These documents relate to the Debt Arrangement and Attachment (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 7 May 2002

DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Debt Arrangement and Attachment (Scotland) Bill introduced in the Scottish Parliament on 7 May 2002:
   • Explanatory Notes;
   • a Financial Memorandum;
   • an Executive Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 52–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill is intended to implement the central recommendations of a broadly based Working Group which was set up, in response to the request of the Justice and Home Affairs Committee of the Parliament in the Committee’s Stage 1 Report on the Abolition of Poindings and Warrant Sales Bill (SP Paper 82, paragraph 48), to consider an alternative for poinding and warrant sale. The Working Group’s recommendations were published in its report Striking the Balance – a new approach to debt management on 6 July 2001.

5. The Bill is in five parts:

   Part 1 (The debt arrangement scheme) creates a national debt arrangement scheme to enable multiple debts to be assessed with the support of money advisers and paid in accordance with a debt payment programme over a period of time. During participation in the debt arrangement scheme enforcement and sequestration action against the debtor will be prohibited. Regulation making powers are included within the Bill to enable the scheme to be introduced without the need for additional primary legislation, so allowing for early implementation. The current consultation on Enforcement of Civil Obligations in Scotland, published on 22 April 2002, will determine matters of detail for the scheme.

   Part 2 (Attachment) provides for attachment of corporeal moveable property.

   Part 3 (Attachment of articles kept in dwellinghouses: special procedure) provides for an order of court to authorise attachment, on an exceptional basis, within dwellinghouses. Attachment in dwellinghouses will be competent only where the court grants an exceptional attachment order and assets exist which are not essential and valuable. An exceptional attachment order will be competent only after money advice and information has been given to the debtor. Judicial enquiry and means assessment will determine whether an exceptional attachment order will be appropriate in individual cases. Factors to be taken into account by the court include whether negotiated settlement has been attempted, any previous time to pay arrangement, the nature of the debt and whether earnings or ordinary arrestment have been attempted if appropriate in the individual circumstances of the case. Provision is made for a voluntary declaration of circumstances, lay representation and intervention of a domestic visit by a money adviser.
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Part 4 (Abolition of poindings and warrant sales) makes provision for the abolition of poinding and warrant sale and contains a saving provision in respect of warrant sales already completed before the date on which abolition comes into force.

Part 5 (Miscellaneous and general) makes provision for the short title, regulations and orders, commencement of the Bill and other miscellaneous matters.

The schedules contain details of non-essential assets, the expenses of attachment chargeable to the debtor and minor and consequential amendments and repeals.

Part 1 – The debt arrangement scheme
6. Part 1 provides the framework within which the debt arrangement scheme will operate and for which further detailed provision will be made following consultation about proposals for the operational arrangements and legal effect of the scheme.

Section 1 – Debt arrangement scheme
7. Section 1 creates a scheme, named the “debt arrangement scheme”, to enable individuals to arrange for their debts to be paid under debt payment programmes without enforcement or sequestration being undertaken against them.

Section 2 – Debt payment programmes
8. Section 2 specifies how an application may be made to participate in the scheme and defines what a debt payment programme is.

9. Section 2(1) defines a debt payment programme as a programme which provides for the payment of money owed by a debtor. It is intended that a debt payment programme can include all debts owed by an individual, regardless of whether they have been legally constituted by court decree or otherwise, and their ongoing liabilities; and the Scottish Ministers intend to make regulations under section 7(1) to so provide.

10. The Scottish Ministers are given the power in section 2(2) to approve a debt payment programme upon submission of an application by a debtor. It is intended that this approving function will be delegated to another body by virtue of the power in section 8.

11. Details of what must be included in an application are set out in section 2(3). The programme is to specify arrangements proposed for payment of debts giving details of the amounts, periods and manner in which debts are to be paid.

12. Section 2(4) provides that the application form is to incorporate consent of creditors.

13. Since the scheme is to provide for management of multiple debts, a minimum number of creditors will be necessary for participation in a programme. It is intended that the scheme will be restricted to debts up to a maximum total monetary threshold. Section 2(5) provides for these
requirements which will be specified in regulations to be made, under section 7(1)(a), following the current consultation exercise.

14. The debt payment programme will specify the person (a “payments distributor”) to whom the debtor proposes to make instalment payments for distribution amongst creditors. Section 2(6) provides that a person appointed to carry out the payment distribution function has to be approved for that purpose by the Scottish Ministers.

**Section 3 – Money advice**

15. Section 3 requires the debtor to take certain steps before submitting an application for approval of a programme and imposes certain responsibilities on money advisers.

16. Section 3(1) requires the debtor to seek the assistance of a money adviser before applying for approval of a debt payment programme, or its variation. A money adviser must assist with the preparation of an application to participate in the scheme.

17. Section 3(4) provides that a money adviser is to monitor how the scheme is operating in order to enable the debt payment programme to operate effectively and as approved.

**Section 4 – Effect of debt payment programmes**

18. Section 4 details the effects of an approved debt payment programme under the scheme.

19. Section 4(2), (3) and (5) prohibits all creditors from executing any form of diligence against or seeking to sequestrate a person participating in the scheme.

20. Section 4(4) provides that any period during which a debtor is participating in the scheme is to be disregarded for the purpose of creditors’ rights and remedies for enforcing a debt when debtors cease to participate in the scheme. The effect of this provision is, in particular, to suspend prescription during the debtor’s participation. Thus, debts for which creditors had not obtained decree which are included in a debt payment programme under the scheme but which ceases before payment is made in full, will not prescribe during the period of the programme.

**Section 5 – Variation of debt payment programmes**

21. Section 5 deals with the variation of an existing debt payment programme and any conditions attached. It is anticipated that, once a programme is approved, variation will be infrequent. Circumstances in which variation should be allowed are being consulted upon and will be provided for in regulations made under section 7(1)(see section 7(2)(g) in particular).

22. Section 5(3) specifies that an application for variation will be made in a standard form which will be prescribed in regulations.
Section 6 – Deduction from earnings

23. Section 6 provides for deduction from earnings under the terms of a debt payment programme. It is anticipated that, subject to consultation, the regular payments to be made for distribution amongst creditors could be made by deduction from debtors’ earnings.

24. Section 6(1) and (2) requires the debtor to instruct an employer to make the approved payments to the person distributing the payments to the creditors and the employer to comply with the instruction.

Section 7 – Debt payment programmes: power to make further provision

25. Section 7 gives the Scottish Ministers further powers to regulate the content, operation and effect of debt payment programmes approved under the scheme. This will enable the detail of the scheme to reflect views expressed in the current consultation.

26. Section 7(1) gives the Scottish Ministers a general power to make further provision in this respect by way of regulations. It enables regulations to be made concerning applications to participate in the scheme upon approval of debt payment programmes, the manner in which they are to operate, the conditions to be complied with and the effects which they will have.

27. Section 7(2) sets out particular matters in respect of which the general power in section 7(1) may be exercised. It lists many of the arrangements for which it will be necessary to make provision in order to enable the scheme to operate and which have been anticipated in the current consultation. For example, section 7(2)(m) provides for regulation of the period over which a payment programme may run. This is intended to enable participation in the scheme to result in settlement of the debts within a reasonable period (to be determined following consultation).

28. Section 7(3) allows legislation, which may have to be modified as a consequence of the scheme in order to make it operate effectively, to be modified by the regulations. For example, it may be necessary to modify existing legislation concerning diligence and sequestration to ensure that their operation is suspended during participation in the scheme in accordance with provisions of the Bill in section 4 and the regulations which can be made under section 7(1)(c) and (2).

Section 8 – Functions of the Scottish Ministers

29. The Scottish Ministers may wish to nominate a body or bodies outwith the Scottish Executive to perform functions in relation to the debt arrangement scheme currently provided for in Part 1 of the Bill as a function of the Scottish Ministers. Section 8 gives them the power to do so by order.

Section 9 – Interpretation of Part

30. Section 9 defines terms used in Part 1. Money advisers, for the purposes of the scheme, will be approved by the Scottish Ministers. Debtors, for the purposes of the scheme, must be natural persons (i.e. companies, partnerships, associations etc. may not apply).
PART 2 – ATTACHMENT

Attachment

31. This part of the Bill introduces a new method of enforcement, or diligence, for the attachment of corporeal moveable property. The law of diligence provides procedures by which legal obligations, usually imposed by order of the civil courts, can be enforced. Different procedures, for enforcement of obligations concerning legally constituted debt, apply to different types of property. Corporeal moveable property is property which is tangible (corporeal), is not fixed like land or buildings and can be handled and moved (moveable).

32. Rules of court will make supplementary provision for the manner in which the procedural requirements under this Part are to be undertaken within the court process – for example, regarding intimation of documents and steps in procedure, the conduct of hearings and the manner in which applications to the sheriff or appeals against decisions may be made (including provision of forms to be used).

Section 10 – Attachment

33. This section creates a new diligence over corporeal moveable property for recovery of legally constituted debt, to be known as attachment.

34. Section 10(3) and (4) provides that attachment is only competent where, the debtor having been charged to pay the sum owed together with interest accrued, the creditor has provided the debtor with a debt advice and information package.

35. Section 10(5) defines terms used in this section. It specifies the meaning of decree and document of debt. It specifies that the debt advice and information package is to contain such information as may be determined by the Scottish Ministers. It is intended that the debt advice and information package will be made available by the Executive for distribution by creditors at any stage when seeking repayment of debt and will be made widely available to debtors by other means. It will include basic money advice, details of where debtors may obtain further advice locally about individual circumstances and information about what could happen under the enforcement process if management of debt is not tackled.

Section 11 – Articles exempt from attachment

36. This section specifies property which is to be exempt from attachment.

37. Section 11(1) provides that it will not be competent to attach assets which are reasonably required for the debtor’s profession, trade or business, and which do not exceed a value of £1,000. In particular, tools of trade, books other equipment or vehicles may not be attached. This will enable valuable property to be attached whilst permitting the debtor to retain items which will allow him to continue his business and generate income. This is in line with recommendations 7 and 11 of the Scottish Law Commission in its Report on Poinding and Warrant Sale (Scot Law Com No177). Specific provision is also made to exempt a mobile home which is the debtor’s only or principal residence.
38. Section 11(2) allows the Scottish Ministers to add or remove and vary the items exempted by regulations. This will provide for flexibility in order to meet changing circumstances or where it may be considered that further debtor protection may be needed.

Section 12 – Times when articles may not be attached

39. Section 12 specifies days on which attachment may not take place, namely on a Sunday, Christmas Day, New Year’s Day, Good Friday and any other day prescribed by rules of court. It also specifies times during which attachment may not take place, restricting it to between 8am and 8pm unless prior authority has been obtained from the sheriff.

Section 13 – Presumption of ownership

40. Section 13 provides a presumption that articles in the possession of a debtor are owned by the debtor, either solely or in common with a third party.

Attachment of articles kept outwith dwellinghouses

Section 14 – Procedure for attachment of articles kept outwith dwellinghouses

41. Section 14 provides that sections 15 to 20 apply only to articles which are kept outwith a dwellinghouse and that they do not apply to a mobile home which is the debtor’s only or principal residence.

Section 15 – Powers of entry and valuation

42. Section 15(1) provides for entry into premises which are not a home (dwellinghouse) for the purpose of executing an attachment and permits locked premises to be opened if necessary. Sections 15(2) and (3) provide that the valuation of an article is to be based on the amount the articles would be likely to fetch if sold on the open market, and is to be carried out, where appropriate, by a professional valuer or other suitably skilled person. This will be applicable in cases where, for example, the article concerned is antique or unusual.

43. Section 15(4) and (5) enables an attachment to be disapplied where the sheriff is satisfied that articles have been undervalued.

Section 16 – Unlawful acts after attachment

44. This section prohibits the removal, sale, gifting or other disposal of attached articles and their wilful destruction or damage. To do so will be in breach of the attachment and may be treated by the sheriff as contempt of court.

45. Section 16(7) requires the debtor to give notification if an attached article is stolen and of any insurance claim which the debtor intends to make. Section 16(10) provides that, where attached articles have been damaged, destroyed or stolen, the sheriff may order that others be attached. Damaged articles may, on the authority of the sheriff, be revalued.

46. Section 16(11) to (15) makes provision for a sum of money to be consigned in court in circumstances where an article is made unavailable by the debtor after attachment has taken
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place. These include where the debtor moves an attached article and it is subsequently damaged, destroyed, lost or stolen or is acquired by another person who was unaware of the attachment, and where the debtor willfully damages or destroys an article. The sum to be consigned will be equal to the difference between the value of the article when attached and the value of the damaged article or, in any other case, a sum equal to the attached value. Where an attachment of an article ceases to have effect before its auction, any sum which has been consigned in court will be paid to the creditor to the extent necessary to meet the debt with any surplus left over being paid to the debtor.

Section 17 – Release of mobile home from attachment

47. This permits a caravan, houseboat or other moveable structure owned by the debtor, which is the only or principal residence of a third party, to be released from an attachment on application made within 14 days of the attachment. If however, there is good reason for not having applied within the 14 days, the Sheriff can consider an application for release made after that period but before the date of auction.

Section 18 – Report of attachment

48. This section provides for judicial supervision of the attachment by requiring that a report of the attachment be made to the sheriff within 14 days of its execution. The sheriff may allow a longer period on cause shown. If there is some irregularity in the format or procedure by which the report was made, the sheriff may refuse to accept the report and the attachment will cease to have effect.

49. Section 17(2) provides that the report must be in the form prescribed in rules of court and that it must be signed. Section 17(3) stipulates what the report should specify. Under section 17(4) the report need not specify articles sold following specific orders made by the court regarding the sale of perishables or a vehicle released from attachment.

Section 19 – Redemption

50. Section 18 enables attached articles to be redeemed by the debtor within 14 days of the date on which the article was attached. This provides for circumstances where an article has been attached but the debtor wants to buy it back before auction.

51. Section 18(2) specifies that the article must be redeemed at the attached value. Section 18(3) and (4) provide for a receipt to be given when payment is made and for the attachment to cease to have effect in relation to the article on doing so which will authorise its release. The receipt will be in a form prescribed by rules of court.

52. Section 18(5) provides for a supplementary report to be made as soon as reasonably practicable to the sheriff in respect of redemption made after the original report of attachment has been made.

Section 20 – Removal and auction of attached articles

53. Section 19 requires arrangements for the auction of attached articles to be made and, after notice of the date on which the auction is to take place has been given, permits the removal of
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articles from the place where they are kept to the place where the auction is to take place. Section 19(4) and (5) permit only sufficient articles as would, if sold at their valuation, cover the debt due to be removed for auction. Any remaining attached articles will cease to be subject to attachment.

Section 21 – Order for security of articles or sale of articles which are perishable etc.

54. Section 20 allows the sheriff to make an order for the security of attached articles and for immediate sale of perishable articles so that they do not deteriorate and lose value. The proceeds are then consigned in court.

55. Section 20(2) provides that an application for such an order must be intimated to the debtor or creditor and the officer depending on which party made the application.

56. Section 20(4) provides that where an attachment ceases to have effect before an auction takes place the sum consigned in court will be paid to the creditor to meet the debt and any surplus will be paid to the debtor.

Section 22 – Release of vehicle from attachment

57. This section provides for the protection of vehicles in certain circumstances other than business purposes, if for example, those used for travel to work or for regular medical treatment from a rural area not serviced by public transport. Circumstances which would constitute undue harshness are not specified, thus allowing the sheriff to make a decision based on the debtor’s individual circumstances. This section implements recommendation 11 of the Scottish Law Commission in Scot Law Com No 177.

58. Section 21(1) entitles the sheriff, on an application by the debtor, to make an order for release of the vehicle. Section 21(2) restricts the release to a value under £1,000. This monetary limit may be varied by the Scottish Ministers by regulations. Section 21(3) provides that, where the value of the vehicle is over £1,000, the sheriff may order the sale of the vehicle and for the proceeds of sale up to £1,000 to be paid to the debtor to enable a replacement to be obtained. Section 21(5) provides that if the vehicle cannot be sold within 14 days of the order the attachment will cease to have effect.

Section 23 – Duration of attachment

59. This section provides that an attachment will cease to have effect if no further action is taken within six months of the attachment or 28 days of the removal of the attached article from the place at which it was attached, whichever is the earlier. An extension of the period may be permitted only by order of the sheriff in circumstances where delay has been caused through no fault of the creditor.

Section 24 – Second attachment at same place

60. Section 24 provides that a second attachment may not be undertaken at the same premises to enforce the same debt unless other articles were brought onto the premises after the first attachment took place.
Section 25 – Invalidity and cessation of attachment

61. Section 25 provides that, at any time before the auction of attached articles, the sheriff may, on his own initiative or on an application by the debtor, make an order declaring the attachment to be invalid or having ceased to have effect. The sheriff may also make such other order as is considered necessary in the circumstances. This enables enforcement action to be halted in the event of an irregularity in the procedure or if an attachment should have ceased to have effect.

62. Section 25(4) gives the debtor and the creditor an opportunity to make representations or be heard. Section 25(5) provides for any articles removed to be returned in the event of an order being made. Section 25(6) provides for the sheriff to give reasons for refusal to grant such an order.

Auction of attached articles

Section 26 – Notice of public auction

63. Section 26 provides that an auction of attached articles must be held by public auction in an auction room. Intimation of the auction must be given to the debtor and details advertised by public notice.

Section 27 – Alteration of arrangements for removal or auction

64. Section 27(1) prohibits the date of auction and removal from being varied, unless due to circumstances beyond the creditor’s control. Any new date must be intimated to the debtor and to any other person in possession of the attached articles. Section 27(3) requires the new date to be at least seven days after intimation to the debtor.

Section 28 – Cancellation of auctions

65. This section allows an auction to be cancelled to enable the debtor to repay the debt in the event of an agreement having been reached with the creditor but restricts the cancellation to no more than two occasions. It also provides for any necessary subsequent resumption of the auction should the debtor defaults on any such agreement.

Section 29 – Auction

66. Section 29(1) to (3) provides for the auction to be attended by the officer and a witness and for a record to be made of the articles sold.

67. Section 29(4) permits any article to be bought by any creditor or by a third party who owns the article in common with the debtor.

Section 30 – Disposal of proceeds of auction

68. Section 30(1) provides for the proceeds of the auction to be applied to the expenses of the procedure and then to the creditor to meet the debt with any surplus paid to the debtor. Where the sum due is not realised then ownership of any unsold articles will pass to the creditor, in which case their value will be credited against the debt due.
69. Section 30(6) specifies that the proceeds of auction are to include any sum consigned in court and any sum received from a third party for purchase of the debtor’s share in joint property.

Section 31 – Report of auction
70. Section 31(1) requires a report to be made to the sheriff within 14 days of the date of auction.

71. Section 31(2) specifies the content of the report of auction, including details of articles sold and remaining unsold, price achieved, expenses, any surplus paid to the debtor and any balance due to or by the debtor.

72. Section 31(3) provides for the sheriff to order that the expenses, in whole or in part, be charged against the officer responsible for the report in the event of failure to make the report without reasonable excuse. Section 31(4) allows the sheriff to treat any such failure as misconduct.

Section 32 – Audit of report of auction
73. Section 32 requires the sheriff to remit the report of the auction to the auditor of court for taxation of the expenses charged, for verification of the balance due to or by the debtor and to make a report to the sheriff.

74. Section 32(4) requires the sheriff to make an order declaring what sum remains due to or by the debtor. In the event of an irregularity in the procedure, the sheriff may declare the auction void and make any other provision considered necessary as a result. However, any such order will not affect a purchaser’s title to property bought in good faith.

Section 33 – Retention and availability of report of auction and auditor’s report
75. This section requires the report of auction to be retained by the court for 5 years after the date of the auction; and provides that it should be open for public inspection on payment of a fee.

General and miscellaneous provisions

Section 34 – Articles belonging to a third party
76. Section 34(1) enables articles removed from where they were attached and, prior to auction, to be released from attachment where a third party claims ownership and the officer is satisfied as to the validity of the claim or the sheriff grants an order.

77. Section 34(3) provides for other articles owned by the debtor to be attached instead of the released articles.

Section 35 – Articles in common ownership
78. Section 35(1) allows articles commonly owned by a debtor and a third party to be attached and sold in satisfaction of the debtor’s debt.
79. Section 35(2) and (3) allow the common owner to redeem such articles on payment of an amount equal to their interest in the article or for the sheriff to order that the article be released from attachment where its sale would be unduly harsh to the common owner.

80. Section 35(4) provides for other articles owned by the debtor to be attached in replacement.

Section 36 – Procedure where articles in common ownership are sold at auction.

81. Section 36 covers circumstances where assets in common ownership are sold at auction. Section 36(1) and (2) entitles the third party to a proportion of the proceeds of sale corresponding to their interest in them.

Section 37 – Attachment terminated by payment or tender of full amount showing

82. Section 37 provides that an attachment will cease to be effective where the full amount owing to the creditor is paid.

Section 38 – Assistance to debtor

83. Section 38 allows the sheriff clerk to provide debtors with assistance in explaining the procedure involved or completing any forms which may be necessary in connection with any of the procedures in the Bill. It is expected that debtors who will make use of the sheriff clerk’s assistance will be those who are without legal representation.

Section 39 – Expenses chargeable in relation to attachment etc.

84. This section makes provision for determining liability between debtor and creditor for the expenses of the procedures in the Bill.

Section 40 – Recovery from debtor of expenses of attachment

85. This section specifies when the expenses of an attachment chargeable against the debtor may be recovered otherwise than from the proceeds of auction.

Section 41 – Ascription of sums recovered by attachment or while attachment is in effect

86. This section provides for the order in which amounts recovered by attachment are to be applied, namely towards the cost of attachment, then to interest payable which had accrued by the date of the attachment, then to the debt due including expenses.

Section 42 – Restriction on fees payable by debtor

87. This section prohibits the charging of fees by the court for any application made by the debtor under the Bill, any objections made by the debtor to an application made by another party or in relation to any hearing.

Section 43 – Legal aid

88. This section extends current provision for the availability of civil legal aid in certain proceedings for time to pay under the Debtors (Scotland) Act 1987 to proceedings under Parts 2
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and 3 of the Bill. The effect is that legal aid is not available for proceedings under Parts 2 and 3 of the Bill. Third parties are not prevented from obtaining legal aid in connection with those proceedings.

Section 44 – Interpretation of this Part and Part 3

89. This section defines terms used in Parts 2 and 3 of the Bill.

PART 3 – ATTACHMENT OF ARTICLES KEPT IN DWELLINGHOUSES: SPECIAL PROCEDURE

90. This Part of the Bill provides for special procedures that are to be followed when attaching property kept in dwellinghouses. These procedures follow recommendation 6 of the Working Group.

91. Rules of court will make supplementary provision for the manner in which the procedural requirements under this Part are to be undertaken within the court process - for example, regarding intimation of documents and steps in procedure, the conduct of hearings and the manner in which applications to the sheriff or appeals against decisions may be made (including provision of forms to be used).

92. A specific application must be made to the court for an exceptional attachment order in all cases where a creditor wishes to pursue the attachment of property in a dwellinghouse. Each case will be considered individually on its own merits by judicial enquiry. The sheriff will have regard to specified criteria when considering whether to grant an exceptional attachment order. Any order granted will be restricted to articles which are not essential.

Section 45 – Restriction on attachment of articles kept in dwellinghouses

93. This section prohibits the attachment of articles kept in a dwellinghouse except in accordance with the provisions of Part 3 where an exceptional attachment order is being pursued.

Section 46 – Exceptional attachment order

94. Section 46 provides for an order of court to authorise attachment of non-essential assets, on an exceptional basis, within dwellinghouses. Attachment of articles in dwellinghouses will be competent only where the court is satisfied that exceptional circumstances exist.

95. Section 46(3) and (4) requires that, when considering an application for an exceptional attachment order, the sheriff must take account of specified factors when determining whether to grant the order. This ensures that an appropriate assessment of individual circumstances is made.

96. Section 46(4) specifies the factors to be taken into account by the court. These include whether money advice has been given to the debtor, whether any agreement for settlement has been attempted, whether there have been any previous time to pay arrangement. The court must have regard to the nature of the debt, particularly where it relates to any trade, business or unpaid tax. To assist the court, the debtor will have the opportunity to make a voluntary declaration
about his financial circumstances, his ability to pay and any non-essential assets held (and, where they are held, their aggregate value).

97. In taking account of whether the debtor has received money advice the sheriff may, where appropriate, make that opportunity available, if necessary by intervention of a domestic visit for the purposes of providing money advice.

98. Section 46(2) provides that, where it is considered that exceptional circumstances exist justifying granting an order, assets which are not essential and are valuable may be auctioned at a public auction house. The procedure for auction will follow that in Part 2.

Section 47 – Exceptional circumstances

99. Section 47 specifies matters about which the sheriff must be satisfied when deciding whether to grant an exceptional attachment order. The creditor must have attempted to obtain settlement by negotiation and must have attempted earnings or ordinary arrestment if appropriate in the individual circumstances of the case. The sheriff must be satisfied that an auction of the non-essential assets which the debtor has would not only meet the creditor’s expenses recoverable from the auction, but also reduce the outstanding debt itself by 10% of the total sum due (including accrued interest) or £50, whichever is the lesser amount.

Section 48 – Power of entry

100. This section provides that it will not be competent to enter a dwellinghouse unless there is a person present who is over 16 years of age and is able to understand the proceedings or the debtor has been given 4 days’ notice of the intended entry. The sheriff may dispense with the requirement to give notice on application if cause can be shown.

Section 49 – Unlawful acts before attachment

101. Section 49(1) and (2) provide that the removal, sale, gifting or relinquishment of non-essential assets known to be subject to an exceptional attachment order assets or their wilful destruction or damage will amount to breach of the order.

102. Section 49(3) requires the debtor to give notification if an asset is stolen and of any insurance claim which it is intended to make. Section 49(5) and (6) make provision for a sum of money to be consigned in court by the debtor in circumstances where an asset is made unavailable before attachment has taken place in the knowledge of an exceptional attachment order’s existence. The sum to be consigned will be the best estimate of the amount which the asset would have achieved at auction under section 49(7). Where an attachment ceases to have effect, any sum which has been consigned in court will be paid to the creditor to the extent necessary to meet the debt with any surplus left over being paid to the debtor under section 49(8).

Section 50 – Articles with sentimental value

103. Section 50 prohibits the attachment of assets of sentimental value to the debtor not exceeding £150. This provision will implement recommendation 9 of the Law Commission in Scot Law Com No 177.
Section 51 – Removal of articles attached in dwellinghouse
104. Section 51(1) provides for immediate removal of non-essential assets in execution of an exceptional attachment order once an attachment schedule has been completed. Section 51(2) permits only those assets likely to realise the sum due to be removed.

Section 52 – Release of articles from attachment
105. This section allows a period of 7 days from the removal of non-essential assets during which the debtor may apply to the sheriff for the return of an asset on the grounds that attachment was incompetent, that auction would be unduly harsh or because of the sentimental value of the asset.

Section 53 – Redemption
106. Section 53 provides for the redemption of non-essential assets within 7 days of the date on which they were attached. Redemption will be at an amount which the asset is likely to fetch if sold on the open market.

Section 54 – Power to provide for lay representation
107. This section confers power to make provision in rules of court for lay representation to be permitted in proceedings concerning an exceptional attachment order.

Section 55 – Appeals
108. Section 55 provides for appeal against any decision made in relation to proceedings on an exceptional attachment order to the Court of Session with the leave of the sheriff and on a point of law only.

PART 4 – ABOLITION OF POINDINGS AND WARRANT SALE

Section 56 – Abolition of poindings and warrant sales
109. This section makes provision for the abolition of poinding and warrant sale and repeals various provisions of the Debtors (Scotland) Act 1987.

Section 57 – Saving
110. This section makes a saving provision in respect of warrant sales already completed before the date on which abolition comes into force.

PART 5 – MISCELLANEOUS AND GENERAL

Section 58 – Application of this Act to sequestration for rent and arrestment
111. This section makes provision for schedule 1 (non-essential assets) of the Act to be applied to other methods of enforcement.
Section 59 – Minor and consequential amendments and repeals
112. Along with Schedule 3, this section provides for necessary minor and consequential amendments to and repeals of existing legislation.

Section 60 – Regulations and orders
113. This section provides that, where the Bill gives the Scottish Ministers power to make an order or regulations, such power will be exercisable by statutory instrument subject in most cases to negative resolution procedure.

Section 61 – Crown application
114. This section provides for application of the Bill to the Crown acting in its capacity as a creditor or employer.

Section 62 – Short title and commencement
115. This section provides for commencement of the Bill on 30 December 2002. Powers conferred by the Bill to make rules of court will be come into force upon Royal Assent to enable them to be in place in advance of the commencement of the rest of the Bill. Sections 1 to 9, regarding the debt arrangement scheme, will be brought into force on a day to be appointed by the Scottish Ministers.

SCHEDULES

Schedule 1 – Non-essential assets
116. This schedule is introduced by section 44(1). It sets out non-essential assets which it will be competent to attach under an exceptional attachment order. This provision is made in accordance with recommendation 6 of the Working Group, recommendation 7 of the Scottish Law Commission and interest groups invited to make suggestions.

117. Paragraph 5 provides for modification of this list by regulations.

Schedule 2 – Expenses of attachment etc.
118. This schedule specifies the expenses of attachment which will be chargeable against the debtor.

Schedule 3 – Minor and consequential amendments and repeals
119. This schedule makes necessary minor and consequential amendments and repeals to existing legislation. For example, section 33(1)(a) of the Bankruptcy (Scotland) Act 1985 provides exemptions to property vesting in the trustee for bankruptcy and this schedule amends that provision to incorporate property exempt from attachment in the Bill.
these documents relate to the debt arrangement and attachment (scotland) bill (sp bill 52) as introduced in the scottish parliament on 7 may 2002

financial memorandum

costs on the scottish administration

120. the scottish executive is consulting on matters of detail concerning the operation of the debt arrangement scheme in its consultation paper, enforcement of civil obligations in scotland, published on 22 april 2002. it is proposed that an independent body, a scottish civil enforcement commission, be set up to undertake functions including the administration of this scheme. pending introduction of any such body, provision is made in the bill for the scottish ministers to administer the scheme. applications by debtors for participation in the scheme will be determined administratively with certain disputed matters remitted to the sheriff court for determination. it is unknown how many applications will be made and what proportion may be disputed. it is envisaged that appropriate fees might be payable for participation in the scheme and for controlled access to a register containing details of those currently participating in the debt arrangement scheme. it may, therefore, be possible to recoup the running costs in respect of the scheme. the current consultation exercise seeks views on this issue.

121. the gross staff, setting up and running costs arising from the debt arrangement scheme have been estimated, in the initial phase before delegation of this function by the scottish ministers, at approximately £500,000 per annum. this is estimated on the basis of a percentage of known numbers of payment actions (civil judicial statistics) which research (evaluation of the debtors (scotland) act 1987) attributed to individuals and sole traders. that category of persons would generally be eligible to participate in the scheme although an allowance was made for those who would not otherwise be eligible by reason of lack of other qualifying factors (those not multiple debtors or lacking surplus funds from income with which to make payments). following the initial phase, it is anticipated that there would be a reduction of these costs. the cost of additional money advice provision is specified in paragraph 123 below.

122. provision for attachment against corporeal moveable property in commercial cases will not give rise to any costs on the scottish administration.

123. provision for creditors to make specific application to the court, for an exceptional attachment order in respect of attachment against non-essential valuable assets in domestic cases, will give rise to a cost on the scottish administration. the court’s consideration of any such application will involve a means enquiry and will take place only where an information and advice pack has been provided to the debtor who has had the opportunity to make a voluntary disclosure and take money advice, if necessary, by intervention of a domestic visit by a money adviser. provision is made for the creditor to supply an advice and information pack to the debtor against whom enforcement by attachment may be intended. it is envisaged that the package will be disseminated by creditors more widely and will be made available generally. the scottish ministers will provide the material to be included in the information pack. it is estimated the cost of printing and distributing this may be in the order of £300,000 per annum. this is based on the cost of a pack of up to 30 pages made available for the number of known diligences executed each year (civil judicial statistics).

124. as a consequence of these provisions, it is anticipated that recourse to court for an exceptional attachment order will be extremely low and that the vast majority of such domestic
These documents relate to the Debt Arrangement and Attachment (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 7 May 2002

cases will be resolved by other means including the debt arrangement scheme. The numbers of applications will be influenced by unquantifiable factors, including the wider economic climate, the manner in which creditors elect to pursue bad debt, whether by means of informal measures or the range of formal enforcement measures, the impact of additional money advice on the rate of negotiated settlement, and the uptake of the debt arrangement scheme. It is anticipated that, over an extended period, the availability of the debt arrangement scheme should offer an alternative remedy for the payment of debt without recourse to court and enforcement action and should, therefore, yield savings in the court system. An estimate of the immediate costs of any applications for an exceptional attachment order to the Scottish Administration, and of any future saving to the court system in the long term, cannot be forecast at this time.

COSTS ON LOCAL AUTHORITIES

125. As part of its overall approach to the management of multiple debt in Scotland, the Executive has recently announced an additional investment of £3 million per annum in money advice provision. The additional investment is to be channelled through local authorities to provide additional front-line money advice services, over and above existing services, to ensure that debtors across the country have easier access to money advice.

126. There are no direct costs on local authorities. However, they are major users of the Scottish enforcement system and, as such, the considerations below in respect of other bodies, individuals and businesses apply equally to them.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

127. The Bill does not regulate business, government or individual activity. Rather, it affects the range of remedies by which unpaid debt may be legally enforced by them and introduces a debt arrangement scheme, as an alternative means by which unpaid debt may be recovered. The number of other bodies, individuals and businesses which may be affected by the provisions of the Bill cannot be forecast with any accuracy. This will be influenced by unquantifiable factors, including the wider economic climate, the volume of unpaid debt and the means chosen to pursue it. Costs incurred in pursuing unpaid debt by the method of enforcement provided for in the Bill may be offset by improved rates of recovery of unpaid debt due to debtors participating in the debt arrangement scheme.

128. In the absence of the measures provided for by the Bill, business, government and individuals would experience a significant reduction in recovery rates of unpaid debt. This is because, in the absence of the Bill, there would be no alternative arrangements in place when abolition of the current method of enforcement against corporeal moveable property, poinding and warrant sale, takes effect at the end of 2002 as a consequence of the Abolition of Poindings and Warrant Sales Act 2001 (asp 1). This method of enforcement has been widely used by creditors and is regarded by them as effective. Without an alternative form of enforcement, it would become impossible to undertake enforcement action in respect of this type of asset against any bad debtors, most notably the commercial cases. It would also become impossible to enforce payment in the few cases where domestic bad debtors, who were able but refused to pay, held valuable non-essential assets. The consequence of imposing very strict conditions for enforcement in domestic cases, so that it would be available only exceptionally in the last resort might, of itself, be expected to lead to a reduction in recovery rates. However, the establishment
of a debt arrangement scheme should provide an effective alternative for repayment of debt over time. Whilst it is intended that creditors would be expected to incur an administration charge for receiving payments under the scheme, these should replace costs which would otherwise be incurred for recovery and enforcement.

129. Inclusion of money advice and information as an integral part of the provisions in the Bill, both in the debt arrangement scheme and in the new enforcement measures, should encourage negotiated settlement of debts and reduce potential enforcement costs to creditors. This should enable business, government and individuals to recover bad debt whilst avoiding the expense involved in formal enforcement. Although such relative costs and savings cannot be accurately quantified, the overall result could potentially be cost-neutral.

130. The effects of the Bill mentioned in the previous paragraph (inclusion of money advice as an integral part of the debt arrangement scheme and in the new enforcement measures encouraging negotiated settlement of debts and reduce potential enforcement costs) will apply equally to debtors. As a result of these measures, it is anticipated that far fewer debtors will be faced with court and enforcement action and that recourse to an exceptional attachment order will be sought in very few instances. In the small number of cases which do proceed, any costs for representation will be minimised by the opportunity for lay representation. Since debtors ultimately bear the costs of court and enforcement action, there should be a cost saving to debtors who take advantage of the measures introduced by the Bill. The extent of the cost saving cannot be quantified.

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

131. On 7 May 2002, the Minister for Justice (Mr Jim Wallace) made the following statement:

“In my view, the provisions of the Debt Arrangement and Attachment (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

132. On 7 May 2002, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Debt Arrangement and Attachment (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
These documents relate to the Debt Arrangement and Attachment (Scotland) Bill (SP Bill 52) as introduced in the Scottish Parliament on 7 May 2002

DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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