



Law Society
of Scotland

Consultation Response

Mental Health Moratorium Consultation

January 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.

We welcome the opportunity to consider and respond to the Scottish Government consultation: Mental Health Moratorium Consultation.¹ We have the following comments to put forward for consideration.

Consultation Questions

Question 1. Do you agree with the proposed initial mental health eligibility criteria?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

The proposed initial mental health eligibility criteria are set out at paragraph 4 of the consultation paper and provides that, in order to be eligible for a Mental Health Moratorium, an individual must be receiving treatment with an element of compulsion under specific legislative provisions.

We recognise that this approach will provide clarity around availability of the moratorium, which will assist debtors, creditors and their advisers in navigating the new provisions.

Whilst we consider that vulnerable debtors need to be protected, we would agree with the statement in the consultation document that there is a fine balance to be struck between protecting individuals and managing the impact on creditors. The proposed initial mental health eligibility criteria seek to strike this balance by limiting the scope of availability to only those with significant mental ill-health, and providing an element of third party verification (eg the existence of the treatment order or direction).

We also recognise that the proposed approach is broadly in line with the approach in England and Wales in the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2022. Given that creditors and others are often unaware of the differences

¹ <https://consult.gov.scot/accountant-in-bankruptcy/mental-health-moratorium-consultation/>

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 with the approach in England and Wales.

We note, however, that the proposed initial mental health eligibility criteria will exclude any debtor who is receiving treatment on a voluntary basis. Voluntary patients will also have a support team, and in our view it is equally likely that the individual's financial circumstances are either a contributory factor to their poor mental health or are hindering their recovery. Such patients may be equally unable to focus on dealing with their debts during treatment. In certain circumstances, there is a risk that limiting the availability of the moratorium along these lines could worsen the circumstances of a voluntary patient to the extent that compulsory treatment became necessary where it could have been avoided. A mental health issue can be a disability and therefore a protected characteristic under the Equality Act 2010, therefore aligning with the approach in England and Wales may be desirable in order to circumvent issues that may arise in this regard.

We also note that basing eligibility on treatment being received under specific legislative provisions implies a medicalisation of issues which has been largely rejected in other contexts in favour of a human rights-based approach. In addition, any provision should be "future-proofed" to encompass at least the underlying philosophy of the recommendations of the Scottish Mental Health Law Review. Provision of information and debt advice as for other statutory debt solutions should be a requirement. The information must be 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.

In our written evidence to the Economy and Fair Work Committee of the Scottish Parliament during stage 1 scrutiny of the Bill, we noted that people with a wider range of conditions, characteristics and disabilities could also benefit from the protections afforded by the proposed moratorium. People with other conditions, characteristics and disabilities may, for various reasons, find themselves equally unable to focus on dealing with their debts or be likely to end up in bankruptcy because of the failings of others, including in relation to provision of services and provision of support. 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.

Overall, the proposed mental health eligibility criteria should be based on a robust and conclusive evidence base, and we would welcome further clarification on the evidence base for this proposal. The above-noted points should also be taken into account in future considerations regarding the expansion of the mental health moratorium.

Question 1a. If you believe the proposed mental health criteria are too narrow,

please suggest an alternative that could be measured fairly and easily implemented.

Please comment in the box below:

We would suggest that availability of the moratorium should be based on assessment by a treating professional on need and potential benefit. We agree with the Working Party Recommendations 1-3 in relation to the criteria. The priority should be on effective, rather than easy, implementation of the policy intention.

Question 2. Do you agree that no minimum debt level should be set for the eligibility criteria?

Agree

Please add any further comments on this proposal in the box below:

We agree that no minimum debt level should be set for the eligibility criteria.

Question 3. Do you agree that there is no need to establish the individual's financial position at the application stage?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

Whilst we note the reasoning behind this approach as set out in the consultation paper, we would suggest that some element of inquiry by an Approved Debt Adviser into the individual's circumstances would be required to ascertain whether benefit would accrue from a moratorium, and what that benefit would be as is required for other statutory debt solutions. It is possible that for some people there would be no benefit in putting a moratorium in place, if the ultimate outcome will be the same. However, we recognise that there may be some difficulties in acquiring relevant information in the circumstances.

Question 4. Do you think the proposed role of the Mental Health Professional at the application stage is appropriate?

Don't know

Please add any further comments on this proposal in the box below:

In light of our comments at question 1, above, we would suggest that an open-ended list of those providing certification would be required as expertise would need to be relevant to the particular issues and circumstances for an individual. It is important that the system is not overly prescriptive.

Professionals involved in the application process would need appropriate training and guidance, and the proposals would need to be properly resourced. We support the Mental Health Working Group's Recommendation (3) in this regard.

Question 4a. Do you think the proposed role of the Mental Health Professional at the application stage is practical?

Don't know

Please add any further comments on this proposal in the box below:

See our comments at question 4, above.

Question 5. Do you think the proposed role of the debt adviser at the application stage is appropriate?

Don't know

Please add any further comments on this proposal in the box below:

See 4 above. We consider that additional resources are required and should be made available for debt advisers dealing with vulnerable clients who are suffering from mental health issues and that debt advisers are sufficiently trained in this, as referenced in Regulation 8 of the Debt Arrangement Scheme (Scotland) Regulations 2011. In our view, the support the debtor receives from the debt adviser is key and the suggested limited involvement of the debt adviser at the initial stages could be detrimental to the effective and streamlined objective.

Question 5a. Do you think the proposed role of the debt adviser at the application stage is practical?

Don't know

Please add any further comments on this proposal in the box below:

See our comments in response to question 5, above.

Question 6. Connecting the Mental Health Professional to the debt adviser - which option would you choose?

Neither option

Please explain the reason for your answer in the box below

We consider that some version of either of these options or a combination of both could be desirable. However the connection on the Mental Health Professional side could also be directly from another Health Professional/GP or Mental Health Officer. There may, however, be some difficulties for such parties accessing debt advisers if the AiB merely provides a list on its website. It would be necessary to raise awareness with all parties of the availability of the service which would need to be properly resourced to meet any additional demand. Partnership working and formal referral systems (not signposting) at a local level is essential to ensure the effectiveness of the Mental Health Moratorium process.

Question 7. Do you believe that specialist debt advice and support is required for frontline debt advisers for their involvement with the Mental Health Moratorium process?

Yes

Please explain the reason for your answer in the box below:

See our comments in response to question 5, above. Additional resources for training and additional support may be required to ensure frontline debt advisers are fully trained and supported to complete and submit applications for a Mental Health Moratorium. This training could be extended to include Health Professionals.

Question 8. Do you agree that a Mental Health Moratorium application should only be consented to by the individual, a power of attorney or guardianship?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

We would welcome further clarity regarding this aspect of the proposal. The very limited proposed mental health eligibility criteria will mean that the moratorium is only available to those whose inability to understand the potential benefit of mental health treatment, or who refuses to accept that there would be such benefit, has led to a requirement for compulsory rather than voluntary treatment. Whilst some people in this position may be able to validly consent to an application for a moratorium, we would anticipate that the number would be very small. The combined effect of these aspects of the proposal 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 would suggest that further consideration is required in respect of this aspect of the proposal.

We would agree that, where an individual has granted power of attorney containing relevant powers or where a court has appointed a guardian with relevant powers, the attorney or guardian should be able to consent to an application in respect of an individual who does not have capacity to consent to the application. Again, consideration should be given to the recommendations of the Scottish Mental Health Law Review and the need to future-proof in respect of reforms arising from these recommendations.

Question 8a. If you disagree, we would be grateful for your views on how a Mental Health Moratorium application is made available to those who do not have the capacity to consent.

Please comment in the box below:

We would suggest that a clearer, evidence-based concept of who the Moratorium is for and what benefit it would achieve is required in order to answer this question.

Question 9. Do you have any other comments on the proposed application process?

Please provide them in the box below:

See our comments in response to question 8a, above.

Question 10. Do you agree with the proposed period of protection?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

We note the proposal in the consultation document that the proposed period of protection should be the period for which the individual has a compulsory aspect to their mental health treatment, followed by a 'recovery period' of 6 months.

We note that the consultation paper highlights that some individuals will continue to receive compulsory treatment for long periods, potentially for the rest of their lives, and that this may place a burden on creditors.

It will be important that individuals are able to access debt advisers and other services promptly both before compulsory treatment and particularly during the recovery period. This will require all aspects of the system to be properly resourced.

Question 11. Do you agree with the proposed approach to the qualifying debts?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

While we are generally supportive of the proposed approach to qualifying debts, 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.

Question 12. Do you agree that interest and charges should not be added to the individual's debt during the full period of their Mental Health Moratorium, i.e. frozen?

Agree

Please add any further comments on this proposal in the box below:

We generally agree with this. The same principles and processes/procedures should be applied as for the Debt Arrangement Scheme.

Question 12a. We would be grateful for your views on the possible costs to creditors by the freezing of interest and charges on debts during the Mental Health Moratorium period.

Please provide comments in the box below:

See our response to Q12.

Question 13. We would be grateful for your views on the possible practicalities of limiting creditors from contacting the individual during the Mental Health

Moratorium period.

Please provide comments in the box below:

See our response to Q12.

Question 14. Do you agree with the proposed approach to the protections against diligence?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

In general terms, the Mental Health Moratorium should have the same effects as the standard moratorium as regards diligence. See also our response to Q12.

Question 15. Do you agree with the proposed position on creditor consequences for not adhering to a Mental Health Moratorium?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

We consider that the consequences should align with those in relation to the standard moratorium. See also our response to Q12.

Question 16. Do you agree with the proposed position on the creditor's right to challenge the granting of a Mental Health Moratorium?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

We note that the Scottish Government is proposing not to include a right to challenge the granting of a Mental Health Moratorium when the scheme is first established. As a matter of access to justice, parties should be able to challenge the granting of a Moratorium, in limited circumstances (e.g. relating to fraud), and a debtor should be able to challenge a decision not to grant a Moratorium, on the basis that the criteria are, in fact, met.

Should such a right to challenge be created in the future, it should be accompanied by a right of appeal available to anyone, including the person in question, claiming an interest. This would be consistent with equivalent processes in the relevant legal landscape.

Such appeal processes must be compliant with article 6 of the ECHR and drafted to ensure that they accommodate the needs of people with mental ill health. Advice and Assistance and Legal Aid funding should be made available for any process, to ensure access to justice. Should the individual not qualify for either, other avenues of support should be available.

Question 16a. Do you think creditors should be able to request the cancellation of an approved Mental Health Moratorium?

Don't know

Please explain the reason for your answer in the box below:

The precise meaning of this is not clear. Presumably requesting the cancellation of a Mental Health Moratorium is being distinguished from challenging the granting of such a Moratorium in the first place. It may be desirable for creditors to be able to cancel a Moratorium in very limited circumstances, e.g. where there is evidence of fraud. See also our response to Q16.

Question 16b. If you answered yes to question 16a, in what circumstances could the creditor request a cancellation?

Please provide your comments in the box below:

See answer to Q16a above.

Question 16c. Further to question 16b, we would be grateful for your views on how a cancellation process could work.

Please provide comments in the box below:

See answer to Q16a above.

Question 17. Do you agree with the proposed approach to the obligations on the individual?

Agree

Please add any further comments on this proposal in the box below:

We generally agree, except perhaps in cases of deliberate fraud or abuse, where penalties may be appropriate. However, we note that this would be unlikely in the case of a Mental Health Moratorium. See our responses to Q8 and Q18.

Question 18. Do you believe penalties should be applied to the individual for not following the rules of the Mental Health Moratorium?

Don't know

Please add any further comments in the box below:

We would welcome further clarity regarding this aspect. We consider that, where the mental health eligibility criteria has been met for a moratorium, which is only available to those whose inability to understand the potential benefit of mental health treatment, or who refuses to accept that there would be such benefit, has led to a requirement for compulsory rather than voluntary treatment. It is unlikely therefore that those who meet the criteria for a moratorium may have capacity to understand 'the rules' and therefore we do not consider that penalties should ordinarily apply. We would suggest that further consideration is required in respect of this aspect of the proposal.

Question 18a. If you answered yes, we would be grateful for your views on what kind of penalty would be appropriate.

Please comment in the box below:

N/A

Question 19. Do you agree there is insufficient justification to place restrictions on the individual's access to credit?

Agree

Disagree

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

We consider that thought be given to aligning with existing statutory debt solution rules.

Question 20. Do you believe other obligations should be placed on an individual in a Mental Health Moratorium?

Don't know

Please explain the reason for your response in the box below:

See our response to Q19.

Question 21. Which of the following options would you choose as the delivery mechanism for the Mental Health Moratorium?

Option 2 - Enrol the individual into a Debt Payment Programme under the Debt Arrangement Scheme with no payments due

Please provide the reason(s) for your response in the box below:

Option 2 may be the more effective/streamlined as all parties would appear to be familiar with its operation. Choosing Option 2 would also enable alignment of the Debt Arrangement Scheme / DPP rules should a 'no payments' DPP be introduced. However, the system will have to clearly acknowledge that the person is actually in a Mental Health Moratorium rather than a Debt Arrangement Scheme, to avoid potential confusion and practical problems.

Question 21a. If you selected neither option, we would be grateful for your views on a workable alternative which would meet the Mental Health Moratorium requirements.

Please provide comments and reasoning in the box below:

N/A

Question 22. Do you agree with the proposed position on how the Mental Health Moratorium will interact with a standard moratorium?

Neither agree nor disagree

Please add any further comments on this proposal in the box below:

We are generally supportive. However, information about a person entering the standard moratorium is publicly available on the Register of Insolvencies and further consideration would be required in respect of interaction with the Mental Health Moratorium 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. These are relevant points in relation to any proposal to require the registration of the granting of a Mental Health Moratorium.

Question 23. We would be grateful for your views on how best to promote the Mental Health Moratorium.

Please provide your views in the box below:

We consider that initially, the legal profession, Mental Health Officers/CPNs and the credit and debt advice sector could be brought together by the Minister/Government/AIB to be informed about the new 'product' and encourage further dialogue in their local areas. The inclusion of the members of both Statutory Debt Solutions/Mental Health working parties is essential to demonstrate stakeholder involvement.

Question 24. We would be grateful for any further comments you have about the Mental Health Moratorium which has not been raised in this consultation.

Please provide comments in the box below:

We have no further comments.

Question 24a. Would you be happy for officials to contact you to discuss your response if we want to explore your comments in more detail?

Yes

For further information, please contact:

Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk