

# The Highland Council

Agenda Item	<b>14</b>
Report No	<b>RES/31/23</b>

**Committee:** Corporate Resources

**Date:** 20 August 2023

**Report Title:** Scottish Government Consultation: Bankruptcy and Diligence (Scotland) Bill

**Report By:** Executive Chief Officer, Communities & Place

## 1. Purpose/Executive Summary

1.1 Diligence is a Scottish legal term used to describe several procedures that are used to enforce the recovery of debts using Sheriff Officers. The Scottish Government has consulted on a Bill which aims to change the laws around bankruptcy in Scotland – the Bankruptcy and Diligence Bill. The consultation closed on 21 July 2023. Some of the changes included in the Bill are:

- Add a “mental health moratorium” – meaning debt enforcement can be frozen for someone with serious mental health problems
- Require creditors to give a debtor information about debt advice before enforcement
- Require those responsible for seizing a debtor’s assets to tell creditors when this has not been successful, and why

1.2 The purpose of this report is to highlight the key areas of this Bill for the Council in its role as a creditor and in relation to the Council’s duty to provide welfare services, including those Money Advice services which are outsourced to Inverness, Badenoch & Strathspey Citizens Advice.

1.3 The submitted response is detailed at Appendix 1 to this report and is technical in nature. Depending on how any future legislation or guidance is developed, there may be impacts for the activities undertaken within the Revenues & Business Support section and in relation to the collection of council house rents by the Housing & Property Service.

## 2. Recommendations

2.1 Members are asked to:

- i. Consider the policy matters raised in this consultation; and
- ii. Agree by homologation the response detailed at Appendix 1 to this report.

## 3. Implications

- 3.1 Resource: There are no immediate resource implications arising from this report.
- 3.2 Legal: While there are no immediate legal implications arising from this report, the Council will need to take steps to ensure it complies with any changes to the legislation and/or guidance that may arise.
- 3.3 Community (Equality, Poverty, Rural and Island): The Bill seeks powers to introduce changes that will provide protections for those with mental health issues who are also in debt.
- 3.4 Climate Change / Carbon Clever: There are no Climate Change/Carbon Clever impacts arising as a direct result of this report.
- 3.5 Risk: There is a risk that the definition of mental health and the statutory duration of any such moratorium is insufficient and gives rise to unintended consequences.
- 3.6 Health and Safety (risks arising from changes to plant, equipment, process, or people): There are no immediate impacts arising from this report.
- 3.7 Gaelic: There are no impacts arising from this report.

#### **4. The Bankruptcy and Debt Advice (Scotland) Act 2014**

- 4.1 Since April 2015, the Bankruptcy and Debt Advice (Scotland) Act 2014 introduced a statutory moratorium on diligence providing protection for debtors. The current moratorium provisions are set out in sections 195-198 of the Bankruptcy (Scotland) Act 2016.
- 4.2 The existing arrangements for a moratorium ensure that for a period of six months, creditors cannot take any action against debtors who are considering whether to apply for bankruptcy, a trust deed or Debt Arrangement Scheme (DAS). These moratoriums may be requested by debtors who need more time to make a decision but are concerned about what debt recovery actions their creditors could take in the meantime. This debt relief is available to all debtors, including but not limited to, those with mental health issues.

#### **5. Mental Health Moratorium**

- 5.1 During the first full year of operation fewer than 2% of Breathing Space registrations in England and Wales involved mental health crisis moratoriums. In Scotland, for the financial year 2022-23, 3,268 statutory moratoriums on diligence (as described in section 4 of this report) were registered. Should any future Scottish mental health moratorium be modelled on the equivalent system that is already operating in England, then it is anticipated that the number of mental health moratoriums in Scotland will be manageable.
- 5.2 The amount of debt owed to a local authority/ies by an individual debtor can be significant. In order to protect vulnerable residents, while also ensuring that creditors continue to have powers to pursue those able to pay, it is in the interests of local authorities to help shape and comply with any future changes to bankruptcy and diligence in Scotland.

## 6. Definitions

- 6.1 The definition of mental health is unclear from the Bill and the consultation guidance. Clarity is critical to the future operation of any such protections for vulnerable debtors.
- 6.2 The anticipated legal period of any future moratorium is unknown, and needs clarified. A moratorium is intended to temporarily suspend the actions that creditors may take to recover the sums that are due. However, those experiencing mental health recover at different rates, making it difficult to place a definitive period for any future moratorium.

## 7. Money Advice

- 7.1 In addition to receiving specialist mental health support, requiring the debtor to engage with an approved debt advice professional would protect and be beneficial for the debtor. Approved professional advisers would ensure that the debtor fully understands the range of debt solutions that may be available in their circumstances, the outcomes and implications of these debt solutions, and thereafter to enable them to make informed decisions.
- 7.2 However, in order to require a debtor to obtain advice from an approved professional debt adviser, it will be essential that there is a sufficient number of suitably trained debt advisers who can be accessed for free at point of need. The limited supply of suitably trained debt advisers across Scotland is already under extreme pressure, which is being exacerbated by the cost of living pressures. It is therefore acknowledged that providing a sufficient supply of advisers will require investment by the Scottish Government. Where investment in free advice is not possible, debtors should be advised to seek free advice but not required to do so as a condition of applying for a moratorium.

## 8. Financial Wellbeing in Scotland

- 8.1 Research from the Money and Pension Service provided some key indicators of financial wellness in Scotland, this included:
- 700,000 people in Scotland are at risk of or in problem debt
  - only 54% of Scottish people save regularly
  - 15% borrow to pay for food or bills
- 8.2 Research and available data from a range of sources helps inform the effectiveness of existing debt solutions and informs areas where wholesale change is necessary, or improvements will be beneficial.

Designation: Executive Chief Officer, Communities & Place

Date: 18 August 2023

Author: Sheila McKandie

Background Papers: **Bankruptcy and Diligence (Scotland) Bill; Sections 195-198 of the Bankruptcy (Scotland) Act 2016.**

Appendices: Consultation Response

## **Consultation response to the Scottish Government's Bankruptcy and Diligence (Scotland) Bill**

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

In principle the Scottish Government's intentions to provide legal protections for those with serious mental health issues are supported as are the existing moratorium on diligence arrangements for those with debts. It is well established and evidenced that financial insecurities and money worries can have a significant detrimental impact on physical and mental health, and poor health can make it challenging to manage money.

Since April 2015, the Bankruptcy and Debt Advice (Scotland) Act 2014 introduced a statutory moratorium on diligence providing protection for debtors. The current moratorium provisions are set out in sections 195-198 of the Bankruptcy (Scotland) Act 2016.

The existing arrangements for a moratorium ensure that debt relief is available for a period of six months, during which creditors cannot take any action against the debtor. When debtors are considering whether to apply for bankruptcy, a trust deed or Debt Arrangement Scheme (DAS) and need more time to make a decision but are concerned about what debt recovery actions their creditors could take in the meantime, they have the right to request a moratorium. This debt relief is available to all debtors, including but not limited to, those with mental health issues. Debtors apply to the Accountant in Bankruptcy through the Register of Insolvencies homepage.

Once granted, the Accountant in Bankruptcy registers the moratorium in the Register of Insolvencies and the DAS Register. From this date, the debtor has six months to decide whether to proceed with an application. If they are granted a trust deed or bankruptcy, then any interest, fees or charges will either be settled or written off once completed. Under DAS, these will be written off on completion of the debt payment programme. Debtors can apply for one moratorium in a 12-month period.

Learning from the operation of the existing moratorium on diligence can helpfully inform the proposed mental health moratorium. For example, ease of the application process for debtors and the administratively light process are helpful. However, there are concerns that some individuals with problem debt are being mis-sold protected trust deeds in favour of alternative solutions that would better suit their needs and the interests of the creditors involved. The effectiveness of the steps taken by the Financial Conduct Authority to address these concerns should be assessed to help inform the design and operation of the proposed mental health moratorium.

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

#### **1. Provide a clear definition of the circumstances in which a mental health moratorium would apply**

It is noted from the consultation that one of the changes in the new Bill will be to add "a 'mental health moratorium' – meaning debt enforcement can be frozen for someone with serious mental health problems". The overview of the Bill as published on the Scottish Government's website includes that the Bill is intended to "give

powers to the Scottish Ministers to establish a pause on debt recovery action against people who are in debt and who also have a mental illness.”

To avoid confusion and unintended consequences for all stakeholders, ie debtors, creditors, Administrators, representatives and Advisers, it will be important to provide a clear definition of the circumstances in which a mental health moratorium would apply when this stage of legislation is being developed. For example, the Mental Health section of the NHS inform website provides information about a range of “mental health problems and disorders” but it is unclear whether the mental health moratorium is intended to be available in all, or a subset of these circumstances, or in other circumstances. Furthermore, the Bill needs to clearly set out whether the proposed mental health moratorium will be available to individuals who are in debt and who are also the person with main responsibility for children with serious mental health conditions. The NHS inform websites details the following “mental health problems and disorders”: Anorexia Nervosa, Anxiety, Anxiety Disorders in Children, ADHD, Binge eating disorder, Bipolar Disorder, Bulimia, Depression, Eating Disorders, Insomnia, Mental health problems after birth, Munchausen’s syndrome, OCD, Panic disorder, Phobias, PTSD, Post-natal depression, Psychosis, Schizophrenia, SAD, Self-harm, Suicide, Surviving Suicidal thoughts, and Personality Disorder.

## **2. Clearly define the duration of a mental health moratorium**

Providing a ‘safety net’ for individuals with serious mental health issues who also have debts, provides debtors with some breathing space. Individuals who are in debt and require specialist support with their mental illness, need to know that there is a reliable and effective system available that enables debt recovery actions to be paused temporarily. The protection of the most vulnerable and marginalised debtors should therefore be guaranteed for a time-limited, appropriate period to enable their mental health issues to be managed and stabilised, while providing assurances for creditors that recovery actions can be resumed after a fixed time period has lapsed or some other definition as defined. The duration of the moratorium period will therefore need to be clearly determined for the protection of all parties.

## **3. Establish a formal application process, including permitted frequency of applications within a stated timeframe**

To provide clarity for all stakeholders and to ensure that all parties have a shared understanding of the process, it is essential that a formal application process is established and published. The current moratorium process could be adopted for these purposes, using a newly established application form.

The number of times the same debtor can apply for a mental health moratorium in a 12-month period needs to be clearly defined and communicated.

## **4. Confirm whether there is an interplay between the current 6-month moratorium and the proposed mental health moratorium**

To avoid doubts or delays, it will be necessary to confirm whether a debtor who has been granted a 6-month moratorium on diligence under the current arrangements, and where that moratorium is active and still in operation, can also be granted a mental health moratorium. Thereafter, the legislation must clearly set out whether a mental health moratorium can operate simultaneously and/or consecutively with the existing 6-month moratorium.

## **5. Transparency and clear definitions**

A mental health moratorium needs to be transparent and clearly defined. Qualifying criteria must be set out clearly and succinctly, easily understood and operated for both the individuals with mental ill health and for their creditors. For example, a moratorium may be available to people who are receiving treatment from a specialist mental health service for serious mental ill health, which is certified by approved mental health professionals and where the evidence confirms care and support goes beyond routine treatment. Certification by an approved professional will ensure that the policy intent of a mental health moratorium is achieved.

## **6. Engagement with a specialist debt adviser and information/advice for debtors**

In addition to receiving specialist mental health support, requiring the debtor to engage with an approved debt advice professional will be helpful. Approved professional advisers would ensure that the debtor fully understands the range of debt solutions that may be available in their circumstances, the outcomes and implications of these debt solutions, and thereafter to enable them to make informed decisions. Approved debt advice is available in the free, charitable and fee-paying sectors. Advice would include:

- enable early interventions to prevent the escalation of risk
- help people access appropriate support to reduce risk and promote wellbeing
- coordinate effective and efficient responses in relation to the debtor's health and the advice they are receiving to address their debts i.e. a joined up approach to ensure the debtor receives the best support and opportunity to manage their health and financial issues in a way that aims to mitigate relapses or deteriorations in mental illnesses.
- Ensure the debt advice professional sets out to creditors, the steps being taken by creditors. This is necessary to reduce creditors' organisational risks and to protect creditors' reputation whilst a moratorium is in place.
- It will be crucial that the debtor understands that a mental health moratorium does not mean that their creditors will write off their debts. Instead, any such moratorium will have the effect of pausing creditors' recovery actions for a fixed period of time, at the end of which the debts accrued prior to the date that the moratorium is effective, will be due to be paid by the debtor.
- The debtor should be provided with clear and concise information which explains that the effect of the moratorium and the conditions that are attached.

### **Important note**

To require a debtor to obtain advice from an approved professional debt adviser, it will be essential that there is a sufficient number of suitably trained debt advisers who can be accessed for free at point of need. However, the limited supply of suitably trained debt advisers across Scotland is already under extreme pressure, which is being exacerbated by the cost of living pressures. It is therefore acknowledged that providing a sufficient supply of advisers will require investment by the Scottish Government. Where investment in free advice is not possible, debtors should be advised to seek free advice but not required to do so as a condition of applying for a moratorium.

## **7. Requirement to notify creditors**

Requiring debtors, their Money Advisers, or their legal representatives to notify their creditors once a moratorium has been granted, would

- protect the debtor from the risk and worry of inadvertent creditor action;.
- remove the need for a creditor to check the Register of Insolvencies and the DAS Register before taking action;
- remove the risk of errors by creditors during the checking process; and
- avoid the risk of creditors incurring unnecessary costs.

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

The technical amendments within the bankruptcy legislation should have the desired effect to provide protections for debtors who also have mental illnesses.

The challenge will be to clearly set out the definition of mental illnesses that apply and the circumstances in which a moratorium may be sought. When defining mental illness and any supports that the debtor must be receiving, wherever possible, it will be crucial to remove any ambiguities that could exist. Doing so will further protect those who the mental health moratorium is intended to support, ie the debtor and assist creditors, legal representatives and debt advisers to undertake their respective roles effectively and in full compliance with the scheme.

It will also be important to strike an appropriate balance between the protections for debtors with mental illness and protections for creditors while also ensuring that unintended consequences are identified and mitigated. This will include setting the moratorium at an appropriate period and avoiding the risk of multiple moratoriums operating indefinitely for the same debtor.

Clear and concise information for debtors is crucial and wherever possible, steps should be taken to simplify the language used in the Debt Advice and Information Package, without interfering with legal terminology.

Ease of application and an administratively light process are also important.

It would be helpful to reflect the underpinning beneficial impacts of income maximisation for individuals with debts in the design and operation of the mental health moratorium.

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

Aligning the length of time that applies to the Debt Advice and Information Package (DAIP) with the timings applicable to serving a charge for payment, is a logical and more practical step forward.

There is a set timescale for the issue of a DAIP within each of the processes in which it is required. Generally, it must be issued no earlier than 12 weeks before diligence is carried out. The DAIP must also be issued before a creditor presents a petition for the debtor's bankruptcy and prior to the issue of a Certificate for Sequestration.

Currently, legislation decrees a DAIP is valid for 12 weeks, whereas once a charge for service has been served, the time limits for court action is 4 months and 2 weeks. Depending on the court date, a DAIP could expire, requiring the creditor to re-serve the same information to the debtor. This causes confusion for debtors and adds to the administrative overheads for creditors.

The content and complexity of the information in the DAIP mean that key messages can be lost. Simplifying the language used and ensuring the salient points are summarised in an accessible format, at the start of the DAIP will be beneficial.

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

These diligence reforms proposals are welcomed, especially those relating to Arrestment and Action of Furthcoming and Diligence Against Earnings. Improved standardised communications detailing the reasons for unsuccessful actions will provide creditors with relevant information and influence next steps in the recovery of outstanding debts.

For example, Earnings Arrestment are used regularly in some instances by many debtors as a reliable, structured and protected means of payment for their arrears. Where an Arrestment has been unsuccessful, improved communication detailing the reasons for such an outcome, may reduce/avoid creditors from making multiple attempts to arrest earnings. This should benefit the debtor by reducing the stress and anxiety of creditors making multiple attempts to arrest.

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

Consumer behaviours are rapidly changing with online/electronic methods becoming more and more prevalent. However, legislation has not kept abreast of these changing behaviours and the rapid growth of online/electronic banking services. Legislation needs updated to enable creditors to utilise opportunities for digital collections from challenger banks i.e. small modern retail banks which challenge longer-established institutes by offering modern financial technology. This would provide an equitable landscape for all debtors regardless of banking choices while also protecting the interests of creditors.

In addition, the pandemic has had a significant impact on people's payment habits, with cash use falling significantly. This has been reflected in an increase in the number of businesses moving to cashless payment options, including those in the retail, hospitality, and leisure sectors. Traditionally, the use of attachments by Sheriff Officers when collecting unpaid debts, has provided a very strong incentive for business to pay their bills. Applying an electronic transactions attachment within a business needs to be addressed within future reforms.

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

There are several cross-cutting policies that connect with the Bill. Financial capability including the ability to understand and undertake positive financial decisions in life is essential to help reduce those who fall into debt and may be subject to bankruptcy. An individual's financial resilience has wide ranging impacts on their own and their family's daily life and their ability to plan for the future. Reducing financial stress has been demonstrated to improve health and wellbeing, independent living, housing



sustainment, social interactions, and continued employment. Low income is a cause of poverty and people living on low incomes are more likely to rely on public services.

Research from the Money and Pension Service provided some key indicators of financial wellness in Scotland, this included:

- 700,000 people in Scotland are at risk of or in problem debt
- only 54% of Scottish people save regularly
- 15% borrow to pay for food or bills

The Highland Council has long advocated the need for improved financial capability from an early age to improve financial capability among Scotland's children to prepare them to manage their money in later life.

In addition, engaging those who are out of work or on low incomes in managing their money and taking financial decisions is a vital step to giving them the skills and confidence needed to cope financially whilst in work and life in general. Effective financial decision making is a key life skill that needs nurtured over a period of time rather than being designed in a manner that only provides beneficiaries with a one-off opportunity to gain such valuable skills.

Furthermore, a cash-first approach involves maximising an individual's income by ensuring they are accessing their full entitlements, and places money in people's pockets. Maximising incomes and enabling individuals to make financial decisions for themselves, develops financial management and therefore financial resilience skills.

Integrating these cross-cutting policy areas with the Bill, has the potential of enabling individuals to manage their incomes in a manner that avoids or reduces some debts and will underpin a more effective and responsive debt management approach in Scotland.