BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Bankruptcy and Diligence (Scotland) Bill introduced in the Scottish Parliament on 27 April 2023.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 27-EN)
- a Financial Memorandum (SP Bill 27-FM)
- a Delegated Powers Memorandum (SP Bill 27-DPM)
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 27-LC)

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bankruptcy and Diligence (Scotland) Bill ("the Bill"). It does not form part of the Bill and has not been endorsed by the Parliament.

BACKGROUND

4. The Scottish Ministers committed to undertake a wide-ranging policy review of Scotland's statutory debt solutions, specifically moratorium protection, bankruptcy, Protected Trust Deeds (PTDs) and the Debt Arrangement Scheme. This commitment was made in September 2019 by Jamie Hepburn, the then Minister for Business, Fair Work and Skills. This was in response to a recommendation put forward by the Economy, Energy and Fair Work Committee following their scrutiny of the Debt Arrangement Scheme (Scotland) Regulations 2019 where they had taken evidence from a number of stakeholders. The same Committee conducted an inquiry into the operation of PTDs and re-emphasised the requirement to undertake an over-arching review of debt solutions when it published its findings on 21 May 2020.

5. The commencement of the policy work associated with the wider review was interrupted by the on-set of the Coronavirus pandemic.

6. The Minister for Business, Fair Work and Skills met with stakeholders in October 2020 where it was agreed that the review should consist of three stages:

- Stage 1 - immediate priorities to be taken forward to help address the immediate impact of the COVID-19 pandemic
- Stage 2 – a wider review looking at the operation of existing statutory debt solutions, aimed at providing recommendations and options for improvement
- Stage 3 – a longer term strategic review to assess if the current range of statutory solutions meets the needs of a modern economy

7. Stage 1 was led by the Accountant in Bankruptcy ("AiB") who worked with stakeholders to identify the priorities which resulted in the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021 coming into force in March 2021. These Regulations made some of the temporary measures introduced through emergency Coronavirus legislation permanent, including lowering the cost of access to bankruptcy where it has been identified as the right mechanism to resolve debt issues, and removing all fees for the most financially vulnerable.

8. Stage 2 involved the creation of dedicated stakeholder-led working groups to look at key areas of the current statutory debt solutions. The working groups drew on a wide range of expertise and knowledge from representatives of all sectors involved in the debt landscape. Each working group produced a paper outlining its considerations and recommendations. Some of the issues considered were complex in that there were strongly opposing views amongst stakeholders and it was not always possible to reach a consensus on the best way forward. Where that was the case, the information was presented to Ministers for their consideration. In August 2022, the Scottish Government published the consultation 'Scotland's Statutory Debt Solutions and Diligence: Policy Review Response', in response to the working groups' reports and recommendations. This outlined specific proposals for further action and sought further views.

9. A similar policy review of Scottish diligence measures was conducted through a stakeholder-led working group established to consider feedback received through an earlier public consultation in 2016. This working group consisted of stakeholders with a wide range of experience in diligence and the debt landscape.

10. The Scottish Government proposals in response to the working groups' recommendations were included in the public consultation published in August 2022.

11. This Bill largely brings together the areas requiring primary legislation from Stage 2 of the review of statutory debt solutions and the review of diligence. Other areas can be taken forward in secondary legislation or through guidance.

12. The format and timescale for Stage 3 of the review into statutory debt solutions has still to be finalised. This stage will be more strategic and is likely to take place over an extended period of time, as agreed by stakeholders. It is expected to include a critical assessment of existing mechanisms to establish if they are fit for purpose and meet the needs of a modern economy. It will not impact on this Bill. Stakeholders have indicated they wish this stage to be independent from government and have been considering a number of options. Stakeholders have asked for Stage 3 of the review to be put back, both in recognition of demands on their time in responding to the Bill itself and the wider cost crisis, and because they want to see what comes out of a similar process being undertaken in England and Wales.

POLICY OBJECTIVES OF THE BILL

13. The purpose of the Bill is to bring forward stakeholder-led recommendations to introduce improvements to current insolvency solutions. As well as making technical changes to bankruptcy legislation, its aim is to help and improve the lives of people who are struggling with problem debt and serious mental health issues.

14. It also brings forward stakeholder-led recommendations to improve existing debt recovery processes known as diligence and make them more efficient while maintaining protections for those who are subject to diligence. It looks to assist parties who are owed money to collect debts from those who can pay, whilst protecting those who are unable to pay.

15. The Bill will contain provisions that broadly fall into three categories:

- An enabling power which will provide the platform for future regulations to introduce a "mental health moratorium". The general purpose of a moratorium in the bankruptcy context is to provide a person who is experiencing debt issues (a debtor) some 'breathing space' by preventing a person to whom the debtor owes money (a creditor) from taking action to recover those debts for a specified period of time. There is currently one statutory moratorium on diligence available in Scots law, provided for in Part 15 of the Bankruptcy (Scotland) Act 2016 ("2016 Act"). The policy intention underpinning the present proposal is to create a new and bespoke form of moratorium protection which is to be available to a specific group of individuals being those who are experiencing serious difficulties with their mental health as well as having problem debt.
- Minor and technical amendments to bankruptcy legislation that would serve to provide clarity and improve the operation of bankruptcy processes as set out in the legislation.
- Diligence measures to modernise existing debt recovery mechanisms and allow for more streamlined and improved processes. Examples include changes to Exceptional Attachment where parties with debts will be given a longer period to pay the redemption figure to maintain the asset, in certain circumstances. In addition, introducing a requirement for information to be shared between parties on the outcome of certain diligences will help creditors to decide what further action, if any, they should take.

16. Other measures identified by stakeholders are not included in the Bill as they can be taken forward in secondary legislation or without the need for legislation. This work is under consideration.

SUMMARY OF MAIN PROVISIONS IN THE BILL

Mental health moratorium

17. The current moratorium on diligence available in Scotland is provided for in Part 15 of the 2016 Act. It applies where a person notifies AiB of their intention to enter into or apply for one of the existing statutory debt solutions (being bankruptcy, a PTD or a debt payment plan through the Debt Arrangement Scheme).

18. The general purpose of this moratorium is to provide a debtor who intends to apply for one of the existing debt solutions with breathing space by preventing a creditor from taking action to recover those debts for a specified period of time. During the period of the moratorium the debtor is able to take advice on their financial situation and consider the most appropriate debt solution for their circumstances. This moratorium currently runs for a period of 6 months from the day it begins[1]. At the conclusion of the moratorium period, the debtor will either have entered one of the formal statutory debt solution processes or, if they have not (because, for example, the notice of an intention to enter bankruptcy which commenced the moratorium was withdrawn) a creditor may once again take debt recovery action against the debtor.

19. The moratorium is not a payment holiday, and debtors are expected to continue to make payments towards any debts falling due while a moratorium is ongoing, although it is often the case that a debtor is unable to do so given their financial difficulties. Rather than relieve a debtor from any obligation to pay, the moratorium typically prevents creditors from taking particular forms of recovery action for a set period of time. The current moratorium may only be applied for once in each 12 month period, so that restrictions on creditors taking recovery action are not repeatedly extended.

20. The power in the Bill is intended to allow for the creation of a bespoke moratorium protection for a specific group of debtors, being those struggling with problem debt and serious mental health issues. The overarching policy intention would be to provide protections in addition to those provided through the existing moratorium, with a focus on providing the debtor with breathing space from creditor action in order to focus on treatment for, or recovery from, serious mental illness. Stakeholders and those with practical experience in both the money advice and mental health sectors consider that there is a strong link between problem debt and poor mental health, and that poor mental health can both cause, and be caused by, problem debt. The Royal College of Psychiatrists reports that one in two adults with debts has a mental health problem and one in four people with a mental health problem is also in debt.

21. Poor mental health can impact an individual's ability to manage their money; to make sound financial judgements and decisions; or to maintain employment and a regular income that can service debt. Experience in the money advice sector also shows that individuals with mental health problems often do not seek early help with debt issues, which may be attributed to a stigma surrounding mental health problems. This can lead to problems worsening before action is taken. It is also generally acknowledged that the threat of creditor action, or pressure from creditors, can exacerbate existing mental health issues.

22. There is no specific protection in Scottish bankruptcy law linked to poor mental health and there has been widespread support for a mental health moratorium to be developed. A similar scheme operates in England and Wales with protection available specifically to individuals with qualifying debts who are experiencing a mental health crisis[2]. The debtors in respect of whom the English and Welsh mental health crisis moratorium is available are, broadly speaking, individuals who have been detained for treatment or assessment under mental health legislation or who are

[1] This period was most recently confirmed in the Coronavirus (Recovery and Reform) (Scotland) Act 2022. Ministers committed to reviewing the length of the moratorium period when the cost crisis is over.
[2] The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020.

receiving acute crisis care or treatment in hospital or in the community. The scheme allows for protection against a creditor taking action against a debtor or contacting a debtor for the period of the debtor's mental health crisis treatment, plus an additional 30 days.

23. This provision in the Bill is to introduce an enabling power which would permit regulations to be made by the Scottish Ministers to introduce a similar form of moratorium protection in Scotland. Any regulations proposed by Scottish Ministers using this enabling power will be subject to affirmative procedure meaning that they will be subject to the highest level of SSI parliamentary scrutiny before approval. Further work will be taken forward within government and with stakeholders to develop the details of the scheme which will cover specific areas such as the criteria for entry to, and exit from, a moratorium; the specific protections afforded by a moratorium; and the duration of those protections. It is recognised that, to be successful, the scheme will require to be designed with the input of a variety of different professionals including those in the mental health and debt advice sectors, as well as groups or individuals with particular experiences. That work will be progressed in tandem with the Bill.

24. As a guide to expectations as to how many people might benefit from a mental health moratorium, some broad parameters can be suggested by looking at the equivalent scheme in England and Wales. In their pre-implementation impact assessment, they used an estimate provided by the Money and Mental Health Policy Institute that 22% of people with severe symptoms of common mental health disorders were also in problem debt. That suggested a maximum take-up of 27,500 in 2021-22. In the event, in 2022, there were 1,212 mental health crisis breathing space registrations in England and Wales. Using relative population sizes, that is equivalent to 112 in Scotland. This suggests it might be reasonable to plan on the basis of between 200 and 500 applications a year, though clearly this will depend very much on the detailed design of the scheme.

25. There is broad support for the implementation of these enabling powers among stakeholders. In the recent consultation, Scotland's Statutory debt solutions and diligence; policy review response, 84% of those who responded to the question answered in favour of introducing a specific mental health process as part of the statutory moratorium. This was also supported by the Social Justice and Social Security Committee in their recent inquiry into low income and problem debt. In their final report 'Robbing Peter to pay Paul: Low income and the debt trap', they urged the Scottish Government to implement a mental health element to the moratorium on diligence quickly.

Alternative approach

26. The alternative would be to make no provision for these enabling powers to create a specific moratorium for those in mental health crisis. The Scottish Government does not consider this to be an appropriate approach.

27. The aim of this provision is to help to improve the lives of people who are struggling with problem debt and serious mental illness. The link between mental health and debt has been highlighted from many sectors and the proposed mental health moratorium will represent a positive and progressive step towards helping alleviate those concerns.

28. The Scottish Government recognises the importance of providing more help and protection to those with serious mental health issues experiencing problem debt. This is especially relevant in the current cost crisis which may cause the issue to worsen in some cases. To not proceed with this proposal would be of detriment to the people of Scotland with serious mental health issues experiencing problem debt.

29. Another alternative may have been to replicate the mental health crisis breathing space that applies in England and Wales. While the English and Welsh scheme may provide useful learning for the development of the Scottish moratorium, the Scottish Government does not consider it would be appropriate to simply replicate the model that applies in England and Wales as there may be good reasons for taking a different approach in Scotland. The approach taken in the Bill therefore is to take an enabling power to allow the development of a Scottish-specific moratorium that is informed by the input of stakeholders in the areas of both mental health and debt in Scotland. The Bill accordingly leaves flexibility for a model that is appropriately tailored for Scotland to be developed, rather than simply replicating what has been done in other jurisdictions.

Minor or technical amendments to bankruptcy legislation

30. The following proposals on clarification of bankruptcy recall legislation, award of bankruptcy, gratuitous alienation and appeal time periods are minor or technical fixes that have been identified as necessary for the 2016 Act. These changes do not represent new Scottish Government policy.

31. These proposals were not part of the public consultation. The changes should be largely uncontroversial. They are intended to clarify existing requirements, remove potential ambiguity in the interpretation of processes, and correct errors in the 2016 Act.

Clarification of bankruptcy recall legislation

32. The bankruptcy process is administered by an appointed trustee. The trustee could be either a private insolvency practitioner or the AiB.

33. The functions of a trustee are set out in section 50 of the 2016 Act and include recovering, managing and realising the estate of the debtor and to distribute the estate among the debtor's creditors.

34. The 2016 Act provides that where the debtor has paid, or is able to pay, all of their debts in full, an application can be made to AiB for recall of bankruptcy[3]. The process for applying for a recall of an award of bankruptcy differs depending on who initiates the process and whether or not the trustee is the AiB. Essentially there are three possible scenarios:

- where the AiB is not the trustee[4]
- where the AiB is the trustee and another party makes the application
- where the AiB is the trustee and acts on its own accord

[3] Accountant in Bankruptcy - Recall of Bankruptcy guidance booklet

[4] The applicant in these cases would be any party who may already make an application under section 31(2) i.e. debtor, creditor, trustee or any other person having an interest

35. Issues of interpretation and ambiguity within these recall processes have come to light recently. It has been suggested that the current provisions are unclear on what the appropriate process is for AiB to follow in cases where AiB is the trustee and section 35(1)(b) does not apply. The intention was for all recall applications where the AiB is trustee to be considered under section 35 and this is how cases have been decided to date. The proposal for the Bill is to put this position beyond doubt and remove any scope for ambiguity in the current recall provisions.

36. Therefore, the amendments made by section 2 of the Bill seek to clarify the process for each of the three scenarios to make clear:

- where the AiB is not the trustee: sections 31 to 34 apply and the AiB makes its decision under section 34
- where the AiB is the trustee and another party makes the application for recall: sections 31 and 35 apply and the AiB makes its decision under section 35
- where the AiB is the trustee and initiates the process for recall: section 35 applies and the AiB makes its decision under that section

37. The three scenarios above are not intended to be treated in the same way because not all provisions are relevant depending on who the trustee is. For example, if AiB is the trustee the requirements of sections 32-34 are not relevant. But if it is a non-AiB trustee, they are. If AiB is initiating the process it isn't appropriate for AiB to make an application to themselves under section 31, so section 35 only applies to that scenario. To treat all scenarios in the same way would require a more substantive reform to recall procedure. As the provisions do work at present, although there is ambiguity, it was deemed important to refine the current provision and make the intention clearer rather than make any more substantive reform.

38. This proposal was not publicly consulted on but it is intended only to clarify existing processes in the 2016 Act and remove ambiguity in the operation of these sections. This is not expected to have any practical effect.

Alternative approach

39. The alternative is to leave the recall provisions in the 2016 Act as they are currently drafted. The Scottish Government does not consider this to be appropriate as there might remain ambiguity in the process in respect of whether recall should be decided under section 34 or section 35 in cases where AiB is trustee. This could result in time and expense being incurred to review recall decisions. It is important the legislation is clear on what process AiB will follow when making a decision.

Award of bankruptcy

40. Section 2 of the 2016 Act provides that an award of bankruptcy may be applied for by a debtor, a qualified creditor or creditors, or certain other parties. Prior to the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2007 Act"), all applications for bankruptcy were made by petition to the court. The 2007 Act made provision for an application for bankruptcy by a debtor to be made to AiB rather than by petition to the court.

41. A debtor can make this application under section 2(2) of the 2016 Act for the Minimal Asset Process (known as "MAP" bankruptcy) or under section 2(8) of the 2016 Act for a full administration bankruptcy. A MAP bankruptcy is open to individuals who have limited assets and are in receipt of certain prescribed payments or have insufficient income to make a contribution to their bankruptcy. It is a form of bankruptcy that is available to the most financially vulnerable.

42. Where a debtor application is made, section 22 of the 2016 Act provides that AiB must award bankruptcy where, amongst other criteria, section 2(8) applies to the debtor (which is the reference for full administration criteria[5]). However, there is no cross reference to section 2(2), the relevant provision for MAP bankruptcy. The Scottish Government believes this is an error. The Scottish Government position is that all MAP and full administration bankruptcies which meet the required criteria under the relevant subsection of section 2 of the 2016 Act should be awarded without delay. An amendment is therefore proposed to clarify this.

Alternative approach

43. The alternative would be to retain section 22 of the 2016 Act as currently drafted. The Scottish Government does not consider this to be appropriate given we have identified an error and therefore should take this opportunity to correct it. It is important that the legislation is clear and accessible for users and that it is clear under what circumstances AiB must award bankruptcy under section 22 of the 2016 Act.

Gratuitous alienations

44. Section 98 of the 2016 Act includes provisions relating to gratuitous alienations. A gratuitous alienation is the voluntary disposal of a debtor's asset by the debtor to another person for no value or less than full value (e.g. a debtor gifting a car to a friend to put it beyond the reach of creditors). This can be challenged and, on a successful challenge, the court must grant decree of reduction, or for such restoration of property to the debtor's estate, or such other redress, as may be appropriate. The policy intention behind section 98(7) of the 2016 Act is that, where a court does grant such a decree, the decree does not affect any right acquired by a third party where those parties undertook the transfer in good faith and for value through the transferee (for example, if the transferee has granted a lease of a property to a third party). However, section 98(7) refers to the wrong subsection. It should refer to section 98(5) which obliges the court to grant a decree, and not the exceptions which would prevent the court from granting such a decree (set out in section 98(6)). The Bill will correct this error so that section 98(7) now refers to subsection (5).

45. R3, the trade association which represents the UK's insolvency and restructuring professionals, are supportive of this change.

Alternative approach

46. The alternative is to retain section 98 as it is currently drafted. The Scottish Government does not consider this to be appropriate [as an error has been identified] and therefore the Scottish Government should take this opportunity to correct it.

[5] Details of full administration criteria – Accountant in Bankruptcy website

Appeal time periods

47. It has been identified that there are missing time periods within which appeals against decisions by AiB are to be made to the sheriff in sections 69 and 134 of the 2016 Act.

Section 69 of the 2016 Act (resignation or death of trustee)

48. Section 69 of the 2016 Act currently provides that where a trustee is seeking authority to resign from office or where the trustee has died, the newly appointed trustee may require the resigning trustee or the representatives for the trustee who has died to submit their accounts for audit to the commissioners, or where there are no commissioners, to AiB. The commissioners, or the AiB, as appropriate, may issue a determination fixing the amount of remuneration and outlays payable to the previous trustee or their representatives.

49. In this section, parties wishing to appeal the commissioners' determination on outlays and remuneration to AiB must do so within 14 days of the determination. Section 69(12) provides that a determination of AiB in any such appeal is appealable thereafter to the sheriff, but the legislation is silent on the time period, and therefore the provision may be open to interpretation and dubiety.

50. The Bill provided that this appeal to the sheriff, available under section 69(12), to be made within 14 days of any decision of AiB in an appeal under section 69(11)(a).

Section 134 of the 2016 Act (trustee's outlays and remuneration)

51. Provision is made in the 2016 Act for the taxation of accounts to allow for the audit and determination of the trustee's outlays and remuneration by the commissioners or the AiB for each accounting period.

52. Commissioners are elected by the creditors and their general functions are to supervise the intromissions of the trustee and advise the trustee.

53. Section 132 of the 2016 Act provides that within 2 weeks after the end of an accounting period, the trustee must submit to the commissioners, or, if there are none, to the AiB, the trustee's accounts of intromissions with the debtor's estate for audit, together with a scheme of division of the divisible funds and a claim for outlays and remuneration. As per section 132(6), this section and sections 133 to 135 do not apply where AiB is the trustee in the bankruptcy.

54. Section 133 of the 2016 Act provides that within 6 weeks after the end of an accounting period, the commissioners (or, as the case may be, AiB) may audit the accounts and must issue a determination fixing the amount of the outlays and the remuneration payable to the trustee in the bankruptcy. The trustee must make the audited accounts, scheme of division and the determination available for inspection by the debtor and the creditors.

55. Section 134(1)(a) of the 2016 Act currently provides that where there are commissioners involved in a bankruptcy, parties wishing to appeal the commissioners' determination may appeal to AiB and this must done within an 8 week period after the end of the relevant accounting period. Section 134(3) of the 2016 Act provides that a determination of AiB in any such appeal is

appealable thereafter to the sheriff, but the legislation is silent on the time period for this and therefore the provision may be open to interpretation and dubiety.

56. The Scottish Government therefore proposes to address this by inserting an amendment to make clear that the trustee, the debtor or any creditor may, within 14 days beginning with the date of any decision of AiB in an appeal under section 134(1)(a), appeal to the sheriff against that decision. The Bill also modifies section 134(4) to make it clear that the debtor may appeal under subsection (3) only if the debtor satisfies the sheriff that the debtor has a financial interest in the outcome of the appeal.

57. These amendments to sections 69 and 134 will clarify the time period for appeals and remove any current dubiety with interpretation. The time periods being inserted will provide consistency with other sections of the 2016 Act for similar onward rights of appeal against an AiB decision to the sheriff.

Alternative approach

58. The alternative would be to retain the current drafting in sections 69 and 134 of the 2016 Act. The Scottish Government does not consider this to be appropriate as it would leave the timescales for an appeal to the sheriff against AiB's determination on appeal of the commissioners' determination open to interpretation and inconsistent with other sections of the 2016 Act. It is important that parties are clearly informed of the time periods within which they have a right to appeal to the sheriff.

59. An alternative timescale was not considered as a 14 day period is consistent with the rest of the 2016 Act for similar onward rights of appeal and this is how the provision is intended to work.

60. The proposed changes are not considered to be controversial and would provide clarity to users of the legislation, in particular, debtors, creditors and insolvency practitioners acting as trustees in a bankruptcy, as it will inform them of the time period within which they are able to make an appeal of these particular decisions of AiB to the sheriff.

Diligence provisions

Arrestment and action of furthcoming

61. Arrestment is a diligence which allows a creditor to arrest or freeze funds or goods belonging to a debtor which are held by a third party ("arrestee"), often a bank. For example, where a debtor owes money and this is established by decree or document of debt[6], a creditor may serve a schedule of arrestment on the debtor's bank. The result of this would be that the bank cannot release the arrested funds to the debtor without reference to the creditor. Arrestment attaches the assets held by an arrestee; it does not transfer ownership of the assets to the creditor. In order to complete the diligence, it is necessary that the arrestment is followed either by automatic release under section 73J of the Debtors (Scotland) 1987 Act ("the 1987 Act"), where this section applies funds are released automatically after the expiry of 14 weeks, or by the creditor raising an action

[6] See the definitions for these terms in section 73A of the Debtors (Scotland) Act 1987.

of furthcoming. An action of furthcoming, if successful, grants judicial authority for the property to be released to the creditor. Alternatively, the debtor may sign a mandate authorising the arrestee to release the arrested items to the creditor. Currently, there is a duty on the arrestee to disclose to an arresting creditor the existence of and the nature and value of any property attached by an arrestment set out in section 73G of the 1987 Act. Where nothing is arrested, there is no requirement for the arrestee to provide a "nil" return. The proposal is to amend this, so that where the arrestment was unsuccessful (meaning that it did not arrest funds), the arrestee is required to confirm to the creditor the reasons why. For example, nothing may have attached because the sum held is less than the protected minimum balance (see section 73F of the 1987 Act), or the arrestee does not hold an account for the debtor. The new disclosure being required is to be submitted in the same way that existing disclosures are required to be made under section 73G. The prescribed form must be sent within 3 weeks of the date on which the schedule of arrestment is served on the arrestee. A copy of the disclosure must be sent to the debtor. There will however be no requirement to send a copy of the form to any other person under subsection (5)(b) in such cases since no property or funds will have attached so these provisions are not relevant. For example, if no property has attached there can be no person who owns the *attached* property in common with the debtor.

62. This information will help a creditor to decide what action to take next. Without this information, the party pursuing the diligence can only make assumptions about the debtor, for example, the debtor does not have a bank account with that bank, the funds held are under the protected minimum balance or there is no money in the account.

63. If banks provide this information, it would allow a creditor to make a more informed decision on whether to pursue further action. As an example, this would be helpful where a creditor knows that a debtor has previously banked at a specific bank but after 21 days does not receive a form from the arrestee. Currently, the creditor does not know why the arrestment did not capture funds and therefore whether to try another arrestment at a later date. It may be that the debtor has changed bank and that is the reason why it was unsuccessful. In these circumstances it would not be worth trying another arrestment.

64. It is important arrestees are encouraged to provide this information. An existing process is set out in section 73H of the 1987 Act in respect of arrestee failure to provide the information currently required to be disclosed under section 73G(2) of the 1987 Act. This process will apply to all failures of disclosure equally (i.e. any of the information required under section 73G(4) which, in other words, covers failure to respond in relation to both a "successful" and an "unsuccessful" arrestment). Under section 73H, where an arrestee fails, without a reasonable excuse to disclose the required information, the sheriff may on the application by the creditor, order the arrestee to pay the creditor the lesser of either the sum due by the debtor to the creditor or the amount which represents the minimum protected balance in bank accounts which are subject to an arrestment (currently £1,000). The Bill changes the amount payable to £500 and also inserts a power for the Scottish Ministers to amend the sum in the future through negative procedure regulations[7]. This is to align the financial penalty with that which will be payable for the equivalent

[7] As an example, currently if a debtor owes a creditor £800 then the amount a sheriff may order an arrestee to pay to the creditor under section 73H(1) would be £800 (which represents the sum due since this is lesser than the protected minimum balance – currently £1,000). Under the provisions of the Bill, with the same example of debt due, the amount a sheriff may order an arrestee to pay to the creditor under section 73H(1) would be £500 (which represents the fixed amount proposed to be set out in section 73H(1)(b) as this would be less than the sum owed).

process for diligence against earnings described below. Section 73H(3) provides that payment of the sum under subsection (1) will reduce the debt owed to the creditor by the same amount and the arrestee is not entitled to recover that sum from the debtor. The financial aspect of the order is considered necessary to achieve arrestee compliance. An arrestee aggrieved by an order under section 73H(1) may appeal in terms of section 73H(4) (see also section 109 of the Courts Reform (Scotland) Act 2014 which applies changes to the appeal procedure).

65. There is broad support for this proposal in the recent consultation, Scotland's Statutory debt solutions and diligence; policy review response, with 92.5% of those responding agreeing that there should be the requirement for banks (who are often the arrestees) to report where an arrestment is unsuccessful within 21 days. The remaining 7.5% of respondents neither agreed nor disagreed with the proposal.

Alternative approach

66. An alternative would be to not extend the type of information that arrestees are required to disclose to creditors under Part 3A of the 1987 Act. If this approach was taken, creditors would continue to only receive information where property or funds have attached. The Scottish Government does not consider this to be appropriate as it is important that creditors are furnished with appropriate information in the progression of the diligence they have pursued so they are able to ascertain what further action to take. Without this information the party pursuing the diligence can only make assumptions about the debtor, for example, that the debtor does not have a bank account with that bank, the funds held are under the protected minimum balance or there is no money in the account. If banks provide this information, it will allow a creditor to make a more informed decision on whether (and what) further action to pursue, which may reduce the likelihood of them incurring unnecessary additional costs.

67. The Scottish Government also gave consideration to the appropriate level for the fixed amount of financial penalty to be set at in section 73H(1)(b) – which the Bill sets at £500. Prior to amendments made by the Coronavirus (Recovery and Reform) Scotland Act 2022 the fine available for failure of the information to be provided under section 73F of the 1987 Act was the lesser of the debt owed or £566.51 (being the sum first mentioned in column 1 of Table B in Schedule 2 to the 1987 Act which was the sum representing the net monthly earnings from which no deduction would be made under an earnings arrestment were such an arrestment in effect). It was considered that as a figure around £500 has been in effect before for failure to provide information on a successful arrestment and, so far as it was known, not caused issues in practice the £500 figure is appropriate and a reasonable penalty. The figure of £500 is also similar to the level of fine payable in England and Wales for failure to provide information in relation to earnings arrestments. The Scottish Government considered it appropriate to set the financial penalty at a similar level for earnings arrestments in Scotland and to align arrestment and furthcoming with this. The enabling power included in this provision will allow this amount to be altered in the future if evidence suggests that is necessary.

Diligence against earnings – 21 day notification

68. Diligence against earnings are types of arrestments which allow a creditor to instruct a debtor's employer to make a deduction from the debtor's earnings. Statutory provisions on the

three types of diligence against earnings (earnings arrestment, current maintenance arrestment and conjoined arrestment[8]) are set out in Part 3 of the 1987 Act.

69. Changes to allow for a more informed flow of information amongst the parties operating a diligence against earnings were introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (amending Part 3 of the 1987 Act). The employer therefore is already under a duty to provide certain information set out at section 70A of the 1987 Act. It provides that where an employer receives a schedule or order in relation to an earnings arrestment, they must send, as soon as reasonably practicable, to the relevant party the following information: how the debtor is paid (whether weekly, monthly or otherwise); the date of the debtor's next pay-day; and the sum deducted on that pay-day and the net earnings from which it is so deducted. Provided the debt has not been extinguished, the information is to be sent again on the dates specified in section 70A(4).

70. The above information enables a creditor to gauge if an arrestment is going to be successful and arrest earnings, but they will have limited information in cases where it is not going to arrest earnings. The Bill makes provision for a new requirement for a person (usually an employer) who receives a schedule or order to notify the relevant party if an arrestment is unsuccessful within 21 days after the arrestment schedule or order is served. [Unsuccessful in this context means that because of the net earnings of the debtor, the sum to be deducted on any pay-day under Part 3 of the 1987 Act is, or is expected to be, nil (for example, because their earnings are too low, see sections 48, 53 and 61 and schedule 2 of the 1987 Act) or that the debtor is not employed by the person on whom the schedule or order has been served.] For example, if an employer receives an earnings arrestment schedule in respect of a debtor who is employed by them, but the debtor is paid monthly and their net earnings are not more than £655.83, the employer will now be required to disclose to the arresting creditor that the sum to be deducted is nil. This is because these earnings are below the minimum amount from which deductions can be made from monthly earnings for an earnings arrestment (see section 49 read with schedule 2 of the 1987 Act).[9] In such cases this disclosure would be a one-off obligation and so, following the disclosure to the creditor or sheriff clerk, the person would have no further obligation to provide information under section 70A.

71. Depending on the timing of the arrestment, the information currently required to be provided to the creditor under section 70A can take time and leave the creditor waiting to find out the outcome of the arrestment, and does not require information where the arrestment is unsuccessful to be disclosed. Extending the type of information to be provided to include information related to an unsuccessful arrestment will provide a creditor with additional information which will allow them to make a decision about what action to take next based on facts rather than assumptions. Employers will be required to provide this information on a prescribed form so that only the required information is shared between the parties.

72. It is important that employers are encouraged to provide the required information timeously to the relevant parties. Section 70B(A1) (as inserted by the Bill) will provide that if a person fails without a reasonable excuse to provide the required information, the sheriff may, on the application of any creditor, make an order requiring the person who received the schedule or order to send the information to the creditor, and to pay to the creditor the sum due to the creditor by the debtor or

[8] See the glossary for definition of terms

[9] The figures in the tables in schedule 2 of the 1987 were recently amended by the Diligence against Earnings (Variation) (Scotland) Regulations 2023.

the sum of £500 (whichever is the lesser). Section 70B(2) as amended provides that payment of the sum, including by virtue of new subsection (A1), will reduce the debt owed by the debtor to the creditor by the same amount and the employer is not entitled to recover that sum from the debtor. The financial aspect of the order is considered necessary to achieve compliance. A person aggrieved by an order may appeal in terms of section 70B(3) of the 1987 Act (see also section 109 of the Courts Reform (Scotland) Act 2014) which applies changes to the appeal procedure.

Alternative approach

73. An alternative would be to retain this area of Part 3 of the 1987 Act without modification. The effect of this would be that the creditor would continue to only receive the information currently required by section 70A. The Scottish Government does not consider this to be appropriate as it has been identified that there is gap in the current information received by creditors who are attempting to carry out an earnings arrestment. It is important that creditors are furnished with appropriate information in the progression of the diligence they have pursued so they are able to ascertain what further action to take.

74. The Scottish Government also gave consideration to the appropriate level for the fixed amount of financial penalty to be set at in section 70B (as amended by the Bill and set at £500). A fine at this level is similar to the fine that employers in England and Wales may be liable up to for failure to provide information in relation to earnings arrestment10. Setting the amount at £500 also aligns the financial penalties for both failure of an employer to provide information related to earnings arrestments and failure of an arrestee to provide information related to arrestment and furthcoming (set out above). The Bill includes an enabling power which will allow the Scottish Ministers to vary the sum.

Diligence on the dependence

75. Diligence on the dependence of an action is a provisional measure which may be taken against the property of a debtor during the progress of a court action to safeguard the creditor's claim. Diligence on the dependence can prevent a debtor disposing of funds, goods or property. Provision on this type of diligence is contained in part 1A of the 1987 Act.

76. There are two main types of diligence on the dependence: arrestment and inhibition. Arrestment "freezes" goods or money owned by the defender which are held by a third party, who is usually called the arrestee. Inhibition has the effect of prohibiting the defender from selling heritable property by making deeds granted by the debtor in breach of the inhibition reducible.

77. A creditor may apply to the court for warrant for diligence by arrestment or inhibition on the dependence of action. If granted, the effect of this would be that the debtor's property would be secured for the benefit of the creditor before judgement is obtained. The court, on receiving an application, may fix a date for a hearing on the application ("an ordinary case") or, if satisfied that certain circumstances apply, it may grant a warrant without a hearing ("an urgent case"). The latter of these results in a hearing post-warrant being fixed.

[10] See sections 7(2), 14(1)(b) and 15 of the Attachment of Earnings Act 1971 read with section 23(2)(b) of that Act.

78. The Diligence Working Group recommended that a debtor should be issued with a Debt Advice and Information Package (DAIP) during diligence on the dependence. This recognised the importance of debtors understanding how to access advice but also recognised the sensitive nature of this diligence which is used to protect an asset by preventing it from being sold or hidden.

79. A DAIP is a booklet which provides information about the importance of seeking early advice and provides contact details for organisations which can help the debtor find an advice provider in their local area. The booklet also contains information about common forms of enforcement, gives information about bankruptcy and trust deeds, and provides details of other sources of debt advice. A creditor is required by law to arrange to provide a DAIP prior to using most types of diligence.

80. The Bill makes provision for the creditor to provide the debtor with a DAIP (where the debtor is an individual) in advance of the relevant hearing stage and this will be a factor that the court must consider. In an ordinary case, the creditor will be required to have provided the debtor with a DAIP as a condition in the court making an order granting warrant for diligence. In an urgent case, where a hearing is fixed under section 15E(4)(a), the proposal is that where the court is satisfied that the creditor has not provided the debtor with a DAIP, the court must make an order recalling the warrant, and recalling any arrestment or inhibition executed in pursuance of the warrant.

81. In other words, regardless of whether a warrant is granted with or without a hearing, the creditor will be required to provide the debtor (if the debtor is an individual and not, for example, a company) with a DAIP in advance of the relevant hearing. If the creditor fails to do so then either, in the case of a hearing on the application, the warrant will not be granted, or in the case of a warrant granted without a hearing, the court will recall the warrant (and the arrestment or inhibition executed in pursuance of it).

82. There is a benefit to the debtor being issued with a DAIP prior to a relevant hearing. This is to encourage the debtor to seek help or advice about the debt. Whilst it is acknowledged that the debtor may have previously received a DAIP, this is not always the case and the Scottish Government is aware of the importance of debtors being encouraged to seek advice, and the DAIP is a good way to highlight where advice is available.

83. There is broad support for this proposal in the recent consultation, Scotland's Statutory debt solutions and diligence; policy review response, with 75% of those responding agreeing that the DAIP be issued when a diligence on the dependence application is submitted. Of the remaining 25% who do not agree to this proposal the main concern raised was that by notifying the debtor with a DAIP it may provide them with the opportunity to dispose of, or move, the asset.

Alternative approach

84. An alternative approach would be to retain this area of Part 1A of the 1987 Act as currently drafted. The Scottish Government does not consider this to be appropriate as it is important that those with unmanageable debt are furnished with the necessary information to be able to find advice when being pursued for debts owed. This would be consistent with other diligences that require the DAIP to be provided.

85. In considering the options for the precise timing at which the DAIP should be provided, the Scottish Government considered whether a creditor should be required to issue the DAIP to the debtor when an application for diligence on the dependence is made. However, in the case of an application for an urgent case, the circumstances that merit this include where there is a risk that enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of the likelihood of the debtor removing, disposing of or concealing their assets, were warrant for diligence on the dependence not granted in advance of such a hearing. The debtor is not given prior warning. It would therefore not be desirable for the DAIP to be given to the debtor pre-application, as that would defeat the purpose of seeking an application for a warrant without a hearing where the circumstances merit this. The need to allow flexibility for these urgent cases therefore prevented this option from being taken forward.

Exceptional attachment

86. Exceptional attachment is set out in Part 3 of the Debt Arrangement and Attachment (Scotland) Act 2002 ("the 2002 Act") and is a special procedure to be followed when attaching property kept in a dwellinghouse. It is necessary for an application to be made to the court in all cases where a creditor wishes to pursue attachment in a domestic dwellinghouse and the court must consider whether to grant an exceptional attachment order. Such an order allows the attachment, removal and ultimately the auction of non-essential assets belonging to the debtor and kept in a dwellinghouse[11]. Prior to granting an order, the sheriff needs to be satisfied that there are exceptional circumstances and must take matters into consideration including: the nature of the debt; whether the debtor resides in the dwellinghouse; whether they have received money advice; and whether there is, or has been, any agreement between the debtor and the creditor for the payment of the debt. Exceptional circumstances require the sheriff to be satisfied that the creditor has taken reasonable steps to negotiate a settlement, or used or tried to use other forms of diligence first, and that there would be assets available at least to satisfy the creditor's expenses plus the sum of £100, and that it would be reasonable in the circumstances to grant the exceptional attachment order.

87. When executing an exceptional attachment order, there is a provision which allows for the assets to be removed immediately or left in the dwellinghouse and removed at a later date, if the officer of court considers it impracticable to remove them immediately. An officer of court therefore has discretion over whether or not to remove an item immediately and, when this is impractical, may leave the item in the dwellinghouse and arrange for it to be removed at a later date. The Scottish Government understands that, in reaching a decision over whether or not to remove an item immediately, officers of court may consider the costs associated with storing assets, whether the item is easy to remove and store, and whether there is a prospect of the assets being destroyed or vandalised. Where an asset is left in the dwellinghouse, the officer must give at least 7 days' notice of the date when the assets will be removed.[12]

88. Attached articles may not be auctioned before 7 days have elapsed from the date of removal. During this 7 day period the debtor may apply to the sheriff for the return of an asset on the grounds that attachment was incompetent, that auction would be unduly harsh or that the articles are of sentimental value. A 7 day "redemption period" also runs from the date on which the asset is attached. During this period, the debtor may pay a sum to redeem the asset. The amount

[11] Non-essential assets are described in schedule 2 of the Debt Arrangement and Attachment (Scotland) Act 2002.
[12] See rule 19.2 of the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002

for which such an article may be redeemed is the value fixed under section 51 or 54(1) of the 2002 Act.

89. For articles removed immediately from the dwellinghouse once an attachment schedule has been completed, the minimum time period before they can be auctioned is 7 days. For articles left in the dwellinghouse and removed at a later date, the minimum period before auction is 14 days (allowing for 7 days' notice before removal, plus the 7 days 'no auction' period during which the debtor can apply to the sheriff for the return of the asset in certain circumstances). For articles left in the dwellinghouse and removed at a later date, currently, the debtor may only redeem the article within the first 7 days as this period runs from the date the article was attached.

90. The Diligence Working Group recommended that the current 7 day redemption period should be extended but were also mindful that any extension could impact on storage costs which can be added to the debt. In striking what they considered to be a fair balance, the recommendation was that the redemption period for assets that are attached and not immediately removed from the dwellinghouse (because it was impracticable to do so) should be extended from 7 days to 14 days. The working group recommended that the redemption period of 7 days would remain for assets which were removed immediately from the dwellinghouse.

91. This proposal is therefore to extend the redemption period for attached articles not immediately removed from the dwellinghouse from 7 to 14 days. This will bring the redemption period in these circumstances into line with the minimum period before they are auctioned. The policy reasons behind this change are to allow the debtor an additional 7 days to pay the redemption figure and retain the asset. The article cannot be auctioned for at least 14 days in any event so it is sensible to allow the debtor longer to redeem if they are able to. Given that the article cannot be auctioned within 14 days, this change will not result in any delays for creditors using this method of diligence. Where an asset is removed immediately from the dwellinghouse, the redemption period is to remain at 7 days to help limit the storage costs that would otherwise be added to the debt.

92. There is broad support for this proposal. In the recent consultation, Scotland's Statutory debt solutions and diligence; policy review response, 82.5% of those responding agreed to extend the redemption period from 7 to 14 days where assets are not removed from the dwellinghouse. Only 7.5% disagreed. None of these respondents provided a reason for specifically being against the increasing of this time period.

93. The Scottish Government proposes to set out in primary legislation the minimum notice period of 7 days for the removal of articles attached but not immediately removed. This notice period is currently set out in rule 19.2 of the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002. This is necessary to ensure the time periods work together as if the minimum notice period were to be reduced, a situation could arise where an article could be auctioned despite the debtor still being entitled to redeem the article.

Alternative approach

94. Retain this area of Part 3 of the 2002 Act as currently drafted. With this approach the time period for redemption of assets attached under an exceptional attachment period would remain at 7 days in all cases, notwithstanding that for items left in the dwellinghouse and removed at a later

date, the minimum period before they are auctioned is 14 days. The Scottish Government does not consider this to be appropriate following strong support from stakeholders to increase the redemption period for articles not immediately removed from the dwellinghouse.

95. The Scottish Government also considered whether the redemption period should be increased to 14 days for articles that are removed immediately from the dwellinghouse. For these cases, any increase to the redemption period would increase the minimum period of time before which these articles could be auctioned. This would lead to increased storage fees which can be added to the debt. The Scottish Government does not consider this to be appropriate as it could exacerbate the debtor's financial problems.

Money attachment

96. Money attachment is a special procedure contained in Part 8 of the 2007 Act and allows a creditor to attach money (cash including coins and banknotes in a foreign currency, postal orders, banking instruments etc.) which is owned by a debtor (but not kept in their home). Currently money attachment cannot take place on a Sunday, public holiday or before 8am or after 8pm (and cannot continue after 8pm if it is in progress) unless prior authority of the sheriff has been obtained.

97. In executing a money attachment, an officer of court has to make a judgement on the best time to carry out the attachment, which is generally the time at which there is a prospect of recovering the most money. This in practice would mean that an officer of court would not seek to carry out a money attachment when a business has just opened. Instead they are more likely to carry out the money attachment after the business has been open for a time but before banking. The current restrictions on when this diligence can be carried out can make it difficult to execute a money attachment in a pub or nightclub in particular, due to their later opening times, without obtaining the prior authority of the sheriff. This incurs an extra cost for the creditor.

98. The proposal is to provide some more flexibility for when a money attachment can take place. The Bill disapplies the current restrictions in section 176 of the 2007 Act in relation to premises in which a trade or business is carried on, any day and at any time the premises are open (whether to the public generally or not), for the purposes of the trade or business. This would mean, for example, that it would be competent for an officer to execute a money attachment at a nightclub at 1am on a Sunday and to do so without prior approval of the sheriff, providing the nightclub was in fact open at that time. The current restrictions are otherwise retained so, for example, a money attachment could not be executed at a shop at 10pm on a Sunday if the shop was not open at that time.

99. This will reduce the need for applications to the court to be made for authority for the attachment to be executed outwith the currently stated times where premises are open. This will reduce the burden on the courts and the costs for creditors.

100. There is broad support for this proposal. In the recent consultation, Scotland's Statutory debt solutions and diligence; policy review response, 75% of those responding agreed with removing restrictions on when money attachment can be executed. Only 5% disagreed, none of these respondents provided a reason for disagreeing.

Alternative approach

101. Retain this area of Part 8 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2007 Act") in its current form. The effect of this would be that for premises, for example licensed premises, that open outwith the stated times (8am to 8pm), officers of court would be required to seek authority of the sheriff to execute a money attachment. This restriction can result in additional costs being incurred and the Scottish Government does not consider this to be appropriate.

102. In considering options to achieve the intended policy outcomes, The Scottish Government considered whether to disapply the rules in section 176(1) and (2) entirely. The intention however was that for other types of premises and premises that are not open for business outwith the hours of 8am and 8pm (or on Sundays or public holidays), that money attachment should still generally not be carried out outwith those times. We therefore intend for other types of business to continue to benefit from the protections within these subsections.

CONSULTATION

103. In 2015, AiB sought initial feedback from messengers-at-arms and sheriff officers on the effectiveness of current diligence provisions. This helped shape a diligence review undertaken by AiB in 2016 and formed the basis for a wider public consultation on diligence measures which closed in November 2016.

104. As part of the diligence review, the Scottish Government brought together a number of stakeholders, in 2018, to form a diligence working group. The group members were from a wide range of stakeholders with representatives from the insolvency profession, sheriff officers, the legal profession, courts, the banking sector, creditors and the debt advice sector. Their remit was to review and identify ways to improve the diligence landscape in Scotland to ensure that debt recovery mechanisms were fair and effective for the 21st century. The group also considered feedback received from the 2016 public consultation.

105. In March 2021, the Diligence Working Group issued a report with their recommendations to improve diligence. These recommendations have formed the basis for the diligence provisions within this Bill.

106. 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 and committed to take forward a wide-ranging review of Scotland's statutory debt solutions. It was agreed with stakeholders that this should be a three stage process. The first and second stages have been completed with the final stage due to commence.

107. The first stage of the review was to consider changes which could be immediately implemented. This culminated in those changes being introduced through the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021.

108. The second stage of the review was undertaken by three stakeholder-led working groups formed from a wide body of sector specialists with expertise in debt advice and the operation of

statutory debt solutions. The members included money advice professionals, insolvency professionals, creditor bodies and academics. The working groups considered any improvements which could be made to the existing statutory debt solutions.

109. The groups also considered the recommendations made by the then Economy, Energy and Fair Work Committee who had conducted a short focused inquiry on PTDs in January 2020. A number of the recommendations made were addressed operationally through the PTD protocol which came into force on 1 October 2021. The working groups considered the remaining recommendations and agreed that the protocol should be allowed to operate for a reasonable period to gauge its effectiveness.

110. In March 2022, each working group issued a report of their recommendations. The Scottish Government considered those recommendations and subsequently, on 12 August 2022, published a consultation 'Scotland's statutory debt solutions and diligence: Policy Review Response' in response to the second stage of the review and the diligence review. The consultation closed on 7 October 2022.

111. At the close of the consultation a total of 46 responses were received, of which 13 were from individuals and 33 were from organisations. On 26 January 2023, the Scottish Government published a 'summary of responses'.

112. The Minister for Public Finance, Planning and Community Wealth hosts a regular cross sectoral working group involving key stakeholders. The main proposals in the Bill have been discussed and received a high level of support.

113. The following Impact Assessments are available on the Scottish Government website:

- Equality Impact Assessment Results Document
- Business and Regulatory Impact Assessment
- Fairer Scotland Duty Impact Assessment
- Island Communities Impact Assessment
- Child Rights and Wellbeing Screening Template

114. The Scottish Government wrote to the UK Information Commissioner's Office ("ICO") on 9 February 2023 in relation to proposed data processing under the Bill and received a response on 10 March 2023. The ICO confirmed that the Scottish Government had fulfilled its obligation under Article 36(4) of the GDPR and that no further consultation with the ICO would be necessary. A Data Protection Impact Assessment has been completed.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

115. Under an Equality Impact Assessment the potential impacts of each of the proposals in the Bill have been considered on each of the protected characteristics. The evaluation shows that there have been no negative impacts identified for any of the equality groups and the measures included have not been assessed as directly or indirectly discriminatory under the Equality Act 2010. Furthermore after consideration under a Fairer Scotland Duty Impact Assessment it has been assessed that all provision set out in the Bill will have no immediate or significant impact on socio-economic disadvantage. Equality Impact Assessment Results Document and Fairer Scotland Duty Impact Assessments have been published.

Human rights

116. The Scottish Government is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights (ECHR).

117. In particular, the government has considered the effect of the provisions of the Bill in relation to Article 1 Protocol 1 (A1P1), including the property rights of creditors. The provision in section 1 of the Bill introduces an enabling power for a moratorium on debt recovery action for individuals with mental illness and is likely to, when regulations are brought forward, engage creditors' property rights. A full assessment of any impact on those rights will be conducted at that stage but the government is satisfied that the enabling power is capable of being exercised in a manner that is compatible with the rights of creditors protected by A1P1.

118. The government has also considered the effect of the provisions of the Bill in relation to Article 8 of the ECHR (right to respect for private and family life, home and correspondence), particularly with regard to provisions which extend current duties on employers and arrestees to disclose particular information in the course of diligence. The Scottish Government is satisfied that insofar as there is any interference with a debtor's article 8 rights, this interference is adequately limited by the Bill provisions and is proportionate to the legitimate aim of improving the flow of information to creditors in the course of recovering debts owed to them which is in the interests of economic well-being and protection of creditors' rights.

Island communities

119. Under an Island Communities Impact Assessment Screening it was assessed that the provisions set out in the Bill are not likely to have an effect on island communities which is not significantly different from the effects they will have on other communities. The introduction of enabling powers for a mental health moratorium alone do not have an immediate effect on the island communities which is significantly different from the effect on other communities. The provisions being introduced to bankruptcy and diligence legislation will apply equally to all parties and will not differ between the island communities and the rest of Scotland. It has therefore been considered that a full Island Communities Impact assessment is not required. The Island Communities Impact Assessment Screening has been published.

Local government

120. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities and will affect local authorities in the same kind of way as they do any other creditor or money adviser.

121. The Bill creates an enabling power which will permit Scottish Ministers to introduce a mental health moratorium through regulations. The development of these regulations may result in a process that requires the involvement of a money adviser funded by local authorities and may increase their time and costs. However the exact impact will depend on the agreed system and this will be fully considered prior to the finalisation of these regulations.

122. Any financial impact on the business of local authorities has been captured in the Financial Memorandum.

Sustainable development

123. The Bill will have no negative impact on sustainable development. A Strategic Environmental Assessment pre-screening report has been completed. The Scottish Government consider that the provisions of the Bill are likely to have no or minimal. environmental effects

124. It is generally acknowledged that the threat of creditor action, or pressure from creditors, can exacerbate existing mental health issues. The Royal College of Psychiatrists report that one in two adults with debt has a mental health problem and one in four people with a mental health problem is also in debt showing the seriousness of the issue. The creation of the enabling power which will permit Scottish Minister to introduce a mental health moratorium will help work towards sustainable development and the goal of good mental health and wellbeing. It will help ensure specific mental health protections are put in place and are available to those with problem debt who are also experiencing serious mental health issues giving them time to focus on treatment and recovery and work to improve good mental health and wellbeing.

125. The Bill implements measures to modernise existing debt recovery mechanisms and allow for more streamlined and improved processes. The provision for Diligence on the Dependence will ensure that individuals with problem debt are furnished with full information contained in the DAIP on options and solutions available. The provisions on Diligence Against Earnings and Arrestment and Action of Furthcoming will provide creditors with information on failure of arrestment which may discourage them from future action where there are unlikely to be recoveries. The provision on Exceptional Attachment will give a further 7 days for a debtor to redeem assets. The provision on Money Attachment simplifies a procedure already in place. Ensuring diligence mechanisms and statutory debt solutions are designed and available to help people in severe financial difficulty and give them a fresh starts works towards sustainable development by ensuring we tackle poverty by sharing opportunities, wealth and power more equally.

CROWN CONSENT

126. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

GLOSSARY

A

B

Bankruptcy - A formal insolvency process where a trustee is appointed to realise and distribute the bankrupt's (debtor's) estate for the benefit of creditors.

C

Commissioners - A creditor or their representative elected by the statutory meeting of creditors to represent the general body of creditors and to supervise the permanent trustee on its behalf.

Conjoined arrestment - Diligence issued by and administered by the court where two or more debts owed to different creditors are deducted from the debtors earnings.

Current maintenance arrestment - Diligence used to enforce the payment of maintenance, such as a regular allowance awarded by a court on divorce, when the debtor is in default. A creditor must have a current maintenance order from the court on which the debtor has defaulted and, where the debtor is an individual, the creditor must also have provided them with a Debt Advice and Information Package.

Creditor - Any person, business or organisation which is owed money by another.

D

Debt Advice and Information Package (DAIP) - A booklet providing information for debtors to advise on options they have when a creditor is going to take action to recover a debt, what steps to take and where to get advice. A creditor is required by law to provide an individual with a Debt Advice Information Package prior to using most types of diligence.

Debt Arrangement Scheme (DAS) - A statutory debt management plan accessed through an approved money adviser. It may help debtors who have one or more debts and want to pay what they owe over an extended period of time, free from the threat of enforcement action by creditors through diligence or bankruptcy.

Debtor - Any person who owes money to another.

Decree - A formal order of court which says the debtor must pay money to a creditor. This might follow court action.

Dwellinghouse - A house which is the sole or main residence of the debtor.

Debt Respite Scheme (Breathing Space) - A UK Government scheme (for England and Wales) that provides individuals with problem debt with legal protection from creditor action. There are two types of breathing space:

Standard breathing space - similar to the moratorium in Scotland but with different protections and administrative processes.

Mental health crisis breathing space - available to someone who is receiving mental health crisis treatment. It has some stronger protections and lasts as long as the individuals mental health crisis treatment, plus 30 days.

Diligence - Various forms of legal process taken by creditors to enforce repayment of overdue debts.

E

Earnings arrestment - Diligence that can be taken by a creditor to secure the repayment of a debt through deductions from a debtors earnings for general debts and court fines.

Exceptional Attachment - Exceptional Attachment is a special procedure for the attachment of non-essential articles kept in a dwellinghouse. As the name suggests, this procedure can only be used in exceptional circumstances.

F

Full Administration Bankruptcy - A route into bankruptcy for an individual who has debts of more than £3,000 and doesn't meet the criteria for minimal asset process bankruptcy.

Furthcoming - An action of furthcoming is an application to the court to authorise the release of funds or goods to the creditor.

G

Gratuitous Alienation - A transfer of property by a debtor to another person for free or for less than it is worth. The permanent trustee can challenge any alienations which took place in the 5 years before the date of sequestration.

H

Heritable property - Property in the form of land, houses, and buildings, so called because it passed under the former law to the heir on the owner's death.

I

Inhibition - Inhibition allows your creditor to stop you selling, transferring, or re-mortgaging your house or land unless you pay your debt to them. It does not allow your creditor to sell your property

Insolvency Practitioner - A person licensed and authorised to act as a trustee in bankruptcies and also as a liquidator, administrator, or receiver of a limited company.

Intromissions - The assuming of the possession or management of someone else's property.

J

K

L

M

Messenger-at-arms - Messenger-at-arms is an officer of the Scottish Court of Session. They are responsible for serving documents and enforcing court orders throughout Scotland.

Minimal Asset Process (MAP) - A route into bankruptcy for individuals who have limited assets and are in receipt of certain prescribed payments or have insufficient income to make a contribution to their bankruptcy

Money adviser - Somebody trained to offer advice on debt.

Moratorium on diligence - A period of protection for an individual seeking a solution to problem debt during which creditors cannot take action to enforce a debt. This protection is available to individuals as well as certain entities. It cannot be granted more than once in any 12 month period.

N

O

P

Protected Trust Deed (PTD) - A voluntary formal debt solution entered by a debtor which transfers their estate to a trustee to be realised for the benefit of their creditors. A trust deed may be protected as long as a majority in number or a third in value of creditors do not object to its terms. Once protected, the terms of the trust deed become binding on all the creditors and prevents them from pursuing their debt or to make the debtor bankrupt.

PTD Protocol - A document voluntarily entered into by Insolvency Practitioners which promotes good practice and transparency in the PTD process. It sets out agreed non-statutory changes to the operational processes within PTDs.

Q

R

Recall of bankruptcy - A process to end the bankruptcy and restore as far as possible the debtor, or any persons affected by the bankruptcy to the position they would have been in if the bankruptcy had not been awarded.

S

T

Trustee - A person who administers a bankruptcy or trust deed. In bankruptcy a trustee can be either the Accountant in Bankruptcy or a private Insolvency Practitioner. In Trust Deeds the Trustee must be an Insolvency Practitioner.

U

V

W

X

Y

Z

This document relates to the Bankruptcy and Diligence (Scotland) Bill (SP Bill 27) as introduced in the Scottish Parliament on 27 April 2023

BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL

POLICY MEMORANDUM

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents