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Bankruptcy and Diligence (Scotland) Bill - consideration prior to Stage 3

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The Bill would create the power to introduce a Mental Health Moratorium as well as make reforms to bankruptcy and debt enforcement laws.



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Contents

About this briefing	3
Terminology	4
About the Bill - key dates and documents	6
What the Bill would do	7
Consideration of the Bill at Stage 1	8
Consideration of the Bill at Stage 2	9
Effective scrutiny of Mental Health Moratorium regulations	9
The detailed operation of a Mental Health Moratorium	10
Amendments to the debt enforcement proposals in the Bill	12
Greater protection from enforcement action for debtors	13
Bibliography	15

About this briefing

This briefing looks at parliamentary consideration of the Bankruptcy and Diligence (Scotland) Bill prior to Stage 3.

The Bill would do three things:

- give Scottish Ministers the power to bring forward regulations creating a Mental Health Moratorium - a freeze on creditors taking action against debtors with significant mental health issues
- make minor and technical reforms to bankruptcy law
- make reforms to the law of "[diligence](#)" - formal options to recover money, with the authority of the courts, from debtors.

The Bill would implement all recommendations which require primary legislation from the [Diligence Working Group](#) and the second stage of the [Review of Statutory Debt Solutions](#).

The key issues going into Stage 3 are:

- **the detailed operation of the Mental Health Moratorium**, with [draft regulations being presented to the Economy and Fair Work Committee on 17 May 2024](#) ¹
- **whether additional reforms to diligence law are needed** to deal with the cost of living crisis.

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Terminology

The Bill deals with technical legal issues. Some of the terminology used is explained below.

Accountant in Bankruptcy - both the Scottish Government agency which supervises statutory debt solutions and the individual office holder who heads up that agency. Among other functions, the Accountant in Bankruptcy can take the role of trustee in a bankruptcy where no one else has been nominated to act. This happens in the majority of cases.

Arrestment - a type of formal debt enforcement in which assets belonging to a debtor in the hands of a third party can be seized by creditors. The most common types are arresting money in a bank account (a "bank arrestment") and wages in the hands of an employer (an "earnings arrestment").

Attachment - a type of formal debt enforcement in which assets belonging to a debtor and in their possession can be seized by creditors - for example, stock in a shop. Seized assets can be sold to raise money to pay the debt. There are additional requirements to be met before a creditor can seize items in a debtor's home via an "exceptional attachment order".

Bankruptcy - a statutory debt solution which includes debt write off for debts which cannot be paid during the duration of the bankruptcy. Debtors can apply for their own bankruptcy, and creditors can petition to make a debtor bankrupt.

Debt Advice and Information Package - a [leaflet about debt and debt enforcement](#) which must be given to individuals before creditors use most types of formal debt enforcement action against them.

Diligence - the legal term for formal, court-sanctioned, debt enforcement action.

Diligence against earnings - the catch-all term for diligence options against someone's earnings. It covers earnings arrestment (seizing wages in the hands of an employer), current maintenance arrestment (for maintenance debts) and conjoined arrestment (where there is more than one arrestment against earnings in place).

Diligence on the dependence - short for diligence on the dependence of the [court] action. It covers diligence used before a court action has concluded. Its purpose is to prevent one of the parties to the action from disposing of assets which may be needed to comply with an order made by the court.

Exceptional attachment - the diligence used to attach non-essential goods in a debtor's home. There are specific criteria in legislation which must be met before this diligence can be used. These require additional court hearings.

Inhibition - the diligence used to stop a debtor selling or re-mortgaging land or buildings they own until a debt is repaid. An inhibition lasts for five years but can be renewed.

Joint and several liability - where more than one person is liable for the repayment of a debt. A creditor is entitled to take action against any liable person for repayment of the whole sum. Householders are usually jointly and severally liable for council tax.

Mental Health Crisis Breathing Space - the scheme for protecting people in mental health crisis from creditor action in England and Wales.

Money attachment - the diligence used to attach money and physical equivalents in business premises.

Protected Trust Deed - a statutory debt solution administered by an insolvency practitioner (referred to as a "trustee"). It is similar to, but more flexible than, bankruptcy.

Recall of an award of sequestration - a process which, if successful, aims to restore the person affected to the position they would have been in if an award of sequestration (bankruptcy) had never been made. An individual can apply to the Accountant in Bankruptcy to recall an award of sequestration where they can pay their debts in full. They can apply to the sheriff courts in other circumstances.

Standard moratorium - a freeze on enforcement action available to anyone in debt in Scotland which stops creditors being able to take most types of formal enforcement action.

Statutory debt solutions - the three options available in legislation to deal with debts in Scotland - bankruptcy, a Protected Trust Deed or a Debt Payment Programme under the Debt Arrangement Scheme.

Summary warrant - an expedited court process which some public sector bodies can use to enforce debts. There is no court hearing. Instead, the creditor presents a list of names and certifies that the legislative requirements necessary to use the process have been met. It is extensively used in relation to Council Tax debts.

Trustee - the person who administers a bankruptcy or Protected Trust Deed. They act on behalf of creditors. In Protected Trust Deeds, the trustee will be an insolvency practitioner in private practice. In bankruptcy, it can be either the Accountant in Bankruptcy or an insolvency practitioner in private practice.

About the Bill - key dates and documents

The Bankruptcy and Diligence (Scotland) Bill is a Scottish Government bill and was introduced in the Scottish Parliament on 27 April 2023.

Documents relevant to the Bill and its parliamentary progress are available on the [Bankruptcy and Diligence \(Scotland\) Bill webpage](#). They include

- the Bankruptcy and Diligence (Scotland) Bill
- the Policy Memorandum
- the Explanatory Notes.

The [SPICe briefing on the Bill](#) ² provides detailed consideration of its provisions and policy context.

The Economy and Fair Work Committee has been the lead committee for Stage 1 and Stage 2 scrutiny.

What the Bill would do

The Bill would provide ministers with the power to introduce a Mental Health Moratorium for people with debt problems and serious mental health issues. It would also reform bankruptcy and debt enforcement law.

Mental Health Moratorium

The Bill would give Scottish Ministers the power to bring forward regulations to create a Mental Health Moratorium. This would prevent creditors taking certain steps to recover debts from someone with serious mental health issues.

However, no details about how a Mental Health Moratorium would operate appear on the face of the Bill. The new Minister for Public Finance, Ivan McKee MSP, [wrote to the Committee on 17 May 2024 to present draft Debt Recovery \(Mental Health Moratorium\) \(Scotland\) Regulations](#) ¹ These are discussed in the section entitled [The detailed operation of a Mental Health Moratorium](#).

Bankruptcy reforms

The Bill would make minor and technical reforms to bankruptcy law. The reforms in the Bill as introduced were not considered to be controversial and are not discussed further. The Bill was amended at Stage 2 to make additional reforms, at the request of stakeholders. These covered:

- when interest is payable on debts when an [award of sequestration \(bankruptcy\) is recalled](#) by the courts or the [Accountant in Bankruptcy](#)
- a process for passing administration of bankruptcy cases from an insolvency practitioner [trustee](#) to the Accountant in Bankruptcy when a debtor cannot be found or is unco-operative
- extending the time period when a bankruptcy petition can be served on a debtor by officers of the court. Service of this document constitutes formal notification of the date of the court hearing.

Debt enforcement reforms

The Bill as introduced would make a number of minor changes to diligence law:

- requiring individuals or bodies who were the subject of [arrestments](#) (primarily banks and employers) to give creditors more information when an arrestment was not successful
- requiring creditors who undertake [diligence on the dependence](#) to issue a [Debt Advice and Information Package](#)
- extending the time period debtors have to reclaim seized assets under an [Exceptional Attachment Order](#)
- extending the times when [money attachments](#) can be carried out on business premises.

Consideration of the Bill at Stage 1

The Economy and Fair Work Committee was the lead committee for Stage 1 scrutiny.

The Committee took evidence on the Bill over five meetings:

- [13 September 2023](#)³ - legal and insolvency practitioners
- [20 September 2023](#)⁴ - debt and mental health policy experts
- [27 September 2023](#)⁵ - court officers and local authorities
- [25 October 2023](#)⁶ - money advisers
- [29 November 2023](#)⁷ - Minister for Community Wealth and Public Finance.

The Committee published its [Stage 1 report](#)⁸ on 23 January 2024. The [Scottish Government responded to the recommendations](#)⁹ on 1 February 2023.

The Stage 1 debate took place on [6 February 2024](#)¹⁰.

A key theme of the Stage 1 debate was the lack of detail in the Bill about how a Mental Health Moratorium would work in practice

In his opening speech, the Minister for Community Wealth and Public Finance, Tom Arthur MSP, repeated a commitment to provide draft regulations in relation to the moratorium to the Economy and Fair Work Committee in advance of Stage 3. Nevertheless, a number of contributors raised concerns about the Scottish Parliament's ability to pass good laws if insufficient information was available to allow effective scrutiny at Stage 1.

Other issues of concern included:

- that the entry criteria for the Mental Health Moratorium would be too narrow, meaning only a very small number of people would benefit. Comparisons were made to the wider criteria used by the similar [Mental Health Crisis Breathing Space](#) initiative in England and Wales
- that there should be greater protections for those in a Mental Health Moratorium - for instance, in relation to creditor contact and eviction
- the need to consider resources for money advice and mental health support so that the moratorium could be effective in practice
- the impact of a proposed public register on those participating in the scheme.

Consideration of the Bill at Stage 2

The Economy and Fair Work Committee considered Stage 2 amendments to the Bill on [20 March 2024](#) ¹¹ .

This briefing does not cover all the amendments. Instead, it focusses on the main issues identified by the Committee in its Stage 1 Report and how they were dealt with at Stage 2. The main issues were:

- [how to ensure the Scottish Parliament had the opportunity to scrutinise detailed proposals for a Mental Health Moratorium](#)
- [issues about the detailed operation of the Mental Health Moratorium which should appear in regulations](#)
- [amendments to the debt enforcement proposals in the Bill](#)
- [greater protections from enforcement action for debtors.](#)

Effective scrutiny of Mental Health Moratorium regulations

One of the concerns at Stage 1 was how the Scottish Parliament could ensure that detailed proposals for a Mental Health Moratorium would be properly scrutinised. These would be brought forward by regulations after the Bill became law.

There was some criticism of this way of legislating. However, it was also argued that putting the practical details governing the operation of a Mental Health Moratorium in secondary legislation would create greater flexibility. This would allow proposals to be tested and adjusted more easily.

When he appeared before the Committee on [29 November 2023](#) ⁷ , the Minister for Community Wealth and Public Finance, Tom Arthur MSP, described this approach as (col 3):

“ being able to start small but then, through the opportunity of learning, further review and reflection, potentially expanding or amending the criteria.”

Stage 1 consideration

The Committee emphasised the importance of ensuring there was sufficient time for effective parliamentary scrutiny of how the Mental Health Moratorium would operate in practice. The [Stage 1 Report](#) ⁸ called for the Committee to be provided with draft regulations in advance of Stage 3 of the Bill, in line with a commitment from the Minister on this issue on [29 November 2023](#) ⁷ (col 2).

In the [Scottish Government's response to the Stage 1 report](#) ⁹ , the Minister stated:

“ I am happy to commit to providing the Committee with these draft regulations as soon as practicable, but ahead of Stage 3.”

Stage 2 amendments

Table 1: amendments on effective scrutiny of Mental Health Moratorium regulations

Purpose of amendment	Result
<p>Amendment 20, in the name of Daniel Johnson MSP, would require Scottish Ministers to consult debt advice agencies and other relevant stakeholders before making regulations.</p>	<p>Following a commitment from the Minister to work with members to ensure a process for parliamentary scrutiny of Mental Health Moratorium regulations (cols 10 and 11) ¹¹, amendment 20 was not moved.</p>
<p>Amendment 21, in the name of Daniel Johnson MSP, would require Scottish Ministers to lay draft regulations before the Scottish Parliament for at least 120 days and seek the view of a Scottish Parliament Committee before finalising them. Ministers would also be required to lay a statement outlining the views given and setting out any changes which have been made as a result.</p>	<p>Following the Minister's commitment described above, amendment 21 was not moved.</p> <p>Scottish Government Stage 3 amendments include a requirement to lay draft regulations before the Scottish Parliament for a period of at least 60 days before bringing forward the final version.</p>

After Stage 2

The new Minister for Public Finance, Ivan McKee MSP, [wrote to the Committee on 17 May 2024 to present the draft Debt Recovery \(Mental Health Moratorium\) \(Scotland\) Regulations](#) ¹. The draft regulations are discussed in more detail in the [Detailed operation of a Mental Health Moratorium section](#).

The detailed operation of a Mental Health Moratorium

No details about the practical operation of a Mental Health Moratorium appear on the face of the Bill. Instead, it would give Scottish Ministers a wide regulation-making power to create a Mental Health Moratorium. The lack of detail was a cause for concern for some stakeholders.

Some details of the likely policy direction emerged during Stage 1 scrutiny, in particular a [consultation on the development of the moratorium](#) ¹². However, there were no firm commitments from the Scottish Government in relation to their approach to particular issues.

Stage 1 consideration

The Committee made a number of recommendations about how a Mental Health Moratorium should operate in its [Stage 1 Report](#) ⁸. These included:

- **that the criteria for accessing a Mental Health Moratorium should be widened** beyond those receiving compulsory treatment under mental health or criminal justice legislation
- **that the moratorium should have two stages:** a first stage which would last as long as treatment for the serious mental health condition was continuing; and a second stage to focus on dealing with debt problems, lasting at least six months

- that the Scottish Government should consider greater protections for those in a Mental Health Moratorium in relation to evictions and joint and several liability
- that there should be a process for those who lack capacity, or a legally recognised representative to act for them, to access the scheme
- that further clarity should be provided around how a public register of those entering a Mental Health Moratorium could operate without creating stigma for those using the scheme.

Stage 2 amendments

Several Stage 2 amendments sought to constrain the wide regulation-making power contained in the Bill to create a Mental Health Moratorium. The purpose was to require specific issues to be addressed in regulations.

Table 2: amendments on the detailed operation of the Mental Health Moratorium

Purpose of amendment	Result
Amendment 18 (and 18A), in the name of Paul O’Kane MSP, would require a Mental Health Moratorium to mirror in some respects the Mental Health Crisis Breathing Space initiative in England and Wales. In particular, it would be open to those in crisis treatment (in hospital or in the community) and have a two stage process. Unlike Breathing Space in England, the second phase would last for up to 180 days.	Amendment 18A (which amended amendment 18 to create a 180 day period for the second phase of the moratorium) was agreed to without division. Following a commitment from the Minister to work with members to ensure a process for parliamentary scrutiny of Mental Health Moratorium regulations (cols 10 and 11) ¹¹ , amendment 18 was withdrawn.
Amendment 16 , in the name of Colin Smyth MSP, would require the regulations to contain sanctions against creditors who fail to respect the requirements of a Mental Health Moratorium.	Following the Minister’s commitment above, amendment 16 was not moved.
Amendment 17 , in the name of Colin Smyth, would prohibit there being a public record of details of individuals participating in a Mental Health Moratorium.	Following the Minister’s commitment above, amendment 17 was not moved.

After Stage 2

The new Minister for Public Finance, Ivan McKee MSP, [wrote to the Economy and Fair Work Committee on 17 May 2024 to present the draft Debt Recovery \(Mental Health Moratorium\) \(Scotland\) Regulations](#) ¹. At the meeting on 29 May 2024, [Committee members decided to write to the Scottish Government](#) ¹³ to highlight their concerns in relation to the draft regulations.

In summary, the draft regulations would do the following things:

- establish a Mental Health Moratorium which can be accessed by someone who is in compulsory treatment or is voluntarily receiving "equivalent crisis, emergency or acute care or treatment". Debt problems must also be contributing to the person's mental health condition and they must be unable to deal with their debts as a result of their mental health condition
- establish that a Mental Health Moratorium lasts for as long as someone is receiving relevant treatment, plus an additional six months

- create a Mental Health Moratorium register which can only be accessed by the individual affected, supporting professionals and the individual's creditors (in relation to their specific debts)
- prevent a creditor contacting the debtor in relation to repayment or enforcement of the debt; charging interest or fees in relation to the debt; or commencing or executing most [diligence](#) in relation to the debt. Note though that it would not stop [diligence against earnings](#) already in place, or eviction. The position in relation to [joint and several liability](#) is unclear. In addition, debts which were built up after a moratorium was put in place would not be covered (for example, additional arrears in relation to rent or council tax)
- make any actions by creditors which breach restrictions on contact, freezing balances or pursuing enforcement void, as well as making creditors liable for any losses to the individual
- require that someone cannot enter a [standard moratorium](#) within six months of being in a Mental Health Moratorium.

The regulations will be subject to public consultation in advance of being laid in their final form before the Scottish Parliament. The contents may therefore change.

Amendments to the debt enforcement proposals in the Bill

The Bill contains fairly minor reforms to court-sanctioned debt enforcement (called "[diligence](#)") recommended by the Diligence Working Group. Several Stage 2 amendments sought to improve these processes.

The proposals contained in the Bill are discussed in the [What the Bill would do section](#).

Stage 1 consideration

The Bill would place a requirement on arrestees (the person or body holding assets belonging to the debtor) to give creditors more information when an [arrestment](#) is not successful. The Committee's [Stage 1 Report](#)⁸ highlighted concerns from stakeholders about potential costs to organisations, such as banks. It recommended further consideration of proposals to reduce those costs - for example, by only responding when a creditor specifically asked for information.

Amendments at Stage 2

Table 3: amendments to the debt enforcement proposals in the Bill

Purpose of amendment	Result
Scottish Government amendment 13 , in the name of Tom Arthur MSP, would enable electronic delivery of documents relating to arrestments where the arrestee has indicated agreement to this.	Amendment 13 was agreed to.
Scottish Government amendment 14 , in the name of Tom Arthur MSP, would enable electronic delivery of documents as above in relation to earnings arrestments and current maintenance arrestments .	The Minister acknowledged concerns that amendment 14 removed current restrictions on personal service, which could result in increased costs to debtors. He promised to remedy this issue at Stage 3 (col 39) ¹¹ . Amendment 14 was agreed to.
Amendment 4 , in the name of Murdo Fraser MSP, would limit the requirement for arrestees to tell creditors why an arrestment had not been successful to situations not involving summary warrant, and where the creditor specifically requests the information. Arrestees would be required to provide this information as soon as was is reasonably practicable (instead of the current proposal of within 21 days).	Amendment 4 was disagreed to by division.
Amendments 5 and 6 , in the name of Murdo Fraser MSP, would make similar changes to amendment 4 in relation to diligence against earnings .	Amendments 5 and 6 were disagreed to by division.

Greater protection from enforcement action for debtors

A key issue for scrutiny of the Bill is whether it should do more to support debtors in a cost of living crisis. A number of Stage 2 amendments sought to introduce greater protection from enforcement action by creditors.

Stage 1 consideration

The Committee's [Stage 1 Report](#) ⁸ noted stakeholder concerns around the [Debt Advice and Information Package](#), in particular that it wasn't as easy to understand or as effective as it could be. It welcomed a statement from the Minister that the contents were being reviewed.

The Committee also noted concerns around the potential for [diligence against earnings](#) to have harsh consequences for debtors. The vast majority of [earnings arrestments](#) are in favour of local authorities for the purpose of recovering council tax arrears.

The Committee called for the sum protected from creditor action to be increased to £1,000 per month. This would bring it into line with the minimum balance protected in a bank account.

In its [response to the Stage 1 Report](#) ⁹, the Scottish Government highlighted its belief that the impact of changes to diligence against earnings needed to be considered carefully. It noted that changes to the threshold at which money could be seized could be dealt with via secondary legislation.

Stage 2 amendments

Table 4: amendments providing greater protection for debtors from debt enforcement action

Purpose of amendment	Result
<p>Amendment 22, in the name of Paul O'Kane MSP, would require the Scottish Government to bring forward regulations setting requirements to be met before local authorities could take debt enforcement action against individuals. Requirements could cover, for example, information to be provided to debtors and steps to be taken to agree reasonable repayment proposals. Amendment 23 was put forward as an alternative.</p>	<p>The Minister discussed work to develop good practice for local authority debt collection, including some pilot projects covering advice on Council Tax arrears (col 15).</p> <p>Amendment 22 was withdrawn.</p>
<p>Amendment 23, in the name of Paul O'Kane MSP, was put forward as an alternative to amendment 22. It would make similar changes in relation to local authority debt enforcement. In the member's view, it would provide Scottish Ministers with more flexibility than amendment 22. It would also cover access to income maximisation advice.</p>	<p>Amendment 23 was disagreed to by division.</p>
<p>Amendment 24, in the name of Daniel Johnson MSP, would require creditors to offer to discuss the information contained in the Debt Advice and Information Package with debtors when petitioning for bankruptcy. Creditors could arrange for the support to be provided via an alternative contact. Separately, trustees in Protected Trust Deeds would also be required to offer to discuss the contents of the package.</p>	<p>Following a commitment from the Minister to meet with Mr Johnson to find out if his concerns could be reflected in the current review of the Debt Advice and Information Package (col 19) ¹¹, amendment 24 was withdrawn.</p>
<p>Amendments 27 and 28, in the name of Daniel Johnson MSP, would place similar requirements on creditors to those discussed above in relation to diligence on the dependence.</p>	<p>These amendments were not moved on the basis of the commitment described above.</p>
<p>Amendment 12, in the name of Colin Smyth MSP, would increase the threshold at which a creditor could recover money in diligence against earnings to £1,000 per month.</p>	<p>The minister argued that there was a need for further consultation on this issue to avoid unintended consequences (cols 30 to 32) ¹¹.</p> <p>Amendment 12 was withdrawn.</p>
<p>Amendment 25, in the name of Colin Smyth MSP, would protect funds comprised entirely of certain social security benefits from being seized by creditors in a bank arrestment.</p>	<p>Following a commitment from the Minister to consider what further protection was needed for social security benefits (col 32) ¹¹, amendment 25 was not moved.</p>
<p>Amendment 26, in the name of Paul O'Kane MSP, would require the Scottish Government to bring forward inflation-related increases to the minimum sum protected from being seized by creditors in a bank account.</p>	<p>Amendment 26 was disagreed to by division.</p>
<p>Amendment 29, in the name of Paul O'Kane MSP, would prevent a 10% surcharge being added to summary warrant debts under the Local Government (Scotland) Act 1947 where the debtor was receiving Council Tax Reduction or the Scottish Child Payment.</p>	<p>The Minister highlighted that this amendment would only affect business rates, rather than rates and Council Tax more generally.</p> <p>Amendment 29 was disagreed to by division.</p>
<p>Amendment 30, in the name of Daniel Johnson MSP, would require Scottish Ministers to review the impact of the Debt Advice and Information Package within three years of Royal Assent. The review would be required to consider the experiences of debtors and options for additional assistance, for example, via telephone or in person.</p>	<p>Amendment 30 was not moved on the basis of a commitment from the Minister to meet with Mr Johnson (see amendment 24).</p>

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