

# Consultation Response

## Mental Health Moratorium Draft Regulations

March 2025





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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Mental Health and Disability Law Committee and Banking, Company & Insolvency Sub-Committee welcome the opportunity to consider and respond to the Scottish Government's consultation on the Draft Debt Recovery (Mental Health Moratorium) (Scotland) Regulations (**Consultation**).

## General Remarks

We note the Mental Health Moratorium (**MHM**) Working Group recommended using existing mental health legislation as the most appropriate parameter for setting the eligibility criteria in a Mental Health Moratorium and note the stated legislation referred to in this Consultation. We are surprised that various other pieces of important UK legislation have been omitted, including the Adults with Incapacity (Scotland) Act 2000 (**AIS Act 2000**) and the Adult Support and Protection (Scotland) Act 2007. This is alongside the European Convention on Human Rights (**ECHR**) and UN Convention on the Rights of Persons with Disabilities.

So far as ECHR compliance is concerned, we welcome the addition of Regulation 4 (2) (b) which we feel significantly helps to move the relevant legislation from potential non-compliance with the ECHR towards clear compliance, and thus within the competence of the Parliament. This Regulation, amongst others, will be further discussed below.



## Consultation Questions

Question 1. Do you agree with the proposed mental health eligibility criteria as listed above?

Whilst welcoming the above point in relation to ECHR compliance, we have identified a practical issue in Regulation 4 (2) (b) in the way in which an individual meets the mental health criteria. We believe that certain individuals who experience being in debt often suffer from poor mental health. This, in turn, can lead to a mental health crisis which may be triggered, in part, by enforcement action or the threat of it, for example, the prospect of losing their home. Therefore, if a moratorium is to be of use, it will need to be put in place quickly. Simultaneously, the individual would meet the criteria if they are referred to a “*specialist mental health service*”. However, in anything other than a quite extreme mental health crisis, the individual will be unlikely to have been moved up the queue for referral to a “*mental health professional*” practising in a “*specialist mental health service*” quickly enough for a moratorium to achieve the desired result.

Moreover, the term “*specialist mental health service*” seems intended to exclude mental health services generally, and to be limited to those that are “*specialist*”, though we point to the Regulations not providing an accurate and thus helpful definition of this term. The need for such a definition is increased if its use in the Regulations is intended to be wider than ordinary language would indicate.

By way of example, the individual may have gone to see (or been persuaded to go and see, more likely) a general practitioner, or may have been detained by the police and seen by a duty mental health officer. This may have resulted in an immediate referral to mental health services, but the urgent need for the moratorium may arise before the individual has actually come under the care of a specialist mental health service. We are of the view that as well as tidying up the language around these provisions, Regulation 4 (2) (b) should be extended beyond “*receiving*” care from a specialist mental health service to having been referred to a specialist mental health service. In order to be robust, we would suggest that the Regulations would likely be required to answer the question: “Referred by whom?”, and the answer to this question would need to reflect practical realities. On this point, we



believe any such practical extension of Regulation 4 (2) (b) would also help address other previous concerns expressed about the previous Bankruptcy and Diligence (Scotland) Bill (now Bankruptcy and Diligence (Scotland) Act 2024<sup>1</sup>), which includes the likelihood of challenge on grounds of unlawful discrimination.

In view of the foregoing, we have concerns that the present wording of the draft Regulations could be interpreted to result in a situation where the moratorium could cease following the ending of the current specialist mental health treatment plus the “*Recovery Period*” (as defined in the Regulations<sup>2</sup>), rather than with reference to more general treatment subsequently received in relation to the mental health crisis. This, in turn, could create a situation where it would be predictable that the consequences of ending the moratorium would trigger another mental health crisis, with the individual thus being caught in a “revolving door” of successive moratoriums.

#### Question 2. Do you agree with the proposed debt eligibility criteria as listed above?

We have no comment to make.

#### Question 3. Do you agree that an individual subject to a statutory debt solution should not be eligible for a Mental Health Moratorium?

We agree - an individual who is already subject to a statutory debt solution has obtained (or is in the course of obtaining) forbearance and / or debt relief already. Therefore, it is our view that those creditors who are already being compromised by such debt solution should not be subject to further restrictions. It could also create additional burdens on the individual’s Payment Distributors and Continuing/Approved Money Advisers. We also believe that further consideration could be given as to whether or not it is appropriate for a mental health moratorium to be available to individuals who have recently exited from a statutory debt solution.

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<sup>1</sup> [Bankruptcy and Diligence \(Scotland\) Act 2024](#)

<sup>2</sup> [The Debt Recovery \(Mental Health Moratorium\) \(Scotland\) Regulations 2025](#)



Question 4. Do you agree with the proposed definition of moratorium debt which would qualify to be protected in a Mental Health Moratorium (see regulation 3 in particular)?

We have no comment to make.

Question 5. Do you agree with the proposed requirement for AiB to confirm the mental health eligibility criteria is continuing to be met?

We have no comment to make.

Question 6. Do you agree with the proposed application process?

We note the application process outlined at Regulation 5 and its reference to “*legal representative*”, as defined in Regulation 2<sup>3</sup>. Aside from the issues surrounding legal aid and ability for an individual in debt to access the representation they need in making an application on their behalf, we have concerns as to the proposed definition of “*legal representative*” in consideration of the AIS 2000 Act.

Giving the role of legal representative to “*any guardian*” would be contrary to the AIS 2000 Act in that no guardian would be entitled to act as such except within the powers that have been conferred upon the guardian. This is confirmed by Section 64 (3) which provides that a guardian can act as a person’s legal representative “*in relation to any matter within the scope of the power conferred by the guardianship order*”<sup>4</sup>.

Furthermore, we are of the view that there has been a significant oversight in the definition of the term “*legal representative*” in taking this as being any “*... power of attorney*”. We point to a power of attorney being a document, not a person, and therefore cannot do anything in the role of attorney. Alongside this, we note that appointees under an intervention order have not been included in this definition at all.

In view of this lack of the effective inclusion of attorneys, and of any mention at all of appointees under intervention orders, we have concerns that there would likely be a

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<sup>3</sup> [The Debt Recovery \(Mental Health Moratorium\) \(Scotland\) Regulations 2025](#)

<sup>4</sup> [s64 Adults with Incapacity \(Scotland\) Act 2000](#)



challenge on grounds of discrimination, the comparator being a guardian with relevant powers. We would suggest that suitable wording for the definition would be: *“Any appointee holding relevant powers under a guardianship order, intervention order or power of attorney”*.

We also point to further uncertainty that is created around the drafting of Regulation 5 (2) (f) (i) which provides that an application to the Accountant in Bankruptcy (**AiB**) for a mental health moratorium must include a signed statement from *“the individual or, where appropriate, their legal representative confirming that they understand the effect of a mental health moratorium and consent to the application”*<sup>5</sup>. We would question who is meant by *“they”* and whether this means the individual, or legal representative, or both. A legal representative (if defined in accordance with the points raised above), would not be able to provide consent unless the individual was incapable of acting in the matter. In view of this, we would suggest that there needs to be two separate provisions here.

Firstly, the individual would apply on the basis that the individual can competently do so. However, we question whether it would be adequate for an individual to self-assess their own competence to make the application, including their own understanding of both the application process along with the wider implications of any moratorium that was granted. It would be contrary to human rights requirements to presume incapacity because of diagnosis of a mental disorder, but it is doubtful whether it would be appropriate to assume capacity in the particular circumstances in which an application for a moratorium should be made.

Secondly, should the legal representative make the application, there would need to be at least an assertion, and possibly evidence, that the individual cannot competently do that. However, we would again question whether it would be necessary for the legal representative to demonstrate the representative’s understanding, or would that be an unreasonable and potentially unlawful hurdle.

As a side point, we would flag that the words after the comma in the definition of “legal representative” are incomplete and should follow the method used in section 1(7) of the AIS 2000 Act, and elsewhere in the same AIS 2000 Act.

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<sup>5</sup> [The Debt Recovery \(Mental Health Moratorium\) \(Scotland\) Regulations 2025](#)



Finally, we would add that certain strengths can be found in the use of Mental Health Evidence Forms in Scotland where a Money Adviser works with the Mental Health Professional to provide evidence for debt relief. We would therefore welcome consideration being given to the strengths that lie in this current process so that these are utilised in the proposals being made to the application process.

[Question 7. Do you agree with the proposed process for the notification of the Mental Health Moratorium?](#)

We have no comment to make.

[Question 8. Do you agree with the proposed process for the registration of the Mental Health Moratorium?](#)

We have no comment to make.

[Question 9. Do you agree with the proposed Mental Health Moratorium protections included in the current draft regulations?](#)

We have no comment to make.

[Question 10. What are your views on how best to link the Mental Health Moratorium administrative processes and evictions procedures to ensure these work effectively together in practice?](#)

We believe that ahead of any eviction application, a creditor could be required to serve notice similar to that already required in a calling up of a standard security (where the secured creditor must send notice to a borrower's local council, giving the council an opportunity to offer support and advice). Conceivably, a similar notice could also be served on the AIB as holder of the register, who (where there is an active moratorium) could advise the applicable Court or Tribunal, ensuring it was taken into consideration at the appropriate point.





Question 11. Do you agree that protection against the installation of pre-payment meters and disconnection of gas or electricity supply should be one of the protections available under the Mental Health Moratorium?

We agree that the measures proposed are aligned with protecting individuals at a vulnerable time.

Question 12. Do you agree with the proposed framework for the Mental Health Moratorium period?

We have no comment to make.

Question 13. Should an individual in a Mental Health Moratorium be subject to the following proposed obligations? (Please tick all applicable options)

- An obligation to pay a continuing liability
- An obligation to not obtain additional credit
- Some other obligation (please specify in the comment box below)
- No obligation at all

We are of the view that whilst new debts arising post-moratorium should be paid, care must be taken in relation to continuing liabilities which have been accelerated as a result of a missed payment pre-moratorium.

In relation to obtaining additional credit, we consider that the restrictions proposed are sensible, albeit there may be scope to allow credit to be extended where, for example, a money advisor has recommended it; where the creditor is an existing creditor with knowledge of the moratorium; or should the AiB or the Court provide permission for this. There is a balance to be struck in terms of protecting creditors, particularly where credit can be extended in ignorance of a moratorium.

Question 14. Do you agree with the proposed process for a creditor's search?



We agree with this proposal.

**Question 15. Do you agree with the proposed consequences for creditors?**

We agree and note that this and the above process for a creditor's search reflects the position under the English breathing space equivalent. We are of the view that creditors who operate across the UK will no doubt appreciate the practice being aligned so that their internal procedures do not deviate and a consistent approach to this can be taken. We see a consistent approach across all jurisdictions in the UK as being a sensible approach.

**Question 16. Do you agree with the proposed process for an individual to request a review of AiB's decision to either not grant or to cancel a Mental Health Moratorium?**

We agree and welcome that the proposals provide transparency in this process.

**Question 17. Do you agree with the proposed process for a creditor to request a review of AiB's decision to grant, or not cancel a Mental Health Moratorium?**

We disagree – the proposals as drafted are “all or nothing” in terms of cancellation of the full moratorium. While cancelling the moratorium may be suitable in some instances, for example in the event of fraud, more limited effects may be more appropriate in other circumstances. An alternative analysis might be to consider whether a particular creditor should be allowed to overcome the moratorium with the consent of the Court, taking into account a balancing of that creditor's interests versus those of the individual.

**Question 18. Do you agree with the proposed cancellation process?**

We note that the consultation document refers to *“prior to any such cancellation, AiB must consult the individual insofar as its possible to do so. AiB is not required to cancel a MHM if the individual's personal circumstances would make the cancellation unfair or unreasonable. Any decision by AiB to cancel a MHM may be appealed to the sheriff court.”*



We welcome that an individual subject to a mental health moratorium can appeal a decision to cancel this made by the AiB to the sheriff court and believe that this ensures safeguards are built into the process.

Question 19. Do you agree with the proposed interaction between the Mental Health Moratorium and the standard moratorium?

We have no comment to make.

Question 20. We would be grateful for any further comments you have about the Mental Health Moratorium which has not been raised in this consultation.

Please provide comments below:

We have no further comment to make.



For further information, please contact:

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