

21st September 2023

Claire Baker
Convenor
Economy and Fair Work Committee
Scottish Parliament
Edinburgh

Dear Sir or Madam

Re: Bankruptcy and Diligence (Scotland) Bill 2023

I am writing in relation to the evidence the Committee took in relation to the above Bill on the 20th of September 2023.

I would first like to draw the Committee's attention to the Survey I have recently carried out in relation to Earning Arrestments through my website www.advicescotland.com and which I have published the results on.

I wish to outline that I disagree with some of the evidence that was provided from Citizen Advice Scotland in relation to several matters.

Secondary Legislation

First, although I appreciate the benefits of giving Ministers the powers to make laws through secondary legislation, I believe there are dangers of leaving too much discretion to Ministers. If I can provide recent examples of this, I would draw this Committee's attention to several regulations that have come in front of it (and its predecessor) in recent years.

The first example of this was the Bankruptcy Fees (Amendments) (Scotland) Regulations 2016, which proposed significant hikes to the fees that people would pay when their home was sold as part of a bankruptcy. These regulations were subsequently withdrawn, after the Committee took evidence. This also happened in relation to the Common Financial Tool (Scotland) Regulation 2018 after this Committee took evidence and the Minister at the time, Jamie Hepburn, subsequently withdrew these after evidence provided by front line Money Advisers.

Finally, I would draw this Committee's attention to the Debt Arrangement Scheme (Amendment) (Scotland) Regulations 2019, which although eventually recommended by this Committee, only occurred after the Minister, Jamie Hepburn, provided assurances to this Committee that the Accountant in Bankruptcy (AIB) would enter Memorandums of Understanding with free sector Advice agencies that they would receive 75% of their payment distribution fee. Unfortunately, the Regulations were drafted without consulting the free sector and had not made any provision for Money Advice agencies to have any funds repaid to them for the work they carried out to help clients.

I believe all these examples highlight the problem that exists in leaving too many powers to Ministers to make laws by secondary legislation. First, there is no way of compelling them to make secondary legislation and secondly, although Parliamentary Committees have a role in scrutinising regulation, they have no way of amending secondary legislation and only have the options of either rejecting or

accepting the regulations and, as can be seen in the examples giving above, this too often, in this area of law, leads to Minister's having to withdraw regulations, which can only delay much needed change.

It is my opinion, although secondary legislation has a role to play in how we make laws, the function of primary legislation is not simply to make enabling powers for Ministers, and it is vital that primary legislation contains sufficient details that allows Parliament to give direction to Ministers as to what form that secondary legislation should take. I would also make the point that by including provisions in primary legislation, this does not prevent the Parliament making provisions that allows Ministers to make further secondary legislation later. So, including provisions in primary legislation does not prevent it being flexible in future.

I would also take the view, another problem I have with some of the evidence provided by Citizen Advice Scotland is in many of the areas mentioned, such as how often debtors can apply for the Minimum Asset Procedure, the Scottish Government have taken no clear policy position on whether the current 10-year time period should be shortened. It seems strange to me that when Citizen Advice Scotland want this period reduced and made a very compelling argument for reducing it, they wouldn't want provisions included in this Bill to reduce it and instead are happy to wait and see if Ministers may at some point in the future, agree to reduce the period and bring forward secondary legislation.

I would also take the view that in relation to increasing the Protected Minimum Amount in wage arrestments from £655.83 to £1,000, which Citizen Advice Scotland supported when giving evidence to the Social Justice and Social Security Committee during their Low Income and Debts enquiry, it makes no sense for them to not want these provisions included in this Bill, in light of the fact, the Minister, Tom Arthur, wrote to this Committee on the 13th March 2023, and made it clear that he has no intention of bringing forward such secondary legislation.

It raises the question, should laws be made by Parliament and elected Members or should Parliament only make enabling legislation and leave it to non-elected Government agencies and Ministerial working groups to decide whether secondary legislation should be brought forward to help voters?

Council Tax and Earning Arrestment

The issue of Council Tax debt was also rightfully raised in the evidence taken by the Committee, as the Scottish Diligence Statistics showed in 2022/23 almost 99% of the 52,785-wage arrestment executed in that year were by local authorities for council tax. This is likely to become even more an important issue if the Scottish Government do proceed with their proposal to increase council tax for those in higher council tax bands.

As my survey, the first of its type showed, the effect wage arrestments are having on some people is clearly unduly harsh. This cannot be acceptable, as it's been well established in Scots Law that although diligence by its nature is harsh, it should never be unduly harsh.

This is why I have proposed that creditors should be allowed to vary the amount of wage arrestments, like the Department of Works and Pensions can for Direct Earning Attachments and is provided for in the UK Welfare Reform Act 2012. This must be done by primary legislation and, therefore, cannot phantom why Citizen Advice Scotland would not support such provisions being included in this Bill, as ultimately it just gives creditors, and primarily local authorities, the power to take a more proportionate approach to households suffering from undue hardship. It is also likely to

not only reduce the number of debtors who must go bankrupt or into the Debt Arrangement Scheme (as these can lift wage arrestments), but consequently would likely increase the returns for creditors.

I think it should be noted that South Lanarkshire Council, in their submission to the Committee have supported this proposal and if asked, I am sure most local authorities would.

Unforeseen Circumstances and Further Reviews

I would also like to address this argument that debt laws are complex and can often lead to unforeseen circumstances, which was raised in your evidence session on the 20th September and also when you took evidence from Insolvency Practitioners and the Law Society of Scotland.

The law of Bankruptcy and Diligence, like many areas of law are complex and yes, changes can often have unforeseen circumstances. However, I believe there is a danger that this argument is being overly relied upon to avoid change.

It should be noted that this current review by the Scottish Government began in 2019 (over 4 years ago) and has undertaken a huge amount of work overseen by many industry experts who are more than capable of anticipating what the known knowns and known unknowns are. Unfortunately, it is never possible to anticipate what the Unknown Unknowns are due to the nature to them and carrying out more reviews won't change this.

The arguments for further reviews, therefore, in my opinion, are an unnecessary procrastination and nothing more than devices intended to delay or avoid further necessary changes, as certain parts of the relevant sectors are opposed to change and see a risk with this current cost-of-living crisis that they these changes will be forced through.

It should also be borne in mind that the origin of the current review is heavily linked with the actions of this Committee in 2019 when it began an independent review of Protected Trust Deeds. This review was not welcomed by all sections of the debt and insolvency sector, and I believe even the Accountant in Bankruptcy. However, it was only because of that review, which done great work, that the insolvency industry called for a wholesale review of debt solutions, and I believe that was to delay the recommendations of this Committee being introduced in relation to the work it carried out.

After 4 years, I believe that tactic is continuing to be effective in kicking into the long grass necessary changes that should be introduced through this Bill.

Mental Health Moratorium

In relation to the Mental Health Moratorium, I am broadly in favour of this measure, but dispute how effective it will be or how useful it will be for money advisers trying to assist clients. I would dispute Money Advisers are calling out for it, as its not clear what additional benefits this new Moratorium will bring.

Already we do have the Statutory Moratorium that last six months and has no gatekeeping, in that people in crisis can apply online without a Money Adviser's assistance or even any Health and Social Care Professionals sign off. I find it hard to believe this won't always be the first tool used when someone is experiencing a mental health crisis.

Secondly, from May 2021 to April 2022, for the 62,852 normal Breathing Space measures used in England and Wales, only 1,012 Mental Health Crisis Breathing Space Measures were used, representing 1.4% of the number of normal Breathing Space Measures used.

Considering only 3,268 Statutory Moratoriums were used in 2022-23 in Scotland, if a similar model is used for the Scottish Mental Health Moratorium as is used in the English and Welsh equivalent, this would mean approximately only 45 people a year in Scotland would avail themselves of the new Moratorium here. It is likely, therefore, this new measure is going to only provide protection to a very small number of people, and its questionable how much it would be used, as England and Wales don't have the 6 month moratorium we have in Scotland and also if the Mental Health Moratorium only provides the same level of protection that the Statutory Moratorium provides, then it will provide significantly less protection than the English and Welsh equivalent provides.

I believe as my Survey shows, that if the Scottish Government and Parliament want to do more to help people struggling with debt and mental health, then looking to make some of the changes I have proposed in relation to Earning Arrestments would be far more effective.

Further Evidence Hearings by the Committee

Finally, I would like to ask the Committee that it considers taking further evidence from front line Money Advisers and asking them what they believe needs to change and whether the advice sector and their clients can continue to wait for that change, as Citizen Advice Scotland suggested.

I appreciate that organisations like Citizen Advice Scotland, Money Advice Scotland and Stepchange are often seen as the industry experts, but I am also conscious that many of their staff can often become distanced from front line advice work, whereas front line advisers who are listening to the lived experience of clients daily can often provide more informative evidence.

This Committee has had a long history of doing this in recent years and did so in relation to the Bankruptcy Fees (Amendment) (Scotland) Regulations 2016 (withdrawn), the Common Financial Tool (Scotland) Regulation 2018 (withdrawn) and the Debt Arrangement Scheme (Amendment) (Scotland) Regulations 2019 (which led to monetary concessions from the Minister). I also note that the Social Justice and Social Security Committee did this in their enquiry into Low Income and Debt and the Covid 19 Committee did this in relation to the Coronavirus (Recovery and Reform) Bill (Scotland) Bill 2023, which led to amendments being laid by John Mason in relation to Bank Account Arrestments.

In all cases, I believe the evidence shows the Parliament's consideration of debt laws are greatly enhanced when the evidence of front line advisers is taken.

Yours sincerely

Alan McIntosh