

Submitted to Mental Health Moratorium Consultation  
Submitted on 2024-01-22 16:41:15

## Ministerial forward

### Eligibility criteria

#### 1 Do you agree with the proposed initial mental health eligibility criteria?

Neither agree nor disagree

Please add any further comments on this proposal in the box below::

We are broadly supportive of the eligibility criteria being linked to identified statutory circumstances which would provide certainty for all stakeholders. Notwithstanding, further clarification with respect to the relevance of all the statutory provisions quoted is needed from the Scottish Government before R3 can offer full support to the proposed criteria.

We refer to the statement in paragraph 7 'It is likely to be the mental health officer who first becomes aware that the individual's financial circumstances are either a contributory factor or are hindering their recovery.' We consider this to be a significant assumption. The mental health officer may not be aware that the patient has financial difficulties, unless of course a financial issue is part of the reason for the compulsory treatment, for example a financial based addiction. In the absence of a specific reference, the mental health officer will be raising the matter at a time when the individual may not be fully cogent (although not necessarily certified as lacking capacity). The consultation does not appear to consider what would happen in such circumstances.

We would refer further to the section headed 'When the individual does not have capacity.' If the Scottish Government is minded to accept the mental health working group recommendation that the mental health moratorium should only be available to those with the capacity to consent (to be determined by the mental health professional), and where no power of attorney or guardianship is in place, we consider that 'capacity' would also be a mental health eligibility criterion. We acknowledge that the Scottish Government is seeking stakeholders' views at Question 8 but we believe that 'capacity' is fundamental to the determination of the process. If an individual does not have capacity, they cannot consent to the process.

1a If you believe the proposed mental health criteria are too narrow, please suggest an alternative that could be measured fairly and easily implemented.

Please comment in the box below::

We neither agree nor disagree that the proposed mental health criteria are too narrow but if the Scottish Government does not accept the mental health working group recommendation with respect to capacity, and limits the mental health eligibility criteria to that set out at paragraphs 3 - 7, we suggest that it would be less complex to grant an automatic mental health moratorium where the individual meets the proposed mental health eligibility criteria. This would avoid the question of capacity and also remove the requirement for the mental health professional to certify that the individual's financial circumstances are either a contributory factor to the individual's poor mental health or is hindering their recovery.

#### 2 Do you agree that no minimum debt level should be set for the eligibility criteria?

Agree

Please add any further comments on this proposal in the box below::

If there is to be a narrow definition for mental health, we do not believe that a minimum debt level is required, as it is questionable whether there would be many individuals who would then meet the eligibility requirements. A minimum debt level would require the mental health professional or the debt adviser to ask the individual for further information to determine if this was met, adding to the administrative burden and likely adding to the distress of the individual.

#### 3 Do you agree that there is no need to establish the individual's financial position at the application stage?

Agree

Please add any further comments on this proposal in the box below::

We agree that if there is no requirement for a minimum debt level, establishing the individual's financial position at the application stage would not be relevant either. Trying to establish the individual's financial position at this stage could cause significant practical difficulties and would add to the administrative burdens and concerns for the individual. Further, it seems counter intuitive to request more information at this stage whilst also expecting a mental health professional to state that debt problems are impacting negatively on the client's mental health.

### The application process

4 Do you think the proposed role of the Mental Health Professional at the application stage is appropriate?

Yes

Please add any further comments on this proposal in the box below::

We agree that the proposed role of the mental health professional at the application stage is appropriate. It is unclear who else would be in a position to carry out the role in terms of having the necessary direct contact with the individual who is receiving the compulsory treatment. We are however concerned about an additional obligation being put on the mental health professional, particularly if any financial eligibility criteria were included as a pre-requisite to a mental health moratorium.

In the consultation document, paragraph 12, the Scottish Government refers to the working group recommendations 'to future proof the list of job titles to include a mental health professional as someone of equivalent standing and professional qualification.' We disagree on the basis that this could cause differences in interpretation. Further, by making wider the list of professionals competent to sign the application, it increases the number of people who need to be made aware of the legislation which in turn, increases awareness and training needs.

With regard to paragraph 14, if the intention is to exclude financial eligibility criteria for a mental health moratorium because it is not possible to work out realistically what the individual's financial position is, it seems anomalous to have a requirement for the mental health professional to certify that the individual's financial situation is a contributing factor to their mental health or hindering their recovery.

4a Do you think the proposed role of the Mental Health Professional at the application stage is practical?

Don't know

Please add any further comments on this proposal in the box below::

We consider that the mental health professional should be asked this question.

5 Do you think the proposed role of the debt adviser at the application stage is appropriate?

No

Please add any further comments on this proposal in the box below::

We disagree with the proposed role of the debt adviser with regard to confirming the three matters set out in paragraph 16 of the consultation where the individual does not have a representative. In the outlined process in the consultation paper, it is envisaged that these individuals would be able to consent to a mental health moratorium at a time when they might have 'capacity' but are not emotionally stable and/or overwhelmed. Experience and regulation of the profession has informed us that understanding insolvency options is a challenging time for any individual without considering the impact on those who are subject to compulsory mental health crisis treatment.

We would be interested to know if consideration has been given to the appointment of a representative to assist the individual who does not already have a representative (as defined in the consultation paper), for example extending the role of the Office of the Public Guardian, or similar. This could be particularly useful with regards to giving any necessary consent. That representative could also assist the individual with the ongoing liability position.

With regard to the circumstances where the individual does have a representative, we agree that the debt adviser would be able to fulfil the role at the application stage (subject to the next paragraph).

We do not agree that a debt adviser can undertake to provide debt advice to the individual at a suitable point in the future when the future at the point of application is unknown to the individual and the debt adviser.

5a Do you think the proposed role of the debt adviser at the application stage is practical?

No

Please add any further comments on this proposal in the box below::

As referred to above, we believe that the proposed role of the debt adviser at the application stage is not practical, particularly where the individual is receiving hospitalised compulsory treatment.

6 Connecting the Mental Health Professional to the debt adviser - which option would you choose?

Accountant in Bankruptcy acts as a link

Please explain the reason for your answer in the box below::

This would need the least input for what is, in the proposed process, an administrative task.

7 Do you believe that specialist debt advice and support is required for frontline debt advisers for their involvement with the Mental Health Moratorium process?

Yes

Please explain the reason for your answer in the box below::

On the basis that the debt adviser's role is accepted, we consider that there will be a requirement for specialist training, specifically with regards to interactions with the individual. This raises the issue of having the correct and properly funded resources in terms of capacity and expertise.

8 Do you agree that a Mental Health Moratorium application should only be consented to by the individual, a power of attorney or guardianship?

Neither agree nor disagree

Please add any further comments on this proposal in the box below::

We referred earlier to the concept of 'capacity' being fundamental to the process. Therefore if the process is to exclude those individuals who do not have capacity from access to a mental health moratorium, we would be more inclined to agree. However, if these individuals were not excluded, we believe that an individual would need to have someone, for example the Office of the Public Guardian, to work closely with the individual or act on their behalf.

Has the Scottish Government given thought to any reassessment that might be made to the individual's capacity during the period of compulsory treatment?

The individual's representative would need to know what was happening with the individual's financial affairs. We have no concerns in this regard.

8a If you disagree, we would be grateful for your views on how a Mental Health Moratorium application is made available to those who do not have the capacity to consent.

Please comment in the box below::

The options appear to be that either the individual is automatically entitled to a mental health moratorium as referred to earlier, or perhaps the Office of the Public Guardian, or similar, could be brought into play, to act on their behalf.

9 Do you have any other comments on the proposed application process?

Please provide them in the box below::

We have the following comments on the proposed application process for a mental health moratorium based on mental health eligibility criteria only:

1. As the Scottish Government is proposing that the debt adviser interacts with the individual or their representative to obtain consent, this needs to be reflected in the flowchart.
2. We support a public register for mental health moratoriums. This would be a further step to add, prior to the AiB sending notification to creditors.
3. Paragraph 26 of the consultation paper refers to the other mechanisms that the AiB is looking to use to obtain detail of public sector creditors. This step needs to be added to the process flowchart.

Overall, we believe that the process is a significant administrative obligation. As there is no proposed fee for a mental health moratorium, we do have concerns that the process will be adequately funded. We did not see that the Scottish Government has provided an indication of what funding is available.

## Period of protection

10 Do you agree with the proposed period of protection?

Disagree

Please add any further comments on this proposal in the box below::

We do not agree with the Scottish Government's proposals regarding the period of protection but rather echo the recommendations of the mental health working group. We think that the period of protection (the recovery period) should be linked to the period in the standard moratorium, which is currently six months but which we understand is subject to review and probable decrease, post the cost of living crisis. We believe that on the basis of the eligibility criteria, once an individual has completed their compulsory treatment, they should be treated equally to:

- those individuals who might have significant mental health difficulties but who are nonetheless not entitled to access the proposed mental health moratorium and
- to those individuals who have no mental health concerns.

We also disagree with the proposals set out in paragraph 30 which refer to an individual under compulsory long term or indefinite treatment. It would not necessarily be in anyone's interest that a mental health moratorium continues indefinitely. It would be an issue for the individual if interest and charges are not frozen (though enforcement would be prevented by the moratorium) and it would be an issue for creditors the interest and charges were frozen (and the moratorium preventing the creditor from enforcing). We think that the Scottish Government should give further consideration to these scenarios.

We did not notice that there was any proposal for the ability of the individual or representative to apply to have the mental health moratorium or period of protection withdrawn. If this has not already been considered, we think it needs to be.

## Obligations on the creditor

### 11 Do you agree with the proposed approach to the qualifying debts?

Neither agree nor disagree

Please add any further comments on this proposal in the box below::

We are unclear as to whether 'matching the list of debts which can be included in the Debt Arrangement Scheme' extends to matching the list of debts that are excluded from a Debt Arrangement Scheme. If it does extend to the excluded debt list, we would question the relevance of fees charged for a debt payment programme and the reason for excluding student loans. If it does not extend to the list of excluded debts we do not have a concern.

We agree that debts where the individual operates as a sole trader would be included as qualifying debts but do not understand why any business debts from a joint business entity would be excluded from the moratorium unless the presumption is that the other partner(s) would carry on the business in the absence of the individual.

With regard to paragraph 35 there is an assumption that the individual can deal with ongoing liabilities. Without having undertaken any financial review this is a significant assumption. We question how this correlates with paragraph 38 of the consultation paper regarding the Scottish Government's policy goal 'to provide the individual time to address their severe mental health issues without additional pressures from their financial problems.'

The consultation paper does not appear to cover the impact on the individual's bank account where there is an overdraft. The overdraft would be a qualifying debt for the moratorium. However, income the individual may receive during the moratorium may be paid into that account and ongoing liabilities may be paid from that account and if the account continues to be operated, this may raise issues regarding the rule in Clayton's case. If the account is frozen this could cause significant further financial difficulties to the individual. This might not be a problem if there is a representative who can perhaps make alternative arrangements but perhaps so for an individual without a representative. Has this matter been given consideration?

We have read paragraphs 36 and 37 to mean that the Scottish Government is not planning to exclude the list of debts that have been excluded in the parallel scheme in England and Wales.

### 12 Do you agree that interest and charges should not be added to the individual's debt during the full period of their Mental Health Moratorium, i.e. frozen?

Disagree

Please add any further comments on this proposal in the box below::

Creditors should not be prejudiced. If the mental health moratorium is being put in place without any minimum debt level or assessment of the individual's financial position, we think the corollary of that is interest and charges should continue to be charged.

We agree that a public register is appropriate.

### 12a We would be grateful for your views on the possible costs to creditors by the freezing of interest and charges on debts during the Mental Health Moratorium period.

Please provide comments in the box below::

We consider that creditors' views would be required in response to this question.

### 13 We would be grateful for your views on the possible practicalities of limiting creditors from contacting the individual during the Mental Health Moratorium period.

Please provide comments in the box below::

Creditors would be relying on the AiB's checks for identification and notification purposes. Regardless of the thoroughness of those checks, there will be creditors who are missed or creditors who are unable to establish the identity of the individual without a reference. In such cases, a creditor or their representative may not be aware of the mental health moratorium and might continue to contact the individual. Consequently, in the proposed process, the onus would be on the individual or their representative to notify the debt advisor of any direct creditor contact to enable that creditor to be notified. We question whether all individuals without a representative will be able to fulfil that task.

### 14 Do you agree with the proposed approach to the protections against diligence?

Agree

Please add any further comments on this proposal in the box below::

None.

15 Do you agree with the proposed position on creditor consequences for not adhering to a Mental Health Moratorium?

Agree

Please add any further comments on this proposal in the box below::

We note that working group recommendation at paragraph 51 presumes the initial debt adviser continues to operate throughout the duration of the mental health moratorium. We question whether thought has been given to the position, particularly when there is long term compulsory treatment, to the initial debt adviser no longer providing a debt advice service - who would the individual or anyone else who believes the creditor is not applying the protections notify?

We consider that for the larger private sector creditors, the risk of action by their regulator, for example, if the creditor is a commercial lender, the FCA, will encourage creditors to cease contact with the individual. For most creditors, reputational risks would be sufficient to deter them from acting outwith their obligations.

16 Do you agree with the proposed position on the creditor's right to challenge the granting of a Mental Health Moratorium?

Disagree

Please add any further comments on this proposal in the box below::

We consider that creditors must always be given the opportunity to protect their interests, particularly when there is a risk of abuse, however minimal that risk may be. Further, if the decision is made that creditors will be required to freeze interest and charges or cannot pursue their debt long term or indefinitely, some balance needs to be given to the rights of the creditor in the process. We therefore consider that creditors should have the right to challenge on any one of the following grounds:

- there has been an unfair prejudice to the creditor.

- there has been a material irregularity where the individual did not meet the mental health moratorium eligibility criteria. We acknowledge this occurrence would be extremely unlikely on the basis of the narrow criteria for the mental health eligibility but this would be appropriate if there were financial eligibility criteria.

- the individual had been involved in fraud.

- if the Scottish Government includes the 1995 Act as part of the mental health eligibility criteria, where the individual's prison sentence was for fraud or money laundering.

- if the eligibility criteria are to include a requirement for the mental health professional to confirm that the individual's financial circumstances are either a contributing factor or hindering the individual's recovery, creditors should be able to challenge on those grounds as there may be occasions where the individual is more than capable of paying.

The Scottish Government would need to consider the process for challenge or review.

16a Do you think creditors should be able to request the cancellation of an approved Mental Health Moratorium?

Yes

Please explain the reason for your answer in the box below::

We do think that creditors should be able to request a cancellation on the same basis and reasoning as in the answer to question 16.

16b If you answered yes to question 16a, in what circumstances could the creditor request a cancellation?

Please provide your comments in the box below::

Please see response to Question 16.

16c Further to question 16b, we would be grateful for your views on how a cancellation process could work.

Please provide your comments in the box below::

We suggest that in the proposed process, the AiB would be the appropriate person to undertake a review of the challenge or cancellation request. There would also need to be a right to appeal the AiB review decision to the court.

## Obligations on the individual

17 Do you agree with the proposed approach to the obligations on the individual?

Neither agree nor disagree

Please add any further comments on this proposal in the box below::

We agree that there should be a public register for mental health moratoriums.

We consider that no sanctions are necessary except for a sanction for deliberate alienation.

18 Do you believe penalties should be applied to the individual for not following the rules of the Mental Health Moratorium?

Yes

Please add any further comments in the box below::

This goes back to the question of 'capacity' and whether those individuals who are certified as not having capacity are excluded access to the mental health moratorium.

If the individual is considered able to consent to a mental health moratorium, there needs to be a penalty if they do not follow the rules. We would stress our concerns about an individual considered to have capacity, consenting to a process during a period of significant mental stress.

If the individual does not have capacity, they would need to have a representative.

18a If you answered yes, we would be grateful for your views on what kind of penalty would be appropriate.

Please comment in the box below::

The individual should not be able to apply for a standalone moratorium.

We consider that the obligations should be brought in line with bankruptcy obligations.

19 Do you agree there is insufficient justification to place restrictions on the individual's access to credit?

Disagree

Please add any further comments on this proposal in the box below::

We disagree with the Scottish Government's view that it is not persuaded that a limit should be placed on an individual's ability to access additional credit during a mental health moratorium.

We suggest that access to credit should be allowed only in exceptional circumstances. If the individual required credit, this would need to be subject to a specified limit. In this regard, we do have concerns regarding the individual's emotional state during a period of compulsory treatment and the necessary wherewithal to sign any credit agreement.

The purpose of the mental health moratorium is to remove the burden of the individual's debts and we consider that adding more debt to be irresponsible and to the detriment of existing creditors. We appreciate there is no limit in a standard moratorium but we do not think these processes should be compared in this regard - one is short term and one may be indefinite or long term.

20 Do you believe other obligations should be placed on an individual in a Mental Health Moratorium?

No

Please explain the reason for your response in the box below::

We consider that paragraph 61 is an incorrect assumption.

Whilst the individual may have the capacity to consent to a mental health moratorium, it does not follow that they are able to deal with day-to-day tasks, such as being able to meet ongoing liabilities. Their circumstances may have changed significantly as a result of the nature of their compulsory treatment which means they are unable to work and no longer have an income.

If creditors are prepared to extend forbearance to individuals when they become aware of mental capacity issues in respect of ongoing liabilities, they might do similarly for qualifying debts. We have our doubts that some creditors, for example private landlords, would be able to extend forbearance long term or indefinitely. For some creditors, not paying ongoing liabilities will have a significant impact on their own financial position.

We suggest that the Scottish Government needs to consider the issue of capacity/state of mind and ongoing liabilities where the individual has no representative as part of this process as opposed to their proposal to keep the matter under review.

The delivery mechanism - using the Debt Arrangement Scheme

21 Which of the following options would you choose as the delivery mechanism for the Mental Health Moratorium?

Option 1 - Clone the underlying IT system in place for the Debt Arrangement Scheme to administer the Mental Health Moratorium

Please provide the reason(s) for your response in the box below::

The system is in place so it would be readily available.

We strongly disagree with the principle of enrolling the individual into a debt arrangement scheme when there is no knowledge of the individual's financial position.

21a If you selected neither option, we would be grateful for your views on a workable alternative which would meet the Mental Health Moratorium requirements.

Please provide your comments and reasoning in the box below::

Not applicable.

### Interaction with a standard moratorium

22 Do you agree with the proposed position on how the Mental Health Moratorium will interact with a standard moratorium?

Agree

Please add any further comments on this proposal in the box below::

None.

### Additional questions

23 We would be grateful for your views on how best to promote the Mental Health Moratorium.

Please provide your views in the box below::

Awareness needs to be raised with the medical profession, e.g. GP surgeries and hospitals, at police stations and with debt advisers. Training will be necessary, particularly with the mental health professionals and debt advisers and within the AiB's office.

24 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 in the box below::

R3 welcomes the commitment to introducing an enhanced moratorium protection for individuals who have mental health issues. It is also reasonable that those individuals that meet the mental health criteria have access to a procedure that covers the entirety of the period that they are receiving compulsory treatment. However, consideration needs to be given as to whether a long term moratorium is in anyone's interest - the individual's, were creditors not required to freeze charges and interest, or the creditors if they were to be required to freeze charges and interest.

Having considered the separate mental health moratorium procedure set out in the consultation paper, we are unconvinced of its value, in terms of its apparent complexity, consequential costs and impact on resources and are of the view that these aspects could have been minimised by extending the existing standalone moratorium procedure.

However, we acknowledge that the Scottish Government appears to be committed to the implementation of a separate procedure and have focused our thoughts on the process proposed in the consultation paper. Notwithstanding, we would have found it useful to have been provided with an indication of how many individuals are likely to be eligible for the proposed process. We also have concerns with regard to the availability of funding and resources required to implement the proposed process effectively and fairly.

With regard to the exclusion of the individuals who do not have 'capacity', this results in a group of the most vulnerable of society being denied access to a procedure that could potentially benefit them, particularly if there was the opportunity to have someone involved to represent them, for example the Office of the Public Guardian. The consultation paper does not cover the question of any review of the diagnosis of 'capacity.' For some individuals, capacity is a short term issue whereas for others it may be permanent.

The consultation paper has not proved to be the easiest of papers to follow, not least because some of the assumptions that have been made, for example: that an individual could meet and manage ongoing liabilities, or that the individual will be able to communicate their financial concerns to the mental health professional at the outset of their compulsory treatment. When we considered the questions and the implications thereof, we found ourselves having to revisit earlier responses particularly with regards to the process for being granted (or applying for) a mental health moratorium. We have referred to our concerns that an individual's consent in a mental health crisis as opposed to an individual having 'capacity,' have not been adequately addressed with regard to the individual without a representative.

We understand that this mental health moratorium process may be used as the basis for a possible wider moratorium to include individuals who have mental health problems without having compulsory treatment. We suggest that dealing with the question of capacity and consent is key in that regard.

24a Would you be happy for officials to contact you to discuss your response if we want to explore your comments in more detail?

Yes

Thank you

About you

2 What is your name?

Name:

moira fitzpatrick

3 Are you responding as an individual or an organisation?

Organisation

4 What is your organisation?

Organisation:

R3, Association of Business Recovery Professionals

5 Further information about your organisation's response

Please add any additional context:

R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from global legal and accountancy firms through to smaller, local practices.

The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals get back on their feet. Our members have direct experience of insolvencies and their impact on the UK economy and insolvent companies' stakeholders.

This response has been prepared by R3 in collaboration with members of its Scottish Technical Committee. The Committee deals with issues of general importance and significance to the profession in Scotland, keeping under review all UK and EU legislation, prospective and other matters relating to insolvency law. The Committee is multi-disciplinary and is made up of representatives from across the insolvency and restructuring profession, including practising insolvency practitioners, lawyers (including those specialising in advising regulated entities), academics, and others.

6 The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response only (without name)

7 Do you consent to Scottish Government contacting you again in relation to this consultation exercise?

Yes

8 What is your email address?

Email:

moira.fitzpatrick@r3.org.uk

9 I confirm that I have read the privacy policy and consent to the data I provide being used as set out in the policy.

I consent

Evaluation

10 Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Please enter comments here.: