This document relates to the Bankruptcy and Diligence (Scotland) Bill (SP Bill 27) as introduced in the Scottish Parliament on 27 April 2023

Bankruptcy and Diligence (Scotland) Bill

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Financial memorandum

Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Bankruptcy and Diligence (Scotland) Bill, introduced in the Scottish Parliament on 27 April 2023.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 27-EN)
- a Policy Memorandum (SP Bill 27-PM)
- a Delegated Powers Memorandum (SP Bill 27-DPM)
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 27-LC)

3. The Scottish Government has prepared this Financial Memorandum to set out the costs associated with the measures introduced by the Bankruptcy and Diligence (Scotland) Bill ("the Bill"). It does not form part of the Bill and has not been endorsed by the Parliament.

Background

4. The Scottish Ministers committed to undertake a wide-ranging policy review of Scotland's formal debt recovery mechanisms (known as diligence) and the statutory debt solutions (moratorium protection, bankruptcy, Protected Trust Deeds and the Debt Arrangement Scheme) with the aim of further enhancing and improving our system.

5. The Ministerial Working Group on Statutory Debt Solutions, comprising a wide body of sector specialists with expertise in debt advice and the operation of statutory debt solutions, agreed that the review should be a three stage process.

6. Stage 1 was led by the Accountant in Bankruptcy ("AiB") who worked with stakeholders to identify immediate priorities to be taken forward to help address the immediate impact of the COVID-19 pandemic. Stage 1 culminated in the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021 which were approved by the Parliament and came into force on 29 March 2021. These reforms included lowering the cost of access to bankruptcy where it is identified as the right mechanism to resolve debt issues and removing all fees for the most financially vulnerable.

7. Stage 2 was a wider review looking at the operation of existing statutory debt solutions, aimed at providing recommendations and options for improvement. Stage 2 involved the creation of dedicated stakeholder-led working groups to look at key areas of the current statutory debt solutions. The working groups drew on a wide range of expertise and knowledge from representatives of all sectors involved in the debt landscape. Each working group produced a paper outlining its considerations and recommendations. Some of the issues considered were complex in that there were strongly opposing views amongst stakeholders - it was not always possible to reach a consensus on the best way forward. Where that was the case, the information was presented to Ministers for their consideration. In August 2022, the Scottish Government published the consultation 'Scotland's Statutory Debt Solutions and Diligence: Policy Review Response', in response to the working groups' reports and recommendations. This outlined specific proposals for further action and sought further views.

8. The format and timescale for Stage 3 of the review into statutory debt solutions has still to be finalised. This stage will be more strategic and is likely to take place over an extended period of time, as agreed by stakeholders.

9. A similar policy review of Scottish diligence measures was conducted through a stakeholder-led working group established to consider feedback received through an earlier public consultation in 2016. This working group consisted of stakeholders with a wide range of experience in diligence and the debt landscape. The Scottish Government proposals in response to the working groups' recommendations were included in the public consultation published in August 2022.

10. This Bill largely brings together the areas requiring primary legislation from Stage 2 of the review of statutory debt solutions and the review of diligence. Other areas can be taken forward in secondary legislation or through guidance.

Mental health moratorium provisions

Detail of change

11. The current statutory moratorium on diligence available in Scotland is provided for in Part 15 of the Bankruptcy (Scotland) Act 2016 ("the 2016 Act"). It applies where a person notifies AiB of their intention to enter into or apply for one of the existing statutory debt solutions (being bankruptcy, a protected trust deed or a debt payment plan through the Debt Arrangement Scheme).

12. The general purpose of this moratorium is to provide a person who is in debt (generally known as the debtor) with 'breathing space' by preventing a person to whom the debtor owes money (generally known as the creditor) from taking action to recover those debts for a specified period of time. During the period of the moratorium the debtor is able to take advice on their financial situation and consider the most appropriate debt solution for their circumstances. This moratorium currently runs for a period of 6 months from the day it begins. At the conclusion of the moratorium period, the debtor will either have entered one of the formal statutory debt solution processes or, if they have not (because, for example, the notice of an intention to enter bankruptcy which commenced the moratorium was withdrawn) a creditor may once again take debt recovery action against the debtor.

13. Stakeholders and those with practical experience in both the money advice and mental health sectors have stated that there is a strong link between problem debt and poor mental health, and that poor mental health can both cause, and be caused by, problem debt. Poor mental health can impact an individual's ability to manage their money, to make sound financial judgements and decisions, or to maintain employment and a regular income that can service debt. Experience in the money advice sector also shows that individuals with mental health problems often do not seek early help with debt issues, which may be attributed to the stigma surrounding both mental health and debt problems. It is also generally acknowledged that the threat of creditor action, or pressure from creditors, can exacerbate existing mental health issues.

14. There is no existing statutory moratorium provision in Scotland which recognises the impact mental health has on a person's ability to manage their debt. The policy intention underpinning the present proposal is to create a new form of moratorium protection for a specific group of individuals, being those who are experiencing serious difficulties with their mental health as well as having problem debt.

15. There is no specific protection in Scottish bankruptcy law linked to poor mental health and there has been widespread support for a mental health moratorium to be developed. There is currently the Debt Respite Scheme, known as Breathing Space, in England and Wales specifically for those in mental health crisis which allows for protection against a creditor taking action against a debtor or contacting a debtor for the period of the mental health crisis treatment plus an additional 30 days.

16. The provision in the Bill will create an enabling power which would permit regulations to be made by Scottish Ministers to introduce a mental health moratorium. The enabling power in and of itself does not result in direct costs or savings to the Scottish Administration. Work continues with mental health professionals and other stakeholders on the practical aspects of the process which will be implemented through secondary legislation to be made under this new power. At that point, further details will be published on the likely direct costs or savings - which will be wholly dependent on the content of the regulations, and cannot be quantified at this point.

17. Dependent on the will of the Parliament, and assuming the Bill comes into force by summer 2024, the intention would be to bring forward detailed regulations in the autumn of that year, with the new mental health moratorium being available from 1 April 2025.

Costs on the Scottish Administration

18. The Bill seeks an enabling power to allow the Scottish Ministers to set out the detail of a mental health moratorium in regulations. The scheme is yet to be developed in detail, and as noted in the policy memorandum, further work is to be undertaken with a range of stakeholders as to how the scheme should operate, which debtors it should apply to, and the extent of the protections the moratorium will provide.

19. One key factor is the estimate of how many people might benefit from a mental health moratorium. Whilst this will clearly depend on the details of the scheme, some broad parameters can be suggested by looking at the equivalent scheme in England and Wales. In 2022, there were 1,212 mental health crisis breathing space registrations. Using relative population sizes, that is equivalent to 112 in Scotland. They had however expected a significantly greater take-up, so it might be reasonable to plan on the basis of between 200 and 500 applications a year.

20. In terms of assessing the potential cost, this again depends very much on the detailed design of the scheme. The Scottish Government can however be fairly confident that administration costs will fall between those of the existing Scottish moratorium at the lower end, and the costs of the England and Wales scheme at the upper end. In part this is because the stakeholder-led working group designing the scheme is expected to draw heavily on the best elements of the two extant schemes.

21. Lower end: At present anyone who is struggling with debts can apply for a moratorium if they are concerned that a creditor is going to take action against them to recover the debt. This application can be submitted through the AiB website. Alternatively, forms can be completed, signed, scanned and emailed to AiB or submitted by post. There is no fee or charge for a moratorium application. There were 3,112 moratoriums registered in 2022. The costs of operating this scheme are comprised mainly of IT and staff costs, and are estimated at no more than £25,000 a year[1]. To the extent that the mental health moratorium is able to rely on the same IT systems, the cost to the Agency should be de minimis.

22. Upper End: The UK Insolvency Service have provided us with details of the ongoing costs of the unit responsible for administering their Debt Respite Scheme (Breathing Space)[2]. For 2022-23, these are forecast to be in the region of £1.5m. This covers the costs of both their standard Breathing Space and Mental Health Crisis Breathing Space[3], and includes a share of general office overheads. Mental Health Crisis Breathing Space registrations were less than 2% of total Breathing Space registrations, so that allocating

[1] As drawn from Accountant in Bankruptcies internal management accounts
[2] The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020.
[3] Debt Respite Scheme (Breathing Space) guidance for creditors - GOV.UK (www.gov.uk)

these costs by relative case numbers would suggest an ongoing cost of administering the Mental Health Crisis Breathing Space of around £30,000. The UK Insolvency Service did not have the benefit of an existing personal insolvency moratorium to build upon, so that they were designing new IT and processes from scratch, and their Breathing Space schemes includes additional requirements such as creditor notification that are not included in Scotland's existing moratorium and – depending on the detailed design work – may not be requirements for Scotland's mental health moratorium. Their costings are therefore likely to be the very upper limit of what might be required – though it is worth noting that the total costs on the Breathing Space unit include around £215,000 of IT spend. IT costs are not necessarily scalable – in that the costs of developing and maintaining a system for a smaller number of cases may largely match the costs for a system handling more cases. Including this might therefore give a fairer indication of the costs of the Mental Health Crisis Breathing Space operation. On the other hand, at least some elements of any IT system required for administering the new Scottish mental health moratorium will be able to be brought over from the existing Scottish statutory moratorium, so these costs should be seen very much as the upper limits, and the Agency's existing systems for other statutory debt products, such as that for the Debt Arrangement Scheme, already include functionality for creditor notification.

23. The provisions within the secondary legislation will be developed from the work currently being undertaken with stakeholders. On conclusion of that work, and prior to the drafting of the required secondary legislation, more detailed costs will be established and provided to the Parliament.

Costs on local authorities

24. These provisions provide the Scottish Ministers with a power to make secondary legislation. However, as the provisions themselves are purely an enabling power, they do not result in direct costs or savings to local authorities. It is noteworthy that the impact assessment for the equivalent England and Wales scheme concluded there would be a net *benefit* to creditors as those individuals supported by debt advisors in general repay more debt than those not supported.

25. That said, the costs to local authorities in respect of administration will be dependent upon the finalised system. If the process requires the involvement of a money adviser funded by local authorities, this may increase their time and costs. Currently money advisers help individuals with their application for the statutory moratorium in Scotland, however, the Scottish Government is unable to extract the numbers of applications where this is the case.

26. There may also be a cost to the local authority as a creditor in terms of a delay in recovering debt. The extent of that cost would be dependent upon the level of protections provided by the mental health moratorium and the period of protection (which may not be a fixed period). It is therefore not possible to estimate the cost to local authorities when acting as creditors until the system has been finalised prior to secondary legislation being drafted.

Costs on other bodies, individuals, businesses or third sector organisation

27. These provisions provide the Scottish Ministers with a power to make secondary legislation, and the provisions within the secondary legislation could entail a range of costs and savings for other bodies, individuals and businesses. However, as the provision within the Bill is purely an enabling power, it does not result in direct costs or savings.

28. It is anticipated that there will be a role for mental health professionals in the mental health moratorium process and this will be developed through engagement with stakeholders including mental health professionals. The Insolvency Service impact assessment quantified the net cost to the approved mental health professionals of their similar moratorium at £9.12 per case.

29. It is standard practice at the moment for mental health professionals, on an ad-hoc basis, to provide a letter for a debtor to give to their creditors to say that they are unable to deal with their financial matters due to their mental health. Creditors are not bound to act on these letters beyond meeting the requirements of the Financial Conduct Authority to treat customers fairly. In the main, creditors extend extra forbearance through kindness rather than through duty or obligation. Discussions with mental health professionals suggests they will welcome the more formal structure and consistency that a mental health moratorium could provide.

30. There is currently a cost associated with a mental health professional's time for preparing such letters to creditors and there is the potential, depending on the processes introduced, for these costs to be reduced. For example if a standard form was developed whereby a mental health professional was required to confirm that a debtor meets certain specified criteria in terms of their mental health for accessing the moratorium, together with standardised and efficient processes for engaging with the scheme, this could reduce the time involved for the mental health professional to prepare the relevant paperwork.

31. The money advice sector is currently involved in helping debtors apply for the current statutory moratorium, and depending on the process developed for the mental health moratorium, there may be a cost to this sector through, for example, providing advice to, or on behalf of, potential applicants to the scheme or assisting with the application process. That, however, will need to be balanced with the savings being made by providing an additional tool to support those with serious mental health issues and problem debt which could result in reducing the work and costs for money advisers.

32. The extent of the cost to other bodies, individuals and businesses when acting as a creditor will be dependent upon the level of protections provided by the mental health moratorium and the period of protection (which may not be a fixed period). It is therefore not possible to estimate the cost to creditors until the system has been finalised prior to secondary legislation being drafted.

Summary of potential costs of mental health moratorium

33. As noted above, until the details of the scheme have been developed, it is not possible to provide accurate estimates of the potential ongoing or set-up costs either for the Agency or for third parties. These more detailed estimates will be provided in due course. To give an indication of the likely scale, the information above is summarised here. Ongoing costs assume a caseload of 375 a year as the midpoint of the range of likely case numbers suggested above.

	Year 1 (including implementation costs)		Annual cost for year 2 & 3		Total costs
	Low end system process	High end system process	Low end system process	High end system process	
Agency IT development	£10,000	£215,000	Nil	Nil	£10,000 - £215,000
Agency Staff Training, Publicity, Providing Guidance	De minimis	£30,000	De minimis	De minimis	Nil - £30,000
Costs on Local Authorities	Net Benefit	De minimis	Net Benefit	De minimis	De minimis
Costs on Creditors	De minimis	Unable to estimate*	De minimis	Unable to estimate*	Unable to estimate*
IT refresh	Nil	Nil	De minimis (wrapped up into changes to existing moratorium software)	Up to £50,000 (in year 2 or 3)	Up to £50,000

*Some potential designs of moratorium might involve creditors having to do significant work on their software systems, for example, to enforce different rules on interest and charges than those imposed by either FCA rules or the English and Welsh system. Since minimising unnecessary cost is a key concern in the detailed design work, this is unlikely, but is mentioned here for the sake of completeness.

Staffing costs	£15,000 (covered by staff time devoted to existing moratorium)	£30,000	£15,000 (covered by staff time devoted to existing moratorium)	£30,000	£45,000 - £90,000
Costs on Medical Professionals	Net Benefit	£3,750	Net Benefit	£3,750	Net Benefit - £11,250
Costs on Other Creditors	Net Benefit	Unable to estimate*	Net Benefit	Unable to estimate*	Unable to estimate*
Total cost	£25,000	£278,750	£30,000	£117,500	£55,000 - £396,250

Minor or technical amendments to bankruptcy legislation

Clarification of bankruptcy recall legislation

Detail of change

34. The bankruptcy process is administered by an appointed trustee,. The trustee could be either a private insolvency practitioner or the AiB.

35. 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[4]. The process for applying for a recall of an award of sequestration differs depending on who initiates the process and whether or not the trustee is the AiB. Essentially there are three possible scenarios:

- where the AiB is not the trustee[5]
- where the AiB is the trustee and another party makes the application
- where the AiB is the trustee and acts on its own accord

*Some potential designs of moratorium might involve creditors having to do significant work on their software systems, for example, to enforce different rules on interest and charges than those imposed by either FCA rules or the English and Welsh system. Since minimising unnecessary cost is a key concern in the detailed design work, this is unlikely, but is mentioned here for the sake of completeness.

[4] Accountant in Bankruptcy - Recall of Bankruptcy guidance booklet

[5] any party who may already make an application under section 31(2) i.e. debtor, creditor, trustee or any person having an interest.

36. Issues of interpretation and ambiguity within these 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. The intention was for all recall applications where the AiB is trustee to be considered under section 35 and this is how cases have been decided to date. The proposal for the Bill is to put this position beyond doubt and remove any scope for ambiguity in the current recall provision.

37. Therefore, the amendments made by section 2 of the Bill seek to clarify the process for each of the three scenarios to make clear:

- where the AiB is not the trustee: sections 31 to 34 apply and the AiB makes its decision under section 34
- where the AiB is the trustee and another party makes the application for recall: sections 31 and 35 apply and the AiB makes its decision under section 35
- where the AiB is the trustee and initiates the process for recall: section 35 applies and the AiB makes its decision under that section

38. The three scenarios above are not intended to be treated in the same way because not all provisions are relevant depending on who the trustee is. For example, if AiB is the trustee the requirements of subsection 32-34 are not relevant. But if it is a non-AiB trustee, they are. If AiB is initiating the process it isn't appropriate for AiB to make an application to themselves under section 31, so section 35 only applies to that scenario. To treat all scenarios in the same way would require a more substantive reform to recall procedure. As the provisions do work at present, although there is ambiguity, it was deemed important to refine the current provision and make the intention clearer rather than make any more substantive reform.

Costs on Scottish Administration

39. This is a technical change to address ambiguity in current legislation to clarify the correct section of the act to be followed. It will not result in any additional costs.

Costs on local authorities

40. This is a technical change to address ambiguity in current legislation and will not result in any additional costs.

Costs on other bodies, individuals, businesses or third sector organisations

41. This is a technical change to address ambiguity in current legislation and will not result in any additional costs.

Award of bankruptcy

Detail of change

42. Section 2 of the 2016 Act provides that an award of bankruptcy may be applied for by a debtor, a qualified creditor or creditors, or certain other parties. Prior to the changes introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2007 Act), all applications for bankruptcy were made by petition to the court. The 2007 Act made provision for an application for bankruptcy by a debtor to be made by debtor application to AiB rather than by petition to the court.

43. A debtor can make this application under section 2(2) of the 2016 Act for the Minimal Asset Process (known as "MAP" bankruptcy) or section 2(8) of the 2016 Act for a full administration bankruptcy. A MAP bankruptcy is open to individuals who have limited assets and are in receipt of certain prescribed payments or have insufficient income to make a contribution to their bankruptcy. It is a form of bankruptcy that is available to the most financially vulnerable.

44. Where a debtor application is made, section 22 of the 2016 Act provides that AiB must award bankruptcy where, among other criteria, section 2(8) applies to the debtor (which is the reference for full administration criteria[6]). There is no cross reference to section 2(2), the relevant provision for MAP bankruptcy. [The Scottish Government position is that all MAP and full administration bankruptcies which meet the required criteria under the relevant subsection of section 2 of the 2016 Act should be awarded without delay. An amendment is therefore proposed to clarify this, although AiB already works on this basis so no additional costs are anticipated.

Costs on Scottish Administration

45. This is a technical change to correct an error in the current legislation and will not result in additional costs.

Costs on local authorities

46. This is a technical change to correct an error in the current legislation and will not result in additional costs.

Costs on other bodies, individuals, businesses or third sector organisations

47. This is a technical change to correct an error in the current legislation and will not result in additional costs.

[6] Details of full administration criteria – Accountant in Bankruptcy website

Gratuitous alienations

Details of change

48. 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 (e.g. a debtor gifting a car to a friend to put it beyond the reach of creditors). This can be challenged and, on a successful challenge, the court must grant decree of reduction, or for such restoration of property to the debtor's estate, or such other redress, as may be appropriate. The policy intention behind section 98(7) of the 2016 Act is that, where a court does grant such a decree, the decree does not affect any right acquired by a third party where those parties undertook the transfer in good faith and for value through the transferee (for example, if the transferee has granted a lease of a property to a third party). However, section 98(7) refers to the wrong subsection. It should refer to section 98(5) which obliges the court to grant a decree, and not the exceptions which would prevent the court from granting such a decree (set out in section 98(6)).

49. The Bill will correct this error so that section 98(7) now refers to subsection (5). There is no anticipated impact on court resources and time.

Costs on Scottish Administration

50. This is a technical change to address an error in the current legislation and will not result in additional costs.

Costs on local authorities

51. This is a technical change to address an error in the current legislation and will not result in any additional costs for local authorities.

Costs on other bodies, individuals, businesses or third sector organisations

52. This is a technical change to address an error in the current legislation and will not result in any additional costs.

Appeal time periods

Detail of change

53. It has been identified that there are missing time periods within which an appeal of a decision of AiB is to be made to the sheriff in sections 69 and 134 of the 2016 Act.

Section 69 (resignation or death of trustee)

54. Section 69 of the 2016 Act currently provides that where a trustee is seeking authority to resign from office or where the trustee has died, the newly appointed trustee

may require the resigning trustee or the representatives for the trustee who has died to submit their accounts for audit to the commissioners, or where there are no commissioners, to AiB. The commissioners, or AiB, as appropriate, may issue a determination fixing the amount of remuneration and outlays payable to the previous trustee or their representatives.

55. 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, and therefore the provision may be open to interpretation and dubiety.

56. The Bill provides that this appeal to the sheriff, available under section 69(12), would be made within 14 days of any decision of AiB in an appeal under section 69(11)(a).

Section 134 of the 2016 Act (trustee's outlays and remuneration)

57. Provision is made in the 2016 Act for the taxation of accounts to allow for the audit and determination of the trustee's outlays and remuneration by the commissioners or the AiB for each accounting period.

58. Section 134(1)(a) of the 2016 Act currently provides that where there are commissioners involved in a bankruptcy, parties wishing to appeal the commissioners' determination may appeal to AiB and this must be done 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.

59. The Scottish Government therefore proposes to address this by inserting an amendment to make clear that the trustee, the debtor or any creditor may, within 14 days beginning with the date of any decision of AiB in an appeal under section 134(1)(a), appeal to the sheriff against that decision. The Bill also modifies section 134(4) to make it clear that the debtor may appeal under subsection (3) only if the debtor satisfies the sheriff that the debtor has a financial interest in the outcome of the appeal.

60. These amendments to sections 69 and 134 will clarify the time period for appeals and remove any current dubiety with interpretation. The time periods being inserted will provide consistency with other sections of the 2016 Act for similar onward appeals against an AiB decision to the sheriff. It is not anticipated that this will increase or decrease the number of appeals.

Costs on Scottish Administration

61. These are technical changes to address ambiguity in current legislation and will not result in any additional costs.

Costs on local authorities

62. These are technical changes to address ambiguity in current legislation and will not result in any additional costs.

Costs on other bodies, individuals, businesses or third sector organisations

63. These are technical changes to address ambiguity in current legislation and will not result in any additional costs.

Diligence provisions

Arrestment and action of furthcoming

Details of change

64. Arrestment is a diligence which allows a creditor to attach arrest or freeze funds or goods belonging to a debtor which are held by a third party (the "arrestee"), often a bank. For example, where a debtor owes money and this is established by decree or document of debt[7], a creditor may serve a schedule of arrestment on the debtor's bank. The result of this would be that the bank cannot release the arrested funds to the debtor without reference to the creditor. Arrestment attaches the assets held by an arrestee; it does not transfer ownership of the assets to the creditor. In order to complete the diligence, it is necessary that the arrestment is followed either by automatic release under section 73J the Debtors (Scotland) 1987 Act ("the 1987 Act"), where this section applies funds are released automatically after the expiry of 14 weeks, or by the creditor raising an action of furthcoming. An action of furthcoming, if successful, grants judicial authority for the property to be released to the creditor. Alternatively, the debtor may sign a mandate authorising the arrestee to release the arrested items to the creditor

65. Currently, there is a duty on the arrestee to disclose to an arresting creditor the existence of and the nature and value of any property attached by an arrestment set out in section 73G of the 1987 Act. Where nothing is arrested, there is no requirement for the arrestee to provide a "nil" return. The proposal is to amend this, so that where the arrestment was unsuccessful (meaning that it did not arrest funds), the arrestee is required to confirm to the creditor the reasons why. 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. The new disclosure being required is to be submitted in the same way that existing disclosures are required to be made under section 73G. The prescribed form must be sent within 3 weeks of the date on which the schedule of arrestment is served on the arrestee. A copy of the disclosure must be sent to the debtor. There will however be no requirement to send a copy of the form to any other person under subsection (5)(b) in such cases since no property or funds will have attached so these provisions are not relevant. For example, if no property has

[7] See the definitions for these terms in section 73A of the Debtors (Scotland) Act 1987.

attached there can be no person who owns the *attached* property in common with the debtor.

Costs on the Scottish Administration

66. There are no additional costs on the Scottish Administration.

Costs on local authorities

67. There are no additional costs on local authorities.

Costs on other bodies, individuals, businesses or third sector organisations

68. The form on which the information is to be provided will be standard and will be prescribed by the Scottish Ministers. While there will be time costs for the arrestee to complete the form, it is envisaged that these will be minimal. It is not known how many bank arrestments are unsuccessful. There were approximately 223,000 non-earnings arrestments executed in the year 2021-22. If 30% of these were unsuccessful this would mean an estimated 66,900 would have been unsuccessful. Assuming 10 minutes to complete the form and staff costs of £15 an hour, this would imply a cost of £167,250 – this is likely to be a significant over-estimate. The cost would be spread across the banks. Sheriff officers have agreed to work with banks to minimise the costs.

Diligence against earnings – 21 day notification

Details of change

69. Diligence against earnings are types of arrestments which allow a creditor to instruct a debtor's employer to make a deduction from the debtor's earnings. Statutory provisions on the three types of diligence against earnings (earnings arrestment, current maintenance arrestment and conjoined arrestment[8]) are set out in Part 3 of the 1987 Act.

70. Changes to allow for a more informed flow of information amongst the parties operating a diligence against earnings were introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (amending Part 3 of the 1987 Act). The employer therefore is already under a duty to provide certain information set out at section 70A of the 1987 Act. It provides that where an employer receives a schedule or order in relation to an earnings arrestment, they must send, as soon as reasonably practicable, to the relevant party the following information: 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).

[8] See the glossary for definitions terms

71. The Bill makes provision for a new requirement for a person who receives a schedule or order 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 because of the net earnings of the debtor, the sum to be deducted on any pay-day under Part 3 of the 1987 Act is, or is expected to be, nil (e.g. because their earnings are too low, see sections 48, 53 and 61 and schedule 2 of the 1987 Act) or that the debtor is not employed by the person on whom the schedule has been served. For example, if an employer receives an earnings arrestment schedule in respect of a debtor who is employed by them, but the debtor is paid monthly and their net earnings are not more than £655.83, the employer will now be required to disclose to the arresting creditor that the sum to be deducted is nil. This is because these earnings are below the minimum amount from which deductions can be made from monthly earnings for an earnings arrestment (see section 49 read with schedule 2 of the 1987 Act).[9] In such cases this disclosure would be a one-off obligation and so, following the disclosure to the creditor or sheriff clerk, the person would have no further obligation to provide information under section 70A.

72. Depending on the timing of the arrestment, the information currently required to be provided to the creditor under section 70A can take time and leave the creditor waiting to find out the outcome of the arrestment, and does not require information where the arrestment is unsuccessful to be disclosed. Extending the type of information to be provided to include information related to an unsuccessful arrestment will provide a creditor with additional information which will allow them to make a decision about what action to take next based on facts rather than assumptions. Employers will be required to provide this information on a prescribed form so that only the required information is shared between the parties.

73. It is important that employers are encouraged to provide the required information timeously to the relevant parties. Section 70B(A1) (as inserted by the Bill) will provide that if a person fails without a reasonable excuse to provide the required information, the sheriff may, on the application of any creditor, make an order requiring the person who received the schedule or order to send the information to the creditor, and to pay to the creditor the sum due to the creditor by the debtor or the sum of £500 (whichever is the lesser). Section 70B(2) as amended provides that payment of the sum, including by virtue of new subsection (A1), will reduce the debt owed to the creditor by the same amount and the employer is not entitled to recover that sum from the debtor. The financial aspect of the order is considered necessary to achieve compliance. A person may appeal an order in terms of section 70B(3) of the 1987 Act (see also section 109 of the Courts Reform (Scotland) Act 2014) which applies changes to the appeal procedure).

Costs on the Scottish Administration

74. There are no additional costs for the Scottish Administration unless they are the employer of someone who is subject to an earnings arrestment. Costs will already be incurred in providing the current information required by section 70A of the 1987 Act. Here

[9] The figures in the tables in schedule 2 of the 1987 were recently amended by the Diligence against Earnings (Variation) (Scotland) Regulations 2023.

they will have a new cost of completing and submitting a form to confirm where an arrestment is unsuccessful.

Costs on local authorities

75. There are no additional costs for the local authorities unless they are the employer of someone who is subject to an earnings arrestment. Costs will already be incurred in providing the current information required by section 70A of the 1987 Act. Here they will have a new cost of completing and submitting a form to confirm where an arrestment is unsuccessful.

Costs on other bodies, individuals, businesses or third sector organisations

76. The form the information is to be provided on will be prescribed by the Scottish Ministers. While there will be time costs for the employer to complete the form it is envisaged that these will be minimal. Figures provided by local authorities suggest less than 20% fail. There were approximately 58,000 earnings arrestments executed in the year 2021-22 meaning an estimated 11,000 fail. Assuming again the form requires 10 minutes of staff time at a cost of £15 a hour would suggest a total cost of £27,500. This is likely to be a significant over-estimate. The cost would be spread across all employers.

77. If employers are required to provide this additional information, it would allow creditors to make informed decisions on whether to pursue further action. If the debtor is earning below the minimum threshold or not employed by the person who was served the order, it would not be cost effective for the creditor to continue attempting to serve an earnings arrestment. This would remove the cost of further investigation and pursuit where there is no return. Similarly, weighing up costs allows for a potential greater return.

78. As outlined above, the court may order an employer to pay a financial penalty to a creditor in certain circumstances. A financial penalty will only impact those employers who, without reasonable excuse, fail to provide the required information. There would be a time and resource cost for a creditor in making an application to the court for such an order where they do not receive the required information. It is not possible to quantify this.

Diligence on the dependence

Detail of change

79. Diligence on the dependence of an action is a provisional measure which may be taken against the property of a debtor during the progress of a court action to safeguard the creditor’s claim. Diligence on the dependence can prevent a debtor disposing of funds, goods or property. Provision on this type of diligence is contained in part 1A of the 1987 Act.

80. There are two main types of diligence on the dependence: arrestment and inhibition. Arrestment “freezes” goods or money owned by the defender which are held by a third party, who is usually called the arrestee. Inhibition has the effect of prohibiting the defender from selling heritable property by making deeds granted by the debtor in breach of the inhibition reducible.

81. A creditor may apply to the court for warrant for diligence by arrestment or inhibition on the dependence of action. If granted, the effect of this would be that the debtor’s property would be secured for the benefit of the creditor before judgement is obtained. The court, on receiving an application, may fix a date for a hearing on the application (“an ordinary case”) or, if satisfied that certain circumstances apply, it may grant a warrant without a hearing (“an urgent case”). The latter of these results in a hearing being fixed after the court grants the order for warrant..

82. A Debt Advice and Information Package (“DAIP”) is a booklet which provides information about the importance of seeking early advice and provides contact details for organisations which can help the debtor find an advice provider in their local area. The booklet also contains information about common forms of enforcement, gives information about bankruptcy and trust deeds, and provides details of other sources of debt advice. A creditor is required by law to arrange to provide a DAIP prior to using most types of diligence.

83. The Bill makes provision for the creditor to provide the debtor with a DAIP (where the debtor is an individual) in advance of the relevant hearing stage and this will be a factor that the court must consider. In an ordinary case, the Bill will require the creditor to have provided the debtor with a DAIP as a condition in the court making an order granting warrant for diligence. In an urgent case, where a hearing is fixed under section 15E(4)(a), the proposal is that where the court is satisfied that the creditor has not provided the debtor with a DAIP, the court must make an order recalling the warrant, and recalling any arrestment or inhibition executed in pursuance of the warrant.

84. The policy intention therefore is for the debtor to be issued with a DAIP during diligence on the dependence. This recognises the importance of, and value to, debtors understanding how to access advice but also recognises the sensitive nature of this diligence which is used to protect an asset by preventing it from being sold or hidden.

Costs on the Scottish Administration

85. The addition of the new provision requiring a DAIP to be issued to a debtor prior to the relevant hearing stage for diligence on the dependence will result in additional ongoing costs for publishing and distribution. These costs will be incurred by AiB who is already responsible for the costs of printing and distributing the DAIP. These documents cost 18 pence each to print plus delivery from AiB to creditors or their representatives. In the last 5 years there have been approximately 1,800 diligence on the dependence applications. This change would therefore cost an estimated £324.

Costs on local authorities

86. There are no significant cost implications for local authorities for the DAIP. Whilst there may be a small additional cost for the creditor in providing the debtor with a DAIP – and the level of that cost will depend on how that is done – this cost can be added to the debt, and is therefore recoverable from the debtor.

Costs on other bodies, individuals, businesses or third sector organisations

87. There are no significant cost implications for other parties. The DAIP is provided to creditors or their agents by AiB free of charge. Whilst there may be a small additional cost for the creditor in providing the debtor with a DAIP – and the level of that cost will depend on how that is done – this cost can be added to the debt, and is therefore recoverable from the debtor.

Exceptional attachment

Detail of change

88. Exceptional attachment is a special procedure to be followed when attaching articles kept within a dwellinghouse. It is necessary for an application to be made to the court in all cases where a creditor wishes to pursue attachment in a domestic dwellinghouse, 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. Prior to granting an order the sheriff needs to be satisfied that there are exceptional circumstances and must take matters into consideration including the nature of the debt, whether the debtor resides in the dwellinghouse, whether they have received money advice and whether there is, or has been, any agreement between the debtor and the creditor for the payment of the debt. Exceptional circumstances require the sheriff to be satisfied that the creditor has taken reasonable steps to negotiate a settlement or used, or tried to use, other forms of diligence first, rather than resorting to exceptional attachment, and that there would be assets available at least to satisfy the creditor's expenses plus the sum of £100, and that it would be reasonable in the circumstances to grant the exceptional attachment order.

89. When executing an exceptional attachment order, there is a provision which allows for the assets to be removed immediately or left in the dwellinghouse and removed at a later date, if the officer of court considers it impracticable to remove them immediately. An officer of court therefore has discretion over whether or not to remove an item immediately and, when this is impractical, may leave the item in the dwellinghouse and arrange for it to be removed at a later date. The Scottish Government understands that, in reaching a decision over whether or not to remove an item immediately, officers of the court may consider the costs associated with storing assets, whether the item is easy to remove and store, and whether there is a prospect of the assets being destroyed or vandalised. Where

an asset is left in the dwellinghouse, the officer must give at least 7 days' notice of the date when the assets will be removed.[10]

90. 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 on the grounds that the attachment was incompetent, that auction would be unduly harsh or that the articles are of sentimental value. 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. The amount for which such an article may be redeemed is the value fixed under section 51 or 54(1) of the Debt Arrangement and Attachment (Scotland) Act 2002.

91. For articles removed immediately from the dwellinghouse, once an attachment schedule has been completed, the minimum time period before they can be auctioned is 7 days. For articles left in the dwellinghouse and removed at a later date, the minimum period before auction is 14 days (allowing for 7 days' notice before removal, plus 7 days 'no auction' period during which the debtor can apply to the sheriff for the return of the asset in certain circumstances). For articles left in the dwellinghouse and removed at a later date, currently, the debtor may only redeem the article within the first 7 days as this period runs from the date the article was attached.

92. The Diligence Working Group recommended that the current 7 day redemption period should be extended but were also mindful that any extension could impact on storage costs which can be added to the debt. In striking what they considered to be a fair balance, the recommendation was that the redemption period for assets that are attached and not immediately removed from the dwellinghouse (because it was impracticable to do so) should be extended from 7 days to 14 days. The working group recommended that the redemption period of 7 days would remain for assets which were removed immediately from the dwellinghouse.

93. The policy intention is to extend the redemption period for attached articles that are not immediately removed from the dwellinghouse from 7 to 14 days. This will bring the redemption period in these circumstances into line with the minimum period before they are auctioned and will allow the debtor an additional 7 days to pay the redemption figure and retain the asset. The article cannot be auctioned in that period in any event so this will not result in any delays for creditors using this method of diligence.

94. Where an asset is removed immediately from the dwellinghouse, the redemption period is to remain at 7 days from the date of removal to help limit the storage costs being added to the debt. In these cases, any increase to the redemption period would increase the minimum period of time before which these articles could be auctioned. This would lead to increased storage fees which can be added to the debt.

[10] See rule 19.2 of the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002

Costs on the Scottish Administration

95. There are no additional administration costs relating to exceptional attachment changes.

Cost on local authorities

96. There are no additional costs on local authorities. Extending the redemption period where attached items are initially left in the dwellinghouse and removed at a later date will provide more time for a debtor to redeem the attached items. This may increase the chances of local authorities being able to recover the debt via the debtor paying the redemption fee as opposed to the sale of the item at auction. Exceptional attachment was used by local authorities five times in the year 2021-22 and not used in the year 2020-21. Given this was the period of the pandemic, these numbers may not be fully reflective of standard use. During the last 5 years it has been used 575 times.

Costs on other bodies, individuals, businesses or third sector organisations

97. Whilst creditors may be required to pay to store an attached article before it is auctioned, this change should have minimal impact on such costs. This is because at present, at least 7 days storage will always be required whether the item is removed immediately or at a later date, and this will continue to be required. As set out above, during this 7 day period the debtor may apply to the sheriff for the return of an asset on the grounds that the attachment was incompetent, that auction would be unduly harsh or that the articles are of sentimental value. Although the redemption period for items that are not immediately removed from the dwellinghouse is to be extended from 7 to 14 days, this simply brings that period into alignment with the minimum period before auction for those cases. The minimum time an item is stored before its auction will continue to be 7 days. There is no anticipated impact on courts and sheriffs.

Money attachment

Detail of change

98. Money attachment is a special procedure which allows a creditor, via a sheriff officer, to attach money (cash including coins and banknotes in a foreign currency, postal orders, banking instruments etc.) which is owned by a debtor (but not kept in their home). Currently money attachment cannot take place on a Sunday, public holiday or before 8am or after 8pm (and cannot continue after 8pm if it is in progress) unless prior authority of the sheriff has been obtained.

99. In executing a money attachment, an officer of court has to make a judgement on the best time to carry out the attachment, which is generally the time at which there is a prospect of recovering the most money. This in practice would mean that an officer of court would not seek to carry out a money attachment when a business has just opened. Instead they are more likely to carry out the money attachment after the business has

been open for a time but before banking. The current restrictions on when this diligence can be carried out can make it difficult to execute a successful money attachment in a pub or nightclub in particular, due to their later opening times, without obtaining the prior authority of the sheriff. This incurs an extra cost for the creditor.

100. The proposal is to provide some more flexibility for when a money attachment can take place. The Bill disapplies the current restrictions in relation to premises in which a trade or business is carried on, any day and at any time the premises are open (whether to the public generally or not), for the purposes of the trade or business. This would mean, for example, that it would be competent for an officer to execute a money attachment at a nightclub at 1am on a Sunday and to do so without prior approval of the sheriff, providing the nightclub was in fact open at that time. The current restrictions are otherwise retained so, for example, a money attachment could not be executed at a shop at 10pm on a Sunday if the shop was not open at that time.

101. This will reduce the need for applications to the court to be made for authority for the attachment to be executed outwith the currently stated times. This will reduce the burden on the courts and the costs for creditors.

Costs on the Scottish Administration

102. There are no additional administration costs.

Costs on local authorities

103. There are no additional costs on local authorities. Allowing money attachment to be executed outwith the current time restrictions where the premises are open for business may provide minimal cost savings for a local authority where they are a creditor. It will reduce the likelihood of being required to make a court application to execute money attachment outwith the stated times. The Act of Sederunt (Money Amendment Rules) 2009 sets out that for applications under Part 8 of the Bankruptcy and Diligence 2007 Act, by an officer of court, shall be made by minute and that the cost of lodging the minute is £52.

104. In the last 5 years, money attachment has been used 15 times in respect of council tax and a further 15 times by public bodies which may have included local authorities (it is not possible to establish the split of the public bodies). It is not known how often this involved an application to the court for executing this diligence outwith the set timescales. The costs over the last 5 year period could have ranged from £0 to £1,560. Savings therefore are expected to be minimal.

Costs on other bodies, individuals, businesses or third sector organisations

105. There are no additional costs. Allowing money attachment to be executed outwith the current time restrictions where the premises are open for business may provide minimal cost savings for a creditor. It will reduce the likelihood of being required to make a court application to execute money attachment outwith the stated times.

106. In the last 5 years, money attachment has been used 85 times of which 15 were known to be by local authorities for council tax, as stated above. It is not known how often this involved an application to the court for executing this diligence outwith the set timescales. The costs over the last 5 year period could have ranged from £0 to £3,640. As highlighted the financial impact is likely to be minimal given the level of usage of this diligence.

107. Reducing the likelihood of officers of court being required to apply to court to execute money attachment outwith the stated times, and instead, allowing money attachment to be executed outwith those times when premises are open for business will reduce the burden on the courts. Although given the low usage of this diligence, this is expected to be minimal.

Summary of financial costs

Table 1: Mental health moratorium

	Year 1 (including implementation costs)		Annual cost for year 2 & 3		Total costs
	Low end system process	High end system process	Low end system process	High end system process	
Agency IT development	£10,000	£215,000	Nil	Nil	£10,000 - £215,000
Agency Staff Training, Publicity, Providing Guidance	De minimis	£30,000	De minimis		Nil - £30,000
Costs on Local Authorities	Net Benefit	De minimis	Net Benefit	De minimis	De minimis
Costs on Creditors	De minimis	Unable to estimate*	De minimis	Unable to estimate*	Unable to estimate*
IT refresh	Nil	Nil	De minimis (wrapped up into changes to existing moratorium software)	Up to £50,000 (in year 2 or 3)	Up to £50,000
Staffing costs	£15,000 (covered by staff time devoted to existing moratorium)	£30,000	£15,000 (covered by staff time devoted to existing moratorium)	£30,000	£45,000 - £90,000

*Some potential designs of moratorium might involve creditors having to do significant work on their software systems, for example, to enforce different rules on interest and charges than those imposed by either FCA rules or the English and Welsh system. Since minimising unnecessary cost is a key concern in the detailed design work, this is unlikely, but is mentioned here for the sake of completeness.

Costs on Medical Professionals	Net Benefit	£3,750	Net Benefit	£3,750	Net Benefit - £11,250
Costs on Other Creditors	Net Benefit	Unable to estimate*	Net Benefit	Unable to estimate*	Unable to estimate*
Total cost	£25,000	£278,750	£30,000	£117,750	£55,000 - £396,250

Table 2: Arrestment and action of furthcoming

Non-earnings arrestment unsuccessful	Number of arrestments	Time taken	Cost per hour	Annual cost for year 1, 2 & 3	Total cost for 3 years
Costs on the Scottish Administration	Nil	Nil	Nil	Nil	Nil
Costs on Local Authorities	Nil	Nil	Nil	Nil	Nil
Costs to other bodies, individuals, business etc	66,900	10 minutes	£15	£167,250	£501,750

Table 3: Diligence against earnings

Earnings arrestment unsuccessful 2021-22	Number of unsuccessful arrestments	Time taken	Cost per hour	Annual cost for year 1, 2 & 3	Total cost for 3 years
Costs on the Scottish Administration	Nil	Nil	Nil	Nil	Nil
Costs on Local Authorities	Nil	Nil	Nil	Nil	Nil
Costs to other bodies, individuals, business etc	11,000	10 minutes	£15	£27,500	£82,500

*Some potential designs of moratorium might involve creditors having to do significant work on their software systems, for example, to enforce different rules on interest and charges than those imposed by either FCA rules or the English and Welsh system. Since minimising unnecessary cost is a key concern in the detailed design work, this is unlikely, but is mentioned here for the sake of completeness.

Table 4: Money attachment

	Minimum annual cost for year 1, 2 & 3*	Maximum annual cost for year 1, 2 & 3*	Minimum Cost for 3 years	Maximum Cost for 3 years
Costs on the Scottish Administration	Nil	Nil	Nil	Nil
Costs on Local Authorities and public bodies	Nil	£1560	Nil	£4,680
Costs on other Organisations (exc local authorities)	Nil	£3640	Nil	£10,920
Total Costs	Nil	£5,200	Nil	£15,600

*Figures based upon the costs for 2018 – 2022.

Table 5: Total cost of the Bill across 3 years

Total cost for mental health moratorium	£55,000 - £396,250
Total cost for diligence measures	£589,450 - £599,850
Total costs	£594,950 - £996,100

This document relates to the Bankruptcy and Diligence (Scotland) Bill (SP Bill 27) as introduced in the Scottish Parliament on 27 April 2023

Bankruptcy and Diligence (Scotland) Bill

Financial memorandum

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