

Scottish Statutory Debt Solutions and Diligence: A Response in a Time of Crisis

Alisdair D J MacPherson*

A. INTRODUCTION

In recent decades, personal debt and insolvency law in Scotland have witnessed significant changes. The focus has often been on providing individual debtors with a greater degree of protection. This desire is likely to be even more apparent as we venture further into a period of inflationary pressures, rising living costs and increasing personal debt. It is therefore a suitable context in which to evaluate and reconsider aspects of the law of diligence and statutory debt solutions (including moratorium protection, sequestration, the Debt Arrangement Scheme (DAS) and Protected Trust Deeds (PTDs)).¹ On 12 August 2022, the Scottish Government published a consultation paper containing a policy review response (the “*Response*”) regarding these areas,² and on 6 September 2022 the First Minister announced the intention to introduce a Bankruptcy and Diligence Bill in the present parliamentary year, the aim of which “is to help and improve the lives of people who are struggling with debt”.³ This article considers the proposals and provides further suggestions.⁴

* Lecturer in Commercial Law, University of Aberdeen.

¹ For statistics regarding these debt solutions for 2021-2022, see Accountant in Bankruptcy, “About AiB”, available at <https://www.aib.gov.uk/about-aib/statistics-data/scottish-statutory-debt-solutions-statistics-annual-edition>.

² Scottish Government, Report on *Scotland’s Statutory Debt Solutions and Diligence – Policy Review Response: Consultation* (2022), available at <https://www.gov.scot/publications/scottish-government-consultation-scotlands-statutory-debt-solutions-diligence-policy-review-response/>. The consultation period finished on 7 October 2022.

³ Scottish Government, Report on *A Stronger and More Resilient Scotland: the Programme for Government 2022 to 2023* (2022), available at <https://www.gov.scot/publications/stronger-more-resilient-scotland-programme-government-2022-23/pages/3/> at 31. It is acknowledged too that “[m]ore efficient recovery processes will assist businesses and local authorities to collect debts from those who can pay”. In addition, on page 11, it is stated: “We will also introduce regulations that will help protect those who are paying debts through the Debt Arrangement Scheme, ahead of further legislation on bankruptcy and diligence”.

⁴ For a recent consultation in England and Wales regarding the same area of law, see The Insolvency Service, Consultation on *Review of the Personal Insolvency Framework* (2022),

B. BACKGROUND

In the past twenty or so years, there have been a number of legislative interventions in the law of diligence and personal insolvency law. The creation of the Scottish Parliament (and Scottish Government) has undoubtedly been one of the principal drivers for this flurry of activity. The Scottish Parliament has passed the Debt Arrangement and Attachment (Scotland) Act 2002, the Bankruptcy and Diligence etc (Scotland) Act 2007, the Home Owner and Debtor Protection (Scotland) Act 2010, the Bankruptcy and Debt Advice (Scotland) Act 2014, and the Bankruptcy (Scotland) Act 2016 (which consolidated the Bankruptcy (Scotland) Act 1985 and other legislation), as well as pandemic legislation with provisions on bankruptcy and diligence,⁵ and there have also been various items of secondary legislation.⁶

Despite these legislative efforts, the Scottish Government has rightly recognised that the law would also benefit from further, and wider, review and reform. A Diligence Working Group was formed in August 2018, following a consultation conducted by the Accountant in Bankruptcy (AiB), to identify how the law of diligence in Scotland could be improved.⁷ Separately, a Ministerial Working Group on Statutory Debt Solutions was established in December 2018 to consider discrete issues in relation to the Common Financial Tool, but subsequently expanded to include various other matters such as the DAS and PTDs.⁸ The Scottish Government committed to a policy review of statutory debt solutions. After some

available at <https://www.gov.uk/government/consultations/call-for-evidence-review-of-the-personal-insolvency-framework>. The work being undertaken there, and any reforms proposed, should be considered carefully in Scotland and may prove helpful when reviewing Scottish statutory debt solutions and diligence in future.

⁵ Coronavirus (Scotland) Act 2020, s 3, Sch 2; Coronavirus (Scotland) (No 2) Act 2020, s 2, Sch 1 paras 8-14.

⁶ Including the Bankruptcy (Scotland) Regulations 2016, SSI 2016/397. For discussion of some of the reforms, see e.g. D McKenzie Skene, “Plus Ça Change, Plus C’est La Même Chose? The Reform of Bankruptcy Law in Scotland” (2015) 3 Nottingham Insolvency and Business Law eJournal 15; D McKenzie Skene, *Bankruptcy* (2018) paras 2-22-2-33.

⁷ On the group, see Accountancy in Bankruptcy, “Diligence Working Group”, available at <https://www.aib.gov.uk/about-aib/stakeholder-working-groups/diligence-working-group>; Diligence Working Group, Report on *Recommendations to Modernise Diligence* (2021), available at <https://www.aib.gov.uk/diligence-working-group-final-report>.

⁸ For details and for meeting minutes (2018-20), see Accountancy in Bankruptcy, “Ministerial Working Group on Statutory Debt Solutions”, available at <https://www.aib.gov.uk/about-aib/consultations-and-reviews/general-review-scotlands-debt-solutions/ministerial-working>.

delays due to COVID-19, it was agreed in October 2020 that the review should consist of three stages, corresponding to the relevant timescales involved: (1) priority steps to help address the immediate impact of the COVID-19 pandemic; (2) a wider review examining the operation of existing statutory debt solutions, aimed at providing recommendations and options for improvement; and (3) a longer term strategic review to assess if the current range of statutory solutions meet the needs of the economy.

Stage one was concluded in late 2020 and led to the Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021,⁹ which sought to make permanent certain changes introduced by COVID-19 emergency legislation. Amongst other things, the 2021 Regulations increased the upper limit for the minimal asset bankruptcy process from £17,000 to £25,000, and removed bankruptcy fees for certain financially vulnerable debtors while reducing fees for entry into bankruptcy for debtors more generally.¹⁰ Stage two involved the formation of three working groups regarding statutory debt solutions, comprising a range of stakeholders. Those groups reported to the Scottish Government, and, likewise, the AiB's Diligence Working Group submitted its report. The *Response* provides the Scottish Government's reaction to these four reports.¹¹ Given the interrelationship of diligence, debt and insolvency, it is pleasing that they are being considered together. This is more likely to lead to a comprehensive review of this area, and reform that is wide-ranging and coherent, rather than piecemeal and disjointed. We now await the reforms that will emerge from the conclusion of the second stage, including in the context of the proposed legislation this year, as well as the stage three review (the timescale for which is uncertain). The *Response* provides some indication as to what to expect.

C. THE RESPONSE AND DISCUSSION

There is recognition in the *Response* that the COVID-19 pandemic and the cost-of-living crisis have caused significant financial difficulties for households, and that for many

⁹ SSI 2021/148.

¹⁰ Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021, regs 4, 9.

¹¹ There is also some overlap with the recommendations in Scottish Parliament Social Justice and Social Security Committee, Report on *Robbing Peter to Pay Paul: Low Income and the Debt Trap* (2022), available at: <https://digitalpublications.parliament.scot/Committees/Report/SJSS/2022/7/2/22c9ae33-c802-4690-8d36-73d65b356069#a28aed54-ac8d-4545-acd3-03b46e43dc3b.dita>.

“unsustainable debt will be the regrettable consequence”.¹² It is against that background that the proposals must be considered. The *Response* contains thirty-eight proposals split across five themes: (i) protections, information and advice prior to debt solutions; (ii) debt solutions – entry criteria; (iii) administration of debt solutions; (iv) exit from debt solutions; and (v) improvements to debt recovery mechanisms (diligence). Due to the space available, only some of the proposals can be considered directly in the present article. The first subsection below will reflect upon proposals relating to statutory debt solutions, while subsection two will consider those involving diligence (excluding the moratorium on diligence, which is a statutory debt solution). Nevertheless, given their interconnectedness, there is inevitably some overlap of topics in the subsections.

(1) Statutory Debt Solutions

In a number of respects, Scotland has been the leader within the UK regarding statutory debt solutions.¹³ For instance, while Scotland has had the DAS for around twenty years,¹⁴ HM Treasury has just recently consulted on introducing a “Statutory Debt Repayment Plan” in England and Wales.¹⁵ Furthermore, only in May 2021 did England and Wales introduce an equivalent of the Scottish statutory moratorium on diligence (introduced in Scotland by the 2014 Act, the relevant provisions of which came into force in April 2015).¹⁶ Yet the English reform also introduced additional protection for those receiving mental health crisis treatment that do not exist in Scotland. In acknowledgement of this, the Scottish Government now

¹² *Response*, 2.

¹³ Albeit that it is weaker in relation to some aspects of security rights and debt enforcement. The Scots law of security rights over moveable property will, however, be improved significantly by the Moveable Transactions (Scotland) Bill.

¹⁴ Introduced by the Debt Arrangement and Attachment (Scotland) Act 2002, Pt 1 and the Debt Arrangement Scheme (Scotland) Regulations 2004, SSI, 2004/468.

¹⁵ See HM Treasury, Consultation paper on *Statutory Debt Repayment Plan* (2022), available at <https://www.gov.uk/government/consultations/statutory-debt-repayment-plan-consultation>.

¹⁶ In England and Wales, this is known as the Debt Respite Scheme or “Breathing Space”; Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020; see also The Insolvency Service, *Debt Respite Scheme (Breathing Space): Guidance for Creditors* (2022), available at <https://www.gov.uk/government/publications/debt-respite-scheme-breathing-space-guidance/debt-respite-scheme-breathing-space-guidance-for-creditors>. The Scottish provisions were first introduced by the Bankruptcy and Debt Advice (Scotland) Act 2014 s 8, which added ss 4A-4D into the Bankruptcy (Scotland) Act 1985. The current provisions are in the Bankruptcy (Scotland) Act 2016, Pt 15 ss 195-198.

supports the introduction of extra moratorium protection for those suffering a mental health crisis and proposes to engage with various specialists to devise a tailored Scottish system.¹⁷

As regards the time period for the general moratorium on diligence in Scotland, the pre-pandemic period of six weeks was replaced, first temporarily and now permanently, with a six-month period.¹⁸ However, there is provision to vary this through regulations, and Scottish Ministers have committed to review the period “when the cost of living crisis subsides”.¹⁹ While a phased return to a “normal” position following the pandemic and cost-of-living crisis is advisable, it is important that promised reviews do actually take place to ensure that the rules involve an appropriate balance between protecting debtors in times of difficulty and offering fairness to creditors in the recovery of debts. Six months is a significant period for a creditor to have to wait to undertake debt enforcement, particularly when: they are also subject to wider economic pressures, may also owe debts that require to be paid, and may depend upon a stream of income or sufficient assets to meet their own liabilities. Limiting the ability of a creditor to enforce can also have wider negative economic consequences, in terms of business failures and increased borrowing costs. While there was no consensus from the relevant working group regarding a time period going forward, sixty days with the potential for extensions in some circumstances seems a reasonable suggestion that balances different interests but also offers some flexibility.²⁰

PTDs have proved a particularly controversial feature of the Scottish debt and insolvency landscape. Concerns about the promotion and marketing of PTDs and their detrimental impact led to them being the subject of a Scottish Parliament Economy, Energy and Fair Work Committee (EEFWC) inquiry in January 2020, which resulted in a number of recommendations.²¹ These included the provision of free independent money advice and clear information to a debtor before they enter a statutory debt solution such as a PTD. While the Scottish Government acknowledges the “critical importance” of high-quality advice being

¹⁷ *Response*, paras 7-8.

¹⁸ Coronavirus (Scotland) Act 2020, Sch 2 para 4; Coronavirus (Recovery and Reform) (Scotland) Act 2022 s 23, amending Bankruptcy (Scotland) Act 2016 s 198. Moratoriums have been utilised in other contexts in response to recent and ongoing crises, e.g. the moratorium on evictions in the private and social rented sectors in Scotland until at least 31 March 2023 under the Cost of Living (Tenant Protection) (Scotland) Bill s 2, Sch 2; see also Scottish Government, Report on *A Stronger and More Resilient Scotland* (n 3), 24 and 31.

¹⁹ *Response*, para 11.

²⁰ *Response*, para 10.

²¹ EEFWC, Report on *Protected Trust Deeds* (SP 732, 2020), available at <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/5/21/Protected-Trust-Deeds>.

available prior to entering into any debt solution, it agrees with the relevant working group that “it would not be feasible to mandate free money advice sector involvement in advance of the granting of each trust deed”.²² This highlights the obvious difficulty in providing greater protections for debtors, particularly at a time of economic hardship. A higher level of demand places greater pressure on resources, but there are various other competing demands for funding, which means that the desirability of the provision is overcome by economic reality and the decision to prioritise other matters.

The Scottish Government does, however, propose to introduce “a clear and succinct information leaflet for those considering granting a trust deed” and will also seek to simplify the language used in a Debt Advice and Information Package (DAIP).²³ Such a package provides details about various matters, including trust deeds, and requires to be given to an individual debtor by a creditor in advance of the execution of many diligences, before petitioning for bankruptcy and by a (proposed) trustee before a debtor grants a PTD.²⁴ In addition, the possibility of implementing a “cooling off period” for trust deeds will be considered at the third stage of the review. As regards the administration of PTDs, the Scottish Government intends to make some of the processes within the voluntary PTD Protocol statutory and to introduce legislation as regards the payment of creditors at an earlier point, namely twelve months, with a requirement to report on the dividend payment position annually.²⁵ The intended and suggested changes above ought to improve the experience of PTDs for both creditors and debtors.

With reference to bankruptcy, the Scottish Government proposes to remove the minimum debt threshold for Minimal Asset Process (MAP) bankruptcy (which is currently £1,500) and the single asset threshold (which is currently up to £1,000), retaining the total

²² *Response*, para 30.

²³ *Response*, paras 33-35. The Scottish Government also intends to simplify the language used in relation to diligence on its websites and in publications. See also *Ibid* paras 204-206, where the Scottish Government agrees that DAIPs should be issued earlier in the process of obtaining summary warrants.

²⁴ See Debtors (Scotland) Act 1987 ss 47(3)-(4) (earnings arrestment), 51(2A) (current maintenance arrestment), 60(3A) (conjoined arrestment order); Debt Arrangement and Attachment (Scotland) Act 2002 s 10(3)(c), (5) (attachment); Bankruptcy (Scotland) Act 2016 ss 3 (sequestration), 167(3)(b) (protected trust deed). See also Accountant in Bankruptcy, “Debt Advice and Information Package”, available at <https://www.aib.gov.uk/debt/deal-debt/debt-advice-and-information-package>.

²⁵ *Response*, paras 97-104. See also Accountant in Bankruptcy, “PTD Protocol”, available at <https://www.aib.gov.uk/guidance/trust-deeds/ptd-protocol>.

assets threshold of £2,000 but with a proposal to review and increase it.²⁶ The need to continue to monitor and review such figures is particularly apparent at a time of relatively high inflation. The intention is to widen access to the MAP process and to simplify the entry criteria. In terms of the minimum debt level for entry into a PTD, the Scottish Government acknowledges that it “is amongst the most contentious issues under discussion across any of Scotland’s debt solutions”.²⁷ Following its inquiry, the EEFWC recommended an increase from the current level of £5,000 but recognised that this might force more parties into bankruptcy instead. Subsequently, the relevant working group did not reach a consensus position, but discussed the matter in considerable detail.²⁸ Perhaps unsurprisingly based upon the divided opinion on the issue, the Scottish Government proposes to retain the existing level. However, the matter will be closely reviewed on an ongoing basis.²⁹

The Scottish Government intends to make some changes relating to vehicles in the context of bankruptcy (and diligence), as well as considering legislative changes to ensure that mobility scooters are deemed essential assets and thus excluded from the entry criteria in bankruptcy and will not vest with the trustee in sequestration.³⁰ More widely, following concerns that the £3,000 asset threshold for vehicles is now too low to represent an average mid-sized family car, the Scottish Government proposes to review and increase the figure, and in stage three further consideration will be given to how to deal with vehicles in bankruptcy in future.³¹ The figure for vehicles was last raised in 2010,³² from £1,000 to £3,000, and any vehicle reasonably required by the debtor up to such an amount is excluded.³³ Even though fewer people now own cars due to alternative finance options, increasing the threshold figure further is merited given general inflationary pressures and the significant increases in the costs of second-hand cars in particular in recent years.³⁴ It is clear

²⁶ Bankruptcy (Scotland) Act 2016 s 2(2); *Response* paras 45-46.

²⁷ *Response* para 47.

²⁸ Working Group 2, Report on *Protected Trust Deeds – Recommendations* (2022) para 5.1 ff, available at <https://www.aib.gov.uk/stage-2-working-groups-group-2-report>.

²⁹ *Response* paras 57-58.

³⁰ *Ibid* para 82. All reasonably required disability aids ought to be excluded from bankruptcy and diligence.

³¹ *Ibid* paras 86-87.

³² Bankruptcy (Scotland) Amendment Regulations 2010, SSI 2010/367, reg 4.

³³ Debt Arrangement and Attachment (Scotland) Act 2002 s 11(1)(b); Bankruptcy (Scotland) Act 2016 s 88(1)(a)(ii).

³⁴ See Working Group 3, Report on *Bankruptcy and Wider Issues – Recommendations* (2022), available at <https://www.aib.gov.uk/stage-2-working-groups-group-3-report> paras 2.41-2.43 for consideration of relevant issues.

that depriving a debtor of a vehicle can impede their ability to have a reasonable standard of life and may have negative social and economic consequences for that debtor, as well as for other connected individuals and society more broadly. However, there should be greater clarity as to what the level of the excluded property is seeking to do. Is the intention to merely allow the debtor to retain a modest but reliable small car that can be used for work purposes and necessary travel, or for them not to be deprived of a mid-range family vehicle that will enable them to undertake a range of activities, social as well as work-related?³⁵

The equivalent figure of £1,000 for implements, tools of trade, books or other equipment reasonably required by the debtor for their profession, trade or business,³⁶ should also be reviewed, as it has remained static since the 2002 Act was introduced.³⁷ It is all too commonplace that in legislation threshold figures become neglected and, due to the passage of time and increased prices, rather inadequate in meeting the policy objectives they were designed to achieve. An alternative approach would be to make the bankruptcy and diligence figures index-linked to one of the inflationary measures (CPI or RPI).³⁸ However, this is more complicated than the current approach. What needs to happen at the least is that there should be proper monitoring of the figures, rather than merely ad hoc changes in the midst of crisis.³⁹ It would nevertheless be desirable, including for the purposes of determining the appropriate level of exclusion, to explore and better articulate the underlying policy and rationale as to

³⁵ The assumption of the Working Group and in the *Response* seems to be the latter.

³⁶ Debt Arrangement and Attachment (Scotland) Act 2002 s 11(1)(a); Bankruptcy (Scotland) Act 2016 s 88(1)(a)(ii).

³⁷ The threshold figures may also have a knock-on effect in relation to the Moveable Transactions (Scotland) Bill, as, at the time of writing, it uses a figure of £1,000, under which value consumer items are excluded from the statutory pledge. On the basis of reactions to the Bill, it is likely that the threshold figure will at least be increased, while there is also the possibility that further or alternative protective measures will be added. Some respondents have even suggested that consumers should not be allowed to grant a statutory pledge. For published consultation responses, see Scottish Government, “Moveable Transactions Bill – Consultation: Published Responses”, available at https://yourviews.parliament.scot/dplr/moveable-transactions-bill/consultation/published_select_respondent.

³⁸ For these indices, see e.g. Office for National Statistics, “Inflation and price indices”, available at <https://www.ons.gov.uk/economy/inflationandpriceindices>.

³⁹ This is an issue in other related areas too – see e.g. employee wage claims as preferential debts, which are limited to £800 (for the four months prior to the relevant date) and this has remained the maximum amount for decades in both personal and corporate insolvency (see, formerly, Bankruptcy (Scotland) Amendment Regulations 1986, SI 1986/1914, reg 3; and now Bankruptcy (Scotland) Regulations 2014, SSI 2014/225, reg 21; and Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996, reg 4), albeit that employees can claim unpaid wages from the state per the Employment Rights Act 1996 ss 166-170, 182-190.

what property ought to be excluded from bankruptcy and diligence and how this should be formulated.

The Scottish Government also proposes to investigate a number of other matters further with a view to potential changes. These include allowing an individual to exit a solution and obtain debt relief more quickly, which would offer greater flexibility and freedom to the parties involved.⁴⁰ In addition, the Scottish Government plans to reform the statutory rate of interest (currently 8%) payable on debts following sequestration, and to instead link it to the Bank of England base rate plus 2%, which will help to future-proof it.⁴¹ If such a change is to occur, the judicial rate of interest ought to follow suit in the interests of consistency and to better reflect wider circumstances.

(2) Diligence

The *Response* includes a number of proposals regarding diligence. One of these involves information disclosure orders (IDOs), which would help creditors to execute diligence. Under section 220(1) of the Bankruptcy and Diligence etc (Scotland) Act 2007, Scottish Ministers are given the power to make regulations for sheriffs to obtain information about debtors (upon application by creditors) and for that information to be disclosed to creditors “to facilitate diligence to enforce payment of debts due by virtue of decrees and documents of debt”. While no regulations have yet been made, the Scottish Government agrees with the recommendations of the Diligence Working Group that IDOs should be enacted.⁴² The introduction of IDOs is a reasonable step, and fits in with the wider approach of increasing the information available to parties (albeit that other measures are principally focused on information for debtors for protective purposes). IDOs would constitute a useful part of the toolbox of a creditor and allow for more efficient and better targeted recovery of debts, albeit this may depend upon the particular information to be included in such an order.

A significant diligence issue that has been unresolved for some time, and remains so, is how to deal with the family home (and dwellinghouses more broadly). Rules for the family

⁴⁰ See *Response* paras 114-115, 127 (PTDs and bankruptcy). Cf paras 135-137 (for DAS).

⁴¹ *Response* paras 145-147. For the current rate of interest, see Bankruptcy (Scotland) Act 2016 s 129(1)(h), (10); Bankruptcy (Scotland) Regulations 2016, SSI 2016/397, reg 26. The current rate has applied since 1993, per the Bankruptcy (Scotland) Amendment Regulations 1993, SI 1993/439, reg 4, and was set under rather different economic circumstances, again demonstrating the need to monitor and amend statutory provisions as time passes.

⁴² *Response* paras 153-154. See Diligence Working Group Report, 28-32, for discussion of IDOs and how they could work in practice.

home ought to be broadly consistent across diligence, bankruptcy and voluntary security (standard security).⁴³ This would avoid incentivising one approach over another.

Additionally, the underpinning policy applies broadly: namely, to protect the debtor from losing their home except as a last resort, particularly for relatively small debts, as there could be various social and other costs for them and others, including the state. It is therefore welcome that the family home will be considered as part of the next stage of the review.⁴⁴

Yet political and policy issues regarding the family home have contributed to the earlier blockage of broader reforms in the Bankruptcy and Diligence etc (Scotland) Act 2007, particularly the replacement of adjudication for debt with land attachment and residual attachment.⁴⁵ As such, adjudication for debt, a longstanding but now little used and often impractical form of diligence, remains the form of judicial real security that would need to be utilised.⁴⁶ But this remains the case not only for the family home, but also for holiday homes, rented properties the debtor owns, commercial premises, and land and buildings owned by companies. It is difficult to justify why creditors wishing to enforce against such property should still require to use a form of diligence that is generally considered unsuitable for modern times, and where the policy issues involved in relation to a family home are not applicable.

The family home controversy has held up the reform of this area of diligence for too long and there is a danger that reform will be delayed further. While it is sensible to give further consideration to the family home and other residential property, it may in fact be wise to separate this issue from the wider reform of diligence over land. This could allow for the expeditious replacement of adjudication with land attachment, or an equivalent, for heritable

⁴³ For bankruptcy, see Bankruptcy (Scotland) Act 2016 ss 112-115. For standard securities, see Conveyancing and Feudal Reform (Scotland) Act 1970 ss 20(2A), 23(4), 23A, 24(1A)-(1B), 24A-24E. The rules for standard securities are currently being reviewed as part of a Scottish Law Commission project on heritable securities, per Scottish Law Commission, “Law Reform Projects: Heritable Securities”, available at <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/heritable-securities/>.

⁴⁴ *Response* paras 155-156. See also the discussion in the Diligence Working Group Report, 24-27.

⁴⁵ This would replace adjudication’s role as the default or residual diligence in Scots law, i.e. it can be used where no other diligence is possible. See 2007 Act Pt 4. For adjudication, land attachment and residual attachment, see also L J Macgregor et al, *Commercial Law in Scotland*, 6th edn (2020) para 9.11 and the sources cited there.

⁴⁶ Inhibition is a diligence over land but, unlike adjudication, is merely prohibitory and does not give an inhibitor a real right. See Bell, *Comm II*, 139; G L Gretton, *The Law of Inhibition and Adjudication*, 2nd edn (1996) ch 6.

property other than property used as a primary residence by a debtor and/or their family (or possibly by other individuals too).

For residual attachment, the Scottish Government agrees with the recommendations of the Diligence Working Group that it should be taken forward once suitable alternatives to adjudication for debt and land attachment are developed, and will also be considered at stage three.⁴⁷ However, this could likewise lead to considerable delays. Under the current law, adjudication is the form of diligence which must be used for certain moveable property, such as intellectual property and digital assets (in most scenarios).⁴⁸ This is the consequence of adjudication's residual status, which applies to the aforementioned property since arrestment is rendered incompetent by the general absence of a third-party arrestee for such property and because attachment can only be used for *corporeal* moveable property.⁴⁹ The inappropriateness of adjudication for doing diligence against intellectual property and digital assets is obvious, and there are various facets of its operation and enforcement regarding such assets that are unclear. Given that adjudication is a weapon forged in earlier centuries, and is inadequate for skewering twenty-first century assets. A more appropriate form of diligence such as residual attachment is required and soon.

The *Response* also covers a number of other aspects of diligence.⁵⁰ In relation to exceptional attachment orders,⁵¹ which are relatively intrusive and enable a creditor to attach non-essential items belonging to the debtor in a dwellinghouse (with the court's permission), the Scottish Government intends to increase the value of sentimental items (such as jewellery and family heirlooms) that cannot be attached (under certain conditions) from £150 to £500, following a recommendation from the Diligence Working Group.⁵² Again, this will help

⁴⁷ *Response* paras 209-211.

⁴⁸ For intellectual property, see e.g. Bell, *Comm I*, 110-111; Gretton, *Inhibition and Adjudication* (n 46), 215-216; G L Gretton, "Diligence", in *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 8 (1992) para 200.

⁴⁹ For this aspect of attachment, see Debt Arrangement and Attachment (Scotland) Act 2002 s 10(1).

⁵⁰ As well as the proposals below, there are, for instance, proposals to: investigate extending inhibition to summary warrants (*Response* paras 170-171); have a DAIP issued to debtors when an application is made for diligence on the dependence (*Ibid* para 176); re-examine when money attachment can be executed and explore how equivalents to money attachment in other countries operate, with a view to modernising and recognising that physical cash is becoming rarer (*Ibid* paras 179-183).

⁵¹ For exceptional attachment orders, see Debt Arrangement and Attachment (Scotland) Act 2002 Pt 3 ss 46-57.

⁵² *Response* paras 160 and 164; Diligence Working Group Report, 11. See Debt Arrangement and Attachment (Scotland) Act 2002 ss 52, 55(4).

respond to increasing inflation but it may be useful to determine what exactly the figure is intended to protect here and why a £500 value may be more appropriate.⁵³ Furthermore, it would be worthwhile to consider the extent to which there should be protection for sentimental items in the law of debt and insolvency more broadly, albeit that significant limitations on the exclusion of such items would be necessary to avoid unfairness to creditors seeking repayment of debts.

In relation to exceptional attachment, the Scottish Government also plans to proceed with an extension of the redemption period for exceptional attachment to fourteen days (from the current seven days) where items are attached but not removed from premises.⁵⁴ This will bring the law into line with attachment more broadly and also give the debtor greater opportunity to pay the value of the item(s) to avoid them being sold.⁵⁵

Regarding arrestment of earnings, the Scottish Government is to examine how to implement a recommendation to introduce a twenty-one-day timescale for an employer to confirm that an earnings arrestment has been successful and to allow for employers to send recovered funds to creditors quarterly instead of monthly.⁵⁶ They will also consider whether to enable creditors to vary the amount repaid through an earnings arrestment (to allow debtors to ask a creditor for more flexibility). In addition, an increase in the value of earnings protected from an earnings arrestment will be necessary due to inflationary pressures.⁵⁷ The protected minimum balance for arrestment of funds in bank accounts increased from £566.51 to £1,000 on 1 November 2022,⁵⁸ along with a provision to amend the figure through regulations. This decoupling from earnings arrestments means the amount will need to be

⁵³ In fact, the proposed figure of £500 may not be considered high enough by the time the change is to be made.

⁵⁴ *Response* paras 161-164. However, it seems as if the period would remain at seven days where items are attached under an exceptional attachment order and *removed* from the premises, as an extended redemption period would increase storage costs. See Debt Arrangement and Attachment (Scotland) Act 2002 s 56(1).

⁵⁵ See Debt Arrangement and Attachment (Scotland) Act 2002 s 18(1) for the redemption period for attachment generally.

⁵⁶ *Response* paras 184-190. See Debtors (Scotland) Act 1987 Pt 3, for earnings arrestments.

⁵⁷ The protected amounts at the time of writing are £130.73 for net weekly earnings (where the debtor's earnings are paid weekly); £566.51 for net monthly earnings (where payments are monthly); and £18.63 for net daily earnings (which is used for calculating deductions where payments are at other regular intervals or at irregular intervals). See Debtors (Scotland) Act 1987 ss 47, 49, 49A, Sch 2. These amounts were substituted, as of 6 April 2022, in place of the previous amounts by the Earnings (Variation) (Scotland) Regulations 2021, SSI 2021/409, reg 1, Sch.

⁵⁸ Coronavirus (Recovery and Reform) (Scotland) Act 2022 s 22, amending Debtors (Scotland) Act 1987 s 73F.

directly monitored going forward, with consideration to be given to how closely the figures for earnings arrestments and arrestments of funds should align.

Finally for arrestments, the Scottish Government is to consider the Diligence Working Group's recommendation to require arrestees to notify whether an arrestment is unsuccessful (within twenty-one days), rather than just whether it is successful.⁵⁹ While this would provide more certainty for creditors seeking to do diligence, and fits in with other proposals that seek to increase the availability of information to relevant parties, it would incur costs for banks and it is unclear whether and how this would filter through into financing costs more broadly. Consequently, minimising the administrative costs for banks arising from such a change is desirable. It is possible that that this may be achievable through technological solutions combined with relatively non-onerous statutory requirements. However, it will be necessary to consult with the major banks and others with expertise to attain greater clarity on this.

D. CONCLUSION

Overall, the *Response* is to be welcomed. Many of its proposals are sensible and the joint consideration of statutory debt solutions and diligence bodes well for coherent reform in the future. The reforms arising from stage two, and which are likely to be implemented via the forthcoming Bankruptcy and Diligence Bill, will improve the law. However, the following stage is likely to be more contested and it will be more difficult to meet the wider set objectives. Nevertheless, as well as the proposals in the *Response* and the suggestions above, it could be an opportunity to consider broader issues, such as the fundamental purposes of debt solutions, how they fit with the rest of a debt-driven economy, and whether partnerships and trusts should be moved out of the personal insolvency framework and towards a corporate insolvency model.

In relation to statutory debt solutions and diligence, recent decades in Scotland have witnessed a mixture of frantic hyperactivity and inattention. While much legislation has been passed, there are examples of incomplete reform (particular for diligence) and a failure to monitor and amend the law as developments have taken place. The last point is particularly applicable where there are monetary figures involved. Instead of ad hoc changes in response to crises, it would be preferable if there were a standing group that continued to monitor such

⁵⁹ *Response* paras 192-194, 199. For the arrestee's duty of disclosure, see Debtors (Scotland) Act 1987 s 73G.

issues in the law of bankruptcy and diligence annually (or at least periodically). This would help to ensure that the law remains fit for purpose and does not merely address yesterday's problems.