BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are 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:

- a Financial Memorandum (SP Bill 27–FM);
- a Policy Memorandum (SP Bill 27–PM);
- a Delegated Powers Memorandum (SP Bill 27–DPM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 27–LC).

3. These 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.

4. The Notes should be read in conjunction with the Bill. 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

5. 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

6. 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

7. 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

8. 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.

9. 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

10. 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

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

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.

11. 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 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.

12. 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)).

13. 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.

14. 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)).

15. 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.

16. 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.

17. 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.

18. 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 3 – When sequestration is awarded: minimal asset process

19. 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.

20. 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[2], 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

[2] 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.

the 2016 Act bankruptcy should be awarded without delay. This section applies that change to section 22 of the 2016 Act.

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

21. 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

22. 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.

23. 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.

24. 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.

Arrestee's duty of disclosure

Section 6 – Arrestment and action of furthcoming

25. Section 73G of the Debtors (Scotland) Act 1987 (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.

26. 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

27. 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.

28. 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

29. 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).

30. 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[3], 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).

31. 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

32. 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

[3] Debt Advice and Information Package (AiB)

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.

33. 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

34. 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.

35. 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.

Final provisions

Section 11 – Ancillary provision

36. 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

37. 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).

38. 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

39. 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 27) as introduced in the Scottish Parliament on 27 April 2023

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