Law Society of Scotland

Bankruptcy and Diligence (Scotland) Bill

Stage 1 Briefing

February 2024

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Bankruptcy and Diligence (Scotland) Bill ("the Bill") was introduced on 27 April 2023[1]. We responded to the Economy and Fair Work Committee of the Scottish Parliament's call for views on the Bill in July 2023[2] and provided oral evidence as part of the Committee's Stage 1 consideration of the Bill on 13 September 2023. The Economy and Fair Work Committee's Stage 1 Report on the Bankruptcy and Diligence (Scotland) Bill ("the Stage 1 Report") was published on 23 January 2024.[3]

We welcome the opportunity to consider and provide comments on the Bill ahead of the Stage 1 debate scheduled for 6 February 2024.

General Comments

The Bill seeks to amend the law of diligence in Scotland (comprising of formal debt recovery processes) and to amend parts of the Bankruptcy (Scotland) Act 2016 as well as proposing to establish a mental health moratorium on debt recovery action.

We support the introduction of the Bill. We believe that legislation on certain matters is overdue, and that it is desirable to update the pre-existing bankruptcy and diligence legislation.

We note that the Bill forms part of a wider exercise to review and reform the law of statutory debt solutions and diligence, and we are currently at the end of Stage 2 of this process. The Bill deals with the areas requiring primary legislation from Stage 2 of the review and the intention is that other areas will be addressed by secondary legislation or through guidance. [4]

The Bill comprises of 13 sections.

1 Bankruptcy and Diligence (Scotland) Bill (parliament.scot)

2 23-07-21-bci-con-mhdc-calls-for-views-bankruptcy-and-diligence-s-bill.pdf (lawscot.org.uk)

3 Stage 1 Report on the Bankruptcy and Diligence (Scotland) Bill (parliament.scot)

4 Policy Memorandum (parliament.scot), at paras 4-12

We have commented on specific provisions of the Bill below.

We would also suggest that consideration be given to reform in the following areas:

- In our view, progress needs to be made on reforming adjudication for debt or replacing it with land attachment (and residual attachment) or an equivalent. While we understand the difficulties surrounding diligences over residential property, these issues are also delaying desirable reform for diligences over commercial property.
- Further, we also consider that Information Disclosure Orders (IDOs), under the Bankruptcy and Diligence etc. (Scotland) Act 2007[5] should be made available by regulations to improve transparency and to assist the recovery of debts. We acknowledge that IDOs do not need to be included within the Bill, given the existing primary legislation, however it would be beneficial to bring them into being as soon as possible and, if achievable, around the same time that the Bill's provisions enter into force.

Specific comments on the Bill

Section 1 – Mental health moratorium.

Section 1 concerns the moratorium on debt recovery actions – debtors who have a mental illness. Section 1(1) allows Scottish Ministers by regulations to make provision to establish a moratorium on debt recovery action by creditors against individuals who have a mental illness. Section 1(2) sets out the matters which may, amongst other things, be covered by Regulations. Section 1(4) provides that Regulations made under section 1 are subject to the affirmative procedure.

Much of the detail regarding how the proposed mental health moratorium will operate in practice is left to secondary legislation. Given the level of detail to be provided for in Regulations, we consider that the affirmative procedure is appropriate. We note the comments of the Delegated Powers and Law Reform Committee of the Scottish Parliament regarding section 1 in their Stage 1 Report on the delegated powers in the Bill.[6] We also note the lead Committee's call for Scottish Government to provide it with early sight of the draft regulations before the commencement of Stage 3, and prior to these being formally laid.[7] We would suggest that Regulations made under these provisions should also be subject to appropriate consultation with stakeholders.

In January 2024, we responded[8] to the Scottish Government consultation[9] on the proposed process for a Mental Health Moratorium ("the 2024 consultation"). In our response, as in our written evidence to the committee, we highlighted the need for the moratorium to strike a balance between protecting vulnerable

5 Bankruptcy and Diligence etc. (Scotland) Act 2007 (legislation.gov.uk)

6 Delegated powers provisions in the Bankruptcy and Diligence (Scotland) Bill at Stage 1 | Scottish Parliament, at para 17.

7 Stage 1 report, para 40.

8 lawscot.org.uk/media/375885/24-01-22-bci-mhdc-mental-health-moratorium-consultation.pdf

9 Mental Health Moratorium: consultation - gov.scot (www.gov.scot)

debtors and managing the impact on creditors. We also highlighted that people with a wider range of conditions, characteristics and disabilities could also benefit from the protections afforded by the proposed moratorium. In particular, we noted our concerns that the proposed initial mental health eligibility criteria will exclude any debtor who is receiving treatment on a voluntary basis. While we understand the desire for adopting a narrow approach (for now) with reference to particular legislative provisions, and the need to balance different interests, clarity is required on what the moratorium is seeking to achieve and why it ought to be limited only to those who meet the proposed mental health eligibility criteria. We note the recommendations of the lead Committee in the Stage 1 Report, and would welcome further clarification on the policy detail.[10]

We note that the Stage 1 Report asks the Scottish Government to reconsider its position that moratorium protection should not extend to preventing eviction or to people who are jointly and severally liable for debts. Whilst we are generally supportive of the proposed approach to qualifying debts set out in the 2024 consultation, we consider that further consideration should be given to diligence protections for joint and severally liable debtors, particularly in relation to housing whether tenanted or owned. We agree with the Mental Health Working Party recommendations 9 and 10.

We note the comments in the Stage 1 Report regarding additional pressures on the money advice sector[11] and the need for guidance and training for mental health professionals and money advisers. We also consider that additional resources are required and should be made available for professionals and debt advisors dealing with vulnerable clients who are suffering from mental health issues and that debt advisors are sufficiently trained in this, as currently required.

We note the concerns highlighted in the Stage 1 Report that people in compulsory treatment who do not have the capacity to consent to a mental health moratorium or have a legally recognised representative to do so for them, will not be able to access the scheme.[12] In our response to the 2024 consultation, we called for further clarity regarding this aspect of the proposal. The combined effect may mean that most people experiencing serious mental illness, including those most in need of protection, are excluded from the scope of the moratorium.

We also note the request for clarity in the Stage 1 Report regarding the proposals for a public register for the mental health moratorium.[13] In our response to the 2024 consultation, we highlighted that further consideration would be required in relation to any proposal to require registration as mental health issues are a matter deserving of privacy and can be a disability and therefore a protected characteristic under the Equality Act 2010.

10 Stage 1 report, paras 52- 55.

11 Stage 1 report, para 85.

12 Stage 1 report, para 98.

13 Stage 1 report, para 102.

Sections 2-5 - Modification of the Bankruptcy (Scotland) Act 2016

Section 2 concerns modification of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"), and amends Part 2 of the 2016 Act. Section 2(2) amends section 29 of the 2016 Act (petitions for recall of sequestration), section 2 3) amends section 31 of the 2016 Act (application to Accountant in Bankruptcy for recall of sequestration) and section 2(4) amends section 32 of the 2016 Act (application under section 31: further procedure).

Section 2(5) amends section 33 of the 2016 Act (determination where amount of outlays and remuneration not agreed), section 2(6) amends section 34 of the 2016 Act (recall of sequestration by Accountant in Bankruptcy) and section 2(7) amends section 35 of the 2016 Act (recall where Accountant in Bankruptcy trustee).

Section 3 (when sequestration is awarded: minimal asset process) amends section 22 of the 2016 Act (when sequestration is awarded).

Section 4 (gratuitous alienations: right acquired in good faith and for value) amends section 98 of the 2016 Act (gratuitous alienations).

Section 5 amends section 69 of the 2016 Act (resignation or death of trustee), and section 134 of the 2016 Act (appeal against determination as to outlays and remuneration payable to trustee).

We consider that other aspects of the 2016 Act could benefit from reform, such as the payment of statutory interest on the recall of sequestration. We note the decision in *The Advocate General for Scotland (for and on behalf of HMRC) v The Accountant in Bankruptcy*[14] and we would suggest that statutory interest should require to be paid if there is to be a recall of sequestration (by the Sheriff in terms of section 30 of the Act or by the Accountant in Bankruptcy in terms of section 31 of the Act) on the basis that the debtor has paid their debts in full. We consider this requirement could be limited to where such recall shall take effect on a date after a certain period from the date of the Award. It is suggested that an appropriate period would be six months. We think this change could be included in the Bill and we welcome the request in the Stage 1 Report that the Scottish Government further considers this suggestion.[15]

Sections 6-10- Diligence reforms

Section 6 (arrestment and action of furthcoming) amends Part 3A of the Debtors (Scotland) Act 1987.

Section 7 (diligence against earnings) amends Part 3 of the Debtors (Scotland) Act 1987.

Section 8 (Provision of debt advice and information package) amends Part 1A of the Debtors (Scotland) Act 1987

14 [2020] SAC (CIV) 5

15 Stage 1 Report, para 121.

Section 9 (Notice and redemption periods) amends Part 3 of the Debt Arrangement and Attachment (Scotland) Act 2002.

Section 10 (Money attachment when premises are open) amends section 176 of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

We are generally supportive of the diligence reform proposals. We note that their effects will be positive overall in enabling diligence to be undertaken successfully by creditors, albeit that certain parties may be negatively affected.

Regarding the arrestee's duty of disclosure (sections 6 and 7 of the Bill), we see merit in requiring arrestees to disclose that an arrestment has been unsuccessful, and we support the policy behind this. Arrestees already need to determine whether they hold relevant property when served with an arrestment.

However, the proposed disclosure requirement will increase costs for banks and other arrestees dealing with attempted arrestments.

Banks and others could seek to pass these costs on to consumers and businesses, and so, while we agree with the reform in a broad sense, we believe that the requirements of disclosure here should be as light touch and non-onerous as possible. Forms and paperwork should be as straightforward as possible and clear for the parties involved, and the possibility of an arrestee using a simple electronic communication to specify that no property has been arrested could be considered.

Whilst we support electronic format for communication, this must be accessible to all parties and persons with protected characteristics.

We are aware of other suggestions to give effect to a duty of disclosure where an arrestment is unsuccessful (e.g. as noted in the Economy and Fair Work Committee's Stage 1 Report). We are relatively agnostic as to which of these is the most suitable in the circumstances. However, some form of hybrid model might be considered. For example, there could be a requirement to respond to arrestments arising from individual warrants rather than bulk warrants, while for the latter category, there could be a requirement to respond within a reasonable time to specific requests. In any event, the requirements for specific requests should be as straightforward as possible for a creditor, to avoid them incurring unnecessary time and expense.

We note that the amount payable by an arrestee where they have failed to disclose relevant information is to be reduced to £500. We are uncertain what the justification is for this and why the link to the protected minimum amount has been removed, and we would welcome clarity on this matter.

In relation to the arrestment provisions, we would suggest that the Explanatory Notes should make clear that the applicable property is not just funds but also other corporeal and incorporeal moveable property in the hands of a third party. For the changes regarding diligence on the dependence, it should be made clearer that the date before which the debt advice and information package requires to be served is the date of the hearing (rather than e.g. the date when the diligence is executed).

We consider the proposed amendment for money attachments (section 10) is sensible.

Sections 11-13- Final provisions

These Sections of the Bill deal with ancillary provision, commencement and short tile.

We have no comments on these sections.

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