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Stuart McMillan, Convener
Delegated Powers and Law Reform Committee
By Email: dplr.committee@parliament.scot

30th May 2024

Dear Stuart,

BANKRUPTCY AND DILIGENCE (SCOTLAND) BILL - NEW POWERS TO MAKE SUBORDINATE LEGISLATION AT STAGE 3

I am writing to inform you that I have lodged three amendments (amendments 1, 2 and 3) to the Bankruptcy and Diligence (Scotland) Bill (“the Bill”) at Stage 3, each of which are in connection with the enabling power under section 1 of the Bill.

Section 1 of the Bill, as introduced, creates an enabling power which will permit Scottish Ministers to introduce a mental health moratorium through regulations. This is intended to allow for the creation of a bespoke moratorium protection for a specific group of individuals, namely those struggling with problem debt and serious mental health issues.

Amendment 1 would amend the enabling power itself, by adding a further example of things which the power under section 1 of the Bill may cover to make it clear the mental health moratorium regulations may make provision in respect of any post-moratorium period. This power could be used to provide for obligations or restrictions which may apply to individuals or creditors during such period. The amendment puts beyond doubt that the regulations may make provision about the circumstances in which a person may not apply for a moratorium under Part 15 of the Bankruptcy (Scotland) Act 2016.

A standard moratorium is established through existing provision under Part 15 of the Bankruptcy (Scotland) Act 2016, which allows any debtor (who intends to apply for bankruptcy, a protected trust deed or a debt payment programme) to apply for a period in which creditors are prevented from taking debt recovery action against them. The standard moratorium is intended to allow the debtor time to address their debt problems and, if appropriate, seek a statutory debt solution (a protected trust deed, a debt payment programme, or bankruptcy).

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A standard moratorium is only available once a year, to protect creditors from potential abuse. Our intention is that a debtor should not be able to go straight from a mental health moratorium to a standard moratorium, on the grounds that the intention is that mental health moratorium will include a six month 'recovery' period. This will be set out in the Regulations, and the amendment makes it clear such provision will be within the power of the Regulations.

Amendment 2 would make the first regulations under section 1 of the Bill subject to a super-affirmative style procedure. The provision would require the Scottish Ministers to lay a copy of the proposed draft regulations before the Scottish Parliament for 60 days (not including recess of more than 4 days) and to have regard to any representations made to them. After 60 days, the Scottish Ministers will then be required to lay a statement alongside the SSI containing the first regulations detailing any representations made and what changes (if any) made to the regulations are a result of those representations. The purpose of this amendment is to give Parliament sufficient opportunity to scrutinise the draft Mental Health Moratorium Regulations before they are formally laid before Parliament.

Amendment 3 places a one-off duty on the Scottish Ministers to review the operation of the Mental Health Moratorium and prepare a report on that review 5 years after the first regulations, which establish the moratorium, come into force. The report must be published and laid in Parliament.

I am also aware that Colin Smyth MSP has lodged an amendment (amendment 10), which I intend to support, and which contains a Regulation-making power to make provision about the types of funds or other property that may not be attached by an arrestment, or to establish or modify a process for a debtor to apply to a person specified in the regulations for an order requiring an arrestee to release to a debtor funds due to, or other property attached by, an arrestment of the debtor under Part 3A of the Debtors (Scotland) Act 1987.

At Stage 2 of the Bill, Colin Smyth lodged an amendment sought to prevent the arrestment in a bank account of any funds wholly acquired through social security benefits. The Government was sympathetic to the aim of this Stage 2 amendment but we think that the original amendment raised a number of practical difficulties and risked unintended consequences.

The amendment that Mr Smyth is bringing forward at Stage 3 offers an alternative of a requirement on the Scottish Government to consult on these issues and an enabling power to introduce changes by Regulations. I am in agreement that taking a delegated power in this way avoids the risk of taking forward an amendment before the policy thinking and stakeholder consultation has been carried out and a workable solution devised. I note the power will be subject to affirmative procedure given the scope to amend primary legislation. I consider this to be appropriate.

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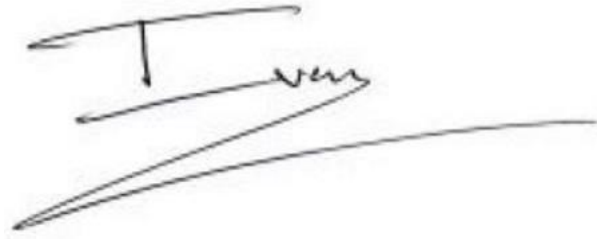
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Should you require any further information in relation to either of these amendments, please do not hesitate to ask.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ivan McKee', with a long horizontal flourish extending to the right.

Ivan McKee

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