

Claire Baker
Convenor
Economy and Fair Work Committee
Scottish Parliament
Edinburgh
EH99 1SP

23 April 2024

Dear Ms Baker,

Bankruptcy and Diligence (Scotland) Bill

In advance of the conclusion of Stage 3 of the Bill, and having recently read the correspondence received by the Committee from Alan McIntosh of Advice Talks dated 21 March 2024, we write to clarify and reiterate our position in relation to arrestments and social security benefits. As we hope will become evident, we agree with Mr McIntosh more than it may appear from his correspondence.

There are, of course, different ways in which a debtor can be protected from arrestments in relation to funds deriving from social security benefits, and each of these has its strengths and weaknesses. However, if the policy preference is as indicated in our correspondence of 19 March 2024, we support an amendment of the Bill to ensure that funds deriving from social security benefits are automatically excluded from an arrestment. Of course, the amendment proposed by Colin Smyth MSP sought to do this and he deserves credit for seeking to deal with the matter in the Bill. We acknowledge the complexity of addressing the issue by way of legislation and the constructive points we raised regarding the amendment were provided with a view to ensuring that any provision is as effective as possible and best ensures the fulfilment of the policy objectives.

As a result of the points we identified and the need to ascertain the consequences of any proposed amendment, and how these should be addressed, we consider it reasonable that the Scottish Government has decided to take further time to consider how best to proceed. This is true as regards matters such as the precise relationship between the automatic exclusion of funds deriving from benefits and other forms of protection, as well as whether a statutory automatic exclusion should only be limited to funds solely derived from social security payments, or whether it should also apply to funds originating from various sources but limited to the amount deriving from social security payments.

Given the Minister's response at Stage 2, our understanding is that the Scottish Government is considering the matter and intends to propose a relevant amendment at Stage 3 and we look forward to seeing their proposal and commenting on it. In the event that they do not decide to proceed with such an amendment, we would be supportive of an appropriately revised version of the amendment proposed by Colin Smyth MSP, if he or another MSP were to lodge such an amendment.

We agree with Mr McIntosh that it is desirable to provide legal clarity regarding the arrestment of funds deriving from social security payments. This is even more desirable from our perspective,

given that we are less confident than him regarding the extent to which social security payments are automatically excluded under the current law. While there are cases to this effect, they are not from the higher courts (i.e. the Inner House of the Court of Session or the UK Supreme Court) and are not legally binding on courts throughout Scotland. In addition, there are authorities and arguments relating primarily to statutory interpretation (as discussed in the article previously provided) which have not been fully considered and may lead to a different result, and would necessitate reliance on other protective measures, such as the unduly harsh mechanism in s.73Q of the Debtors (Scotland) Act 1987.

In relation to legislative competence, we have not suggested that UK legislation such as the Social Security Administration Act 1992 should be amended or circumvented. In fact, we appear to be in agreement with Mr McIntosh that the Scottish Parliament has competence in relation to whether or not diligence can be successfully executed against funds in an account. We consider there to be no doubt that Mr Smyth's amendment would have been within legislative competence and we would expect any attempt to meet the policy objectives here by way of legislative provision would need to be in similar terms. Whether or not a wide or narrow interpretation of legislation such as the 1992 Act is adopted does not affect the legislative competence of a provision dealing with the arrestment of funds in an account. Even if a narrow view is adopted, once benefits are paid over, it is up to the law of diligence (which is devolved) to determine if the assets can be successfully arrested. The 1992 Act and other legislation does not preclude or prohibit this.

In addition, it can be noted that the unduly harsh protective mechanism, which was introduced by the Scottish Parliament via the Bankruptcy and Diligence etc. (Scotland) Act 2007, allows for regard to be had to the source of funds (Debtors (Scotland) Act 1987, s.73R(2)-(3)). This can cause an arrestment to be rendered fully or partially ineffective if e.g. social security benefits have been paid into the relevant fund. Similarly, the source of funds would be the focus of the proposed amendment to give automatic protection to funds deriving from social security benefits and such an amendment would likewise be legitimate and competent.

Finally, as regards earnings arrestments, we refer to Mr McIntosh's separate correspondence of 21 March. The Minister's comments at Stage 2 indicate that the Scottish Government is considering the merits and implications of an amendment to raise the protected amounts (for weekly, monthly and daily earnings) and to alter the deduction levels for such arrestments. Again, this seems reasonable to us, and also provides an opportunity for other stakeholders to offer their views. We suggested in our previous correspondence that if the protected amounts are to be raised, then there may be merit in increasing the deduction levels higher up the scales to offset the consequences for creditors. We note that Mr McIntosh has now provided his own suggestions for altering the deduction levels and has also proposed inserting additional intermediate levels for deductions. We are of the view that his model and the other points he makes in his letter are worthy of consideration by the Scottish Government and MSPs too. As a specific (and minor) point with reference to the tables on the final page of his letter, it would be desirable to clarify that e.g. "less than £1,000" includes the exact figure of £1,000.00, by, for example, stating "not exceeding £1,000.00" instead. Overall, we do not have a strong view as to which approach is the best one, particularly in the general absence of data or other evidence from creditors, including local authorities, regarding how the proposed change(s) will affect them.

We trust that this letter has helped to clarify our position. Assuming the intention is to meet the policy objectives specified previously, we are hopeful that the Bill can be amended to address the issues already discussed to the satisfaction of all of us.

Yours sincerely,

Dr Alisdair MacPherson, University of Aberdeen

Prof Donna McKenzie Skene, University of Aberdeen

Dr Andrew Sweeney, University of Edinburgh