

# Bankruptcy and Diligence (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Bankruptcy and Diligence (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 27–EN)
- a Financial Memorandum (SP Bill 27–FM)
- a Policy Memorandum (SP Bill 27–PM)
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 27–LC)

3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

### Outline of Bill provisions

4. The purpose of the Bill is to bring forward stakeholder-led recommendations to introduce improvements to current insolvency solutions. As well as making technical changes to bankruptcy legislation, its aim is to help and improve the lives of people who are struggling with debt, which may be exacerbated by serious mental health issues.

5. It also brings forward stakeholder-led recommendations to improve debt recovery processes known as diligence and make them more efficient while maintaining protections for those who are subject to diligence. It looks to assist parties who are owed money to collect debts from those who can pay, whilst protecting those who are unable to pay.

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6. The Bill contains provisions that broadly fall into three categories:

- An enabling power which will provide the platform for regulations to introduce a “mental health moratorium.” The general purpose of a moratorium in the bankruptcy context is to provide a person who is experiencing debt issues (a debtor) some ‘breathing space’ by preventing a person to whom the debtor owes money (a creditor) from taking action to recover those debts for a specified period of time. There is currently one statutory moratorium on diligence available in Scots law, provided for in [Part 15 of the Bankruptcy \(Scotland\) Act 2016 \(“the 2016 Act”\)](#). The policy intention underpinning the present proposal is to create a new bespoke form of moratorium protection which is to be available to specific individuals who have problem debt and are experiencing serious difficulties with their mental health.
- Minor and technical amendments to bankruptcy legislation that would serve to provide clarity and improve the operation of bankruptcy processes as set out in the legislation.
- Diligence measures to modernise existing debt recovery mechanisms and allow for more streamlined and improved processes. Examples include changes to Exceptional Attachment where parties with debts will be given a longer period to pay the redemption figure to redeem the asset, in certain circumstances. In addition, introducing a requirement for information to be shared between parties if an arrestment has not attached property will provide creditors with important information to help them determine what further action, if any, they should take.

## Rationale for subordinate legislation

7. The Bill contains six delegated powers. In deciding whether provisions should be in the Bill or in subordinate legislation, and in deciding on the appropriate level of scrutiny of subordinate legislation, the Scottish Government has given due regard to:

- The need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation
- The need to allow detailed administrative arrangements to be kept up to date within the basic structure and principles set out in the primary legislation
- The need to ensure proper use of parliamentary time
- The possible frequency of amendment
- The need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation

8. The relevant provisions are described in detail below, with a short explanation of what each power allows, why the power has been taken in the Bill, and why the selected form of Parliamentary procedure has been considered appropriate.

## Delegated 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

9. Section 1 allows the Scottish Ministers to bring forward regulations to make provision establishing a moratorium on debt recovery action against individuals who have a mental illness. 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.

10. Subsections (2) and (3) provide more detail on what these regulations may cover. These include the eligibility criteria for accessing the moratorium; the types of debt in respect of which the moratorium may apply; and the time period for which the moratorium is to apply. The regulations may also include provision about the specific actions which creditors may or may not take during the period of a moratorium, as well as the recording of, and access to information about the moratorium.

#### Reason for taking power

11. The Policy Memorandum provides background detail on the development of the proposal to introduce a mental health moratorium in Scots law<sup>1</sup>. There is broad support, following the stakeholder-led review, for the introduction of a moratorium specific to debtors with serious mental illness. The Scottish Government recognises the importance of providing more help and protection to those with serious mental health issues experiencing problem debt. This is especially relevant in the current cost crisis which may cause the issue to worsen in some cases. To not proceed with this proposal would be detrimental to the people of Scotland with serious mental health issues experiencing problem debt. The current cost crisis therefore provides a strong rationale for introducing a mental health moratorium as quickly as possible.

12. While the details of the moratorium are yet to be fully developed, in broad terms, the scheme is expected to draw on elements of the existing moratorium against diligence, provided for in Part 15 of the Bankruptcy (Scotland) Act 2016, and the similar scheme in England and Wales known as the "mental health crisis breathing space"<sup>2</sup>. While there is support for the introduction of a mental health moratorium, the precise scope and detail

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<sup>1</sup> See paragraphs 17-25.

<sup>2</sup> [The Debt Respite Scheme \(Breathing Space Moratorium and Mental Health Crisis Moratorium\) \(England and Wales\) Regulations 2020](#)

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of the measure (including the debtors to whom it may be available, the nature of the protections it will afford and the length of time the moratorium should run for) is still in development. It is recognised that, to be effective, the moratorium needs to be developed in partnership with a variety of different professionals including those in the mental health and debt advice sectors, as well as groups or individuals with particular experiences in the relevant areas. Following earlier consultation which showed wide support for the general principles, the detailed design work is currently being taken forward in partnership with these groups. Therefore, the government's view is that it is appropriate to take an enabling power to provide a platform for the development of the moratorium once that work has completed.

13. Taking a power to set out the detail of the moratorium in regulations 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. It is possible that adjustments to the scheme will be required once it is operational and after there has been lived experience of how it works in practice. With the detail set out in regulations, the government will be able to act quickly and flexibly to make improvements suggested by post-implementation review.

### Choice of procedure

14. The affirmative procedure is considered to provide the appropriate level of parliamentary engagement and scrutiny over the regulations. The power is not limited to provision of a procedural or technical nature, but rather, it permits the substance of the moratorium to be set out in regulations. The power is therefore considered to be more substantive in nature, and the Government accordingly considers that the degree of scrutiny provided by the affirmative procedure is appropriate.

## 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

15. Section 6 amends the duty of disclosure by an arrestee in the course of an arrestment and forthcoming as set out in Part 3A of the Debtors (Scotland) Act 1987 ("the 1987 Act"). Section 6(2) introduces a requirement for an arrestee to disclose to an arresting creditor information where an arrestment is unsuccessful (in this context meaning that it did not arrest funds) and to specify the reason for this. For example nothing may have attached because the sum held is less than the protected minimum balance (see section 73F of the 1987 Act), or the arrestee does not hold an account for the debtor. There is an existing duty in section 73G(4) of the 1987 Act on the arrestee to disclose to an arresting creditor the existence of and the nature and value of any property attached by an arrestment (a "successful" arrestment).

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16. Where an arrestee fails to make a disclosure, current section 73H(1) of the 1987 Act provides that the sheriff may, on the application of the creditor, order the arrestee to pay the creditor the lesser of either the sum due by the debtor to the creditor or the amount which represents the minimum protected balance in bank accounts which are subject to an arrestment (currently £1,000). This sum stems from the minimum protected balance which is set out in section 73F(4) of the 1987 Act. There is already power to vary that sum under section 73F(6)(aa). Section 6(3) of the Bill reduces the amount to £500 and severs the link between the sum payable under section 73H and the minimum protected balance in section 73F. This applies to all failures of disclosure equally (i.e. any of the information required under section 73G(4) which, in other words, covers failure to respond in relation to both “successful” and “unsuccessful” arrestments). New subsection (5) of section 73H provides a new power for the Scottish Ministers to vary the sum referred to in section 73H(1)(b) by regulations. The existing power to vary the minimum protected balance remains, but has this now has no relevance in terms of the sum payable for failure to disclose information under section 73H.

### Reason for taking power

17. The power to vary the sum is taken to continue, in line with what is possible in terms of the existing provision, to allow a degree of flexibility and future-proofing. This will allow the Scottish Ministers to continue to vary the sum more frequently if required and respond more quickly to any changes of circumstances or evidence without the need for primary legislation.

### Choice of procedure

18. The choice of negative procedure reflects the limited nature of the provision and will, for example, allow the sum to be uprated at a point when its real terms value has been eroded by cumulative inflation. The government considers that this provides the appropriate level of scrutiny for this type of change. It is also in keeping with the procedure that applies to other regulation making powers in the 1987 Act of this nature (e.g. section 73F(6)(aa)).

### 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

19. Section 7 of the Bill amends the duty of disclosure by an employer in the course of diligence against earnings. Section 7(2) of the Bill introduces a requirement to section 70A of the 1987 Act for an employer or person who receives a relevant schedule or order to notify whether an earnings arrestment was unsuccessful within 21 days of the

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arrestment being served. 'Unsuccessful' in this context means that the debtor is earning less than the minimum threshold from which deductions may be made (as is determined by tables set out in schedule 2 of the 1987 Act) or the debtor is not employed by the person served the earnings arrestment. Section 7 of the Bill inserts a new subsection (1A) into the 1987 Act which requires this information, as well as the information currently required to be provided by an employer to the creditor or sheriff clerk under section 70A of the 1987 Act, to be provided on such form as may be prescribed. Section 7 of the Bill also amends section 70(5) of the 1987 Act so that information currently required is also to be provided on such form as may be prescribed. "Prescribed" means prescribed by regulations made by the Scottish Ministers by virtue of new section 70A(7)(b).

### Reason for taking power

20. The power to prescribe a form will allow for a standard process for providing the required information. This will ensure that only information required to be passed between the parties is disclosed. A form and its manner are procedural matters and it is appropriate for this to be set out in a statutory instrument to allow it to be amended easily and respond to changing circumstances.

### Choice of procedure

21. The power to prescribe a form will be subject to negative procedure. A form and its manner are procedural matters and it is appropriate for this to be set out in regulations to allow it to be amended easily and respond to changing circumstances. Negative procedure is appropriate given the procedural nature of prescribing a form.

### 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

22. Section 7(3)(e) of the Bill inserts new subsection (4) to section 70B of the 1987 Act to provide a power for the Scottish Ministers to vary the sums referred to in new subsection (A1)(b)(ii) and subsection (1)(b)(ii) of section 70B in regulations.

23. There is an existing duty on an employer to provide certain information in the course of an earnings arrestment set out in section 70(2) of the 1987 Act. This information is how the debtor is paid (whether weekly, monthly or otherwise); the date of the debtor's next pay-day; and the sum deducted on that pay-day and the net earnings from which it is so deducted. Provided the debt has not been extinguished, the information is to be sent again on the dates specified in section 70A(4).

24. Where a person fails to notify the creditor of the required information under new section 70A(1A) (described in paragraph 19 above) or the existing information required by section 70(2), new subsection (A1) of section 70B of the 1987 Act provides the sheriff may, on the application by the creditor, make an order requiring the person who

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received the schedule or order to send the prescribed form to the creditor and to pay a sum to the creditor. The sum payable by the person to the creditor is the sum due to the creditor by the debtor, or the sum of £500, whichever is the lesser. Section 7 of the Bill also modifies subsection (1)(b) of section 70B so that the amount payable under an order made by the sheriff under that provision aligns with new subsection (A1) (i.e. £500 instead of an amount exceeding twice the amount that the creditor would have received on the debtor's next pay day).

### Reason for taking power

25. The power to vary the sum is taken to allow a degree of flexibility and future-proofing. This will enable the Scottish Ministers to vary the sum more frequently and respond to any changes of circumstances or evidence, which is considered to further support the taking of these powers being appropriate.

### Choice of procedure

26. The power to vary the sum will be subject to negative procedure and this reflects the limited nature of the provision which is intended, for example, to allow the sum to be updated at a point when its real terms value has been eroded by cumulative inflation. It is also in keeping with the procedure that applies to other regulation making powers in the 1987 Act of this nature.

## 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)

### Provision

27. Section 11 enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provision for the purposes of, in connection with, or for giving full effect to the Bill.

### Reason for taking power

28. As with any new body of law, the Bill may give rise to a need for a range of ancillary provision. Whilst the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and that the purpose of the Bill is not inadvertently obstructed. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible. It would not be an effective use of Parliament's time, or the Scottish Government's resources to deal with such matters through primary legislation.

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## Choice of procedure

29. Section 11(3) provides that regulations made in exercise of this power are subject to the affirmative procedure if those regulations add to, replace or omit any part of an Act. Otherwise, such regulations will be subject to the negative procedure. This formulation is standard in connection with ancillary powers.

30. The approach taken here is typical for ancillary powers and recognises the particular interest Parliament has in provisions which modify primary legislation. Whereas, ancillary changes to subordinate legislation are likely to be more technical in nature and so merit a lesser degree of parliamentary scrutiny.

## Section 12: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

## Provision

31. Section 12 sets out when the provisions of the Bill will come into force (i.e. begin to have effect). Sections 11, 12 and 13 will come into force on the day after Royal Assent. However, for the most part, commencement will take place on the day appointed by the Scottish Ministers in regulations. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure (see section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

32. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes. In particular, this allows different sections of the Bill to be commenced on different days.

## Reason for taking power

33. It is standard for Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. Such provisions may require to make transitional or transitory provision, or the saving of repealed or amended provisions.

## Choice of procedure

34. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions, the substance of which have already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made (and in any event before the legislation is due to come into force).





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