BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Bankruptcy and Diligence (Scotland) Bill, introduced in the Scottish Parliament on 27 April 2023, as amended at Stage 2. Text has been added or amended as necessary to reflect amendments made at Stage 2 and these changes are indicated by sidelining in the right margin.

2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill as amended at Stage 2. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

NOTES ON INTERPRETATION

4. The Bill's freestanding text, that is its sections, fall to be interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010. Text that the Bill inserts into other enactments falls to be interpreted in accordance with the interpretation legislation that applies to that enactment. For example, text inserted into the Bankruptcy and Diligence etc. (Scotland) Act 2007 falls to be interpreted in accordance with the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, whereas text inserted into the Debtors (Scotland) Act 1987 falls to be interpreted in accordance with the Interpretation Act 1978.

CROWN APPLICATION

5. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. As such, this Bill applies to the Crown in the same way as it applies to everyone else. However, the Bill amends a number of existing enactments which apply to the Crown to varying and limited extents (e.g. only in its capacity as employer or creditor). The Bill makes no change to the application of those enactments to the Crown.

OVERVIEW

6. The Bill—

- provides an enabling power to establish a mental health moratorium on debt recovery action
- makes minor and technical modifications to the Bankruptcy (Scotland) Act 2016
- makes technical modifications to the law of diligence (Scotland's formal debt recovery mechanisms)

COMMENTARY ON PROVISIONS[1]

Mental health moratorium

Section 1 – Moratorium on diligence: debtors who have a mental illness

7. This section gives the Scottish Ministers a power by regulations to establish a moratorium (meaning a temporary suspension for a set amount of time) on debt recovery action in relation to individuals who have a mental illness. Subsection (2) sets out the things that regulations under this section may include provision about, but the list is neither exhaustive nor mandatory.

8. Regulations under this section will be subject to the affirmative procedure. The regulations may make different provision for different purposes, modify any legislation and include incidental, supplementary, consequential, transitional, transitory or saving provision.

Modification of the Bankruptcy (Scotland) Act 2016

Section 2 – Process for applying for recall of an award of sequestration

9. The Bankruptcy (Scotland) Act 2016 ("the 2016 Act") contains provisions allowing the Accountant in Bankruptcy ("the AiB") to recall an award of sequestration on the ground that the debtor has paid, or is about to pay, their debts in full. Sequestration is the term used for bankruptcy in Scotland. It is the formal legal process in Scotland in which a person is declared bankrupt or insolvent by the AiB or a court. As set out in section 38(1) of the 2016 Act, the effect of the recall of an award of sequestration is, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position the debtor, or, as the case may be, the other person, would have been in if the sequestration had not been awarded. The sequestration process is administered by a trustee, which may be a private trustee or the AiB. 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: 1) where the AiB is not the trustee, 2) where the AiB is the trustee and another party makes the application, or 3) where the AiB is the trustee and acts on its own accord. The amendments made by this section seek to clarify the process for each of these scenarios.

10. Subsection (2) amends section 29 of the 2016 Act. A petition for recall of an award of sequestration may be presented to the sheriff by the debtor, any creditor, any other person having

[1] See the glossary in the Policy Memorandum for definition of terms.

an interest, the trustee in the sequestration, or AiB. Subsection (2) amends section 29 so that it is clear that the person presenting the petition only needs to send a copy of the petition to the other persons listed in section 29(4) of the 2016 Act — i.e. they do not need to notify themselves if they are listed.

11. Subsection (3) amends section 31 of the 2016 Act. An application to the AiB may be made under this section by the debtor, a creditor, any other person having an interest, or the trustee (if the trustee is not the AiB). Subsection (3)(a) and (b) amend section 31 so that it is clear that the person making the application only needs to notify the other persons listed in section 31(4) of the 2016 Act—i.e. they do not need to notify themselves if they are listed. The changes also clarify that the applicant does not need to notify AiB where the trustee is AiB, since AiB will be the recipient of the application. Subsection (3)(c) makes it clear that in all cases where an application is made under section 31 of the 2016 Act, the proceedings in the sequestration are to continue until a decision on the application has been made. This amendment highlights that a decision on an application under section 31 of the 2016 Act can be made under either section 34 or 35 of that Act, depending on whether or not the AiB is the trustee (each of those sections setting out how and in what circumstances AiB may recall an award of sequestration (which includes, for example, a requirement that the debtor's debts have been paid in full)).

12. Subsections (4), (5) and (6)(a) and (d) amend sections 32 (application under section 31: further procedure), 33 (determination where amount of outlays and remuneration not agreed) and 34 (recall of sequestration where Accountant in Bankruptcy is trustee) of the 2016 Act to make it clear that those sections apply only where the AiB is not the trustee.

13. Subsections (6)(b) inserts provision into section 34 which provides that before recalling an award of sequestration AiB must take into account any representations made by an interested person within 21 days beginning with the day on which notice is given. Subsection (6)(c) increases the time limit in section 34(2)(a) in which AiB must make its decision under section 34 of the 2016 Act from 8 to 9 weeks (where no appeal is made under section 37(5)(a)).

14. Subsection (7) amends section 35 of the 2016 Act. The modification made by subsection (7)(a) makes it clear that section 35 is to apply when the AiB is the trustee and where either an application is made under section 31 or where the AiB acts of its own accord. Like a private trustee, the AiB as trustee is able to initiate the process for the recall of an award of sequestration, and the amendments in subsections (7)(b) and (c) align the notification requirements to mirror those required of private trustees.

15. Subsection (7)(d) modifies section 35(5)(a) to reflect that representations may be made by an interested person to AiB under subsection (2A) or section 31(3)(b), depending on whether AiB is acting in response to an application or on its own accord.

16. Subsection (7)(e) imposes a time limit in which the AiB must make its decision under section 35 of the 2016 Act. It applies both to an application received under section 31 of that Act and to when the AiB is acting of its own accord. As mentioned above, subsection (6)(c) increases the time limit in which AiB must make its decision under section 34 of the 2016 Act. The changes made by subsection (7)(e) align the decision-making time period in which the AiB must make a decision under section 35. Subsection (7)(e) also aligns the process in section 35 with that for

situations where the AiB is not the trustee by providing that, despite any notice given under subsection (2)(b) the proceedings in the sequestration are to continue until a recall of an award of sequestration is granted.

17. Overall, the modifications remove ambiguities as to what the appropriate processes are for AiB to follow in different cases. The amendments made by this section clarifies the following:

a) where the AiB is not the trustee: sections 31 to 34 apply and the AiB makes its decision under section 34,

b) 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, and

c) where the AiB is the trustee and initiates the process for recall: section 35 applies and the AiB makes its decision under that section.

Section 2A – Recall of sequestration: payment of interest

18. Section 2A modifies Part 2 of the 2016 Act, which deals with the award and recall of sequestration. These amendments make the payment of interest a pre-requisite of recall, except where the debt is paid in full within six months of the award of sequestration.

19. Section 30 of the 2016 Act sets out the process for recall of sequestration by the sheriff. Section 30(2) of the 2016 Act sets out that the sheriff may recall the award of sequestration if satisfied that, among other things, the debtor's debts have been paid in full. Section 2A(2) of the Bill adds that the payment of any interest payable on the debtor's debt and the payment of the outlays and remuneration of the interim trustee and of the trustee are included in the debtor's debts to be paid before recalling an award of sequestration. Section 2A(2) also modifies section 30(4) of the 2016 Act so that where the sheriff intends to recall an award of sequestration on the ground that the debtor has paid the debtor's debts in full, the order recalling the award may not be made before the payment in full of any interest payable on the debtor's debts.

20. Section 32 of the 2016 Act sets out further procedure where an application for recall of sequestration is made to AiB. Under section 32(3), the trustee must submit a statement to AiB containing the information set out in subsection (4) of that section, which includes a statement as to whether the debtor's debts have been paid in full (including any outlays and remuneration of the interim trustee and of the trustee). Where the debtor's debts have not been paid in full, the statement must also include an indication as to whether, in the opinion of the trustee, the debtor's assets are likely to be sufficient to pay the debts in full (including the payment of the outlays and remuneration of the interim trustee and of the trustee) within 8 weeks of when the statement is made. Section 2A(3) of the Bill modifies section 32(4) of the 2016 Act so that interest payable on the debtor's debts is included for the purposes of the statement as to whether the debtor's debts have been paid in full and (where the debts have not been so paid) the indication as to whether the debtor's assets are likely to be sufficient to pay the debts in full.

21. Section 34 of the 2016 Act sets out the process for recall of sequestration by AiB. AiB may recall the award of sequestration if satisfied that the debtor's debts have been paid in full (including any outlays and remuneration of the interim trustee and of the trustee), and it is appropriate in all

the circumstances. Section 2A(4) of the Bill adds that the payment of any interest payable on the debtor's debt is included in the debtor's debts to be paid before recalling an award of sequestration.

22. Section 35 of the 2016 Act applies where AiB is the trustee, and allows AiB to recall an award of sequestration if the debtor's debts have been paid in full (including any outlays and remuneration of the interim trustee and of the trustee). Section 2A(5) of the Bill adds that the payment of any interest payable on the debtor's debt is included in the debtor's debts to be paid before recalling an award of sequestration.

23. Subsection (6) inserts a new section 37A into the 2016 Act, setting out how the amount of interest on the debtor's debts in relation to a recall of an award of sequestration is to be determined. Section 37A(2) states that interest is payable between the date of sequestration and the date of payment of the debt at the rate specified in section 129(10) of the 2016 Act[2], subject to section 37A(3). Section 37A(3) applies if the whole of the debt is paid in full within six months after the date of the award of sequestration. In such cases, interest is not payable on the debt. If only part of the debt is paid within six months after the date of the award of sequestration, section 37A(4) clarifies that interest is payable on the whole of the debt (including any part of the debt already paid since the award) in accordance with section 37A(2).

Section 3 – When sequestration is awarded: minimal asset process

24. Section 2 of the Bankruptcy (Scotland) Act 2016 ("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.

25. A debtor can make this application under section 2(2) of the 2016 Act through the Minimal Asset Process (known as "MAP" bankruptcy) for debtors who have a lower level of debt or, if they cannot use the MAP process, under 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. Where a debtor application is made, section 22 of the 2016 Act provides that AiB must award bankruptcy where, among other criteria[3], section 2(8) applies to the debtor (which is the reference for full administration criteria). However, there is no cross reference to section 2(2) the relevant provision for MAP bankruptcy. The intention is that all bankruptcies (both MAP and full administration) which meet the required criteria under the relevant subsection of section 2 of the 2016 Act bankruptcy should be awarded without delay. This section applies that change to section 22 of the 2016 Act.

[2] Whichever is the greater of (a) the prescribed rate at the date of sequestration and (b) the rate applicable to that debt apart from the sequestration.

[3] The other criteria being that the application is made in accordance with the 2016 Act (or any provision made under it) and that the debtor has sent to AiB, along with the application, a statement of assets and liabilities and a statement of undertakings.

Section 3A – Petition for sequestration: citation of debtor

26. Section 3A modifies section 22 the 2016 Act to extend the specified period for citation of the debtor by removing the upper limit of 14 days.

27. Where a petition for sequestration of the estate of a debtor is presented by a creditor or a trustee acting under a trust deed, section 22 of the 2016 Act requires that the sheriff grant a warrant to cite the debtor to appear before the sheriff on a specified date. The debtor must then be cited no fewer than six days, and no more than 14 days before the specified hearing date, meaning that sheriff officers have a period of eight days in which to cite the debtor. Section 3A of the Bill removes the requirement that citation must occur no more than 14 days before the date on which the debtor is to appear before the sheriff, meaning that sheriff officers can cite the debtor on any day from when the sheriff grants the warrant to cite up to six days before the hearing date.

Section 4 – Gratuitous alienations: right acquired in good faith and for value

28. Section 98 of the 2016 Act includes provisions relating to gratuitous alienations. 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 (see section 98(2) of the 2016 Act) 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 intention behind section 98(7) of the 2016 Act is that, where a court does grant a decree, the decree is not to 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. This section fixes that cross referencing error so that section 98(7) now refers to subsection (5) (rather than subsection (6) of section 98).

Section 5 – Time periods for appeals against decisions by AiB

29. 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 and there is a requirement to appoint a new trustee, the new 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 the AiB, as appropriate, may issue a determination fixing the amount of remuneration and outlays payable to the previous trustee or their representatives. In this section, parties wishing to appeal the commissioners' determination on outlays and renumeration 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 for making such an appeal.

30. Similarly, section 134(1) 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 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.

31. This section modifies sections 69(12) and 134(3) of the 2016 Act so that an appeal to the sheriff against a determination by AiB must be made within 14 days beginning with the date of any decision of AiB in an appeal under section 69(11)(a) or section 134(1)(a), respectively. This section also modifies section 134(4) of the 2016 Act 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.

Section 5A – Debtor not traced: former trustee's outlays and remuneration

32. This section makes changes to section 142 of the 2016 Act. Section 142 contains the process by which the trustee in a sequestration may resign office and be replaced by AiB where it is not possible to trace the whereabouts of the debtor. This section clarifies that the restriction on recovery of outlays and remuneration in section 142(6)(c) does not apply to outlays and remuneration already claimed and paid to the former trustee before the issue of the notice granting the application to resign office, and ensures consistency with the treatment of fees and outlays for former trustees of uncooperative debtors (set out in section 147A(9)(d) of the 2016 Act, as inserted by section 5B of the Bill).

Section 5B – Failure of debtor to co-operate with trustee in sequestration

33. This section inserts new sections 147A, 147B, and 147C into the 2016 Act.

34. Section 147A introduces a new route for a trustee to resign office due to the debtor's failure to cooperate in the sequestration by applying to AiB to take over as trustee. It applies where AiB is not the trustee in the sequestration, the case is at least five years old (beginning from the date of sequestration of the debtor's estate), and the debtor has not been discharged from the sequestration (subsection (1)). The trustee may apply to AiB for authority to resign office due to the debtor's failure to cooperate under subsection (2). Subsection (3) sets out the information that the application must include: the nature and extent of the debtor's failure to cooperate, the actions taken by the trustee to secure the debtor's cooperation, any other matters the trustee considers relevant, and the details of every creditor known to the trustee. Under subsection (4), before making an application, the trustee must notify the debtor and all known creditors by sending them an intention to resign notice. An intention to resign notice must be in the prescribed form and include a statement that the recipient of the notice has a right to make representation to AiB in relation to the application within 14 days (beginning on the day that the application is made).

35. On receiving an application under section 147A(2), AiB must take into account any representations made by the debtor or a creditor (subsection (6)) and make a decision on whether to issue a notice granting the application, if satisfied of the matters in subsection (7). Those matters are that the debtor has failed to cooperate with the trustee to such an extent that the trustee is prevented from carrying out the trustee's functions, the failure is likely to continue, and the trustee has taken all reasonable steps to secure the debtor's cooperation. In making a decision, AiB may request further information from the trustee and must notify the trustee, the debtor, and every known creditor of its decision (subsection (8)).

36. If a section 147A(2) application is granted, subsection (9) sets out the consequences, all of which apply after a period of 14 days. The 14 day delay is to allow for any application under section 147B for a review of a decision (and the suspension of the decision on such an application) to happen before AiB becomes the new trustee. The main consequence of an AiB decision to grant an application is that, under subsection (9)(a), AiB is deemed to be the trustee, with notification requirements in paragraph (b) and a requirement to update the register of insolvencies in paragraph (c). Subsection (9)(d) deals with the treatment of outlays and remuneration for former trustees, in line with the position where a trustee resigns under section 142 on the grounds that a debtor cannot be traced. The remainder of subsection (9) (paragraphs (e) and (f)) and subsection (10) make modifications to the 2016 Act in these circumstances, so as to provide for the administration of the sequestration by AiB as trustee. Section 69(9) to (13) of the 2016 Act are applied in order to deal with the transfer of documents from the former trustee and the fixing of the former trustee's outlays and remuneration. Section 116(2) of the 2016 Act is modified where AiB is the new trustee to require the debtor to give an account in writing of their current state of affairs when requested, rather than at 6 monthly intervals. Finally, subsection (9)(g) applies section 138 of the 2016 Act (discharge of debtor where Accountant in Bankruptcy is the trustee) with the modifications set out in subsection (10) to allow for the subsequent discharge of the debtor, if the debtor later cooperates.

37. Section 147B provides a process for review and appeal against decisions to grant or refuse an application under section 147A. The trustee may apply to AiB for a review of a decision to refuse an application (subsection (1)), and the debtor or any creditor may apply to AiB for a review of a decision to grant an application (subsection (2)). An application for review must be made within 14 days, beginning on the day of notification of the decision being reviewed (subsection (3)). As noted, section 147A(9) provides that the effect of a decision to grant an application happens after 14 days, so AiB would not have taken over as trustee when an application for review of such a decision was made. If an application for review is made, the grant of the application is further suspended until AiB makes a determination (subsection (4)). Subsection (5) sets out what AiB must do if an application for review is made, requiring AiB to take into account any representations of an interested person which are made within 21 days after the application was made (paragraph (a)), and to confirm or revoke the decision within 28 days after the application was made (paragraph (b)). Subsection (6) deals with the consequences of AiB's review decision, including at paragraph (c) allowing for a further 14 day delay of AiB becoming the new trustee for a review decision to grant an application, in order to allow for any appeals to the sheriff before the actual transfer of trusteeship occurs.

38. Section 147B(7) allows the debtor, the trustee, or any creditor to appeal the review decision of AiB to the sheriff within 14 days after the day of the decision under subsection 5(b). If an appeal relating to a decision to revoke a decision to refuse an application or a decision to confirm a decision to grant an application is made, the grant of the application is suspended until the determination of that appeal (subsection (8)). If the sheriff determines that an application which was refused should have been granted, the sheriff must order AiB to issue a notice granting the application (subsection (9)), with the transfer and the consequences of the transfer under section 147A(9) happening immediately. Alternatively, if the sheriff determines an application which has been granted should be refused, under subsection (10) the sheriff must order AiB to revoke the notice granting the application. Subsection (11) requires the sheriff clerk to send AiB a copy of the sheriff's decree, and subsection (12) makes the sheriff's decision final.

39. Section 147C provides a process parallel to section 147A for cases where AiB is already the trustee. It applies where AiB is the trustee in the sequestration but not as a result of appointment under section 147A, the case is at least five years old (beginning from the date of sequestration of the debtor's estate), and the debtor has not been discharged from the sequestration (subsection (1)). AiB may make a determination under subsection (2) that the debtor has failed to cooperate, as long as AiB is satisfied that the matters in subsection (3) apply: that the debtor failed to cooperate with AiB to such an extent that AiB is prevented from carrying out the AiB's functions as trustee, that the failure is likely to continue, and that AiB has taken all reasonable steps to secure the debtor's cooperation. Under subsection (4), if AiB determines that a debtor is uncooperative, it must notify the debtor and every known creditor. Subsection (4) also makes modifications to sections 116 and 138(6) of the 2016 Act, so that these apply in the same manner as when AiB becomes trustee under section 147A. Subsection 116(2) of the 2016 Act is modified to allow AiB to require the debtor to give an account in writing of their current state of affairs, when requested, rather than at 6 monthly intervals. Section 138(6) is modified to allow for AiB to subsequently discharge the debtor if the debtor later cooperates with AiB to such an extent that AiB is able to carry out its trustee functions.

40. Section 214 of the 2016 Act deals with grounds of appeal for certain provisions in the 2016 Act. All appeals under the listed provisions may be made on a matter of fact, a point of law, or the merits. Subsection 5B(3) of the Bill adds new section 147B(5) (confirming or revoking a decision to grant an application to resign office and appoint AiB as new trustee) to the list of provisions, allowing the appeal to be on a matter of fact, a point of law, or the merits.

41. Finally, section 5B(4) of the Bill provides a transitional provision clarifying that for the purposes of calculating the five year periods referred to in new sections 147A(1)(b) and 147C(1)(b) of the 2016 Act, any part of that period which is before the commencement of those sections may be included.

Section 5C – Commissioners: disqualification from office where AiB is trustee

42. Section 5C corrects an anomaly created by the 2007 Act, reinstating the position before the 2007 Act came into effect. Subsection (2) modifies section 76 of the 2016 Act to ensure that no commissioners may be elected when AiB is the trustee in sequestration. Subsection (3) modifies section 77 of the 2016 Act so that if a commissioner already holds office, then they cease to hold office if AiB becomes the trustee.

Arrestee's duty of disclosure

Section 6 – Arrestment and action of forthcoming

43. Subsection (1A) inserts a new section 73CA into the Debtors (Scotland) Act 1987 (the "1987 Act") which allows for arrestment schedules to be served electronically on the arrestee, in addition to existing methods of service (personal delivery and post). The proper address of the arrestee for postal purposes is defined in subsection (2) as the address of the registered or principal office of the body corporate (in the case of a body corporate), the address of the principal office of the partnership (in the case of a partnership), or the last known address of the arrestee (in any other case). Any posted document is considered to be received 48 hours after it is sent unless the contrary is shown (subsection (3)). Provisions relevant to electronic service are set out in subsection (4), and include that electronic transmission must be done in a way that the arrestee has indicated to

the creditor or officer of the court that they are willing to receive the document. An indication of willingness may be specific to the particular document in question (or documents of that kind), expressed specifically to the creditor or officer of the court or more generally (e.g. on a website), or inferred from past conduct with no indication of unwillingness to receive documents in such a way again. Electronic transmission of a document may also be by uploading a document to an electronic storage system for download by the arrestee, as long as the arrestee is sent a notification that the document has been uploaded. Documents transmitted electronically are taken to have been received on the day of transmission (unless the contrary is shown).

44. Section 73G of the 1987 Act includes a duty on arrestees to disclose to an arresting creditor the existence of and the value of assets attached by an arrestment. Arrestment is a form of diligence which can be used to recover debt owed by a debtor to a creditor. A reference to an "arrestee" is a reference to the legal person who holds assets (property or funds) on behalf of the debtor. This may, for example, be a bank or other financial institution. In this section a reference to an "arrestee" may also mean a person who is a *potential* arrestee, i.e. they are referred to using the label arrestee whether or not any property (which includes funds) is actually attached. Where nothing is attached, there is currently no requirement for the arrestee to provide a "nil" return. The modifications made by this section change that so, where nothing attaches, the arrestee is required to confirm to the creditor the reasons why. For example, nothing may have attached because the arrestee has no connection with the debtor and does not hold an account for them, or the arrestee does hold an account but the sum held is less than the protected minimum balance (see section 73F of the 1987 Act). 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 section (5)(b) in such cases since no property or funds will have attached.

45. Section 73H(1) of the 1987 Act provides that, where an arrestee fails to make a disclosure under section 73G(2), the sheriff may, on the application of the creditor, order the arrestee to pay the creditor the lesser of either the sum due by the debtor to the creditor or the amount which represents the minimum protected balance in bank accounts which are subject to an arrestment (currently £1,000). This section reduces the amount payable to £500. This applies to all failures of disclosure equally (i.e. any of the information required under section 73G(4) which, in other words, covers failure to respond in relation to both a "successful" and an "unsuccessful" arrestment). The existing provision regarding the minimum protected balance (section 73F(3) of the 1987 Act) remains as it is, but the figure mentioned in that section now has no relevance in terms of the sum payable for failure to disclose information under section 73H. Section 73H(3) provides that payment of the sum under subsection (1) will reduce the debt owed to the creditor by the same amount and the arrestee is not entitled to recover that sum from the debtor. An arrestee aggrieved by an order under section 73H(1) may appeal in terms of section 73H(4) (see also section 109 of the Courts Reform (Scotland) Act 2014 which applies changes to the appeal procedure). This section also inserts a power for the Scottish Ministers to amend the sum in the future through negative procedure regulations.

Section 7 – Diligence against earnings

46. Subsection (1A) makes various modifications to the 1987 Act allowing for earnings arrestment schedules and current maintenance arrestment schedules to be served electronically on employers, in addition to the existing methods of service (personal delivery and post). It substitutes section 70(3) for four new subsections ((3), (3A), (3B), and (3C)). New subsection (3) sets out the ways in which an earnings arrestment schedule or a current maintenance arrestment schedule can be served: by personal delivery to the employer, by being sent to the proper address of the employer by registered or recorded post, and electronic transmission. Subsection (3A) stipulates that the proper address of the employer for postal purposes is defined in subsection (2) as the address of the registered or principal office of the body corporate (in the case of a body corporate), the address of the principal office of the partnership (in the case of a partnership), or the last known address of the employer (in any other case). Any posted document is considered to be received at a United Kingdom address 48 hours after it is sent unless the contrary is shown (subsection (3B)). Provisions relevant to electronic service are set out in subsection (3C), and include that electronic transmission must be done in a way that the employer has indicated to an officer of the court that they are willing to receive the document. An indication of willingness may be specific to the particular document in question (or documents of that kind), expressed specifically to the officer of the court or more generally (e.g. on a website), or inferred from past conduct with no indication of unwillingness to receive documents in such a way again. Electronic transmission of a document may also be by uploading a document to an electronic storage system for download by the employer, as long as the employer is sent a notification that the document has been uploaded. Documents transmitted electronically are taken to have been received on the day of transmission (unless the contrary is shown).

47. Subsection (1A) also substitutes a new subsection (5) in section 70 of the 1987 Act. It makes it 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 electronic transmission. It also updates the language used in subsection (5) from "poinding" to "an attachment", given that the former diligence of poinding was abolished and replaced with attachment by the Debt Arrangement and Attachment (Scotland) Act 2002.

48. Section 70A of the 1987 Act places a duty on an employer, on whom an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order is served, to provide the creditor and, in the case of a conjoined arrestment order, the sheriff clerk with certain specified information. Earnings arrestment is a form of diligence which can be used to recover debt owed by a debtor to a creditor by taking money from a debtor's earnings (e.g. wages). This section modifies section 70A so that where the debtor is not employed by the person who received the schedule or order, or the debtor is employed by that person but the sum to be deduced on any pay-day would be nil (e.g. because their earnings are too low, see sections 48, 53 and 61 and schedule 2 of the 1987 Act), the person who received the schedule or order must respond. They must, within 3 weeks of receiving the schedule or order send to the creditor or, in the case of a conjoined arrestment order, the sheriff clerk, notice of the reason nothing has attached (as appropriate) in such form as may be prescribed by regulations made by the Scottish Ministers (negative procedure). 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. Where earnings have attached the obligations on the employer will

remain as they are. They must send to the creditor or the sheriff clerk the information set out in subsection (3) (which relates to details of the debtor's pay and any deductions from it) as soon as reasonably practicable following the order or schedule being served. They must also provide that information at subsequent intervals, as set out in subsection (4) of section 70A.

49. There also remains a duty on the employer under section 70A to notify the creditor when a debtor's employment is terminated and provide details of any new employment. This section of the Bill changes this but only so that such information must be given in such form as may be prescribed by regulations made by the Scottish Ministers (negative regulations). Section 70B(1) provides that where an employer fails to do this without a reasonable excuse, the sheriff may, on the application of any creditor, make an order requiring the employer to provide whatever information is known by that employer to the creditor. The sheriff may also order the employer to pay the creditor an amount not exceeding twice the amount which that creditor would have received on the debtor's next pay day had the debtor still been employed by the employer. This section inserts a new subsection (A1) which would mirror the sanction in subsection (1) for cases in which a person fails to give any notice required under section 70(1A) or (2), as modified by this section of the Bill. The sheriff may make an order requiring the person who received the schedule or order to send the information to the creditor and to pay a sum to the creditor. The sum payable by the person to the creditor is the sum due to the creditor by the debtor, or the sum of £500, whichever is the lesser. This section also modifies subsection (1) so that the amount payable under an order made by the sheriff under that provision aligns with new subsection (A1) (i.e. £500 instead of an amount exceeding twice the amount that the creditor would have received on the debtor's next pay day). Section 70B(2) provides that payment of the sum under subsection (1) 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. This section modifies section 70B(2) so that this extends to sums paid by virtue of new subsection (A1). A person aggrieved by an order under section 70B(A1) or (1) may appeal in terms of section 70B(3) (see also section 109 of the Courts Reform (Scotland) Act 2014). This section also inserts a power for the Scottish Ministers to amend the sum in the future through negative procedure regulations.

Diligence on the dependence

Section 8 – Provision of debt advice and information package

50. Section 15F of the Debtors (Scotland) Act 1987 (the "1987 Act") sets out the procedure to be followed at a hearing on an application for warrant for diligence on the dependence. Diligence on the dependence is a provisional or protective measure which may be utilised by a creditor whilst a court action is ongoing. It allows the creditor to take steps to preserve the debtor's property so that it will be available to satisfy any claim eventually upheld by the court. Such a hearing on an application takes place in respect of applications where the creditor either does not apply for a warrant to be granted in advance of a hearing or where the court refuses to make an order granting a warrant without a hearing. Subsection (2) of section 15F provides that the court may grant the warrant if it is satisfied as to the matters mentioned in subsection (3) of that section. This section of the Bill extends those matters to include, where the debtor is an individual, that the creditor has provided the debtor with a debt advice and information package (meaning the debt advice and information package referred to in section 10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002).

51. Section 15E of the 1987 Act gives the court power to grant a warrant for diligence on the dependence without an initial hearing. Subsection (4) requires the court, on granting warrant for diligence on the dependence without a hearing on the application to fix a date for a hearing under section 15K (recall of diligence on the dependence) and to require the creditor to intimate that date to the debtor and any other interested party. Where a hearing has been fixed under section 15E(4)(a), subsection (5) of that section applies section 15K as if the debtor or a person having an interest had applied to the court for an order under that section. Under section 15K of the 2007 Act, the debtor or any other person having an interest can apply to the court for any order set out in subsection (2). Those orders are an order recalling or restricting the warrant granted, if the warrant has been executed, an order recalling or restricting any arrestment or inhibition so executed, an order determining any question as to the validity, effect or operation of the warrant or an order ancillary to any other order sought. This section would amend section 15K so that, where the debtor is an individual, and the court is satisfied that the creditor has not provided the debtor with a debt advice and information package[4], the court must make an order recalling the warrant and recalling any arrestment or inhibition executed in pursuance of the warrant, and may make any order ancillary to those things. But this provision would only apply where the hearing is a hearing fixed under section 15E(4)(a) (i.e. a hearing fixed by the court on granting warrant for diligence on the dependence without an initial hearing). This section of the Bill would also provide that the onus would be on the creditor to satisfy the court that no such order should be made (in line with the other orders made under section 15K).

52. In other words, regardless of whether a warrant is granted without a hearing or not, the creditor will be required to provide the debtor (if the debtor is an individual and not, for example, a company) with a debt advice and information package in advance of the relevant hearing. If the creditor fails to do so then either, in the case of a hearing on the application, the warrant will not be granted, or in the case of a warrant granted without a hearing, the court will recall the warrant (and the arrestment or inhibition executed in pursuance of it).

Exceptional attachment

Section 9 – Notice and redemption periods

53. Exceptional attachment is a form of diligence which can be used, in specific circumstances, to recover debt owed by a debtor to a creditor using a procedure which allows the attachment of non-essential assets within a debtor's home. Section 53 of the Debt Arrangement and Attachment (Scotland) Act 2002 (the "2002 Act") provides for immediate removal of non-essential assets in execution of an exceptional attachment order once an attachment schedule has been completed unless the officer considers it impractical to do so, for example where specialist handling is required. Section 53(2) provides that if an article is not immediately uplifted, the officer must inform the debtor or any person in possession of the article when it will be removed. Rule 19.2 of the Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002 currently provides that a notice under section 53(2) must be given to the debtor and to any other person in possession of an article which is the subject of that notice, no later than 7 days before the proposed date of removal. This section modifies section 53(2) to cement that minimum notice period of 7 days into primary legislation.

[4] Debt Advice and Information Package (AiB)

54. Section 56 of the 2002 Act provides that the debtor may redeem non-essential assets within 7 days of the date on which they were attached. This section modifies section 56 so that, if an article was not removed immediately by the officer from the home in which it was attached, the debtor is entitled to redeem that article within 14 days of the date on which it was attached. Where an article is removed immediately by the officer from the home in which it was attached, the debtor has the same time to redeem the article as the legislation currently allows – i.e. 7 days from the date on which the article was attached.

Section 10 – Money attachment when premises are open

55. Subsections (1) and (2) of section 176 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (the "2007 Act") provides that money attachment cannot be carried out on a Sunday, a public holiday in the area in which the attachment is to be carried out or on any other day designated by rules of court. An attachment must not begin before 8 a.m. or after 8 p.m. and cannot continue after 8 p.m. if it is in progress. An officer of court can, however, apply to the sheriff for authority to commence a money attachment or to continue to carry it out outwith these times.

56. This section modifies section 176 so these rules are disapplied 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.

Section 10A – Arrestment of ships on a Sunday

57. Admiralty arrestment is a type of diligence relating to the arrestment of ships and cargo on board ships for debt due. Generally, arrestment of a ship prevents it from sailing to its next destination until the arrestment is recalled or the debtor provides alternative security. It has historically been a general rule of common law that arrestments and other forms of diligence cannot be executed on a Sunday. There has been provision in the Court of Session Rules and the Ordinary Cause Rules allowing some admiralty arrestment on any day, but not for arrestment to found jurisdiction. Arrestment to found jurisdiction is an action brought specifically to establish jurisdiction over a ship docking in Scotland. Once jurisdiction is established, a creditor can rely on another form of ship arrestment to detain the ship and prevent it from sailing again that day. This section disapplies any rule of law that prevents the execution of an arrestment on a Sunday, but only insofar as it relates to the arrestment of a ship.

Final provisions

Section 11 – Ancillary provision

58. This section provides the Scottish Ministers with the power to make any ancillary provision which they consider appropriate for the purposes of, in connection with, or for giving full effect to the Act. Regulations made under this section may modify any legislation. This power is exercisable by regulations. Where the regulations amend primary legislation, they are subject to the affirmative

procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010). Otherwise, they are subject to the negative procedure (see section 28 of that Act).

Section 12 – Commencement

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

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

Section 13 – Short title

61. This section provides for the short title of the resulting Act to be the Bankruptcy and Diligence (Scotland) Act 2024 (which is the year the Bill would be expected to pass).

This document relates to the Bankruptcy and Diligence (Scotland) Bill (SP Bill 27A) as amended at Stage 2

BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

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