the date of sequestration until the date of payment of the debt.
5. Section 129(10) of the 2016 Act specifies that the rate of interest payable is the greater of:
 - a) the prescribed rate at the date of sequestration, and
 - b) the rate applicable to that debt apart from the sequestration.
6. The prescribed rate of interest is currently 8% per annum and is specified in regulation 26 of the 2016 Regulations. It has been at this rate since the Bankruptcy (Scotland) Amendment Regulations 1993 came into effect on 1 April 1993. This a fixed percentage rate of interest.

7. The rate applicable to a debt apart from the sequestration (the contractual rate) is the rate of interest agreed between the parties when entering into a contractual transaction. This rate can vary significantly between contracts depending on the specific circumstances and is a private arrangement between the contracting parties.

8. The trustee in sequestration does not have discretion over the rate of interest payable where individual creditors have a contractual rate of interest. The 2016 Act sets out that interest is payable at the greater of the prescribed rate of interest or the contractual rate of interest where debts are able to be settled in full. While there are no statistics available it is believed that where interest is payable in most instances it is at the prescribed rate

9. A stakeholder-led working group representing a broad spectrum of sector specialists and organisations including money advice professionals, insolvency professionals, creditor bodies and academics considered bankruptcy issues as part of stage 2 of a 3-stage wider review of Scotland's statutory debt solutions. This group considered that the current fixed rate of 8% was too high and that interest in a sequestration context should be compensatory in nature rather than punitive. It recommended that a fairer methodology to calculate the prescribed rate of interest would be to link it to the Bank of England base rate. This would reflect the prevailing rate of interest at the date of sequestration for each relevant case where creditors can be paid in full and are entitled to interest on their claim.

10. Trustee discharge reports indicate that between 1 November 2018 and 31 October 2023, 5.5% of bankruptcy cases paid all creditors' claims in full plus interest.

Rationale for Government intervention

11. The Scottish Government recognises the responsibility it has to help the people of Scotland by ensuring its debt relief solutions are fit for purpose, as well as ensuring policy strikes the right balance and fairness between those who are owed money and those who have debt. These Regulations seek to address concerns on

how interest is currently calculated where there are sufficient funds to settle debts in full.

12. The proposals in the Regulations are very much in line with the Scottish Government's National Outcomes, which form part of the Scottish Government's National Performance Framework. They will ensure that statutory debt solutions (including bankruptcy processes) are fit for purpose and able to help those who need them.

Consultation

Within Government

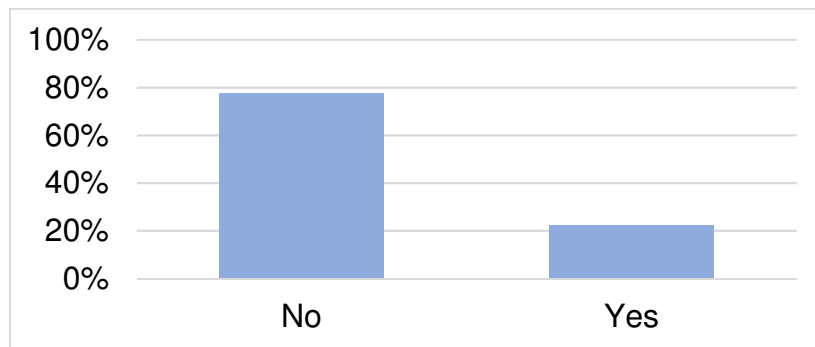
13. HM Revenue and Customs was represented on the stakeholder-led working group at stage 2 of the wider review of Scotland's statutory debt solutions which considered bankruptcy issues and recommended a change to methodology for calculation of the prescribed rate of interest.

Public Consultations

14. In April 2015, wide ranging bankruptcy reforms were introduced through the Bankruptcy and Debt Advice (Scotland) Act 2014. In 2019, the Scottish Government consulted with stakeholders to gauge how these reforms were working in practice.

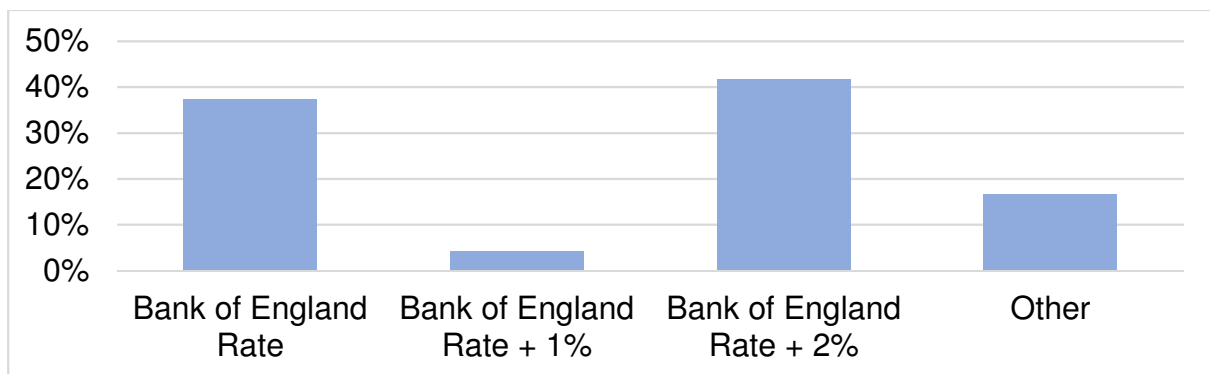
15. As part of this consultation stakeholders were asked to consider whether the prescribed rate of interest in bankruptcy was appropriate and if not, what it should be. Below is a summary of the results:

Do you consider that the currently prescribed 8% rate of interest for dividends in bankruptcy is appropriate?



- A quarter of the total consultation respondents answered this particular question.
- 77% of those respondents did not believe the current prescribed rate of interest for dividends in bankruptcy is appropriate.

If you have answered no, what interest rate do you think should be applied?



16. Of the respondents who answered this question:

- 42% believed the rate of interest should be the Bank of England base rate plus 2%
- 37% of respondents believed it should be the Bank of England base rate alone
- 4% believed it should be the Bank of England base rate plus 1%

- 17% believed it should be another amount not listed

17. Some respondents believed that a rate linked to the Bank of England base rate as opposed to a fixed rate was the fairer option as it was responsive to changing circumstances and market conditions and some suggested that the rate should have a compensatory element to reflect the fact that a creditor has had to wait for repayment.

18. In 2019 the Scottish Government also committed to take forward a three stage wide ranging review of Scotland's Statutory debt solutions including bankruptcy processes.

19. The second stage of this policy review brought together three stakeholder-led working groups to examine the existing statutory debt solutions and determine where improvements could be made. The working groups comprised of sector specialists with involvement in debt advice and the operation of debt solutions and included money advice professionals, insolvency professionals, creditor bodies and academics. One of these working groups was responsible for considering matters in relation to bankruptcy including the prescribed rate of interest.

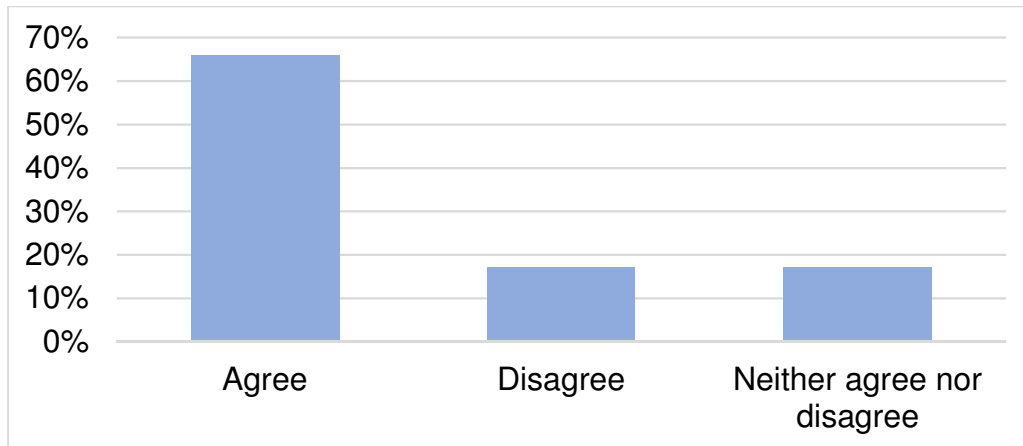
20. The stakeholder group recommended that the methodology for setting the prescribed rate of interest should be changed to link it to the Bank of England base rate at the date of sequestration and that additional consultation on the rate should be sought.

21. Having considered the recommendations of the stakeholder led working group and the recommendations of a separate working group on diligence, the Scottish Government on 12 August 2022 published a public consultation, '[Scotland's Statutory Debt Solutions and Diligence: Policy Review Response](#)'. The consultation closed on 7 October 2022.

22. At the close of the consultation a total of 46 responses were received, of which 13 were from individuals and 33 were from organisations. A summary of

responses to this consultation was published by the Scottish Government on 26 January 2023.

23. Included within this consultation was the proposal to “Reform the basis for the prescribed rate of statutory interest and link this to the Bank of England base rate plus 2% - fixed at the date of bankruptcy”. Below is a summary of the results:



- 89% of respondents to the consultation answered this particular question.
- 66% of those respondents agreed with the proposal. 17% disagreed with the proposal and 17% neither agreed nor disagreed.

Business

24. We have not held face-to-face discussions with individual businesses. However, the review of statutory debt solutions has been a stakeholder-led process with each of the groups representing a broad spectrum of sector specialists and organisations who may be affected by this change, including representatives from the creditor and business sectors such as, HM Revenue and Customs, Nationwide Building Society, Association of British Credit Unions Limited and TDX Group.

Options

Option 1 – No Change

25. Under this option the calculation of the prescribed rate of interest on creditors' claims, where there are sufficient funds to pay these claims in full, would be calculated at a fixed 8% at the date of sequestration.

26. Creditors would still be entitled to payment of interest at their contractual rate of interest if this is greater than the prescribed rate.

Option 2 – Introduce the regulations to amend the methodology of calculation to the Bank of England base rate +2%.

27. Under this option, the methodology for calculation of the prescribed rate of interest on creditors' claims, where there are sufficient funds to pay these claims in full, would be amended and linked to the Bank of England base rate at the date of sequestration plus 2%.

28. Creditors would still be entitled to payment of interest at their contractual rate of interest if this is greater than the prescribed rate.

29. The rate of interest is fixed at the date of sequestration, which coincides with the relevant date for claims in the 2016 Act. The creditors are entitled to claim the accumulated sum of principal and interest which is due on the debt at that date.

30. Any cases with a date of sequestration before the date the regulations come into force would still be entitled to payment of interest at the prescribed rate of 8% or their contractual rate if this is higher.

Option 3 – Introduce an amended fixed rate of interest

31. Under this option the prescribed rate of interest on creditors' claims, where there are sufficient funds to pay these claims in full, would be calculated at a fixed

rate at the date of sequestration. The rate of interest would be reduced from 8% to an agreed rate.

32. Creditors would still be entitled to payment of interest at their contractual rate of interest if this is greater than the prescribed rate.

Option 4 – Introduce a different variable rate linked to the Bank of England base rate

33. Under this option, the methodology for calculation of the prescribed rate of interest on creditors' claims, where there are sufficient funds to pay these claims in full, would be amended and linked to the Bank of England base rate at the date of sequestration or the Bank of England base rate plus 1% at the date of sequestration.

34. Creditors would still be entitled to payment of interest at their contractual rate of interest if this is greater than the prescribed rate.

Sectors and Groups Affected

- Debtors
- Creditors
- Insolvency practitioners
- Accountant in Bankruptcy

Benefits

Option 1

35. The no change option would mean that where there are sufficient funds to settle creditors' claims in full the prescribed rate of interest would be based on a fixed 8% on all relevant cases, as at present. The rate for each case would be the same irrespective of the prevailing rates of interest and would not require any

additional work for Insolvency Practitioners and the Accountant in Bankruptcy to establish the base rate and to calculate the interest payable.

36. Creditors would know that the same rate of interest would be payable on their claims irrespective of the date of sequestration.

37. Creditors would continue to be entitled to be paid their contractual rate of interest if this is higher than the 8%.

Option 2

38. This option would mean that the prescribed rate of interest which can be paid on creditors' claims, where there are sufficient funds available for full settlement of claims, would be variable depending on the Bank of England base rate at the date of sequestration for each relevant case and reflect the prevailing rates of interest more accurately. This could potentially increase the level of residual estate repayable to the debtor while creditors would continue to be paid their debts in full.

39. Creditors would continue to be entitled to be paid their contractual rate of interest if this is higher than the prescribed rate of interest.

40. Linking the calculation of interest to the Bank of England base rate with a percentage uplift would be similar to the well-established methodology adopted in many commercial transactions involving the calculation of interest.

41. A small percentage uplift on the base rate would compensate the creditors for their loss of funds to which they were entitled at an earlier date while not being punitive to the debtor.

42. Having the prescribed rate of interest fixed at the date of sequestration coincides with the relevant date for claims. It provides certainty to creditors on what rate they may be paid if there is sufficient estate to meet claims in full and also to the debtor on the potential impact on any residual estate. It also removes the complexity of calculation of the interest if the interest rate was varied throughout the bankruptcy.

This would affect the amount which may be payable on claims, which could incur additional costs and reduce the estate further.

Option 3

43. This option would mean that where there are sufficient funds to settle creditors' claims in full the prescribed rate of interest would be based on a fixed percentage on all relevant cases, as at present. The rate for each case would be the same irrespective of the prevailing rates of interest and would not require any additional work for Insolvency Practitioners and the Accountant in Bankruptcy to establish the base rate and to calculate the interest payable.

44. Creditors would know that the same rate of interest would be payable on their claims irrespective of the date of sequestration.

45. Creditors would continue to be entitled to be paid their contractual rate of interest if this is higher than the fixed rate.

Option 4

46. This option would mean that the prescribed rate of interest which can be paid on creditors' claims, where there are sufficient funds available for full settlement of claims, would be variable depending on the Bank of England base rate at the date of sequestration for each relevant case and reflect the prevailing rates of interest more accurately. This could potentially increase the level of residual estate repayable to the debtor while creditors would continue to be paid their debts in full.

47. Creditors would continue to be entitled to be paid their contractual rate of interest if this is higher than the prescribed rate of interest.

48. Linking the calculation of interest to the Bank of England base rate would be similar to the well-established methodology adopted in many commercial transactions involving the calculation of interest.

49. A small percentage uplift on the base rate would compensate the creditors for their loss of funds to which they were entitled at an earlier date while not being punitive to the debtor.

50. Having the prescribed rate of interest fixed at the date of sequestration coincides with the relevant date for claims. It provides certainty to creditors on what rate they may be paid if there is sufficient estate to meet claims in full and also to the debtor on the potential impact on any residual estate. It also removes the complexity of calculation of the interest if the interest rate was varied throughout the bankruptcy. This would affect the amount which may be payable on claims, which could incur additional costs and reduce the estate further.

Costs

Option 1

51. Where interest rates are low or falling there would be no adjustment to the prescribed rate of interest which can be payable on creditors' claims and it would continue to be calculated at 8%, which may be significantly higher than the prevailing rate of interest at the date of sequestration. This could potentially reduce the level of residual estate which could be repaid to the debtor.

52. If interest rates fall to significantly below 8% the prescribed rate of interest could be seen as punitive to the debtor as opposed to compensatory to the creditors.

Option 2

53. Where interest rates are rising it could result in a higher rate of interest being paid on creditors' claims and reduce the residual estate which may be repayable to the debtor.

54. There may be some additional minimal time costs for the trustee and the Accountant in Bankruptcy to establish the Bank of England base rate at the date of sequestration which would be applied to individual cases.

55. Creditors would continue to be entitled to be paid their contractual rate of interest if this is higher than the prescribed rate of interest.

Option 3

56. Where interest rates are low or falling there would be no adjustment to the prescribed rate of interest which can be payable on creditors' claims and it would continue to be calculated at fixed rate, which may be significantly higher than the prevailing rate of interest at the date of sequestration. This could potentially reduce the level of residual estate which could be repaid to the debtor.

57. If interest rates fall to significantly below the fixed rate set for the prescribed rate of interest, it could be seen as punitive to the debtor as opposed to compensatory to the creditors.

58. Setting the rate would be subjective and it would be difficult to arrive at a rate which strikes the right balance of fairness between the debtor and their creditors.

59. This option would not reflect the stakeholder-led recommendation to move to a rate linked to the Bank of England base rate.

Option 4

60. Where interest rates are rising it could result in a higher rate of interest being paid on creditors' claims and reduce the residual estate which may be repayable to the debtor.

61. There may be some additional minimal time costs for the trustee and the Accountant in Bankruptcy to establish the Bank of England base rate at the date of sequestration which would be applied to individual cases.

62. Creditors would continue to be entitled to be paid their contractual rate of interest if this is higher than the prescribed rate of interest.

63. If the rate was at the Bank of Interest base rate with no uplift, there is no compensatory element for creditors who have had to wait for payment of the sums due to them. Many commercial contracts are based on the base rate with an uplift.

64. The favoured option in a previous consultation was the Bank of England base rate plus 2% and the change would not reflect the wishes of the stakeholders

Regulatory and EU Alignment Impacts

65. The provisions in these Regulations have no impacts on the Scottish Government's regulatory features related to leaving the EU. See below for further commentary.

Intra-UK Trade

66. These Regulations amend the methodology for calculating the prescribed rate of interest on creditors' claims in bankruptcy where there are sufficient funds for these claims to be settled in full. This interest is currently a fixed percentage of 8% at the date of sequestration and will be amended to a rate linked to the Bank of England base rate which will more accurately reflect the prevailing rates of interest at the date of sequestration.

67. Having considered the United Kingdom Internal Market Act 2020 and Common Frameworks I can confirm that these Regulations will not impact on intra-UK trade.

International Trade

68. The Regulations amend the methodology for calculating the prescribed rate of interest on creditors' claims in bankruptcy from a fixed 8% to a rate linked to the Bank of England base rate at the date of sequestration.

69. The amendment to this methodology will have no impact on international trade and investment.

EU Alignment

70. The Regulations and its associated policies will have no EU implications and there is no identified conflict with the Scottish Government's policy on EU alignment. There will be no impact on relations with significant international organisations.

Scottish Firms Impact Test

71. As previously mentioned, we held no face-to-face discussions with individual businesses. However, the review of statutory debt solutions has been a stakeholder-led process with a working group representing a broad spectrum of sector specialists and organisations including money advice professionals, insolvency professionals, creditor bodies and academics.

72. This working group recommended that the methodology for calculation of the prescribed rate of interest on creditors' claims should be linked to the Bank of England base rate.

73. A subsequent Scottish Government consultation proposed this should be calculated at the Bank of England base rate plus 2%. At the close of the consultation a total of 46 responses were received, of which 33 were from organisations. 89% of respondents answered this proposal and of those respondents 66% agreed with the proposal, 17% disagreed and 17% neither agreed nor disagreed.

Competition Assessment

74. Having considered the Competition and Markets Authority competition assessment questions, I can confirm that these changes will apply equally to all who engage with these Regulations. There should be no competitive advantage to any particular individual or group as a consequence of the introduction of the Regulations.

Will the proposal directly limit the number or range of suppliers? No

Will the proposal indirectly limit the number or range of suppliers? No

Will the proposal limit the ability of suppliers to compete? No

Will the proposal reduce suppliers' incentives to compete vigorously? No

Consumer Assessment

75. If passed the Regulations will likely have a positive impact on consumers as the rate of interest will more accurately reflect the prevailing rates of interest at the date of sequestration.

Test Run of Business Forms

76. These regulations will not require the introduction of new forms for businesses to complete.

Digital Impact Test

77. The Scottish Government has considered the extent to which technology will impact on future delivery. The Regulations amend the methodology for calculation of the prescribed rate of interest on creditors' claims in bankruptcy and do not alter the transfer of information.

Legal Aid Impact Test

78. The Scottish Legal Aid Board (SLAB) have estimated that the impact of these regulations on the legal aid fund is negligible.

Enforcement, Sanctions and Monitoring

79. The Scottish Government will carefully monitor how these Regulations are working in practice by carrying out reviews and seeking feedback from stakeholders.

80. Accountant in Bankruptcy has an existing pool of engaged stakeholders representing all sectors with an interest in debt and the money advice sector in Scotland.

Implementation and Delivery Plan

81. If approved by the Scottish Parliament, these Regulations will come into force on 6 April 2024.

82. Accountant in Bankruptcy will publish the introduction of the Regulations on their website. The new regulations will also be incorporated in the legislation published on the [legislation.gov.uk](https://www.legislation.gov.uk) website. Accountant in Bankruptcy will, where appropriate, prepare and publish, on their website, guidance to support stakeholders when implementing the new legislation.

Post-implementation review

83. These provisions will be evaluated after they have been in place for an appropriate amount of time. This will involve the analysis of statistical data and feedback from stakeholders collated by Accountant in Bankruptcy.

84. The Scottish Government will review the findings of this research and consider whether any changes are necessary to the legislation or the associated guidance in light of its findings. Any changes identified will be brought to the attention of the Scottish Parliament and Parliamentary committees where necessary.

Summary and Recommendation

Summary costs and benefits table

Option	Total benefit per annum; economic, environmental, social	Total cost per annum; economic, environmental, social, policy and administrative
1	<ul style="list-style-type: none"> For those who interact with bankruptcy legislation there would be no change. 	<ul style="list-style-type: none"> There would be no financial costs to the Scottish Government. The prescribed rate of interest which can currently be paid on creditors' claims, where they can be settled in full, in the small number of cases impacted, would be above the Bank of England base rate plus 2% while creditors would still be entitled to interest at their contractual rate if higher. The rate of interest would be fixed and would not accurately reflect the prevailing rates of interest and economic conditions at the date of bankruptcy for each relevant case. If interest rates were to fall significantly the rate of interest could be seen to be punitive reducing the level of residual estate which may be payable to the debtor and further legislation may be required to amend the rate where there are significant economic fluctuations

Option	Total benefit per annum; economic, environmental, social	Total cost per annum; economic, environmental, social, policy and administrative
2	<ul style="list-style-type: none"> • The prescribed rate of interest which can be paid to creditors on their claims would be linked to the Bank of England base rate and more accurately reflect the prevailing rates of interest and economic conditions and be seen as compensatory rather than punitive. It would not impact on a creditor's right to be paid their contractual rate where this is higher than the prescribed rate. • Where interest rates are falling it may increase the residual estate repayable to the debtor. • There would be no requirement to amend the rate of interest by legislation where there are significant economic fluctuations. 	<ul style="list-style-type: none"> • If interest rates were to rise the prescribed rate of interest which can be paid on creditors' claims could exceed the current 8%. It may also reduce the level of residual estate repayable to the debtor. It would not impact on a creditor's ability to be paid their contractual rate. • There is no financial cost to the Scottish Government. There may be a small cost to trustees and the Accountant in Bankruptcy in establishing the rate applicable to each relevant case but it is not considered that this will be significant as interest is payable on creditors' claims in a small percentage of bankruptcy cases.
3	<ul style="list-style-type: none"> • The rate for each case would be the same irrespective of the prevailing rates of interest and would not require any additional work for Insolvency Practitioners and the Accountant in Bankruptcy to 	<ul style="list-style-type: none"> • There would be no financial costs to the Scottish Government. • The rate of interest would be fixed and would not accurately reflect the prevailing rates of interest and economic conditions at the date of

Option	Total benefit per annum; economic, environmental, social	Total cost per annum; economic, environmental, social, policy and administrative
	<p>establish the base rate and to calculate the interest payable.</p> <ul style="list-style-type: none"> • Creditors would know that the same rate of interest would be payable on their claims irrespective of the date of sequestration. 	<p>bankruptcy for each relevant case. If interest rates were to fall significantly the rate of interest could be seen to be punitive and further legislation may be required to amend the rate where there are significant economic fluctuations.</p> <ul style="list-style-type: none"> • Choosing this rate would not reflect the results of stakeholder consultation. • Setting the rate would be subjective and it would be difficult to arrive at a rate which strikes the right balance of fairness between the debtor and their creditors.
4	<ul style="list-style-type: none"> • The prescribed rate of interest which can be paid to creditors on their claims would be linked to the Bank of England base rate and more accurately reflect the prevailing rates of interest and economic conditions and be seen as compensatory rather than punitive. It would not impact on a creditor's right to be paid their contractual rate where 	<ul style="list-style-type: none"> • If interest rates were to rise the prescribed rate of interest which can be paid on creditors' claims could exceed the current 8%. It may also reduce the level of residual estate repayable to the debtor. It would not impact on a creditor's ability to be paid their contractual rate. • There is no financial cost to the Scottish Government. There may be a small cost to trustees and the

Option	Total benefit per annum; economic, environmental, social	Total cost per annum; economic, environmental, social, policy and administrative
	<p>this is higher than the prescribed rate.</p> <ul style="list-style-type: none"> • Where interest rates are falling it may increase the residual estate repayable to the debtor. • There would be no requirement to amend the rate of interest by legislation where there are significant economic fluctuations 	<p>Accountant in Bankruptcy in establishing the rate applicable to each relevant case but it is not considered that this will be significant as interest is payable on creditors' claims in a small percentage of bankruptcy cases.</p> <ul style="list-style-type: none"> • A rate set at the Bank of England base rate or an uplift of 1% may not be seen as compensatory in nature. • Choosing either of these rates would not reflect the results of stakeholder consultation.

Recommendation

85. Following an analysis of the costs and benefits of each option, it is recommended that options 1, 3 and 4 be dismissed and option 2 be adopted.

Declaration and Publication

86. I have read the Business and Regulatory 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: TOM ARTHUR

Date: 14 February 2024

Minister's name: Tom Arthur

Minister's title: Minister for Community Wealth and Public Finance

Scottish Government contact point:

David Farr

Policy Development

Team Accountant in Bankruptcy