

Common Financial Tool (Scotland) Regulations 2018

Submission to the Economy, Jobs and Fair Work Committee of the
Scottish Parliament

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Introduction

My name is Alan McIntosh. I am approved money adviser and employed as the Senior Money Adviser for Inverclyde Council. My employer previously submitted a submission to the Accountant in Bankruptcy consultation on the Common Financial Tool for Scotland ([see here](#)) as did I ([see here](#)). Both were opposed to the adoption of the Standard Financial Statement as the Common Financial Tool.

This submission is a personal submission.

I have been working in the money advice and personal industry for over 17 years and have held several roles, including as a case carrying money adviser, a senior money adviser, a trainer, policy officer and as a senior Manager for one of Scotland's largest personal insolvency practitioner firms.

I have experience of using the Common Financial Statement since 2003.

I have also been an Irish Personal Insolvency Practitioner, which involved using the Insolvency Service of Ireland's Prescribed Financial Statement and [Reasonable Living Expenditure figures](#), which in my experience, had advantages over the Common Financial Statement and Standard Financial Statement.

Like the [Joseph Rowntree Foundation Minimum Income Standards](#), the figures used were publicly available and set a minimum living standard for consumers.

I hope the Committee will consider my submission, as I believe these regulations are important and concern not just administrative matters.

I am available to give evidence to the Committee if that is required.

a “reasonable standard of living” does not mean that a person should live at a luxury level but neither does it mean that a person should only live at subsistence level. A debtor should be able to participate in the life of the community, as other citizens do. It should be possible for the debtor “to eat nutritious food..., to have clothes for different weather and situations, to keep the home clean and tidy, to have furniture and equipment at home for rest and recreation, to be able to devote some time to leisure activities, and to read books, newspapers and watch television”¹

¹ Nordenankur, ‘More than A Minimum Budget in Sweden’ in ‘Money Matters - Reference Budgets for Social Inclusion’; European Consumer Debt Network (No. 6, 2009) page 8

Common Financial Tool: Its Scottish Background

The Common Financial Tool (CFT) is a generic phrase used to describe the chosen financial statement in Scotland used when determining what constitutes a reasonable standard of living for consumers and their family when they apply for or are in a formal debt remedy in Scotland.

The current CFT is the Common Financial Statement (CFS) and is owned by the Money Advice Trust. Its use is governed by individual licence agreements between advice agencies, creditors, and the Money Advice Trust. It is also overseen by a governing body which includes representatives of the creditor, insolvency, and debt advice sector.

The proposal in the regulation is the Standard Financial Tool (SFS) should become the new Common Financial Tool. The SFS is owned by the Money Advice Service (which will soon become the Single Financial Guidance body in the UK). Like the CFS, the SFS is governed by a mixture of bodies, including representatives of the creditor, insolvency, and debt advice sector.

Both tools take the same approach in how they determine what constitutes a reasonable standard of living for financially distressed consumers. They allow for an income and expenditure to be drafted, with the expenditure broken down into several categories, which include sub-categories for different types of spend.

Other than the essential expenditure category, the other categories have trigger figures attached to them which act as guidance for advisers and creditors when deciding if expenditure is reasonable or not.

The methodology used to determine these trigger figures is to take the median expenditure of the lowest twenty per cent group in the Living Costs and Food Survey.

Where the SFS and CFS differ, several categories of expenditure have been removed from the SFS and sub-categories have been moved about from one category to another. Also, more recently, the trigger figures in the SFS for 2018 were updated by omitting some expenditure groups from the sample, namely those in receipt of Universal Credit. The effect of this has been the overall increasing of average expenditure across the sample. This “tweaking” of the methodology did not occur for the CFT in 2018.

Local authority funded money advice services, which include Citizen Advice Bureaux, have used the Common Financial Statement since 2003. Other organisations, such as the debt charity, Stepchange, used their own, which was the preferred choice of most insolvency practitioners and the Accountant in Bankruptcy. Since April 2015, there has been a statutory requirement for all sectors to use the CFS in Scotland, when advising on formal debt remedies.

The need for this unified approach in Scotland arose because of the passing of the Home Owner and Debtor Protection (Scotland) Act 2010 and the introduction of

Certificate of Sequestrations. Certificates of sequestration are certificates completed by approved money advisers and insolvency practitioners that allow people to apply for their bankruptcy by stating they cannot pay their debts as they fall due.

Prior to April 2015, as there were several financial statements in use, whether you were deemed able to pay your debts as they fell due, or how much you had to pay, depended often on the financial statement used. There were often disputes between money advisers, insolvency practitioners and the AIB.

Since 2015, the use of other financial statements across the rest of the UK has continued.

A decision was then taken to create a UK wide financial statement. This was led by the Money Advice Service.

The SFS is the product of that decision.

Common financial Tool (Scotland) Regulations 2018 (Draft)

I support the concept of a common financial tool for Scotland, but not necessarily a UK wide approach being adopted.

It is important to emphasise these regulations are not of a purely administrative nature, and concern significant policy issues. I believe the impact of these regulations will be:

- They will determine what is a reasonable standard of living for tens of thousands of Scots and their families over the next few years;
- They will determine what remedies Scots can use to address their over-indebtedness; and
- How they are implemented will impact on the capacity of advice agencies to give advice, at a time when resources are scarce and there is a lack of capacity.

These regulations merit the robust scrutiny of the Committee, as the body that has brought them forward, the Accountant in Bankruptcy, has a personal stake in that much of their costs are met from the contributions people pay towards their debts. An austere financial statement, therefore, could be argued to be beneficial to the Accountant in Bankruptcy.

It is also important to mention, an austere financial statement arguably could also have benefits for insolvency practitioners, creditors and even debt charities that are funded via percentages of what consumers pay towards their debts.

It is also important to note that although the Minister suggested, when he wrote to the Committee, that there were no fundamental issues with the Standard Financial Statement, this is not the case.

Money Advice Scotland have raised fundamental concerns. There has also been fundamental concerns raised consistently in the Accountant in Bankruptcy's Common Financial Tool Working Group; and the AIB's own consultation on the Common Financial Tool clearly led to many respondents raising fundamental concerns about the adoption of the SFS.

It is also important to note that the AIB have been lobbying organisations for the adoption of these regulations, as has the Money Advice Service. We need to be cautious about the influence both organisations have on debt advice agencies as both have been important funders of money advice over the last few years and it's clear some national institutions may have changed their position since the initial AIB consultation. I would suggest Committee members may find it helpful to canvas the views of their own local advice agencies, as I suspect some national organisations are not reflecting the views of their members.

It is of course correct we should adopt a common financial tool in Scotland that strikes the correct balance between the interests of creditors and debtors, but also one that safeguards minimum standards of living for Scottish families, particularly when there are children and vulnerable adults in households.

These regulations do not do that, nor does the Common Financial Statement (CFS) or the SFS. They do not aim to establish minimum living standards in the way the Joseph Rowntree Foundation's Minimum Income Standards do.

Instead they create trigger figures that are often used by the AIB as caps and place significant evidential burdens on consumers and advice agencies to justify exceeding those caps (such as providing proof clients are purchasing incontinence pads, possess pet dogs; or in the past, evidence the expenditure of child Disability Living Allowance, even though the debts concerned are their parents).

Is the Standard Financial Statement suitable for incorporation into legislation?

I believe one of the most important issues in front of the Committee is the question of whether the Standard Financial Statement or the Common Financial Statement are fit to be incorporated into legislation. It is true the CFS has previously been incorporated and is the current CFT, but it is important to note when that occurred it was part of a large body of secondary legislation that was introduced at the time to commence the Bankruptcy and Debt Advice (Scotland) Act 2014 and the Committee did not take evidence on it.

To be fair, the concerns that exist today, did not exist then, but we have now over three years' experience of the Common Financial Tool and its application.

It would be fair to say it's implementation by the AIB has been controversial and an area of contention between money advisers and the AIB, with disputes over what type of verification are required and what constitutes the income of the debtor and what does not (in particular, one area of dispute surrounds child maintenance and whether this income is that of the child or the parent – see [Child Maintenance – Whose Money is it?](#)).

Other changes that were introduced in April 2015 have also created problems in resolving these disputes, in that the power to make contribution orders in bankruptcy now vest with the Accountant in Bankruptcy, whereas previously they were made by the court. This allows the AIB to make orders using the CFT and places the onus on the bankrupt to appeal the decision to the Sheriff, which can cost money, which most don't have as they are bankrupt. Any claims by the AIB, therefore, that a lack of appeals to sheriffs indicates a lack of disputes, must be viewed in that context.

It should also be noted the original intention behind these financial statement models was not to incorporate them into legislation and they have not been incorporated anywhere else into legislation in the UK.

The question must be asked whether it is appropriate for Parliament to delegate the task of deciding how much Scottish families get to live on to an external body, where over half the organisations involved in establishing the SFS were either insolvency agencies, creditors or debt charities that are funded via percentages of what consumers pay. As noted above, all of whom, it could be argued, benefit from austere financial statements.

Equally Scottish representation on the body is obviously a minority, which mean that even if there are significant Scottish objections to any proposed changes in future, they can be ignored. The draft regulations contain no sunset clause, or requirement that any change in methodology or trigger figure amounts be brought in front of Parliament.

The dangers of this can be seen by looking at other UK “working groups”, chaired by the Money Advice Service, such as the Debt Advice Steering Group, which recently

adopted several recommendations of the Peter Wyman Review into the free provision of debt advice, despite strong concerns being raised in Scotland.

The Money Advice Service approach to their “strategic role” as to how money advice is delivered in Scotland, as provided for in the Financial Claims and Guidance Act 2018, is to take a UK wide approach and then recommend that as the way forward in Scotland, regardless of whether Scotland has historically diverged from the rest of the UK in relation to these areas.

It also must be noted that the governing body for the Standard Financial Statement is not accountable to Parliament or the Minister and is not subject to freedom of information laws. Also, it is a body that will be able to change the financial statement format in future, the methodology it uses and the trigger figures, without any of these changes being presented to the parliament or having the agreement of Scottish representatives on their governing bodies.

In addition to that it must be considered whether it is appropriate for the Scottish Parliament to incorporate into legislation expenditure figures that will be used to determine how much people have to live on, when the licencing agreements that agencies enter to access them, prevent them publicly being shared or shown to the client, despite the fact every other party involved is allowed to see them and they are then used by creditors and the AIB to determine whether a client’s standard of living is reasonable or not.

I would also suggest such legislation falls far below the standards we expect in public life and in relation to legislation do not believe there is any comparable incorporation of such secret rules elsewhere in the Scottish Parliament’s legislative history.

I would suggest the regulations may even be ultra vires and incompatible with the Minister’s obligations under the Scotland Act in relation to the European Convention of Human Rights. People involved in legal processes have a right to full disclosure and transparency in relation to the information being used to make legal decisions about them.

Do we need a UK-wide approach?

There are reasons why Scotland developed a Common Financial Tool. The important thing to note, however, is the CFT was a Scottish solution to a Scottish problem. That problem was solved by a Scottish approach and no UK-wide approach was required.

In terms of whether a UK approach is required, there has never been a UK “single market” approach to debt recovery, either before or after devolution.

Scotland’s formal debt solution remedies have always been distinct from those elsewhere in the UK. This includes, for example, protected trust deeds which traditionally lasted for 3 years (now 4), compared to the 5 years of individual voluntary arrangements. It also includes bankruptcy, and the 4-year payment period that exists in Scotland, compared to the 3-year payment period that exists elsewhere in the UK.

In addition to that, it is worth while noting that even if Scotland was to adopt the Standard Financial Statement, this will not result in a common approach being adopted across the UK, as the Scottish approach is distinct in that the Common Financial Tool has been put on a statutory footing and an additional layer of guidance is applied to it by the AIB, over and above that which is applied elsewhere in the UK by the Governing body of the SFS.

It is also worthwhile noting that in the Debt Arrangement Scheme (Scotland) Regulations 2018 (Draft), which have been laid before the Committee, the Scottish Government also propose that consumers applying for the Debt Arrangement Scheme will not have to offer all their disposable income to creditors when making an application. This is contrary to the good practice that underpins both the CFS and SFS, albeit it is an approach I support, as in the context of Scotland and the Debt Arrangement Scheme, a Scottish approach is required.

This, however, demonstrates, even in Scotland, never mind across the UK, there is unlikely to be a common approach, even if the SFS is introduced. The arguments for a UK approach, therefore, are weak, at best, and problematic when using a tool that was not designed to be incorporated into legislation and is not incorporated into legislation elsewhere in the UK.

Flawed Methodology of the CFS and SFS

The methodology behind the CFS and SFS is a cause for much concern and, without “tweaking” has been shown to produce unreasonable outcomes.

The current methodology is that the trigger figures are arrived at by taking the median expenditure of the lowest 20% expenditure group in the Living Costs and Food Survey, which is produced by the Office of National Statistics.

This is the average of what people can spend, not what they need to spend and does not take into consideration, how much of this expenditure is driven by the borrowing of the person spending. In a normal economic environment, when we see both wage and living cost inflation, we would expect to see the median expenditure for items increase and, therefore, when there is a review of the trigger figures, for these to be updated.

However, in the situation we currently are in, where we have cost of living inflation, but not wage inflation, what these figures are showing is average expenditures in many areas are falling as people are forced to spread their income wider to make ends meet.

For this reason, when the Common Financial Statement was reviewed in 2018, the categories for some expenditure areas fell, despite it being obvious to everyone that cost of living was increasing.

This then creates trigger figures which are falling when common sense suggests they should be increasing and create a presumption that expenditure over and above their amount is excessive,. This problem, I believe was partly corrected in relation to the Standard Financial Statement in 2018 (SFS 2018), by removing those in receipt of Universal Credit from the sample group that were used to determine what the trigger figures should be, therefore, increasing average expenditure levels. This correction did not occur for the Common Financial Statement 2018 (CFS 2018), which is still currently being used as Scotland’s CFT, meaning some category trigger figure areas fell.

The cynic may take the view that this correction did not take place, to help “nudge” Scotland onto using the SFS and to ensure it looked more favourable when comparative studies were carried out between the two to see how they impacted on consumers. It is interesting to note that the AIB’s comparative study between the two models ([see here](#)) compares the SFS 2018 (after correction) with the CFS 2018 (without correction) and not with the CFS 2017 (before the downrating of some of the categories trigger figures).

It is also worthwhile asking whether the lower 20% in the Living Costs and Food Survey are the correct group to use and whether they are living a reasonable standard of living? With over 1 million in Scotland believed to be living in poverty, there is an argument the standard of living this group represent, is a poverty standard of living.

Trigger Figure Amounts

I do not propose to address the trigger figure amounts for the SFS 2018 in this submission as my access to them has been through my employer's licence which prevents me disclosing them in a document that will be made public. Equally, I do not believe it is the intention of the Scottish Government or the Money Advice Service to make them available to members of the Committee in case they are released into the public domain.

However, it should be noted that one member of the SFS governing body, the Credit Service Association Ltd, [has raised their concerns](#) that the figures are overly generous and called for a review to downgrade some of them. It is my understanding they are not alone in this view.

It is also interesting to contrast this position with the Scottish Government's in relation to the draft Debt Arrangement Scheme (Scotland) Regulations 2018 that have been submitted to the Committee, in that they don't require consumers to propose their full disposable income in any repayment plan, unlike in Protected Trust Deeds and Sequestrations. This must be viewed as an implied admission that the Scottish Government feels the figures are too austere in certain circumstances.

Also, with the introduction of the new CFT Regulations by the Minister, to allow a longer lead in period, it is likely the trigger figures that will be in force at the date of commencement will not be the ones currently in force, and may have been downgraded or uprated, tweaked or not tweaked.

It is important to point out, however, that all comparative studies that have been carried out by the AIB and Money Advice Scotland, show to varying degrees that the effect may be some consumers breaching trigger figures and being considered in a Scottish context, to be able to contribute to their debts, whereas before they wouldn't have been deemed to be able to.

This is important, as it may lead to some clients having to contribute, whereas before they wouldn't have been thought able to. It may also mean some clients that previously were able to use the Minimum Asset Procedure (MAP) for bankruptcy, will not be able to do so and will have to use Full Administration Bankruptcy (FAB), which may also mean having to pay the £200 application fee for FAB, instead of the £90 application for MAP. This may mean some consumers not being able to access appropriate remedies.

Equally, it may mean because of the transitional provisions, consumers who were told they had to pay a specific amount, will be deemed able to be pay more, once the regulations commence, despite there not being a material change in their circumstances.

For the Committee, however, the important question that needs to be answered is should the methodology and rules used to determine whether Scots can access

solutions be approved by the Parliament itself, or should it be approved by a body that is not accountable to Parliament or the Minister himself?

Is Scotland being used as a Guinea Pig?

The Money Advice Service are keen to promote that there has been a wide take up of the Standard Financial Statement across the UK, and there is no good reason for Scotland not to follow by adopting them as the Common Financial Tool.

In their submission to the Accountant in Bankruptcy's consultation on the Common Financial Tool, they submitted that there had been no significant problems and referenced the large numbers that had signed up to them.

The important point to make here is that signing up to the SFS does not mean you are using them, only that you want to access them. It is highly likely a significant number who have signed up to them are not using them. Second, two of the largest providers of debt solutions across the UK, Stepchange and Payplan, as far as I am aware, are not currently using them.

In fact, my understanding is that after initially trialling of the new figures, Payplan turned them off over a year ago, as they were producing results that were not expected.

My understanding is the reason provided for this was further training of staff was required. My understanding is this also occurred prior to the uprating of the SFS trigger figures in 2018 and the resumption of their use has not happened yet.

The danger is contrary to what the Money Advice Service states, with the adoption of the Standard Financial Statement across the UK not being the success it is being presented as, if Scotland adopts it and it produces unexpected results, it cannot just be turned off.

There is now a danger in my mind that Scotland will become the test ground for the UK in increasing uptake of the SFS, as with the passing of these regulations, use will become universal and compulsory across Scotland.

For all these reasons I would urge the Committee to reject the draft regulations and for the AIB to commit to looking at other models that could be use in Scotland.