



Law Society
of Scotland

Bankruptcy and Diligence (Scotland) Bill

Call for views

July 2023



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.

We welcome the opportunity to consider and respond to the Economy and Fair Work Committee of the Scottish Parliament's call for views on the Bankruptcy and Diligence (Scotland) Bill¹.

We have the following comments to put forward for consideration.

Q1. Do you agree that the Scottish Government should take forward legislation in these areas?

Yes, we agree that the Scottish Government should take forward legislation in the relevant areas. Legislation on certain matters is overdue and it is desirable to update the pre-existing legislation. 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 other areas can be addressed by secondary legislation or through guidance.

Q2. What are the key issues that the Scottish Government should consider when developing a mental health moratorium?

There are currently a number of points of uncertainty regarding the proposed mental health moratorium.

We think that the system should not be too prescriptive for parties. A mental health issue can be a disability and therefore a protected characteristic under the Equality Act 2010. We consider that vulnerable debtors need to be protected, however a balance must be achieved, and third-party involvement/verification may be generally desirable.

We also consider that additional resources are required and should be made available for debt advisors dealing with vulnerable clients who are suffering from mental health issues and that debt advisors are

¹ [Bankruptcy and Diligence \(Scotland\) Bill - Scottish Parliament - Citizen Space](#)

sufficiently trained in this, as currently required. We also believe that the support the debtor receives from the money advisor is key.

Given that creditors and others are often unaware of the differences between Scots law and English law, and the fact there is an existing model in England and Wales, there may be desirability in a significant level of alignment of the mental health moratorium with the measures in the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020².

There is a lack of clarity regarding the mental health issues that will give rise to the moratorium. The equivalent in England is triggered where the debtor is receiving mental health crisis treatment. This is narrow in its scope, and it is unclear how closely the Scottish equivalent will follow this. While there is a need to consider the interests of the creditors as well as the debtor, it could be contended by some that the limitation of the moratorium provisions to people with “serious mental health problems” is unduly narrow.

From one perspective it could even be viewed as potentially discriminatory against people with equally significant impairments, such as (in terms of Scots statute law as it is at present) people with other forms of “mental disorder”, or in terms of UN CRPD³ people across the range of mental, intellectual, and sensory disabilities: indeed, what about people with serious physical disabilities?

It is reasonable to assert that people within such wider range of disabilities are particularly likely to end up in bankruptcy because of the failings of others, including in relation to provision of services and provision of support. It is therefore necessary to elaborate upon what the moratorium is seeking to achieve and why it ought to be limited only to those with serious mental health problems, and what is meant by this.

The reference to “serious mental health problems” creates difficulties of definition (e.g., how is “serious” to be defined?) and implies a medicalisation of issues which has been largely rejected in favour of a human rights-based approach. An approach that is limited to certain types of mental health issues needs to be adequately justified.

In addition, any provision should be “future-proofed” to encompass at least the underlying philosophy of the recommendations of the Scottish Mental Health Law Review⁴.

The requirement to give information should be a requirement to ensure (in each individual case) that the information is given in a form that the debtor can understand, with sufficient support to the debtor (as required by Article 12.3 of CRPD) to understand it, to challenge it effectively if it is incorrect, and to challenge it if bankruptcy has arisen from preceding failures to communicate effectively, to provide adequate support, or to ensure that all rights available to the debtor have been safeguarded and exercised.

² [The Debt Respite Scheme \(Breathing Space Moratorium and Mental Health Crisis Moratorium\) \(England and Wales\) Regulations 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

³ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>

⁴ See the Scottish Government’s recent response to the Scottish Mental Health Law Review: <https://www.gov.scot/publications/scottish-mental-health-law-review-response/>

It is also not obvious what the duration of the mental health moratorium would be. Is it to be for a fixed time period, irrespective of whether the debtor has recovered or not, or is it to be for a period of time connected to the duration of a mental illness or mental health crisis?

There are difficulties in relation to each approach and practical issues, such as difficulties in accessing money advisors and mental health advisors and other services. On a related note, we understand that some police forces in England, such as the Metropolitan Police, will no longer generally respond to call outs involving mental health incidents.

Q3. What are the practical implications of the proposed amendments to bankruptcy legislation?

Please see our comments at question 2 on the mental health moratorium. The clarifications set out in section 2, the reduction in the period before a further Minimal Asset Process application may be made in section 3, the correction of the internal reference in the 2016 Act by section 4 and the clarification of the timescales in section 5 are all to be welcomed.

Q4. Are there any other aspects of the Bankruptcy (Scotland) Act 2016 that you think could benefit from reform?

Yes, we consider that other aspects could benefit from reform, such as the payment of statutory interest on the recall of sequestration. Following the decision in *The Advocate General for Scotland (for and on behalf of HMRC) and The Accountant in Bankruptcy (upheld by the Sheriff Appeal Court)*⁵, we feel 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. However, 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. This is a change that could be made in the context of the present Bill.

There are also various other ways in which the Bankruptcy (Scotland) Act 2016 could be usefully reformed; however, these are more complicated and so would be more appropriate to consider as part of the next stage of the review of this area of law.

⁵ [2020] SAC (CIV) 8 - [2020-sacciv-005.pdf \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/2020-sacciv-005.pdf)

Q5. How will the diligence reform proposals in the Bill impact on creditors and people in debt?

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

Regarding the arrestee's duty of disclosure, we see merit in requiring arrestees to disclose that an arrestment has been unsuccessful. Yet it needs to be acknowledged that, even though arrestees already need to determine whether they hold relevant property, 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.

We think that the requirements of disclosure here should be as light touch and non-onerous as possible. Forms required 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, we noted that this must be accessible to all parties and persons with protected characteristics.

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. Clarity on this matter would therefore be welcomed.

In relation to the arrestment provisions, 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).

The proposed amendment for money attachments is sensible.

Q6. Are there other proposals for diligence reform that should be taken forward in this Bill?

There are various other ways in which diligence could be usefully reformed. However, we accept that this may not be realistic in the context of the current Bill.

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 2007⁶, 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.

Q7. Do you have any other comments on the Bill or this area of policy?

We note the desirability of further reform in this area and support the continuation of the review of statutory debt solutions and the review of diligence to Stage 3. We are keen for Stage 3 of the review to lead to more substantial reforms and endorse a joined-up approach to reform of statutory debt solutions and diligence.

For further information, please contact:

Gavin Davies
Policy Team
Law Society of Scotland
DD: 0131 370 1985
GavinDavies@lawscot.org.uk

⁶ <https://www.legislation.gov.uk/asp/2007/3/contents>