

Stuart McMillan  
Convener  
Delegated Powers and Law Reform Committee  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

23 February 2024

Dear Stuart,

## **BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL: STAGE ONE REPORT**

Thank you for your Committee's scrutiny of this Bill. Please find attached a response which I have sent to the Economy and Fair Work Committee.

Your Committee highlighted concerns about one of the six proposals contained in the Bill which confers powers to make subordinate legislation on the Scottish Ministers, highlighting the need for careful parliamentary scrutiny of the regulations which would set out the detail of the proposed mental health moratorium. As set out in my response to the Economy and Fair Work Committee, I have made a commitment to share the draft regulations when they are available before Stage 3.

It may also provide further reassurance to you that, the Scottish Government intends to run a further full consultation on the draft regulations which, as well as providing a further opportunity for interested parties to provide feedback, will also provide the Committee time to scrutinise the regulations if they wish.

I hope this will help to address the concerns of Members and I look forward to exploring this with Members as the Bill progresses and when the draft regulations are brought forward to Parliament.

Yours sincerely

**TOM ARTHUR**

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T: 0300 244 4000  
E: scottish.ministers@gov.scot

Claire Baker  
Convener  
Economy and Fair Work Committee  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

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1 February 2024

Dear Claire

## **BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL: STAGE ONE REPORT**

Thank you for your Committee's detailed consideration of this Bill and for your Stage 1 Report. I welcome the conclusion that the Committee supports the general principles of the Bill and your recommendation that the Parliament agrees to these principles.

The proposals contained in this Bill stem primarily from a stakeholder-led review which looked at each of the statutory debt solutions and a review on diligence. We put stakeholder engagement at the heart of this work and that approach will continue as we look to develop the new mental health moratorium.

I appreciate many of the recommendations within the Committee's report relate to the mental health moratorium and I welcome the Committee's input to this. The work to develop the detail around this new scheme has taken time and I was pleased that we were able to reach a point where we could consult on proposals and were able to share these with the Committee, albeit later than we would have liked. As you know, the Bill contains only the enabling power with the details to come in Regulations.

The consultation on the mental health moratorium closed on 22 January 2024 and we have received 47 responses to date. We received three requests for an extension to that deadline which have been granted. We will not be able to fully analyse the responses to the consultation until we have received all responses, however, early indications are that there is broad support for many of the proposals that have been put forward. It is, however, also entirely appropriate to say that there are other areas where there is not strong support and we will need to look further at these. One particular area where there is less of a consensus is on the entry criteria which I know is also an area that the Committee was concerned about. We will continue to work with stakeholders to agree the best way forward here.

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You may also be interested to know that, as recommended by the Committee at my evidence session, the Scottish Government will be holding a lived experience session to hear first-hand from those who have experienced severe mental health issues and debt challenges. This event is scheduled to take place at the end of February 2024 and will be hosted by VOX Scotland, an organisation which represents its members' views to influence policy and services for those with mental health difficulties.

As I indicated when I gave evidence, I am happy to keep the Committee informed of progress and to share draft regulations when they are available, and certainly before Stage 3. I reiterate that commitment. I also welcome the Committee's willingness to help shape this new scheme.

I attach the Scottish Government's response to the points and recommendations made in the Report. Each of the conclusions and recommendations have been considered and are addressed in the response. For ease of reference, the numeration from the report has been used.

I hope that this response addresses the concerns of Members on certain elements of the Bill and I look forward to exploring the issues raised in your report during the Stage 1 debate on 6 February, and continuing to work with the Committee on this important Bill at Stage 2, should the Parliament endorse the general principles at Stage 1.

**TOM ARTHUR**

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## SCOTTISH GOVERNMENT RESPONSE TO STAGE 1 REPORT

This paper provides the Scottish Government's response to the specific points and recommendations made by the Economy and Fair Work Committee in their Stage 1 Report published on 23 January 2024.

For ease of reference, the Committee's points or recommendations are shown in bold and numbered in line with their report.

### **Moratorium on debt recovery action: debtors who have a mental illness**

#### **General Context**

**39. The Committee agrees with the principle of a Mental Health Moratorium but is concerned at the lack of detail on how it will operate in practice. More information on the Scottish Government's policy direction was provided in the consultation issued in November 2023, but this came too late to be discussed with witnesses.**

**40. It is imperative that sufficient time is made available for detailed Parliamentary scrutiny of how the moratorium will work in practice. The Committee calls on the Scottish Government to provide it with early sight of the draft regulations before the commencement of Stage 3, and prior to these being formally laid.**

The Scottish Government is keen to take the time necessary to shape this new mental health moratorium and to work with all interested parties to find a system that will work and offer the right support and protections to those who need it most. As you are aware the Scottish Government recently carried out a consultation seeking valuable feedback from interested parties. As mentioned in my covering letter, that consultation closed on 22 January 2024. The feedback received will be used to help us develop draft regulations. I am happy to commit to providing the Committee with these draft regulations as soon as practicable, but ahead of Stage 3.

The Scottish Government intends to run a further full consultation on the draft regulations which, as well as providing a further opportunity for interested parties to provide feedback, will also provide the Committee a period of three months to scrutinise the regulations if they wish. The Bill itself simply provides an enabling power and I am pleased to see the Committee is fully behind the proposal to introduce the mental health moratorium and welcome the Committee's willingness to play a full part in shaping the details behind this new moratorium.

#### **Criteria for entering a mental health moratorium**

**52. The Committee notes the proposals in the Scottish Government's consultation that only those receiving compulsory treatment should be eligible for the mental health moratorium. However, the Committee believes that the Scottish Government's position does not reflect the severity of the issues faced by those with serious mental health issues and debt problems. The Committee therefore urges the Scottish Government to widen the entry criteria, allowing more people to access the much needed support provided by the mental health moratorium.**

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**53. The Committee draws attention to three suggestions for alternative entry criteria. These were—**

- 1. Using the "Severely Mentally Impaired" criteria from Council Tax Legislation;**
- 2. Allowing Mental Health Professionals to certify a required level of impact from mental health problems using a form similar to the Debt and Mental Health Evidence Form currently in use in the money advice sector; and**
- 3. Using entry criteria similar to those set out under the Breathing Space Scheme in England and Wales - this covers people receiving "crisis treatment", encompassing those in compulsory treatment as well as those with conditions of comparable severity who are receiving crisis, emergency or acute treatment without compulsion.**

While the consultation officially closed on 22 January, some stakeholders have asked for more time to provide substantive replies and that means I am not yet in a position to set out a detailed analysis of the responses. The Scottish Government will do this as soon as possible. We will of course be considering this further on the back of that analysis, and will take the Committee's views and suggestions into account as we do so. The Scottish Government also noted that some witnesses to the Committee agreed with the suggestion within the consultation document that we should start small, make sure the scheme works properly and then consider expanding it once we have sufficient experience under our belts.

The protections that could potentially be offered to someone who is eligible for this scheme are quite significant and we therefore need to be cautious about the dangers of setting the eligibility criteria too wide. We need to avoid creditors taking a more restricted approach to lending to the very people we are trying to help. While we fully appreciate the role that debt plays on a person's mental health can be significant, we do not believe the mental health moratorium can be used to help everyone who has a mental health condition and debt challenges. For many the current standard moratorium will be sufficient.

**54. The Committee notes the lack of detail in the Bill and the Scottish Government's intention that the scheme will be fleshed out in regulations. The Committee calls on the Scottish Government to provide these in draft form, ahead of Stage 3, so that members have adequate time to consider the policy detail.**

The Scottish Government reiterates its commitment to provide the Committee with a copy of the draft regulations ahead of Stage 3.

**55. In addition, although it is recognised that the phrase "Severely Mentally Impaired" is currently used in Council Tax legislation, the Committee believes this is outdated and stigmatising and draws this to the attention of the Scottish Government.**

I indicated during my evidence session that this is an area that I have had correspondence on and that my officials responsible for Council Tax have explored. I am sympathetic to the argument that it is an outdated and stigmatising term that we would want to see changed and brought up to date. My position is that, we should be alert should an opportunity arise for us to amend that term in primary legislation. I am happy to see what we could do to address this and that commitment remains.

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## Length of mental health moratorium

**63. The Committee notes the concern of the Delegated Powers and Law Reform Committee that moratoria are meant to be temporary and that failure to specify the maximum duration of the moratorium on the face of the Bill represent a departure from previous statutory moratoria.**

**64. The Committee supports the proposed two-stage approach to the moratorium period with an open-ended first phase, allowing an individual to focus on recovery from a serious mental health condition, rather than exacerbating the problem with continuous debt worries. Given the varying nature of mental health conditions, the Committee believes it is appropriate for this period to last as long as needed. The follow-on phase would focus on dealing with a person's debt problems.**

The Scottish Government welcomes the Committee's support on this matter. We agree it is right to focus on the time that each individual needs, allowing them to focus on recovering from a serious mental health condition, before addressing their debt challenges.

**65. The Committee notes proposals in the mental health moratorium consultation that the follow-on period should last for six months and recommends the follow-on period should last at least this long.**

The Scottish Government welcomes the Committee's support on this.

**66. The Committee welcomes the Minister for Community Wealth and Public Finance's assurances that there are no immediate plans to reduce the standard moratorium from the current 6 month period.**

The Scottish Government welcomes the Committee's support on this.

## Protections within the mental health moratorium

**75. The Committee agrees with Citizens Advice Scotland that the Debt and Mental Health Evidence Form should be built into the mental health moratorium as a mechanism that may trigger other support that may be available to individuals in appropriate circumstances.**

The Scottish Government appreciates this feedback and I will reflect on it together with any other feedback received that has been received through the consultation.

**76. The Committee asks the Scottish Government to reconsider its position that moratorium protection should not extend to preventing eviction or to people who are jointly and severally liable for debts.**

We have sought further views on this point through the consultation and other stakeholder engagement. We will reflect on the responses to the consultation, the Committee's recommendation and other feedback from stakeholders before finalising the position with respect of evictions and joint and several liability.

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**77. The Committee notes the Scottish Government's commitment to liaise with the UK Government on the issue of pre-payment meters, and requests regular updates on the Scottish Government's discussions with the UK Government in this area.**

I am writing to the UK Government and will pass the response onto the Committee once it has been received.

### **Additional reforms to support the mental health moratorium**

**85. The Committee notes that the proposed moratorium may put additional pressures on the money advice sector. The Committee recognises the constraints on those already working in the sector. It urges the Scottish Government to consider the impact the proposals in the Bill may have on waiting times for those seeking advice and work with the sector to mitigate these.**

The Scottish Government works closely with the money advice sector and they have been involved in helping to shape proposals for the new mental health moratorium. We will continue to consider the potential impact on the sector as we seek to finalise the detail behind the scheme.

**86. The Committee reiterates its views that those participating in a mental health moratorium are likely to benefit from local service provision with an option for face to face meetings if this is the client's preference and welcomes the Scottish Government's commitment to advice via the channel of their choice for participants.**

The Scottish Government welcomes the Committee's support on this.

### **Awareness-raising and Resources**

**91. The Committee believes that clear guidance and training should be provided for mental health professionals and money advisers to allow them to effectively support people to access the mental health moratorium to those in need. Guidance should also be available to creditors to make their role and responsibilities clear.**

The Scottish Government agrees that clear guidance and training should be provided for mental health professionals and money advisers to enable them to deliver the mental health moratorium, and we will work closely with them to ensure the tools they need are available.

**92. The Committee agrees that lessons could be learned from the Breathing Space scheme in England and Wales and that this could be adapted for use in Scotland. However, it notes concerns that a lack of awareness among mental health professionals and potential users may be hampering uptake.**

The Scottish Government has been in close contact with those operating the Breathing Space in England and Wales and their experience has helped to inform the progress that has been made to date. We will continue to listen so that we can benefit from those lessons learned.

**93. The Committee recommends that the offer of a mental health moratorium should be automatically signposted to those who enter compulsory treatment, to raise awareness of the scheme, and support those experiencing debt. Processes to**

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**support this should be designed in conjunction with mental health professionals and money advisers.**

This is an area that the Scottish Government is keen to explore further with the mental health profession. We want to make sure there is an awareness of the mental health moratorium as well as a good understanding of who it can help and the benefits it can bring, so that it can be used where financial pressures are a contributory factor to an individual's poor mental health. However, we do not want to create any unnecessary bureaucracy given the pressures already in the system and we entirely agree that processes should be designed in conjunction with mental health professionals and money advisers.

### **Capacity of the debtor**

**98. The Committee is concerned that people in compulsory treatment who do not have the capacity to consent to a mental health moratorium or have a legally-recognised representative to do so for them, will not be able to access the scheme. The Committee urges the Scottish Government to develop and implement a process to allow everyone who is eligible for the mental health moratorium to access it**

We have sought further views on this point through the consultation and other stakeholder engagement. We will reflect on the responses to the consultation, the Committee's recommendation and other feedback from stakeholders before finalising the position with respect of capacity.

### **Mental Health Moratorium Public Register**

**102. The Committee seeks clarity from the Scottish Government on the proposal for a public register for the mental health moratorium. The Committee has difficulty in understanding how creating a public record of someone's significant mental health issues could be done without causing stigma. It therefore requests clarification from the Scottish Government on how long someone's information will be stored on the register; who will be able to view the data; and how the requirements of data protection legislation in relation to the processing of special category data would be met.**

The Scottish Government will explore this area further taking account of the feedback from the Committee, together with the feedback received through the consultation. We are mindful that as well as protecting the interests of the individuals entering a mental health moratorium that we also need to protect the legitimate interest of creditors. We are therefore looking for a process which will meet both of these objectives. We will set out our findings on this, and all the issues raised above, either before or at the same time as we consult on the draft regulations.

### **Modification of the Bankruptcy (Scotland) Act 2016**

**106. The Committee welcomes the minor and technical changes to the Bankruptcy (Scotland) Act 2016 as the changes are intended to clarify existing requirements, remove potential ambiguity, and correct errors in the 2016 Act**

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The Scottish Government welcomes the Committee's support in bringing these changes forward. They are small but were recommended by stakeholders, and the clarity will be welcomed by those using the legislation.

## **Additional changes to be considered**

### **Minimal Asset Process (MAP) Bankruptcy**

**112. The Committee agrees with the recommendation by the Social Justice and Social Security Committee in its Robbing Peter to pay Paul report, and calls on the Scottish Government to reconsider its position and reduce the period of time people must wait to reapply for MAP Bankruptcy and bring it into line with full administration bankruptcy.**

At my evidence session, I committed to discuss this with a wide range of stakeholders to seek their views about the potential impact of such a change. That process is underway and we will come back to the Committee when that process is complete.

This is an area that can be dealt with using secondary legislation and we would therefore not propose to address it in this Bill.

### **Discharge of Trustees**

**117. The Committee agrees with stakeholders that trustees should be discharged in certain circumstances where all reasonable steps had been taken to contact debtors who cannot be found or were uncooperative. It recommends that the Scottish Government outlines its plans to deal with this situation in its response to this report.**

The Scottish Government has considered this recommendation. We are working with stakeholders to establish the right circumstances where this would be appropriate as well as the best way to take this forward.

### **Statutory Interest**

**121. The Committee welcomes the Scottish Government's proposals to bring forward secondary legislation but notes this is not expected to cover the issue of statutory interest when there is a petition for recall. The Committee requests that the Scottish Government considers the Law Society of Scotland's suggestion to clarify the law, to provide that within the first 6 months of a sequestration, debts can be paid in full without interest being charged but thereafter interest would have to be paid for a petition for recall to be successful.**

The Scottish Government plans to bring forward regulations during February 2024 which will propose changes to the prescribed rate of interest (statutory interest) where an individual is able to repay all of their debt and has funds available to repay the interest.

With regards to interest when there is a petition for recall, this is something that the Scottish Government is happy to explore further. We will work with stakeholders to establish the best way to take this forward.

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## Bankruptcy Petition

**125. The Committee calls on the Scottish Government to consider increasing the number of days in which a bankruptcy petition must be served.**

The Scottish Government is happy to explore this further and is working with stakeholders to consider how best to address this.

## Diligence reforms

### Arrestee's duty of disclosure

**134. The Committee notes the concerns expressed by some stakeholders that the provisions at sections 6 and 7 of the Bill will have resource and cost implications and calls on the Scottish Government to give further consideration to the NatWest Group PLC recommendation that arrestees and potential arrestees should only be required to respond to specific creditor requests for further information.**

The Scottish Government is happy to reflect on this further. We note that other stakeholders in their evidence said that the benefits to creditors justified the additional costs that would be incurred if this proposal were to be accepted. We will of course consider both sides before coming to a final position, including the potential implications of NatWest Group PLC's recommendation.

### Diligence on the dependence

**138. The Committee notes the support from stakeholders for the reforms to diligence on the dependence and is content with these.**

The Scottish Government welcomes the Committee's support here.

## Exceptional Attachment

**141. The Committee notes the support from stakeholders for the provisions in relation to exceptional attachment and is content with these**

The Scottish Government welcomes the Committee's support here.

## Money Attachment

**147. The Committee agrees with the provisions on money attachment. It calls on the Scottish Government to consider the suggestion made in evidence that further reforms should be made to allow creditors to access electronic transactions.**

This is an area which the Scottish Government understands is very complex. The Diligence Working Group explored the possibility of being able to attach electronic banking transactions such as debt card and credit card transactions as this was considered a way to make this diligence more effective. During its investigations the group learned about the journey that an electronic transfer takes before it moves from one account to another and was unable to determine at which stage the electronic transaction would be attached. They became concerned about potentially high administration costs involved in identifying funds to

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attach, which would ultimately produce little or no return if accounts were overdrawn. As a result, the Scottish Government decided not to proceed with this potential change.

## **Debt Advice and Information Package (DAIP)**

**151. The Committee welcomes the news that the Scottish Government is in the process of updating the Debt Advice and Information Package, utilising the experience of those who have used the booklet in the past**

The Scottish Government welcomes the Committee's support here. We will continue to work with stakeholders to ensure the new version of the DAIP meets the needs of those who receive this.

## **Earnings arrestments**

**156. The Committee urges the Scottish Government to increase the amount protected from creditors in earnings arrestment and other forms of diligence against earnings. The Committee is of the view that increasing the protected minimum amount to £1,000 in line with that which applies to bank arrestments would appear to be reasonable.**

The Scottish Government agrees that individuals who are unable to pay their debts need the proper level of support, however, the Scottish Government believes the potential impact of such a change has to be considered carefully and we continue to look at how to balance creditor and debtor interests.

This type of change can be taken forward through secondary legislation, and we would therefore not propose to take this forward within this Bill.

## **Related reforms to be taken forward by regulations**

**166. The Committee notes the significance of some of the related reforms that are additional to the provisions in the Bill and which will be taken forward separately by regulations. It calls on the Scottish Government to consult with stakeholders and reflect fully on the impact of these reforms prior to their introduction.**

The Scottish Government is happy to continue to work with stakeholders and each of the proposals coming forward to the Committee in the coming months have already been subject to public consultation. Many of them were also proposals put forward by stakeholders during a stakeholder-led review process. I continue to meet regularly with stakeholders to discuss areas of key interest to them, as well as the details of changes that we propose to bring forward to the Committee for consideration.

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