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Dear Gordon,

The Diligence against Earnings (Variation) (Scotland) Regulations 2018

Thank you for your letter of 29 November following up on the Economy, Energy and Fair Work Committee's consideration of the Diligence against Earnings (Variation) (Scotland) Regulations 2018 ("the 2018 Regulations").

The Committee has raised a query relating to the measures introduced by the 2018 Regulations (which effectively uprate the figures contained in existing provisions setting out the deductions to be made under earnings arrestments) and the separate arrangements in place to assess income, expenditure and the contributions made in other statutory or non-statutory debt solutions in Scotland. In particular, the Committee has requested that I set out the reasons for the differences in the amounts assessed for living costs and how the Scottish Government can ensure that there is consistency in the arrangements for those repaying their debts.

The important consideration here is the distinction between on the one hand Scotland's diligence provisions, which provide certain powers for creditors to enforce recovery of specific debts, subject to meeting necessary legal and Scottish Court requirements; and on the other the process for determining income and expenditure to assess appropriate debt solutions and contributions payable where these apply.

The 2018 Regulations flow from the Debtors (Scotland) Act 1987 (as amended) ("the 1987 Act"), which together with the Bankruptcy and Diligence etc. (Scotland) Act 2007 set out the diligence measures currently in force. Earnings arrestment is one of a number of diligence measures used by creditors to recover a debt where a debtor is not cooperating. There are several stages the creditor must first go through to try and get the debtor's cooperation - for example, consumer creditors would need to satisfy the requirements of the Financial Conduct Authority in this regard – so that diligence is a last resort. Diligence against earnings then follows a court process and is used when the creditor knows where the person employed. It is normally used to repay a single debt and the amount paid by the debtor is determined by their salary with deductions taken on each pay day. The deductions from salary continue until the debt (and any costs) are repaid in full, or until the debtor leaves the employment. As a debtor is not cooperating with the creditor it is not possible to carry out an assessment of their income and expenditure. The minimum net earnings levels are calculated by reference to statutory tables set out in the 1987 Act, exempting a level of income from arrestment in order to protect debtors and their dependents. The uprating of these figures aims to strike the right balance between debtor protection and effective enforcement action for creditors.

In summary, the diligence measure of wage arrestment is a relatively blunt instrument aimed at the recovery of what is normally a single debt in cases where there has been no debtor cooperation. Although provision is made to allow a protected minimum income and bank balance where a bank arrestment is being enforced, the mechanism does not allow for further detailed assessment of overall expenditure.

By contrast, the Common Financial Tool (CFT) is designed to assist the operation of statutory debt solutions where contributions are made over an extended period. This can include debt relief (insolvency) solutions including bankruptcy and Protected Trust Deeds and the Scottish statutory debt repayment solution – the Debt Arrangement Scheme. The income and expenditure tool currently designated as the CFT, the Common Financial Statement, has been commonly used by advisers assisting those that are dealing with debt to enter non-statutory solutions including Debt Management Plans or in helping to make the case for debt write-off.

The CFT helps a debt adviser or trustee carry out a full assessment of an individual's income and expenditure and calculate any surplus income that can be payable. Importantly, the CFT is a key determinant in assessing that no surplus income is available which may mean, for example, that minimal asset process bankruptcy is the appropriate solution. The key issue that sets this apart from the diligence provisions described above is that the CFT is designed to be an agile tool that makes appropriate allowances for individual circumstances - helping to guide those struggling with debt to the best solution. In general terms, the CFT is used where an individual is seeking advice and a solution and is co-operating with their creditors. It is also utilised by trustees to determine contributions in bankruptcy granted following a creditor petition to court which may not always involve a debtor cooperating. In either scenario, however, the CFT approach is there to try and achieve consistency and fairness in the determination irrespective of the circumstances. Bankruptcy is a serious step, and it is important that where debtors themselves wish to pursue this route, they do so in full understanding of their financial position.

I hope that this is helpful in clarifying the issues that the Committee has raised.

JAMIE HEPBURN