

# **Bankruptcy and Diligence (Scotland) Bill**

## **Island Communities Impact Assessment Screening**

**April 2023**

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## **Name of Policy, Strategy or Service**

1. Bankruptcy and Diligence (Scotland) Bill.

## **Step One – Develop a clear understanding of your objectives**

### **What are the objectives of the policy, strategy or service?**

2. Generally, the provisions in the Bankruptcy and Diligence (Scotland) Bill (the “Bill”) described in the Policy Memorandum are intended to benefit all communities across Scotland.
3. The Bill brings forward stakeholder-led recommendations to introduce improvements to current insolvency solutions and debt recovery processes. Its aim is to help and improve the lives of people who are struggling with debt, which may be exacerbated by mental health issues. More efficient recovery processes will assist businesses and local authorities to collect debts from those who can pay.

### **Mental Health Moratorium**

4. The policy intention underpinning the proposal is to introduce an enabling power which would permit regulations to be made by the Scottish Ministers to introduce a new form of moratorium protection for a specific group of debtors, being those who are experiencing serious difficulties with their mental health as well as having problem debt.
5. The general purpose of a moratorium is to provide the debtor with ‘breathing space’ by preventing their creditors from taking action to recover those debts for a specified period of time, in order for the debtor to focus on treatment and recovery.
6. Further work will be taken forward within government and with stakeholders to develop the details of the scheme which will cover specific areas such as the criteria for entry to and exit from a moratorium; the specific protections afforded by a

moratorium; and the duration of those protections and the development of regulations.

## **Minor or technical amendments to bankruptcy legislation**

### **Clarification of Bankruptcy Recall Legislation**

7. The bankruptcy process is administered by a trustee who is appointed on award of bankruptcy or by their replacement trustee. The trustee could be either a private insolvency practitioner or the Accountant in Bankruptcy (AiB).

8. The Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) provides that where the debtor has paid, or is able to pay, all of their debts in full, an application can be made to AiB for recall of bankruptcy.

9. Sections 32-34 of the 2016 Act set out the recall process to be followed by AiB for cases where there is a private trustee.

10. Section 35 sets out the process AiB should follow where the AiB is trustee and both sections 35(1)(a) and (b) apply; it does not specify the process that should be followed if only section 35(1)(a) applies.

11. To date, all applications received where the AiB is trustee have been determined under section 35 of the 2016 Act.

12. However, issues of interpretation and ambiguity within these two recall processes have come to light recently. It has been suggested that the current provisions are unclear on what the appropriate process is for AiB to follow in cases where the AiB is the trustee and Section 35(1)(b) does not apply.

13. The original policy intention was that all recall applications where the AiB was trustee would be considered under section 35.

14. The proposal for the Bill is to put this position beyond doubt and remove any scope for ambiguity in the current provisions.

## **Award of Bankruptcy**

15. Section 22 of the 2016 Act makes provision for when bankruptcy is awarded by AiB where a debtor application is made. A debtor can make this application where they meet the criteria for the Minimal Asset Process (MAP) bankruptcy (section 2(2) of the 2016 Act) or full administration bankruptcy (section 2(8) of the 2016 Act).

16. Section 22 provides that AiB must award bankruptcy where, among other criteria, section 2(8) applies to the debtor. There is no cross reference to section 2(2) applying to the debtor and we believe this is an error.

17. The policy intention is that section 22 be amended to correct this error, so that all bankruptcies (both MAP and full administration) which meet the required criteria under the relevant subsection of section 2 of the 2016 Act should be awarded “forthwith”.

## **Gratuitous Alienations**

18. A gratuitous alienation is the voluntary disposal of a debtor’s asset by the debtor to another person for no value or less than full value.

19. It has been identified that there is a cross referencing error in Section 98(7) of the 2016 Act. It refers to section 98(6) rather than subsection (5) of section 98.

20. The provision included in the Bill is a technical amendment which will correct this error.

## **Appeal time periods**

21. The legislation currently provides that where there are commissioners involved in a bankruptcy, parties wishing to appeal the commissioners’ determination to AiB must do so within an 8 week period after the end of the relevant accounting period. Section 134(3) of the 2016 Act provides that a determination of AiB in any such appeal is appealable thereafter to the sheriff but the legislation is silent on the

time period for this and therefore the provision may be open to interpretation and dubiety.

22. The policy intention is that the appeal to the sheriff, available under subsection (3), must be made within 14 days of the date of determination of AiB. This is a technical amendment to clarify this and remove any dubiety of interpretation.

23. A similar issue of a missing time period for an onward appeal arises in section 69 of the 2016 Act. This section applies where the trustee is seeking authority to resign from office or where the trustee has died and there is a requirement to appoint a new trustee.

24. In this section, parties wishing to appeal the commissioners' determination on outlays and remuneration to AiB, must do so within 14 days of the determination. Section 69(12) provides that a determination of AiB in any such appeal is appealable thereafter to the sheriff, but the legislation is silent on the time period.

25. The proposal would be that an appeal to the sheriff against a determination of AiB, under section 69(12), must be made within 14 days of any decision of AiB in an appeal under section 69(11)(a).

## **Diligence provisions**

### **Arrestment and Action of Furthcoming**

26. The policy intention is to require a new type of information to be disclosed by the arrestee to the creditor. The new information which the arrestee would be required to provide would be that the arrestment did not attach property and the reason why, for example, due to insufficient funds or no account held. This would be set out in a prescribed form and requires to be submitted by the arrestee to the creditor within three weeks of the schedule of arrestment being served. This information will help a creditor to decide what action to take next.

27. It is important that arrestees are encouraged to provide the required information timely to the relevant parties. Where no information is provided, a creditor may apply to the court and the court may make an order imposing a fine on the arrestee where they fail, without a reasonable excuse, to provide the required information.

### **Diligence Against Earnings – 21 day notification**

28. The policy intention is to introduce a new requirement for an employer to notify the relevant party if an arrestment is unsuccessful within 21 days after the arrestment schedule or order is served. Unsuccessful in this context means that the debtor is earning less than the minimum threshold from which deductions may be made, or that the debtor is not employed by the person on whom the schedule has been served. Currently, the employer is required to provide information to the creditor if the arrestment is successful. Depending on the timing of the arrestment this can take time and leave the creditor waiting to find out the outcome of the arrestment. Inserting a provision to notify the outcome of an unsuccessful arrestment will provide a creditor with information which will allow them to make a decision about what action to take next based on facts, rather than assumptions.

29. It is important that employers are encouraged to provide the required information timely to the relevant parties within the timescales provided. Where no information is provided, a creditor may apply to the court and the court may make an order imposing a fine on the employer and order the information to be provided where they fail, without a reasonable excuse, to provide the required information.

### **Diligence on the Dependence**

30. The policy intention is to add a new statutory requirement for a Debt Advice and Information Package (“DAIP”) to be issued to a debtor in advance of the relevant court hearing stage where an application for diligence on the dependence is made by the creditor. This is to encourage the debtor to seek help or advice about the debt.

## **Exceptional Attachment**

31. Exceptional attachment is a diligence whereby a debtor's corporeal moveable property is valued, removed and sold. In order to be able to attach articles within a dwellinghouse, it is necessary for an application to be made to the court and the court must consider whether to grant an exceptional attachment order. Such an order allows the attachment, removal and ultimately the auction of non-essential assets belonging to the debtor and kept in a dwellinghouse. There is also currently provision for an attached asset to be left in the dwellinghouse and removed at a later date prior to auction if the officer of court considers it impracticable to remove immediately, for example if it is considered to be too bulky.

32. Attached articles may not be auctioned before 7 days have elapsed from the date of removal. During this 7 day period the debtor may apply to the sheriff for the return of an asset in certain circumstances. A 7 day "redemption period" also runs from the date on which the asset is attached. During this period, the debtor may pay a sum to redeem the asset.

33. The policy intention is to extend the redemption period where attached assets are left in the dwellinghouse and removed at a later date prior to auction. This will provide a longer period for the debtor to pay the redemption figure and retain the asset. Where an asset is removed immediately from the dwellinghouse, the intention is to leave the redemption period at 7 days from the date of removal to help limit the storage costs being added to the debt.

## **Money Attachment**

34. The policy intention is to amend the hours during which money attachment may take place (currently not beginning before 8am or after 8pm or not continuing after 8pm unless the prior authority of the sheriff has been obtained, or on a Sunday or public holiday). The amendment is to provide some more flexibility for when a money attachment can take place allowing the money attachment to take place outwith those hours where the premises are open for the purposes of trade or



business. This will reduce the need for applications to the court to be made and reduce the burden on the courts and the costs for creditors.

## **Do you need to consult?**

35. The proposals in this Bill are stakeholder-led. Scottish Ministers committed to undertake a wide-ranging policy review of Scotland's statutory debt solutions. As part of that review working groups were formed with key stakeholders from the debt, creditor and insolvency practitioners sector. Their remit was to look at the operation of existing statutory debt solutions, and provide recommendations for improvement. These recommendations have formed the basis of this Bill.

36. A public consultation '[Scotland's statutory debt solutions and diligence policy review](#)' was published subsequent to those recommendations. Within the consultation the Scottish Government proposed a series of improvements to the statutory debt solutions and diligence from those recommendations.

37. While there has been no public consultation on the provision to clarify bankruptcy recall legislation or the minor technical amendments, the purpose of these provisions are intended only to clarify existing processes in the 2016 Act.

38. There were no concerns raised either from the initial stakeholder working groups or the consultation responses about any undue impact the provisions would have on the island communities.

## **How are islands identified for the purpose of the policy, strategy or service?**

39. The islands have not been specifically identified for the policy and we do not anticipate that the Bill provisions will differentially affect those who live on the islands compared to those who live on the mainland.

## **What are the intended impacts/outcomes and how do these potentially differ in the islands?**

40. As the provisions in this Bill relating to the mental health moratorium are enabling powers, these provisions alone do not have an immediate effect on an island community which is significantly different from the effect on other communities, because these powers will only have an effect overall once exercised: any such effect would come at the point of regulations being made under the powers contained in the Bill.

## **Is the policy, strategy or service new?**

41. There is no existing statutory provision for the mental health moratorium. This is a new policy.

42. The other provisions within this Bill are amending current provisions in legislation.

## **Step Two – Gather your data and identify your stakeholders**

### **What data is available about the current situation in the islands?**

43. The data available on island communities with respect of statutory debt solutions and diligence is limited.

44. The number of diligence (such as earnings and wages arrestments) are recorded per Sheriffdom in Scotland. Therefore, the number of diligences undertaken in the island communities for each financial year are included within the data for the Sheriffdoms of both Grampian, Highland and Islands and North Strathclyde and cannot be extracted.

45. The data we hold on statutory debt solutions, however, is separated according to local authority areas within the 6 Sheriffdoms. The only local authorities specific to the island communities are Shetland Islands, Orkney Islands and Na h-Eileanan Siar. The other islands are part of a local authority area which also includes part of the mainland.

46. In 2021-22, the number of bankruptcies in the islands did not differ greatly from the mainland. When broken down into the 32 local authorities across Scotland the number of bankruptcies per 10,000 adults was similar across the entire country. For example, the number of bankruptcies (per 10,000 adults) on the Orkney Islands was between five and 10 which was the same as North Lanarkshire and East Lothian. Across the 32 local authorities in Scotland, there were either less than 5 adults being made bankrupt for every 10,000 adults or five to 10 adults being made bankrupt per 10,000 adults. On average, there is not a clear distinction in levels between the island communities and other areas of the country with respect to bankruptcy awards. In 2021-22, individuals entering a Protected Trust Deed or the Debt Arrangement Scheme per 10,000 adults were also similar in number, between the islands and the mainland.

### **Do you need to consult?**

47. The accessibility of professional mental health services in the islands may be more limited than those on the mainland. There may also be concerns as to whether the island communities will have easy access to the online mental health moratorium system, therefore, general connectivity may be an issue.

48. However, feedback to the public consultation did not raise any concerns which would unduly impact on the islands. The provision in the Bill is intended to create an enabling power to allow the Scottish Ministers to introduce regulations creating a mental health moratorium.

49. Further targeted consultation on the mental health moratorium will be undertaken through a working group of mental health professionals and representatives from the debt sector. This will focus on the practical operation of the

moratorium process including discussion on the resources available to less densely populated parts of the country.

### **How does any existing data differ between islands?**

50. Given the above mentioned difficulties obtaining data it is not possible to identify any differences.

### **Are there any existing design features or mitigations in place?**

51. The provisions within the Bill will amend legislation which will apply equally to all parties and will not be different between the island communities and the rest of Scotland.

## **Step Three – Consultation**

### **Who do you need to consult with?**

52. A mental health moratorium working group has been formed to focus on the practical application of the moratorium. Key stakeholders are members of the working group – these include representatives from the mental health profession. The working group's discussions will consider the resources available to implement the moratorium. One area for consideration will be the less densely populated parts of the country such as mainland rural communities and the islands. The Bill will introduce an enabling power allowing the Scottish Ministers to introduce regulations creating a mental health moratorium. The impact on the island communities and whether any additional consultation is necessary will be considered further as the regulations progress.

### **How will you carry out your consultation and in what timescales?**

53. Meetings of the working group commenced at the end of February with members determining the number of meetings required and the total period of time

necessary to reach their conclusions. The working group would be expected to conclude their work before the summer recess.

### **What questions will you ask when considering how to address island realities?**

54. Establishing the current accessibility of mental health services is a key question for the reality of life in the islands. Data to be identified will include - what level of mental health issues are experienced per head of population in the island communities when compared to other regions of the country. In addition, how does this correlate with the data available on the debt levels on a regional basis?

### **What information has already been gathered through consultations and what concerns have been raised previously by island communities?**

55. A public consultation was completed in October 2022 entitled '[Scotland's statutory debt solutions and diligence policy review](#).' Within the consultation the Scottish Government proposed a series of improvements to the statutory debt solutions and diligence from those recommendations.

56. There were no concerns raised either from the consultation responses or from any other previous stakeholder engagement about any undue impact the provisions would have on the island communities.

### **Is your consultation robust and meaningful and sufficient to comply with the Section 7 duty?**

57. Not applicable.

## **Step Four – Assessment**

### **Does your assessment identify any unique impacts on island communities?**

58. No. We do not anticipate that any impact on island communities will be different from the impact of communities on the mainland.

59. The potential impacts outlined in this document are not unique to island communities and may also be faced by rural communities across mainland Scotland, nor have they been raised significantly through consultation.

### **Does your assessment identify any potential barriers or wider impacts?**

60. We do not consider there to be any potential barriers.

### **How will you address these?**

61. Given the foregoing, in our opinion, we do not consider that this Bill will have an effect on an island community which is significantly different from its effect on other communities (including other island communities).

## **Recommendation**

62. A full Islands Community Impact Assessment is NOT required.

63. In preparing the Island Communities Impact Assessment, I have formed an opinion that our policy or strategy is NOT likely to have an effect on an island community which is NOT significantly different from its effect on other communities (including other island communities). The reason for this is detailed below.

## **Mental Health Moratorium**

64. The Bill will introduce an enabling power allowing the Scottish Ministers to introduce regulations creating a mental health moratorium. These provisions alone do not have an immediate effect on the island communities which is significantly different from the effect on other communities. Any such effect would come at the point of regulations being made under the powers contained within the Bill. The impact on the island communities and whether any additional consultation is required will be considered further as the regulations progress.

## **Minor or technical amendments to bankruptcy legislation**

65. As the data provided confirms, bankruptcy levels in the island communities do not differ greatly from other communities. The provisions within the Bill are solely technical amendments to bankruptcy legislation which will apply equally to all parties and will not differ between the island communities and the rest of Scotland.

## **Diligence provisions**

66. The provisions within the Bill will amend diligence legislation which will apply equally to all parties and will not differ between the island communities and the rest of Scotland. The diligence amendments are not markedly negative or unique to islands communities.

## Sign off

Screening ICIA Completed by Russell Haddow

Position: Policy Development Officer

Signature: Russell Haddow

Date: 22 February 2023

ICIA Authorised by Richard Dennis

Position: The Accountant in Bankruptcy and Agency Chief Executive

Signature: Richard Dennis

Date: 22 February 2023





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