Dear Trustee

**Debtor Non-Cooperation Cases**

I would be grateful if you could bring the contents of this letter to the attention of all staff who are involved in administering bankruptcy cases.

Under the provisions applying to bankruptcies made on or after 1 April 2015, the discharge of a debtor from bankruptcy is conditional. The decision to discharge a debtor is made at the discretion of the Accountant in Bankruptcy, and must consider a report made by the Trustee (where the AiB is not the Trustee) which includes a statement on the opinion of the Trustee as to whether the debtor has cooperated with them. The current legislation is contained in section 137 of the Bankruptcy (Scotland) Act 2016. The discretionary nature of the AiB’s power of discharge was upheld in the appeal of Hutcheson vs. AiB [2019] SC ABE 53.

The fundamental policy here is that an individual obtains relief from their debts through full participation in the process. This ensures both creditors’ and the wider public interest can be taken into account and properly protected, at the same time as giving the individual the fresh start they need. There is however a balance to be struck, in that keeping an individual undischarged for many years for relatively minor failures of co-operation serves little purpose. The individual pays the price of such failure as the failure to obtain discharge places similar restrictions as would be imposed by a bankruptcy restriction order- whilst at the same time, costs continue to be borne by both trustee and the Agency, further reducing any return to creditors.

It is the Accountant’s view that it is therefore not proportionate to refuse discharge indefinitely where the level of failure to co-operate is not significant to the administration or likely final outcome of the case. Whilst it remains the Trustee’s judgement in terms of what to include in the statement of opinion, it is important that broadly the same approach is adopted across all cases, so that individuals do not face significantly different decisions depending on who their trustee might be.
The AiB has prepared guidance to assist proportionate administration of these cases, balancing the interests of debtors and creditors in the costs and benefits of continuing to keep the bankruptcy process ongoing in different categories of cases. The guidance identifies five broad categories and suggests a course of action most likely to be appropriate in each category, which will be the approach adopted in those cases in which the Accountant is the Trustee. These are set out in the Annex attached to this letter. The Accountant is aware that this will still leave a significant number of cases where discharge will continue to be refused, including those serious cases in which the debtor’s discharge is refused indefinitely, and that issue will need further consideration.

This guidance is intended to streamline the process in typical cases, allowing discharge where appropriate, but still requiring further action to ensure reasonable investigation is carried out. There may, however, be exceptional cases, and trustees may consider a different approach in particular circumstances, similarly other factors may arise or need to be considered by the AiB in any reviews. In particular, reference is made to Category 3 in the annex attached. Trustees should submit a BRI application to AiB, enclosing a copy of a section 215 order where debts are in excess of £50,000.

In determining the value of the debt owed in a case, the Trustee should rely on the total of creditors’ claims, and details of these claims must be recorded in BASYS before seeking the discharge of the debtor. See the Dear Trustee letter of 19 January 2023 at https://aib.gov.uk/dear-trustee-submissions-documents-and-applications-basys.

A draft of this guidance has been considered and agreed by the Policy and Cases Committee, and has been discussed with the RPBs. The AiB will review the guidance during 2024.

Yours faithfully

Simon Roberts
Head of Operation Policy and Compliance
Annex: Categories of debtor non-cooperation

Category 1 – Discharge Immediately

- Where the debtor is deceased and the trustee has established there are no policies or assets or that these have been dealt with, the deceased debtor may be discharged.

Category 2 – Refuse Discharge for One Year

A Nil DCO is set, or the debtor is found to be in receipt of benefits only. The debtor has completed the interview, signed Supplementary Questionnaire, Assets and Liabilities, and provided up to date Current Statement of Affairs (CSoA)

Outstanding matters:
- the trustee considered that the debtor should complete a financial education course, but has failed to do so.

Prior to recommending discharge, the trustee must be able to demonstrate:
- there is no prospect of a future increase in a Nil DCO
- they have conducted a recent check for new and current bank accounts
- be able to evidence there is no change in debtor’s circumstances

Category 3 – Refuse Discharge Until the End of the 48 Month DCO Period

1. A Nil DCO is set, or the debtor is found to be in receipt of benefits only with no prospect of future DCO. The debtor has completed the Interview.

Outstanding matters:
- Signed Supplementary Questionnaire, Assets and Liabilities or CSoA

Prior to recommending discharge, the trustee must be able to demonstrate:
- there is no prospect of a future increase in a Nil DCO
- evidence all avenues have been explored to engage the debtor, including making a section 215 application to court
- they have conducted a recent check for new and current bank accounts
- be able to evidence there is no change in debtor’s circumstances

2. DCO not maintained for 48 months (includes assessed DCOs) but at least half of the DCO payments have been made. The debtor has completed the Interview, signed Supplementary Questionnaire, Assets and Liabilities.
Prior to recommending discharge, the trustee must be able to demonstrate:

- At least half of the DCO payments have been made.
- Evidence all avenues have been explored to engage the debtor, including making a section 215 application to court
- They have carried out a recent check for new and current bank accounts
- Be able to evidence there is no change in debtor’s circumstances

**NB**

If debts are over £50k a Bankruptcy Restrictions Investigation (BRI) should be submitted to AiB before discharge to allow a 4-year Bankruptcy Restrictions Order (BRO) to be considered. (A Section 215 must first have been obtained and expired, prior to the submission of a BRI application)

**Category 4 – Refuse Discharge Indefinitely**

If any of the following matters apply, discharge should not be recommended:

- Less than half DCO payments made
- No contact/interview not conducted
- Interview conducted, no further contact from debtor or no DCO set
- No trace (AiB deemed trustee)

**Further points to consider for all categories**

- The trustee must be able to demonstrate they have carried out several actions such as writing to the debtor on at least 3 occasions; emailed or telephoned the debtor on at least 5 occasions (where possible); instructed Sheriff Officers to conduct personal service; and instructed a tracing agent if appropriate. This list is not exhaustive.
- The trustee must run a final check on the debtor, prior to recommending discharge to ensure the debtor has not opened any further bank accounts.
- The trustee has the option to quash the DCO early, if appropriate on completion of CSoA, or grant discharge if estate has been realised to pay maximum dividend to creditors.
- The trustee is expected to explore an assumed DCO in such situations if estate realised does not pay maximum dividend to creditors.
• The trustee is expected to explore all avenues to engage the debtor and administer the case. This includes submitting a Section 215 application to the Sheriff.

• Case by case basis - Trustee to explain why it is not commercially viable to keep the case open - provide cost analysis to show that it is of no benefit to creditors.