

Annex A - Extract from email between AiB Policy Development To Minister For Community Wealth And Public Finance – 14 March 2024

From: [redacted]

Sent: Thursday, March 14, 2024 5:19 PM

To: Minister for Community Wealth & Public Finance <MinisterCWPF@gov.scot>

Cc: [redacted]@aib.gov.uk>

Subject: Government P&E notes for the Bankruptcy and Diligence (Scotland) Bill

Hi [redacted]

Attached are the P&E notes as requested for the government amendments.

I was sent an example earlier of how the notes are sent to the Committee Clerk and they were in their groups. We don't have our groups yet so I will send those up to you as soon as I can for you to share with the Clerk.

Hope that is ok but if you need anything else just let me know.

Thanks

[redacted]

Accountant in Bankruptcy

1 Pennyburn Road

Kilwinning

KA13 6SA

OFFICIAL - SENSITIVE

Purpose and Effect Notes for government amendments

Out of scope

Amendment number(s)	Government Amendment 14
Subject	Diligence: Electronic service of earnings arrestment schedule
Text of amendment(s)	<p>[PCO12] Tom Arthur</p> <p>In section 7, page 5, line 10, at end insert—</p> <p><() In section 70 (execution and intimation of copies)—</p> <p>(a) for subsection (3), substitute—</p> <p>“(3) An earnings arrestment schedule or a current maintenance arrestment schedule may be served on an employer—</p> <p>(a) by being delivered personally to the employer,</p> <p>(b) by being sent to the proper address of the employer—</p> <p>(i) by a registered postservice (as defined in section 125(1) of the Postal Services Act 2000), or</p> <p>(ii) by a postal service which provides for the delivery of the document to be recorded, or</p> <p>(c) by being transmitted to the employer electronically.</p> <p>(3A) For the purpose of subsection (3)(b), the proper address of the employer is—</p> <p>(a) in the case of a body corporate, the address of the registered or principal office of the body,</p> <p>(b) in the case of a partnership, the address of the principal office of the partnership,</p> <p>(c) in any other case, the last known address of the employer.</p> <p>(3B) Where a document is served as mentioned in subsection (3)(b) on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.</p> <p>(3C) For the purpose of subsection (3)(c)—</p> <p>(a) electronic transmission of a document must be effected in a way that the employer has indicated to the officer of court that the employer is willing to receive the document,</p>

	<p>(b) the employer’s indication of willingness to receive a document in a particular way may be—</p> <ul style="list-style-type: none"> (i) specific to the document in question or generally applicable to documents of that kind, (ii) expressed specifically to the officer of court or generally (for example on a website), (iii) inferred from the employer having previously been willing to receive documents from the officer of court in that way and not having indicated unwillingness to do so again, <p>(c) the officer of court’s uploading of a document to an electronic storage system from which the employer is able to download the document may constitute electronic transmission of the document, where the employer is sent a notification that the document has been uploaded in that way,</p> <p>(d) a notice transmitted electronically is taken to have been received on the day of transmission unless the contrary is shown.”, and</p> <p>(b) for subsection (5), substitute—</p> <p>“(5) Section 12(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 applies to the service of an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order as it applies to the execution of an attachment except where such service is by post or transmitted electronically.”.>.</p>
Government position	Support
Purpose and Effect	<p>The purpose of amendment 14 is to allow for earnings arrestment schedules and current maintenance arrestment schedules to be served electronically on employers. Amendment 14 substitutes a provision at subsection (3) in section 70 of the Debtors (Scotland) Act 1987 (the “1987 Act”) to achieve this purpose. Sending an earnings arrestment schedule, or current maintenance arrestment schedule, electronically to the employer would be an additional method of service to those already available. The methods of service already available are serving a schedule by personal delivery on the employer or the schedule being sent by post to the employer’s address.</p> <p>The effect of amendment 14 is to enable an officer of court to send an earnings arrestment schedule, or current maintenance arrestment</p>

schedule, to the debtor's employer electronically if the employer has indicated to the officer of court that they are willing to receive the schedule electronically. This will address difficulties in serving earnings arrestments which are being experienced following the move to more hybrid working following the coronavirus pandemic. The hybrid models of working have led to a reduction in the times when offices are manned and therefore limiting the ability of sheriff officers to serve an arrestment on the employer of the debtor.

Amendment 14 also makes a technical amendment to subsection (5) of section 70 in the 1987 Act. This outlines when it would be competent to serve an earnings arrestment schedule, or current maintenance arrestment schedule, in the execution of an attachment. The effect of amendment 14 is that it would be competent to serve an earnings arrestment schedule, or current maintenance arrestment schedule, on a Sunday, public holiday, or such other day as may be prescribed by Act of Sederunt, where such service is by post or transmitted electronically. The amendment will also update the reference from 'poining' to 'an attachment' in section 70(5) of the 1987 Act. The former diligence of poining was abolished and replaced with attachment by the Debt Arrangement and Attachment (Scotland) Act 2002.

[out of scope]

ANNEX B - Email from AiB Policy Development to the Committee for Economy and Fair Work – 15 March 2024

From: [redacted]

Sent: Friday, March 15, 2024 1:27 PM

To: Economy and Fair Work <economyandfairwork.committee@parliament.scot>

Cc: Minister for Community Wealth & Public Finance <MinisterCWPF@gov.scot>; [redacted]@aib.gov.uk>; [redacted]@aib.gov.uk>; [redacted]@aib.gov.uk>; [redacted]@aib.gov.uk>; [redacted]@aib.gov.uk>

Subject: Bankruptcy and Diligence (Scotland) Bill - SG amendment Purpose and Effect Notes

Good afternoon [redacted]

Please find attached short purpose and effect notes on the SG amendments lodged in relation to the Bankruptcy and Diligence (Scotland) Bill.

Thank you

[redacted]

[redacted]

Accountant in Bankruptcy

1 Pennyburn Road

Kilwinning

KA13 6SA

Out of scope

Group 8 – Led by Tom Arthur MSP

Amendment number(s)	Government Amendment [out of scope] and 14
Subject	Arrestment: service and disclosure
Text of amendment(s)	<p>[out of scope]</p> <p>14 Tom Arthur</p> <p>In section 7, page 5, line 10, at end insert—</p> <p><() In section 70 (execution and intimation of copies)—</p> <p>(a) for subsection (3), substitute—</p> <p>“(3) An earnings arrestment schedule or a current maintenance arrestment schedule may be served on an employer—</p> <p>(a) by being delivered personally to the employer,</p> <p>(b) by being sent to the proper address of the employer—</p> <p>(i) by a registered postservice (as defined in section 125(1) of the Postal Services Act 2000), or</p> <p>(ii) by a postal service which provides for the delivery of the document to be recorded, or</p> <p>(c) by being transmitted to the employer electronically.</p> <p>(3A) For the purpose of subsection (3)(b), the proper address of the employer is—</p> <p>(a) in the case of a body corporate, the address of the registered or principal office of the body,</p> <p>(b) in the case of a partnership, the address of the principal office of the partnership,</p> <p>(c) in any other case, the last known address of the employer.</p> <p>(3B) Where a document is served as mentioned in subsection (3)(b) on an address in the United Kingdom it is to be taken to have been received 48 hours after it is sent unless the contrary is shown.</p> <p>(3C) For the purpose of subsection (3)(c)—</p> <p>(a) electronic transmission of a document must be effected in a way that the employer has indicated to the officer of court that the employer is willing to receive the document,</p> <p>(b) the employer’s indication of willingness to receive a document in a particular way may be—</p> <p>(i) specific to the document in question or generally applicable to documents of that kind,</p> <p>(ii) expressed specifically to the officer of court or generally (for example on a website),</p>

	<p>(iii) inferred from the employer having previously been willing to receive documents from the officer of court in that way and not having indicated unwillingness to do so again,</p> <p>(c) the officer of court’s uploading of a document to an electronic storage system from which the employer is able to download the document may constitute electronic transmission of the document, where the employer is sent a notification that the document has been uploaded in that way,</p> <p>(d) a notice transmitted electronically is taken to have been received on the day of transmission unless the contrary is shown.”, and</p> <p>(b) for subsection (5), substitute—</p> <p>“(5) Section 12(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 applies to the service of an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order as it applies to the execution of an attachment except where such service is by post or transmitted electronically.”>.</p>
Government position	Support
Purpose and Effect	<p>[out of scope]</p> <p>Amendment 14 also makes a technical amendment to subsection (5) of section 70 in the 1987 Act. This outlines when it would be competent to serve an earnings arrestment schedule, or current maintenance arrestment schedule, in the execution of an attachment. The effect of amendment 14 is that it would be competent to serve an earnings arrestment schedule, or current maintenance arrestment schedule, on a Sunday, public holiday, or such other day as may be prescribed by Act of Sederunt, where such service is by post or transmitted electronically. The amendment will also update the reference from ‘poiniding’ to ‘an attachment’ in section 70(5) of the 1987 Act. The former diligence of poiniding was abolished and replaced with attachment by the Debt Arrangement and Attachment (Scotland) Act 2002.</p>

[out of scope]

Annex C – Email and letter from Scottish Parliament to Colin Smyth MSP – 18 March 2024

Email

From: [redacted]@parliament.scot>

Sent: Monday, March 18, 2024 5:32 PM

To: Smyth C (Colin), MSP <Colin.Smyth.msp@parliament.scot>

Cc: Presiding Officers <PresidingOfficers@parliament.scot>;

[redacted]@parliament.scot>; [redacted]@parliament.scot>;

[redacted]@parliament.scot>; [redacted]@parliament.scot>; Baker C (Claire), MSP

<Claire.Baker.msp@parliament.scot>; Minister for Parliamentary Business

<MinisterForPB@gov.scot>; [redacted]@gov.scot>; Minister for Community Wealth & Public Finance <ministercwpf@gov.scot>; cabsecfinance@gov.scot

Subject: Bankruptcy and Diligence Scotland Bill - FR determination

Dear Colin

As previously discussed, we have been considering the financial implications to the Scottish Consolidated Fund of amendments to the Bankruptcy and Diligence (Scotland) Bill.

I wanted to let you know that we sought a determination from the Presiding Officer on amendment 12 and the Presiding Officer has determined that a financial resolution is not required.

All amendments can therefore be debated and moved as normal.

Please see the attached letter from the Presiding Officer with her determination. I am copying the Cabinet Secretary for Finance, the Minister for Community Wealth and Public Finance, the Minister for Parliamentary Business and the Convener of the Economy and Fair Work Committee.

Best wishes

[redacted] Legislation Team | The Scottish Parliament | [redacted]@parliament.scot

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Letter

RT HON ALISON JOHNSTONE MSP
PRESIDING OFFICER
Letter to Colin Smyth

Dear Colin

BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL – FINANCIAL RESOLUTION

As you may know, I am required under Rule 9.12.6C, for the purposes of Rules 9.12.6 to 6B, to determine whether an amendment makes provision which, if it were agreed to, would cause, or might contribute to causing, a Bill to require a financial resolution which it would not otherwise require.

In essence, if an amendment would change a Bill in a way that makes the costs or changes to revenues likely to arise from the Bill exceed the “significant” threshold of £500,000 or more in any single financial year, a financial resolution will be required.

The Bankruptcy and Diligence (Scotland) Bill as introduced did not require a financial resolution. Amendments lodged for Stage 2 have therefore had to be considered in terms of whether they fall within the terms of Rule 9.12.6.

Amendment 12 lodged in your name makes provision to increase the minimum protected balance for earning arrestments. I note your view that there may be a net benefit for creditors in increasing the protected minimum amount, as it could mean earning arrestments become more affordable for more debtors. This, in turn, could result in debtors being more likely to continue with earnings arrestments without having to resort to formal debt solutions that see a reduced return for creditors. Nonetheless, drawing on analysis of both SPICe and the Scottish Government, I consider that the amendment would likely result in a significant reduction in the amount of money that could be recovered by local authorities through earnings arrestments and that these amounts would likely be well in excess of £500,000.

However, that does not automatically mean that a financial resolution is required. Rule 9.12.3A is triggered only if there is a financial impact on the Scottish Consolidated Fund. In the absence of further information, I do not consider that your amendment would automatically financially impact the Scottish Consolidated Fund.

I have therefore determined that, the amendment if agreed to, would not change the Bill in a way that makes the costs likely to arise from the Bill exceed the “significant” threshold of £500,000 or more in any single financial year and therefore a financial resolution is not required.

Copies of this letter go to the Cabinet Secretary for Finance, the Minister for Community Wealth and Public Finance, the Minister for Parliamentary Business and the Convener of the Economy and Fair Work Committee.

Yours sincerely

RT HON ALISON JOHNSTONE MSP
PRESIDING OFFICER

Annex D – Email chain between AiB Chief Executive and Alasdair Macpherson, University of Aberdeen – March 2024

From: Macpherson, Alisdair [redacted]
Sent: Monday, March 18, 2024 9:40 AM
To: Richard Dennis <Richard.Dennis@aib.gov.uk>
Cc: [redacted]@ed.ac.uk; [redacted]@aib.gov.uk>
Subject: RE: Bankruptcy and Diligence Bill

Dear Richard,

Thanks for your email. I hope you had a good weekend.

Yes, indeed, I've seen the amendment proposed by Colin Smyth. I've also discussed it with my co-author [redacted], copied in.

As per our article, while we think that the decision in *McKenzie* may not be right, the unduly harsh arrestments provision would ordinarily provide a suitable remedy where funds derived from social security payments are arrested (as such arrestment would be considered unduly harsh in almost every conceivable instance), and the protected minimum balance would also of course provide some protection to a debtor. Given our view on *McKenzie*, if the policy preference is to protect funds deriving from social security payments automatically and without the need for any challenge by the debtor, legislation seems necessary. This is, of course, what Colin's amendment seeks to do.

We do acknowledge that it may be challenging to formulate such legislation in a satisfactory way and understand why you might wish to consider the matter and its consequences further. We should note that in the past there have been suggestions that legislating to exclude funds deriving from social security payments may raise issues of legislative competence; however, as per footnote 48 of our article, "once social security benefits are paid to the recipient, whether those funds are arrestable becomes a matter for the law of diligence, which is devolved to the Scottish Parliament."

While we understand the motivation behind Colin's proposed amendment, we do have some issues with it:

- It may be preferable to insert a new section into the Debtors (Scotland) Act 1987, rather than to add further sub-sections to s 73E, but we do acknowledge that the numbering of a new section won't be the neatest either.
- In (7) "wholly acquired through social security benefits" is used but perhaps another term like "wholly and directly deriving from" or "wholly and exclusively deriving from" would be better.
- There may also be an argument in favour of clarifying that it is to be benefits received by the debtor (subject to e.g. payments made to family members in some instances), as there might be a possibility that someone could receive payments and transfer them to someone else, at which point they should presumably lose their protection.

- In (8) “wholly social security benefits” is used (rather than e.g. “funds wholly deriving from”) but this is incorrect and should presumably line up with the terminology from (7).
- Also in (8), it will be very difficult to show that a creditor is satisfied that the attached funds are from social security benefits. The test would seem to be subjective and any suggestion that they are satisfied could be easily contested by a creditor.
- The reference to “release the funds” in (8) presumably refers to removing any restrictions on the funds and enabling the debtor to draw upon the account again, but perhaps the wording could be clearer to make sure this is easily understood.
- In (9) the list is non-exhaustive and may create some uncertainty. Perhaps a definition elsewhere could be drawn upon, potentially instead of or in addition to the benefits arising from the listed legislation.
- The terminology in (10) regarding the arrestee “attaching” the funds is somewhat confusing as the creditor is the arrester, so it may be advisable to remove the reference to the arrestee carrying out the attaching. It can also be queried whether the protection for the arrestee should only be limited to situations in which (8) applies.
- Regarding the wording more generally, it is sometimes difficult to know what precisely the drafter intended and the final wording will depend upon policy preferences and intentions.

Given this proposed change and the suggested increase in the protected amount regarding earnings arrestments, a clear statement regarding the interrelationship between these and the protected minimum balance in bank accounts would be desirable. It may appear unfair to creditors if e.g. a debtor could have protection of up to £1,000 per month from earnings, plus a separately protected additional £1,000 in a bank account, as well as any social security payments on top of that. The protected minimum balance seems to apply irrespective of the source, so once funds enter into the account, they have that protection, even if already protected by another mechanism. Of course, if benefits extend beyond that protected minimum amount, and the change noted above is made, the overall protection will apply to the extent to which those further funds derive from social security payments. Perhaps it could be clarified that the same funds can be covered by various forms of protection, and that they don't automatically apply to additional funds on top of those protected through other mechanisms, just because some funds are already protected. Of course, debtors can also utilise the unduly harsh arrestment provisions to obtain further protection if the circumstances justify it.

We hope this is of some assistance. We'd be happy to discuss it further.

[redacted] and I are also planning to separately write to the DPLR Committee this week about this and other amendments and we can share our comments with you too, if you like.

Best wishes,

Alisdair

Dr Alisdair MacPherson
Senior Lecturer in Commercial Law
School of Law
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[redacted]

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From: Richard.Dennis@aib.gov.uk <Richard.Dennis@aib.gov.uk>
Sent: Friday, March 15, 2024 10:17 AM
To: Macpherson, Alisdair [redacted]
Cc: [redacted]@ed.ac.uk; [redacted]@aib.gov.uk
Subject: RE: Bankruptcy and Diligence Bill

CAUTION: External email. Ensure this message is from a trusted source and exercise caution before clicking links/opening attachments.

I'm sure you've seen the latest Colin Smyth amendment – laid yesterday (I think it is amendment 26) dealing exactly with protecting benefits from arrestment.

Any thoughts you might have very welcome! (I think this is probably right in policy terms, but not something to rush into – at least, I think that I'd be telling the Minister we just need more time to work this through?)

Off to reread your draft article again now!

Richard

From: Macpherson, Alisdair [redacted]
Sent: Tuesday, March 12, 2024 9:10 PM
To: Richard Dennis <Richard.Dennis@aib.gov.uk>
Cc: [redacted]@ed.ac.uk
Subject: Re: Bankruptcy and Diligence Bill

Thanks, Richard. I spotted that. I shall follow it with interest!

I'll have a chat with [redacted] too.

Best wishes,

Alisdair

Sent from [Outlook for Android](#)

From: Richard.Dennis@aib.gov.uk <Richard.Dennis@aib.gov.uk>
Sent: Tuesday, March 12, 2024 8:39:40 pm
To: Macpherson, Alisdair
Cc: [redacted]@ed.ac.uk>
Subject: RE: Bankruptcy and Diligence Bill

Thanks Alisdair – excellent timing. Colin Smyth (Lab) has today laid an amendment to the bill raising the earnings arrestment threshold to £1000.....

Committee Session that will consider that is next Wednesday morning

Richard

From: Macpherson, Alisdair [redacted]
Sent: Tuesday, March 12, 2024 6:47 PM
To: Richard Dennis <Richard.Dennis@aib.gov.uk>
Cc: [redacted]@ed.ac.uk>
Subject: RE: Bankruptcy and Diligence Bill

Dear Richard,

I hope your week is going well.

As a quick follow-up on the email below, and in case it's of interest, I attach a final proofs version of the previously mentioned case analysis piece on the arrestment of funds deriving from benefits (discussing *McKenzie v City of Edinburgh Council*). The paper will be published later this month in the Juridical Review. As per below, if there's a policy intention to automatically exclude benefit funds paid into an account without an "unduly harsh" challenge, or reliance on the protected minimum balance, then we're of the view that further statutory provision is necessary and desirable.

Also, some of the data regarding recoveries obtained through arrestment by City of Edinburgh Council using summary warrant procedure is referred to at the end of page 24. Their recovery rates for earnings arrestments are significantly higher, but we didn't include that information in the paper.

Best wishes,

Alisdair

Dr Alisdair MacPherson
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www.abdn.ac.uk/law



From: Macpherson, Alisdair
Sent: Wednesday, December 6, 2023 3:40 PM
To: Richard.Dennis@aib.gov.uk
Cc: [redacted]@ed.ac.uk>
Subject: Bankruptcy and Diligence Bill

Dear Richard,

I hope you're well.

I enjoyed watching last week's session on the Bankruptcy and Diligence Bill.

With reference to your point about the lack of data on the effectiveness of diligences, you may be interested to know that, along with a colleague at the University of Edinburgh (copied in), I recently acquired data from the City of Edinburgh Council about the use of arrestments and earnings arrestments in 2022. The data includes the total number of such diligences executed using summary warrant procedure, the total aggregate debts for which the diligences were executed using such procedure and the total recovered aggregate amounts. Would you like us to send you the data? We could also consider a more expansive piece of work through obtaining equivalent data from other local authorities. We'd be happy to discuss that further, if it would be of interest.

We're currently undertaking a lot of work on diligence, with a view to publishing a reference book on the subject in the coming years. We have also recently drafted a case analysis piece on the *McKenzie v City of Edinburgh Council* regarding the arrestment of benefit payments in bank accounts. While we're relatively supportive of the policy of protecting such payments from diligence, we consider that the decision was incorrect on statutory interpretation grounds. The primary methods of protecting benefits from diligence were intended to be the protected minimum amount and a challenge on the basis that the arrestment is "unduly harsh". If there is a desire to automatically exclude benefit payments without an "unduly harsh" challenge, then we are of the view that further statutory provision is necessary. Our article is due to be published in the *Juridical Review* in early 2024; however, we would be willing to send you a copy, if you'd like to read it.

In terms of earnings arrestments, the acquired data from City of Edinburgh Council suggests that the percentage recovery is significantly higher for local authorities than other arrestments. As such, if there is a desire to increase the protected earnings

amount for wages, careful consideration would need to be given regarding the impact of this on the timely recovery of debts by local authorities and the effects on their finances. We can see some justification in increasing the protected amount, e.g. by using the minimum wage/living wage as a reference point, but the wider consequences of such a change and how it connects up with the rest of this area of law is important. If a change is to be made, then the new protected amount level should be properly supported by evidence and/or reasoning. At present, we do not have the data to know what the impact on local authorities might be. In the event that a change is considered, a means of partially offsetting any negative impact for local authorities, and other creditors, would be to increase the percentage contributions of those receiving higher wages, e.g. 19% in the next category could be increased to 25%, for example.

If you think it would be helpful to discuss any of the above further, please let me know.

Best wishes,

Alisdair

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