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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers provisions in the Bankruptcy and Diligence (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 6 and 20 June 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Bankruptcy and Diligence \(Scotland\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

Overview of the Bill

3. This Scottish Government Bill was introduced on 27 April 2023. The lead committee is the Economy and Fair Work Committee.
4. The Bill aims to strengthen and update the law relating to bankruptcy and diligence by implementing various stakeholder-led recommendations. The Bill pursues three policy aims: -
 1. to help people who are struggling with problem debt and serious mental health issues;
 2. to clarify and improve bankruptcy legislation; and
 3. to make debt recovery processes (known as “diligence”) more efficient, whilst maintaining protections for those who are unable to pay.
5. The Bill proposes to achieve this by: -
 1. providing Scottish Ministers with the power to establish a mental health moratorium on debt recovery action;
 2. making minor and technical modifications to the Bankruptcy (Scotland) Act 2016; and
 3. making minor and technical modifications to the law of diligence.
6. The Bill comprises thirteen sections which fall into four categories: the mental health moratorium, bankruptcy, diligence, and general provision. A brief outline of the Bill is contained in **Annex A**.

Delegated powers

7. The Bill confers six powers to make subordinate legislation on the Scottish Ministers.
8. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.
9. At its meeting on 6 June, the Committee indicated it was content with five of the powers, as follows: -
 - Section 6(3)(b): arrestment and action of furthcoming - power to vary sums
 - Section 7(2)(b) and (e): diligence against earnings - power to prescribe forms
 - Section 7(3)(e): diligence against earnings - power to vary sums
 - Section 11: ancillary provision
 - Section 12: commencement

10. However, the Committee agreed to write to the Scottish Government in relation to the following delegated power: -
 - Section 1(1): power to introduce a moratorium on debt recovery action: debtors who have a mental illness
11. The Accountant in Bankruptcy responded on behalf of the Scottish Government. The Committee's questions and the response received are set out at Annex B. The Committee's consideration of this, and the other delegated powers contained in the Bill, are set out below.

Review of relevant powers

Section 1(1): Moratorium on debt recovery action: debtors who have a mental illness

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

12. This section gives the Scottish Ministers a power by regulations to establish a moratorium on debt recovery action in relation to individuals who have a mental illness.

Committee Consideration

13. At its meeting on 6 June, the Committee observed that, whilst the supporting documentation to the Bill makes it clear that the moratorium is intended to be temporary, the Scottish Ministers are not obliged to set a time limit for the moratorium in any regulations which they may bring forward. The Committee further observed that this is not the first time a moratorium on diligence has been provided for in Scottish primary legislation. However, previously, each time a moratorium on diligence has been provided for, the maximum duration of the moratorium has been set out on the face of the primary legislation. That is not the case in the current Bill. Given that (i) the duration of the moratorium is central to its operation, and (ii) the duration of the existing moratorium on diligence has previously been specified on the face of primary legislation, the Committee asked the Scottish Government: -
 1. why the Scottish Government has not specified the length of the proposed mental health moratorium on the face of this Bill;
 2. in absence of such specification, what the Scottish Government's intentions are regarding the period for which the moratorium is to apply; and
 3. why the power to set a time period in regulations is discretionary rather than mandatory.
14. In its response, the Accountant in Bankruptcy (responding on behalf of the Scottish Government) explains that: -
 - any mental health moratorium brought forward under section 1 will be temporary,
 - however, given the purpose of the moratorium and the circumstances of those for which it is intended to offer protection, the Scottish Ministers' preferred policy approach is to not fix a standard expiry period on the face of the Bill and instead allow for a tailored approach which reflects an individual debtor's specific circumstances;
 - an expert working group is advising on the design of the moratorium, and it is

moving towards favouring a two-stage approach which would comprise an individually tailored period whilst a debtor is receiving treatment, followed by a fixed period to give the individual time to settle. This would reflect the approach in place in England and Wales where a “mental health breathing space” for debtors lasts as long as the person's mental health crisis treatment, plus 30 days (no matter how long the treatment lasts);

- the Minister responsible has committed to provide the working group's report to the Economy and Fair Work Committee as soon as it becomes available (anticipated to be around the end of summer recess); and to keep the Committee informed of developments

15. The Delegated Powers Memorandum (paragraph 12) sets out the Government's view that it is appropriate to take an enabling power to provide a platform for the development of the moratorium once the detailed design work which is currently being undertaken has completed. Furthermore, taking this power will also allow for future amendments or adjustments – for example to the entry criteria for the moratorium - to be made through secondary, rather than primary, legislation.
16. The Committee accepts that it is appropriate for the detail of the scheme to be set out in regulations. However, it is also the case that the moratorium scheme has the potential to interfere with a creditor's rights to a significant extent. The length of time during which a creditor will not be able to pursue debt recovery action will be central to any assessment regarding whether the correct balance has been struck between the rights of the creditor and those of a debtor. The details of the scheme will therefore merit close scrutiny. The Committee therefore wishes to highlight this provision to the lead committee.

17. **The Committee notes the reasons given by the Accountant in Bankruptcy in response to the Committee's letter. The Committee accepts the reason for the need for this delegated power in principle and that it will be subject to the affirmative procedure. However, given (i) the potential impact on the rights of creditors, (ii) the potential for this policy to make it harder for people with a history of mental health issues to access credit, (iii) the need to strike a fair balance between the rights of creditors and those of debtors, and further given that (iv) moratoria are meant to be temporary and that failure to specify the maximum duration of the moratorium on the face of the Bill represents a departure from previous statutory moratoria, the Committee considers that the details of the regulations merit careful parliamentary scrutiny. It therefore highlights this provision to the lead Committee.**

Section 6(3)(b): Arrestment and action of forthcoming

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

18. Section 6 amends the duty of disclosure by an arrestee (the legal person who holds assets on behalf of the debtor – this is often a bank or other financial institution). Section 6(2) introduces a requirement for an arrestee to disclose to an arresting creditor (i) that it did not arrest funds and (ii) to specify the reason for this.
19. Where an arrestee fails to make a disclosure, a sheriff may, on the application of the creditor, order the arrestee to pay the creditor the lesser of either: (i) the sum due by the debtor to the creditor or (ii) the amount which represents the “minimum protected balance” in bank accounts which are subject to an arrestment (currently £1,000). Section 6(3)(b) provides a new power for the Scottish Ministers to vary the sum of the “minimum protected balance” by regulations.

Committee consideration

20. Where an amount of money is set in primary legislation, it is common practice to take a power to vary that amount to take account of inflation. This “future proofs” the Bill as it avoids the need for further primary legislation each time an update is required.

- 21. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 7(2)(b) and (e): Diligence against earnings - Power to prescribe forms

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

22. Section 7(2)(b) and (e) give Scottish Ministers the power to prescribe the form that certain required information is to be provided in.

Committee consideration

23. The form and manner in which information is to be provided are administrative matters and the Committee considers it is appropriate that this level of detail is set out in regulations.

- 24. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 7(3)(e): Diligence against earnings - Power to vary sums

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

25. Where a person fails to notify the creditor of certain required information in the course of diligence against earnings, a sheriff may, on application by the creditor, make an order requiring that person to pay a sum to the creditor. The sum payable is the sum due to the creditor by the debtor, or the sum of £500, whichever is the lesser. Section 7(3)(e) gives Scottish Ministers power to vary the sum of £500.

Committee consideration

26. Where an amount of money is set in primary legislation, it is common practice to take a power to vary that amount to take account of inflation. This “future proofs” the Bill as it avoids the need for further primary legislation each time an update is required.

- 27. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 11: Ancillary Provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative (unless adding to, replacing, or omitting any part of the text of an Act, in which case affirmative)

28. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory, or savings provision as they consider appropriate for the purposes of, or in connection with the Bill, or for giving full effect to it. The regulations may make different provision for different purposes and modify any enactment.

Committee consideration

29. This is a standard ancillary power.

- 30. The Committee finds the power acceptable in principle and is content with the choice of procedure.**

Section 12: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

31. This is a standard commencement provision, which allows the Scottish Ministers to bring the Bill into force on such day as they appoint. In accordance with normal

practice, the commencement regulations will be laid before Parliament, but will not be subject to any further procedure.

Committee consideration

32. This is a standard commencement power.

33. The Committee finds the power acceptable in principle and is content that it will not be subject to any parliamentary procedure.

Annex A - Outline of the Bill

34. The Bill comprises thirteen sections which fall into four categories: the mental health moratorium, bankruptcy, diligence, and general provision.
35. Section 1 confers power on the Scottish Ministers to bring forward regulations to establish a mental health moratorium on debt recovery action for debtors who are experiencing serious mental illness.
36. Sections 2 to 5 make minor and technical changes to the Bankruptcy (Scotland) Act 2016 in relation to recall of an award of sequestration, award of bankruptcy, gratuitous alienations, and time periods for appeal.
37. Sections 6 to 10 make technical changes to the law of diligence in relation to arrestment and action of furthcoming, earnings arrestment, diligence on the dependence, exceptional attachment, and money attachment.
38. Section 6 amends the duty of disclosure by an arrestee (the legal person who holds assets on behalf the debtor – this is often a bank or other financial institution). Section 7 amends the duty of disclosure by an employer in the course of diligence against earnings.
39. Section 8 inserts a requirement for a creditor to provide a debtor with a debt advice and information package before the relevant hearing stage in diligence on the dependence. Diligence on the dependence is a provisional or protective measure which is used during the progress of a court action, or just before an action is raised. It gives the creditor security over the debtor's property for any sum which the court may find the creditor entitled to.
40. Section 9 amends the notice and redemption periods in exceptional attachment. Exceptional attachment allows a creditor to seize non-essential assets within a debtor's dwelling house.
41. Section 10 modifies the diligence of money attachment to extend the hours during which money attachment may be executed. Money attachment allows a creditor to seize cash, cheques, promissory notes, money orders and postal orders held in a debtor's premises. Money attachment tends to be used in places where cash changes hands, such as in shops, public houses, and places of entertainment.
42. Sections 11 to 13 contain the standard provisions that you would expect to see at the end of a Bill (ancillary, commencement, and short title).

Annex B - correspondence with the Scottish Government

Clerk to the Scottish Government, 7 June 2023

At its meeting on 6 June, the Delegated Powers and Law Reform Committee considered the delegated powers in the above Bill.

It agreed to write to you in relation to **Section 1(1): Moratorium on debt recovery action:**

debtors who have a mental illness.

The Committee noted that supporting documentation to the Bill makes it clear that the moratorium is intended to be temporary. The DPM explains that “in the debt context, a moratorium generally prohibits creditors from taking specific actions to recover monies owed by the debtor. The measure does not extinguish the debt, but simply defers the creditor’s ability to recover the monies owed.” It would therefore appear that the intention is that the debtor will still be obliged to pay down the debt and existing debt recovery actions will remain available to creditors after the moratorium period has expired. Nevertheless, the delegated power in section does not require the regulations to specify a time limit. Subsection (2) sets out the matters that regulations under this section may include provision about, including: “(d) the time period for which the moratorium is to apply”. However, Scottish Ministers are not obliged to set a time limit in any regulations which they may bring forward.

The Policy Memorandum explains that there is already one statutory moratorium on diligence available in Scots law, which is provided for in Part 15 of the Bankruptcy (Scotland) Act 2016. Part 15 introduced a six-week moratorium which protected debtors from their creditors while they took advice and considered what debt relief options might be available to them. Applications for the moratorium could only be made once in any 12-month period.

The Coronavirus (Scotland) Act 2020 made two significant changes to that moratorium: - it increased the time period from six weeks to six months and suspended the limitation on multiple applications during any 12-month period. Those provisions expired on 30 September 2021.

On 1 October 2022, the Coronavirus (Recovery and Reform) (Scotland) Act 2022 again increased the length of the moratorium against diligence created by Part 15 of the Bankruptcy (Scotland) Act 2016 from 6 weeks to 6 months. The Act also gave Scottish Ministers the power to vary the moratorium period through regulations. Ministers have committed to reviewing the length of the moratorium when the cost- of-living crisis is over.

Each time a moratorium on diligence has been provided for, the maximum duration of the moratorium has been set out on the face of the primary legislation. That is not the case in the current Bill. Given that (i) the duration of the moratorium is central to its operation, and (ii) the duration of the existing moratorium on diligence has previously been specified on the face of primary legislation, the Committee is asking Scottish Government:

1. why the Scottish Government has not specified the length of the proposed mental health moratorium on the face of this Bill;
2. in absence of such specification, what the Scottish Government's intentions are regarding the time period for which the moratorium is to apply; and
3. why the power to set a time period in regulations is discretionary rather than mandatory.

Response from the Accountant in Bankruptcy & Agency, on behalf of the Scottish Government, 14 June 2023

I refer to your letter of 7 June to Helen Webster, Head of Cabinet, Parliament and Governance Division within the Scottish Government, in which you drew attention to the comments of the Delegated Powers and Law Reform Committee in relation to the above

Bill and specifically Section 1 (1): Moratorium on debt recovery action: debtors who have a mental illness. I have been asked to reply, in my capacity as lead for officials' support for the Bill.

The Committee is correct to understand that it is intended that any mental health moratorium (MHM) resulting from this provision will be temporary. During a period of mental health crisis, it will temporarily prohibit creditors from taking specific actions to recover monies owed by the debtor. However, it will not extinguish the debt, which will ultimately remain the responsibility of the debtor.

The Committee is also correct that, notwithstanding the temporary nature of the proposed MHM:

- the Bill itself does not specify a maximum duration for the MHM;
- the delegated power in the Bill does not oblige Ministers through regulations to specify a time limit for the MHM, though it does provide them with the discretionary power to do so.

Against this background, I fully understand why the Committee has questions about the apparent lack of specification of the MHM's duration. Careful consideration has been, and continues to be, given to the issue of duration. Our current view, however, is that taking account of the essential purpose of the MHM and the particular circumstances of the client group for which it is to offer protection, a standard, one-size-fits-all approach might not be appropriate.

As stated in the Bill's Policy Memorandum [para 20], what is envisaged is "a bespoke moratorium protection" for a specific group of debtors, being those struggling with problem debt and serious mental health issues. Given the potential severity and complexity of the issues involved, and the associated uncertainties around prognosis and time required to focus on treatment for, or recovery from, any individual's serious mental illness, it was felt that using legislation to fix a standard expiry period for the protections, rather than allowing for a tailored approach reflecting a person's particular medical circumstances, could potentially be problematic.

With these considerations in mind - and taking account of the ongoing discussions in the expert Working Group which is advising us on the design of the MHM (and which seems to be moving towards favouring a two-stage approach, comprising an individually tailored period of treatment followed by a fixed period to give the individual time to settle and adjust, reflecting something of the approach already in place in England and Wales) - it was felt that it would not be right either to specify the length of the proposed MHM on the face of this Bill, or even necessarily to require a time period to be set in regulations, though that may prove to be appropriate, in due course.

As further stated in the Bill's Policy Memorandum [para 23], the Scottish Government's intention is that further work should be progressed in tandem with this Bill, in order to develop the details of the scheme. It is intended that Parliament will be kept in close touch with this work, which will cover a range of areas, including the duration of the protections afforded by the MHM. Indeed, the Minister has given a commitment that the report of the Working Group will be provided to the Economy and Fair Work Committee when it becomes available, which we anticipate being before the end of the summer recess. It is this report that will be the key driver for the regime that the Scottish Government eventually seeks to introduce although, of course, we will need to make our own assessments of its proposals and take account of any representations from other

stakeholders. The Minister has also said that he is happy to keep the Committee abreast of those assessments and representations. He has further committed that, in addition to providing the Committee with such background analysis, which is what will inform the approach to regulations, he will ask officials to strive to ensure that draft regulations can be made available to Parliament for stage 3, if not earlier.

Our ongoing work will continue to be taken forward with crucial input from a variety of different professionals including those in the mental health and debt advice sectors, as well as groups or individuals with particular experiences.

Equally, we are also conscious that any moratorium has a potential impact on the rights of creditors, and will be working to satisfy the requirement for the

MHM to be developed in such a way as to achieve a fair balance of rights between the creditor and the debtor. These considerations will form a key part of the policy development work on the MHM, including duration, which will be progressed alongside the Bill, and which will be informed by the forthcoming report of the expert Working Group.

