

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) BILL

POLICY MEMORANDUM

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This document relates to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005

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INTRODUCTION

1. This document relates to the Bankruptcy and Diligence etc. (Scotland) Bill introduced in the Scottish Parliament on 21 November 2005. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 50–EN.

BACKGROUND

2. This Bill implements the Partnership Agreement¹ commitment to legislate on personal bankruptcy and diligence to modernise the law to provide a better balance between supporting business risk and protecting the rights of creditors, and in doing so will support the commitment to promote an entrepreneurial culture and to recognise the need to support risk-taking as a means of growing the economy.

3. This Bill will implement the Scottish Law Commission's Report on Registration of Rights in Security by Companies (Scot Law Com No 197) published in September 2004.

Bankruptcy

4. Bankruptcy is part of the law of insolvency. In Scotland, natural persons, ordinary or 'common law' partnerships, and limited partnerships can become bankrupt. The United Kingdom Parliament is responsible for insolvency law as it applies to all other corporate bodies, such as limited companies and limited liability partnerships.

Current Law

5. The Bankruptcy (Scotland) Act 1985² ("the 1985 Bankruptcy Act") sets out the existing legal framework for bankruptcy. The last significant reform was in the Bankruptcy (Scotland) Act 1993 ("the 1993 Act").

6. There are two types of insolvency provided for in the 1985 Bankruptcy Act as amended. The first is sequestration and the second is a protected trust deeds for creditors ("PTD"). A full list of all abbreviations used in this Policy Memorandum is in Annex A.

7. The language used in this area of law can be a bit unclear to non-experts. "Sequestration" describes any legal process where the court takes control of property for the benefit of creditors. To say someone is 'bankrupt' is nearly always meant to mean that they have been sequestrated under the 1985 Bankruptcy Act. It would however be accurate, if unusual, to say that the debtor under a PTD is bankrupt. Sequestration and PTD are both referred to as "personal insolvency", which is not quite accurate given that a partnership (a corporate body) can be sequestrated.

¹ 'A Partnership for a Better Scotland: Partnership Agreement', dated 14 May 2003

² 1985 c.66

Recent trends

8. There has been an increase in the number of individuals and partnerships that go bankrupt in most years since 1998.

9. Table 1 shows the number of sequestrations in the period from 1997/98 to date, and Table 2 shows the number of PTD registered by the Accountant in Bankruptcy in that period.

Table 1: number of sequestrations in the Scottish courts in the period 1997 to 2005³

1997/98	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05
2701	3110	3185	2935	3193	3228	3309	3521

Table 2: number of PTD registered by the Accountant in Bankruptcy in the period 1997 to 2005

1997/98	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05
890	1574	2353	2946	4011	5363	5669	6141

10. The total number of personal insolvencies in the period 1997 to 2005 is therefore as set out in Table 3, and Table 4 shows the percentage trends extrapolated from the figures in Tables 1 to 3. The number of sequestrations increased at the end of the last decade, but since then has on average (allowing for a dip in 2000/01) increased slowly. In contrast, there has been a strong growth in the use of PTD levelling out in the year ending 2004 before picking up again in the year to 31 March 2005.

Table 3: number of insolvencies commencing in the period 1997 to 2005

1997/98	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05
3591	4684	5538	5881	7204	8591	8978	9662

Table 4: trend in number of insolvencies in the period 1997 to 2005

Year to	Percentage change from previous year⁴		
	Sequestration	PTD	Overall
1999	15	76	30
2000	2	49	18
2001	-9	25	6
2002	9	36	22
2003	1	33	17
2004	2	6	2
2005	6	8	7

11. The economy has grown steadily since 1997, and in general rates of personal insolvency can be expected to increase in times of economic hardship. It is therefore thought to be significant that the level of sequestrations has remained relatively flat, and that the growth in insolvencies is largely due to the increase in PTD. Unlike bankruptcy, there is a market for PTD services and their use is promoted by advertisement and other means.

³ Information on levels of bankruptcy, is obtained from the Accountant in Bankruptcy, Irvine and Edinburgh, an agency of the Scottish Executive, in respect of their financial year which runs from 1st April to 31st March.

⁴ Rounded to the nearest whole number.

12. A further trend worth noting, and one that applies equally to both sequestrations and PTD, is the average dividend in the pound paid to creditors in the 6 year period from 2000 to 2005, shown in Table 5.

Table 5: dividends paid to creditors in completed insolvency cases

Year ended 31 March	Sequestrations	Protected Trust Deeds⁵
2000	25.5 pence	34.1 pence
2001	13.6 pence	23.8 pence
2002	21.9 pence	23.6 pence
2003	20.3 pence	21.1 pence
2004	15.3 pence	19.8 pence
2005	18.4 pence	22.2 pence

13. In both types of bankruptcy the average dividend paid to creditors in cases closed in 2004 was 40% less than in those closed in 2000, but has partially improved in 2005 so that sequestrations are 28% down and PTD 35% down compared to 2000.

14. There is therefore a trend for debtors to have more debt relative to realisable resources in each of the years recorded in table 5, subject to a slight improvement in 2005. That table records completed cases, so the trend can be said to have started no later than 1997 given the current minimum 3 year administration period for sequestration and PTD.

15. The trend shown in table 5 is consistent with consumer taking on more and more debt, perhaps because rising incomes make that debt affordable. Debtors can therefore be said to be falling harder, as well as being more likely to fall in the first place (depending in part on how the figures in table 4 are viewed).

16. All PTD insolvencies are voluntary, but in a sequestration any of the creditor, the debtor or the trustee in a PTD can petition the court. A final trend suggesting that consumer debtors are becoming more vulnerable is that the balance is shifting from debtor sequestrations to creditor sequestrations, and that the number of PTD sequestrations (failed trust deeds) is rising. Table 6 sets out the source of court petitions in the 6 year period from 2000 to 2005.

Table 6: source of sequestration petitions

Year ended 31 March	Creditor	Debtor	PTD trustee
2000	1139	2027	19
2001	1089	1802	47
2002	991	2130	72
2003	1306	1797	125
2004	1391	1714	204
2005	1610	1655	256

⁵ Based on a sample survey of 353 PTD cases carried out by the Accountant in Bankruptcy in 2005. The average debt in that survey, that is the average for all years, is £32,938 per debtor.

17. Available statistics do not discriminate between personal and corporate insolvencies arrestment and other types of arrestment. The figures are thought to be low, and show little variation.

Future trends

18. The latest figures provided by the Accountant in Bankruptcy suggest that the rate of increase in personal insolvencies is increasing.

19. Preliminary returns for the year beginning 1st April 2005 show a 53.4 % rise in the number of sequestrations, a substantial increase. There has also been a 16.4 % rise in the number of PTD registered in the first quarter of the 2005. If these trends continue throughout this year then sequestration numbers will rise from 3,521 to 5,401 and PTD numbers from 6,141 to 7,148, giving an overall increase in numbers of insolvencies from 9,662 to 12,549. Clearly, some overall rise can be expected.

20. There are two reasons for concluding that this unwelcome trend is due to a more challenging UK economic environment. The first is that the overall number of sequestrations (as opposed to PTD) is growing significantly for the first time in recent years, and the second is that the UK Insolvency is recording a substantial increase for England and Wales⁶.

Floating charges

Current law

21. The concept of a floating charge as a security over corporate assets was developed in England and Wales to meet the needs of business for increased working capital. The floating charge allowed additional borrowing by a company to be secured on the circulating assets of a trading business. The classic definition is in a 1903 case⁷ which sets out that to be floating a charge must be:

- on a class of assets both present and future,
- on a class subject to change in the course of business, and
- the creditor must act before the charge has any active effect on those assets.

22. They were first created in Scots law by the Companies (Floating Charges) (Scotland) Act 1961⁸. In some ways their English origin made for an uncomfortable fit with the principles of Scots security law, for example that rights became real on registration. However, broadly similar rights had developed separately in Scots common law. In particular, the landlord's hypothec which is a security that 'floats' over moveable property brought into rented property by a tenant.

23. The current law relating to the registration of securities granted by companies registered in Scotland is contained within Chapter II of Part XII of the Companies Act 1985 ("the 1985

⁶ Department of Trade and Industry figures show that 11,195 people were bankrupted (sequestrated) in the second quarter of 2005, an increase of 28% on the same period in 2004.

⁷ *Re Yorkshire Woolcombers Association Limited* [1903] 2 Ch 284 (CA).

⁸ 1961 c.49.

Companies Act”) and the law relating to floating charges is within Part XVIII of that Act. As well as Scottish registered companies, the law applies to:

- oversea companies having a place of business in Scotland,
- limited liability partnerships⁹, and
- European economic interest groupings¹⁰.

Recent trends

24. Particulars of charges (securities) granted by Scottish registered companies must be registered with companies house¹¹ in Edinburgh. A charge includes both a fixed security such as a standard security over land and buildings, and floating charges. Information is available on the numbers of active companies and the total number of charges registered in each year.

25. Companies House does not keep separate figures for the numbers of floating charges, but estimates that such charges are on average between 40% and 45% of all charges registered. A floating charge is usually granted for ‘all sums due and to become due’ and there is therefore no record of the value of the loan or facility secured by the charge.

26. Table 7 provides for the 10 year period to 2005 the figures for number of active companies registered in Scotland, the total numbers of registered charges, and high and low estimates for the numbers of registered floating charges 5 years to 31st March 2004.

Table 7: numbers of active companies¹² and floating charges registered 1996 to 2005

Financial year end	Active companies	Charges	Floating charges 40% of total	Floating charges if 45% of total
1996	57,600	7000	2,600	2,925
1997	61,800	6,800	2,720	3,060
1998	65,500	8,000	3,200	3,600
1999	69,300	7,700	3,080	3,465
2000	73,100	8,400	3,360	3,780
2001	77,400	8,800	3,520	3,960
2002	80,800	9,600	3,840	4,320
2003	89,300	10,200	4,080	4,590
2004	99,000	11,800	4,720	5,310
2005	102,000	11,800	4,720	5,310

27. Table 7 shows that the rate of registration of charges increases broadly in line with the number of active companies, which is to be expected.

⁹ Limited Liability Partnership Regulations [SI 2001/1090] Reg 4 and Sch 2.

¹⁰ The European Economic Interest grouping Regulations 1989[SI 1989/638] Reg 18 and Sch 4. Pursuant to the Industrial and Provident Societies Act 1967, s 4, as amended an industrial and provident society is required to register a floating charge with the Financial Services Authority.

¹¹ Companies House is part of the UK Department of Trade and Industry, and carries out reserved functions.

¹² An active company is any company on the Register which is not in liquidation or in the process of being dissolved. It does not necessarily mean an economically active company.

28. The increase shown in table 7 in the numbers of active companies is cumulative, that is an increase of 3000 between 2003/04 and 2004/05. The number of charges is however absolute, that is a total of 10,640 in the years 2003/04 and 2004/05. Table 7 does not therefore show that about 5% of active companies have a floating charge. It does support the conclusion that they are an important form of company security.

Future trends

29. Table 7 shows an upward trend. It can be expected to continue so long as the numbers of active companies continues to grow.

Enforcement and diligence

30. The law of diligence is concerned with the enforcement of court decrees, and is of fundamental importance to the Scottish legal system. Without it, there could be no system. Viscount Stair, the pre-eminent Scottish jurist, observed in 1681¹³ that:

“Decrees would be of no effect, but as bees without stings, if the law did not fix the kinds and forms of the executions thereof”.

31. Diligence is an old and complex area of law, only partly modernised. Indeed, some of the kinds and forms of execution have changed little since the 17th Century. This Bill will complete the task of modernising diligence.

32. In Scotland, the enforcement of court decrees is for the parties and not the courts. The State neither guarantees nor enforces payment of debts. A warrant (permission to use diligence) being enforced is given to a private sector officer, akin to a lawyer. A sheriff court warrant is sent to a sheriff officer, and a Court of Session warrant goes to a messenger-at-arms (“enforcement officers” for short, although they have other court functions).

Current Law

33. The major Acts set out a legal framework for diligence. They are:

- The Debtors (Scotland) Act 1987 (“the 1987 Act”), and
- The Debt Arrangement and Attachment (Scotland) Act 2002 (“the 2002 Act”).

34. The 1987 Act created three new diligences against earnings: earnings arrestment, current maintenance arrestment, and conjoined arrestment order. It helped to strike a balance between debtor and creditor interests by introducing new ‘time to pay’ orders preventing both diligence and sequestration, but usually known as ‘diligence stoppers’.

35. The 1987 Act also provides the legal framework for the regulation and discipline of the enforcement officers’ professions.

¹³ Stair *Institutions* IV,47,1.

36. The 2002 Act completed the abolition of the old diligence of poinding, and created the new diligence of attachment to replace it. It also set up the framework for the Debt Arrangement Scheme, a third ‘diligence stopper’ covering multiple debts.

37. Other important, and not so important, laws affecting diligence have been created under older Acts of Parliament or the Scottish Parliament, or by the courts. They are:

- Adjudication for debt,
- Admiralty arrestment,
- Arrestment, leading to furthcoming,
- Diligence on the dependence,
- Ejection,
- Inhibition,
- Maills and duties, and

38. As with bankruptcy the language and definitions used in this area of law can be a bit unclear, to both experts and non-experts. In particular, there is debate about what exactly ‘diligence’ means.

39. The remedies created in the 1987 and 2002 Acts are clearly diligences, and arrestment and inhibition are also in that category. Reasonable lawyers could, however, disagree about whether or not other remedies listed in paragraph 24 are diligences.

40. Ejection from property is, for example, directed against people rather than property. On that basis an order for interdict could be considered as a diligence, but few lawyers would describe it that way. An interdict is court order that can be enforced by (say) punishing a defender for contempt of court), but is not itself a diligence.

41. Maills¹⁴ and duties and sequestration for rent are themselves court actions involving claims by landlords etc. for rent and logically are not diligences because they create the court order to be enforced. Few lawyers, however, would disagree that they are diligences.

42. In large part this difficulty arises because of the need to reform the law in this area, and the Bill will bring clarity. For working purposes we can say that the core meaning of ‘diligence’ is that it describes the procedures that a creditor:

- who holds a decree for payment can use to enforce that decree against the property of his debtor, or
- who claims a right in court can use to get security for payment.

Recent trends

43. Some information about the use of diligence is held by the courts, and the Scottish Executive obtains information direct from enforcement officers using powers under section 84 of the 1987 Act.

¹⁴ ‘Maills’ is the old Scots law word for rents.

44. The Executive is aware that information about this area of activity is not always either complete or clear. Some diligences are used rarely, local court records and court officer returns can be of uneven quality, and in any event the State (through the courts) has no direct involvement in many areas of enforcement activity.

45. Having said all that, information is available¹⁵ on the following diligences or procedures:

- admiralty arrestment,
- attachment,
- arrestment of all kinds,
- action of furthcoming,
- earnings arrestments,
- inhibitions of all kinds,
- maills and duties,
- poindings and warrant sales
- sequestrations for rent, and
- use of diligence stoppers.

Admiralty arrestment

46. In 2003, the only year for which full statistics are available, there were 54 admiralty arrestments. 12 of those were arrestments on the dependence, and the rest in execution.

Attachment

47. The new diligence of attachment was created at the end of 2002. Table 8 shows the numbers of attachments, exceptional attachment orders (permitting the attachment and sale of goods in debtors homes) and auctions in the calendar years listed, as reported to the courts or the Scottish Executive by the enforcement officers involved.

Table 8: numbers of attachments and auctions in the period 2003 to 2004

	Year	
	2003	2004
Attachments	2,741	3,336
Attachments under summary warrant¹⁶	3,295	Not yet collated
EAO granted -	380	606
EAO executed -	4	Not yet collated
Auctions	170	Not yet collated

¹⁵ From 'Civil Judicial Statistics 2002' published by the Scottish Executive during 2004 [ISBN 0-7559-4067-9], and from unpublished court returns, and enforcement officer returns under the 1987 Act, made to the Executive.

¹⁶ Total attachments for 2003 is 6,036

Arrestment and furthcoming

48. Arrestment is nearly always arrestment of funds due to debtors in bank and building society accounts; although any property held by a third party is in principle liable to arrestment. Available statistics do not discriminate between ‘bank’ arrestment and other types of arrestment.

49. It is common for creditors who think there are funds in an account from (say) wages or salary, but are unsure where the account is, to serve multiple arrestments for a single debt. This is the ‘5 bank arrestment’, named after the number of Scottish clearing banks. Available statistics measure the number of arrestments rather than the number of debts.

50. Arrestment is a freezing diligence, and (say) the bank does not have to pay the creditor unless the debtor agrees or the court orders it. The creditor may need to raise a separate action for a court order, known as a furthcoming. Available statistics as below show that the number of furthcomings is low.

51. Arrestment can be used on the dependence of a court action, that is before the party has proved their claim and been granted final decree. The court has discretion to grant warrant which then allows the party to try and freeze property as security for any payment found due.

52. Table 9 shows the total number of ordinary arrestments in the nine year period between 1996 to 2004 for which full or partial figures are available, Table 9a shows the number of those arrestments for debts due to either local or national government and executed under summary warrant, and table 9b shows the number of those arrestments either in execution or on the dependence for private or commercial debts. It is not possible to arrest on the dependence of a summary warrant application.

Table 9: total number of ordinary arrestments in the period 1996 to 2004

1996	1997	1998	1999	2000	2001	2002	2003	2004
86,374	94,503	101,291	103,225	105,145	88,612	78,997	155,432	Not yet collated

Table 9a: number of ordinary arrestments under summary warrant

Type of Debt	1996	1997	1998	1999	2000	2001	2002	2003	2004
Council Tax	35,872	51,416	71,711	63,244	74,791	69,534	65,666	130,436	Not yet collated
Community Charge	41,011	34,436	20,778	28,061	15,899	10,498	5,579	7,758	Not yet collated
UK debt: taxes and duties	4,823	3,789	4,218	7,308	7,892	4,892	5,243	12,237	Not yet collated
TOTAL	81,706	89641	96,707	98,613	98,582	84,924	76,488	150,431	Not yet collated

Table 9b: number of ordinary arrestments for private debts

Type of arrestment	1996	1997	1998	1999	2000	2001	2002	2003	2004
Dependence	2,483	2,857	2,606	2,614	2,735	1,509	572	572	489
In execution	2,158	2,005	1,978	1,998	3,828	2,179	1,936	4,429	4713
TOTAL	4,641	4,862	4,584	4,612	6,563	3,688	2,508	5,001	5,202

53. Arrestment is a well used diligence, although the very much higher level of usage by public creditors is notable. It is arguable that there is a ‘community charge’ effect causing an increase in usage between 1996 to 2000/01, after which there was a drop in usage, followed by a sharp rise for both public and private creditors in 2003 apparently continuing into 2004.

54. Arrestment is a freezing diligence, and under current law the creditor in an arrestment in execution must raise a separate action of furthcoming in order to have funds released or realised for payment of the debt. Table 9c shows the number of actions of furthcoming in the courts of Scotland in the period 1996 to 2004. It will be seen that very few arrestments carry on to a furthcoming.

Table 9c: number of actions for furthcoming

Court	1996	1997	1998	1999	2000	2001	2002	2003	2004
Court of Session	5	6	2	7	Nil		Nil		
Sheriff courts	159	150	97	151	184		97		
TOTAL	164	156	99	158	184		97		

Diligences against earnings

55. Table 10 shows the total number of earnings arrestments in the nine year period between 1996 and 2004 for which full or partial figures are available, and Table 10a shows the number of those arrestments for debts due to either local or national government and executed under summary warrant, and Table 10b shows the number of those arrestments for private or commercial debts.

Table 10: total number of earnings arrestments in the period 1996 to 2004

1996	1997	1998	1999	2000	2001	2002	2003	2004
108,491	97,742	85,053	82,958	68,851	66,021	67,247	121,161	Not yet collated

Table 10a: number of earnings arrestment under summary warrant

Type of Debt	1996	1997	1998	1999	2000	2001	2002	2003	2004
Council Tax	48,446	55,160	54,215	53,626	69,575	53,756	55,919	104,270	Not yet collated
Community Charge	48,784	31,654	18,630	18,597	11,455	3,530	1,943	4,180	Not yet collated
UK debt: taxes and duties	1,887	1,338	1,355	1,241	952	648	899	2,084	Not yet collated
TOTAL	99,117	88,152	74,200	73,464	60,764	57,934	58,761	110,534	Not yet collated

Table 10b: number of earnings arrestment for private debts

1996	1997	1998	1999	2000	2001	2002	2003	2004
9,374	9,590	10,853	9,134	10,917	8,087	8,486	10,627	11,021

56. Earnings arrestment is also a well used diligence, and again the very much higher level of usage by public creditors is notable. A similar 'community charge' effect to that seen with ordinary arrestment appears to apply, but with the exception of a sharp rise in 2003 for recovery of public debt usage levels by both public and private creditors appears to be relatively more stable than for ordinary arrestment.

57. Table 11 shows the number of current maintenance arrestments in the nine year period between 1996 to 2004 for which full figures are available.

Table 11: number of current maintenance arrestments

1996	1997	1998	1999	2000	2001	2002	2003	2004
158	172	138	133	133	2,420	793	5,978	8,037

58. There is a notable rise in the use of this diligence from 2001 onwards, for which there is no known explanation.

59. No more than one earnings arrestment or current maintenance arrestment can be in operation at one time. If any further creditors wish to arrest earnings then they can apply to the sheriff court for a conjoined arrestment order. Table 12 shows the number of applications for conjoined arrestment orders in the period from 1996 to 2003, and the number of orders granted.

Table 12: numbers of conjoined arrestment orders applied for and granted

Stage	1996	1997	1998	1999	2000	2001	2002	2003
Applications	1,335	1,732	1,451	1,361	1,201	1,771	1,741	1,660
Orders granted	889	1,129	1,136	1,007	889	1,036	1,335	1,184

60. There is no obvious pattern of usage, although it can be seen that conjoining of arrestments is a rare event when compared to the high levels of earnings arrestment.

Inhibitions

61. Statistics on inhibition are available for 2003 and 2004. Table 13 shows the total number of inhibitions, with sub-totals for the numbers on the dependence of a court action and the numbers in execution of a court decree or equivalent authority.

Table 13: numbers of inhibitions in the period 2003 to 2004

TYPE	YEAR	
	2003	2004
Dependence	1,358	1,794
In execution	2,232	2,826
Total	3,590	4,620

Maills and duties

62. Statistics on maills and duties are available for 2003 and 2004, and table 14 shows the total number of actions of maills and duties in that period.

Table 14: numbers of actions of maills and duties in the period 2003 to 2004

YEAR	
2003	2004
41	Nil

Poundings and warrant sales

63. The diligence of pouncing against moveable goods held by the debtor was replaced by attachment in 2002. Pounding had the effect of freezing the goods, and the creditor could then apply for a warrant to remove and sell them. Table 15 shows the number of poundings under summary warrant, and table 15a the number that proceeded to sale, in the period from 1996 to 2002.

Table 15: number of poundings 1996 to 2002

Type of Debt	1996	1997	1998	1999	2000	2001	2002
Council Tax	6,850	12,046	10,260	10,029	7,228	4,561	6,677
Community Charge	946	916	747	587	786	163	141
UK debt: taxes and duties	5,313	6,018	5,778	5,969	5,647	3,193	4,061
TOTAL	13,109	18,762	16,785	16,585	13,661	7,917	10,879

Table 15a: number of sales 1996 to 2002

Type of Debt	1996	1997	1998	1999	2000	2001	2002
Council Tax	30	21	37	48	34	4	22
Community Charge	1	19	3	6	4	-	1
UK debt: taxes and duties	92	92	79	56	36	9	24
TOTAL	123	232	119	110	74	13	47

64. Available statistics do not accurately record the split between public and private debt, but it is thought to mirror that for ordinary arrestment and earnings arrestment. Public creditors make significantly more use of enforcement procedures than private creditors.

65. Poining as a diligence was significantly less popular with creditors than arrestment and the same appears to be true for attachment. What is notable is very low level of sales in comparison to the number of poindings, which was of course welcome given the much more intrusive nature of poinding as a diligence when compared to attachment.

Sequestration for rent

66. Statistics on sequestration for rent are available for 2003 and 2004, and Table 16 shows the total number of actions for sequestration for rent in that period.

Table 16: numbers of actions for sequestration for rent in the period 2003 to 2004

YEAR	
2003	2004
9	9

Time to Pay (diligence stoppers)

67. Available statistics do not record the number of time to pay decrees, but it is thought that a significant number are approved by the court under small claims and summary cause procedures.

68. A time to pay order under the 1987 Act can be applied for after decree, say when the creditor first uses diligence. Available statistics cover 2002 and 2003, and Table 17 shows the numbers for that period.

Table 17: numbers of time to pay orders in the period 2002 to 2003

2002	2003
445	334

69. It is notable that time to pay orders are used infrequently when compared to the high number of diligences shown in the table above. It is not thought that this is due to a lack of need

for time to pay, and that the explanation is rather a low level of awareness on the part of the public.

70. The Debt Arrangement Scheme commenced on 30 November 2004. At the date of preparation of this Memorandum 55 debt payment programmes have been approved.

Future trends

71. To the extent that a general pattern can be made out from available information the use of arrestment increased up to about 2000, after which usage declined, and then picked up again from about 2002. The scale of the rise from about 2002 appears to be attributable to public creditor, and particularly local authority, behaviour.

72. There is no clear future trend that can be made out from this general pattern, but it seems likely that usage will continue to rise in the short term given preliminary returns for 2004.

73. The Bill will encourage a reduction in usage in some ways, and this is expected to have a medium term effect. Reform of ordinary arrestment will provide more information about what is caught, reducing any need for 5 bank arrestments, and providing a saving for both creditors and debtors. The introduction of information disclosure orders will enable creditors to target their efforts (and their money) to better effect.

74. There is, as mentioned above, an issue about the quality and reliability of enforcement statistics. Work is already under way to improve the quality of statistics covering all parts of the court process, including diligence. The Scottish Executive published a consultation paper on the current review of civil judicial statistics in September 2004, and the results of that consultation are being assessed¹⁷.

75. The new Scottish Civil Enforcement Commission established by this Bill will also play an important role in improving understanding of the way in which diligence works. These two initiatives will provide better information about attitudes towards the use of diligence, and any trends in usage that can't be identified from current statistics.

POLICY OBJECTIVES OF THE BILL

76. The Bill will modernise the laws of personal bankruptcy and diligence to strike a better balance between the rights of creditors and debtors, and to support business risk.

77. The Bill will modernise the law of floating charges, to remove existing uncertainties and make arrangements more transparent. This will support both secure lending and business risk.

78. The Bill contains measures that support these objectives and this Policy Memorandum sets out in more detail the policy behind them. Unless alternative approaches are specifically discussed, no alternatives were considered.

¹⁷ The paper and responses are available on the Scottish Executive website at <http://www.scotland.gov.uk/library5/justice/cjs02-00.asp>

Bankruptcy reform - overview

79. When someone is insolvent they can't pay their debts, and that has both economic and social consequences. Bankruptcy doesn't create insolvency, but it is an effective way of dealing with those consequences.

80. If someone has tried to make a business idea pay but without success, then the debts run up may stop them building on that experience to make a success of another plan. They are locked into failure, and that is bad for them and bad for the economy.

81. Bankruptcy is a way for them to write off their debts and start again, and is therefore part of the legal framework needed to support an entrepreneurial culture. The reforms in this Bill will help people who can re-start do so more quickly, and in that way make Scotland a better place in which to do business.

82. Some people have business problems, but many others run up debt because of unemployment or just poor money management. Whatever the cause, unmanageable debt causes severe stress and can lead to social ills such as illness and family breakdown. Bankruptcy is a way for people to write off their debts and get relief from those stresses. The reforms in this Bill will help make bankruptcy a more humane option for people who need debt relief.

Floating charge reform – overview

83. Businesses, particularly successful businesses, often need outside funding to grow. Lenders are prepared to support business risk by (for example) providing working capital, but need to know that their loan is secure even if assets are moved quickly in and out of the business.

84. For many debtors, loans are secured over separate assets. For example, a homeowner may give security to a mortgage lender both by granting a standard security over the house and by assigning their interest in a life insurance policy. If the house is sold or the policy cashed in then new security may have to be found. This works well for homeowners who move every 7 or 8 years, but not (say) for a property developing company that sells a new home every 7 or 8 days.

85. A floating charge can be very flexible form of security for such a company. The charge creates a security over whatever property belongs to a company at any given time. If the company goes into liquidation or if a receiver is appointed, the charge "crystallises" and becomes, for example, the same as a standard security over land or an assignation of an insurance policy.

86. A floating charge can therefore save considerable time and costs for both business and lender, provided they work effectively. By reforming the law of floating charges the Executive intends to build on the work of the Scottish Law Commission, and to make the security as modern and effective as is possible.

Enforcement and diligence reform – overview

87. Credit and debt are two sides of the same coin. In a modern economy it is an essential condition for growth that people have access to credit on reasonable terms, and that lenders can expect to recover the money they lay out on behalf of investors. Formal debt enforcement through diligence affects risk, and therefore plays a key role in the credit market.

88. The Executive considers that people who can pay, should pay. Debtors can thereafter be divided into 3 categories¹⁸. The ‘won’t pays’, the ‘could pays’, and the ‘can’t pays’.

Won’t Pays

89. People who can pay, but choose not to. A modern diligence system gives the:

- debtor no place to hide wealth, described by the Scottish Law Commission as the principle of universal attachability, and
- creditor quick and effective procedures for use against all assets.

Could Pays

90. People who can pay, but may need more time and extra support to do so. A modern diligence system gives such people:

- Flexible time to pay arrangements for all types of debt, and
- Protection from creditors while they repay.

Can’t Pays

91. People who can’t pay, even with more time and extra help. A modern diligence system gives them humane access to methods of clearing their feet, and a chance to start again after insolvency.

92. This Bill completes the reforms needed to deliver that modern diligence system. There will be a system effective against the won’t pays, supportive of the could pays, and offering a humane way out of debt for the can’t pays.

93. The laws of diligence and bankruptcy intersect in two ways. The first is when ‘can’t pays’ need debt relief, which in nearly all cases will mean sequestration or a PTD.

94. The second is that bankruptcy lies at the end of the debt recovery road, as far as the creditor is concerned. Indeed, sequestration is sometimes known as the ultimate diligence because every asset of the debtor is seized. Creditors who petition for sequestration are, however, taking a risk as they may recover little or nothing by doing so.

¹⁸ Based on the analysis of the project ‘*Mapping the ‘Can’t pay, won’t pay divide*’, commissioned by the Lord Chancellor’s Department (now the Department of Constitutional Affairs) and published in 2003 by Elaine Kempson of Bristol University Personal Finance Research Centre.

95. By reforming bankruptcy and diligence together, the Executive is aiming for a unified system of debt recovery (won't pay), debt management (could pay) and debt relief (can't pay). This Bill delivers many important reforms, and while no system can be perfect, taken together those reforms will achieve great progress towards that goal.

96. Creating such a unified system is a complex task. The Executive is, however, able to build on an important body of work on diligence reform produced by the Scottish Law Commission. Annex B contains a list of all relevant consultative memoranda, discussion papers and reports.

MAIN POLICY THEMES

97. Each reform in this Bill has been included after a full consideration of all the particular circumstances. Each such consideration has, however, been guided by a series of underlying principles or themes. They are:

- Better informed choice,
- Modernisation,
- Removal of barriers to business, and
- Striking the right balance.

Information – more and better

98. Information is the key to effective targeting of enforcement activity and of public resources. The Bill will where appropriate improve both the amount of information available to the parties, and the relevance of that information in particular circumstances.

99. If the amount, or quality, of information is poor then unnecessary costs and avoidable delays will occur. An example of this is where creditors execute a '5 bank arrestment'. The creditor has extra costs through the inevitable failed arrestments, and unaffected banks pay staff to check and see if the debtor is a customer.

100. A 5 bank arrestment only makes sense when the creditor doesn't know where the account is. If they do, then of course they arrest against the bank in question. The Bill provides for an information disclosure scheme, which will allow creditors to discover account details. They need then arrest once only, making it harder for 'won't pays' to avoid payment and reducing the administrative burden for arrestees.

101. Earnings arrestment is a very popular diligence. It is easy to operate from the creditors' point of view, and helps 'could pay' debtors get back on their feet. However, arrestments can fail because of changes in circumstances, and that risk is another example of how better information can improve the system. The Bill provides for new duties on creditors, debtors and employers to inform the other parties affected where (for example) the debtor changes employer.

102. In general, more and better information about enforcement will help the Executive develop policy for any changes that may be needed in the future. The Bill provides for a new public body, the Scottish Civil Enforcement Commission, which will play an important role in

gathering and analysing enforcement information, and making recommendations to the Executive.

Modernisation

103. This Bill will either provide or make possible the last of the reforms intended to deliver a unified system of debt recovery, debt management and debt relief.

104. A large part of this Bill implements recommendations of the Scottish Law Commission. Society has moved on, even in time since the Scottish Law Commission completed its programme on diligence reform. Legislation now needs to modernise the law to deal with further changes, including payment of state benefits direct into bank accounts, student loans, and the continued increase in levels of consumer debt.

105. The key insolvency legislation is contained in the 1985 Bankruptcy Act. The last reform of Scottish insolvency was made by the Bankruptcy (Scotland) Act 1993¹⁹ which amended the 1985 Bankruptcy Act. The changes in the 1993 Act brought in some useful reforms, primarily better protection for creditors' interests by modernising the duties of trustees in sequestration, and extending the supervisory role for the Accountant in Bankruptcy.

106. Even so, the regime under the amended 1985 Bankruptcy Act is no longer fit for purpose. A modern entrepreneurial culture needs to do more to encourage re-start, and people who need debt relief need to be dealt with both more quickly and in a more humane way if Scotland is to have a modern and efficient enforcement system. This Bill delivers most of the necessary reforms.

107. It is intended to modernise PTD through subordinate legislation under the 1985 Bankruptcy Act, and this Bill extends the enabling powers needed to carry through that reform. The Executive is consulting on draft regulations, and will therefore welcome comments from the Scottish Parliament on the scope and effectiveness of the planned changes.

108. The key legislation on diligence is contained in, or made under, the 1987 and 2002 Acts. Both those Acts implemented reforms recommended by the Scottish Law Commission as part of its long running programme on diligence reform.

109. The 1987 Act implemented recommendations in respect of:

- Earnings arrestment,
- Current Maintenance Arrestment,
- Conjoined arrestment orders, and
- Two of three forms of time to pay arrangement: time to pay directions, and time to pay orders.

110. The 2002 Act implemented the recommendation for the third time to pay arrangement, by providing the framework for a Debt Arrangement Scheme for people with multiple debts. The

¹⁹ 1993 c.6.

detailed legislation is contained in the Debt Arrangement Scheme (Scotland) Regulations 2004²⁰. The Scheme offers a radical new solution for the ‘could pays’. It has been operating for less than a year, and is receiving substantial development support from the Executive.

111. This Bill implements the remaining reforms recommended by the Scottish Law Commission as set out in more detail later in this Policy Memorandum, and completes the Executive’s programme of legislation on diligence reform. In particular it abolishes old and inefficient diligences such as adjudication for debt, and introduces the new diligences of:

- Land attachment,
- Residual attachment,
- Money attachment, and
- Interim attachment.

112. As well as recommending the abolition of outdated diligences and their replacement with important new tools for creditors to use against the won’t pays, the Scottish Law Commission has recommended modernisation of other diligences. This Bill implements their recommendations in respect of:

- Admiralty arrestment,
- Arrestment and furthcoming,
- Diligence on dependence, and
- Inhibition.

113. The reforms in this Bill extend the modernisation programme beyond the range of the reforms recommended by the Scottish Law Commission. In particular, this Bill:

- creates the Scottish Civil Enforcement Commission,
- creates the office of messenger of court, combining and modernising the functions of sheriff officers and messenger-at-arms,
- provides for a limited reform of landlord’s hypothec,
- provides for automatic release of attached funds after arrestment in some circumstances,
- provides for information disclosure orders,
- extends the use of the debt advice and information package, and
- facilitates electronic transactions.

114. The key legislation on floating charges is in the 1985 Companies Act. This Bill will implement the reforms recommended by the Scottish Law Commission as set out in more detail later in this Policy Memorandum, and completes the Executive’s part of a United Kingdom wide programme of legislation on floating charge reform.

²⁰ SSI 2004/468, as amended by SSI 2004/470.

Restart and growth – removing barriers for business

115. Scotland enjoys a long and proud tradition of enterprise: it is a ‘can do’ nation. A strong economy is good for everyone, and the Executive intends to build on that tradition so that Scotland will always be a place where business can prosper.

116. A thriving small business sector is an essential part of a strong economy. In Scotland, over 98% of all private sector businesses are ‘small’ in that they employ less than 50 people. There is nothing small about the sector in terms of its economic importance. Annual turnover of small business in Scotland during 2004 was estimated at £52 billion, when the sector accounted for 40% of all private sector employment²¹.

117. Small businesses, and particularly business start ups, challenge incumbent businesses leading to increased efficiency and improved competitiveness in the whole economy. They are the seed from which large businesses grow, and Scotland needs more of them. Our small businesses start up rate is 27% below the UK average, and the Executive is therefore working to remove barriers to business start up and growth²².

118. Most small businesses are run by individuals and partnerships. They don’t enjoy the depth of resource of the medium and large business sectors, or in most cases the protection against personal liability that larger businesses enjoy by being incorporated. Small businesses are more vulnerable to the risks of customers not paying their debts, or a promising business idea failing to deliver, and business problems are more likely to lead to bankruptcy.

119. If the worst happens, and bankruptcy takes place, then the law should give business people who can re-start an early chance to do so. They may have learned hard lessons from the first failure, and be better entrepreneurs for it. That promising business idea may work well the second time, and lead to a strong and growing business. The law is a barrier to re-start and growth to the extent that it does not allow people that early chance.

120. So long as someone is sequestrated they are subject to legal restrictions against borrowing money, and taking part in businesses. Any extra cash they may have properly goes to the creditors. They are severely limited in what they can and can’t do, until they are discharged. The reforms in this Bill will therefore encourage re-start and growth by discharging the debtor from sequestration after one year instead of the present three years.

121. Reducing the discharge period brings another important economic benefit. It creates a level playing field with England and Wales, where a similar change in the discharge period was made under the Enterprise Act 2002²³ and came into force on 1 April 2004. The modernisation in this Bill, good in itself, also means that Scottish business people are not disadvantaged compared to their competitors in the rest of the United Kingdom.

²¹ Source: Scottish Corporate Sector Statistics.

²² Source: VAT registrations, Small Business Service Statistics, DTI.

²³ 2002 c.40.

122. The difficulty of getting over a business failure is only one barrier to business growth. Businesses can struggle to cope with unpaid bills without ever going under. The Executive will make it easier for business to get its money both from the won't pays and the could pays, and by doing so promotes a strong and growing business sector.

123. This Bill therefore provides a diligence system with remedies for use against all kinds of property, making it harder for the won't pays to avoid their responsibilities. This Bill also helps the 'could pays', not least because doing so helps business: a deferred payment is a lot better than no payment. This Bill fills in the gaps by, for example:

- introducing the new diligence of land attachment, and
- extending time to pay arrangements.

Striking the right balance

124. The rule of law must prevail if society is to operate in an orderly manner. Given therefore that people must be able to insist on their legal rights, others must be compelled to honour their obligations.

125. In a free and democratic society the law seeks to strike a fair balance between competing interests. When considering the reform of diligence and bankruptcy, the particular balance that needs to be struck is between the creditor's interest in full and early payment and the debtor's interest in being protected against inhumane and capricious enforcement. There are also third party interests to consider, as the use of diligence impacts on (for example) banks holding money for debtors.

126. In this Bill the balancing of legitimate interests is a sensitive process. Any reform that makes a diligence more effective for a creditor is likely to make the working of that diligence more burdensome for the debtor. Reform must therefore be both relevant, with no need to fix things that aren't broken, and proportionate, with no undue advantage for any party.

127. The reforms in this Bill strike the right balance between competing interests. The Executive and the Scottish Law Commission before that where appropriate, have consulted as fully as possible on the intended changes. Policy has changed, for example, on the law of set off during ordinary (or bank) arrestment, where responses have shown that the balance would have been struck in the wrong place.

128. Reform of sequestration will deliver a better bankruptcy system by encouraging business re-start, but that reform by itself will not deliver a better balanced system. Change must therefore go further if the whole package is to strike the right balance amongst the competing interests. For that reason the reduction in the discharge period is balanced by flexible bankruptcy restrictions that can last for up to 15 years.

129. Summary warrants can only be used by public creditors such as local authorities and Her Majesty's Revenue and Customs. Public debt is involuntary and services have to be available even where taxes aren't paid. There are therefore good reasons why the balance under that

procedure favours the creditors, but that balance is another one that has been reviewed during the preparation of this Bill.

130. Enforcement under summary warrant is too favourable to the creditors, without there being enough benefit to the public interest. The balance has been struck in the wrong place, and this Bill therefore provides that a charge to pay is needed before a summary warrant can be enforced, bringing it into line with ordinary debt.

131. Getting the balance right can have a cross-cutting effect. Extending charge to pay to cover summary warrant debts strikes a better balance for insolvency as well. Debtors can bankrupt themselves if they are ‘apparently insolvent’, which generally means that a creditor has tried to enforce the debt by (for example) serving a charge to pay. A summary warrant charge will serve as a final warning for the won’t pays and could pays, and a new way into debt relief for the can’t pays.

CONSULTATION AND ENGAGEMENT

132. There are 5 types, or phases, of consultation and stakeholder or expert engagement associated with the development and implementation of this Bill. They are:

- Scottish Law Commission consultations,
- Major Scottish Executive consultations,
- Secondary Scottish Executive consultations,
- Working groups,
- Meetings with the public and stakeholders, and
- Expert advice.

Scottish Law Commission

133. The Scottish Law Commission consulted extensively amongst interested parties prior to making recommendations in its Reports on diligence and floating charge reform. The recommendations in those Reports take account of many responses received by the Commission, including many detailed technical comments from legal and other experts.

134. Annex B lists all the consultative memoranda and discussion papers prepared by the Scottish Law Commission. Copies of the memoranda and papers, but not of the responses, are available on the Commission’s website at www.scotlawcom.gov.uk.

Scottish Executive – major consultations

135. There have been three major Executive consultations in respect of the provisions of this Bill.

136. The starting consultation paper on diligence reform is ‘*Enforcing Civil Obligations in Scotland*’ (“the ECOS consultation”), published on 22 April 2002. An analysis of the 68 consultation responses was published on 8 November 2002. Copies of the consultation paper

and response analysis are available on the Scottish Executive website at www.scotland.gov.uk/Topics/Justice/Civil/17853/10315.

137. The starting consultation paper on bankruptcy reform is '*Personal Bankruptcy Reform in Scotland: a modern approach*' ("the Bankruptcy consultation"), published on 19 November 2003. An analysis of the 84 responses was published during March 2004. Copies of the consultation paper and response analysis are available on the Scottish Executive website at www.scotland.gov.uk/Topics/Justice/Civil/17868/13245.

138. The last major consultation was on a draft Bankruptcy and Diligence Bill. The consultation paper '*Modernising Bankruptcy and Diligence in Scotland: draft Bill and Consultation*' ("the Bill consultation"), was published on 2 July 2004. Details of the 81 responses were published during March 2005. Copies of the consultation paper and of the responses are available at the Scottish Executive website at <http://www.scotland.gov.uk/Topics/Justice/Civil/17853/ModernisingBandD/BandDConsResponsePage/In1>.

Scottish Executive – secondary consultations

139. One secondary consultation has been carried out by the Executive, and a second secondary consultation will take place in the fourth quarter of 2005.

140. During the ECOS consultation an additional issue was raised, namely whether it is in the public interest for messengers-at-arms and sheriff officers to organise their businesses as limited liability partnerships. A secondary consultation paper was issued on that and associated issues to members of the court officer professions and other interested parties on 22nd December 2003, and 24 responses were received²⁴.

141. The Bankruptcy consultation sought views on the reform of PTD. The Bill consultation noted the strongly favourable response to the proposal to improve transparency and monitoring of PTD, and that the Executive had decided to implement the reforms by regulations made under powers in the 1985 Bankruptcy Act. A consultation paper on draft regulations will be published in the later part of 2005, so that the Scottish Parliament can express a view on the detailed proposals during the Committee stages of this Bill.

Working groups

Debt Relief Group

142. The Bankruptcy consultation sought views on whether there were any people for whom the range of current and planned debt management tools will not provide an effective solution to their problems. The consultation responses showed strong agreement that there was a gap in provision.

²⁴ A copy of the consultation paper and the responses can be found in Annexes D and E respectively of the ECOS consultation.

143. The Bill consultation set out the view of the Executive on the nature of that gap, namely that some debtors on low incomes and with no assets are unable to get debt relief. No insolvency practitioner would act as a trustee in a PTD, and bankruptcy is out because creditors see no benefit in taking the enforcement action which makes the debtor apparently insolvent. This group of debtors is often referred to as the no income no asset or “NINA” debtors.

144. In November 2004, the Deputy First Minister established a short term working group chaired by Donna McKenzie-Skene of Aberdeen University, known as the Working Group on Debt Relief (“the Debt Relief Group”). The members of the Group came from varied backgrounds, and brought together a wide range of debtor and creditor interests. The Debt Relief Group’s remit was to determine if possible the number of NINA debtors, and recommend any solution it thought would enable such debtors to use debt relief where appropriate.

145. The Debt Relief Group reported to the Deputy First Minister, and its Report was published on 29 July 2005. The Group concluded that there is a category of NINA debtors who can’t use existing debt relief mechanisms. It made 2 principal recommendations for reform, namely for a:

- Money advisor gateway into sequestration, similar to that for DAS, and
- A moratorium on creditor led sequestration while alternatives (DAS, PTD) are explored.

146. It did not prove possible for the Executive to fully consider these recommendations before introducing this Bill, but work is continuing in that respect.

147. Copies of the remit of the Debt Relief Group, minutes of their meetings, and their Report, are available on the Scottish Executive website at:
<http://www.scotland.gov.uk/Topics/Justice/Civil/17868/NewPage>.

Ad hoc court officer groups

148. This Bill delivers a major reform of the citation and diligence officer professions. The two existing professions of sheriff officer and messenger-at-arms will be combined into a single profession to be known as messenger of court (“court messenger”).

149. There will be a substantial change in existing professional and business arrangements in the course of the change over to a court messenger profession. The Executive will work with the two existing professions, and in due course with the new Scottish Civil Enforcement Commission, to ensure that the change is efficiently handled and delivers the intended benefits.

150. The Executive held a conference on the Scottish Civil Enforcement Commission for the two existing professions at Dunblane Hydro on 3rd May 2005. At that Conference officials and court officers were organised into 5 ad hoc groups as follows:

- Appointments, qualifications and recruitment,
- Disciplinary arrangements,
- Professional Association,
- Regulations and codes of practice, and

- Training and education.

151. These groups, and others when appropriate, will meet as often as is needed during the policy and implementation phases of the reform programme.

Meetings

152. The Executive has had extensive engagement with the public and particular stakeholders on this Bill throughout the period 2002 to 2005. The forms of engagement include public meetings, and hosting and attending conferences and seminars. Annex C contains further information about the main meetings and events.

Expert advice

153. To further assist in the development of policy leading towards the drafting of the Bill and to provide expert advice, the Executive has instructed 3 legal experts. Those experts are assisting the Executive with the more technical and specialised aspects of bankruptcy reform, property law issues (with particular reference to the new diligence of land attachment), and admiralty arrestment.

THE BILL

PART 1: BANKRUPTCY

Aims

154. The Bill will enable earlier business and personal re-start, and in doing so aims to support the entrepreneurial attitudes needed in a strong and growing economy. At the same time there will be new protections introduced for creditors. (*restart theme*)

155. There is a difference between rational risk taking, and recklessness. The Bill aims to introduce new and robust protections for the public against culpable behaviour. (*striking the balance theme*)

156. The Bill aims to strike a better balance between creditors and debtors. Creditors should be paid what the debtor can afford, neither more nor less. Debtors should get a clean break from their liabilities. (*striking the balance theme*)

157. The Bill aims to modernise the sequestration process, and to make possible modernisation and reform of protected trust deeds. (*modernisation theme*).

Policy discussion

158. The Bill consultation looked in detail at responses to the Bankruptcy consultation.

Early discharge, flexible restrictions and income payments

Policy objectives

159. The bankruptcy period in Scotland currently lasts for three years. This is in contrast to the one year period introduced in England and Wales by the Enterprise Act 2002, which came into effect on 1 April 2004. Debtors in Scotland find it too hard to re-start after insolvency, and in particular harder to re-start when compared to people made bankrupt in England and Wales.

160. Most people who go bankrupt co-operate fully with the trustee acting for their creditors, and their actions leading up to the sequestration are not reckless or particularly blameworthy. Some debtors, however, behave badly. If they behave very badly before or after the sequestration they can be prosecuted for fraud or obstruction in the criminal courts, and that should continue to be the case.

161. There is still a category of people whose behaviour is blameworthy but not so clearly criminal that a prosecution will succeed. All people who are sequestrated are restricted from taking credit or carrying on a business until the date of the discharge but not afterwards, no matter how the debtor has behaved. The public needs protection, and a debtor restricted, according to the actual risk in the particular case.

162. Investigation of, and gathering in, the estate of a debtor rarely takes more than a year. It makes sense to keep restrictions in place for ‘normal’ bankrupts for that long. If the estate is complex then the trustee should ask for more time, as at present, and restrictions stay in place for a bit longer. For poor behaviour, however, some or all of the ‘normal’ restrictions should last even after the discharge. The law should be flexible.

163. Bankruptcy restrictions undertakings (“BRU”) and bankruptcy restrictions orders (“BRO”) provide that flexibility. In cases where there is enough evidence that a debtor has committed an offence, they will be prosecuted as at present. In other cases where the debtor has behaved culpably or recklessly a BRU or BRO can be used.

164. Scottish Executive policy is that if debtors can pay then they should pay, and that applies to people who are bankrupt as well as everyone else. At present payments from income tend to be the result of a voluntary agreement between the debtor and the trustee, in part because of the difficulty of taking cases to court under section 32 of the 1985 Bankruptcy Act. In any event, all payments end when the debtor is discharged.

165. Payments are therefore less common, and when made can be lower, than they should be. Creditor interests suffer and bankruptcy may be, or be seen to be, too easy an option. Reducing the discharge period will make this even more of an issue, unless the law on payments from income is changes at the same time.

166. Early re-start while important should be balanced against the ‘can pay should pay’ principle. The introduction of income payment agreements (“IPA”) and income payment orders (“IPO”) can take over from the existing, all too often voluntary, arrangements between debtors and trustees. They should be capable of continuing after the date of discharge.

Consultation and responses

167. The Bankruptcy consultation first put forward the proposal for a shorter period of sequestration in Scotland. This was one of the policy proposals that respondents were most evenly divided on. Many respondents agreed that the important work in a sequestration is done by the trustee in the first six to twelve months. The remaining two years could therefore be viewed as a ‘punishment’.

168. Other respondents considered that a one year bankruptcy would be too easy an option, and would be used more frequently than necessary. The Executive view is that individuals will not find it easier to go bankrupt more than once, as–

- there are no current plans to take away the need to show apparent insolvency,
- bankruptcy restrictions can deal with such behaviour, and
- in any event, debtors can sequestrate themselves only once every five years.

169. The Bankruptcy consultation proposed that there should be an automatic five year sequestration for repeat debtors. This proposal was widely supported, although some respondents raised sensible objections. The Executive view is that this proposal was indeed too rigid, and that some people will be insolvent for ‘genuine’ reasons. Bankruptcy restrictions are capable of dealing flexibly with those who aren’t.

170. The Bankruptcy consultation put forward the proposal that a flexible BRO of between 2 and 15 years, applying either or both of credit and business restrictions after the discharge. There was nearly unanimous support for some form of restrictions regime, and wide support for Accountant in Bankruptcy (“AiB”) having the responsible role.

171. Sixty five percent of respondents to the Bankruptcy consultation agreed that debtors who can afford it should be made to pay a contribution from income after the date of discharge. The most common period suggested was three years. This would provide a balance between encouraging debtors to re-start and giving a return to creditors.

172. We also asked respondents in the Bill consultation what they thought should be an allowable expense when deciding on the level of a debtor’s contribution. We asked if they wanted to see a formula applied to all cases.

173. Respondents were evenly split on whether to impose a formula. Those against argued that there is so much variation that any formula would do more harm than good. Those in favour argued that it would support fairness across the board, and the majority of those in favour supported the British Banking Association/Money Advice Trust assessment formula to be the best indicator of the affordability of a payment offer.

Proposals

174. The Executive intends to reduce the sequestration period to one year, so that the debtor does not have to wait for three years before starting again. This will encourage responsible risk takers to start again more quickly, and will ensure that Scottish debtors are treated in the same way as those in England and Wales.

175. The Executive intends to change the way that bankruptcy restrictions apply equally to all debtors, and for a fixed period. There will be three kinds of bankruptcy restriction applied more flexibly than at present, and for between 2 and 15 years as needed. The three kinds of restriction either in the Bill, or proposed to be made by subordinate legislation are—

- The credit restriction: obtaining credit above a fixed limit, currently £250, without disclosing the bankruptcy,
- The business restriction: holding office as a director of a limited company or limited liability partnership (“LLP”), or acting as the receiver under a floating charge granted by a company or LLP, and
- The office restriction: being a local government councillor.

176. Limited companies and LLPs are a reserved matter under Head C1 of Schedule 5 to the Scotland Act 1998, and an order under section 104 of that Act will therefore be needed to extend the new bankruptcy restrictions regime to cover holding office in such business organisations.

177. The Bill provides for a power for Scottish Ministers to make an order imposing a further business or office bankruptcy restrictions. These powers will be used as needed to ensure that re-start and public protections stay in the right balance in the future

178. Bankruptcy restrictions will apply equally to all debtors during the sequestration in the same way as they do now. The trustee for the creditors will assess if the debtor’s behaviour up to the sequestration suggests a risk to the public interest. If there is such a risk then the trustee must seek the appropriate bankruptcy restriction.

179. If so, the trustee must decide what kind of bankruptcy restriction is needed (if not all three) and for how long. A debtor who has run up large credit card bills without any reasonable prospect of re-paying them may need a credit restriction. A debtor who has been unusually careless with their book keeping may need a business restriction, or an office restriction. The Bill provides a list of relevant factors, and the Scottish Executive intends to provide non-statutory guidance for trustees.

180. The Executive wishes to encourage negotiation, and only involve the courts where necessary. It is therefore intended to introduce both BRO and BRU, although the Bankruptcy consultation did not cover BRU. The trustee will first seek agreement on a BRU, but if necessary the AiB can apply to the court for a BRO on the same or different terms.

181. The Executive intends to amend section 32 of the 1985 Bankruptcy Act to introduce a new system of income payment agreements and orders. As with bankruptcy restrictions the debtor and trustee are to be encouraged to reach agreement, but if necessary the trustee (rather than the AiB) can apply during the sequestration to the court for an income payment order lasting up to 3 years.

182. It is intended that the new Income Payment scheme will provide the trustee with a much more effective method of fixing and collecting contributions from the ‘won’t pays’. Above all, the new scheme will have the teeth that present arrangements lack. A debtor who fails to pay without good reason runs the risk of a criminal prosecution.

Alternative approaches

183. The Executive's first consideration given that the needs of re-start demand an earlier discharge for debtors, and the length of a typical administration, was whether debtors should wait more than one year. A reduction to 2 years would still encourage re-start, if to a lesser extent.

184. However, the intended one year discharge appears to the Executive to be clearly preferable to any other period when coupled with flexible restrictions. In addition, any other period justifiable on objective grounds would still leave an inequality between Scotland and England & Wales and disadvantage Scottish debtors.

185. The Executive considered that there were certain categories of debtors who should not automatically qualify for a one year bankruptcy period. These were business debtors and debtors who do not co-operate with their trustees. The Executive considers, however, that such a distinction is both hard to make and hard to maintain. Sole traders can run up credit card debts as easily as anyone else, if for a different purpose.

186. The Executive considered whether there should be an automatic five year bankruptcy period for debtors who are bankrupt for the third or subsequent time. This would also have extended to debtors who are bankrupt for the second time but have been the subject of a BRO. However, on balance it was decided that this additional protection is unnecessary. It looks like a punishment rather than public protection.

187. The purpose of a BRU or BRO is to protect the public. Any misconduct leading up to a repeat bankruptcy can be dealt with if known about by applying a bankruptcy restriction for the appropriate length of time, in serious cases up to fifteen years. It could also prove difficult to link one bankruptcy to another for the purposes of a '5 year' rule due (for example) to common names or people being sequestered under a different name or in a different part of the country.

188. The Executive consider imposing a standard formula for determining surplus income for the purposes of an IPA or IPO. However, the arguments in favour of flexibility are strong. Debtor's circumstances do indeed differ widely. It is therefore intended to develop non-statutory guidance for Scotland to assist trustees and debtors in deciding what is a reasonable deduction and what is not. It is intended to work with insolvency practitioners and money advisors to seek agreement on common approaches where that is appropriate.

189. The differences between sequestration and bankruptcy can cause confusion. Indeed, sequestration is commonly called bankruptcy even by those who understand that the Scottish system is different from that in England and Wales. The fact that legislation in Scotland, including this Bill, refers to 'bankruptcy' does not assist understanding of the sequestration and PTD processes.

190. The Executive therefore considered renaming sequestration as 'bankruptcy'. However, sequestration and PTD can be seen as two kinds of bankruptcy with important differences. Losing every aspect of the distinction between sequestration and bankruptcy risks some arguably more serious confusion. It is still possible to aid understanding through less radical changes.

One intended change, as set out below, is therefore to call the grant of sequestration a 'bankruptcy order'.

The trustee in the sequestration

Policy objectives

191. Scottish sequestrations are administered for the creditors first by an interim and then by a permanent trustee. The role of the interim trustee is to safeguard or preserve the assets of the estate in the early part of the administration, and then hand over to the permanent trustee who realises or gathers in the assets and pays the creditors.

192. In nearly every case the interim and permanent trustees are the same person. There has been confusion about the two functions, and worse still there have been occasions where the permanent trustee has been denied by the courts some of the rights of an interim trustee. The administration process should as far as practicable be easy to understand, and effective.

193. The objective of reform is therefore that the new trustee in sequestration will combine the major functions of the interim and permanent trustees. There will still be a role for an interim trustee acting with the approval of the court to preserve the debtor's estate between the date of warrant of an application for sequestration, and the date of the sequestration. This will in most cases mean an appointment of no more than a small number of weeks.

Consultation and responses

194. A combined trustee would acquire all the appropriate rights and obligations of the interim and permanent trustees in the period after the grant of sequestration. Combining the functions will make the administration process easier to understand, and should speed it up as well. We therefore consulted on whether the existing functions should be combined.

195. The majority of respondents agreed that it would be a good thing to combine the major part of the two functions into one office. They considered that it would clarify proceedings for debtors and creditors. Some also commented that after the introduction of the one year bankruptcy it would be essential.

196. Some respondents felt it was important to maintain distinct 'preserving' and 'realising' roles, as those roles assume more or less importance depending on how far advanced the administration is. There were some who considered that it was essential that the creditors should retain the right to elect a different trustee at the end of the interim/ preservation stage of the administration.

Proposals

197. The Executive intends to improve the sequestration process by combining the functions of the interim and permanent trustees after the sequestration into a new office to be known as the 'trustee in sequestration'.

198. The trustee in sequestration will be appointed on the date of the grant of sequestration, which it intended will in future be known as a bankruptcy order. The order will still represent a sequestration of the debtor's estate. The trustee will then be able to undertake all the duties of the former interim and permanent trustee. The trustee appointed can be either an insolvency practitioner or the Accountant in Bankruptcy. The creditors will retain the right to elect a different insolvency practitioner as trustee after the preservation stage.

199. The Executive intends to use the opportunity provided by the Bill to modernise and streamline the trustee in sequestration's functions during the administration of the estate. These minor reforms were not consulted on, but make the sequestration process more effective:

- Removing the restriction requiring the trustee in sequestration to live within Scotland,
- Aligning the duties of the trustee in sequestration more closely to the financial interests of the creditors,
- Clarifying the reasons that a trustee in sequestration must give to the court if he or she asks to resign office,
- Removing any automatic need for the trustee in sequestration to call a statutory meeting of creditors, given that the AiB when trustee has a discretion unless the creditors call for such a meeting, and
- Permitting the AiB to apply once to the Court of Session for the removal of a trustee from all the cases he was appointed in, rather than make slow (and expensive) 'case by case' applications.

Debtor applications

Policy objectives

200. The Court of Session and the sheriff courts have jurisdiction to deal with debtor and creditor petitions for sequestration. The Court of Session alone can deal with applications for recall or reduction of sequestrations. The Executive reviewed these arrangements with a view to ensuring that sequestration business is dealt with in the most appropriate way. There are three different issues:

- Debtor petitions,
- Creditor petitions, and
- Recall and reduction.

201. Debtor petitions are straightforward applications to the courts, and the debtor does not have to appear in court. All that is needed is for the debtor to show apparent insolvency. It is rare for the court to refuse an application, and they are therefore a largely administrative process. Court time is a valuable resource, and applications should be dealt with by the courts only where judicial intervention is necessary.

202. Applications for sequestration, although in practice 'administrative', can still raise complex issues. It is therefore important that any application taken out of the court is dealt with in the appropriate way. The Scottish Executive considered that the AiB is well placed to administer debtor applications, as staff there are already familiar with the sequestration process.

203. The Executive does not consider that this will raise any conflict of interest for the AiB. That office has no personal interest in the outcome of the application, and there are clear procedures for dealing with sequestrations already in place. A debtor either meets the requirements to enable the petition to proceed or does not. If the requirements are met sequestration is awarded.

204. Creditor petitions raise different issues. The grant of sequestration has very serious consequences, and the debtor may well not wish to become a bankrupt. Indeed, contested applications are much more common in creditor petitions. It is much easier to justify judicial intervention as important issues need to be balanced by the courts.

205. However, it is not so easy to justify creditor petitions going to the Court of Session. All judicial time is valuable, but the time of senior judges is particularly so. Applications must go to the courts only where necessary, and within the court system they should be dealt with at the most appropriate level. Sequestration business is not so complex that it should be dealt with in the first instance by the Supreme Court.

206. Awards of sequestration cannot at present be appealed in the usual way. Sequestrations are therefore challenged by an application for either recall or reduction.

207. Recall is wider than appeal in that anyone with an interest can apply, and not just the parties. It is also more flexible in that the court can look beyond the simple question of whether the decision was right or wrong, and recognise actions done in good faith on the strength of the original decision. Section 17 of the 1985 Bankruptcy Act gives the court a wide discretion to look at the issues in the round.

208. Applications for recall can deal with situations where sequestration was awarded by mistake, or where the debtor can in fact pay in full. Making an application to the Court of Session is however both difficult and expensive, particularly for party litigants. Against that, there is no obvious reason why a decision 'in the round' cannot be made by a sheriff just as well as by a Court of Session judge.

209. Reduction is however a remedy of last resort appropriate only where other applications, such as recall, are unavailable. In support of that view, there are no reported cases on reduction. In addition, reduction is more likely to affect the validity of transactions entered into in good faith. It is therefore best seen as part of the inherent supervisory jurisdiction of the supreme court of Scotland.

210. Administrative determinations of debtor applications raises different issues from a court decision. The debtor should also have the right to appeal a refusal to the sheriff court. If there is no appeal then the debtor's only remedy would be judicial review of the decision, which would in comparison be slow, difficult and expensive.

211. At present, a petition for sequestration is not intimated to any creditor. They are usually made aware of the grant when the trustee contacts them. That will not change if debtor applications are dealt with by the AiB. Creditors will continue to have the right to ask for recall

or reduction, and indeed a new right to seek judicial review of what would be an administrative decision. There is no obvious need to provide a new appeal right.

Consultation and responses

212. The Scottish Executive consulted on whether to move debtor petitions for sequestration from the courts to the AiB, and on whether to move all sequestration business other than reduction from the Court of Session to the sheriff courts.

213. There was overall support for both these proposals. The main concerns voiced by respondents were the need for greater resources for AiB, and the relocation of AiB leading to the loss of experienced staff. It was also queried whether AiB documentation carried as much authority as court papers. Concerns were raised about there being a conflict of interest for AiB in first awarding sequestrations and then administering them.

Proposals

214. The Scottish Executive intends to deal with debtor applications for sequestration administratively. The Bill provides that the function of receiving and if appropriate granting a debtor application will be exercised by the Accountant in Bankruptcy.

215. It is intended that the debtor will be able to appeal a refusal to the sheriff on a point of law, and that the sheriff's decision is final. There will be no other appeal from the decision of the AiB.

216. It is intended that the AiB will be made an officer of the court by this legislation, and that the intended new bankruptcy order will have the same effect as an order issued by the courts. The Executive does not consider that any award granted by the AiB will carry less weight than a court order.

217. The Executive intends to move creditor petitions and applications for recall from the Court of Session to the sheriff courts, but does not intend to change the supervisory jurisdiction of the Court of Session. Applications for reduction of a sequestration will therefore continue to be made to the Court of Session.

Alternative approaches

Reform of apparent insolvency

218. Debtors can only be sequestrated if they are 'apparently insolvent'. The circumstances in which someone is apparently insolvent are set out in section 7 of the 1985 Bankruptcy Act. In short, third party action is needed. This is either because a creditor has taken formal enforcement action such as serving a charge to pay, or because a creditor supports ('concur') in the application.

219. The Bankruptcy consultation asked respondents if they agreed that establishing apparent insolvency could be difficult. Most respondents did, and thought that a summary warrant alone should establish apparent insolvency for debtor petitions, and that a summary warrant and a 14 day notice to the debtor should establish apparent insolvency for creditor petitions.

220. The Executive therefore set out proposals for extending apparent insolvency in the Bill consultation. Section 22 of the draft Bill in the Bill consultation version provided for the grant of a summary warrant to be apparent insolvency for debtor petitions, and for summary warrant followed by the service of a new statutory 14 day notice to be apparent insolvency for creditor petitions.

221. The Executive no longer intends to amend apparent insolvency in the way proposed by draft section 22, and no equivalent provision appears in the Bill. On reflection, a court decree by itself is not enough to constitute apparent insolvency, and neither therefore should a summary warrant be enough by itself.

222. However, the Executive accepts that the need to show apparent insolvency can make it hard for NINA debtors to access debt relief. The need to set up the Debt Relief Group to review this issue was set out earlier under the Bill consultation, and the Executive is considering the recommendations of the Group. As the gap in provision exists, that could still be dealt with in either or both of two ways.

223. The first option would be to extend apparent insolvency in other ways by providing for service of a 'charge to pay' as provided (for example) for earnings arrestment by section 90 of the 1987 Act. This has three potential advantages:

- the cost of setting up a new form of notice is avoided,
- charge to pay procedure is well understood by debtors as a formal 'final' warning before enforcement, and extending the charge will encourage payment, and
- failure to pay after a charge constitutes apparent insolvency.

224. The second option is to abolish apparent insolvency for debtor applications. Debtors could then access debt relief by, for example—

- applying through an approved money adviser who will 'vet' the application, or
- giving the AiB the function of checking applications, in which case there might need to be a less subjective test of suitability.

225. If the AiB were to approve applications then one possibility would be to require the debtor to make a sworn declaration of insolvency, and to refer any deception in that statement to the courts to be punished as contempt.

226. There is not the same need to consider reform or abolition of apparent insolvency for creditor petitions, as a creditor can create apparent insolvency under the existing law in any number of ways.

Debt threshold

227. Debtors can only be sequestrated where they have at least £1500 of outstanding debt. That figure is unchanged since the 1993 Act. The Executive therefore sought views through the Bankruptcy consultation on whether or not to increase the debt threshold, and if so to what figure.

228. Respondents were against an increase, in part because of concerns that bankruptcy was already difficult to use as a result of the issues explored by the Debt Relief Group. The Executive decided not to increase the threshold at this time, but remains concerned that flexibility is desirable in this very sensitive area. The Executive therefore intends that Scottish Ministers should have power to vary the debt threshold by order.

Debtor's property: homes and inheritances

Policy objectives

229. In bankruptcy, whether sequestration or PTD, everything that does and (in some senses could) belong to the debtor is conveyed to the trustee for the creditors. This, of course, is one of the main reasons why bankruptcy should only ever be used a last resort.

230. The biggest concern for debtors is if they will lose their home. Against that, people who can pay should pay. The law must give the creditor a fair chance to get the value out of any home even where that means the debtor must start again. In general trustees deal with the sale of heritage promptly, which has at least the merit from the debtor's perspective of getting the worst over quickly.

231. However, under the present law the trustee for the creditors is entitled to wait as long as they want in the hope, perhaps, of some speculative gain being realised in a later sale. They may also decide to do nothing, and leave the debtor and his family hanging in limbo not sure if the creditors have abandoned their claim. This causes uncertainty, and makes it harder for debtors to move on and re-start.

232. On sequestration, the creditors acquire a right to any 'non vested contingent interest' of the debtor under section 31(5) of the 1985 Bankruptcy Act. The most likely example of such an interest is a future inheritance. As with actual property the right to 'potential' property remains vested in the trustee after the debtor is discharged.

233. In practice non vested rights have little or no value for the creditors. The claim of the trustee flies off when he or she is discharged from the sequestration, which usually happens some months after the debtor's discharge. It is not cost effective for a trustee to remain in office, possibly for years, against the chance of such an asset becoming worth something.

234. The position is of course different if the non vested right becomes an actual claim before the debtor's discharge, say because a relative of the debtor has died with a will leaving an inheritance to the debtor, or has died without a will and the debtor has legal rights in that person's estate. In those cases the right has vested in the debtor, and does have value for the creditors that should be pursued by their trustee.

235. The law in this area must strike a fair balance between the creditor's interest in payment, and the debtor's interest in early re-start.

Consultation and responses

236. In the Bankruptcy consultation, the Scottish Executive asked whether:

- it would be useful to introduce a three year time limit in which trustees must confirm their claim against a debtor's home,
- there should be a time limit on a trustee's right to claim inheritances and legal rights,
- the trustee's claim to inheritances and legal rights should be linked to the debtor's discharge, and
- there should be a three year time limit on trustee's claims to inheritances and legal rights.

237. On the debtor's home, the majority of respondents agreed that there should be a three year time limit. Those who disagreed thought there should be a 'clean break, but were split evenly on how long that should be. Half thought that three years was too short, and the other half thought it was too long. Some respondents also mentioned that there should be an ability to extend the time limit if necessary.

238. On inheritances and legal rights, most respondents agreed that a trustee should not remain in office only to realise a non-vested contingent interest. They agreed that a time limit should be placed on the trustee, but there was no clear agreement on what that limit should be. Some suggested that the date of the debtor's discharge was an appropriate cut off, and others suggested three years from the date of sequestration.

239. It was thought by some respondents that the wording of section 31(5) of the 1985 Bankruptcy Act is unclear, at least to lay people.

Proposals

240. The Executive intends to limit the time during which the trustee can insist on their claim to the family home. If the trustee does not take an active step then at the end of three years from the sequestration, or three years after discovering the property if later, the home will re-vest in the debtor. Such an active step would include, for example, registering a Notice of Title in the Land Register of Scotland.

241. The Executive did not consider it necessary to allow for any extension to this three year period. The trustee will not have to do much to confirm the claim, and once the claim is confirmed the home will not re-vest and can be dealt with at any time after the debtor's discharge.

242. For non-vested contingent assets, the Executive intends to remove the trustee's right to claim against (say) an inheritance unless the debtor has acquired an actual right before being discharged from the sequestration.

243. It is intended that the effect of this provision is that:

- legal rights on intestacy (death without a will) will continue to vest in the trustee if the grantor dies between the award of sequestration and the date of the debtor's discharge, and can be claimed after the discharge,
- legal rights and inheritances will not vest in the trustee if the grantor dies after the debtor's discharge, and cannot be claimed after the discharge.

244. The Executive does not intend to use everyday language when amending section 31(5) of the 1985 Bankruptcy Act. This is a good example of how the law needs to be precise even if the language is hard for non-lawyers to understand. The Explanatory Notes, published separately, will of course explain the legal effect of the intended change.

Alternative approaches

245. The Executive did consider making the inheritance ‘cut off’ the same date as that for any family home. This is one view more fair to the creditors, but the Executive took into account that claims arising from non vested contingent interests are rare. Extending the cut off from one year to three years will make little difference in practice, and therefore it is better to have a clean break when the debtor is discharged.

Composition

Policy objectives

246. Section 56 of and Schedule 4 to the 1985 Bankruptcy Act contain the current legislation on composition.

247. Composition allows people to get out of sequestration early by making an offer to the trustee for the creditors. The debtor must offer to pay a dividend of at least 25 pence in the pound, and offer either caution²⁵ or some other security. Caution is a security for payment by a third party, often an insurance company.

248. An acceptable offer if cleared (in most cases) by the AiB is first circulated to the creditors, and then sent to the sheriff court if a both a majority in number and two-thirds by value of the creditors have accepted it. The sheriff fixes a hearing at which he or she decides whether or not the test is met, and if the offer is reasonable. If satisfied the debtor and the trustee will both be discharged.

249. The value of composition to debtors has fallen over the years as the minimum length of sequestrations has reduced, and applications are uncommon. A further reduction to one year will make composition less attractive on the whole. Nonetheless, sequestration is a very serious matter. Those who can get out of trouble by making a reasonable offer to their creditors should be able to do so. The barriers in the way of approving a composition offer must not therefore be too high.

250. A barrier to approval may be the threshold level at which composition is approved, for example the minimum dividend or the number of creditors who must agree or refuse an offer. A barrier might also be procedural, for example applications taking up valuable court time rather than being dealt with in a quick and effective way by administrative measures.

Consultation and responses

251. In the bankruptcy consultation we asked whether offers of composition should be dealt with by the AiB rather than by the courts. A large majority of respondents were in favour of

²⁵ Caution is a term of art in Scots Law, and pronounced ‘kay-shun’.

offers of composition being dealt with administratively, although concerns were raised about the extra burden of work on the AiB, and about the rights of creditors to appeal against composition.

Proposals

252. The Executive intends to deal with procedural barriers to composition. Debtor applications for composition will therefore be dealt with administratively. The Bill provides that the functions of receiving offers of composition, and if appropriate of discharging the debtor and the trustee, will be exercised by the AiB.

253. On further consideration of the issues, the Executive also intends to deal with threshold barriers to fair use of composition. One reason why compositions are low is thought to be the high threshold for creditor approval. This Bill therefore provides for an offer to go to the AiB for approval if accepted by a majority in number or (as opposed to and) one third by value of the creditors. This test is the same that applies to protection of a PTD, which is a way of avoiding the worst effects of sequestration through prior agreement with creditors.

254. This reform and others in the Bill will be delivered through the AiB. The AiB already has an important role in composition procedure, and is familiar with the procedure. The Financial Memorandum, published separately, sets out how the AiB will be funded to deliver all the reforms in the Bill.

255. There will be an appeal to the sheriff court against either grant or refusal of the award of composition by the AiB.

Alternative approaches

256. The Executive considered whether the 25 pence dividend threshold is set too high or too low. On reflection, it was thought that the other barriers to take up made it too early to form a sound judgement on the usefulness of the present dividend threshold.

257. The Executive is aiming for a unified system of debt recovery (won't pay), debt management (could pay) and debt relief (can't pay). The many reforms in this Bill will take time to bed down, and a future change to the dividend threshold may yet prove desirable. The Executive is therefore considering whether to seek a power to amend the debt threshold by order, in the same way that the Bill provides for amendment of the bankruptcy debt threshold in that way.

Credit limit

Policy objectives

258. People who are sequestrated have shown, for one reason or another, that they will run up debts that they are unable to pay. That means, of course, that the creditor (usually a business) has suffered a loss. If a business suffers a loss then in a worst case it fails, threatening prosperity and employment.

259. It is therefore right to protect creditors from undischarged bankrupts. It may also be right in some cases to extend that protection beyond the discharge through the new bankruptcy restrictions. Protection comes through the need for debtors to say that they are sequestrated when they seek a loan of more than £250.

260. This disclosure threshold must do two things. It must offer a proper level of protection to creditors, and at the same time enable debtors to live in a decent and humane way while subject to restrictions. The Executive has examined how effective the present law is when measured against those two objectives.

261. The threshold was set at £100 in section 67(9) of the 1985 Bankruptcy Act, which makes it a criminal offence to seek credit over the threshold without disclosure. The level can be changed by order, and the current threshold level was later set at £250. That threshold now appears to offer a high level of protection for creditors, and can therefore be seen as too restrictive for the debtor.

262. At present, the debtor can run up as much credit as they can get so long they do not go over the debt threshold on any one loan. It is hard to see how creditors are protected properly is a single loan of (say) £5000 is barred, but 20 small loans of £250 are not. This concern will have more significance if as intended the discharge period is reduced to one year.

Consultation and responses

263. In the Bankruptcy consultation the Executive asked if there should be—

- An upward adjustment of the credit limit applied to bankrupts, and
- If there should be a total credit limit applied to bankrupts, and what that should be.

264. Respondents were strongly in favour of both responses. On the threshold most respondents were of the view that there should be a total credit limit of £1000.

Proposals

265. The Executive intends to increase the debt threshold from £250 to £500 by regulations made under the 1985 Bankruptcy Act. The necessary statutory instrument will be made as soon as is practicable.

266. The Executive also intends to introduce a new global threshold. This Bill therefore provides for a total credit limit set at £1000, and will seek an order making power to adjust that figure from time to time as economic circumstances require.

Protected Trust Deeds

Policy objectives

267. PTD are a form of bankruptcy in that the whole estate of the debtor is conveyed to a trustee for the creditors, the trustee realises the estate and pays a dividend, and they are regulated under the 1985 Bankruptcy Act.

268. The key difference between PTD and sequestration, the other form of Scottish bankruptcy, is that the regulation has to date been very ‘light touch’. Debtors are not, for example, subject to any bankruptcy restrictions. The AiB’s functions are limited to entering any PTD in a public register, and if asked, determining the trustee’s remuneration and outlays.

269. The ‘light touch’ approach can be justified if PTD delivers a clearly better return for creditors, and do not leave a gap in public and business protections. The Executive considers that the present arrangements for PTD cannot be justified on either basis. There are two main concerns—

- Poor, or no, return for the creditors, and
- The small number of audits requested, leading to doubts that cases are being properly managed.

Consultation and responses

270. In the Bankruptcy consultation, the Executive sought views on a range of measures intended to increase transparency and monitoring of PTD. The proposed measures were:

- The debtor to swear statement of affairs, with appropriate sanctions,
- Each PTD to have a clearly defined end date,
- The trustee to provide proof of intimation to the creditors,
- The trustee to certify that qualifying creditor agreement obtained,
- The trustee to demonstrate that reasonable dividend will be paid
- Protection of PTD to start from date of registration,
- The estate to be distributed as soon as practicable,
- The AiB to be able to refuse trustee’s discharge if not satisfied on due administration,
- Discharge of trustee effective from date of registration, and
- The AiB to have compulsory audit powers.

271. In the Bankruptcy consultation, the Executive asked whether respondents agreed with the proposals set out in the last paragraph. It also asked for suggestions for other worthwhile reforms, and in particular, whether there should be a ‘cooling off’ period between signing and protection of the deed in which the debtor could withdraw from the trust.

272. The question of improving the transparency and supervision of PTD was almost unanimously supported by the respondents. There was, however, little support for a cooling off period for the debtor after signing a trust deed. Respondents considered such a period to be an unnecessary additional step in the protection process. No additional reforms were suggested.

273. Policy has developed in the period between the Bankruptcy consultation and the Bill consultation. The later consultation noted the responses set out in the last paragraph, and confirmed that the Executive intended to proceed with reform of PTD. Policy as set out in the Bill consultation is that the reform is best carried through by subordinate legislation made under the 1985 Bankruptcy Act, as that will provide the flexibility to continuously improve the PTD scheme.

274. A further consultation on PTD reform and draft amending Regulations is therefore to be published in the autumn of 2005. Paragraphs (3) and (4) of the 1985 Bankruptcy Act contain powers to amend the conditions under which a trust deed is protected. Those powers will not authorise the full range of proposed reforms, and therefore the Bill should extend them.

Proposals

275. The Scottish Executive intends that the Bill will provide the framework needed to support the proposed reform of PTD. It is intended that more extensive enabling powers will be introduced into the 1985 Bankruptcy Act, and those powers will be used to make regulations reforming PTD after the close of the consultation referred to above.

Alternative approaches

276. The Executive considered whether or not PTD should be retained given the often low creditor returns, and the limited public protections against misuse in general and culpable debtors in particular. Removing protection from trust deeds would not have made it illegal for debtors to settle with their creditors for an agreed dividend, but such arrangements would then have been binding only on consenting creditors.

277. The Executive considers on balance that PTD, once reformed, do have a proper role to play in an integrated system of debt management and debt relief. They would, for example, be a way for debtors on limited income but with other assets to avoid the worst effects of sequestration. They would if working properly offer creditors a better return that they could expect in a sequestration.

278. In addition, many developed legal systems offer debtors and creditors ‘hard’ and ‘soft’ forms of bankruptcy. Although what is on offer differs from country to country, the Executive notes (for example) that the in the rest of the UK insolvent debtors have the options of bankruptcy or an Individual Voluntary Arrangement (“IVA”).

279. It is intended, therefore, that PTD will continue to be available as an option for creditors and debtors. The Executive intends to monitor closely the effects of the proposed reforms after implementation, to ensure in particular that the necessary creditor returns are delivered. If not, further reform will be considered.

280. The Executive also considered whether or not to introduce ‘cooling off’, even although respondents to the Bankruptcy consultation were not in favour of that reform. There have been significant developments since that consultation, including the introduction of the Debt Arrangement Scheme (“DAS”) in November 2004 as discussed below for Part 13 of the Bill. The Executive therefore intends to explore this issue further in the planned PTD consultation.

Debt Advice and Information Package

Policy objectives

281. One of the policy objectives informing the creation of the diligence of attachment by the 2002 act was the need to give debtors information about where to get free money advice when

liable to court enforcement. Section 10(3)(b) of that act provides that attachment is only competent where the creditor provides the debtor, before execution of an attachment, with a copy of a debt advice and information package (“DAIP”).

282. The DAIP is as determined from time to time by Scottish Ministers. In 2002 the then Deputy Justice Minister approved the “Dealing with debt: finding your feet” package for that purpose. The package comes in two parts:

- a general information leaflet on what to do and where to go for advice , and
- a local insert applying to each sheriffdom with contact details for money advice agencies in the debtor’s local area.

283. The DAIP has just been reviewed, and an amended version published during October 2005. This version takes due account of developments since 2002, in particular the introduction of DAS. A copy of the most up to date version of the DAIP for each sheriffdom can be found on the debt and enforcement pages of the Scottish Executive website under: [information and guidance materials](#).

284. The need for better and more targeted information is not, of course, limited to attachment. There is no more serious outcome for a debtor than sequestration.

Consultation and responses

285. In the Bankruptcy consultation, the Executive asked whether respondents supported the idea of requiring the creditor to send a copy of the DAIP to the debtor before petitioning for sequestration.

286. This proposal was supported by most respondents, with those against commenting that it was an unnecessary additional burden on creditors. Some respondents commented that in practice sheriff officers and messengers-at-arms were providing copies of the DAIP when serving a charge to pay, or before executing an attachment.

Proposals

287. The Executive intends to provide that the creditor must provide the debtor with a copy of the DAIP before being entitled to petition for sequestration.

Alternative approaches

288. The DAIP will provide information about DAS, and one of the purposes of DAS is to help the ‘could pay’ avoid sequestration. The Executive therefore considered whether it should go beyond specifying information to be provided, and require a compulsory referral to a DAS approved money adviser before a creditor could obtain an award for sequestration.

289. This kind of diversion was on reflection felt to be too onerous on both creditors and debtors. There is, however, a connected issue still being considered by the Executive. The creditor remains free to bankrupt the debtor during the period in which a debtor is seeking agreement to, or approval of, a DAS debt payment programme (“DPP”).

290. The courts at present must grant sequestration ‘forthwith’ except in very limited circumstances, such as the debtor being able to pay in full. A creditor who goes straight to court with a sequestration petition may by doing so block a DPP that would otherwise help the debtor and all the other creditors. There is therefore an argument for giving the courts a new discretion to defer sequestration while the DAS administrator makes a decision on the pending DPP.

Appeals

Policy objectives

291. Chapter 10 of the Bankruptcy consultation discussed ways in which sequestration procedure could be streamlined. That Chapter covered issues such as the role of the courts, composition, and trustee functions. A further ‘streamlining’ issue is raised by appeals against fees determinations.

292. The AiB, or the Commissioners acting for the creditors (if any), can fix the amount of fees and outlays payable to the trustee for his or her work during the administration of the sequestration. At present, the debtor and any of the creditors can appeal that decision to the courts.

293. Where the sequestrated estate is large enough to cover the fees and the costs of the appeal then any dispute is in essence a private matter for the courts to resolve. However, there are many cases where there are insufficient assets in the estate and all costs are paid from public funds. Costs of the appeal will therefore fall to the taxpayer.

294. Public funds must be spent in an effective way, and deliver a clear benefit. The Executive considers that this is not currently the case where appeals are made in ‘no income no assets’ cases.

Consultation and responses

295. In the Bankruptcy consultation the Executive proposed to remove the right of appeal against a determination of fees and outlays where the sequestration process is being funded by the public. This proposal was supported by the majority of respondents, and from those who disagreed some did so because they felt that a blanket ban was excessive.

Proposals

296. The Executive considers that there is no clear benefit where the debtor appeals against a fees determination in ‘no income no asset’ cases, as the debtor does not have an obvious financial interest in the decision. This is also true for the current right to appeal against the decision of the trustee to accept or reject any creditor claim.

297. On reflection, the Executive accepts, first, that debtors should have the chance to state a financial interest in a potential appeal, and second, that creditors do have a financial interest in a fees determination as the decision will affect the size of the dividend.

298. The Executive therefore no longer intends to restrict a creditor right of appeals. It is intended, however, that the debtor will need to satisfy the court that they have a pecuniary interest before they can appeal against:

- the decision of the trustee under section 49 of the 1985 Bankruptcy Act accepting or rejecting a creditor's claim, and
- the decision of the AiB, or any Commissioners, under section 53 of the 1985 Bankruptcy Act determining the trustee's fees and outlays.

Abolition of summary administration

Policy objectives

299. The 1993 Act introduced a certificate of summary administration ("COSA") for cases with debts of up to £20,000 and assets of up to £2000. The relevant provisions now appear in section 23A of and schedule 2 to the 1985 Bankruptcy Act. The intention was to reduce the amount of work otherwise required even in small value cases.

300. Sections 3 and 39 of the 1985 Bankruptcy Act specify the duties of the trustee in sequestration in preserving, managing and realising the sequestrated estate. With a COSA, the trustee need only comply with sections 3 and 39 where, in the opinion of the trustee, there will be a financial benefit to the estate. The trustee would not, for example, need to carry out any speculative work to determine the value of assets.

301. A COSA is applied for at the same time as the grant of sequestration. There is however an additional fee payable to the court. This fee has proved to be an unnecessary extra cost during the administration of estates, and no COSA has been applied for in the last 5 years.

302. The trustee can, in practice, administer a small debt/small asset sequestration case without incurring unreasonable costs, and without having to go to the inconvenience and expense of a further court application. It is, and will remain, a basic duty of the trustee to act in the best interests of the creditors. A trustee can therefore fulfil the duties in sections 3 and 39 of the 1985 Bankruptcy Act without can applying for a COSA.

303. At present, the COSA procedure serves no useful purpose and is not used.

Consultation and responses

304. The Bankruptcy consultation put forward various proposals for streamlining the bankruptcy system in Scotland. The removal of COSA was not specifically consulted, but abolition is consistent with the other streamlining measures in the Bill. There has therefore been no public consultation on this specific issue.

Proposals

305. The Scottish Executive intends to abolish the certificate of summary administration.

Student loans

Policy objectives

306. Student loans provide a benefit that accrues over the whole of the borrowers working life. They are also available at non-commercial rates, and are therefore subsidised by the general taxpayer. They should not be treated as ordinary commercial debt.

307. For that reason, a student loan is not written off on a bankruptcy in England and Wales. In Scotland, however, a sequestrated debtor is not bound to repay the remainder of his or her student loan after their discharge. The cost of the loan falls onto the public purse no matter how successful the former student is in later life.

308. The Financial Memorandum published separately, illustrates the potential receipts to be expected if student loans are not written off on sequestration.

Consultation and responses

309. This policy intention was mentioned in the Bill consultation, but the Scottish Executive did not ask for any response. There have been no unsolicited comments.

Proposals

310. The Executive intends that the liability to repay student loans should continue beyond sequestration. The Bill therefore provides for the necessary amendments to section 73 of the Education (Scotland) Act 1980²⁶ and Schedule 2 to the Education (Student Loans) Act 1990²⁷.

311. Similar considerations apply to debtors who enter into a PTD, but the Executive intends to explore that issue further in the separate PTD consultation.

PART 2: FLOATING CHARGES

Aims

312. The aim of the reform of the law of floating charges is to increase transparency, and provide a quick and simple process that will benefit the business community (*Modernisation theme, restart and growth theme*).

Consultation and engagement

313. In March 1998, the Department of Trade and Industry (“DTI”) launched a major review of company law. DTI presented the final Company Law Review Report to the Secretary of State in July 2001. At that time it recommended further consultation, and that the UK Government should ask the Scottish Law Commission (“the Commission”) and the Law Commission for England and Wales to examine current law on registration of securities.

²⁶ 1980 c.44.

²⁷ 1990 c.6

314. The Commission established an Advisory Group of practitioners and experts following receipt in 2002 of the DTI reference. In October 2002, the Commission produced its *Discussion Paper on Registration of Rights in Security by Companies* (SLC No 121). The discussion paper was widely distributed and responses were received from legal practitioners, commercial interests and academic lawyers.

315. The Commission published its *Report on Registration of Rights in Security by Companies* (Scot Law Com No 197) in September 2004 including draft legislative provisions which will be used as the basis for those in the Bill.

316. The Executive has not consulted separately in view of recent extensive consultation within Scotland by both DTI and the Commission. The Executive has however written to stakeholder to advise them that it is intended to reform floating charges in the Bill.

Policy discussion

Background

317. A "floating charge" is a type of security only available to incorporated bodies such as limited companies. Whilst company law is reserved, the law of floating charges is subject to a specific exception under the Scotland Act 1998 and is therefore devolved.

318. The essence of the floating charge is that unless or until the company goes into liquidation or a receiver is appointed, the company can deal with the secured assets as normal by (say) selling them. If the company goes into liquidation or a receiver is appointed, then the floating charge "crystallises" at that date to become a fixed security over the assets owned by the company and covered by the scope of the floating charge. In most cases the charge covers all assets of the company in any form, including for example intellectual property rights.

319. Registration of floating charges is important in order to give other creditors fair notice that their debts may be deferred in favour of the charge holder should the charge crystallise. So, for example, if there are two floating charges, the holder of the earlier floating charge will be paid out first, in priority to the holder of the later floating charge.

Defects in the current law

320. In its Report, the Commission presented a number of criticisms of the present law. The current arrangements require a company granting a floating charge or certain other securities to register particulars of the security with the Registrar of Companies within 21 days of the grant of the security.

321. The commission reported that these arrangements are widely regarded as unsatisfactory. The principal unsatisfactory features are:

- The period of 21 days allowed for registration of a charge creates an 'invisibility period', which makes the register unreliable for the creditors as a 'hidden' charge may have priority

This document relates to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005

- The register of charges is unreliable as the particulars of charge may be inaccurate or out of date due to later changes in the security, and
- There is unnecessary duplication as some charges are registered at Companies House and in other specialist registers such as the Land Register for Scotland.

322. The Executive considered the points made by the Commission. It concluded that it was in principle desirable to reform the law to remove uncertainty and to increase transparency and that this would benefit the business community in Scotland.

SLC Recommendations

323. In its September 2004 report, the commission made a number of recommendations for reform covering both devolved and reserved areas. In broad outline the devolved aspects are:

- A new register of floating charges set up and maintained by the Keeper of the Registers of Scotland,
- An option for an ‘advance notice’ which if followed by registration of the charge within 21 days backdates the charge to the date of the notice,
- The text of the charge document itself, rather than just particulars, to be registered,
- Registration to be essential to constitute a floating charge,
- Floating charges generally to rank by date of registration,
- Any variation, assignation or discharge of a floating charge to be registered before it will affect any third party interest.

Floating charge process

324. This Part of the Bill provides in detail for the establishment of a new register of floating charges set up and maintained by the Keeper of the Registers of Scotland. The process for holders of floating charges will be:

- Floating charge to be created on registration in Register of Floating Charges,
- The text of the charge document itself, rather than just particulars, to be registered,
- An option for an ‘advance notice’ which if followed by registration of the charge within 21 days backdates the charge to the date of the notice. Advance notices may only be registered by both parties,
- Any variation, assignation or discharge of a floating charge to be registered before it will affect any third party interest, and
- Floating charges to be discharged by registration of a document of discharge.

Proposals

325. The Executive intends to implement the recommendations of the Commission. The Bill therefore provides for the creation of a new Register of Floating Charges to be administered by the Keeper of the Registers of Scotland.

326. Consequential amendments will be needed to reserved legislation to enable the successful implementation of the devolved parts of the intended reforms. Those amendments include the need to remove the current requirement for unnecessary double registration of some charges.

The UK Government has confirmed that it will provide for the necessary changes in the planned Company Law Reform Bill and in secondary legislation.

327. It is intended that the new regime should also apply to floating charges granted by Limited Liability Partnerships and European Economic Interest Groupings. As the relevant provisions relating to these are contained in statutory instruments (made under, respectively, the Limited Liability Partnerships Act 2000 (c.12) and the European Communities Act 1972 (c.68)), it is anticipated that the amendments necessary to apply the new regime to them would be effected by subordinate legislation.

Alternative approaches

328. The Executive has considered whether the defects identified in the current law could be remedied by any other means. The Scottish Executive joined the DTI at meetings with stakeholders at which the Commission's proposals were carefully analysed. Stakeholders, such as the Scottish banking sector, warmly welcomed the Commission's recommendations which they viewed as appropriate, timely, practical, and beneficial to business.

329. In light of these discussions, coupled with the previous in-depth consultations by the Commission itself, the Executive is satisfied that the proposed reforms provide the most effective remedy.

PART 3: ENFORCEMENT

Aims

330. To improve regulation of court enforcement and delivery of enforcement services (*modernisation theme*), and improve public confidence in the enforcement system (*information theme*).

Policy objectives

331. An effective and well regulated court enforcement system will enjoy public confidence.

332. The objective of the reforms in the Bill is therefore to reform and develop the existing court officer professions by providing a new unified court messenger profession, transferring regulatory functions to a new public body with wide civic participation, and improving the independence and accountability of enforcement and citation professionals.

333. The court enforcement system, primarily the debt enforcement (diligence) system, is not well understood by the public. In some areas lack of reliable information hinders policy development. A further objective of reform is therefore to improve the amount and quality information in and about the enforcement system.

Consultation

334. In the ECOS consultation the Scottish Executive asked:

- should there be a Scottish Civil Enforcement Commission (“SCEC”) with the function of regulating (what is intended to be) the court messenger profession,
- should the SCEC have responsibility for an education and information programme for the public,
- should the SCEC be capable of carrying out other functions,
- should the SCEC comprise judicial interests, legal professional interests, and lay representation, and
- should there be a single class of enforcement and citation officer replacing messengers-at-arms and sheriff officers.

335. The vast majority of respondents to our consultation welcomed the proposal to establish a new public body to deliver closer regulation and accountability of the profession. Respondents also welcomed the opportunity for wider public education about enforcement matters, and in particular to raise the profile of the professions and their role.

336. Some in the profession whilst being supportive of the need for change challenged the perceptions of officer behaviour and activity that had arisen. The proposed functions of the SCEC were welcomed and in particular the wider education and information role for the public. Additional suggested future functions for the SCEC included the;

- provision of money advice,
- accreditation of money advice agencies,
- informal dispute resolution,
- issuing information to debtors on diligence, and
- and making recommendations for further reform.

337. There was strong support for a wider education role and some noted the potential for work in schools, and adult education curriculum where there was a financial theme. The potential use of national publicity campaigns through the media was also suggested.

338. There was majority agreement on the merging of the profession into a single class of officer, although some in the professions wished to retain the historic traditions of messengers-at-arms and sheriff officers.

339. Some respondents noted that there are some cases of informal debt collection activity that is not presently regulated in any way and could come under the regulatory regime of the SCEC. Most debt is defined by a court decree and thereby recovered through the existing enforcement regime, or is consumer debt and collection regulated by the Office of Fair Trading so that industry standards are well developed. It is the debt that falls between these two scenarios where there is concern about poor practice. There is a discussion below on how the proposed SCEC will tackle this later.

Policy discussion

340. There are four areas of policy being developed in this Part of the Bill:

- A new court officer profession,

- A new Scottish Civil Enforcement Commission,
- Regulation of court messenger business activity, and
- Informal debt collection.

A new court officer profession

Policy discussion

341. Court officers have a highly sensitive role. It is rarely good news when an officer:

- serves a summons or citation ordering someone to attend court, or
- breaks open a locked place to remove property to sell it to clear debt under a court decree.

342. They are authorised by the state to use force against property, and are (in a very broad sense) a type of civil police. It is therefore essential that they are, and are seen to be, a properly regulated profession.

343. Traditionally court citation and enforcement has been carried out by the national profession of messengers-at-arms appointed by the Lord Lyon King of Arms, and the 'local' profession of sheriff officers commissioned on a territorial basis by the Sheriff Principal of each sheriffdom.

344. Messengers-at-arms are responsible for the execution of warrants issued by the Court of Session, the High Court of Justiciary and the Court of the Lord Lyon King of Arms²⁸. These officers must be commissioned as sheriff officers, and are empowered to operate across Scotland. Sheriff officers execute warrants of the sheriff court and are authorised to operate within the court area where they have been granted a commission.

345. These enforcement professionals work in the private sector either as self-employed contractors or in partnership, in a similar way to solicitors. Businesses mostly comprise both messengers-at-arms and sheriff officers providing a 'one stop' service. Official functions are the core of such business, but in most cases officers provided other services in the areas of non-court debt management and debt collection. These unofficial functions are often an important part of the business.

346. Officers are currently recruited by the Lord Lyon King of Arms and the Sheriff Principal in each sheriffdom. A professional qualification and examination process has been developed by the professional body known as the Society of Messengers-at-Arms and Sheriff Officers ("SMASO"). Not all commissioned officers are members of the professional body. The training and qualifications of the officers is regulated by a 1991 Act of Sederunt (the name for civil court rules) made under the 1987 Act²⁹.

²⁸ The Lyon Court is concerned with issues of honours, heraldic grants and titles

²⁹ Act of Sederunt (Messengers-at-Arms and Sheriff Officer Rules) 1991 [S.S.I. 1991/1937, amended by 1998/2636 and 2000/30]

347. Complaints about a messenger-at-arms are currently heard by the Court of Session and complaints about sheriff officers are currently heard by the Sheriff Principal. The professional body can also hear complaints, but there sanction is removal from membership rather than loss of the commission. Existing complaints arrangements are neither clear nor well used, and lack credibility as a result.

348. Officers are currently regulated by the 1991 Act of Sederunt which sets out arrangements for:

- qualifications, training and examination,
- applications for commission,
- insurance,
- official and extra-official functions,
- a register of officers of court,
- conduct, and
- discipline.

349. The professional body also has a code of conduct for members and carries out a continuing professional development role.

350. An Advisory Council on messengers-at-arms and sheriff officers was created under the 1987 Act to advise the Court of Session on the making of rules with regard to diligence matters and enforcement officers in particular. There are no formal procedures for its meetings which occur roughly once a year.

351. Concerns about the manner in which some officers carried out their role in executing diligence, and concerns generally about debt collection, were important factors leading up to the ECOS consultation which concluded that there was some evidence for concern about both behaviour and the complaint procedures.

352. The role of the courts and the Advisory Council is considered below in the discussion about the intended SCEC.

353. The Executive considers that some concerns are due to a misunderstanding of the role of enforcement professionals, and are in fact concerns about the creditor's actions or the underlying court decision. Officers were caught up in backlash from the non payment campaign in the 1980's against the community charge or poll tax, and the resentment felt towards those enforcing unpopular taxes. The Executive has drawn two conclusions:

- discipline procedures need to be clarified and strengthened, and
- the public should be better informed about the key role of an independent enforcement and citation profession.

354. There are fewer than 200 active officers across Scotland. The Executive considers that a major source of public misunderstanding is that there are two small professions operating in one sphere of interest. Unifying those professions will greatly help the public in understanding the

role of such officers. The proposed name of “messenger of court” will help to bring home that the unpopular decision that led to enforcement was made in another place.

355. The Executive recognises that the move to a single profession will need to be managed in consultation with the existing professions. The intention is to work with SMASO and the successor professional body to develop transitional arrangements enabling all officers to meet the national court messenger standard. In the transitional period a two tier court messenger profession will mirror the existing functions of sheriff officers and messengers-at-arms.

356. Membership of SMASO is not compulsory, and not all existing officers are members. As a result the professions do not speak with one voice, adding to the uncertainty in the public mind about the role of such officers. Indeed, the professional body has lost some internal credibility. Membership has fallen, and it is becoming difficult to attract fresh talent into the professions. This is in no-one’s interest.

357. The Executive’s proposal for compulsory membership will bring the profession together, and enable the professional body to speak with one voice to Government and stakeholders such as the courts.

358. SMASO and its successor body should continue to have a role in education and training under the direction of the SCEC and will act as a forum for court messengers to come together on professional matters. It will not, however, act as a trade union.

Proposal

359. The Executive intends to create a unified enforcement profession coming under the inspection, regulation and discipline of the proposed SCEC. The Scottish Ministers should also designate a professional body to which all officers must belong.

Scottish Civil Enforcement Commission

Policy discussion

360. The Executive seeks to ensure that the enforcement system is as accessible as possible for debtors and creditors. As well as regulation of the new court messenger profession, there is a job to be done in educating the public on rights and responsibilities before, during and after formal enforcement action.

361. The Executive intends that there should be a new non-departmental public body to be known as the Scottish Civil Enforcement Commission. The role of the SCEC will be to:

- publish guidance on enforcement and diligence,
- regulate the court messenger profession,
- develop a code of practice for court messengers, and
- publish information and other materials about informal debt collection, to promote good practice.

362. The SCEC will comprise a board of judicial and lay interests and be recruited according to the public appointment standards developed by the Executive since devolution. The SCEC will be held accountable for its work through annual reports and published accounts as issued to Scottish Ministers and laid with the Scottish Parliament.

363. The Executive anticipates that the functions of the SCEC will develop over time. Indeed, it should from time to time make recommendations for further reforms and improvements. Scottish Ministers should therefore be able to add and remove functions by order.

364. The appointment system for court officers is at the discretion of local courts and has limitations in terms of geographic coverage. The work of the Advisory Council is, as the name suggests, advisory. It is invisible to the public and adds little to the debate about important issues.

365. The courts and the professional body have their own separate disciplinary arrangements for officers which are not well understood or utilised. The professional qualification for court officers is not fit for modern times, and does little to attract a new breed of young professionals to serve the future needs of the people of Scotland.

366. The proposal that the SCEC should appoint, regulate, and discipline members of the new court messenger profession has been welcomed by all respondents to the consultation. The NDPB model gives a direct accountability to Scottish Ministers and through them to Parliament. However, a high degree of independence and autonomy is also guaranteed. The presence of a commission of broad interests with professional staff to deliver the day to day business is a tried and tested model for:

- the regulation of professional standards, and
- the development of a robust education system.

367. The SCEC should have the functions set out above. Practical examples of expected activities are:

- investigating a complaint about a court messenger,
- holding a disciplinary hearing, and disposing of a case,
- developing regulations on fees chargeable by court officers for official functions,
- carrying out research, on informal debt collection for example, and
- developing publicity and information about the new diligence of land attachment, helping ensure that debtors take proper advantage of the available protections.

368. The SCEC should keep a public register of court messengers so that the public can check who has a commission at any particular time. This will make it possible for the register to track any suspensions or disqualifications following from disciplinary action.

369. The SCEC should hold a public code of practice to which all messengers must have careful regard. The code will build on the code of ethics available to SMASO members, as well as cover professional practice issues as they arise. This will enable full consultation with the relevant stakeholders and allow modification to take account of the changing landscape.

370. The training, examination and appointment process for court messengers will be overhauled, with a greater emphasis on flexible learning to accommodate a broader membership base. Flexibility will also help existing court officers to meet new standards, and address the need to enable non-officers in existing firms to qualify and be brought into the new regulatory regime if they choose.

371. The Bill provides for the regulation of messenger of court and their business interests. The SCEC should have a role in relation to setting of fees and advising on commercial issues that may arise. Provision will be made to clearly set out what activities are acceptable for messengers, and that extra- official activities are covered by disciplinary rules. Conflict of interests will be clearly set out and messengers actions will be voided where there has been a breach.

372. The SCEC should have powers to inspect and investigate the conduct of officers. This will come under the wing of one body for the first time. The SCEC will be able to appoint independent assessors to do this on their behalf. A formal disciplinary hearing can be held, whose work will be overseen by the Scottish Council on Tribunals to ensure that its work is fair and transparent.

Proposals

373. The Scottish Executive intends that there will be a new non-departmental public body, the Scottish Civil Enforcement Commission, tasked with oversight of the court messenger profession and with developing public understanding of the enforcement system.

374. It is intended that the courts will no longer have a direct role in the regulation and discipline of court messengers, and that the Advisory Council on messengers-at-arms and sheriff officers will be abolished.

Regulation of court messenger business activity

Policy Discussion

375. A number of respondents the ECOS consultation raised the issue of how court officer businesses organised themselves. In particular, whether a limited liability partnerships (“LLP”) safeguarded adequately the core principles of independence and impartiality.

376. The 1991 Act of Sederunt prohibits court officers from forming their businesses into limited companies. It is thought that this restriction was put in place so that officers could not limit the financial effect of proven misconduct, and so thought that potential conflicts of interest were avoided. LLPs were introduced after 1991³⁰ and are therefore lawful, but their use raises similar issues as for companies.

377. The Executive therefore undertook a secondary consultation on this particular issue following the close of the ECOS consultation. The Executive concluded for the reasons set out

³⁰ Limited Liability Partnership Act 2000 (c.12)

below that use of a LLP is not a problem, but that there are other areas of current business practice that do need to be reformed in the Bill.

378. If court officers are sole practitioners, or form firms of court officers, then the risk of a conflicting interest is low. A limited company or a LLP can be owned or controlled by any person, thus increasing the likelihood of a conflict emerging. LLPs allow non officers to have a control or management role in the organisation, which some have argued may lead to a lowering of standards.

379. For example, the owners of a company or a LLP can buy (or factor) debt from third parties which is then collected. The owner has a commercial interest in the amount of debt collected, and pressure might be put through a partner of the LLP or a court messenger employed by the business to engage in unfair practices or to give priority to 'inside' cases. This would not be in the public interest.

380. Under current law partners of court officer business whether a LLP or an ordinary unlimited liability partnership do not need to be court messengers, and if they are not then they cannot be held to account for the way they behave. The Executive therefore intends to introduce a requirement that each partner in an officer firm (LLP or otherwise) should be a messenger of court.

381. There will as a result be a need for transitional arrangements allowing existing non-officer partners to qualify as court messengers, or to sell their interest in the business. The Executive intends to develop these arrangements in co-operation with SMASO and the successor body. The Executive is also considering whether to introduce regulatory requirements on non officer members of firms as part of the planned transition to new arrangements.

382. Returning to the issue which led to the secondary consultation, the use of a LLP as a business vehicle, no evidence was offered to prove that limited liability as such is a problem. Other professions such as solicitors are entitled to take advantage of limited liability, and court messengers should have equal freedom. A company will continue to be unsuitable because of the very much greater difficulty of regulating company businesses.

383. Under current law there is little regulation of businesses rather than individual officers, in contrast (for example) to the solicitor profession. The secondary consultation therefore raised other issues about accountability of businesses for official functions carried out by their owners and employees. Court officer businesses handle client money received for official purposes.

384. The Executive considers that the accounts of court officers and their businesses should therefore be subject to greater public scrutiny in the public interest. It is therefore intended that the SCEC will develop and audit accounting standards for officer businesses, and will put in place the safeguards needed to ensure that conflicts of interest are avoided in relation to the official and non official activities of court messengers.

Proposal

385. The Executive intends to improve through regulation standards of accountability and professionalism in court messenger businesses.

Informal debt collection

Policy Discussion

386. An important distinction exists between the collection of debts before a court decree is granted and the formal enforcement of debts that have been legally constituted by the courts. Post decree compulsory enforcement procedures are governed by the law of diligence and overseen at present by the Scottish courts.

387. Informal debt collection can be carried out any stage. It might include letters, phone calls, e-mails and personal visits at home or at work. Such activities are regulated by the Office of Fair Trading for the UK government's reserved interest under the Consumer Credit Act 1974, but only if the debt is consumer debt. Informal debt collection outwith the consumer credit regime is not regulated. That includes:

- commercial debt, including debts of small traders, and
- public debt such as council tax arrears.

388. Most creditors attempt to resolve disputes about debt informally as that promotes good customer relations and saves on enforcement costs. Regardless of the initial approach many businesses rely at some point on external debt collection agencies to recover debt. Some debt collection techniques can be heavy handed.

389. Sheriff officers and messengers-at-arms can apply under the 1991 Act of Sederunt for permission to undertake 'extra-official activities' over and above their role as Sheriff Officers and Messengers-at-Arms. This arrangement is considered to have given rise to the level of discontent about the role of enforcement officers. Complaints about (say) sheriff officers often relate to non-court debt collection rather than any role in enforcing debts that have been decreed by a court.

390. There was widespread support in Executive consultations for the regulation of informal debt collection activities for the devolved interest in Scotland. That would cover two areas:

- informal debt collection carried out by court messengers, and
- informal debt collection by otherwise unregulated debt collectors.

391. The Executive proposed that the SCEC should produce mandatory codes for those involved in currently unregulated activity. It also proposed that the Bill should provide for a clear separation the dual roles of court messengers and regulation of each in order to provide for transparency and clarity in this area.

392. However, the Executive has continued to develop policy since the ECOS and Bill consultations. The UK government has also brought forward a reform of consumer credit

legislation, including reform of debt collection regulation. The Executive is therefore no longer persuaded that further regulation is right at this time as:

- There remains a lack of hard information about informal debt collection practices, and how far they are oppressive or abusive as is sometimes claimed, and
- The effect of implementation of the consumer credit reform should be assessed before regulation in the devolved area is considered further.

393. The Executive has therefore concluded that the SCEC should undertake the research needed to inform the best way forward in the longer term, and until then develop and promote good practice in debt collection as well as in debt enforcement. The Executive will continue to keep under review a more formal role for the SCEC in this area and bring forward modifications to the functions of the SCEC as appropriate.

Proposal

394. The Executive intends that the SCEC will have power to develop and publish a voluntary code of practice for informal debt collection in Scotland.

Alternative approach

Name of new single profession

395. The Bill Consultation proposed that the name of the new enforcement and citation officer profession should be ‘court enforcement officer’. That was in part to align the names of the profession and the new regulatory body. The proposed name was not welcomed by SMASO who suggested that the word “enforcement” had an overly negative association, and did not reflect the broad professional role undertaken beyond enforcement per se.

396. The Executive now proposes ‘messenger of court’. That name:

- maintains an historic and traditional link with the messenger-at-arms profession, and
- emphasises that the court has given authority for enforcement or citation.

397. SMASO has asked the Executive to consider other possible names. The Executive has done so, but does not agree that any other name better conveys an appropriate sense of historical continuity and modern function.

398. In particular, the Executive has considered and rejected:

- Court officer: there are many forms of court officer and it is important that the new profession has a distinctive identity,
- Judicial officer: court messengers are not judges and this name is likely to increase rather than reduce uncertainty about their functions, and
- Citation and diligence officer: conveys little or no sense of what the profession does to the lay person who will not be familiar with these technical terms.

A new public body

399. The Executive considered retaining the present appointment, regulation and disciplinary structures. It decided however that administrative improvements, though possible, would not have necessarily raised the profile of the court officer profession and addressed the often unfounded criticism of the profession.

400. Not having a new public body to underpin arrangements could be seen as discouraging the necessary independence and accountability. The connection with the courts uses resources best deployed elsewhere, and would have meant retaining ties to old and outdated traditions that are at odds with the more modern ethos of service the Executive wishes to promote. The opportunity to undertake wider public education would have been lost, as that function is not one for the courts or indeed private persons in the professions.

PART 4: LAND ATTACHMENT AND RESIDUAL ATTACHMENT

CHAPTER 1: ABOLITION OF ADJUDICATION FOR DEBT

Aims

401. To repeal the old and ineffective diligence of adjudication (*modernisation theme*).

Policy objectives

Background

402. The diligence of adjudication was developed both in pre-Union Acts of the Scottish Parliament and by the common law. There are 3 types of adjudication in respect of debt:

- adjudication for debt,
- adjudication in security, and
- adjudication on a *debitum fundi*.

403. All forms of adjudication are either uncommon or obsolete, although adjudication for debt was at least developed to meet key needs in any fully developed system of court enforcement:

- a diligence against land and buildings, and
- a residual diligence available as a last resort for creditors.

Adjudication for debt

404. Adjudication for debt was introduced by the Adjudications Act 1672³¹. It gives the creditor a security over 'adjudged' property, usually but not always land belonging to the debtor. The other main example is thought to be intellectual property. The security can be converted by a second court decree into a right of ownership after a defined period. This is the reason that the abolition of adjudication and the creation of the new diligences of land attachment and residual

³¹ Acts of the Parliament of Scotland, 1672 c.45.

attachment are dealt with as the three Chapters of Part 4 of the Bill. Land attachment and residual attachment are together intended to be a full replacement for adjudication.

405. A decree or document of debt doesn't authorise adjudication. A creditor with an outstanding debt needs to raise an action in the Court of Session specifying the property to be adjudged. If decree is granted the creditor will normally get a real right in security (good against the world) by registering the decree in the property registers.

406. The adjudication then enables the creditor to remove the owner, grant leases, or if the land is let seize the rents through the separate diligence of 'maills and duties'. The security does not, however, entitle the creditor to sell the property.

407. If the debt is paid, either directly or (say) by attaching the rents under a lease, then the security is discharged. If after ten years (a period known as 'the legal') any of the debt is outstanding then creditor may go back to the Court of Session with a second action (or third, if maills and duties has been used) for a declarator of expiry of the legal. If granted the creditor becomes the owner of the property (foreclosure) and can then sell the property without having to account for any surplus.

Adjudication in security

408. Adjudication in security is like adjudication for debt, but the action is raised seeking a security not for a due debt but for a future or contingent debt that will or may become due. It is, broadly speaking, the diligence on the dependence that has developed from adjudication for debt. The Executive considers that it is more helpful to discuss policy considerations in this Part of the Memorandum rather than in the discussion on diligence on the dependence in Part 6 below.

Adjudication on a debitum fundi

409. Adjudication on a *debitum fundi*³², or 'real adjudication', is a diligence against land and buildings where the creditor's debt secured upon that land. The typical examples are feu duty and debts secured by a heritable security such as a standard security (mortgage).

410. This diligence is now obsolete since creditors always have a better means available of enforcement such as calling up the security. Where (say) a feudal superior wished to take action before abolition of the feudal system they would have 'irritated' (cancelled) the feu.

Objective

411. To ensure that all forms of adjudication used to secure or enforce debt are repealed, either in this Part or elsewhere in the Bill.

Consultation

412. The Scottish Law Commission sought views on whether to retain or reform adjudication in their 1978 discussion paper *Adjudication for Debt and Related Matters*, (SLC DP No 78),

³² That is a debt already legally secured on particular land or buildings.

(1987) and their 1999 discussion paper *Diligence against Land*, (SLC DP No 107). There was universal agreement that the diligence of adjudication for debt should be abolished.

413. Most respondents assumed that adjudication would be replaced land attachment and residual attachment. Some respondents were concerned that a more effective form of ‘adjudication’ would be unduly harsh on debtors. These issues are considered in the discussion in Chapters 2 and 3 of this Part of the Memorandum.

414. In their 2001 *Report on Diligence* [SLC No. 183] (“the 2001 Report”) the Commission therefore recommended that:

- The diligence of adjudication should be abolished, and
- The Register of Inhibitions and Adjudications should be re-named the
- Register of Inhibitions.

415. In the ECOS consultation the Executive stated that it intended to implement the Commission’s recommendations, and invited comments on the proposed reform. The responses were generally in accord with those made to the Commission. General support for abolition, but some reservations about what if anything should replace adjudication.

416. In the Bill consultation the Executive confirmed that it intended to proceed with the abolition of adjudication, and that the necessary provision would be made in the Bill.

Policy discussion

Defects in adjudication

417. The Executive considers that all forms of adjudication used for recovery or security of debt are part of an old and clumsy diligence. Adjudication is unjust in different ways to both creditors and debtors. In particular:

- in general the law on adjudications is old, obscure and unfair,
- the creditor has to wait 10 years before land can be sold to pay the debt,
- the debtor and his family can be forced out of their home immediately,
- the full procedure involves two complex and expensive Court of Session actions,
- a separate action is needed before any rent due to the debtor is paid to the creditor,
- on foreclosure after 10 years the creditor has no clear duty to account to the debtor for the value of the property, and the debt is not reduced by that value, and
- a large estate can in principle be adjudged for a small debt.

Proposal

418. The Executive intends to abolish all forms of adjudication for payment or security of debt, either in this Part or in Part 6 where the Bill reforms diligence on the dependence. Given that, the present Register of Inhibitions and Adjudications should be renamed as the Register of Inhibitions.

Alternative approach

419. The Executive did not consider it necessary to fully consider any alternative to abolishing adjudication, such as retaining and reforming the diligence. In one sense, land attachment and residual attachment taken together are a reformed type of adjudication.

CHAPTER 2: LAND ATTACHMENT AND SALE

Aim

420. To ensure that an effective diligence can be used against land, making it harder for ‘won’t pays’ to avoid their debts (*removing barriers to business theme*).

Policy objectives

421. Adjudication for debt is the diligence, or more exactly court procedure, currently used to attach title to or over land and buildings registered in the Register of Sasines or the Land Register for Scotland (“the property registers”). It is intended that adjudication for debt will be abolished.

422. The law should provide a remedy for creditors to use against all forms of property. The Bill will introduce a new diligence of land attachment with the objective that a real right in land held by the debtor can be realised to pay debt.

Consultation and responses

423. The Scottish Law Commission carried through an intensive programme of research, analysis and consultation before recommending the creation of a new diligence of land attachment. Four discussion papers on this and related issues were published, namely:

- *Adjudication for debt and Related Matters* (SLC DP 78) (1987),
- *Equalisation of Diligences* (SLC DP 79) (1987),
- *Diligence Against Land* (SLC DP 107) (1989), and
- *Attachment Orders and Money Attachment* (SLC DP 108) (1998).

424. The Commission recommended in the 2001 Report³³ three linked reforms that build on the academic and public responses to their work in the four discussion papers. They are:

- Abolition of adjudication for debt,
- A new diligence of land attachment and sale (or land attachment for short), and
- A new diligence of attachment orders (now known as residual attachment).

425. The Commission recommended in the 2001 Report that land attachment should attach the debtor’s home. It did not however recommend that land attachment should, or should not, enable sale of a home for payment of debt. It noted that this particular issue raised the strongest concerns amongst those who responded to the discussion papers. It took the view that providing

³³ *Report on Diligence* (SLC 183) (2001)

a power of sale for homes was not a technical issue for the Commission, but rather a policy issue for the Executive.

426. In the ECOS consultation the Executive stated that it intended to introduce a new diligence of land attachment. Consultees offered general support, qualified by concerns that the intended diligence would have an unduly adverse impact on debtors if homes could be either attached or sold. Such comments generally echoed the concerns expressed to the Commission.

427. The draft Bill which was subject to consultation included a Land Attachment Part which provided for the attachment and sale of all land and buildings including the debtor's home. The provision in this part of the final Bill builds on that draft and takes into account technical comments by a property law expert appointed by the Executive, and issues discussed at meetings with stakeholders such as Shelter and Citizens Advice Scotland. In particular, the Bill as introduced extends the range of debtor protections available when an attached home is at risk of sale.

Policy discussion

Overview

428. The Scottish Executive considers that the new diligence of land attachment should be used in execution of a debt constituted by decree or document of debt. For that reason the diligence should only be competent if the debtor has been:

- Charged, and failed, to pay the sum due, and
- Provided with a copy of the Debt Advice and Information Package.

429. The new diligence should work along the same general lines as other diligences. There should be therefore be:

- A qualifying decree or equivalent,
- An attachment stage, and
- A sale or realisation stage.

430. A creditor will need a decree or equivalent in order to use land attachment. In particular, land attachment should not be available on the dependence of a court action. Inhibition on the dependence will restrict the right of the debtor to dispose of land or buildings, but inhibition has a limited effect on all land and buildings belonging to the debtor and should not therefore be seen as a form of 'interim' land attachment.

431. The diligence should attach a specific real right either owned outright or in common in land and buildings, such as ownership of a factory or a long lease over a shop. A real right is good against the world, in contrast to a personal right which is only good against a particular individual. At the attachment stage creditors should themselves acquire a real right in security for the debt owing by the debtor over the particular property specified in the notice.

432. Attachment should not need to be followed by sale. The creditor has a real right, and therefore will need to be paid when the property is sold or disposed of as otherwise the diligence

could be enforced against the new owner. If the property is not sold or disposed of then the creditor will have a preference over unsecured creditors in any competition for payment such as takes place in a sequestration.

433. A reasonable time should elapse before attachment is followed by sale, if that is the case. Further, the creditor should not be able to sell the attached land without first obtaining authority to do so from a sheriff. In this way debtors will have a chance to pay the debt, or to give themselves breathing space by stopping the diligence by (say) entering into debt payment programmes under the Debt Arrangement Scheme.

434. An application for authority to sell should not be made until at least six months from the date of registration of the attachment notice. In deciding whether to agree a sale the sheriff would have to be satisfied that the attachment was competent, and to consider how far a sale is in the interests of the debtor and connected persons.

435. Arrangements for the sale of attached property would be made by an independent person appointed by the sheriff. This 'appointed person' should be someone of professional standing such as a solicitor or a surveyor. The debtor would, of course, have to leave the property. If the property proved difficult or impossible to sell or realize then the court should be able to order 'foreclosure', that is the debtors interest will be transferred to the creditor in satisfaction of the sum secured by the attachment.

436. The Executive considers that this two-stage model of land attachment is a proportionate balancing of the interests of debtors and creditors. The first stage gives the creditor a security over the debtor's land, but the debtor is still able to use and occupy the land. The second stage raises the risk that the property will be lost, and will impact on the debtor. It should not go ahead unless the court is satisfied that the debtor's interests have been considered.

A diligence against land

437. Adjudication for debt is the existing diligence against land. The Scottish Executive considers that it should be abolished for the reasons discussed above for Chapter 1 of Part 3 of the Bill. It does not, however, follow that adjudication should be replaced by a new diligence against land.

438. There are eight concerns put by respondents to the Commission and the Executive about the introduction of a diligence against land are that:

- It would be used more leading to an increase in homelessness and to higher social costs falling on the public purse,
- It would have a harsh effect on any debtor made homeless by eviction and sale, possibly to pay a relatively small debt,
- The cost of a compulsory sale would be relatively high, and may increase the debt unduly without much benefit to the creditor,
- Creditors have in inhibition a diligence against land, and can also sequester, and don't need a new diligence,

- Using the diligence might encourage competing creditors to sequestrate or liquidate the debtor,
- Creditors would threaten, perhaps in an untruthful or excessive way, to sell homes and businesses,
- Using the diligence might prejudice buyers if the creditor can overturn a binding contract for sale, and
- It would turn unsecured debt into secured debt without affecting the interest rate paid.

439. The Executive has considered each of these concerns, in order to assess whether any of them is a compelling argument against having a diligence against land.

Homelessness and other harsh effects

440. The Executive fully expects that a new diligence against land will be used more often than the existing diligence. There would be little point in introducing land attachment if it were not used more frequently than adjudication, as the reformed diligence would then be as difficult to use as the one it replaced.

441. Many of those opposed to a new diligence against land argue that the expected greater use of land attachment will increase homelessness. The Executive takes this concern very seriously. It is therefore important to keep in mind that any arguments concerning homelessness are not arguments against a new diligence as such. There is no risk of homelessness where the land to be attached is used for commercial purposes, or a dwellinghouse is a holiday home.

442. Furthermore, the intended new diligence has an attachment stage and a sale stage. Allowing dwellinghouses to be subject to the attachment stage would have the effect that a new security could be created over a home. By itself a security does not deprive the debtor of the right to continue to live in their home. The security does however protect the interest of the unpaid creditor.

443. The risk of homelessness therefore only arises when the creditor applies to sell attached land. It is in the view of the Executive likely that those who use homelessness as a general argument against a new diligence against land are concerned that it would be:

- Too easy to sell the a debtor's family home, or
- That it would be too difficult to define the type of dwellings which should have special treatment at the sale stage.

444. However, the Executive does not accept either view. It is possible in principle to strike the right balance between creditor remedy and debtor protection. There are well established procedures in Scots law that enable the courts to balance the competing interests of creditor and debtor where a home is at risk of sale. The Mortgage Rights (Scotland) Act 2001³⁴ is a useful example as standard securities can secure loans over all types of land, but the special protections against eviction under that Act are only available for dwellinghouses.

³⁴ 2001 asp 11.

445. The Executive does not therefore accept that having a more effective diligence necessarily results in use of that diligence being harsh for debtors or increasing social problems. What is important is that the effectiveness of the diligence is balanced by the robustness of the protections against harsh or excessive use. A proper concern about the impact of land attachment on homelessness is not therefore a good argument for having no diligence at all.

Excessive costs

446. It is the case that realising a security against land will have higher costs than most other diligences, due to the need to pay (say) a solicitor to convey land on sale. It is also the case that those higher costs will be added to the debt. However, the costs are only significantly higher at the sale stage and a property can only be sold once. The Executive considers therefore that this concern can be resolved by providing that a sale will only be possible where it is likely that the debt will be reduced.

Other suitable alternatives: inhibition and sequestration

447. It is the case that an unsecured creditor can inhibit or (in most cases) sequester for a debt. It also does not follow that there is no technical or conceptual need for a free standing diligence against land. In particular it is important to appreciate that inhibition, offered by some as a 'softer' alternative to land attachment, is not by itself an effective diligence against land. It is also right in principle that there should be a diligence for all kinds of property including land.

448. Inhibition is a freeze diligence. It is a personal bar against dealing with land and to the prejudice of the creditor. If the debtor breaches the inhibition by (say) a sale then all the creditor can do is to ask the court to reduce (cancel) the conveyance, and even then only for the purpose of adjudicating for the debt. The reduction itself does not give the creditor any right to the land. If land attachment doesn't replace adjudication as a diligence against land then inhibition would be worthless, as it would have no teeth.

449. It is important in considering the need for a diligence against land to appreciate the different roles of the diligence and insolvency processes. Diligence is concerned with a dispute between two parties, a creditor and a debtor. Diligence gives a creditor a range of tools for attaching a debtor's assets, with a view to sale or other realisation to pay off the debt. The debtor may be a 'won't pay', 'could pay', or 'can't pay'.

450. The starting point in an insolvency is that a debtor is a 'can't pay'. Sequestration (say) is not about payment of debt to one creditor, but about dividing up what assets there are so that all creditors a fair share of the (usually small) pot. The purpose of a legal process against land is to enforce a debt where the debtor is not insolvent. Liquidation (say) does not therefore sit alongside diligence, but replaces it for the benefit of all of the creditors of a particular debtor.

451. The Executive therefore considers that insolvency should neither be seen nor used as a diligence against land. Neither the 'won't pay' nor the 'could pay' debtor should be sequestered because there is no alternative to bankruptcy. The 'won't pay' debtor should be taken to accept the risk of losing land, even if that land is their home. The 'could pay' debtor on the other hand should not be forced into sequestration, and while they may need some protection from eviction

if the land is their home that itself is not an argument against the creditor having security for the debt.

Perverse incentive to sequester or liquidate

452. It has been said that if any new diligence against land is (unlike adjudication) used frequently then other creditors are at risk of a major asset being put beyond their reach. Widespread use of land attachment might therefore induce non-attaching creditors to sequester or liquidate a debtor, thereby unduly increasing the number of insolvencies. Indeed, there is a further incentive to make the debtor insolvent as the Executive considers that a land attachment within six months of (say) a sequestration would be ineffectual against the trustee in sequestration.

453. It is therefore helpful to keep in mind that a creditor who sought to make a debtor insolvent in these circumstances would in fact be behaving rationally. Widespread use of diligence against one debtor, whether land attachment or anything else, is likely to mean that the debtor in question is a 'can't pay'. If that is the case then insolvency is the way for all creditors to get a fair share of the pot. Indeed, that is the reason that the Executive considers that a sequestration should over-rule a land attachment.

454. It should also be kept in mind that, on the other hand, there will be cases where having land attachment in the 'tool kit' will help avoid the harsh effects of (say) sequestration. If there is no diligence against land then the only way for an unsecured creditor to force a sale of land to satisfy debt is through insolvency.

455. The Executive therefore considers that no case has been made out that land attachment will increase insolvencies, and that having a diligence against land will if anything decrease the risk of bankruptcy. As one experienced lawyer observed on consultation:

"I agree that there is a considerable need for a method of enforcing debt against [land]. With very little thought I can bring to mind a number of sequestrations in which the sole purpose of the exercise was to allow the sale of [land] owned by the debtor or debtor company. It seems inappropriate that such a radical step should take place for such a limited purpose. In addition why should a creditor be required to take steps which bring in other creditors purely to seize a particular asset?"

Excessive threats by creditors

456. Most people pay their way, and never fall into problem debt. Most creditors behave responsibly and have a balanced approach to debt recovery. The Executive accepts even so that some creditors will lie about or exaggerate the effect of non-payment, and that the risk of homelessness is particularly emotive for debtors.

457. The risk of excessive or coercive threats of homelessness is not limited to diligence against land, as similar behavior is associated with (say) threats to bankrupt a debtor. The Executive considers that this risk is not unique to land attachment, and that it is not therefore a good argument against a new diligence. What is important is that the debtor has access to good and reliable information about the risk of non-payment.

458. Indeed, better information about enforcement is one of the main themes of reform in the Bill. It is intended therefore that the Debt Advice and Information Package will have to be provided to the debtor before a land attachment is competent. The DAIP will explain the effect of all the intended new diligences including land attachment, and will tell the debtor where they can to get free local money advice.

459. It is also helpful to keep in mind that a license from the UK Office of Fair Trading is needed to provide or collect consumer debt. Excessive or untrue threats by licensees are likely to be a breach of license, and can therefore be investigated by trading standards officers or indeed the OFT. A money adviser can assist with this, and indeed the other remedies available under UK legislation such as a time order (a diligence stopper) under the Consumer Credit Act 1974³⁵.

Risk to binding contracts

460. Another concern about a diligence against land is that land which is the object of a contract for sale to a third party could be attached. The effect of that would be that the land attachment would over-rule the right of the buyer. This concern, like the concern about homelessness, has force. Even so, the Executive does not regard it as a good ground for having no diligence against land. It regards it as a technical problem with a technical solution.

461. A land attachment would be a new risk, but not a new kind of risk. It is already the case that the selling debtor could have fraudulently sold the land to more than one buyer, or granted a new mortgage over it, or indeed have gone bankrupt. Intending buyers protect themselves against existing risks by searching various public registers. These include the Property Registers, the Personals Register, and the Register of Insolvencies.

462. The Executive considers that land attachment should be registered in the Property Registers, and that there should be a minimum six month delay before any sale is possible. The buyer will have a general protection as a search will show any land attachment registered in the past 6 months, which will make it possible for the buyer either to pull out of the purchase or to make an arrangement with the attaching creditor. The buyer should also be able to ask any court³⁶ that may order a sale for a chance to complete a purchase by paying the agreed price to the creditor.

463. Any search is historic, that is to say it is a record of entries at a particular time. There will be a risk that a search will not show a very new land attachment even if it is delivered minutes before the price is paid. Again this is not a new kind of risk, as the same is true for (say) registration of another title if the land has been sold to more than one buyer. Solicitors therefore give a personal guarantee³⁷ that the land will be registered in the buyer's name if the title is registered in the Property registers within a short period.

464. This guarantee is in principle capable of covering land attachment. The Executive considers that the law should provide some protection where buyers and sellers use good practice, and are not at fault. A land attachment should therefore be effective 28 days after it is

³⁵ 1974 c.39.

³⁶ By lodging a document known as a 'caveat' with the court in question.

³⁷ Backed by insurance cover arranged by the legal profession.

registered in the Property Registers (and will be revealed in a search). There will therefore be a gap between registration and effect in which pending sales can be completed.

Securing unsecured debt

465. In most cases creditors charge more for an unsecured loan. This is in part because they are taking a higher risk that the loan will not be repaid, and compensates them for the greater exposure to loss over the whole of their loans 'book'. It has therefore been said that it is unfair that creditors can use a diligence against land to get both a 'high' interest rate and a 'low' risk of non-payment.

466. The Executive is not persuaded that this is a good argument against reform, for three reasons. First, interest rates are set in a highly competitive credit market. There is no simple (or single) mechanistic relationship between security offered and interest rates.

467. Second, interest rates are often only the most visible part of the price paid for credit. In many cases charges and other contracted payments contribute greatly to the cost.

468. Third, there is no simple relationship between the security (attachment) and payment. Diligence is used when a debt is outstanding. The creditor, in particular, has not chosen non-payment no matter what the interest rate is. The creditor must still run the risks that:

- There is no free value (equity) in the land,
- The debtor is sequestrated or liquidated, or goes into some other form of insolvency, or
- A sale is refused.

A new diligence of land attachment

469. The Executive is therefore satisfied that there is no compelling argument against having a diligence for land. In contrast, there are three compelling arguments in favour of the proposed diligence of land attachment:

- universal attachability,
- simplification and rationalisation of the law, and
- having the proper balance between diligence and sequestration.

Universal attachability

470. The Executive considers that the main, indeed convincing, argument for land attachment is the principle of universal attachability. The general principle of universal attachability has wide recognition both in Scotland and in an international context. For example, the Royal Commission on Legal Services in Scotland maintained that³⁸:

“Where the debtor has some resources at his disposal it is obviously important that our system of justice provides a reasonably efficient means for the creditor to gain possession of whatever proportion of them is needed to extinguish the debt.”

³⁸ Report of the Royal Commission on *Legal Services in Scotland* (1980) Cmnd 7846, also known as the Hughes Report.

471. Land is a resource, and an important and valuable resource at that. It should therefore be subject to an effective process for recovery of debts owed to a creditor.

472. The principle of universal attachability does not of course mean that no property can ever be exempt from diligence. The concerns about a new diligence against land have been considered above, and in the Executive's view most of these arguments are about what should be exempted rather than the general principle that attachment is competent.

473. In particular, the concerns spring mainly from an understandable desire to protect debtors from the distress of attachment or the hardship that may follow sale of or foreclosure on a family home. As discussed above these concerns are not a good argument against a diligence as such. It is also important to keep in mind that a debtor liable to enforcement of any kind is, sadly, already at risk of unavoidable hardship and distress.

474. The Executive considers that land attachment should strike the right balance between effective recovery for creditors and effective protection for debtors against undue hardship. As a starting point, land attachment as a diligence will be linked to significant debtor protections not in the Bill such as the three existing 'diligence stoppers' including the Debt Arrangement Scheme for people with multiple debts.

475. The Executive intends that the Bill will then go further and introduce robust debtor protections specific to the diligence:

- The sum secured must be at least £1500³⁹,
- Attached land cannot be sold unless a sale is likely to reduce the amount of the debt,
- The sheriff can refuse or delay warrant of sale if a sale would be unduly harsh,
- Costs can only be recovered by the diligence and will not therefore add to the general amount of debt, and
- If the land is a home, the sheriff must consider the family circumstances including their ability to find somewhere else to live.

Simple and rational

476. There should be a diligence against land, and the existing process of adjudication is lengthy and complex and of unclear effect. Reform of adjudication was therefore strongly supported in consultation. A new statutory diligence of land attachment will set out a simple and rational process that will bring much needed clarity to this challenging area of law and policy.

Sequestration and diligence

477. The links between diligence and sequestration are considered above in the discussion about creating a new diligence against land. This is however a very important issue, and therefore worth recapping here as a key argument in favour of the proposed diligence of land attachment.

³⁹ The sum secured is not the same as the original debt, whatever that is, as it includes qualifying interest and costs.

478. In sequestration the "whole estate" of the debtor vests in the trustee in sequestration for the benefit of the creditors. Insolvency is not designed to enforce debt, and will usually produce a poor return for the individual creditor. However, a poor return is better than no return. If land is subject to sequestration or liquidation, but not to any diligence, then the effect would be that a creditor has no option but to use an inappropriate and expensive insolvency process to 'enforce' the debt on the debtor's land.

Effect of land attachment

Nature of land attachment

479. To be effective, a land attachment should be good against the world including of course the other creditors of a debtor. As discussed above it should be a 'real' as opposed to a personal right.

480. In most cases a real right is created when the interest in question is registered in an open public register. This is the case for land where real rights must be recorded in the property registers. A land attachment should therefore be registered in the appropriate property register.

481. The question then is what kind of real right land attachment should be. The classic real right is outright ownership of land, but there are other lesser or subordinate real rights. The two most important examples are registered (or 'long') leases and standard securities (mortgages). Land attachment is not ownership and so should therefore be a new form of subordinate real right.

482. Land attachment is different from other forms of real right in that it doesn't stand by itself. It will rather attach existing real rights in land belonging to the debtor. The question then becomes what kind of real rights should be capable of attachment. This is a question of some importance for the attaching creditor as even subordinate real rights belonging to the debtor may be of considerable value. A lease or a standard security represents an income stream for the 'creditor' debtor.

483. There are generally considered to be 5 subordinate real rights. They are:

- Registered leases,
- Heritable securities,
- Servitudes,
- Real burdens, and
- Proper liferents.

484. Three of these subordinate rights are not capable of being held separately from the land to which they relate. As servitudes, burdens and liferents can't be sold or transferred they shouldn't be subject to attachment given that it would only have a nuisance value.

485. A right in a lease although subordinate can be very similar in effect to outright ownership. Indeed the tenant's interest in a lease can be sold, sometimes for a substantial premium. The landlord's interest of course flows from the underlying real right of ownership.

The Executive considers that as lease interests can be sold or realised they should be capable of attachment.

486. Only certain kinds of leases are registered. In particular:

- Leases can only be registered if they are for 20 years or longer⁴⁰, and
- Residential leases must be for up to 20 years⁴¹ and no longer and therefore can't be registered.

487. All long leases created since 1974 are therefore for commercial purposes of one kind or another. There are however still some older long residential leases which are registered and will therefore be liable to attachment. Applications for sale or realisation of such leases should be covered by the provisions on the sale of homes where appropriate.

488. Heritable securities, almost invariably standard securities, are held separately. They are amenable to attachment. The Executive has therefore considered whether they should be attached, but has decided against that for the important practical reason that, unlike leases, there is no ordinary market for the creditor's interest in the security. Where securities are traded it tends to be done commercially and on a large scale⁴².

Registration of land attachment

489. A land attachment should not be effective on the day that it is registered in the property registers, to avoid cutting across conveyancing transactions for the reasons discussed above. The Executive considers that a Notice of Land Attachment should be registered, and then intimated to the debtor within 28 days after the date of registration. Provided this is done the land attachment will be created at the start of the 29th day registration.

490. The 'waiting' period should be whatever is reasonably needed to allow a binding sale to be completed. At the time of the Bill consultation the Executive thought that 14 days was a reasonable period given then current practice. Since then completion (or 'settlement') of sales has taken longer because of changes in stamp duty procedure. The Executive now considers a 28 day waiting period to be reasonable.

491. The waiting period is intended to protect people acting in good faith. It should not allow debtors to avoid the attachment by selling land, or entering into a binding contract for sale (or 'missives'⁴³). Land attachment should have limited effect in the 'waiting' period, and this can be achieved in two ways:

- By making the attachment the equivalent of an inhibition on registration, so that a sale in the waiting period can then be overturned, and

⁴⁰ See section 18 of and paragraph 1 of Schedule 6 to the Land Tenure Reform (S) Act 1974 c.38.

⁴¹ See section 8 of the said 1974 Act.

⁴² For example, through 'securitisation' where (say) a Bank putting together a bundle of assets backed by heritable securities and selling the debt, in effect the income stream, to investors. The investors get a security over the assets through (say) a floating charge.

⁴³ 'Missives', because the contract is agreed by solicitors exchanging as many letters as are needed to set out the details of the agreement.

- By providing that leases in the waiting period can be overturned.

Ranking of land attachment

492. A creditor should not be able to use land attachment to jump ahead of other creditors who were there first. The order or ranking in which debts are paid should be preserved. Equally, a land attachment will be a real right in security and any creditors who come later should not be able to jump ahead of the attaching creditor.

493. This is most likely to be an issue for existing mortgages. The Bill should therefore allow for the creditor to be able to serve the Notice of Land Attachment on an existing security holder, such as a bank or building society. If this is done then (say) the Bank will only have a claim to their existing debt. If the land is sold that debt will be paid first, and any balance will go to pay the debt due to the attaching creditor.

Land attachment process

494. Most of this Part of the Bill provides in detail for the process of land attachment and sale or foreclosure. It is intended that the process of land attachment from the debt being established to payment on behalf of the debtor will be:

- Decree or document of debt authorises the diligence,
- Creditor provides debtor with Debt Advice and Information Package,
- Court messenger instructed by creditor,
- Charge to pay served by court messenger, and debt not paid,
- Notice of land attachment registered in property and personal registers,
- Land attachment created 28 days after Notice registered,
- Sale applied for 6 months after Notice registered,
- Preliminary hearing on sale application,
- Supporting evidence lodged with court—
 - valuation report,
 - up to date property search, and
 - redemption statement for existing secured loans,
- Full hearing on sale application,
- Appointed person markets and sells property,
- Sale price applied to all applicable debts including attached debt,
- Appointed person reports to court on sale, and
- Court audits the report.

495. Where the land cannot be sold it is intended that the appointed person may ask the court to grant decree of foreclosure at a value to be fixed by the court. The court may order the land to be re-valued and offered for sale at auction, but if satisfied that foreclosure is appropriate will grant decree to that effect. The creditor may then register the decree to become the outright owner.

496. The Executive considers that debtors and third parties affected by land attachment should be confident that any sale is for the highest possible price. The court should therefore consider a valuation of the land prepared by a chartered surveyor or equivalent appointed by the court

before it can approve a sale. Any sale that is approved should be carried out by a solicitor appointed by the court. The appointed person should be an officer of the court, and therefore independent of a person with a direct interest in the price.

497. The process should protect the debtor from the effects of harsh or excessive diligence, as discussed above. Further protection is needed if the land is the home of the debtor or a connected person such as a:

- Husband or wife,
- Cohabitee,
- Civil partner,
- Same sex partner, or
- Former partner looking after a child of the debtor.

498. In such cases the Executive considers that the court should have regard when deciding whether to approve a sale application to:

- The availability of other accommodation,
- Any help offered by the creditor,
- The nature of the debt, and
- Whether suspending any sale for up to a year will make it easier to pay the debt.

499. The court should be able to refuse a sale application if on balance it is persuaded that it is not appropriate. The creditor will still have the benefit of the attachment, and can apply again at a later date when the balance of convenience may have changed.

500. Annex D illustrates the main stages of a land attachment leading to sale and foreclosure respectively.

Cessation of land attachment

501. It is intended that land once attached may be released from the attachment in several ways. They are:

- The debtor dies after Notice of Land Attachment is registered but before the attachment is created,
- Payment or tender of the sum recoverable (debt, interest, expenses) to the creditor or their representatives,
- The sheriff recalls or restricts a land attachment where satisfied that it is—
 - invalid,
 - executed incompetently or irregularly,
- an excessive security for the debt.

Miscellaneous

502. The Executive considers that the creditors' expenses in completing the land attachment process as shown in Annex D.

503. The debtor may make one or more payments towards the sum due during the course of an attachment, or the money attached may not be enough to satisfy the debt. The Executive considers therefore that the Bill should provide for the order in which payments to account are applied, or ascribed, to the sum due are. The order should be:

- Expenses of the attachment,
- Interest on the debt up to the date of attachment, and
- The sum due with interest since the date of attachment.

504. The Executive considers that each land attachment should have a limited life. If not, 'spent' land attachments that no longer secure any debt will appear in the property registers. A land attachment should therefore last for 5 years and be renewable for further 5 year periods, provided that each notice of renewal is registered in the 2 month period leading up to the next expiry date.

Proposal

505. The Executive intends that there will be a new diligence over land and buildings, to be known as land attachment and sale. It is intended that a qualifying decree or document of debt will authorise the attachment of land by court messenger, and following a sale order made by the sheriff either payment from the sale proceeds of the sums due to the creditor, or foreclosure of the land in favour of the creditor.

Alternative approaches

Amount of debt authorising diligence

506. The Executive considered two issues relating to the amount of debt needed to authorise attachment and sale, namely whether there should be:

- A debt threshold for attachment, and
- A different debt threshold for sale or realisation.

Attachment threshold

507. The Bill does not provide for attachment to be limited to debts of a specified amount. This means, for example, that creditors in small claims (currently up to £750) or summary cause (currently up to £1500) can attach land to secure payment. Such a creditor may not be able to sell or realise the land if the debt is lower than the sale threshold.

508. The Executive considered whether land should be subject to attachment but not sale, as in general a diligence should not start unless it can be completed. The Executive decided that in this case the apparent anomaly can be justified. In that respect it is important to keep in mind that:

- A 'small' debt may be of great importance to the creditor,
- All debts large and small should in principle be paid, and
- Attachment by itself is a valuable security, and will increase the prospect of payment in the medium term.

Sale threshold

509. The Bill sets at £1500 the level of debt needed before a sale can be approved. This is intended to protect the debtor against sales for trivial sums, particularly as there is no threshold for attachment. The Executive considered whether this sum strikes the right balance between creditor payment and debtor protection.

510. A sale or realisation under a land attachment is a serious business, particularly if a home is involved. Other things being equal that the serious nature of a sale would justify a higher debt threshold. The Executive considers, however, that other things are not equal. In particular due regard must be had to the debt threshold for sequestration currently set at £1500.

511. The Executive considers that one of the 3 main arguments in favour of land attachment is that it will replace inappropriate sequestrations. In order for that benefit to be realised there must be a link between the attachment and sequestration thresholds. If it is easier to get sequestrated, say because the debt threshold is lower, then creditors will have an incentive to opt for insolvency. The Executive did separately consider raising the sequestration threshold from £1500, but respondents to the Bankruptcy consultation were against that.

512. The Executive has therefore decided to set the land attachment and sequestration thresholds at the same £1500 amount. However, the Executive recognises that some flexibility is desirable here. It is intended that the sale and sequestration thresholds can be changed by regulations, and the position will be reviewed as part of the implementation process.

Attachment against uninfert owners

513. Our starting point for diligence reform is that all forms of property should be realisable by creditors enforcing decrees or their equivalents. The SLC called this the principle of universal attachability. It is a principle rather than a policy, and a judgement must be made as to whether a practicable remedy can be developed in the particular circumstances.

514. The Executive therefore considered whether the right of an uninfert⁴⁴ owner of land should be attachable. An uninfert owner has a personal right to land, if they–

- Have agreed missives to buy the land from the owner of the real right, or
- Can get a real right by recording a Notice of Title founded on (say) a bequest in a will.

515. The uninfert owner may indeed have paid the price and have a conveyance, but have no real right because the deed is not recorded or registered in the appropriate property register. The value of uninfert rights can be significant, and they can be realised by the owner. For example, a purchaser under missives can sell on their personal right without first acquiring a real right by registration of a conveyance.

516. No current diligence can attach the personal right. It would in principle be possible to extend the new diligences of land attachment or residual attachment so that they do attach such

⁴⁴ The person is not infert in the land, an old feudal term (although still in use) meaning that the owner has a real right good against the world.

rights. The Executive therefore considered whether land attachment should extend to uninfert rights in land in accordance with the principle of universal attachment.

517. However, the Executive has decided that this conceptual gap is not in fact a significant problem that needs to be addressed in the Bill. In most cases the period in which the debtor has an unattachable personal right is small. Where there is a lengthy period of uninfert ownership the creditor has another remedy.

518. The typical example of an uninfert owner is someone with a strong interest in early infertment. If there is a loan then the solicitor acting for the lender will be personally obliged to record the conveyance and standard security. If there is no loan it is still likely that the purchase represents a large share of the buyer's personal wealth or business capital.

519. In modern practice the gap between conclusion of missives, when the personal right is acquired, and registration of the conveyance should be small. It may be as little as a week where the deed does not need to be stamped, and is rarely more than 28 days. The right that can be attached is therefore short lived, and in any event converted into a real right that will be attachable.

520. There are cases where there will be a longer period of uninfert ownership extending to months or even years. A person living in a property may acquire a right through inheritance, and see no reason to go to the expense of completing title. A housing developer, say, may find it advantageous to sell or transfer the personal right through limited companies in a group.

521. In both the last examples the creditor could, where there is a qualifying debt, make a debtor insolvent. A trustee or liquidator takes the estate *tantum et tale* and could complete a personal right by registration. This would be an unfortunate outcome for the debtor, but in most cases self inflicted.

522. The Executive also considers that there are practical difficulties in obtaining payment. In broad terms, the creditor will either need to sell the uninfert right or complete title on behalf of the debtor. If the uninfert right is sold then someone will need to provide a mid-couple, perhaps the court. If title is to be completed then someone will need to sign a conveyance, perhaps a trustee. Indeed the process begins to look like the available alternative of insolvency.

523. The Executive has therefore decided not to extend land attachment to cover uninfert ownership of land. Attachment should therefore only be effective against real rights recorded in the property registers.

Attachment where payment not due

524. The Bill provides that land attachment is competent to enforce payment of a debt constituted by decree or document of debt. Restricting attachment in this way is as recommended by the Commission and has the virtue of simplicity i.e. the monetary value of the creditor's claim is clear.

525. However the Executive has decided that, in accordance with the Commission's recommendations, there should be no debt threshold debt for attachment. The effect of this is that the monetary value of the creditor's claim only needs to be clear at the sale stage. It would in principle be possible for attachment to secure claims that have not been quantified, and indeed for the security not to be realised as discussed above.

526. Examples of enforceable obligations where the debt may not be quantified are an:

- Order for specific implement of an agreement to deliver machine tools to a factory,
- Order for delivery of a car subject to a failed hire purchase agreement, or
- Undertaking in a separation agreement⁴⁵ on divorce to deliver an endowment insurance policy.

527. A decree for delivery of (say) machine tools may be of high value. There may also be good reasons for delaying delivery for a period of months, say because the tool are being manufactured by a specialised company and it would be difficult to source replacements.

528. In many cases the creditor will seek an alternative order covering the value of the obligation. If so, the decree might be for delivery of machine tools within 6 months, failing which for payment pay of £100,000. An order for payment is only issued on default, and as drafted the Bill only permits attachment on failure to deliver.

529. In other cases, an alternative order for payment is not made when decree is granted. That may be an omission, or it may be that the obligation could not be valued at the date of decree. It is not thought that many obligations are incapable of being valued in monetary terms at any time, but there will be some.

530. The Executive considered whether or not attachment should be used to secure decrees *ad factum praestandum*⁴⁶ or equivalent. It has decided against doing so at present on the basis that this would make land attachment more complex, and therefore harder to understand and to operate. There is also a risk that if the Bill does not set out the right parameters creditors could attach for obligations that cannot in fact be valued, giving them an unacceptable hold over debtors.

CHAPTER 3: RESIDUAL ATTACHMENT

Aims

531. To ensure that a residual diligence is available to attach assets not subject to any other diligence, making it harder for 'won't pays' to avoid their debts (*removing barriers to business theme*)

⁴⁵ A separation agreement would be a 'document of debt' as defined in this Part of the Bill if registered for enforcement in the Books of Council and Session, and therefore the equivalent of a decree.

⁴⁶ Literally, 'for the performance of an act'. Conventionally that would be an act other than payment of money although the distinction can be a fine one.

Policy objectives

532. Adjudication for debt is the diligence, or more exactly court procedure, that can currently be used to attach adjudgeable assets that are not registered in the Property Registers. As discussed above, it is intended that adjudication for debt will be abolished.

533. The law should provide a remedy for creditors to use against all forms of property. It is therefore intended to introduce in the Bill a new diligence of residual attachment with the objective that creditors can seek to attach and realise assets not subject to any other diligence, such as:

- Intellectual property rights (copyright etc.),
- Some timeshare rights,
- Liferents⁴⁷,
- Interests in trusts,
- Annuities, and
- Leases that can't be registered (short leases).

Consultation

534. As discussed in paragraphs above for land attachment, the Scottish Law Commission carried through an intensive programme of research, analysis and consultation. In the 1998 discussion paper *Attachment Orders and Money Attachment* (SLC DP 108) sought views on the three options:

- No residual diligence,
- Adjudication as a residual diligence alongside land attachment, and
- A new residual diligence replacing adjudication.

535. All those who responded to the discussion paper were in favour of the last option: a new residual diligence. Respondents were of the view that any such diligence should only be used in execution of debts due under a decree or document of debt.

536. The Commission thereafter recommended in the 2001 Report⁴⁸ that there should be a new residual diligence known as an 'attachment order'.

537. In the ECOS consultation the Executive stated that it intended to introduce the new diligence of attachment order⁴⁹. Consultees offered general support for the proposal, with only one respondent not in favour of reform. Other respondents requested more information on what reform would entail.

⁴⁷ In a liferent, the beneficiary enjoys the use of or income from property during life after which it 'reverts' to the true owner.

⁴⁸ *Report on Diligence* (SLC 183) (2001) paragraphs 4.1 onwards.

⁴⁹ See the discussion in the ECOS consultation at pages 132 onwards.

538. In the Bill consultation the Executive provided more information on the proposed new diligence⁵⁰, and confirmed that the diligence of attachment order would be included in the Bill when introduced. No further comments were received.

Policy discussion

Overview

539. The Executive considers that a new residual diligence should be used in execution of a debt constituted by decree or document of debt. For that reason an application to use the diligence should only be competent if the debtor has been:

- Charged to pay the sum due and has failed to do so, and
- Provided with a copy of the Debt Advice and Information Package.

540. The Executive considers that the proposed name of ‘attachment order’ risks confusion with the other several other types of attachment that are available or are planned. It also does not convey any sense of what the diligence does, in contrast (say) to money attachment. It is therefore proposed that new diligence should be known as residual attachment for delivery of (say) machine tools may be of high value. There may also be good reasons for delaying delivery for a period of months, say because the tool are being manufactured by a specialised company and it would be difficult to source replacements.

541. Residual attachment should work along the same general lines as other diligences. There should be:

- A qualifying decree or equivalent,
- An attachment stage, and
- A sale or realisation stage.

Residual attachment should not be available on the dependence of a court action.

542. The diligence should be capable of attaching any property capable of being transferred, and not exempt from any other diligence for policy reasons. Some kinds of property cannot be transferred under any circumstances and should not be attached, for example:

- Transferring copyright in private correspondence, which is thought to infringe the right to privacy under Article 8 of the ECHR, or
- The moral right to be identified as the author of a work under EC and UK⁵¹ copyright legislation.

543. The Executive considers that there are reasons for exempting from residual attachment some kinds of property that could be transferred and therefore attached and are not exempt from any other diligence. They are:

- Residential short leases where the property is the debtor’s home, and
- Crofting tenancies.

⁵⁰ See the discussion in the Bill consultation at pages 68 to 73.

⁵¹ Copyright, Designs and Patents Act 1988, c.48.

544. Attachment should not be automatic. A court should be satisfied that:

- no other diligence is available,
- the property in question is capable of being transferred, and
- the debt can be reduced: that is, it is practicable to realise value from the attached property.

545. The attachment once executed should be capable of being a security over the property, and will bar the debtor from making any voluntary disposal whether or not there is a security.

546. The nature of the property attached may vary widely. An asset may have a limited lifespan, for example a fixed term license to use copyright material. The creditor should not therefore have to wait before realising the attached asset. An application for authority to realise or sell the attached property should therefore be competent at any time after the attachment.

547. Authority to realise or sell the property should not be automatic. A general power for the court to refuse or postpone satisfaction of the debt from the attached property would be an effective debtor protection. The court should also be satisfied on the same issues that are set out at paragraph 542 above.

548. In the same way as for land attachment, the court should have a valuation of any property to be realised or sold. Third parties with an interest should be heard. If the property is to be sold on the open market then the arrangements for the sale should be made by an independent person appointed by the sheriff. This 'appointed person' should be someone of professional standing such as a solicitor or a surveyor.

549. The Executive considers that this two-stage model of residual attachment is a proportionate balancing of the interests of debtors and creditors. In that respect the arguments in favour of this model are essentially the same as they are for land attachment.

A residual diligence

550. At present, Scotland has a residual diligence. Legal authorities agree that adjudication can be used to attach both heritable property (interests in land) and some kinds of moveable property.

551. Adjudication should be abolished for the reasons discussed above. It should be replaced at least in part by land attachment also for the reasons discussed above. Land attachment will however only attach two of the real rights that can be registered in the property registers. It will not attach:

- any other kind of real right, particularly a real right in security,
- land or rights associated with land that can't be registered, or
- moveable property.

552. Moveable property can in nearly all cases be attached (if held by the owner) or arrested (if held by a third party). However, it is generally agreed that adjudication is competent where

moveable property is neither attachable nor arrestable. The exact nature of the rights that can be adjudicated is open to debate.

553. The Institutional legal writer Bell considered that patents must be adjudged⁵², and on that basis some other types of intellectual property such as copyright should be adjudgeable. Trade marks⁵³, however, may not be open to any diligence on the principle that a trade mark cannot be severed from the goods identified.

554. Leases that are not registered⁵⁴ are in principle adjudgeable, but only if the lease can be transferred. Authorities⁵⁵ support the argument that a lease can't be adjudged if it can't be assigned to a third party unless the landlord agrees. Most modern leases say that consent must be given but that it cannot be unreasonably withheld, and the effect of this qualification is uncertain. It is thought that where a short lease is adjudged the creditor can complete title by recording the decree in the Personal Register⁵⁶.

555. A heritable security, in modern terms a standard security (mortgage), is an asset of the lender⁵⁷ that can be adjudged by a creditor of that lender. However, the effect of the adjudicating of a security is again unclear. It seems likely that if such an asset were adjudged then it would be a right to the security were assigned to the creditor, who would then get the loan repayments otherwise due to the lender.

556. Property that can be adjudged has therefore a wider range than property subject to land attachment. However, the right to adjudge is more theoretical than real. In practice creditors do not adjudge for anything other than heritable property, and even then only rarely. There are two reasons for this:

- The major problems in using adjudication as discussed above, and
- Limited knowledge that adjudication can be used to attach more than just land and buildings.

557. Although adjudication should be abolished there should be a way for creditors to attach assets that cannot be realised in any other way. Indeed some once less common rights such as intellectual property have grown greatly in importance as the information revolution has developed.

⁵² Professor J.G.Bell *Commentaries on the Law of Scotland and the Principles of Mercantile Jurisprudence* (1870) Volume I, pages 110 and 111. An Institutional writer is considered to have special status and could be, for example, be quoted as authority in an argument before a court.

⁵³ Governed by the Trade Marks Act 1938 c.22.

⁵⁴ Technically, an incorporeal heritable property right.

⁵⁵ For the views of Institutional writers see J Graham Stewart *The Law of Diligence* (1898) p 601 and J Rankine *The Law of Leases in Scotland* (3rd edition, 1916) p 54.

⁵⁶ J Graham Stewart *The Law of Diligence* (1898) p 617.

⁵⁷ Again, an incorporeal heritable right.

Residual attachment

558. The Executive therefore considers that adjudication should be replaced by a more balanced, and more transparent, residual diligence that resolves the doubts discussed in the previous paragraph.

559. The three compelling arguments in favour of the proposed diligence of residual attachment are the same as those discussed above for land attachment, namely:

- universal attachability,
- simplification and rationalisation of the law, and
- having the proper balance between diligence and sequestration.

There is therefore no need to consider them in as much detail in this section.

Universal attachability

560. The principle of universal attachability does not mean that no property can ever be exempt from diligence. The Executive has therefore considered what debtor protection should be in place in a residual attachment, and intends that the Bill will provide the right range of debtor protections:

- Residual attachment can only be used where no other remedy is in place,
- An order should be granted only where an asset is likely to be realised,
- An order should be granted only against a specified asset,
- An order should not be granted in respect of a lease of the debtor's home,
- Attached assets should not be sold or realised unless that will reduce the amount of the debt,
- The court can refuse or delay warrant for sale or realisation if not doing so would be unduly harsh, and
- Costs can only be recovered by the diligence and will not therefore add to the general amount of debt.

Simple and rational

561. There should be a residual diligence against land, and the Bill by providing a simple and rational process for realising less common types of assets will bring much needed clarity to this complex area of law.

Sequestration and diligence

562. In sequestration the "whole estate" of the debtor vests in the trustee in sequestration for the benefit of the creditors. That means that the trustee has an interest in all the assets presently subject to adjudication. As discussed above, if property is subject to sequestration or liquidation, but not to any diligence, then the creditor may have no option but to make the debtor insolvent.

The effect of residual attachment

563. The range of assets that could be attached means that residual attachment will not have a single effect. The court should have discretion to tailor the effect of the diligence to the nature of the particular asset specified in an attachment order. That might mean:

- An interdict against the debtor,
- an interdict against a third party with control of the asset,
- Appointing a judicial factor to manage attached property,
- An order to trustees to set aside part of the estate in their charge,
- Providing that the attachment is registered in a public register, or
- Providing that notice is given to any prior security holder.

564. In some cases title to property, and therefore a security over that property, is acquired only when the interest is registered. The classic example is registration of an interest in land in one of the property registers. A less common example is the Register of Patents which is held in England, and is indeed a reserved area of law. There is also the possibility of registering a notice or warning in the intended Register of Inhibitions, currently known as the Register of Inhibitions and Adjudications.

565. The courts do not have a general power to order registration, or determine the effect of given notice attachment to any other interested party. The Scottish Executive is therefore of the view that powers to make regulations in the Bill should be as extensive as is needed to support attachment against a wide range of property. Regulations may (say) need to provide for:

- The form of and process under which a notice is registered, so far as within devolved competence,
- The effect of such a notice. or
- The effect of giving notice to any prior security holder.

Residual attachment process

566. The Executive considers that:

- there are assets that can only be attached and sold by a residual diligence,
- the current law is unclear and needs reform, and
- that primary legislation cannot set out a unified scheme without going into inordinate detail.

567. What the Bill does, therefore, is to provide for a flexible attachment process, which can be developed as needed by subordinate legislation. Doing this is a great improvement on the present unsatisfactory state of the law.

568. There should be a preliminary hearing at which the creditor will not get a residual attachment order unless the court is satisfied that the diligence will be effective. Factors to be considered should include whether:

- the asset is now, or will in future, be capable of being realised to pay debt,
- the creditor will get a security (or a preference?) good against the world,

- if there is no security there would be a preference as against non-attaching creditors on insolvency, or
- the effect of any interdict, particularly a third party interdict, is proportionate.

569. The court in deciding whether to grant a residual attachment order may have to balance fine and technical distinctions, possibly involving assets of great value. The Executive considers, therefore, that the procedure should be competent in both the Court of Session and the sheriff courts. In practice, it is expected that most applications will go to the sheriff.

570. The Executive considers that a discretionary system will give creditors the incentive to present a workable attachment proposal to the courts. The nature of any residual diligence is such that the relevant law may be mastered by a small number or specialised advisers with a good understanding of what will work, and what will not. They will be able to assist their clients and the courts. The Bill gives them the tools they need to help themselves, subject of course to the supervision of the courts.

571. The Executive does not consider it essential that the process of residual attachment will be effective in all circumstances for all assets, although subordinate legislation should be used to close the 'blind' spot so far as practicable and competent. The Executive does consider that the complex issues raised should not mean that a residual diligence should never be available.

572. The task of persuading the court that attachment is competent and practicable will in many cases be quite simple. For example, if the court were to license the use of or transfer ownership in copyright in commercial artwork. This should be competent as the creditor would have no other remedy than insolvency, but attachment could make it possible for the creditor to provide the license or sell the copyright in whatever market there is. There would be no need for the courts to resolve any issue of trademark ownership or patent registration.

573. The Executive considers that the second stage of the diligence should be an application for a satisfaction order. The court should again be satisfied that the attached asset is capable of being realised before a satisfaction order is granted. It should be able to appoint an independent professional person to see through any sale process, or to provide a valuation of an attached asset. This will protect the debtor and ensure that any price is a fair price.

574. If the court is not satisfied then a satisfaction order will be refused. The creditor will still have the benefit of the attachment, and can apply again at a later date when the balance of convenience may have changed. The debtor will be able to ask the court to review the position by seeking recall or restriction of the warrant to attach or of the attachment.

575. If a satisfaction order is granted then the nature of the order would need to match the particular type of property. The court should therefore as discussed above have discretion to:

- order a sale, after appointing a suitable person for that purpose,
- order a transfer, after an independent valuation of the asset,
- order an income payment, and
- provide authority to the creditor to lease or license an asset.

576. Annex E illustrates the main stages of a residual attachment. In view of the diverse nature of attachable property the process of any particular attachment will vary.

Miscellaneous

577. The Executive considers that the creditors' expenses in completing the residual attachment process should be chargeable to the debtor.

578. The debtor may make one or more payments towards the sum due during the course of an attachment, or the asset attached may not realise enough to satisfy the debt. The Executive considers therefore that the Bill should provide for the order in which payments to account are applied, or ascribed, to the sum due are. The order should be:

- Expenses of the attachment,
- Interest on the debt up to the date of attachment, and
- The sum due with interest since the date of attachment.

Proposals

579. The Executive intends that there will be a residual diligence over:

- interests in land so far as not attachable by land attachment, and
- moveable property so far as not attachable by any other diligence.

580. It is intended that a qualifying decree or document of debt will enable a creditor to apply for an attachment order. The order if granted will authorise the attachment of specified assets. The creditor may thereafter apply for a satisfaction order and where practicable the court will make an order tailored to the particular order. Assets can in principle be sold, transferred either outright or in part, or licensed to the creditor.

Alternative approach

581. The only alternatives to residual attachment are no residual diligence or a series of specialised diligences for unusual or uncommon types of property. The Executive did not consider it necessary to give full consideration to those alternatives for the reasons set out in the discussion on this Part of the Bill.

PART 5: INHIBITION

Aims

582. To ensure the effective operation of the diligence of inhibition, by modernising the relevant law (*modernisation theme*).

Policy objectives

Background

583. Inhibition affects land and buildings of the debtor, but is different in kind from other diligences. It is personal to the debtor, and affects future voluntary deeds dealing with land to the prejudice of the creditor. It does not attach any particular land or building. It is a preventative or ‘freezing’ diligence.

584. Inhibition is either in execution of an obligation in a decree or document of debt, or as discussed below for Part 6 of the Bill used as a security against default during the dependence of a court action. This Part reforms inhibition in execution, but the reforms will apply as appropriate to inhibition on the dependence.

585. Warrants to inhibit may be granted only on application to the Court of Session. The sheriff courts have no jurisdiction to grant such warrants. The creditor, or prospective creditor, in the sheriff courts needs to apply to the Court of Session for ‘letters of inhibition’.

586. An inhibition is registered in the Register of Inhibitions and Adjudications (‘the personals register’). It is said to make the whole of the debtor’s heritable estate (whenever acquired) ‘litigious’ for 5 years. This has two main effects:

- a voluntary deed (say, a conveyance or a standard security) can be cancelled by the creditor, and
- in an insolvency or ranking of claims on land the creditor is paid before the ordinary debts.

587. An inhibition does not create any form of real right. That is why the court can be asked to cancel (reduce) the deed conveying the land after a sale by the debtor. The creditor is then put back to the position they were in before the deed was granted. In order to acquire a real right (good against the world) the creditor currently has to use the diligence of adjudication for debt.

588. Creditors generally regard inhibition as an effective diligence, even although it has a limited scope. In practice a buyer or lender will refuse to deal with a debtor unless the inhibition is cleared from the personals register as part of the transaction.

Objectives

589. The reform of inhibition has two main objectives. First, reform should remove unnecessary barriers to the use of the diligence. Second, it should clarify the effect of inhibition given the intended abolition of the diligence of adjudication for debt.

Consultation

590. The Scottish Law Commission considered inhibition in execution in the 2001 Report⁵⁸, and inhibition on the dependence in the *Report on Diligence on the Dependence and Admiralty Arrestments* (SLC No. 164) (“the 1998 Report”).

591. These reports built on public consultation by the Commission over a period of years on the:

- 1987 Discussion Paper *Adjudication for Debt and Related Matters*, (SLC DP No 78),
- 1987 Discussion Paper *Equalisation of Diligences*, (SLC DP No 79),
- the 1989 Discussion Paper *Diligence on the Dependence and Admiralty Arrestments* (SLC DP No 84),
- the 1998 Discussion Paper *Attachment Orders and Money Attachment*, (SLC DP No 108), and
- the 1999 Discussion Paper *Diligence against Land*, (SLC DP No 107).

Respondents to the Commission consultations were supportive of the reform programme.

592. In the 2001 Report the Commission recommended the retention and reform of inhibition, subject to the following main reforms:

- inhibition should affect land and buildings attachable by land attachment or residual attachment,
- the sheriff courts should be able to grant warrant for inhibition,
- inhibition should be able to secure an obligation to convey land (not just debts),
- land should be acquired at the date of delivery of a deed (not registration),
- an inhibition should be breached on the date of delivery of a deed (not registration),
- a buyer in good faith should not be affected by a breach of an inhibition,
- a new schedule of inhibition should be registered in the personals register,
- cancellation (reduction) of deeds should still be competent but only if a new notice is registered in the property registers,
- inhibition should no longer give any preference on insolvency or ranking,
- the expenses of an inhibition should in principle be chargeable against the debtor, and
- an inhibition should end after 5 years.

593. In the ECOS consultation the Executive stated that it was minded to implement the Commissions recommendations. It therefore sought comments on the proposed reforms of inhibition in execution. There was general support for the proposed reforms across all respondents to that consultation.

594. In the Bill consultation the Executive stated that the Commission recommendations would be implement in this Bill. No views were sought and no further comments offered by respondents to that consultation.

⁵⁸ *Report on Diligence* (SLC 183) (2001)

Policy discussion

595. The Bill implements the recommendations of the Commission, and in places extends the scope of the reform in places following further consideration of policy since the Bill consultation.

Scope of inhibition

596. The diligence of inhibition currently affects only 'heritable' property, which broadly speaking means interests in land and buildings. The test for determining whether property is heritable for the purposes of inhibition is that it is property which can be attached by adjudication for debt. The Executive proposes to abolish adjudication for debt and replace it with the new diligences of land attachment and attachment orders. Inhibition should therefore affect interests in land attachable by those new diligences.

Permission to use inhibition

Letters of inhibition

597. Certain decrees and a document of debts authorise the use of diligence, but do not currently include the diligence of inhibition. They are:

- decrees of the Scottish courts,
- documents of debt registered for execution in the Books of Council and Session, or in the sheriff court books, and
- other awards and orders that are enforceable as if they were documents of debt such as tribunal awards or (say) dog fouling fines.

598. The effect of this is that that a creditor who wishes to inhibit to secure a debt or obligation in a decree or document of debt has to make a separate application to the Court of Session for letters of inhibition. The Scottish Executive considers that the application is a formality where inhibition is used in execution, and does nothing but add delay and cost to the enforcement process.

599. It is therefore considered that decrees and documents of debt should in addition authorise inhibition without further formality. The Executive is satisfied that letters of inhibition have no useful residual purpose, and that they should be abolished as that will help make the law as clear and simple as it can be.

Obligations secured by inhibition

600. Diligences are designed to enable creditors recover money due under a payment decree or equivalent. There are, however, many other kinds of court orders. The other main class of obligation requiring people to do something is known as obligations *ad factum praestandum*, which means broadly the performance by a person of an act (other than payment) within the power of that person.

601. An example of an obligation *ad factum praestandum* is a decree for specific implement. The debtor may have failed to deliver (say) machine tools to a factory. The factory owner could

sue for damages, but what they want is the tools they were promised. The court will grant an order for delivery if the contract can still be performed. The court in that example has not made an order for payment that can be satisfied by (say) land attachment.

602. The Commission considers that inhibition is not like other diligences, and has special features that justify using it to secure non-payment obligations. In particular, the Commission recommended that inhibition in execution should be useable by creditors who wish to secure a decree for specific implement of an obligation to convey land or grant a standard security (mortgage). That would allow the creditor to reduce and deed granted by the debtor to a third party.

603. The Executive agrees, and considers that inhibition should be extended to secure other non-payment decrees. In particular, inhibition should be authorised where the court agrees a payment alternative when granting decree for specific implement. For example, the debtor who failed to deliver the machine tools once may fail again despite the courts order. Most creditors will ask the court to agree (say) a damages payment of £10,000 if the tools are not delivered within 6 months.

604. Decree for the alternative will not be granted until (and if) the debtor fails to deliver. As a payment decree it would then be enforceable by land attachment or residual attachment. The creditor will however run the risk of default due to insolvency or removing assets between the dates of decree for delivery and decree for payment.

605. The same issue of principle arises in the other freeze diligences. It is therefore intended that diligences on the dependence (including interim attachment) should be capable of securing the creditors claim provided the pending action contains a conclusion for payment of a sum other than by way of expenses. An action for specific implement will usually contain a conclusion for payment of a sum of money as an alternative to delivery.

606. The Executive considers that inhibition, being a freeze diligence rather than an attachment diligence, should have the same effect. As it is a diligence in execution the permission to use inhibition should be standard and not need prior agreement by the court as should be the case with the diligences on dependence.

607. The Executive considers that in order for inhibition to be an effective security for performance the creditor should not need to execute another inhibition when a specific implement decree is changed to a payment decree, and the inhibition for should therefore convert by law from securing delivery to securing payment.

608. The Executive has considered the practical effect of extending the scope of inhibition in the way now proposed. It expects that a buyer or lender seeing an inhibition will insist that the debtor registers a discharge, and the creditor would only signed that on the basis that the obligation has been implemented or the debt has paid. In short, it should not in practice matter whether the due date for payment has passed or not as no buyer or lender will accept a title blighted by an inhibition.

609. It is still possible that the debtor could (say) convey land in breach of an inhibition securing a decree for specific implement not relating to land. Such a conveyance would in practice need to be to a connected person such as business associate or family member, and may well be intended to defeat the obligation. Regardless, the deed could be cancelled by reduction. In such circumstances the creditor would have, or could get, decree for payment and attach the land in question.

Service and registration of inhibitions

Effect of notice of inhibition

610. An inhibition is effective from the date of its registration in the personals register. If, however, a separate notice of inhibition is registered in the personal register up to 21 days before the inhibition registered then the diligence is backdated to the date of registration of the notice. Notice procedure is intended to help creditors who fear that the debtor is about to dispose of a valuable asset.

611. The notice of inhibition is not at present intimated to the debtor (although it does show up in a personals search), and the Executive considers that fairness requires that any inhibition that follows should have only limited effect in the 21 day period before the debtor was made aware of it. In short, the notice should make it possible for the inhibition to have effect more quickly.

612. The Executive considers that the existing mechanisms for registration of notice of inhibitions, and for service and registration of the inhibition itself, work well and should remain as they are. However, the Bill should provide that where the inhibition is registered:

- within 21 days after the date of the notice, the inhibition should take effect from the beginning of the day that it was served on the debtor, and
- more than 21 days after the date of the notice, or there is no notice, the inhibition should take effect when it is registered in the personals register.

Information about the creditor's claim

613. At present the creditor registers in the personal register their authority to use inhibition (say, the letters of inhibition) together with a certificate by the court officer messenger that the authority has been served on the debtor.

614. The Executive considers that the information contained in these two documents is not enough for any person searching the personal register to be fully informed about the debt and the debtor. It is considered that this gap can be filled by requiring the creditor to register a copy of the schedule of inhibition served on the debtor, and on that basis it should no longer be competent to register a copy of the authority to use the diligence.

615. It is intended that new forms for the schedule of inhibition and the court messenger's certificate of service will be prescribed by Scottish Ministers. The Executive intends that the amended forms will provide that the information on the personals register conveys a fair view of what is affected, and for what reason.

Time when debtor becomes the owner of land and buildings

616. It is the voluntary disposals of the debtor that are restricted by inhibition. The Titles to Land Consolidation (Scotland) Act 1868⁵⁹ provides that where a person acquires an interest in land after the inhibition, then that property is not caught by the inhibition. It is not, however clear at what point in a transfer of land a person acquires an interest which would be caught by the inhibition (or not caught, in this case).

617. There are 3 points at which a debtor could be said to be the owner of land and buildings. They are the dates on which:

- missives for the purchase were concluded (the personal right),
- the disposition is delivered to the debtor, or
- the debtor registered the new title in the property registers (the real right).

618. The Executive considers that the law should be clarified to avoid dispute. It is considered that right time of ownership for this purpose is the date the disposition is delivered to the debtor. It is that point that the debtor has a deed that can be reduced, which is the remedy for breach of inhibition.

Effect and ranking of inhibitions

619. Inhibition has two effects in law. The creditor can reduce any future deeds voluntarily disposing of land and buildings affected by the inhibition. The other main effect is a preference against other creditors in an insolvency or other ranking for payment from land and buildings of the debt inhibited for over new debts run up after the date of the inhibition. This form of preference is known as ‘preference by exclusion’, and was developed by the common law in the 17th and 18th centuries.

620. The Executive considers that the current law is:

- too complex to operate, as there are often multiple creditors and the dates that debts became due are uncertain, and
- unfair to other creditors, as inhibition does not attach land but the creditor is still paid ahead of other ‘moveable’ creditors.

621. The inhibiting creditor should still be able to reduce deeds, but the Executive considers that the proposed new diligence of land attachment is a fairer way for inhibiting creditors to attain a preference against other creditors over land and buildings.

Sales of inhibited land

Sale by a liquidator

622. A limited company may be wound up voluntarily by its members or by its creditors. The alternative to voluntary winding up is compulsory winding up, usually for debt. In all cases the court appoints a liquidator to manage the winding up process.

⁵⁹ 1868 c.101, section 157.

623. Where a company is subject to compulsory winding up the Insolvency Act 1986⁶⁰ (“the 1986 Act”) court gives the liquidator has the same powers as a trustee on a bankrupt estate. In terms of the 1985 Bankruptcy Act the permanent trustee has power to sell an inhibited debtor’s heritable property free of any prior inhibition. There is no equivalent provision where a company is wound up voluntarily, and there is some doubt about the position.

624. A voluntary liquidator can ask the court under section 112 of the 1986 Act for the power to sell land etc. as if the liquidation were compulsory i.e. free of any inhibition. The Executive considers that creditors liquidating a company should have the same powers to sell land as are available in a compulsory winding up. The members (owners) of a company should still need to apply to the court.

Sale by a secured creditor

625. Where there is a prior standard security over inhibited land the secured creditor may still sell the property. It is not clear whether the inhibition creates any preference over other creditors in such a sale. The Executive considers that there is no reason why it should, and the law should therefore be clarified to provide that inhibition creates no special claim. The inhibition creditor will need to look elsewhere, perhaps to a land attachment.

Sale by receiver under a floating charge

626. An inhibition executed between the creation and crystallisation of a floating charge ranks after the floating charge. The creditor in a floating charge can on crystallisation appoint a receiver under section 51 of the 1986 Act to manage the limited company.

627. A sale by a secured creditor disburdens land of later inhibitions. No similar provision is made for a sale by a receiver, who may however apply to the court for–

- the inhibition to be recalled as ineffective in relation to the land, or
- an order under section 61 of the 1986 Act for authority to sell the land free of the inhibition.

An application under the 1986 Act is slow and expensive. The Executive considers that the receiver should be entitled to sell without further permission any property where the inhibition dates after the creation of a floating charge.

628. It is not clear, under existing law, what claim an inhibiting creditor has to any sale proceeds of land after payment of the debt to the floating charge holder. The Executive considers that as with sales by secured creditors the inhibiting should not create any special claim. In order for there to be such a claim the inhibiting creditor should need to use another diligence such as a land attachment or an arrestment.

Sale by a judicial factor

629. A judicial factor is a person appointed by the court to take over the management of another’s property and financial affairs. The factor in most cases is running the estate for the

⁶⁰ 1986 c.46.

benefit of that person, who may be a debtor. It is unclear whether the factor is bound by any inhibition in his dealings with the estate.

630. A factor is not like a creditor in a standard security or inhibition. The Executive does not consider that there are any grounds for overturning the prior interest of an inhibiting creditor. There is no however no direct law on this. What case law there is relates to other diligences, but does at least suggest that an inhibition should remain effective against a judicial factor.

631. If an inhibition is effective in law, then there remains a possibility that the factor could overturn it. The factor may ask the court for additional powers under section 7 of the Judicial Factors Act 1849⁶¹, and that arguably will cover a power to deal with inhibited property. The Executive therefore considers that the law should be clarified to make it clear that an inhibition is effective against a judicial factor who deals with the heritable property of an inhibited debtor.

Breach of inhibition

632. Section 44(3) of the Conveyancing (Scotland) Act 1924⁶² which in effect provides in effect that all inhibitions shall prescribe (no longer be valid) 5 years from the date on which they take effect. The Scottish Executive considers that inhibitions should indeed last for 5 years but that this provision is unclear and should be clarified. Three issues arise:

- When exactly inhibitions are breached,
- Whether the 5 year period is subject to the normal rules of prescription, and
- Whether a deed can be reduced after 5 years, if the breach occurs within 5 years.

Breach of inhibition

633. There are similar issues here to the one discussed above about when debtors acquire land. The Executive considers that the law should be clarified so that the dates of acquisition and disposal are consistent. The date of the breach of an inhibition should therefore be the date on which the debtor delivers to a third party a voluntary deed relating to land affected by the inhibition.

Prescription of inhibitions

634. When a claim prescribes the person with the right can no longer enforce it. The general law on prescription is contained in the Prescription and Limitations (Scotland) Act 1973⁶³. The fact that there is a special rule for inhibitions raises some doubt about whether creditors claims come to an end in the same way as they would do under that Act.

635. The Commission considered this issue and concluded that there is some doubt over the matter, but that in practice conveyancers assume that an inhibition is not subject to the statutory rules on prescription. This would mean, for example, that the inhibiting creditor could not restart the 5 year period by writing to the debtor to say that he still intends to pursue the debt.

⁶¹ 1849 c.51.

⁶² 1924 c.27, as amended by section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73).

⁶³ 1973 c.52.

636. The Executive considers that inhibition should not be subject to the normal rules. They should last as long as they are registered, and no longer. The effect of what happens to a breach of the inhibition after that period is considered below.

Reduction after an inhibition has prescribed

637. In most cases the end of a prescriptive period ends all claims flowing from the prescribed right. The Executive considers that this rule if applied to inhibition would be unfair to inhibiting creditors. It should therefore a sufficient right to reduce a deed that the breach occurred within the 5 year life of an inhibition.

638. The question then is how long the creditor has to reduce the deed. There are no reported cases on the question of how much time an inhibiting creditor has to reduce a transaction which is in breach of an inhibition. The Executive considers that in this case the law should be clarified to provide that the normal rules apply. The 1973 Act provides that most claims that do not expire after 5 years do so after 20 years.

639. The Executive considers therefore that the inhibiting creditor's right to reduce a deed should prescribe at the end of a period of 20 years after the date of the breach.

Remedies on breach of Inhibition

640. Where a debtor disposes of land affected by an inhibition the inhibiting creditor may reduce the third party's deed on the ground of the inhibition. This reduction operates only for the benefit of the inhibiting creditor, that is it entitles the creditor to adjudge the property.

641. As far as other creditors are concerned the land remains the third party's property. No other creditors of the debtor can attack the third party who remains owner, with the important change that the property could be burdened with the inhibiting creditor's adjudication.

642. The Executive considers that there should be no change to mechanism by which deeds are reduced, and the general effect of any diligence against the land for the debt after the reductions. However, the law needs to be reformed to make it clear that:

- the reducing creditor can attach the land using land attachment rather than adjudication,
- the new land attachment has priority over any other security affecting the third party's interest,
- the property search should disclose that an action of reduction has been raised, and
- only leases of more than 5 years duration should be reduced.

Notice in the property registers

643. Currently, an inhibiting creditor raising an action of reduction will normally registers the summons in the personals register. An action of reduction applies to specific property, and the Executive considers appropriate that any search over that property should disclose the action. The inhibiting creditor should therefore have to register a notice in respect of that land in the property register. This will help protect third parties in good faith.

Effect on leases

644. It is competent to bring an action of reduction of leases granted in breach of an inhibition. This is because a lease of property affected by the inhibition will lessen the value of that property. However, under the common law, a lease for a fair rent and for an ordinary duration is not reducible. The terms “fair rent” and “ordinary duration” are vague and are now out of step with modern law on leases.

645. The law is therefore unclear as to which leases may be caught by inhibition. The Executive therefore proposes that the law should be clarified to provide that leases for longer than 5 years are reducible, and those for less than 5 years are reducible, provided the court is satisfied that it would be fair and reasonable to do so.

Expenses of Inhibition

646. Currently, a creditor using inhibition in execution must pay all court dues, solicitors’ and court officers’ fees and registration dues involved in obtaining the warrant for and executing the inhibition. The inhibiting creditor is not entitled to recover the expenses of inhibition from the inhibited debtor. The Executive considers that the creditor should be able to recover those costs from the debtor in a diligence in execution.

Protecting third parties in conveyancing transactions

647. At present, if a third party transacts with an inhibited debtor without knowing that the property is subject to an inhibition, that transaction is reducible by the inhibiting creditor, even if the third party acts in good faith. The third party is deemed to know of its existence by virtue of its registration in a public register.

648. However, a search carried out by the third party may not disclose the existence of the inhibition because (say):

- the search was flawed, or
- a person is known by 2 different names.

If the deed is reduced, the third party is likely to have a claim against the inhibited debtor under the missives contract or the contract with the searching company. However, the claim will be of little value if the inhibited debtor is insolvent. The Executive considers that the law does not adequately protect third parties who transact with inhibited debtors in good faith.

649. It is proposed therefore that parties transacting in good faith who rely on information obtained from a search of the personal register should be protected, and should not be required to resort to damages actions to recover losses caused by an undiscovered inhibition which they were justifiably unaware of.

650. It is considered that this protection should also apply to the third party’s successors, and to any person who transacts with the third party, even if they know of the inhibition, or the defective search. Otherwise the third party would be effectively prevented from passing on good title.

651. The proposed change should apply to both onerous and gratuitous transactions, i.e. transactions for value and those where heritable property is given by the inhibited debtor to a third party.

652. This protection of third parties will be at the expense of the inhibiting creditor. It is considered, as a matter of policy, that the protection of third parties acting in good faith outweighs the rights of inhibiting creditors to make their inhibitions effectual.

Proposals

653. The Scottish Executive intends that inhibition will secure claims against heritable property subject to land attachment and residual attachment.

654. It is intended that a warrant for execution (permission to use diligence) will authorise inhibition in addition to other diligences when contained in:

- an extract decree of the Court of Session, the High Court of Justiciary, and the sheriff court,
- a writ registered for execution in the Books of Council and Session or sheriff court books, and
- other orders or awards enforceable as if they were decrees or registered writs,

where the decree or other document or award contains or includes an obligation to pay money.

655. It is intended to abolish letters of inhibition.

656. It is intended that inhibition in execution should be competent to secure decrees for specific implement of:

- of an obligation to convey land or grant a standard security (mortgage), and
- an obligation to perform an obligation where the alternative of payment has been authorised.

657. It is intended that where an inhibition is registered:

- within 21 days after the date of a notice of inhibition, the inhibition should take effect from the beginning of the day that it was served on the debtor, and
- more than 21 days after the date of the notice, or there is no notice, the inhibition should take effect when it is registered in the personal register.

658. It is intended that an inhibition should be registered in the Register of Inhibitions by registering a copy of a new schedule of inhibition served on the inhibited debtor, together with the court messenger's certificate of service.

659. It is intended that land should be acquired for the purposes of inhibition at the date of the delivery of the deed transferring the interest to the debtor.

660. It is intended that an inhibition should not confer a preference on the inhibiting creditor over other creditors where a sequestration, liquidation or other ranking process applies to the debtor's interest in land and buildings.

661. It is intended that a liquidator in a creditors' (but not a member's) voluntary winding up of a company should be able to dispose of land and buildings affected by an inhibition against the company, and the inhibiting creditor's claim should be dealt with in the normal ranking process on the proceeds of sale.

662. It is intended that where a secured lender sells inhibited property under a prior security the inhibiting creditor should only be paid first from the sale proceeds if that creditor has a preference from (say) a land attachment. The inhibition will give no special claim.

663. It is intended that a receiver acting under a prior floating charge should be entitled to sell property affected by the inhibition, leaving the inhibiting creditor to claim on the proceeds of the sale of that property.

664. It is intended that an inhibition will be effective against a judicial factor.

665. It is intended that an inhibition is to be treated as having been breached on the date when the inhibited debtor delivers to a third party a voluntary deed relating to land affected by the inhibition.

666. It is intended to clarify the law to provide that the normal rules of interruption of 5 year negative prescription do not apply to inhibitions, which should therefore 5 years after the date on which it came into effect. The inhibiting creditor's right to reduce a deed in breach of an inhibition should prescribe at the end of a period of 20 years after the date of the breach.

667. It is intended that an inhibiting creditor who reduces a deed can:

- should register a notice of the action in the property registers, and
- can attach the inhibited land by land attachment.

668. It is intended that that leases with a term of 5 years or more as at the date on which the action for reduction is raised should be reducible, but if for less than 5 years reducible only if the court is satisfied that in all the circumstances it would be fair and reasonable to do so.

669. It is intended that the inhibiting creditor should be entitled to recover the costs of inhibition from the debtor in any diligence.

670. It is intended that third parties transacting in good faith with debtors for interests in land should have their title protected, provided they took reasonable steps to protect their interest through a property and personals registers search.

Alternative approaches

Decrees of specific implement

Inhibition

671. The Executive considered the alternative policy of restricting inhibition to the enforcement of payment decrees, except to the extent recommended by the Scottish Law Commission for actions of specific implement.

672. Extending inhibition to secure decrees for specific implement was not considered by the Scottish Law Commission, other than for obligations to convey heritable property (land and buildings). Similarly, there was only a brief discussion in ECOS and Bill consultations about extending the use of inhibition. The Executive view then was prison should remain as the remedy of last resort for failure to deliver, and that no reform was needed in respect of delivery of moveables.

673. The Executive also accepts that the trend in the past 100 years has been away from using diligence in execution of decrees *ad factum praestandum*, including specific implement. Indeed, section 100 of the 1987 Act abolished the need to serve a charge for enforcing obligations *ad factum praestandum*. The reason for this trend is thought to be the view that failure to obey a 'general' decree is best seen as a contempt of court, and should be dealt with in much the same way.

674. The only remaining charge after the 1987 Act is therefore the charge to pay. However, the Executive noted when deciding to extend the scope of inhibition that a charge to pay is not needed before that diligence. This is because an inhibition does not in fact attach any property that can be sold to pay the debt. It is a freeze diligence rather than a sale diligence.

675. The Executive does not consider that diligence should be used for what might be seen as general harassment of the debtor. There is a risk that that would happen if the obligation being secured by inhibition had no monetary value, because the debtor may not be able to clear the personals register by either performance or delivery. They would then be subject to a general bar on dealing with land.

676. The Executive considers that there is no real risk of inhibition being used to harass debtors provided any extension is linked to decrees where there is the alternative of payment, as discussed above. Decrees where there is no alternative should therefore not be secured or enforced by diligence. To that extent the Executive has not moved from the position stated in the ECOS consultation.

677. The Executive decided to extend the scope of inhibition as part of the continuing development of policy for the Bill, and for the reasons discussed above. It considers that the current Bill represents the most comprehensive review of diligence for more than 100 years. If a policy is right for the times it should be implemented even if not fully consulted on, although less than full engagement is an argument for a more cautious approach.

Land attachment

678. The issue of whether land attachment should secure non-payment decrees is discussed above, and the Executive concludes that as matters stand it should not.

PART 6: DILIGENCE ON THE DEPENDENCE

Aim

679. To make diligence on the dependence of court action proportionate (*striking the balance theme*), and less complex thereby reducing costs (*modernisation theme*).

Policy Objectives

Background

680. Most forms of diligence give a creditor⁶⁴ the right to attach and sell property in order to pay outstanding debts. Diligence on the dependence of a court action, on the other hand, gives a creditor security for payment of a debt that may or may not be due. Creditors can attach but do nothing else until, and if, they get decree for payment.

681. All of the diligences on the dependence are based on some other form of diligence, but modified by special rules. There are four existing forms of diligence on the dependence. They are:

- Arrestment on the dependence,
- Inhibition on the dependence
- Admiralty arrestment on the dependence, and
- Adjudication in security.

682. The Bill is intended to introduce the new diligence of interim attachment, and abolish adjudication in security, so that there will remain four forms of diligence on the dependence.

683. The effect of diligence on the dependence being based on other diligences is that changes in other parts of the Bill to (say) the diligence of arrestment and furthcoming will complement the reforms in this Part. Relevant changes are explained in their context below.

684. Diligence on the dependence has until recently been available without enquiry and without restrictions. Case law (examined below) has restricted the availability of diligence on the dependence, but it remains a highly effective remedy for a creditor who goes to court. Arguably too effective. There is a danger that debtors are forced to settle court actions not because of weak cases, but because the creditor has frozen assets.

⁶⁴ In this Part of the Memorandum the parties are described as creditor and debtor, following the language of the Bill and the 1987 Act. The nature of diligence on the dependence is such that the alleged debt has not been proved. It would be more accurate, but perhaps more confusing, to describe the parties as ‘pursuer’ and ‘defender’ as those names are used in court procedures. A defender can use diligence on the dependence to secure a counterclaim against the pursuer in the same action.

685. It has not, however, as cheap and easy as it should be to get warrant from the court to use diligence on the dependence. Creditors in the sheriff court, for example have had to make a separate and expensive application to the Court of Session. Even within the Court of Session applications have been unduly complex. Similar concerns are raised about procedures for recall or restriction after execution.

Objectives

686. The key objective of reform is therefore that diligence on the dependence should be quick and comprehensive where needed, for example because a defender is trying to hide assets, and to the extent needed. In other cases the defender in a court action should be free to be able to enjoy the use of their property until, and if, the creditor has proved their case against them.

687. The other objective of reform is modernisation, delivering a benefit for both creditors and debtors. Diligence on the dependence, where justified, should be quick and simple to use. If so, it will also be cheaper than at present.

Consultation and Responses

688. The Scottish Law Commission examined the substantive law and procedural arrangements for diligence on the dependence and made recommendations for reform in its 1998 *Report on Diligence on the Dependence and Admiralty Arrestments*⁶⁵ (“the 1998 Report”).

689. The 1998 Report recommended a significant number of significant proposals. Views on these, with comprehensive arguments where Executive support was not thought possible, were invited in the ECOS consultation which asked for general comments on a range of proposals:

- The sheriff courts should have power to authorise and recall inhibition on the dependence,
- Power to restrict the warrant (authority to use diligence) to particular sums or particular property,
- Where arrestment used before service then the claim document⁶⁶ must be served within 5 days after that arrestment,
- A clear and reasonable test for recall of diligence on the dependence,
- Diligence on the dependence should only be used for money claims,
- Procedure in the Court of Session should be rationalised,
- Diligence on the dependence should expire after 3 years,
- The creditor should be entitled, on success, to the expenses of using diligence, and
- Old procedures should be abolished where unnecessary, namely–
 - loosing of arrestment (other than for ships), and
 - adjudication in security of future or contingent debts⁶⁷.

⁶⁵ Scot Law Com No 164

⁶⁶ Claim document is used here as a general term to cover all forms of document used to start a court action: claim form, initial writ, petition etc. It has no specific legal meaning.

⁶⁷ A future debt is one that will become due, and a contingent debt is one that may become due.

690. There was substantial support for the package of reform set out in the ECOS consultation, with a variety of comment from respondents across all sectors. There was no clear view offered on reducing the days between service of the arrestment and action. Whilst one advice organisation supported the reduction to five days, finance and legal organisations wish to see either a 14 day or a 21 day period allowed.

691. The Executive considered the comments on time limits for service of claim documents carefully, and was persuaded by the time of the Bill consultation that the policy needed to be developed. It is therefore intended that there will be a uniform period of 21 days after using diligence on the dependence in which the claim document must be served on the other party.

692. The 1998 Report recommended a test for the grant of diligence on the dependence, as well as one for recall. In doing so it departed from the 1989 SLC discussion paper *Diligence on the Dependence and Admiralty Arrestments* (SLC DP No 84) which had recommended only general judicial consideration when dealing with applications for diligence on the dependence.

693. The Executive, however, intends to implement both the 1989 Discussion Paper suggestion and the 1998 Report to provide a new test for grant of warrant and a power to limit the effect of the warrant. These further reforms have not been consulted on, and are a considered response by the Executive to developments in case law since the 1998 Report. In particular, in the cases of:

- *Karl Construction Ltd v Palisade Properties Plc* 2002 Session Cases 270 (“*Karl*”), and
- *Advocate General for Scotland v. Taylor* 2003 Scots Law Times 1340 (“*Taylor*”)

Policy Discussion

694. This Part of the Bill provides primarily for reform of inhibition on the dependence and arrestment on the dependence. It is intended that the reforms in this Part of the Bill will apply so far as appropriate to arrestment on the dependence of admiralty actions.

695. It is intended that the Bill will provide for the new diligence of interim attachment through textual amendment of the 2002 Act. This Part of the Bill is intended to have effect through textual amendment of the 1987 Act, and therefore the reforms here will not apply to interim attachment.

Availability

696. The sheriff courts deal with complex and difficult cases. Sheriffs already have the power to grant warrant to arrest on the dependence of a court action. The issues considered when permission is sought to inhibit on the dependence are similar. There is therefore no good reason to prevent sheriffs dealing directly with such issues rather than referring them to the higher courts.

697. Arrestment on the dependence is available for all claims for payment in the sheriff courts regardless of size and procedure. The Court of Session will grant letters of inhibition in ordinary actions (claims over £1500) but perhaps not in summary causes (claims between £750 and

£1500) or small claims (under £500). It would be more consistent for all creditors to be able to ask for permission to use diligence. If nothing else, the value of the claims covered by the three types of actions may be increased in the future.

698. There are, however, good reasons to allow sheriffs to deal with all forms of diligence on the dependence. The lack of full powers compels sheriff court litigants to make a separate application to the Court of Session for letters of inhibition. This adds little to the scrutiny and a lot to the expenses, and makes it easier for debtors who are minded to hide assets to evade claims that they expect to lose.

699. In the Court of Session there is no good reason for giving the same judges power to grant warrant directly in payment actions, and indirectly through letters of inhibition in payment actions. This adds complexity and expense for no benefit at all to either creditor or debtor.

700. The purpose of diligence on the dependence is to give the creditor security for a payment that may be found due. An unscrupulous creditor could use diligence on the dependence to put pressure on the debtor by freezing assets or blocking sales, even although the creditor does not in fact need any security for the claim.

701. In order to prevent this diligence on the dependence should only be available where it serves a purpose, namely in actions for payment of money, or actions asking the court to order the debtor to sign and deliver a conveyance of or security over particular land or buildings.

702. This does not mean that diligence on the dependence should be restricted to 'simple' payment actions. The courts are often asked in actions of specific implement to order debtors to do or deliver something such as a car, and in most such actions the court will be asked to order a payment (say, the value of a car). In such cases it is reasonable to allow the creditor to ask for security for the value of the claim.

703. Future and contingent debts are another special case. Under the law current before the decisions in *Karl* and *Taylor* it was already the case that diligence on the dependence could only be used with specific permission. A court might, for example, be persuaded that a creditor should have security for a claim for payment of a capital sum one year after any decree in a divorce action.

704. The court took into account similar considerations to those the Executive intends will apply in the new statutory tests for grant or recall of warrant to use diligence on the dependence. They included the debtor running away, going bankrupt, or hiding assets. There should therefore be no need for special rules for future or contingent debts, and they can be covered by the reforms in the Bill.

Proposal

705. The Scottish Executive intends that the sheriff will have power to grant warrant both for arrestment on the dependence, as at present, and inhibition on the dependence in all types of procedure. It would therefore no longer be competent for the Court of Session to grant letters of inhibition on the dependence of a sheriff court action.

706. It is intended that the Court of Session will have power to grant warrant for arrestment on the dependence and inhibition on the dependence in petition proceedings. The Court will not retain a general power to grant letters of inhibition.

707. It is intended that the availability of diligence on the dependence, in this Part, will be restricted to actions that include a claim for payment other than payment of expenses, and to other actions in respect of the conveyance or burdening of specific property.

708. It is intended that a claim for payment will include a claim for payment of a future or contingent debt.

Permission to use diligence

709. Until recently permission to use diligence on the dependence was given more or less automatically.

710. In the Court of Session a judge could give permission to arrest or inhibit on the dependence of an 'action', but not 'petitions' for reasons which are unclear. The reason may be that a petition tends to be to establish a right rather than to demand a payment, but that is not true in every case.

711. In the sheriff court a sheriff could give permission to arrest, but not to inhibit. A creditor wanting to inhibit on the dependence of a sheriff court claim or a Court of Session petition has to apply to the Court of Session using an old procedure known as letters of inhibition.

712. A judge or sheriff can refuse permission to use diligence on the dependence but in practice that rarely if ever happened. Indeed, it was the invariable practice to add permission to use diligence to the warrant for first service of a claim document on a debtor whether or not the creditor needed or wanted any security to secure the claim.

713. Letters procedure is different in that the creditor needs to ask for permission, but the granting of it involved little or no scrutiny of need. The main effect of letters procedure is that it adds cost and delay to the process of requesting permission.

714. This state of affairs was considered by the SLC in their analysis in the 1998 Report, which considered amongst other things whether diligence on the dependence infringed either Article 6 (Fair hearing) or Article 1 of Protocol I (freedom to use property) of the European Convention of Human Rights ("ECHR"). The SLC did not make any specific recommendation for reform. The ECOS consultation noted that debate, and the then unreported decision in *Karl*.

715. *Karl* and *Taylor* have confirmed that Article 6 ECHR is not engaged in this area, but that the then application of diligence on the dependence infringed Article 1 of Protocol 1 ECHR because of a disproportionate interference with debtors' property rights. *Karl* has a detailed analysis of the legal issues and procedural steps needed to ensure ECHR compatibility.

716. In the Executive's view, the analysis in *Karl* is to the effect that 4 conditions must be satisfied before diligence on the dependence is compatible with Article 1 of Protocol 1 ECHR:

- The creditor must have a *prima facie* case, that is the allegations in the claim document will if proven true lead to success in the action,
- The creditor must show a specific need for diligence on the dependence,
- There must be a hearing before a judge, and
- The creditor must be liable to pay damages for losses of the debtor should the action fail.

717. *Taylor* is the later, and authoritative, case but has a more limited analysis of the issues. In *Taylor* the court held that a hearing was not necessary, and in essence all that is needed if for the decision on the application for permission to use diligence to be made by a judge. *Taylor* clearly establishes a low minimum requirement for ECHR compatibility, but it has all the same been subject to some academic criticism⁶⁸.

718. When the Bill consultation was published the decisions in both *Karl* and *Taylor* had been reported, and addressed in Court Rules⁶⁹ requiring 'judicial consideration' (following *Karl*) before permission is given to use diligence on the dependence. The Executive was still considering whether or not to introduce further reforms in response to *Karl* and *Taylor*.

719. The Executive considers that since the decisions in *Karl* and *Taylor*, and perhaps because of the differences between them, that practice in the courts has not developed in a consistent way. All decisions must be judicially considered, but in some cases a contested hearing is held and in others there appears to be little more scrutiny of decisions that there was before the decisions in *Karl* and *Taylor*.

720. This does not mean that the courts are acting in a way that is incompatible with Scotland's ECHR obligations, in fact all judicial decisions require to be compatible with the rights protected by the ECHR⁷⁰, but it does mean that parties are treated differently in different areas which leads to uncertainty and arguably to unfairness. The Executive is persuaded that such issues can be resolved by applying tests based on those in *Karl* as needed. The practical effect is in some ways to apply at the permission stage the intended test for recall of diligence on the dependence.

Proposals

721. The Executive intends that in order to get permission to use diligence on the dependence the creditor must have a *prima facie* case, and satisfy the court that there is a specific need for the diligence. The court will need to be satisfied that it is reasonable in all the circumstances that permission be given, and in making the decision consider whether the debtor is:

- Insolvent or verging on insolvency, or

⁶⁸ See for example: Gerry Maher article in Scottish Law Times (news) 167 2004

⁶⁹ Act of Sederunt (Rules of the Court of Session Amendment No. 6 (Diligence on the Dependence 2003) SSI 2003/537 and Act of Sederunt (Ordinary Cause, Summary Application, Summary Cause and Small Claim Rules) Amendment (Miscellaneous) 2004 SSI 2004/197

⁷⁰ Section 6 of the Human Rights Act 1998 (c.42)

- Likely, by removal, disposal, burdening or concealment of assets, to defeat or prejudice enforcement of any decree.

722. It is intended that there will be a hearing in every case, except where the court is satisfied that there is an urgent need to act before intimation of the claim document. It is intended in that event that there will be a hearing after execution of the diligence and service where the court will re-consider the case.

723. It is intended that at all stages of a diligence on the dependence the onus will lie on the creditor to show that the permission to use diligence is reasonable in the circumstances.

Execution and effect

724. The first that a debtor may know of a claim is when a bank account is arrested, or they receive a copy of an inhibition. They may not know why their account has been arrested until they get a copy of the claim document from the creditor. It is therefore important first that the claim document is served quickly, and that the creditor loses their diligence if that doesn't happen.

725. In view of the importance of this issue the Executive originally proposed that service should be made within 5 days after execution of diligence. Respondents pointed out that the creditor, without any fault, would often be unable to serve the claim document within such a short period. The diligence would then be cancelled, and the creditor would lose a security that they might not get again.

726. It is therefore reasonable to offer more time for service. The consultation responses support either 14 or 21 days for service. The Executive prefers 21 days as that is the normal period allowed for notice of a claim document (the 'induciae' of a claim). The longer of the two suggested periods therefore offers the benefit of consistency with other court rules.

727. At present, if the court gives permission to use diligence there are no limits on the amount that can be arrested or the property that can be affected. In this area law and practice run closely together and can be hard to disentangle. There is no doubt that the court has power to restrict diligence on the dependence once executed, and it is logical to extend that power to the grant stage. In practice, however the warrant if granted is on the face of it unlimited when granted.

728. The next consideration arises from the execution stage. Sheriff officers or messengers-at-arms do not on the face of it execute diligence for an unlimited sum. In (say) an arrestment on the dependence the arrestment schedule refers to the sum sued for in the claim document, and invariably adds the words "more or less". The meaning of that phrase has been determined by the courts to mean that everything that could be arrested is arrested⁷¹.

729. This makes a real difference to the debtor. For example, £2.4 million due to the Glasgow Herald in an action for defamation in 1993 was arrested for a claim of £750 000 in damages⁷².

⁷¹ See *Ritchie v. McLachlan* (1870) 8 M 815

⁷² See *Henderson v George Outram and Co. Ltd.*, 1993, SLT (OH) p 824.

The Commission commented that law and practice in this area was clearly excessive, particularly as in some cases this can mean the sums are frozen or property effected for a considerable time. Cases, particularly complex cases involving large sums, may run for months or even years.

730. This difficulty with diligence on the dependence was not resolved by the decisions in *Karl and Taylor*. There is however a conceptual link between the issue of permission to arrest, and what is affected by the arrestment. It may only be appropriate, or proportional, to grant a restricted warrant. An unlimited warrant may tip the balance in favour of the creditor, where a limited one will do justice to both interests.

731. In most cases the court should be left to strike the necessary balance between the interests of the debtor and creditor in an undecided case. Where a claim is limited to a narrow dispute about whether a property should be conveyed or burdened with a security (mortgage), it can be said in advance that the only security a reasonable creditor can need is a security over the property in question.

732. The Bill in Part 5 is intended to reform the linked diligence of inhibition in execution, which is used after a payment is found due. Most of those reforms will apply to diligence on the dependence. For example, Part 4 will determine what property is affected and when.

733. The Bill in Part 10 is intended to reform the linked diligence of arrestment in execution and action of furthcoming. Again, most of those reforms (so far as not providing for release of money etc.) will apply to arrestment on the dependence. For example, Part 10 provides a protected minimum balance to protect debtors from having the whole of a bank account frozen. It also provides for the arrestee to notify the creditor of any sum arrested.

Proposals

734. The Executive intends where diligence on the dependence is executed before the claim document is served that the diligence will cease to have effect unless service takes place within 21 days. The 21 day period should be capable of extension in all cases by the court, which will be particularly useful in admiralty actions where the debtor is more likely to be abroad. Section 17 of the Debtors (Scotland) Act 1838⁷³ (“the 1838 Act”) will need to be repealed as a consequence of this change.

735. It is intended that the court may limit the sum attached by arrestment or the property affected by inhibition. Any limit on arrestment must not exceed a cap, which may be determined in part by regulations made under the Bill. In an action for specific implement on a property, the court will be required to limit any inhibition on the dependence to that property.

Recall, restriction and expenses of diligence

Recall and restriction

736. After permission to use diligence is given the debtor can ask the court to recall the warrant, or to recall or restrict any diligence that has been executed on the warrant. To do so,

⁷³ 1838 c.114 (1 & 2 Vict.)

however, the defender must prove that the diligence has been executed incompetently or irregularly, or that the effect of the diligence is ‘nimious (excessive) or oppressive’.

737. Debtors are rarely aware of any technical defect in execution. This makes it more likely that they will need to show oppression. It can be very difficult first to identify what is serious enough to count as oppression rather than (say) inconvenience or unfairness, and second to convince a court that the circumstances identified do in fact add up to oppression.

738. In practice, therefore, the numbers of applications for recall or restriction are low in comparison to the numbers of diligences. It is thought that is because of the difficulty of meeting the present test for recall or restriction, and not because debtors are happy that diligence on the dependence is used fairly or in a proportionate way.

739. The courts should keep their existing power to recall or restrict diligence on the dependence on the ground that it is irregular or incompetent due to a technical defect, or ineffective in some other way. The current "nimious or oppressive" test is however both unclear and of uncertain value, and should be replaced by a test that clearly states the factors that the courts must consider when recalling or restricting diligence.

740. The debtor makes an application for recall or restriction, but the creditor has not at that stage proved that any sum is due. It is reasonable therefore that the creditor should have to satisfy the court that the existing arrangements strike the right balance. This is the reverse of the normal position which is that it is the person making an application who must satisfy the court.

741. Loosing of an arrestment is an old procedure that originated in the practice of court officers releasing arrested property in exchange for caution (guarantee) for payment. The bond which proved the guarantee was sometimes either lost or ‘lost’, and the Arrestments Act 1617⁷⁴ (“the Act of 1617”) required that bonds were registered with the court. Loosing is still used in admiralty actions, although not under the Act of 1617, but in all other respects will serve no purpose in the modernised diligence system being introduced in the Bill.

Expenses

742. The issue of who pays the expenses of a court action where diligence on the dependence is used is similar to, but more minor than, the issue of wrongful or unreasonable use of diligence. The courts should therefore have similar powers to enable them to do justice between the parties to an action.

743. The expenses, or costs, of an action are intended to compensate a party for the legal and other costs involved in going to court. They are calculated from tables for the different sets of court procedure. The courts have a broad discretion on whom if anyone should be ordered to pay the costs of another party, subject to the general rule that costs should follow success. If the creditor wins the debtor pays, and vice versa.

⁷⁴ Acts of the Parliament of Scotland, 1617 c17.

744. The costs of using diligence on the dependence are an exception to that general rule. Under current law, creditors use diligence on the dependence at their own expense. The debtor does not have to pay the creditor's costs in getting security for the claim, even when the debtor loses the action. Equally, if the creditor behaves unreasonably then the debtor will only have a remedy if they suffer the kind of loss compensated by damages.

745. That does not mean that the creditor should automatically get the costs of diligence on success, or vice versa for the debtor. Court actions can be complicated. Success can be mixed, particularly where (say) a debtor has counterclaimed against the creditor. It could also be the case that a creditor has lost on the merits, but the debtor's behaviour was such that it was reasonable for the creditor to ask for and get security for the claim.

746. The court should therefore be able to balance all relevant factors in deciding whether or not to award costs. A sensible starting point for that balancing exercise is for there to be a presumption that the creditor is paid the costs of diligence regardless of the outcome, but subject to the court limiting or refusing those costs where reasonable. Equally, debtors who lose should still be entitled to their costs if the creditor behaved unreasonably in asking for or using diligence.

Proposals

747. The Executive intends that there will be a new test for recalling or restricting diligence on the dependence. The court which gave permission must first consider whether warrant or any diligence is invalid in which case it must recall it. If the warrant or diligence is valid then the court may, if it is reasonable in all the circumstances, recall or restrict the warrant or any diligence, but must have regard to whether the debtor is:

- insolvent or verging on insolvency, and
- likely, by removal, disposal, burdening or concealment of assets, to defeat or prejudice enforcement of any decree.

748. It is intended that the courts will have power to order the debtor to consign a payment into the court, or to provide a third party guarantee of payment (caution) or some other security. The courts will be able to make any order needed to manage the effect of recalling or restricting a diligence (an ancillary order).

749. It is intended that there will be a presumption that the warrant or diligence should be recalled or restricted as requested by the debtor. It will be for the creditor to satisfy the court otherwise.

750. It is intended that the process of loosing of an arrestment shall be abolished except in admiralty actions and that the Act of 1617 will be repealed.

751. It is intended that the creditor shall be entitled to the costs of using diligence on the dependence regardless of success, unless modification is reasonable or the creditor was acting unreasonably. The debtor shall be entitled on the same basis to the costs of opposing the diligence if the creditor was acting unreasonably, or if modification is reasonable in all the circumstances.

Prescription of arrestment

752. People need to be able to plan rationally for the future and not worry too much about what happened in the past. The law encourages the necessary certainty through the rules of prescription. Claims for payment that people may have lapse, or prescribe, after a certain time. The length in which a claim can be enforced depends on the type of obligation in question.

753. Arrestment is a case in point. The diligence, whether in execution or on the dependence, only attaches (freezes) property. Under current law it must be followed up by an action of furthcoming before there can be any payment. Creditors should not be able to freeze property indefinitely, and since the 1838 Act an arrestment lapses (prescribes) after 3 years unless insisted upon by the creditor.

754. There is, however, a difficulty with section 22 of the 1838 Act. It is arguable that prescription starts running from the date of a diligence in execution. The problem with that, if so, is that the creditor cannot insist on the arrestment until decree is granted because there is no right to make good the claim by furthcoming. If decree is granted within 3 years, the creditor may be left with only a short time in which to obtain payment or lose the security (and with it the best chance of payment).

755. In order to avoid this potentially harmful and unintended consequence section 22 of the 1838 Act should be replaced by a new statutory provision setting out clearly the law on the negative prescription of arrestments on the dependence and other arrestments, along the following lines:

- An arrestment on the dependence should (if not insisted on) prescribe three years after the date of decree for payment, unless the debt is future or contingent,
- An arrestment in execution for payment of a debt presently due should (if not insisted on) prescribe three years from the date of execution of the arrestment, and
- An arrestment in security of a future debt or a contingent debt should (if not insisted on) prescribe three years after the date when the debt becomes payable.

Proposal

756. The Executive intends to repeal section 22 of the 1838 Act, and to clarify the law on prescription of arrestment both on the dependence and in execution.

Adjudication in security

757. Adjudication in security is the diligence on the dependence that links with adjudication for debt. It shares all of the disadvantages of adjudication for debt, and is equally uncommon. It should therefore be abolished by the Bill.

Proposal

758. The Scottish Executive intends that the diligence of adjudication in security will be abolished.

Alternative approaches

759. The Executive considered other ways of delivering the intended reforms before settling on policy for the Bill.

Permission to use diligence

760. The Executive considered leaving it entirely to the courts to develop the law on permission to use diligence on the dependence. Indeed, when the Bill consultation was published the Executive was aware of the decisions in both *Karl* and *Taylor* but took the view at that time that there was no need to intervene. In particular, provided there was ‘judicial consideration’ of the decision Scots Law was compatible with ECHR obligations.

761. In the event, the Executive decided that there was enough legal and practical uncertainty about the law in this area to justify statutory provision. The Bill will therefore provide for a test for grant of permission to use diligence. The test developed in response to *Karl* and *Taylor* builds on the work in the 1989 Discussion Paper and the 1998 Report, and in Executive consultations, but does not follow any single previous recommendation for reform.

Limiting the sum secured

762. The Commission’s preferred option for reform to restrict the “more or less” rule⁷⁵ was based its recommendation for a new system of judicial hearing for assessing every application for a warrant for arrestment on the dependence to particular funds or property when examining every case.

763. An alternative proposal of the Commission, and the one that it is intended the Bill will introduce, was suggested by the Commission in the 1989 Discussion Paper⁷⁶. It would limit the amount which could be caught by arrestments on the dependence, the limit being set by reference to a formula.

764. It was noted in the Commission's consultation that a formula based on the sum sued for could lead to pursuers making inflated claims in order to secure arrestments over a larger sum. However, the Executive felt that proposals in the Bill for a test for grant of permission to use diligence and the greatly strengthened provisions for restriction and recall meant that there was no justification for any further limit on the courts’ discretion.

PART 7: INTERIM ATTACHMENT

Aim

765. To extend diligence on the dependence so that a security for payment is possible over corporeal moveable property (*modernisation theme*).

⁷⁵ SLC DP 84 par 2.141

⁷⁶ *ibid* para 2.163 Proposition 13 para

Policy Objectives

Background

766. Diligence on the dependence is considered in more detail in the discussion above on Part 6 of the Bill. This form of diligence gives a creditor⁷⁷ a security for payment of a debt that may or may not be due. Creditors can attach property but do nothing else until, and if, they get decree for payment. It is a provisional or protective measure.

767. All of the diligences on the dependence are based on some other form of diligence, but modified by special rules. As discussed above there are four existing forms of diligence on the dependence all being reformed or repealed in the Bill. They are:

- Arrestment on the dependence,
- Inhibition on the dependence
- Admiralty arrestment on the dependence, and
- Adjudication in security.

768. There has never been an interim diligence against corporeal moveable property in Scotland. If there had it would have been called something like 'poining on the dependence'.

769. In the 1998 report the Scottish Law Commission noted that there was:

"A gap in the provisional and protective measures available under Scots law in so far as there is no means for attaching articles of the defender's movable property in his possession on the dependence of an action for payment".⁷⁸

770. Historically, this gap could be justified because warrant for diligence on the dependence was available on demand. Poining on the dependence would have had a harsh effect on debtors if (say) the stock-in-trade of a business could be frozen more or less on a whim.

771. By the time of the 1998 Report the Commission was, as discussed above, recommending that warrant for diligence on the dependence should not be available on demand. There should instead be judicial consideration of any application for warrant on the dependence. If a judge has discretion to balance the interests of debtor and creditor then there ceased to be any compelling argument against (what was then) poining on the dependence or interim poining.

772. When the 1998 Report was published poining was the diligence against moveable property, or more exactly corporeal moveable property, held by the debtor. The 2002 Act replaced poining with the new diligence of attachment. A new diligence on the dependence will therefore be based on attachment under the 2002 Act.

⁷⁷In this Part of the Memorandum as in the discussion on Part 6 above the parties are described as creditor and debtor, following the language of the Bill and (in this case) the 2002 Act.

⁷⁸ Scot Law Com No 164, paragraph 1.7.

Objective

773. The objective of reform is to modernise diligence on the dependence in general, and the diligence of attachment in particular, so that a security can be put in place over the defender's goods (corporeal movable property) during a court action, while leaving the debtor free to enjoy the use of their goods until, and if, the creditor has proved their case against them.

Consultation and Responses

774. The Scottish Law Commission set out a new diligence on the dependence which is to be introduced and known as interim attachment. This will protect most types of moveable items in the debtor's possession, but held outside the debtor's home, from being transferred or sold by the debtor.

775. The Scottish Law Commission sought views in the 1989 discussion paper *Diligence on the dependence and admiralty arrestments* (SLC DP 84) on the introduction of an interim remedy against goods held by the debtor, where the court would have a new discretion to grant or refuse warrant for diligence in depending court action.

776. Responses were mixed, and those in favour generally felt that the benefit of the proposed new diligence was self evident. Those against were generally concerned that in practice the diligence would be too easy to use as the courts would not in fact put any hurdle in front of creditors even after the reform of diligence on the dependence proposed at the same time.

777. In the 1998 Report the Commission noted this concern, but took the view that the courts could and should be expected to administer any 'gateway' into diligence in a proportionate way. That being so it considered that there were 3 strong arguments in favour of interim attachment:

- There is a gap in the Scottish system of interim remedies,
- Other UK jurisdictions and other developed economies don't have this gap (in part because diligence on the dependence is not available on demand), and
- Unsecured creditors who might use interim attachment are at a disadvantage compared to floating charge holders who attach goods when a charge crystallises.

It recommended therefore that interim attachment should be introduced.

778. In the ECOS consultation, the Executive noted the work of the Commission as set out above, and that the Executive hoped to replace the diligence of poinding (then prospectively abolished by the Abolition of Poinding and Warrant Sales (Scotland) Act 2001⁷⁹) with a diligence against goods. It therefore asked whether in the event that alternative arrangements for attachment of corporeal moveables pass into law provisional and protective measures should apply.

779. A strong majority of respondents to the ECOS consultation supported the need for this type of provisional and protective measure were poinding to be replaced by attachment.

⁷⁹ 2001 asp 1

780. In the Bill consultation the Executive noted the support from respondents to the ECOS consultation, and confirmed that it intended to introduce a new diligence on the dependence to be known as interim attachment, and invited comment on the provision in the draft Bill annexed to the consultation. No respondent offered any further comment.

Policy discussion

781. The gap in existing remedies is discussed above. Of course, a gap is one thing and a demand for something to fill that gap is another. The Scottish Executive does indeed consider that creditors are prejudiced by the current absence of interim attachment.

782. For example, in the 1996 *Emerald Airways* case⁸⁰ an aircraft was purportedly arrested in its owners' hands by an admiralty arrestment. The court refused to agree that an aircraft (unless perhaps a sea plane on water) could be dealt with in the same way as ship and released the arrestment. The general view was and is that an aircraft is corporeal moveable property and can only be attached in execution of a decree or document of debt.

783. The Executive considers that aircraft move in and out of Scotland in the same way as a ship does. The reason justifying special rules for the arrestment on the dependence of a ship (discussed below) apply with equal force to aircraft. Interim attachment is therefore needed in order to give creditors of aircraft owners equal treatment with creditors of ship owners.

Warrant to use interim attachment

784. The aircraft example also serves to illustrate the importance of interim attachment not being used lightly. An aircraft is a very valuable asset and a debtor should have a chance both to oppose warrant and to seek recall or restriction after attachment. The onus of satisfying the court that interim attachment is needed should at all times lie on the creditor, who will not of course have proved that any sum is due.

785. The issues the court will need to consider and balance are the same as they are for the other diligences on the dependence. The Executive considers therefore that interim attachment should be dealt with by the courts in the same way as those other diligences, namely by having regard when reaching its decision to:

- Whether the debtor is insolvent, or verging on insolvency,
- Whether the debtor is likely to remove etc. assets to defeat or prejudice the pending claim,
- The impact on affected third parties, and
- Whether it is reasonable in all the circumstances to grant the warrant.

786. The court should not grant warrant without giving the debtor and any other person having an interest a chance to be heard except where there is an urgent need. If an urgent warrant is granted there should be hearing as soon as practicable thereafter.

⁸⁰ *Emerald Airways Ltd v Nordic Oil Services Ltd* 1996 Scots Law Times 403, Outer House.

Exempt property

787. In the same way as (say) arrestment on the dependence is based on arrestment in execution, interim attachment should be based on attachment under the 2002 Act. The Executive considers that interim attachment should therefore not be competent against any article exempt from attachment under section 11 of the 2002 Act, namely:

- Tools of the trade up to the value of £1000,
- A vehicle up to the value of £1000,
- DIY tools kept outside a dwellinghouse, and
- Mobile homes.

788. The Executive also considers that interim attachment should not be competent inside a dwellinghouse. The definition schedule 2 to the 2002 Act of non-essential assets inside homes that can be attached under an exceptional attachment order will not therefore be relevant for interim attachment.

Interim attachment on decree

789. In all other diligences on the dependence decree for the creditor in the depending court action turns the diligence on the dependence into a diligence in execution. For example, it is intended that if funds in a bank account are arrested before decree then notice of that decree will trigger automatic release under Part 10 of the Bill.

790. The Executive considered whether interim attachment should turn into attachment in execution in the same way, but decided against that. Attachment is different from either arrestment or inhibition.

791. When money in a bank account is arrested the amount arrested is fixed, or will in any event need to be established in separate action of furthcoming. Inhibition is an incomplete (inchoate) diligence and doesn't attach any property. If an inhibition is breached the offending deed is reduced, and therefore issues of value don't arise at all.

792. Attachment under the 2002 Act, however, can't complete without a valuation. If nothing else there needs to be a value in case the attached item doesn't sell and is transferred to the creditor in satisfaction of the debt. This means that either:

- The item attached is valued at the interim attachment with the risk that the value becomes unfair to one or other party between attachment and decree, or
- The item is attached but not valued, and the court messenger needs to come back and value (or re-value) after decree.

793. The Executive considers that the simplest solution is best where the way forward is unclear. The 2002 Act already provides for speedy valuation and auction of attached articles. It is therefore proposed that an attached article will stay attached for 6 months after decree, or longer on cause shown. In that period the creditor can serve an attachment in execution, failing which the interim attachment should cease.

Miscellaneous

794. The Executive considers that the costs of applying for and executing interim attachment should be dealt with in the same way as for the expenses of other diligences on the dependence. The creditor would get the costs of the diligence unless they were acting unreasonably, but as a debtor protection the costs could only be recovered from the attached goods.

795. The debtor may make one or more payments towards the sum due after decree when the interim attachment is still in force. The Executive considers therefore that the Bill should provide that the order in which payments to account are applied, or ascribed, to the debt are:

- Expenses of the attachment,
- Interest on the debt up to the date of attachment, and
- The sum due with interest since the date of attachment.

Proposal

796. The Executive intends that there will be a new diligence on the dependence over corporeal moveable held outside dwellinghouse, to be known as interim attachment. It will be based on the diligence of attachment that replaced poinding under the 2002 Act.

797. Warrant to use the diligence in a depending court action will not be available as of right, but only on the court being satisfied in general that is appropriate for the creditor to use diligence on the dependence as discussed for Part 6 of the Bill above.

Alternative approaches

Exceptional interim attachment order

798. The Executive's policy is that ordinary attachment in a home is too intrusive to be justified unless a compelling case otherwise is made out. The Executive therefore considered whether or not interim attachment within a home should also be authorised in exceptional circumstances.

799. Extending to diligence to dwellinghouses would have meant that there was no gap in provision. Against that, seizing goods in a dwellinghouse would not be the truly exceptional event it should be if the creditor could have access even before they had proved that any money was due.

800. The Executive therefore decided that the arguments in favour of respecting the privacy and dignity of debtors in their homes are so strong that interim attachment should not be competent in a dwellinghouse, even at the risk of some loss of security to creditor who could otherwise have made out a good case for an exceptional attachment order under for Part 3 of the 2002 Act.

PART 8: ATTACHMENT OF MONEY

Aim

801. To ensure that a diligence can be used against money, making it harder for ‘won’t pays’ to avoid their debts (*removing barriers to business theme*).

Policy objectives

802. As mentioned above, attachment replaced poinding as the diligence for use against corporeal moveable property. It is diligence at its most basic: pick something up, take it away, and sell it. It is however too basic as under current law it does not clearly cover one kind of property that you can pick up and take away: money.

803. The law should provide a remedy for creditors to use against all forms of property. The Bill is therefore intended to introduce a new diligence of money attachment with the objective that money held by the debtor may be attached during enforcement.

Consultation and Responses

804. The Scottish Law Commission sought views in the 1987 discussion paper *Attachment Orders and Money Attachment* (SLC DP 108) on whether money attachment should be introduced as a new diligence for use in the enforcement of civil debts⁸¹. The Commission considered the responses when framing the recommendations for reform in the 2001 report.

805. The Commission concluded that there are four arguments in favour of clarifying and extending the law through a new statutory diligence of money attachment

- All assets of a debtor should be liable to diligence (universal attachability),
- Money vests in a trustee on sequestration, and should not therefore be exempt from diligence,
- Most developed legal systems have a method of enforcing debt against money, and
- Sheriff officers and messengers-at-arms come across money in the course of executing other diligences, but cannot attach it.

806. The Commission recommended that there were issues around extending attachment to money, but considered that they could be resolved. The main issues they identified are that

- Ownership of money is difficult to prove,
- Money required for subsistence should not be attached, and
- Searches for money are likely to be intrusive, and could be deeply resented in some circumstances.

⁸¹ The criminal courts in Scotland have extensive powers to make confiscation orders and forfeit money which is the proceeds of crime.

807. The Commission therefore recommended in the 2001 Report⁸² that there should be a new diligence of money attachment for use against money (cash and instruments) held by the debtor anywhere outside a dwelling house or the residential part of a building with other uses.

808. In the ECOS consultation the Executive stated that it would implement the Commission's recommendations, and invited comments on the proposed reform. All respondents were in favour of the reform. Comments emphasised the importance of not attaching in non-commercial premises, and how to make the diligence more effective by (for example) including a power to open locked places and containers.

809. In the Bill consultation the Executive noted the support from respondents to the ECOS consultation, and confirmed that although provision was not included in the draft Bill it would be in the Bill when introduced.

Policy discussion

810. It is not clear under current law whether money held by a debtor may be subject to diligence. The Scottish Law Commission considered that pouncing and warrant sale was an inappropriate diligence because:

“Later steps in the diligence - advertisement and sale of the attached goods - being designed to turn property into cash, are inappropriate when the attached property is itself cash”⁸³.

811. This concern is still there under current law. The 2002 Act provides that attachment is ‘for recovery of money owed’.

812. In law, it is still an open question whether notes and coins are capable of attachment. Before the 1987 Act, for a pouncing to recover a Crown debt (taxes, duties etc.), the sheriff could authorise a pouncing of the debtor’s moveable effects including bank notes, money, bonds and bills. Attachment, however, is not pouncing. It does not follow that (say) a common law power to pounce money transfers to a statutory diligence such as attachment.

813. The position is even less clear for other diligences, such as a sequestration for rent enforcing the legal security created by landlord’s hypothec for rent. Institutional Scottish legal writers such as J. Graham Stewart in *A Treatise on the Law of Diligence* are either silent on the possibilities, or in the case of Bell in his *Principles* say that money is not secured by (for example) the hypothec.

814. In part this uncertainty is because of a legal debate about what kind of property ‘money’ is. The answer to that question is not quite as obvious as might appear at first. In order to be, at least in principle, capable of attachment under any existing diligence money would have to be corporeal moveable property. However notes and coins have important features which distinguish them from other corporeal moveable property.

⁸² SLC 183 recommendations 63 to 77.

⁸³ *Ibid* para 5.1

815. Firstly, bank notes are best seen as incorporeal moveable property given that they are promissory notes within the meaning of the Bills of Exchange Act 1882⁸⁴ (representing a promise to pay the bearer on demand). A claim or entitlement to money is not itself ‘money’.

816. Secondly, notes and coins (cash) which circulate or are intended to circulate as currency can’t be sold as money is not itself sold or exchanged. Money is lent, or given as a gift, or paid in discharge of a debt due to a creditor. However, notes or coins that don’t circulate as currency can be sold. For example, an historic gold sovereign would be sold for market value rather than used in a shop as legal tender.

817. So the position appears to be that circulating notes are incorporeal property and can’t be attached, circulation coins are corporeal moveable property and can (on one view at least) be attached, and non-circulating cash in any form is corporeal moveable property and can be attached. In an important sense, however, the debate about what category of property to put money in is academic for the purpose of the Bill.

818. In practice money is not attached, the obligation to pay on a banknote is not arrested, and the diligences (or more exactly court procedure) of sequestration for rent is to be abolished. Unless an effective diligence against money is created to cut across the debate then this important source of payment is lost to the creditor enforcing a debt.

A new diligence of money attachment

819. The Executive considers that the new diligence of money attachment should be used in execution of a debt constituted by decree or document of debt. For that reason the diligence should only be competent if the debtor has been:

- Charged, and has failed, to pay the sum due, and
- Provided with a copy of the Debt Advice and Information Package.

820. The Executive considers that money attachment should not be available on the dependence of an action, given that under money attachment the property is removed rather than ‘frozen’. As mentioned above, under Part 6 of the Bill the intended new diligence of interim attachment should extend only to property subject to enforcement under the diligence of attachment as created by the 2002 Act.

821. Attachment under the 2002 Act can take place within a debtor’s home, at least in exceptional circumstances. The Executive considers that searching for money within a debtor’s home is too intrusive to be contemplated. A search of the debtor’s person would be even worse: intrusive, humiliating and in all but the rarest of cases unproductive of any benefit to the creditor. Such searches should not be permitted, which in the case of searches within the home will mean a specific ban in the Bill.

822. Money attachment should therefore be restricted in its competence. Any such restriction will disadvantage the creditor, but in all diligences a balance must be struck between strongly

⁸⁴ 1882 c.61.

competing interests. In the case of searches against the person and searches in the debtor's home, the Executive believes that the balance struck must favour the privacy and dignity of the individual.

823. The Executive considers that money attachment should be competent in any place other than a dwelling house. It follows that money in shop tills and taken at large sporting and entertaining events, or held in the glove compartment of a car can be attached, but not money in the debtor's home.

824. Having said that money attachment should not be competent within a home, there remain clear practical links between money attachment and attachment under the 2002 Act. In practice court messengers are likely to attach and money attach as appropriate at the same time and in the same premises. For that reason the Executive considers that:

- Money attachment should be executable on the same days, and at the same times of day, as 'ordinary attachment', and
- A summary warrant should authorise money attachment.

825. The Scottish Executive considers that statute should provide a definition of money for the purposes of the diligence. This will serve two purposes:

- It will circumvent any argument about what can be attached and what cannot, and
- It will assist court messengers in carrying out a money attachment when instructed to do so.

826. 'Money' should mean cash and instruments having value. The most obvious example of an instrument having value is a cheque, but there are other common (postal orders) and not so common (negotiable instruments) examples. In order for the diligence to be effective the Executive considers that there should be a power to modify the definition of 'instrument having value' so that any future forms of money can be attached.

827. The definition of 'money' should only cover cash used as a medium of exchange, that is Bank of England notes, Scottish bank notes, and foreign bank notes. If cash has a different intrinsic value, in other words if it is collectable for its own sake, then it is not money. In that event it would be attachable by 'ordinary' attachment.

Effect of money attachment

828. The whole point of money, cash and instruments having value, is that they circulate. They are one of the most 'movable' forms of property and there is often nothing to suggest that money belongs to one person rather than another. It would be all too easy for a debtor to say, for example, that they are looking after cash for a relative or a business partner.

829. The Executive considers therefore that in order for money attachment to have effect there must be a presumption that money found on the debtor's premises belongs wholly or partly to the debtor. It is however reasonable for the court messenger executing the attachment to ask if

anyone else has an interest, so that the courts can consider any competing claims when dealing with the creditor's application for a payment order.

830. Where the court is satisfied that attached money does not belong to the creditor the attachment should cease to have effect. In many cases, however, it will be claimed that a third party owns the money in common with the debtor. In those cases the money attachment should still have effect, but the court should be able to do justice between the debtor, creditor, and third party.

831. It should be for the debtor or third party claiming that money is owned in common to prove that fact on the balance of probabilities (the normal civil standard of proof). If proved the sheriff should authorise payment to the creditor from the debtor's part of that money. However, doing justice may require more than that.

832. The sheriff should be able to consider an application by a third party at any time between attachment and disposal of the money, which in the case of an instrument having value may be a period of weeks or even months or after disposal of the money if a claim was made before disposal but not resolved.

833. If a third party claim is made before disposal the sheriff should be able to discharge the attachment if disposal of the money would be unduly harsh to the third party. This power could be used if the money was needed to support the third party, and the court was satisfied that it would in fact be spent on that purpose. It could be used if realising an instrument at a particular time would mean a very poor return because of temporary market conditions.

834. If a claim is made after disposal the creditor should have to compensate the third party for the lost value by paying a proportion of the cash received, or in the case of an instrument a proportion of the value realised. The court will not, of course, guarantee the payment. The Bill should therefore give the third party the right to raise a claim against the debtor for the sum due.

835. The Executive considers that where money owed in common by a third party is released from the attachment because of hardship, or because (say) the third party having established their claim redeems the money by paying the debtor's share to the court messenger, the debtor should be able to attach other money owned by the debtor at the place of attachment. The costs of that further attachment would in due course be paid by the debtor from the attachment proceeds.

836. The Executive considers that attached money should be removed and held by the court messenger until the court can consider how to dispose of it. The debtor will not have been able to do anything about cash, but may realise or attempt to realise an instrument having value such as a cheque. The third party who wrote a cheque could be persuaded to stop it and pay in cash, or by another cheque which would not be attached. The court should be able to deal with that kind of behaviour as a contempt of court.

Money attachment process

837. Most of this Part of the Bill provides in detail for the process of money attachment. The process of money attachment from the debt being established to payment from the debtor is therefore:

- Decree or document of debt authorises the diligence,
- Creditor provides debtor with Debt Advice and Information Package,
- Court messenger instructed by creditor,
- Charge to pay served by court messenger, and debt not paid,
- Attachment executed and money removed by court messenger,
- Schedule of money attachment completed by court messenger immediately after attachment, and copy of the schedule given to the debtor,
- Specialist valuation instructed by court messenger, if needed, and if practicable within 14 days after attachment,
- Instrument having value realised after application by court messenger to sheriff, if needed because value will deteriorate substantially and rapidly,
- Interim report of attachment sent court messenger to the sheriff within 14 days unless longer period needed for valuation,
- Creditor applies to sheriff for payment order,
- Payment order authorises court messenger to pay the creditor, if necessary after realisation of instrument having value,
- Final report of attachment sent by court messenger to the sheriff within 14 days after disposal of attached money,
- Final report of attachment is examined the auditor of court, and
- The sheriff considers the auditor's report, and if needed makes an order declaring the balance due to or by the debtor.

Annex F illustrates the key parts of the process in a flowchart.

Cessation of money attachment

838. It is intended that money once attached may be released from the attachment in several ways. They are:

- Payment or tender of the sum recoverable (debt, interest, expenses) to the creditor or the creditor's representatives,
- Failure of the creditor to apply for a payment order within the specified time limit,
- Redemption of an instrument having value by payment of that value by the debtor to the court messenger,
- The sheriff orders release (see the next paragraph), and
- The sheriff declares that the attachment ceases to have effect due to a material irregularity, if appropriate on the application of the debtor or a third party.

839. The Executive considers that the debtor should be able to oppose the making of a payment order for release of attached money, and that if the sheriff is satisfied that the attachment is or will be unduly harsh to the debtor may order the release of money up to the value of £1000. If necessary the sheriff should be able to order the realisation of an instrument of value so that cash is available for release to the debtor.

Miscellaneous

840. This Part of the Bill is intended to provide for a number of new court applications. Money attachment will only be available in execution of a court decree or equivalent, and the Executive considers therefore that the debtor should not be entitled to civil legal aid for any application under this Part. Advice and assistance from a solicitor will be available, and the DAIP will have been given to the debtor including a list of local money advisers.

841. The Executive considers for the same reason that there should only be a limited right to appeal to a higher court against any decision made by the sheriff. With one exception, there should be an appeal with the agreement of the sheriff on a point of law only to the sheriff principal and no further. The one exception is that there should be no appeal against a decision to order early realisation of money likely to deteriorate in value in view of the urgent need for a final decision.

842. The Executive considers that the creditor's expenses in completing the money attachment process as shown in Annex F should be chargeable to the debtor.

843. The debtor may make one or more payments towards the sum due during the course of an attachment, or the money attached may not be enough to satisfy the debt. The Executive considers therefore that the Bill should provide for the order in which payments to account are applied, or ascribed, to the sum due are. The order should be:

- Expenses of the attachment,
- Interest on the debt up to the date of attachment, and
- The sum due with interest since the date of attachment.

Proposal

844. The Executive intends that there will be a new diligence over money, to be known as money attachment. It is intended that a qualifying decree or document of debt will authorise the attachment of money by a court messenger and, following a payment order made by the sheriff, the payment of that money, or funds realised from that money, against the sums due to the creditor.

Alternative approaches

Exceptional money attachment order

845. The Executive's policy is that ordinary attachment in a home is too intrusive to be justified unless a compelling case otherwise is made out. In essence, 'won't pays' should know that there is a risk that a court messenger will come into their home to look for valuable moveable property. The 2002 Act therefore provides that attachment can take place within a debtor's home where the sheriff is satisfied that exceptional circumstances are made out.

846. The Executive considered whether or not money attachment within a home should also be authorised in exceptional circumstances, particularly as in commercial situations the court messenger is likely to execute an attachment and money attachment on the same visit to

premises. There is an argument from the creditor's perspective for saying that the court messenger should be able to attach any money found when exceptionally the messenger has access to a dwelling house.

847. The Executive decided that the arguments in favour of respecting the privacy and dignity of the debtor are so strong in the case of money attachment, that they are strong enough to prevail even when the court is satisfied that exceptional circumstances exist. In reaching this decision the Executive took into account that no respondent to the Commission or Executive consultations from any sector, debtor or creditor, felt otherwise.

PART 9: DILIGENCE AGAINST EARNINGS

Aims

848. To ensure that diligence against earnings remains an effective diligence by:

- giving an equal priority to more types of debt (*striking the balance theme*), and
- improving the flow of information between employer, creditor and debtor (*information theme*).

Policy objectives

Background

849. The use of repeated ordinary arrestments to attach wages was abolished by the 1987 Act, as recommended by the Scottish Law Commission⁸⁵, and replaced by three new statutory diligences against earnings:

- earnings arrestment,
- current maintenance arrestment, and
- conjoined arrestment orders.

850. In principle, all three diligences against earnings last until the debt is paid or no longer due. They are complete diligences in themselves, and there is not need for a separate action of furthcoming.

851. Earnings arrestment lasts until the debt is fully paid or the debtor leaves the employment. The employer makes a deduction from the debtor's earnings every pay day, and pays the deduction to the arresting creditor. The deductions are calculated by reference to statutory tables in the 1987 Act, exempting a basic income from arrestment in order to protecting debtors and their dependents. The tables provide deduction figures for monthly, weekly and daily earnings.

852. Current maintenance arrestment introduced a simpler and less expensive solution for the collection and enforcement of maintenance payments due to spouses (past and present) and children. The employer makes a deduction calculated on the maintenance due every pay day and

⁸⁵ Scot Law Com Report on Diligence and Debtor Protection (SLC No 95) (1985), Chapter 6

pays it to the arresting maintenance creditor. There is no fixed sum to be recovered, so this diligence lasts as long as the obligation is enforceable.

853. Conjoined arrestment orders allow two or more creditors to share the proceeds of a diligence against earnings. The employer pays the sum deducted to the sheriff court that grants the order, and the court divides that payment amongst the creditors conjoined according to the ranking of their debt.

854. All three diligences against earnings are diligences in execution. They cannot be used on the dependence of a court action.

Objectives

855. In diligences against earnings it is not a case of ‘first come, first served’, which is (for example) an aspect of attachment against earnings in England and Wales. The objective is that money arrested is shared equally amongst all creditors with an equal claim to payment.

856. Diligence is often a process, and that is particularly true of diligences against earnings. Circumstances may change during the process, and the objective is that all those involved will share information in order to make the diligence both effective and fair.

Consultation

857. The 1987 Act implemented the relevant recommendations of the Commission. It has not considered this area further.

858. In the period between 1989 and 1995 the Scottish Office Central Research Unit (“CRU”) canvassed interested parties for their views on and experiences of the new diligences against earnings. There was widespread general satisfaction with the diligences introduced by the 1987 Act.

859. CRU research into the operation of the 1987 Act reported a significant increase in the use of earnings arrestments following their introduction during the period of study. For example, the researchers found that between 1990 and 1994 the number of arrestments increased almost seven-fold before levelling out in 1995. Further statistics are available in the background analysis of enforcement and diligence above.

860. The CRU research disclosed some areas of concern, in particular:

- creditors don’t know how much the debtor earns so can’t check the deduction figures,
- employees did not find the information they are given helpful, and
- there is no sharing of information when the employer changes.

861. The 1987 Act implements the Commission’s recommendation that earnings arrestment should have priority over continuous maintenance arrestment. Their view was, in short, that maintenance creditors must follow the maintenance debtor’s fortunes. The Executive considers that this argument has become much harder to sustain in the past 20 years.

862. There have been other changes in the past 20 years. One notable difference is the growth of student loans, which have their own dedicated collection system. At present they come at the end of the payment queue, and therefore cannot even be conjoined with other debts. Indeed a number of issues have been looked at over the years.

863. In the ECOS consultation the Executive asked should:

- current maintenance arrestments rank equally with earnings arrestments,
- (alternatively) current maintenance arrestments for payments for a child have priority over earnings arrestments,
- student loan deduction from earnings orders be treated as earnings arrestments for the purpose of a conjoined arrestment order,
- there still be exemptions from arrestment for—
 - wages from non-fishing employment at sea, and
 - occupational pension payments,
- clarification that the court for the place where the arrestment is taking place will deal with any conjoinment,
- the fee paid to employers for each deduction be increased to £1,
- holiday pay continue to be aggregated into a single pay period, and
- the debtor, employer and creditor be required to exchange a flow of information.

864. The proposals generally received strong support from respondents to the consultation, including the proposals to end the current exemptions from arrestment. Respondents were however against aggregating holiday pay into a single period (which leads to a high deduction under the 1987 Act tables). There was more support for current maintenance arrestments to rank equally with earnings arrestments than to have priority over them.

865. In the Bill consultation the Executive confirmed that the proposed reforms would be carried through were practicable, and sought views on the provision in the draft Bill annexed to the consultation. A comment was received from the Institute of Payroll and Pensions Management, who were concerned about the additional administrative burden on employers. A meeting has taken place with them to address those concerns.

Policy discussion

Parity in ranking

866. At present the order of payment of debts for the diligences against earnings is—

- deduction from earnings orders (Child Support Agency),
- conjoined arrestment orders (ordinary and maintenance debts only),
- earnings arrestments,
- continuous maintenance arrestments, and
- deduction from earnings orders (student loans).

867. One earnings arrestment and one continuous maintenance arrestment can be operated at the same time, and this can cause some uncertainty for employers. The Executive considers that this opportunity should be taken to re-state and clarify the sums to be deduction and paid.

868. The Bill will bring arrestments against earnings policy in line with current policy for affording priority to maintenance of children. It will create parity in ranking between earnings arrestment and current maintenance arrestment where the debtor's net earnings are not sufficient to meet both. This change reflects changing social attitudes and government policy towards an increased emphasis on the importance of fulfilling maintenance obligations. First call on the debtor's earnings will still be for orders enforcing child support.

Meaning of net earnings

Effect of section 58 of the 1987 Act

869. Section 58 of the 1987 Act is intended to operate where the total to be deducted by an earnings arrestment (section 47) and a continuous maintenance arrestment (section 51) when operating together exceeds net earnings, so that the debtor is left with the subsistence level of earnings per day. However the actual wording does not make any mention of that subsistence level.

870. What the provision actually says is that if the amounts deducted under sections 47(1) and 51(1) of the 1987 Act exceed net earnings then the apportionment provision applies. It would be quite easy to come up with a case where the deduction under section 51 would extinguish everything but the subsistence level of earnings and then, applying section 58 literally, that subsistence could be eroded by the EA deduction under section 47(1).

871. That is not what was intended by the 1987 Act, and the Executive understands it is not what happens in practice. In practice employers read words into section 58 which are not there, so that they first make the earnings arrestment deduction under section 47, then attempt to work out the continuous maintenance arrestment deduction under 51 as if no other deduction has been made and then see if it is possible to do that in that order thus preserving the subsistence level of income.

872. In order to correct the law, and align it with good practice, the Executive considers that the reference to "net earnings" in section 58(2) should be a reference to net earnings less the subsistence level of income.

Effect of section 63 of the 1987 Act

873. Section 63 of the 1987 Act deals with priority in a conjoined arrestment order, and requires that a calculation is to be made of what would otherwise have been due under a continuous maintenance arrestment. It states that the calculation should be carried out as if "all the debts were current maintenance.

874. That implies that all the debts covered by the conjoined arrestment order should be treated as current maintenance for the purposes of that calculation. That would involve somehow converting any ordinary debts into current maintenance for the purpose of that calculation.

875. This is now what was intended when the 1987 Act was passed, and evidence of what happens in practice is that a calculation is made of the current maintenance deduction which

would be made if none of the ordinary debts to which the conjoined arrestment order relates existed. The Executive considers that the wording of section 63 of the 1987 Act should be changed to make the law match the more sensible practice.

Fees

876. The level of fee chargeable by employers against earnings for operating an arrestment which may be charged by employers for administering should be increased to better reflect the actual cost to the employer. The Executive considers that the level of the fee should therefore be increased from 50p to £1.

Jurisdiction

877. A minor issue relating to jurisdiction to make a conjoined arrestment order will be clarified. Jurisdiction should be founded at the place of employment of the debtor in Scotland. The wages may be paid from a central source, perhaps in a different sheriffdom or even outside Scotland.

Better Information amongst the parties

878. There should be better transmission of information between the parties involved in arrestments against earnings and improved provision of information for debtor protection purposes.

879. The Executive's policy is to address the inter-related concerns expressed during the research by requiring the parties to exchange a flow of information amongst themselves while in so far as possible within the existing procedures in order to minimise any additional burden.

880. When deducting and transmitting payment to the creditor or the sheriff clerk, employers will briefly specify the debtor's earnings and the calculation of the deduction made. It will also be made available to the employee. Employers will also be required to pass on information known to them about an employee's change of employment.

881. Creditors will be required to keep employers informed about the status of the employee's debt. An obligation could be placed upon creditors to provide statements of account to both employers and debtors. An obligation will be placed upon debtors to notify creditors of any change in their employment status.

Non-Fisherman Seamen's Wages

882. Currently merchant seamen, but not fishermen, enjoy a greater degree of protection from arrestments against earnings than the vast majority of employees. This is not thought to be relevant due to today's employment conditions for such people and the exemption should be removed.

Proposals

883. The Scottish Executive intends to reform the operation of diligence against earnings:

This document relates to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005

- to clarify the deductions made by the employer where an earnings arrestment and continuous maintenance arrestment are being operated together,
- by providing an enabling power which will allow later reform of the operation of student loans deductions,
- by providing for intimation to the debtor of the arrestment schedule given to the employer,
- by providing a range of new duties of disclosure on the parties affected by diligence against earnings,
- to clarify which court has jurisdiction to deal with a conjoined arrestment order, and
- by repealing the seamen's wages exemption.

Alternative approaches

Cross Border Arrestment of Earnings

884. The ECOS consultation outlined one difficulty for arresting earnings in cross border situations when a creditor attempts to recover maintenance from a former partner who lives in Scotland but works in England⁸⁶.

885. Another came to the Executive's attention later. If an employer is based both Scotland and in England & Wales, that employer may be served with an English attachment of earnings order while at the same time be required to operate a Scottish earnings arrestment. The two systems cannot be operated together leaving the employer in a difficult position.

886. The Executive and the Department of Constitutional Affairs explored together a solution that would allow the employer certainty as to what to do in that situation, as the laws for which Holyrood and Westminster respectively are responsible are unclear. Any solution will require amending Scottish and UK legislation.

887. However while a pragmatic solution for priority ranking on a first come-first served basis has been considered favourably by both the Executive and the Department of Constitutional Affairs it has not as yet proved possible to introduce the necessary legislation in both Parliaments. This is likely to be considered in the context of a planned review in England and Wales of attachment of earnings orders.

Occupational Pension Schemes

888. Occupational public service pension schemes are exempted under the 1987 Act from arrestment against earnings. This means that many public service occupational pensions enjoy protection from arrestments against earnings which is not extended to private pensioners.

889. However, they are not excluded from the definition of earnings which may be subject to a deduction from earnings order for the purpose of collecting child support maintenance.

⁸⁶ ECOS paras 5,151 to 5.158

890. In ECOS it was suggested, as many exemptions or special rules historically afforded to public servants have been abolished or eroded, and as public servants' earnings, previously exempted from arrestment, have been arrestable for some considerable time, there appeared to be no reason why corresponding income from pensions should remain outside the normal rule

891. Although the majority of respondents were in favour of removing the exemption, objections included concern that such pensioners might fall between two stools. Any deduction might bring them below income support levels while they would have no entitlement to benefits because of their entitlement to a pension.

892. This proposal also raises issues of legislative competence. In general, the regulation of occupational pension schemes is a reserved matter, as are some particular public service occupations.

893. The Scottish Ministers exercise certain functions for the regulation of occupational pensions for other public servants, such as for teachers or fire, police, local government officers and MSPs.

894. The introduction of any provisions in relation to arrestment of occupational pension schemes would be likely to create a special rule of diligence for pensions, which would properly be a matter for the UK Parliament.

895. At the UK Government level caution was expressed about hasty reform as the law on pensions is notoriously complex and under review. On balance this did not appear the time for carrying out such reform in this Bill though appropriate reform may be the subject of substantial consultation and co-ordination in the future.

Student loan debt

896. The Scottish Executive has considered whether the Bill should bring parity in ranking between the recovery of student loans deductions and earnings arrestment creditors. At present student loan recovery is suspended if an earnings arrestment is subsequently served, unlike the equivalent system in England. The law on student loans is complex, and raises substantial cross border issues. The changes proposed should therefore be implemented through secondary legislation made under the Bill. Any change, if proposed, will only apply to Scottish student loans paid through a Scottish employer.

Holiday pay

897. The Scottish Executive has considered whether the Bill should amend the treatment of holiday pay under the 1987 Act so that aggregated holiday pay is apportioned over the pay period to which it relates. This would avoid the present problem that the deduction is calculated as a single sum paid in a single period. If (say) pay is weekly then that may leave the employee destitute, or unable to pay for the holiday they've arranged.

PART 10: ARRESTMENT IN EXECUTION AND ACTION OF FURTHCOMING

Aims

898. To improve collection of debt under the diligence of arrestment (*modernisation theme*), improve debtor protection (*striking the balance theme*), and increase the information available to diligence users (*information theme*).

Policy objectives

Background

899. The diligence of arrestment in execution and action of furthcoming is widely used, for example by local authorities seeking to recover unpaid council tax. It is most commonly used against funds in a bank account, and for that reason is sometimes called bank arrestment, but it has a much wider scope.

900. Moveable property owed by the debtor (in an arrestment known as the ‘common debtor’) that can be arrested in the hands of a third party includes shares, insurance payments, outstanding bills, rental payments, bequests under a will, and goods held by a carrier. Ships can be arrested under the associated diligence of admiralty arrestment. Some kinds of moveable property cannot be arrested, for example jointly owned property, and most kinds of social security benefits and pensions before payment.

901. Arrestment in execution enables a creditor to arrest or attach all of the moveable property of the debtor held by a third party (the arrestee). Arrestment attaches the obligation to account rather than the thing itself, although it is common to describe property as being arrested. Where a car belonging to a debtor is held by an arrestee it is the obligation to deliver that car to the debtor which is attached. Where an account with £1000 is arrested and the debtor is at the same time due £500 to the bank, then the bank can set one against the other so that the sum arrested is £500.

902. Arrestment in execution by itself does no more than freeze or attach the obligation of the arrestee⁸⁷. In that sense it is very similar to arrestment on the dependence of a court action as discussed above for Part 5 of the Bill. The key difference between the 2 forms of arrestment is that where arrestment is ‘in execution’, the debt is proved, and the creditor can seek payment from the arrested property.

903. The creditor can raise a separate action of furthcoming in the sheriff court. If successful, money arrested in for example a bank account is paid by the arrestee to the creditor and other property arrested can be sold and the creditor paid. Actions of furthcoming are rare in part because a valid defence (such as debt not due) is equally rare, and in part because an informal mechanism has developed to circumvent the need for court action where funds are arrested.

904. The informal mechanism is for the debtor to authorise the arrestee, typically a bank, to release the sum due to the creditor. The diligence, in this case arrestment, ceases to have effect

⁸⁷ In legal terminology it is an ‘inchoate’ or incomplete diligence.

on payment of the sum due. The arrestee naturally wishes to be sure that there will be no claim for compensation if funds are released without the comfort of a court order. For that reason the debtor is usually asked to sign a written instruction, usually prepared by the arrestee, and commonly known as a ‘mandate’. The mandate is evidence of the instruction but otherwise has no legal status.

Objectives

905. The first objective of reform is that the use of arrestment in execution should have a proportionate effect on the debtor. Debtors should have reasonable access to funds on an arrestment. They should not be left penniless and unable to support themselves or their dependents. The property arrested, or attached, should not be unlimited but rather have a definable relationship with the amount of debt.

906. The second objective of reform is that where debt is legally due the creditor should have access to clear and simple mechanisms allowing payment from arrested funds.

907. The third objective of reform is that there should be better information available to creditors about what is, and what is not, arrested where a debt is legally due. Better information will enable creditors to make rational choices about how best to enforce the debt, or indeed to inform their decision if requested to co-operate with some form of debt management or debt relief.

Consultation and engagement

908. In the 1989 discussion paper ‘*Diligence on the Dependence and Admiralty Arrestments*’ (SLC DP 84) (“the 1989 Discussion Paper”) the Scottish Law Commission proposed that the amount of money that is attached by arrestment in execution should not unreasonably exceed the sum actually due. The proposed limit on arrestment would not apply to arrestment of any other type of property. This proposal did not lead on to a recommendation for reform.

909. In the 1992 ‘*Report on Statutory Fees for Arrestees*’ (SLC 183) (“the 1992 Report”) the Commission recommended that the arrestee should disclose to the creditor the existence and extent of funds or property arrested in execution of a debt⁸⁸. The Commission also recommended that administration fees for arrestees (primarily benefiting banks) should be introduced.

910. In the ECOS consultation the Executive explained why it did not intend to introduce fees for arrestees⁸⁹, and did intend to provide for disclosure on arrestment. The Executive set out its views on other issues arising from the SLC proposals and recommendations and asked whether:

- The amount arrested in execution should be limited by reference to the sum due,
- Where a debtor already has an earnings arrestment or benefits paid into a bank account there should be a–
 - Protected minimum balance in a bank account,

⁸⁸ Scot law Com 133 Recommendation 16

⁸⁹ ECOS consultation paragraphs 5.253 to 5.267

- Restriction on arresting funds from certain sources,
- Ban on arrestment if the debtor is being paid benefits, or
- Some other means of preventing harm to the debtor,
- There should be automatic release of arrested funds to the creditor subject to a 28 day objection period, and
- Court rules should modernise arrestment forms.

911. There was strong support for limiting the arrestment, automatic release, and modernisation. There was strong support for increased protection for debtors faced with double diligence or financial hardship, although without clear support for any of the first three options set out above. The option that had the most support was the protected minimum balance.

912. Subsequent consultation was held with the Committee of Scottish Clearing Bankers to seek a simple and cost effective solution that combined the best aspects of all three options. The opinion of affected UK Departments and key money advice agencies was canvassed on the resulting proposal. The Bill consultation set out the decision of the Executive to implement the first of the three proposed solutions for debtor protection.

Policy discussion

913. This Part of the Bill provides for reform of arrestment in execution, and extends the methods of release of arrested funds beyond an action of furthcoming. It is intended that the protected minimum balance and the arrestee's duty of disclosure will also apply to the diligence of arrestment on the dependence of a court action.

Arrestment in execution

914. The Bill introduces three new diligences in execution of debt. They are land attachment, money attachment and residual attachment. These new diligence supplement the existing statutory diligences introduced by the 1987 and 2002 Acts, which gave effect to other recommendations of the Scottish Law Commission.

915. All the statutory diligences in this Bill and the 1987 and 2002 Acts are authorised by warrant following decree or document of debt. For this purpose a document of debt is the equivalent of a court decree, such as a separation agreement on divorce registered for execution (enforcement) in the Books of Council and Session⁹⁰.

916. The Bill makes other major reforms of diligence law, including to common law diligences such as arrestment in execution and inhibition. It will therefore help to clarify the law on diligence in execution if the legal basis for using all the diligences in execution, old and new, is aligned in the Bill.

917. The diligences of arrestment on the dependence and arrestment in execution are in any event closely aligned. If any property is arrested on the dependence then on decree being

⁹⁰ The Books of Council and Session have their origin in the register of judgements issued by the Court of Session.

granted the diligence has by law the effect of an arrestment in execution, and the property can be released or realised through an action of furthcoming.

918. In particular, the creditor does not need to serve a new arrestment schedule on the creditor when an arrestment on the dependence converts to an arrestment in execution. What is arrested at that point stays arrested until released, or the creditor's right to raise an action of furthcoming prescribes. It will however be necessary to intimate the decree in the action to the arrestee if the intended automatic release procedure is to apply to converted arrestments.

Limiting the sum attached

919. It is generally considered that arrestment in execution attaches the whole of the common debtor's property in the possession of the arrestee, regardless of the size of the actual debt due. Authority for this long standing proposition comes from the case *Ritchie v McLachlan*⁹¹ concerned with arrestment on the dependence but the SLC concluded in the 1989 Discussion Paper that the same principle applied to arrestment in execution.

920. The rule expressed in *Ritchie* has been the subject of judicial and academic criticism. It has been questioned whether the rule is a rational one as the arrestment schedule refers to the principal sum due, and the words 'more or less' are not enough to alert the arrestee to the fact that it is unsafe to release to the common debtor any balance over and above that sum stated in the arrestment.

921. In the 1989 Discussion Paper and the 1998 Report on diligence on the dependence, the Commission considered whether a limit should be placed on the amount which may be attached by an arrestment of any kind. Indeed, in the 1998 Report the Commission thought that for arrestment in execution the case for a limit is stronger as the amount due including expenses and interest to date would be known at the point when the arrestment was executed.

922. Nonetheless, following the mixed reaction to the 1998 Discussion Paper, the Commission rejected the introduction of an upper limit for arrestment on the dependence (and by inference for arrestment in execution) for 3 main reasons:

- it would be difficult to predict the costs of any action of furthcoming that might be needed, and which should be secured at the arrestment stage,
- the aim of the limit, being the protection of the debtor, could be defeated if a creditor served an arrestment on more than one arrestee, and
- the debtor's remedy should be to pay the debt which will have the effect of extinguishing the arrestment.

923. The Executive considered all these arguments carefully in the period including the ECOS and Bill consultations. Actions of furthcoming, for example, are rare and will reduce further as a result of the intended automatic release scheme. In addition, it would be possible to include in the sum arrested at least some security for the costs of any furthcoming.

⁹¹ 1870 M 815, as discussed as discussed for Part 5 of the Bill above.

924. It is correct to say that multiple arrestments will remain lawful, but other factors will tend to depress that practice. The intended disclosure by the arrestee of the amount and nature of any property attached will make it more obvious when an adequate sum has been secured. Indeed excessive use of arrestment in execution may in some circumstances constitute wrongful arrestment. In any event, any limit on arrestment offers more protection than no limit and provides significant protection to a debtor who has only one bank account.

925. The argument that a limit is inappropriate because the arrestment is in execution is on the face of it quite persuasive, but carried too far would lead to the conclusion that few if any debtor protections can be justified. It is therefore important to keep in mind that the purpose of diligence is to recover sums which are due and payable to the creditor and not to punish the debtor by imposing an excessive burden upon him.

926. The Executive concluded that as a matter of principle, it is inequitable that an arrestment in execution should be capable of attaching an amount far exceeding that debt. For that reason the preferable course is as originally suggested by the Commission in the 1989 Discussion Paper, and that the sum attached should indeed be limited as proposed at that time.

Protected minimum balance

927. The 1987 Act introduced earnings arrestment, a new type of diligence against earnings. A key feature of earnings arrestment is that it protects debtors from undue hardship by limiting the amount that can be deducted from wages. Statutory tables set out the permitted deductions for various pay periods and pay bands. For each pay period there is a minimum 'safety net' that is protected from arrestment, namely:

- £10 for daily pay,
- £70 for weekly pay, and
- £304 for monthly pay.

928. The statutory tables are set out in Schedule 2 to the 1987 Act, and can be amended by regulations made under that Act. They were last amended by the Diligence against Earnings (Variation) (Scotland) Regulations 2001⁹², and the Executive is currently consulting on a further variation to those Tables. It is anticipated that the tables will if approved be varied with effect from 6 April 2006.

929. The 1987 Act specified categories of income which were to be exempt from earnings arrestment, including any pension, allowance or benefit payable under any enactment relating to social security. Most social security benefits and child support maintenance are also exempt from arrestment in execution by virtue of the statutory provisions which govern benefits and maintenance. However, arrestment in execution attaches the obligation to account so the value of the statutory protection is limited for two reasons.

930. First, there is no specific protection from arrestment in execution for benefit payments once they are paid into the common debtor's account with a bank or other financial institution. An arrestment of such an account, whether on the dependence or in execution, attaches the entire

⁹² S.S.I. 2001/408

balance in the account regardless of source. The creditor can, by action of furthcoming, obtain payment from the funds arrested up to the value of the outstanding debt.

931. Second, arrestment in execution is in principle⁹³ competent whether or not an earnings arrestment or other diligence against earnings is already in place. A common debtor faced with this ‘double diligence’, a person who may already been left with only the minimum needed to sustain themselves, may find that even that minimum has been cleared out of their bank account by arrestment in execution.

932. There is no reason to doubt that hardship is caused by either or both of the clearing out of bank accounts, and the simultaneous operation of earnings arrestment and arrestment in execution, although statistics are not available and the reported evidence is therefore anecdotal. It is therefore difficult to assess the true scale of the problem, but the Executive considers that the degree of conflict is such as to justify a reform even if that benefits only a relatively small number of people.

933. This particular conflict was not considered by the Scottish Law Commission, who therefore made no recommendation for reform. A Member's Bill⁹⁴ in the Scottish Parliament in 2000 sought to resolve the problem, but that Bill was not supported by the Executive which did not wish to legislate on these issues in isolation. The Member's Bill did not pass, but the Executive confirmed in 2000 that it was sympathetic to the idea of protecting a basic sum from arrestment in execution in a way similar way to that for diligences against earnings.

934. The Executive considers that there should be a link between the level of income protected under earnings arrestment and any amount protected under arrestment in execution. Setting up such a link would deliver 2 clear benefits:

- It would bring consistency, and therefore clarity, to this issue, and
- Deductions under earnings arrestment are already subject to a regular review process, which will preserve the value of the protection.

935. Protecting a basic sum, or a protected minimum balance, was the first of three options consulted upon in the ECOS consultation as set out above. It received the most support, and is in the view of the Executive the best way forward. It is not, however, a perfect solution to the problem. Indeed the ECOS consultation demonstrated that there is no entirely straightforward solution, and that the reform should therefore seek rather to strike the right balance between the competing interests.

936. There are three factors that are relevant to the introduction of a protected minimum balance. They are:

- the right level of protection,
- linking protection and subsistence, and
- arrestment of multiple accounts.

⁹³ Competent in principle because there are three diligence stoppers designed to help the ‘could pays’ faced with multiple diligences.

⁹⁴ Proposal lodged in the Scottish Parliament on 26 April 2000 by Alex Neil MSP.

937. The creditor is denied a legitimate remedy if too much of an account is protected. Conversely, if too little is protected then the debtor may struggle to put food on the table. The Executive considers that the debtor protections available for earnings arrestment have worked well in the period since the 1987 Act, and further the Executive has undertaken to review and update the deduction tables approximately every 3 years. Linking the protected minimum balance with the earnings arrestment tables will therefore strike the right balance. Most people are paid monthly so the protected monthly balance is the appropriate standard.

938. The wrong that needs to be remedied is in large part the unacceptable risk that the common debtor is left without the means of subsistence by an arrestment on the dependence or in execution. If that risk is clearly low then it becomes appropriate to give more weight to the interests of the creditor. If the arrestment is in execution the Executive considers that those who can pay should pay, and the 'won't pay' in particular neither need nor deserve any protection from enforcement. If the arrestment is on the dependence then it is intended that the creditor will have shown that it is reasonable that they should have security for their claim.

939. The Executive considers that the best way to strike the balance between protected and non-protected accounts is to provide that business accounts will not be protected. The clearest way to achieve that is to consider the personal liability for, and purpose of, accounts, so that there would be no protection for accounts held by:

- limited companies,
- limited partnerships and limited liability partnerships,
- common law partnership accounts (other than the separate personal accounts of the individual partners), and
- individual bank accounts operated as business trading accounts.

940. This would have the effect that some personal accounts would not be protected, putting the onus on sole traders in particular to organize their affairs so that business and personal funds are kept separate.

941. The arrestee will need to be able to distinguish trading and non-trading accounts in order to know whether or not to apply the protected minimum balance. The Executive considers that this will be possible in practice. Many such accounts are held in the name of (say) John Smith trading as Smith Kitchens. An account which is a trading account but doesn't have a trading name should be identified and dealt with as a commercial rather than a personal account.

942. If the common debtor has multiple personal accounts then in fairness to creditors the protected minimum balance should only be available on one account. The Executive has considered whether any mechanism could be put in place to identify multiple accounts, but has not been able to devise any method that would not put an undue burden of investigation or compliance on the arrestees. It is therefore considered that all qualifying accounts should be protected even if that means that more than one subsistence amount escapes arrestment.

943. In practice therefore the Executive considers that on arrestment the arrestee should determine the sum they are due to pay the common debtor, for example after setting off any debtor balances. The protected minimum balance should be applied to that sum, and the balance

arrested up to the appropriate sum. For example, a bank would owe a debtor £500 if there were a £1000 credit in a current account and a debit balance of £500 in a loan account. The protected minimum balance of (say) £304 is applied to the arrestable sum and £196 is arrested.

Disclosure by the Arrestee

944. When a creditor arrests, whether on the dependence or in execution, they may not know whether any of the common debtor's moveable property has been attached. There is no obligation on either the debtor or the arrestee to disclose to the creditor the existence, or extent, of assets attached. The only legal method of obtaining this information is to raise an action of furthcoming which may achieve no more than to disclose that nothing has been attached.

945. Until fairly recently, however, the Scottish banks would inform the creditor in an arrestment in execution (but not on the dependence) if funds were attached. However, the limitations of a voluntary system were evident:

- only the Banks had any policy on voluntary disclosure,
- a creditor might know that property was attached, but not how much, and
- it is arguable that both data protection rules and legal obligations to respect privacy limit what can be disclosed.

In 1992, for example, one Scottish bank stated that it would not disclose any information on the effect of an arrestment unless that authorised by the customer or the courts.

946. The Scottish Law Commission reviewed this issue in the 1992 Report. The Commission considered that the practice of voluntary disclosure, then beginning to fall into disuse, has a sensible and practical basis. If necessary the law should step in to provide for a duty to disclose backed up by a proportionate sanction on the arrestee for failure to do so. This could be seen as imposing an additional burden on arrestees with a potential business impact, but to the extent that it does, it also benefits banks and other businesses as creditors in their own right.

947. The Commission considered in the 1992 Report that any duty to disclose should be limited to arrestment in execution. They were concerned that a right to disclosure before decree might be abused by the use of trumped up actions solely for the purpose of finding out confidential information. This was a reasonable concern at the time, but the case law since then and the intended changes in the Bill should weed out all such abuses of process.

948. The Executive considers that there are now three reasons for providing for disclosure to the creditor following an arrestment on the dependence. They are:

- it is intended that the court will have power to limit the amount that can be attached by such arrestments, and disclosure of property arrested will enable the courts and the parties to manage any such limitation by recall or restriction,
- if there is no disclosure there would need to be a mechanism for disclosure following decree, which adds complexity, and
- the creditor may need to re-arrest against the same arrestee following decree, which adds expense.

949. Arrestees, and particularly large arrestees such as banks, require a reasonable time to respond following arrestment. Against that the Executive wishes to encourage quick identification and where appropriate release of arrested property. The Executive considers that 3 weeks is a sufficient period for all arrestees to identify affected property and issue in the appropriate form. There should be no requirement to make a 'nil' return, in order to limit the arrestee's costs.

950. It is important that arrestees are encouraged to report to the creditor within the time limit specified. The Executive considers that a sanction is needed, but that the sanction must be proportionate given that the arrestee is in every other respect an innocent third party not involved in the dispute between the debtor and creditor. The starting point is that therefore that there should be no automatic penalty and the creditor must apply to the court for a remedy. It is expected that a sanction of this kind will encourage unreasonable arrestees to act.

951. The Executive considers that the court should then have discretion to make an order for compensation in an arrestment in execution, or deal with any failure to comply in an arrestment in dependence as a contempt of court. Any sum that is paid as compensation should not be a 'windfall' for the creditor, and would need to be set against the sum due. That would not be possible when no sum is due. The Executive considers that the level of compensation should be linked with the intended protected minimum balance which would be £304 at present.

Automatic release of funds

952. As discussed above, arrestment in execution attaches or freezes moveable property of the common debtor held by the arrestee. Further action is needed before funds or other property can be released by the arrestee. The formal mechanism for release is an action of furthcoming, and the informal and much more common mechanism is voluntary authorisation of release by the debtor.

953. In the case of bank arrestment the debtor usually signs a written instruction to the bank known as a mandate. Signing a mandate is a voluntary act, and gives the common debtor the power to refuse or (more likely) delay a payment that is already long overdue. Conversely, where the common debtor agrees to release funds without further delay the mandate process is a formality that adds little other than extra complexity and expense for the creditor and arrestee.

954. The Executive considers that should be possible to dispense with the need in nearly all cases for the debtor to have to authorise release of funds arrested in a bank or similar account. Intimation by the creditor to the arrestee would trigger automatic release of the debt due within a specified period. The common debtor or arrestee would have a right to object to the release (say) on the basis that the debt was paid.

955. The release procedure should be simple, and should impose as small a burden on the arrestee as is possible. In essence it should work well for the great majority of simple cases, and if a case is not simple, (say) because a dispute about payment or a competition amongst creditors for the funds, then release does not go ahead or is stopped by objection. The arresting creditor will still be entitled to raise an action of furthcoming, and if there is a competition for the arrested fund then the court can adjudicate claims through an action of multiplepinding.

956. In the ECOS consultation the Executive proposed automatic release of funds arrested in a bank or similar account subject to a 28 day objection period. The Executive has considered how best to achieve automatic release since that time, and has refined the intended scheme. Indeed, the Executive was not ready to set out its thinking on automatic release by the time of the Bill consultation.

957. The Executive considers that the automatic release procedure should be triggered by an arrestment in execution that attaches funds or by intimation by the creditor of a decree in an action where funds were arrested on the dependence of the action. The sum arrested may be more or less than the amount of outstanding debt, interest and expenses. The arrestee will therefore be notified of the maximum amount to be released.

958. The amount due should be released 14 weeks after the arrestment or intimation of decree. The Executive considered whether any objection should be made more quickly than the 28 day period originally proposed would have allowed, but is satisfied that a reasonable opportunity is needed for the banks to make disclosure. The common debtor or arrestee should therefore have 4 weeks from arrestment or intimation in which to lodge an objection with the court, which aligns objections to release with the period in which the Banks have to disclose if anything is arrested.

959. The court should have a maximum of 8 weeks from lodging of a notice of objection to uphold or refuse the objection. If the objection is upheld notice is sent to the arrestee and automatic release is stopped permanently, and furthcoming may be needed. If the objection is not upheld then no notice is sent and release will take place on the due date.

960. Automatic release will not take place if the arrestment ceases to have effect for any other reason. The most obvious example of another reason would be where the creditor and debtor agree early release through a mandate. In that example the arrestee would know that the arrestment had ceased but that would not always be the case. The debt might be cleared in some other way, or the arrestment might cease due to some technical invalidity. The arrestee should therefore be protected from claims if release is made in good faith.

961. The Executive considers that the intended new automatic release procedure will:

- reduce the need for—
 - mandates,
 - the scope for delay by ‘won’t pay’,
 - costs for the debtor, creditor and arrestee,
 - actions of furthcoming, and
- simplify the release process for banks and other institutions.

Mandate

962. It is intended that the automatic release process will take 3 months. It will in any event only apply to one class of arrestable property, namely funds. The debtor should therefore be able to authorise release of arrested property as at present, so that funds arrested in a bank account can be released more quickly and arrestments over other classes of property can be released without the creditor having to use furthcoming.

963. As already mentioned the mandate has no formal legal status. Rather it is evidence that the arrestee can rely on it if a claim is made that the release was unlawful and in breach of the arrestment. This creates uncertainty about whether or not release is lawful, particularly for the Scottish clearing banks who handle thousands of arrestments in execution every year. That uncertainty would be resolved if the form of mandate is prescribed under the Bill.

964. Arrested funds should not be released to the creditor if the arrestment ceases to have effect for any reason, or indeed if the debtor is unable to give full authorisation. The arrestee should therefore be protected from any compensation claim if release is made in good faith.

Schedule of arrestment

965. An arrestment is executed, whether on the dependence of a claim or in execution of a debt, through service by court officers of a schedule of arrestment on the arrestee.

966. Until recently the style of schedule was wholly a matter for individual court officers, subject to common law rules on the information needed (and in rare cases) statutory requirements. This scope for variation has two effects:

- the schedule is not always as informative as it could be, and
- there is an increased the risk of legal defects.

Defects in the schedule may also render the arrestment invalid, and that may cause inconvenience and loss for all the parties involved in the arrestment process.

967. A prescribed form of schedule for arrestments in execution of Court of Session decrees, but not arrestments on the dependence, is now provided for by the Court of Session Rules⁹⁵. There is still no prescribed form of a schedule for arrestments on sheriff court decrees or warrants. The style which is commonly used⁹⁶ is archaic and liable to confuse the arrestee. For example, a schedule served on bank may state that the arrestment has:

“Lawfully fenced and arrested in the hands of [the arrestee] the sum of [£] less or more, due and addebted by the said arrestee to [the common debtor]...together with all horses, cattle, goods, gear, merchant-wear of all sorts, sums of money, rents of land and houses, and every other thing presently in their hands, custody and keeping pertaining and belonging to [the common debtor], all to remain in the hands of the said arrestee under sure fence and arrestment at the instance of the said pursuers, aye and until they shall be fully satisfied and paid the sums of [£], being the [details of the debt]”.

968. This and other styles are in need of modernisation, and the Executive intends to improve and update relevant court forms during the implementation of the Bill. Previous forms have been prescribed by the Courts, but in this case the Executive considers that it is best placed to make and review the provision using powers conferred on Scottish Ministers.

969. The Executive considers that the prescribed forms should as far as possible inform debtors about their rights, and assist arrestees to carry out their duties. The disclosure form

⁹⁵ Act of Sederunt (S.S.I. 1994/1443), rule 16.15(1)(f) and Form 16.15-E.

⁹⁶ See the example in J Graham Stewart, *'A Treatise on the Law of Diligence,'* (1898), p 846.

could on that basis include details of the way in which an arrestment can be lifted, and in particular the time limit for and grounds of objection to automatic release. The arrestment schedule could then provide, for example:

- a calculation of the sum to be arrested if available,
- a copy of the prescribed disclosure form,
- the amount from time to time of the protected minimum balance,
- the date for automatic release,
- a calculation of the sum to be realised on that date, and
- confirmation of the events that will stop automatic release.

Proposals

970. The Executive intends that the diligence of arrestment in execution and action of furthcoming shall be authorised by decree or document of debt as defined in the Bill, and subject to a power to extend those definitions to amend the list. Any previous law authorising the diligence will cease to have effect so far as inconsistent with the provision in the Bill.

971. It is intended that the creditor who obtains decree in an action where property has been arrested on the dependence of the outcome shall serve notice to that effect on the arrestee.

972. It is intended that an arrestment in execution should attach whichever is the lesser of an amount equivalent to:

- the debt due by the arrestee to the defender, or
- the aggregate of the sums of—
 - the principal debt,
 - the judicial expenses,
 - the expenses of executing the arrestment,
 - any sum prescribed by statutory instrument as an estimate of the expenses of a possible action of furthcoming, and
- interest on the principle debt to the date of arrestment, and for one year afterwards being an estimate of the length of time it takes to complete a furthcoming.

973. It is intended that in all personal banking accounts with a bank or other financial institution a protected minimum balance will not be attached by an arrestment on the dependence or in execution. The protected balance will be the amount of net monthly earnings level to which from time to time a nil deduction would have applied when a person's pay is subject to an earnings arrestment under the 1987 Act.

974. It is intended that on arrestment either in execution or on the dependence of a court action the arrestee must disclose to the creditor within 3 weeks on a prescribed form the nature and value of any property attached. On any failure to disclose the creditor may apply to the court for an order for compensation of a sum equivalent to the protected minimum balance in the case of an arrestment in execution, or for the arrestee to be held as being in contempt of court in the case of an arrestment on the dependence.

975. It is intended that funds arrested in bank and similar accounts will be released automatically by the arrestee to the creditor 14 weeks after intimation of the sum due, unless stopped by objection made within 4 weeks after service of the arrestment schedule or notice of decree. The court will have until the date two weeks before the date of release in which to consider any objection.

976. It is intended that the automatic release procedure will supplement rather than replace actions of furthcoming or release authorised by mandate or any similar instruction by the debtor.

977. It is intended that the form of arrestment schedule and of a mandate by the debtor authorising release of arrested property by the arrestee shall be in a form prescribed by subordinate legislation.

978. It is intended that arrestees who release funds in good faith under either the automatic release process or a mandate in the prescribed form will be protected from claims for compensation on the basis that the release was legally invalid.

Alternative approaches

Restriction of set off on 'bank' arrestment

979. As set out in the background discussion above arrestment attaches the obligation to account rather than the thing itself. One of the examples given was where a bank receives an arrestment and holds two accounts for its customer, one with a credit balance of £1000 and the other with a debit balance of £500, with the effect that the bank can set one against the other so that the sum arrested is £500. That is the sum which the bank is due to account to its customer.

980. It is clear that a 'liquid' debt (due immediately) can lawfully be set against a liquid credit (cash that can be withdrawn on demand), but it is not clear that the same is true for an illiquid debt (say a mortgage). Banks invariably provided in their contracts with customers that an arrestment is a 'default' that renders all loans payable on demand, and therefore liquid for the purpose of set off. The banks are then entitled to set a mortgage against a credit balance in a current account, if they choose to.

981. The effect of set off is therefore, on one view, that the bank has an unfair preference over the arresting creditor who either proved their claim or satisfied the court that they should have security. Against that it should be realised that the bank and its customer are themselves in a debtor/creditor relationship.

982. The Executive considered that where an account was arrested the interest of the arresting creditor should be preferred to that of the bank or other financial institution. The draft Bill annexed to the Bill consultation therefore included at section 99 (introducing section 73 G into the 1987 Act) a restriction of any contractual right to apply set off where a bank or similar account was arrested. It was intended that set off would not be available for a debt that only become liquid as a result of the arrestment.

983. The Executive met with representatives of the Committee of Scottish Clearing Bankers during and after the consultation period on the draft Bill. The banking sector put forward persuasive arguments against any restriction in the right of set off which would impact on the sector's ability to demonstrate capital adequacy to regulators and business partners.

984. Capital adequacy rules are there to protect customers who have money invested or deposited with a bank, and are monitored by the Financial Services Agency. The risk of a loan going 'bad' is weighted, and the amount of capital a bank needs to back that loan depends on the perceived or notational level of risk. A £1000 unsecured personal loan may have a 100% weighting. A personal loan for £10,000 'secured' against a credit balance in another account may only need a 50 % weighting because the loan could be set against that balance⁹⁷.

985. Deposit takers such as banks have a target capital ratio, and the amount of actual capital they need to hold to satisfy the FSA is found by multiplying the notional asset risk against that target ratio. The ability to apply legal or contractual set off on arrestment affects a banks capital adequacy requirement. If a bank is able to satisfy the FSA's requirements for netting, which include a legal right of set off between relevant accounts, then it may report the accounts net for capital adequacy and large exposure purposes.

986. In some cases multi-million pound inter-group arrangements for large commercial customers are only commercially viable because set off is available. If set off could not be relied on because of the risk of arrestment then the businesses may wish to move their accounts outside of Scotland.

987. The Executive therefore accepts that the arguments for restricting set off are not as strong as they first appeared. There is risk that the unintended consequences of such a reform would seriously impact on the competitive edge of the banking sector, which is one of Scotland's success stories. The Executive therefore decided not to reform this aspect of arrestment, and the proposed restriction of set off does not appear in the Bill.

Arrestees' fees

988. In the 1992 Report⁹⁸ the Scottish Law Commission recommended that court messengers tender a £10 fee, variable by regulations, when they served the arrestment. This fee was intended to be a reasonable contribution to the arrestees' costs in administering the arrestment.

989. The Executive set out in the ECOS consultation that it did not accept the fees recommendations because:

- advances in technology had reduced the administrative impact on bank arrestees, the main persons with an interest,
- banks take on board the risk of arrestment when they set up as deposit takers, and can price accordingly,
- making arrestment less attractive would encourage less scrupulous recovery practices, and

⁹⁷ This is an illustration only, and not an actual example. Capital adequacy rules are, of course, complex.

⁹⁸ Paragraphs 3.1 to 3.72

- the cost of arrestment fees would fall disproportionately on small creditors.

990. The Executive is still of the view that fees for arrestees are not justified on the basis recommended by the Commission. It has however re-considered this policy from a different perspective, the number of ‘5 bank’ arrestments served speculatively on the Scottish clearing banks. The number of ordinary, primarily bank, arrestments has continued to grow since the close of the ECOS consultation. Requiring creditors to pay a fee to the arrestee would help to deter ‘fishing’ diligences.

991. On that basis, the creditor should not pay a fee if the arrestment freezes property. Such a policy could be delivered by requiring the court messenger to tender a fee of (say) £20 on an arrestment, which would be refundable if any property is in fact arrested. The cost of such a fee should not be recoverable from the debtor as otherwise it would not act as a deterrent to fishing diligences. The Executive has decided however that the introduction of arrestees’ fees, although a more attractive option now than in 2002, is still not justified for the reasons set out in the ECOS consultation.

PART 11: MAILLS AND DUTIES, SEQUESTRATION FOR RENT AND LANDLORD’S HYPOTHEC

Aims

992. To repeal the old and ineffective diligences of maills and duties and sequestration for rent (*modernisation theme*).

993. To reform the law of landlord’s hypothec to protect third party interests, and clarify the scope of the security (*striking the balance theme and modernisation theme*).

Policy objectives

994. In this Part the Bill abolishes or reforms old rights and remedies linked to land, and interests in land.

Background

Maills and duties

995. Maills and duties is a common law diligence of great age. An action in either the Court of Session or the sheriff court seeks recovery from a tenant of rent (maills) and services (duties) due to their landlord. In effect it enables the creditor to attach rent payable to the debtor (the landlord), so that the landlord is by-passed and the creditor stands in their place.

Landlord’s hypothec

996. The hypothec has its roots in the hypothec of the landlord under Roman law. Indeed, many other jurisdictions recognise the hypothec or an equivalent security operating by law⁹⁹.

⁹⁹ For example, distress for rent in England and Wales.

The landlord's hypothec, like other Scottish hypothecs, is a right that the parties avoid by 'opting out in an agreement such as the lease. Another example of a hypothec is the maritime lien¹⁰⁰ discussed below in connection with admiralty arrestments.

997. The landlord's hypothec is a bit like a floating charge in favour of the landlord, although with a very different history. The hypothec gives a right in security over moveable property¹⁰¹ on or in leased land and buildings belonging to the tenant or controlled (but not owned) by the tenant. It is thought to secure one year's rent, but not arrears of rent unpaid when the rent payment currently due became payable.

Sequestration for rent

998. Sequestration for rent is not sequestration as is commonly understood, which is perhaps the first and most immediate problem with this diligence. It is more analogous to attachment and auction. The property placed under judicial control (i.e. sequestrated) is the moveable property affected by the hypothec.

999. Sequestration for rent is limited to the sheriff courts. The landlord applies for a warrant to place the property under judicial control (sequesterate it), and to sell the property to the value of the rent due. An action may be for payment for rent due, or in security of future rent. In practice, the two claims are often combined.

1000. Ancillary orders are available to the landlord. They include requiring the tenant to:

- put new furnishings into the land or buildings,
- to secure future rent to by lodging a bond of caution¹⁰² or consignation of money, or
- to eject the tenant and re-let where the land is not refurbished, or caution or consignation not given to the court.

Objectives

1001. To ensure that the diligence of maills and duties and sequestration for rent are abolished, and to modernise the security of the landlord's hypothec given that it is realised by sequestration for rent.

Consultation

1002. In the ECOS consultation the Scottish Executive asked whether:

- sequestration for rent should be abolished, and
- residual availability of maills and duties should be abolished.

1003. There was strong agreement from respondents that maills and duties was no longer needed and should be abolished. There was, however, an equal split between those who thought sequestration for rent should be abolished and those who thought it should be retained. The main

¹⁰⁰ The maritime lien is indeed a hypothec despite its name.

¹⁰¹ Technically, the *invecta et illata*.

¹⁰² A third party guarantee of payment, typically given by an insurance company for a premium.

concern expressed was that the Executive had not considered how abolition would impact on realisation of the landlord's hypothec.

1004. In the Bill consultation the Executive confirmed that maills and duties and sequestration for rent would be abolished, and that the landlord's hypothec would be reformed in order to address the concerns raised by the earlier consultation.

Policy discussion

Maills and duties

1005. Maills and duties was once widely used, but is now limited to the holders of a *debitum fundi*. As discussed for Chapter 1 of Part 4 of the Bill, this means that the debt is secured against land. Maills and duties can therefore only be used by a creditor such as an adjudger or a mortgage lender. The effect of this restriction is that actions of maills and duties are now rare as:

- adjudication for debt of any kind is itself very rare, and
- other secured lenders have more effective remedies, for example under the Conveyancing and Feudal Reform (Scotland) Act 1970¹⁰³.

Landlord's hypothec

1006. The landlord's hypothec is a common law security, but the scope of the security has been restricted in past legislation. In particular:

- agricultural leases were partially exempted by the Hypothec Amendment (Scotland) Act 1867¹⁰⁴ and the Hypothec Abolition (Scotland) Act 1880¹⁰⁵, and
- the 2002¹⁰⁶ Act provides that any property exempt from attachment is also exempt from the hypothec.

1007. The landlord's hypothec now applies only to:

- urban leases, including residential leases, and
- agricultural leases of up to 2 acres,
- mineral leases, and
- game leases.

1008. The law is therefore reasonably clear on the situations where the hypothec arises, but less clear on what exactly is secured. It is clear that it covers some property belonging to third parties. It is clear that it covers one year's rent (although less clear how that is calculated), but not whether it covers other payments that might be due under the lease.

1009. The hypothec extends to third party property brought onto the premises by the tenant, for example property on hire. It can cover property that has been sold by the debtor but not yet removed. The reasoning is that third party is taken to know about the hypothec and to accept the

¹⁰³ 1970 c.35.

¹⁰⁴ 1867 c.42.

¹⁰⁵ 1880 c.12. This, despite its name, did not abolish the hypothec.

¹⁰⁶ 2002 asp 17, section 60.

risk of sequestration for rent. However, some third party property is considered exempt. In particular:

- property on the premises temporarily,
- property belonging to a member of the tenant's family or a lodger,
- property subject to a conditional sale agreement, and
- money bonds or bills

1010. The Executive considers that it is wrong in principle that a third party should lose property in order to pay debts due to a third party. Indeed, it is thought that this may breach the right to enjoy property under Article 1 of Protocol 1 to the ECHR. This is indeed the main reason why the Executive has decided to reform the security of the hypothec at this time. Having decided to reform the Executive intends to take the opportunity to clarify what is and is not subject to the security of the hypothec.

1011. The Executive does not consider that there is now a need to restrict the security to one year's rent. The debt will no longer be enforceable by sequestration for rent, so the security will instead provide a preference. Since a preference is not an immediate remedy it can reasonably be wider in scope. The Executive therefore intends to clarify the law to provide that the hypothec:

- secures rent and rent alone,
- secures all rent due and unpaid at a particular time, regardless of the 'age' of the debt,
- lasts until the debt is paid, and
- gives the landlord a preference against other creditors for payment of the value of the secured assets in any liquidation or other ranking of claims.

1012. The Executive considers that assets in people's homes should not be subject to the security. The 2002 Act gives special protection to 'dwellinghouses' on attachment, and it is considered that the same level of protection should apply to the landlord's hypothec.

1013. It is thought that when the security was restricted in 1867 and 1880 it was still applied to small agricultural leases because they were usually associated with houses and small holdings, and the Executive considers that such a distinction can no longer be justified.

1014. The Executive has not consulted on the reform of the hypothec, but as discussed above considers that there are compelling reasons for a partial reform at this time. Complete reform or indeed complete abolition concerns the law of security over moveable property, and should be dealt with at another time.

Sequestration for rent

1015. As with the hypothec, sequestration for rent is a common law remedy. The landlord enforces his right in security by an action of sequestration for rent. Also as with the hypothec,

limited statutory protections are in place for the debtor. The rent (Scotland) act 1984¹⁰⁷ provides that assured tenancies are exempt except with leave from the sheriff.

1016. Warrant to sequester is granted without hearing parties. It entitles the landlord to instruct officers of court to inventory and sequester (or secure) the property. The action and warrant are intimated to the tenant, who is cited to appear at a subsequent hearing to consider the action. Third parties with an interest are not cited, even if known. The tenant may seek recall of the sequestration.

1017. Unless the sequestration is recalled, the court will grant a warrant to sell the property to the extent of the sum due by public auction. The landlord must lodge a report and statement of the debt within 14 days of the sale. Where any balance of rent remains outstanding the landlord may either seek to have the tenant replenish the tenancy (and sequester again), or to use other forms of diligence.

1018. In the period between sequestration and sale, the tenant may use the property, but may not otherwise sell or interfere with it in breach of the sequestration. A breach is treated in a similar manner to a breach of interdict.

1019. In some ways, the procedure is like a harsh version of the abolished diligence of poinding and warrant sales. The Executive considers that it is very hard to defend the lack of a:

- hearing before sequestration, and
- an 'exceptional' test limiting access to homes.

The only defence would be that there was no alternative, but that is not the case as the landlord can attach any property of the debtor tenant under the 2002 Act.

Proposals

1020. The Executive intends to abolish the diligence of maills and duties.

1021. It is intended to exempt leases of dwellinghouses and remaining small agricultural leases (including crofts) from the security of the landlord's hypothec.

1022. It is intended to exempt all third party assets from the landlord's hypothec, and to provide that a third party who in good faith buys an asset subject to the hypothec will get a clear title to that asset.

1023. It is intended that the landlord's hypothec will secure rent due and unpaid, and will subsist for as long as that rent is unpaid. As the diligence of sequestration for rent is to be abolished the law will be clarified to confirm that creditor will get a preference in an insolvency or similar in respect of assets subject to the reformed security.

1024. It is intended to abolish the diligence of sequestration for rent.

¹⁰⁷ 1984 c.58.

Alternative approach

1025. The Executive did not consider it necessary to fully consider any alternative to abolishing maills and duties and sequestration for rent. The landlord's hypothec could have been subject to a single reform related to third party rights, but the Executive considered that such a partial reform would have been a missed opportunity to clarify some difficult issues.

PART 12: SUMMARY WARRANTS, TIME TO PAY AND CHARGES TO PAY

Aim

1026. To ensure that enforcement under summary warrant is a proportionate remedy (*striking the balance theme*).

Policy Objectives

Background

Summary warrants

1027. Summary warrants are a quick and cheap way, unique to Scotland, for specified public creditors to enforce debt. The application to the sheriff court for warrant does not need a lawyer; there is no intimation to the debtor, and no hearing. The sheriff must grant the warrant, and the warrant once granted can be enforced without notice. This contrasts with enforcement of ordinary decrees, where in most cases the creditor must pay for sheriff officers to serve a final warning known as a 'charge to pay' before enforcement is lawful.

1028. Summary warrants are used by:

- local authorities to collect council tax, non-domestic rates, and community charge (poll tax) arrears,
- water authorities¹⁰⁸ to collect water and sewerage charges, and
- Her Majesty's Revenue and Customs¹⁰⁹ to collect taxes and duties.

1029. A summary warrant only authorises the diligences of:

- Attachment,
- Earnings arrestment, and
- Arrestment in execution and action of furthcoming

As a result, public creditors can choose to use a full payment action. Decree in such an action will authorise the full range of existing and planned diligences.

Time to pay

1030. The 1987 Act implemented most of the recommendations for time to pay arrangements made by the Scottish Law Commission in the 1985 *Report on Diligence and Debtor Protection*

¹⁰⁸ Water and sewerage charges are collected by local authorities on behalf of water authorities.

¹⁰⁹ HMRC is the new UK department combining the functions of the former Inland Revenue and Customs and Excise departments.

(SLC No 95). It did not implement the recommendation in respect of what is now the Debt Arrangement Scheme.

1031. There are two forms of time to pay for single debts under the 1987 Act, both intended to help the 'could pays'. They are a:

- time to pay direction granted at decree (usually called a time to pay decree), and
- time to pay order granted at any time after decree.

In both cases the court considers a time to pay application by the debtor, and any objection by the creditor. The decision on whether to allow time to pay is at the discretion of the judge. Typically, however, a court will accept an offer if the debt will be paid within a period of about a year.

1032. Certain kinds of debt are excluded from time to pay under the 1987 Act. They are:

- debts over £10,000 or such other amount as Scottish Ministers may prescribe,
- capital sums payable on divorce or declarator of nullity of marriage,
- maintenance orders,
- Child Support liability orders,
- taxes or payments due to HMRC treated as if it were tax,
- rates,
- community charge and community water charge,
- council tax, and
- water and sewerage charges.

These restrictions do not apply to the Debt Arrangement Scheme ("DAS"), which is the third time to pay arrangement recommended in the 1985 Report but not implemented until the 2002 Act.

Charges to pay

1033. The statutory charge to pay was introduced by section 90 of the 1987 Act. The form of the charge is prescribed from time to time by court rules. The charge is a final warning that enforcement will be competent unless the debt in question is paid within 14 days. It is served on the debtor by a sheriff officer or messenger-at-arms. The cost of the charge is paid out of money recovered by the diligence.

1034. A charge to pay is or should be served before most diligences in execution. In particular a charge is needed before it is or will be competent to use:

- attachment,
- earnings arrestment,
- land attachment,
- money attachment, and
- residual attachment.

1035. It is not currently needed for the existing diligences that the Executive considers should be reformed and retained, namely:

- continuous maintenance arrestment,
- ordinary arrestment, and
- inhibition.

It is also not needed if an earnings arrestment is being made under a summary warrant debt. The public exemption is therefore narrower than that for time to pay, and if the public creditor chose (as some do) to enforce debt under a decree then a charge would be needed.

Objective

1036. To extend time to pay arrangements to public debt, and to extend charge to pay to enforcement under a summary warrant.

Consultation

1037. The Scottish Law Commission has not considered whether or not summary warrants should be available. It has however considered:

- the diligences that should be authorised by a summary warrant,
- time to pay on a summary warrant debt, and
- notice before enforcement of a summary warrant debt.

Summary warrant: permitted diligences

1038. In the 1988 discussion paper *Adjudications for Debt and Related Matters* (SLC DP No. 78) the Commission's view was that a summary warrant should not authorise the proposed new diligence of land attachment. Respondents were strongly in favour of restricting the use of land attachment.

1039. In the 1998 discussion paper the Commission's view was that a summary warrant should in future authorise inhibition. Respondents were slightly in favour of extending the use of inhibition in that way. No views were sought on whether a summary warrant should authorise the proposed diligence of residual attachment (attachment orders) or money attachment.

1040. However in the 2001 Report¹¹⁰ the Commission made no recommendation on the diligences that should or should not be authorised by summary warrant. Its view then was that the Executive should decide whether or not to extend enforcement under summary warrant debt to any existing or new diligence.

1041. In the ECOS consultation¹¹¹ the Executive view was that on balance a summary warrant should not authorise land attachment, but should authorise the diligences of:

- inhibition,
- residual attachment, and
- money attachment.

¹¹⁰ *Report on Diligence* SLC No. 183.

¹¹¹ ECOS part 6.

1042. The Executive view was that any extending enforcement to residual attachment or money attachment should be permitted on prior service of a new notice of intention to enforce. The Executive did not however seek any views from respondents, and no respondent commented on this issue.

1043. In the Bill consultation the Executive noted the previous discussion, and asked whether a summary warrant any or all of:

- should not authorise residual attachment,
- should not authorise money attachment,
- should authorise inhibition.

1044. The responses were slightly in favour of extending the use of residual attachment and money attachment, and strongly in favour of extending the use of inhibition. Views on extending the use of residual attachment and money attachment were split by sector, with court officer firms and creditors in favour of and debtor interests against the proposal.

Summary warrant: time to pay

1045. In the 1985 *Report on diligence and debtor protection* (SLC No. 95) (“the 1985 Report”) the Commission recommended that time to pay should be available for public debt. That recommendation was not implemented in the 1987 Act by the Government of the time.

1046. In the 2000 *Report on Pounding and Warrant Sale* (SLC No. 177) (“the 2000 Report”) the Commission again recommended that time to pay should be available for public debt. The Commission’s 2000 recommendation was supported by the Working Group on a Replacement for Pounding and Warrant, in *Striking the balance: a new approach to debt management* its 2001 report to the then Justice Minister.

1047. In the ECOS consultation the Executive considered that in general formal time to pay arrangements were an effective debtor protection, and that was an argument in favour of accepting the Commission recommendations. Against that, it considered that the increase in money advice provision needed to support DAS should help to address concerns about lack of information on enforcement and creditor practices. The Executive did not at that time have a concluded view either for or against formal time to pay.

1048. In the Bill consultation the Executive asked if debtors subject to enforcement under a summary warrant should be informed of the ‘right’ to time to pay. In that context, time to pay would have been by informal arrangement rather than the court based time to pay arrangement recommended by the Commission. Again, the Executive did not have a concluded view either for or against formal time to pay.

1049. Respondents to the Bill consultation were strongly in favour of informing debtors about the possibility of time to pay. Suggestions included providing a copy of the Debt Advice and Information Package before enforcement, and attaching details of what a summary warrant does and does not authorise to a new statutory form.

Summary warrant: charge to pay

1050. In the 1985 Report the Commission considered that charge to pay was not needed before an earnings arrestment is used to enforce a summary warrant debt. It took the view that summary warrant enforcement should indeed be summary, and that in practice most debtors get informal warning of enforcement action.

1051. In the 2000 Report the Commission took a different view when recommending reform of pouncing. It recommended not only that a charge to pay should precede pouncing under a summary warrant, but that formal time to pay should be available and that the form of charge should be amended to give notice of that fact. It did so because it thought that a charge to pay:

- gives notice of any error in the summary warrant,
- is an effective final warning for both ‘won’t pays’ and ‘could pays’, and
- is an opportunity for could pays to agree a payment programme.

1052. The Commission considered whether a new form of statutory ‘warning’ letter should be used instead of charge to pay. Such a letter would be cheaper as a court messenger would not need to be instructed. The Commission considered that it would also be less effective.

1053. In the ECOS consultation the Executive considered the issues raised by the Commission, and applied them to all diligences that can be used to enforce a summary warrant debt. It asked whether enforcement of such debts should be preceded by:

- a charge to pay, or
- a notice in standard terms (and if so should that notice include advice and information for debtors).

1054. Respondents were in favour of both charge to pay and a notice in standard terms, but of the two options there was a preference for charge to pay. They were strongly in favour of any notice extending to advice and information.

1055. In the Bill consultation the Executive considered the issue of time to pay (as above), and considered that some kind of notice before enforcement should be introduced, but did not at that time have a concluded view on whether to provide for charge to pay or a notice in standard terms. No views in that respect were offered by respondents to the Bill consultation.

Policy discussion

Summary warrant: permitted diligences

1056. The Executive has given further consideration to the issue of extending or restricting diligence under a summary warrant. A balance needs to be struck between the legitimate interests of public creditors, and the reasonable concerns of debtors. Finding the right balance is not an easy to do.

1057. Summary warrant procedure has a lower level of debtor protection when compared both to other types of court application, and to enforcement of other types of decree or warrant. For

example, there is no hearing on the court application, and no statutory final warning of enforcement. These special rules are a source of some public concern.

1058. Against that, the Executive considers that there are other compelling arguments in favour of summary enforcement of public debt. In particular:

- public services are run for the common good,
- public creditors do not choose their customers and must give ‘credit’ to everyone,
- public creditors must offer a service to everyone who needs it, and can’t refuse (say) medical treatment because a patient has income tax arrears,
- summary enforcement is cheaper, and enforcement costs not recovered from the debtor must be paid for by all taxpayers, and
- summary enforcement takes up less court time, and if not available would mean that the courts would need to be resourced to deal with a large number of new payment actions.

1059. The Executive also notes that public creditors can as they choose for any particular debt either apply for a summary warrant or raise a full payment action. Restricting enforcement under summary warrant should not mean that public debt will be harder to enforce. It would mean that if a public creditor wanted to use less common forms of diligence then they would have to go to court in the same way as ordinary creditors do.

1060. The Executive therefore considers that there should be only a modest extension of enforcement under a summary warrant. Money attachment is intended to be similar to the attachment under the 2002 Act, and attachment is already an authorised diligence. The same court messenger is likely to be asked to attach and money attach in the same place at the same time. Public creditors should not need to raise a payment action to use money attachment when attachment is already permitted. The money attachment Part of the Bill will therefore authorise enforcement under summary warrant.

1061. Other diligences are different from the existing permitted diligences. Land attachment in particular should not be permitted unless the debtor has had a chance to defend a court action for payment. Inhibition has a strong link to land attachment, as discussed above. A public creditor would have no remedy against the land if a summary warrant authorised inhibition but not land attachment. The Executive considers that inhibition in those circumstances would only have ‘nuisance’ value, and should not be authorised.

1062. Residual attachment is a potentially wide ranging diligence. As discussed above the Executive considers that there should be two separate court stages before the debt can be satisfied from any attached property. It should not therefore be possible to use this diligence where a debt is being enforced under summary procedure, for similar reasons to the intended restriction on the use of land attachment.

Summary warrant: time to pay

1063. This exclusion of public debt from the time to pay arrangements introduced by the 1987 Act was justified by the then Government, despite the contrary recommendation by the Commission, on the grounds that:

- people give too low a priority to payment of public debt, and
- public creditors can, and do, negotiate longer payment periods than a commercial creditor would be willing to agree.

1064. The Executive has since the Bill consultation given further consideration to the issue of time to pay for summary warrant debt. Much has changed since 1987, and the Executive has had an opportunity to consider both the final form DAS as enacted in November 2004 and the impact so far that scheme. It no longer considers that much weight should be given to the concerns from 1987 about extending time to pay.

1065. The Executive considers that are three compelling arguments in favour of introducing time to pay:

- the repeated Commission recommendations,
- the nature and effect of the DAS, and
- inconsistent recovery practices.

1066. The Commission recommendations are discussed above, and little further need be said. The Executive notes however that the function of the Commission is to give impartial advice on reforms that will in its opinion improve the Scottish legal system.

1067. The DAS covers all forms of public debt, unless the recovery method is reserved as is the case with child support deduction from earnings orders. There is no reason of principle that justifies stopping enforcement where the 'could pay' debtor has multiple debts, and permitting it where the 'could pay' debtor has a single debt due to a public creditor. The Executive notes further that most programmes approved under DAS include some council tax debt.

1068. The Executive are currently promoting the development by local authorities of a corporate recovery strategies designed in part to promote consistent good practice across the public sector in Scotland. There are many examples of good practice in the local government sector, but equally some authorities appear more likely to use formal enforcement on an otherwise like for like case. One sure way to provide time to pay in appropriate cases is to extend the formal arrangements under the 1987 Act to public debt.

Summary warrant: charge to pay

1069. The Executive has given further consideration to the issue of extending charge to pay to debt enforced under a summary warrant. It considers that the arguments advanced by the Commission in the 2000 Report are good and persuasive. In particular that charge is an:

- effective final warning for both 'won't pays', and
- is an opportunity for 'could pays' to agree a payment arrangement.

1070. A charge is served personally by a sheriff officer or messenger-at-arms, although in some limited cases where an officer may not be available (for example the Scottish islands¹¹²). This personal element is thought to be very effective in bringing home to the debtor that the creditor

¹¹² Execution of Diligence (Scotland) Act c.16.

means business. Payment offers are more likely to be made and kept to, with the result that the creditor saves time and expense and the debtor avoids the distress of diligence.

1071. Service of a charge is already a trigger for money advice. The DAIP includes a list of local money advisers, and must be provided before attachment under the 2002 Act is competent. In many cases the sheriff officer or messenger-at-arms provides the debtor with the required copy when a charge is served (private debts). Extending the charge will therefore make it more likely that ‘could pay’ debtors who may benefit from (say) the DAS will get the advice they need.

1072. The Executive considers that there is a further compelling reason for extending charge to pay to enforcement under a summary warrant. As discussed for the Bankruptcy Part, the Debt Relief Working Group has reported on the problems that some NINA¹¹³ debtors have in using debt relief.

1073. If a charge is served and payment is not made within 14 days then a debtor becomes ‘apparently insolvent’. This means that the debtor can apply to be sequestrated, or indeed that the creditor can sequester the debtor. NINA debtors are much more likely to be served with a summary warrant than with a court decree. Extending charge to pay would therefore offer a valuable route into debt relief for some particularly vulnerable ‘can’t pay’ debtors.

1074. The Executive considers therefore that a charge to pay on 14 days notice should be served before enforcement of a summary warrant debt by:

- attachment,
- earnings arrestment,
- ordinary arrestment, or
- money attachment.

1075. This would mean that a public creditor would serve a charge before ordinary arrestment where an ordinary creditor would not. The Executive considers that this apparent imbalance is justified by the fact that the debtor has had no opportunity to be heard in court, or indeed to apply for a time to pay direction at an earlier stage in the recovery process.

1076. The disadvantage of charging is that public creditors will have a new cost to pay. The Executive therefore considers that the cost of the charge should be recoverable through the diligence, and not (for example) included in the 10% surcharge applied by local government creditors when enforcing local taxes.

Proposals

1077. The Executive intends that a summary warrant will authorise the diligence of money attachment. Provision is made in Part 8 of the Bill.

¹¹³ No Income No Asset.

1078. It is intended that time to pay directions and time to pay orders under the 1987 Act will be extended to enforcement of Scottish public debt.

1079. It is intended that enforcement under a summary warrant will be competent only after service of a charge to pay on 14 days notice, and that the cost of the charge will be recoverable from the debtor through the authorised diligence.

Alternative approaches

Summary warrant: notice in standard terms

1080. The Executive considered providing for a notice in standard form. Indeed, section 22 of the draft Bill annexed to the Bill consultation provides for such a notice. It does so, however, in the context of closing part of the NINA gap by introducing a new trigger for apparent insolvency.

1081. The main advantage of this approach is that it would be cheaper than charge to pay, at least at the 14 day warning stage. It is not considered cheaper overall as the cost of a charge can readily be recovered from the proceeds of the diligence.

1082. The disadvantages of a notice are that would be an unknown new procedure, would not involve personal service, and would in general look like a further administrative notice that could 'safely' be ignored.

Reform of time to pay

1083. The Executive has considered general reform of the time to pay procedures, and the issue of extending the scope of and information about time to pay for all forms of decree or diligence. This remains under review, and further proposals may yet be brought forward.

1084. In the 2000 Report the Commission set out views on improvements to the way in which time to pay is dealt with by the courts. It recommended¹¹⁴:

- raising the upper limit from £10,000 to £25,000, in line with the then upper limit for time orders under the Consumer Credit Act 1974¹¹⁵,
- charge to pay forms should explain time to pay options,
- full details of an offer should go to the creditor,
- a new 'reasonability' test with statutory factors to be considered—
 - length of repayments,
 - length of original agreement,
 - debtor's circumstances,
 - reasonableness of creditor in refusing an offer, and
- clerk of court (not creditor) to intimate time to pay decision.

¹¹⁴ 2000 Report paragraphs 5.18 to 5.51.

¹¹⁵ 1974 c.39. UK government intend to increase this limit to £50,000.

1085. In the ECOS consultation¹¹⁶ the Executive considered the views of the Commission, and consulted on proposed improvements to the administration of time to pay. It asked in addition whether to repeal the present rule barring a time to pay order where there has been a time to pay decree/direction. Respondents were either strongly or slightly in favour of all the proposed reforms. In particular, the proposals to improve information about time to pay were warmly welcomed.

PART 13: AMENDMENTS TO THE DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) ACT 2002

Aim

1086. To ensure the effective operation of the Debt Arrangement Scheme (“DAS”) and the diligence of attachment of moveable property (*modernisation theme*).

Policy objectives

1087. The objective of reform of Part 1 of the 2002 Act is that the DAS should be capable of being operated and administered electronically.

1088. The objective of reform of the diligence of attachment is to ensure that creditors and court messengers can manage their business in a rational and effective manner.

Consultation and engagement

1089. The intended reforms to the 2002 Act will resolve issues identified by the Executive since commencement of attachment and DAS in 2002 and 2004 respectively. There has been no general consultation relating to this Part, but the Executive has worked closely with stakeholders such as sheriff officers who (for example) pointed out that it was sensible to permit more than one officer to be involved in any single attachment.

Policy discussion

Debt Arrangement Scheme

Policy objectives

1090. The Debt Arrangement Scheme (“DAS”) was created by Part 1 of the 2002 Act, and was introduced on 30 November 2004 by the Debt Arrangement Scheme (Scotland) Regulations¹¹⁷ (“the DAS Regulations”). It is a new way to tackle multiple debts. DAS is part of an integrated package of debt tools, and is intended to help people restart after managing their way past problem debt.

1091. In DAS, and unlike in debt relief through sequestration or PTD, the creditor is entitled to payment in full. DAS has a much smaller impact on future credit ratings, and therefore on

¹¹⁶ Part 4A

¹¹⁷ The Debt Arrangement Scheme (Scotland) Regulations S.S.I. 2004/468, as amended by S.S.I 2004/470

access to affordable lending. Creditors are still encouraged to agree voluntary debt relief, perhaps by freezing or waiving interest or charges.

1092. DAS is intended to be a flexible scheme free to the debtor, and striking a fair balance between debtors and creditors. It helps debtors with multiple debts by giving them time to pay, and deals with 'blocking' creditors. It also helps creditors to recover more of their debt at a modest cost.

1093. DAS is not court based unlike time to pay decrees and time to pay orders, the two other 'diligence stoppers', but is administered by the accountant in bankruptcy ('AiB'). Applications must go through a specially trained money adviser, so that debtors get good quality money advice.

1094. If a debt payment programme is approved, then a single regular payment is made to a payments distributor. The distributor will then pay the individual creditors.

1095. A debtor in an approved programme is protected from court enforcement, and from sequestration. In order to strike a balance with the reasonable interests of creditors, prescription (limitation) will not run on any debts during the life of the programme. If the programme fails time bar will not stop enforcement of the unpaid debt.

1096. Only people living in Scotland can use DAS. This makes sense, as DAS only stops court enforcement or bankruptcy in Scotland. A programme can include any debt for which someone is personally liable¹¹⁸, whether or not there is a court decree. Business debts of sole traders are therefore covered, but not debts of a partnership or limited company.

1097. The money adviser and debtor work out the surplus income after all essential payments, such as a mortgage payment or food. This surplus income is what is divided amongst the creditors. The effect of this is that DAS is not suitable for people with no surplus income, but it can work for people with low surplus income as some payments distributors handle less than £1 per debt per month.

1098. DAS is flexible enough to survive a change in the debtor's circumstances. Surplus income may rise or fall, so a debtor or creditor can ask the AiB to vary the payments. DAS also allows for essential new credit. A programme can be varied to cover new loan payments, and further trade credit or credit for emergency repairs is permitted.

1099. Standard conditions apply to all programmes, and are pretty much common sense i.e. pay the rent or mortgage and other essentials, keep DAS payments up to date, and so on. Discretionary conditions are also available, and they include having an emergency fund or deducting payments from wages. If a condition is breached a programme may be revoked.

¹¹⁸ Some reserved debts are in practice outside DAS. For example, where recovery comes under the Child Support Act 1991.

1100. DAS like other diligence stoppers only halts court enforcement and bankruptcy, so other remedies can be used. In particular, a lender or landlord can recover possession of a house. This doesn't mean that DAS puts homes at risk. There are three ways in which DAS can help people with multiple debts reduce the risk of homelessness:

- money advice should mean that the surplus income figure is realistic,
- sequestration or PTD, which do lead to loss of homes, can be avoided, and
- the Mortgage Rights (Scotland) Act 2001 includes DAS as a factor for the courts to consider if asked to suspend a re-possession.

1101. Creditors can choose a *pro rata* payment towards their debt, calculated either on the balance outstanding or the contracted repayment. An equal repayments option is also available, which will repay smaller debts more quickly. Each case will be different, so DAS does not favour one method over another.

1102. The payment distributor can deduct a fee, currently a maximum of 10% of the payment. Creditors save on court and enforcement costs, and this fee is the same as that charged under voluntary debt management schemes that do offer the same level of money advice support or the same protections.

1103. There is no debt level or time hurdle a programme must meet before approval. Flexibility is again the key, and if all creditors agree then the AiB will approve a programme no matter the amount to be paid or the length of the programme.

1104. However, agreement is not always active consent. Creditors have 21 days to reply to an offer, otherwise they are deemed to consent. A programme may be approved even if a creditor replies and says no. The AiB may dispense with the consent of a creditor due less than half of the total debt, so long as the total due to all refusing creditors is not more than 60% of the debt.

1105. A single large creditor could block a programme welcomed by smaller creditors. To get round that a sheriff can be asked to approve a programme even where the majority of creditors do not agree.

1106. If a refusal to consent is dispensed with, or a case goes to the court, then the proposed programme must be 'fair and reasonable' test. Guidance sets out (for example) that 5 year programme should be reasonable, but a 10 year one probably not. Further guidance is on the DAS website at www.moneyscotland.gov.uk.

1107. Creditors can, as well as refusing to agree, object to a programme where the debtor should be made bankrupt, or has substantial equity in land or buildings. Such cases will by-pass the AiB and be dealt with by the sheriff who considers the merit of the objection in all the circumstances.

1108. Given the effect of DAS, creditors need to know when a programme is approved. They can therefore check entries in the public register of programmes which can be accessed at the DAS website on payment of a fee of £5 for each search.

1109. DAS has been in operation for less than a year, and is still developing. At the time of preparing this Memorandum there are 37 approved money advisers and 67 debt payment programmes in payment. The Executive anticipates that DAS will grow substantially, in part because of the effect of other reforms in the programme, to 150 approved advisers and 2000 debt payment programmes in payment.

1110. The Executive has offered strong support to the money advice sector. From 2002 the Executive provided £2 million a year of additional funding for money advice services, increasing to £3 million from 2005. Funds go to local authorities who allocate them as they see best between statutory and voluntary sector advice providers. Funding is intended to build capacity, and to support the expected demand for DAS programmes.

1111. The Executive is aware that money advice work is complex, and can be unduly time consuming for the individual money adviser coping with a busy case load. The Executive has therefore sought to use DAS to deliver to money advisers a package that is convenient to use and automates routine tasks wherever possible. The intention is that DAS can be 'all electronic' where desired.

1112. A significant effort has gone into delivering that objective. The Executive and the AiB working together have developed DAS case management software with a web interface. Money advisers can complete and submit application forms and the like online at the DAS website.

1113. Also, the Executive has worked with the developers of the MACS money advice case management system to include a software interface linking with the AiB. MACS is widely used by Scottish money advisers, and this reduces the need for money advisors to 'double key' data into their software and the DAS website.

1114. The Executive has reviewed the legislative framework for DAS, and considers that further change is needed to deliver the objectives of ease of use, and automation of routine tasks. In particular, the 2002 Act currently requires that applications for approval or variation of debt payment programmes must be signed.

1115. Sections 2(3) and 3(2) of the 2002 Act, respectively, require that an application for approval of a debt payment programme be signed by the debtor and by the money adviser. Section 5(4) requires that an application for variation be signed by the debtor or creditor. Electronic signatures are not permitted.

1116. This has two effects. An application cannot be fully electronic, and the signed copy of the application must be retained by the money adviser for the whole length of the programme in order to prove that all legal requirements have been met. A programme may last for many years

1117. In respect of applications for approval, the DAS regulations provide for the money adviser to send an application electronically to the DAS administrator for approval, retaining the signed hard copy. The adviser uses a unique reference number on the application by which they can be identified. This provides a partial fix, which is therefore only partially satisfactory

1118. DAS is a money advice gateway to statutory protection. It is therefore appropriate to retain the requirement to sign the application form, as formal evidence that the money adviser has offered the advice required under section 2 of the 2002 Act. However there is no clear need for the signature to be on a paper form.

1119. The position is different where the debtor signs the first application form, or either the debtor or creditor signs an application for variation. On first application the debtor's interest is covered by the money adviser certification. Any application for variation is intimated to the money adviser who will comment as needed. There is no clear need for paper evidence vouching that an application is made by the person named on the form.

1120. It would therefore be appropriate either to authorise electronic signatures by the debtor and creditor, or to dispense with the formal requirement to sign an application for approval or variation. The 2002 Act would then state only that the application must be made by the debtor or creditor as appropriate.

1121. The Executive considers that authorising the use of electronic signatures by debtors or creditors will not deliver the policy objective of enabling electronic applications. This is because a signature only has evidential status under the Electronic Communications Act 2000¹¹⁹ if it is certified by the person purporting to make it. It is impracticable to expect the general public to provide such certification.

Proposals

1122. The Executive intends that the requirement on the money adviser to sign an application for approval under section 2 of the 2002 shall be satisfied by a certified electronic signature as defined in the electronic communications act 2000.

1123. It is thought that digital encryption of signatures will be too high a threshold for money advisers to pass. It is intended that an electronic signature can be a scanned signature or a printed name, provided that the money adviser sends a letter to the AiB certifying the form of signature he or she wishes to use. The continued use of the unique reference number will be a further check.

1124. It is intended to dispense with the need for debtors or creditors to sign an application under either sections 2 or 5 of the 2002 Act.

Alternative approaches

1125. The DAS regulations were subject to affirmative Parliamentary procedure. The Communities Committee took evidence from the Scottish Executive when considering the draft Regulations in March 2004. The Executive gave an undertaking at that time that the DAS Regulations would be reviewed after one year of operation.

1126. The review will begin in November 2005, and preparatory work is underway. The Executive held seminars for money advisers in Edinburgh on the 28th September and in Glasgow

¹¹⁹ 2000 c.7

on 29 September. A number of suggestions have already been made by stakeholders, addressing for example the role of the sheriff in substituting for the AiB for certain applications.

1127. The Executive considered, but decided against, making further amendments to Part 1 of the 2002 Act in the Bill. It will await the results of the review, which should be complete by late February 2006.

Attachment of moveable goods

Policy objectives

1128. Part 2 of the 2002 act provides for attachment of corporeal moveable property. Attachment replaced the old and discredited diligence of poinding and warrant sale last amended by the 1987 act, and introduced important new debtor protections. A special warrant is needed in order to attach property in a debtor's home, known as an exceptional attachment order.

1129. Attachment is a widely used diligence, and it is important that the procedures provided by the 2002 act are as effective as they can be. The Scottish executive has therefore considered if any amendments to primary legislation are needed at this time.

1130. Section 19(1) of the 2002 act stipulates that it is the officer who attached articles who is to make arrangements for their auction and for uplifting them. This has the potential to cause difficulties as that particular officer may not be available.

1131. When articles were poinded under the 1987 act the officer poinding them had to leave the articles where they were poinded for at least 14 days. Provision was made, at section 21(1)(a) of the 1987 act for an application to be made to the sheriff for an order for the security or for preservation of the value of the poinded articles which allowed for their immediate removal.

1132. The 1987 act also made provision, at section 20 (7), where there was a pressing need to secure or preserve the poinded articles but no time to get an order under 21(1)(a), for the officer to remove the articles to the other premises belonging to the debtor, or failing that to the nearest secure premises. This was at the creditor's expense.

1133. Provisions for security or preservation of attached articles similar to section 21(1) of the 1987 Act were included in section 20 of the 2002 Act. However, no provision similar to that at section 20(7) of the 1987 act was made in the 2002 Act.

1134. An officer of court is required, by section 17(2) of the 2002 Act, to submit a report of attachment signed by the officer to the court. Similarly, section 32(2)(d) requires the officer to submit a signed report of auction to the court. This raises issues similar to those discussed above for signed applications under part 1 of the 2002 Act.

1135. Section 31 of the 2002 Act provides for the amounts to be credited to the debtor from the sale proceeds at auction. That section does not provide for the amount to be credited where an article is sold for a sum less than the value estimated at attachment, or for where an article was

damaged after attachment and re-valued before the auction. This can lead to disputes between the creditor and debtor.

Proposals

1136. The Executive intends that the officer who removes attached goods and takes them to auction under section 19(1) of the 2002 act does not need to be the same officer that carried out the original attachment.

1137. It is intended that court messengers should have a power to immediately remove and secure attached articles where that is necessary to secure or preserve the value of these articles, and there is no time to make a court application under section 20 of the 2002 Act.

1138. It is intended that where the act requires an application to be signed by a court messenger, that requirement is satisfied by a certified electronic signature under the electronic communications act 2000.

1139. It is intended that on disposal of the proceeds of an auction:

- where an asset is sold for less than the value fixed by either sections 15(2) or (3) or 51 of the 2002 act, then the amount credited to the debtor is the value rather than the sale price, and
- where an asset is sold for less than either the original valuation, or re-valued after damage caused by a third party, then (provided no compensation has been paid) the amount credited to the debtor is the original value rather than either the re-valuation or the sale price.

Exceptional attachment

Policy objectives

1140. Part 3 of the 2002 Act provides for exceptional attachment orders.

1141. Section 49(1)(b) of the 2002 provides that the officer shall not enter a dwellinghouse to execute an exceptional attachment order unless he has served notice on the debtor giving at least 4 days notice of the intended date of entry. No provision has been made for the recovery of the costs of serving that notice from the debtor.

Proposals

1142. It is intended that schedule 1 to the 2002 Act, which sets out the expenses chargeable against the debtor, will include the costs of the notice to the debtor of the planned date of entry.

PART 14: ADMIRALTY ACTIONS AND ARRESTMENT OF SHIPS

Aim

1143. To ensure the effective operation of the diligence of admiralty arrestment, also called ship arrestment or maritime arrestment, by modernising the law on admiralty actions and ship

arrestment under the Administration of Justice Act 1956¹²⁰ (“the 1956 Act”) (*modernisation theme*).

Policy Objectives

Background

1144. Scotland is a coastal nation which relies heavily on shipping for its imports and exports. Ship arrestment is therefore a process or action with a long history in Scots common law. The procedures of maritime actions first developed along with the law on enforcement of them in the old High Court of Admiralty. In 1830 the Admiralty Court was abolished and its jurisdiction in civil maritime cases was divided between the Court of Session and the sheriff courts.

1145. Admiralty arrestments are relatively uncommon although they can be for claims of considerable value. In 2003 there were 54 arrestments in the Court of Session actions. There are no statistics on the number of admiralty actions in, or arrestments from, the sheriff courts in part because there are no separate court rules. However, neither is thought to be any more common than in the Supreme Court.

1146. There are 3 types of ship arrestment:

- **arrestment on the dependence** is used to secure a claim against the owner of a ship, or of shares in a ship, and unlike ordinary arrestment is effective in the hands of the owner¹²¹,
- **arrestment *in rem***¹²² is used to enforce a claim against a ship or other maritime property as opposed to any one owner, for example:
 - salvage of a ship,
 - collision claims, and
 - wages for service on board a particular ship, and
- **arrestment to found jurisdiction** is used to establish jurisdiction, but does in fact detain the ship which if necessary is achieved by either arrestment on the dependence or arrestment *in rem*.

1147. A ship may travel through several countries in the course of a single voyage. There is therefore a strong international interest in aligning the rules of admiralty actions and ship arrest. The last major development of this area of the law came about as a result of the UK ratifying an international treaty. From the Scottish perspective, it is of course important that this jurisdiction is a no less favourable place to arrest than any of our competitors.

1148. Part V of the 1956 Act gave effect (following UK ratification) to articles of the *International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing*

¹²⁰ 1956 c.46.

¹²¹ In that sense admiralty arrestment is more like the intended diligence of interim attachment.

¹²² The Latin tag ‘*in rem*’ means ‘regarding a thing’ i.e. in this context a claim that is not against a specific person but is against the whole world in respect of particular property.

Ships signed at Brussels on 10 May 1952¹²³ (“the 1952 Convention”). The 1956 Act sets out the law on –

- jurisdiction of collision claims, and provides that where a foreign court is already dealing with the subject matter of a claim made here then the Scottish claim must be sisted (suspended) on request, and
- lists the type of claims that can be secured by arrestment on the dependence or enforced by arrestment *in rem*, and in the case of arrestment on the dependence provides that either the ship being arrested is
 - the subject matter of the claim, or
 - wholly owned by the defender.

1149. Work on developing the international aspects of maritime law has continued in the period since the 1952 Convention. A new international Convention on Arrest of Ships was adopted following a conference in Geneva in 1999, but that Convention has not been ratified by the UK government and it is understood that there is no plan to do so in the near future.

Objectives

1150. The reform of admiralty actions and admiralty arrestment has two main objectives. First, reform should modernise the language and process of the current law on ship arrestment.

1151. Second, it should ensure that there is harmony between the 1952 Convention and the 1956 Act, and that Scots law takes due account of important developments in other jurisdictions particularly where those are linked to international treaties on maritime matters.

Consultation and Responses

1152. The Scottish Law Commission in its 1998 *Report on Diligence on the Dependence and Admiralty Arrestments*¹²⁴ (“1998 Report”) recommended reform of the law on admiralty actions and of arrestment of ships and cargo. The 1998 Report built on responses to a previous discussion paper and a Commission consultation¹²⁵.

1153. In the ECOS consultation the Executive consulted on implementation of the recommendations of the 1998 Report. The Executive supported all the recommendations, other than the recommendations that arrestment on the dependence should be treated the same way in admiralty actions as in all other types of claim in the Scottish courts¹²⁶.

1154. The Executive asked first for indications of support for the proposed reforms set out in the ECOS consultation, and second for comments on different possible approaches where the Executive had identified different ways to implement the proposed reforms, namely:

¹²³ International Conventions on Maritime Law, Treaty Series No. 47 (1960) Cmnd 1128.

¹²⁴ Scot Law Com No 164 Parts 7 and 8

¹²⁵ Scottish Law Commission *Diligence on the Dependence and Admiralty Arrestments* DP No 84 and *Consultation Paper on Arrestment of Ships Securing Claims Against Demise Charterers* (1990)

¹²⁶ SLC 164 recommendations 58 and 59.

- whether the appropriate test to be applied in determining whether or not the pursuer should be liable to the defender for damages for loss caused by diligence on the dependence is that the diligence
 - was unreasonable, or
 - wrongful or unjustified
- whether, and if so to what extent, judicial sale of a ship should be regulated by statute,
- Scottish courts can deal with a dispute if jurisdiction is founded by either arrestment to found jurisdiction or arrestment *in rem*, but given that the intention to have a 5 day notice period to defend the claim following arrestment, special rules are needed for service on parties abroad, to be either
- service on the master of the ship, or
- extending the 5 day period for service abroad, and
- it is intended that where arrestment on the dependence of the ship in dispute does not provide full security for a claim that a sister ship (owned by the same person) can also be arrested provided the pursuer can show either or both of
- good cause, or
- inadequate security.

1155. One reform consulted on by the Executive had not been considered by the Commission. An arrested ship may have a crew, and in rare cases the owner or charterer abandons them along with the ship. No person is responsible for the welfare of the crew, unlike England and Wales where that is a function of the Admiralty Marshall. In Scotland the crew may have to rely on charity, and views were sought on whether there should be a safety net for abandoned crews.

1156. The Executive's proposals for reform were generally supported by most of the respondents. There were only a few specific comments. Particular issues on which views were sought produced the following comments:

- Comments on providing for the care of an abandoned crew were equally divided as to whether the reform was necessary,
- the few who commented on providing service of a summons favoured the option of service on the master of the vessel but as explained this proposal was subsequently overtaken,
- there were a couple of responses which suggested monetary and time limits on the proposals for the judicial selling ships operated under demise charter.

Policy discussion

1157. The reforms in this part of the Bill deal primarily with admiralty arrestment on the dependence. This form of diligence is also affected by the reforms in Part 5 of the Bill to diligence on the dependence, for example execution of diligence before service of the claim document on the debtor.

Terminology: maritime hypothecs or liens

1158. The 1998 report set out the arguments for reconciling common usage in international maritime conventions with terminology in Scots law¹²⁷.

1159. In Scots law two types of security over movable property are created automatically by law rather than by specific agreement: a lien and a hypothec. The difference between the two is that in a lien the creditor is already holding property of the debtor and in a hypothec the creditor does not hold any such property.

1160. A right in security arising in law over a ship is referred to as a lien in the 1956 Act, but if usage were consistent with Scots law the right would be called a hypothec because the creditor does not in fact hold the ship. This difference arises because International conventions (often translated with English usages in mind) use lien rather than hypothec to describe this kind of security. The 1956 Act gives effect to UK treaty undertakings.

1161. The Commission thought that all things being equal references in the 1956 Act to lien should be replaced with ‘hypothec’. However, all things are not equal due to the risk of confusion when Scottish disputes are considered in an international context. There is therefore a limit to how far the terms of the 1956 Act can be reconciled with ordinary Scots usage.

Proposal

1162. It is intended that the Bill will provide a new definition of ‘maritime lien’ applied to the 1956 Act, which will clarify ‘lien’ has the special meaning in that context.

Security over a ship’s cargo (respondentia)

1163. In Scots law, respondentia is a maritime security granted over a ship’s cargo in respect of a particular voyage. It is not listed in the 1956 act as one of the types of claims that can be secured by arrestment on the dependence or enforced by arrestment in rem, although a claim arising from respondentia is considered as a an admiralty action under the procedural rules of the Court of Session. The Commission recommended that the 1956 Act and court rules should be aligned to clarify the law in that respect¹²⁸.

Proposal

1164. It is intended that respondentia should be added to the list of claims that can be secured by arrestment on the dependence or enforced by arrestment in rem in the 1956 Act.

Sheriff court jurisdiction

1165. Arrestment of ships and cargo is different in that the ship or cargo can be arrested in the hands of the owner or a third party, as opposed to a third party only as is the case with arrestment in other types of action. Arrestment on the dependence or *in rem* of a ship prevents it sailing to

¹²⁷ SLC 164 recommendation 51 paragraphs 7.3 to 7.8

¹²⁸ SLC 164 recommendation 52 paragraphs 7.16 to 7.44

its next destination until either the arrestment is recalled or security is provided. The physical act of carrying out the arrestment is performed by court messengers.

1166. Ships trade world-wide, and are often now owned by single ship companies registered elsewhere than Scotland. A ship may be in Scotland for no longer than it takes to load and discharge a cargo. In that time it will run up pilotage or harbour costs, and may (say) be involved in a collision. It follows that the ability to hold a ship in order to secure or prosecute a legitimate claim is an important consideration for international trade.

1167. Ships can be arrested on a warrant of either the Court of Session or a sheriff court. The normal rule is that a sheriff has jurisdiction to consider claims on matters arising from within the local area of the court. That would mean, for example, that the sheriff at Inverness could only grant warrant to arrest a ship that was within the Inverness sheriff court district.

1168. Ships, of course, move. Perhaps as a result sheriff court rules¹²⁹ allowing arrestments of ships and their cargo outside the jurisdiction of the sheriff court granting the warrant appear to apply to arrestments *in rem*. That means that a sheriff in one place is granting an order detaining a ship which is in another sheriff court district. This cuts across jurisdictions and causes confusion, as well as being of doubtful legality.

1169. It does all the same make sense to have special rules for ships. It would however be necessary to adjust the underlying jurisdiction of sheriffs in admiralty actions. That jurisdiction is as set out in section 4 of the Sheriff Courts (Scotland) Act 1907¹³⁰ which provides that the powers of the High Court of Admiralty in Scotland in all maritime causes and proceedings shall apply to sheriffs:

“Provided that the Defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the sheriff before whom such cause or proceeding may be raised”. ...”

1170. The Commission recommended¹³¹ reforms to make it only competent to arrest *in rem* a ship or cargo:

- within the territorial jurisdiction of the sheriff court granting the warrant, or
- outside the territorial jurisdiction of the sheriff court in which the action *in rem* is being raised, if the ship or res is within the territorial jurisdiction of the court when the warrant is granted and that arrestment *in rem* outside that jurisdiction is not rendered competent by a warrant of concurrence.

Proposals

1171. It is intended it should only be competent to arrest *in rem* a ship or cargo outside the jurisdiction of the sheriff court that grants warrant if the ship or cargo was within the territory of that court when the warrant is granted.

¹²⁹ Sheriff Court Ordinary Cause Rule 5.8 and Summary Cause rule 11.

¹³⁰ 1907 c.51. The 1907 Act repealed and replaced section 22 of the Court of Session Act 1830.

¹³¹ SLC 164 recommendation 55 paragraphs 7.52 – 7.56.

1172. It is also intended to modify the 1907 Act so as to disapply for admiralty arrestment the requirement that the defender is to be amenable to the sheriff's jurisdiction in the ordinary sense.

Arrestment of shares in a ship

1173. Section 47(1) of the 1956 Act provides that a warrant for arrestment on the dependence may only be granted where the ship being arrested is the subject matter of the action, or it is wholly owned by the defender.

1174. Section 47(3)(a) of the 1956 Act permits arrestment on the dependence of an action where a sum of money is claimed in a dispute:

- about ownership of a ship or shares in a ship,
- between co-owners about the ship,
- a mortgage over or hypothecation of a ship, or
- any forfeiture or condemnation of a ship or cargo.

1175. In a claim of the type of claim covered by section 47(3), the defender may be the owner of only one share in a ship. The clear inference is that even where the defender is the owner of only one share in the ship, that share may be arrested on the dependence with the result that the ship itself is detained.

1176. It is not clear that a ship may be arrested on the dependence, and therefore detained, under the general power in section 47(1) where the defender is the owner of a share in the ship. The Commission therefore recommended¹³² clarification of the law so that, save in relation to demise charterers for the reasons discussed below, arrestment on the dependence is competent only if the defender is the owner of the ship or a share in the ship at the time of the arrestment, and that the arrestment may be of the ship or of a share in the ship.

Proposal

1177. It is intended that the Bill will amend section 47(1) and (3) of the 1956 Act to provide that arrestment on the dependence is competent where the defender owns a share of the ship being arrested.

Right to re-arrest same ship, or to arrest a second sister ship, on the dependence

1178. Sister ships are those which have the same owner. Although a claim may be made in relation to one ship, it is competent to arrest on the dependence another ship owned by the same owner to obtain security for the claim.

1179. The 1956 Act put the first restrictions on that general right in accordance with the 1952 Convention. For example, under section 47(3) of that Act in a dispute about ownership no ship other than the ship which is the subject matter of the dispute may be arrested on the dependence of an action. It is, however, not altogether clear if the restrictions in the 1956 Act give full effect

¹³² SLC 164 recommendation 60 paragraphs 7.99 to 7.106

to the 1952 Convention. A creditor may be prevented from obtaining fair security through arresting more than one ship.

1180. The Commission considered this issue, and having in mind the terms of the 1952 Convention recommended¹³³ that where a ship has been arrested on the dependence then that ship may not be arrested again, and no sister ship may be arrested, unless cause is shown why a new warrant should be granted.

Proposal

1181. It is intended that a creditor in admiralty action may on cause shown obtain warrant to re-arrest a ship, or arrest a sister ship, on the dependence of that action.

Liability for expenses of admiralty arrestment

1182. At common law the expenses of an arrestment on the dependence, including such an arrestment in an admiralty action, are not recoverable from the defender even on success. The rationale is that the diligence is used to get a security for payment, and is not part of the process of obtaining decree.

1183. The Commission recommended¹³⁴ that the expenses of diligence on the dependence should in future be recoverable by the pursuer from the defender on success.

Proposal

1184. It is intended that the expenses of diligence on the dependence will on success by the party using the diligence be recoverable from the other party.

Service of claim

1185. The Bill includes reform of diligence on the dependence in general. It is intended that a new section 15C of the 1987 Act will require that the claim document¹³⁵ is served on the defender within 21 days after a diligence is executed. The time limit originally proposed was 5 days but as the discussion on the reforms in Part 5 of the Bill sets out the Executive accepts that the proposed 5 day period was too short.

1186. This time limit will apply in all actions, including admiralty actions. However, admiralty cases are often quite unlike ordinary actions. Creditors could be unable to meet a 21 day target for reasons beyond their control, for instance because of a need to:

- translate court documents into another language, or
- effect service in another country under the laws of that place.

¹³³ SLC 164 recommendation 61 paragraphs 7.108 – 7.110

¹³⁴ SLC 164 recommendation 63. paragraphs 7.129 – 135.

¹³⁵ A claim form, initial writ, petition or summons depending on the court or type of claim.

Proposal

1187. It is intended that Part 5 of the Bill will enable an extension to the 21 day period in which a claim document must be served after diligence on the dependence has been executed in an admiralty action, provided that good cause is shown to the court.

Care of a Crew

1188. Ship abandonment is thought to be a rare occurrence. However, it happened in the early 1990's when fishing factory ships from the former Eastern block countries were abandoned in Scotland after being arrested under claims for unpaid bills. The crews survived by relying on local charity.

1189. It is therefore sensible to make provision for abandoned ships as part of the first significant reform of admiralty actions and admiralty arrestment since 1956. In practice welfare needs are often organized informally by the parties to an action. A creditor, for example, may decide to feed the crew of an arrested ship if only to have a crew ready to move the ship when needed.

1190. One way to meet this rare need for welfare provision is to give the intended Scottish Civil Enforcement Commission ("SCEC") a residual power to make provision for the crew of a vessel which has been arrested and then abandoned.

1191. The SCEC will, as part of its functions, have the power to recover costs of carrying out these functions (whether that be from the defender as a cost of the diligence by priority ranking or detaining order on the vessel or, from the pursuer who would then be able to seek the costs as expenses of the cause is a policy detail yet to be finalised. There is also an outstanding issue about whether the SCEC should require an undertaking from the pursuer's solicitors to meet costs set at a certain level); the duty to publish all expenses incurred.

Proposal

1192. It is intended that the Bill will in Part 3 impose a function on the SCEC enabling it to provide assistance for a crew of an arrested and abandoned vessel if needed, and to recover the costs of that assistance.

1193. It is intended that welfare costs can be recovered by any of:

- a court order detaining the vessel (in effect a new arrestment),
- payment from the pursuer, who will then seek recovery from the defender, or
- permitting the SCEC to rank as priority creditor for that claim when the arrestment is realised by sale, or when the debt paid by other means.

Arrestment of cargo

Arrestment on dependence of cargo on board ship

1194. Section 47(1) of the 1956 Act provides that a warrant for the arrestment of property on the dependence of an action or in rem shall only have effect as authority for the detention of a ship in the circumstances set out in that section.

1195. Section 47(2) includes as one of the qualifying claims loss of, or damage to, goods carried in and ship. Case law¹³⁶, however, suggests that section 47 of the 1956 Act does not apply to arrestment of cargo on board a ship, as opposed to a ship, on the dependence of a claim. There is therefore some uncertainty about the competence of arresting cargo on the dependence of an action.

1196. The Commission recommended¹³⁷ that arrestment on the dependence of cargo on board a ship may be used in either an ordinary action or an admiralty action in personam. It follows that the restrictions in the 1956 Act will need to be relaxed.

Arrestment of cargo in the hands of the person controlling it

1197. Arrestment is normally effective against a person who has the legal duty to account to the owner for the goods in question. Admiralty arrestment is as mentioned above more like attachment, and a ship can be arrested in the hands of the owner. This has caused some legal uncertainty about who is considered to hold cargo for the purposes of arrestment.

1198. While no clear principle emerges from the few reported cases, nearly all decided last century, the courts seem to adopt a liberal approach and will generally sustain an arrestment of cargo on board ship if it is laid in the hands of the person having actual possession and control of the cargo.

1199. The Commission recommended¹³⁸ that the law should be clarified to remove any doubt about whether it is competent to arrest a cargo on board ship regardless of whether the cargo is in the hands of the Defender, employees of the defender, or agents of the defender.

Moving a ship where cargo is arrested

1200. Common law provides that where cargo is arrested on board ship the arrestee is not entitled to move the ship away from Scotland with the cargo on board. In short, the cargo should be unloaded or the arrestment lifted.

1201. The Commission thought that the legal basis for that proposition was unclear, and recommended¹³⁹ that the legal effect on the arrestee's right to move a ship be clarified.

¹³⁶ For example, *West Cumberland Farmers Limited v Director of Agriculture of Sri Lanka* 1988 SLT 296.

¹³⁷ SLC 164 recommendation 65 paragraphs 7.140 – 7.142

¹³⁸ SLC 164 recommendation 66 paragraphs 7.144 to 7.148

¹³⁹ SLC 164 recommendation 68 paragraphs 7.155 to 7.160.

Attachment or arrestment

1202. As mentioned above, arrestment of cargo is different in that cargo can be arrested in the hands of the owner or a third party, as opposed to a third party only as is the case with arrestment in other types of action.

1203. In every other case corporeal moveable property in the hands of the owner must be attached under the 2002 Act. Cargo, unlike a ship, is a kind of maritime property only when carried on board ship. A car is not cargo once it is unloaded and stored, even in a harbour in the owner's warehouse.

1204. The issue has not been tested in the courts, but it is sensible to use the bill to clarify when goods are cargo for the purposes of arrestment rather than goods which are subject to attachment in the normal way.

Proposals

1205. It is intended that section 47 of the 1956 Act will not apply to arrestment of cargo on the dependence of any action, whether admiralty or otherwise.

1206. It is intended that the 1956 Act should provide that is competent to arrest cargo on board ship where it is in the possession of either the Defender or any person acting on behalf of the defender.

1207. It is intended that the 1956 Act should provide that where cargo on board ship is arrested that the ship shall be treated as if arrested until the cargo is unloaded.

1208. It is intended that where cargo is on board ship it must be arrested, even where it is in the hands of the owner. Once cargo is unloaded onto the quay or elsewhere it shall be subject to attachment or ordinary arrestment in the same way as any other corporeal moveable property.

Demise charters

1209. A "demise charter" is a lease of a ship, or of a ship and (in rare cases) the master and crew, from the owner. The demise charterer takes possession of the vessel, and where a crew is 'chartered' becomes their employer. A demise charter can be short, say one or two years, but is often long. It could be for twenty years, or the working life of the ship.

1210. A demise charterer of a ship is in effect the owner of the ship for the period of the charter. The charterer has during the charter both the right to full possession and control and the corresponding obligations. An analogy would be a full repairing and insuring lease of heritable property.

1211. In a long or lifetime contract the charterer can be seen as the owner in fact, if not in law. The 1952 Convention therefore recognises that some claims against a demise charterer can be

pursued against a chartered ship owned by a third party. In England and Wales¹⁴⁰, for example, the law gives effect to that aspect of the 1952 Convention and a ship may therefore be arrested in the hands of a demise charterer for claims against that person.

1212. Indeed, arrestment of demise chartered ships is common internationally. The right to arrest has evolved over a long period as part of the laws and custom of the sea, now also enshrined in conventions. In tandem with evolution of the right, maritime commerce has developed commercial instruments by which a ship owner may lay off the risk of loss through arrestment of a demise chartered ship.

1213. The Commission considered the issue of demise charters, and recommended¹⁴¹ that in respect of a demise chartered ship—

- it should be competent to arrest the ship on the dependence of an action *in personam*¹⁴² against the demise charterer,
- it should be competent to arrest the ship to found jurisdiction in a claim against the demise charterer,
- on a judicial sale of a ship the ship owner's debts should be paid before the demise charterer's debts, and
- on a judicial sale of a ship the ranking of other claims should be determined by the existing common law.

Arrestment on the dependence and to found jurisdiction

1214. The charterer under a demise charter has most of the characteristics of an owner, and may indeed control a ship from construction to the breaking yard. A demise charter is in modern usage a common way for an 'owner' to finance the construction of a ship. Creditors should not be deprived of a fair remedy against debtors simply because of the way those debtors have chosen to arrange their affairs.

1215. The Commission recommended¹⁴³ therefore that arrestment of a demise chartered ship on the dependence of claim against a demise charterer should be permitted where, at the time of the claim and at the time of execution of the arrestment, the defender is the demise charterer of that ship.

1216. The Commission also recommended¹⁴⁴, given that diligence on the dependence would be competent, that arrestment to found jurisdiction should be competent.

Judicial Sale

1217. If the new right to arrest is to have teeth then the creditor of the demise charterer must where appropriate be able to realise the security created by diligence on the dependence. In

¹⁴⁰ See the Supreme Courts Act 1981 c.54.

¹⁴¹ SLC 164, Part 8

¹⁴² The Latin tag '*in personam*' means a claim against a specific person as opposed to a thing such as a ship (a claim *in rem*).

¹⁴³ SLC 164 recommendation 73 paragraphs 8.43 to 8.57.

¹⁴⁴ SLC 164 recommendation 75 paragraphs 8.64 - 8.70

ordinary actions a security can be realised when decree against the defender is converted by law from a diligence on the dependence to a diligence in execution.

1218. The Commission therefore recommended¹⁴⁵ that if a ship is arrested on the dependence of a claim against a demise charterer, and the claim is proved, it should convert into a 'full' arrestment which will permit the pursuer to sell the ship under the authority of the court.

1219. The Commission thought, and the Executive agrees, that the legal owner should have the chance to redeem the ship. That right will be of particular importance in shorter charters. Of course, a compulsory sale of the ship will not discharge the demise charterer from the duty to make the payments due to the owner under the contract.

Competition between arresting creditors

1220. In any forced sale, there may be a number of different creditors making claims against the price. All the creditors are paid if the price is enough to cover the debts. Sometimes, however, the debts exceed the price. If so the law should if possible assign a priority of importance, or rank, to the different claims. Higher ranked claims are then paid before lower ranked claims.

1221. The Commission recommended¹⁴⁶ that there should be a ranking on the proceeds of a sale of a ship. Creditors who have arrested the ship in respect of the ship owner's debts should be preferred to those who have arrested for the debts of the demise charterer. The Commission did not consider that any other statutory provision is needed as the common law will provide what is needed.

Proposals

1222. The Executive intends that that in respect of a demise chartered ship it should be competent to arrest the ship on the dependence of an action *in personam* against the demise charterer for a claim under section 47(2) of the 1956 Act.

1223. It is intended that a creditor may arrest a demise chartered ship to found jurisdiction against the demise charterer for a qualifying claim.

1224. It is intended that the 1956 Act will be amended to provide for the judicial sale of a ship where the creditor who has arrested a demise chartered ship obtains decree against the demise charterer. Further, it is intended that the legal owner of the ship will be given an opportunity to release the ship before the sale by redeeming the debt of the demise charterer.

1225. It is intended that in a ranking competition a creditor arresting a ship (or a share in the ship) for a debt due by the owner of the ship (or the share) will have priority over a creditor arresting for a debt due by the demise charterer.

¹⁴⁵ SLC 164 recommendation 77 paragraphs 8.58 to 8.62

¹⁴⁶ SLC 164 recommendation 76 paragraphs 8.92 - 8.94

Alternative approaches

Automatic Grant of Warrant for Diligence on the Dependence

1226. The Commission recommended that warrant to arrest a ship on the dependence should be treated in the same manner as all other warrants to arrest on the dependence.

1227. In line with the proposals discussed in granting a warrant in diligence on the dependence cases in paragraphs above, the Executive intends to introduce statutory test for admiralty actions which goes a long way towards, while not fully implementing, the Commission's recommended reforms¹⁴⁷.

1228. The Bill will apply the Commission's recommendation in relation to liability of the pursuer equally to admiralty arrestments on the dependence as to diligence on the dependence generally.

Service of the claim

1229. Consultees were asked for their views on two alternative options in relation to service of a claim document after arrestment on the dependence. The first option was to authorise service of the summons on the master of the vessel, and the second option was to make specific provision to extend the five day rule in relation to admiralty arrestments and 21 day period for service in admiralty cases on reasonable cause being shown to the court.

1230. Most respondents who commented supported option 1. However the Executive subsequently decided that there should be no 5 day rule for service of admiralty arrestment, and that service within 21 days after execution in the same way as any other diligence on the dependence would be sufficient. The Bill does not therefore authorise service on the master of a ship.

Admiralty Marshall

1231. In England and Wales the Admiralty Marshall is a public official responsible for the execution of admiralty arrestments, administration of arrestments, and care of the detained ships. The Marshall may incur costs to maintain arrested ships, including the costs of crew members needed to keep the vessel safely afloat. The Admiralty Marshall's costs are a first charge on the proceeds of any judicial sale of the vessel.

1232. The Marshall's functions are much wider than those of any court or official in Scotland. The Executive considered whether or not the Bill should provide for a similar official. However, ship abandonment is a rare occurrence in Scotland. In addition, and unlike England and Wales, there will be an enforcement commission with relevant functions.

1233. The Executive therefore decided that the cost and complexity of a new office could not be justified. The SCEC will have the functions needed to create a safety net for abandoned crew. If

¹⁴⁷ SLC 164 recommendations 1 to 5 paragraphs 3.1 to 3.52

it proves necessary the functions of the SCEC could be extended by Scottish Ministers using the enabling power in Part 2 of the Bill.

PART 15: DISCLOSURE OF INFORMATION

Aim

1234. To provide creditors with the information they need to make an informed choice of enforcement method (*information theme*), and to make it harder for ‘won’t pays’ to avoid payment and less likely that the ‘could pays’ and ‘can’t pays’ will be subject to unnecessary action (*striking the balance theme*).

Consultation and engagement

1235. The background to consultation has been the work being carried out by the Department of Constitutional Affairs¹⁴⁸ (“DCA”) for the UK interest. At the time of the ECOS consultation DCA had already suggested a system of ‘data disclosure orders’. The intention to introduce data disclosure orders in England and Wales was set out in the DCA White Paper ‘*Effective Enforcement*’ published in March 2003.

1236. Executive policy is to extend a suitably adapted data disclosure order scheme, now called the information disclosure order (“IDO”) scheme, to Scotland. In order to do so it will be necessary to work in partnership with DCA to deliver an IDO scheme that gives Scottish creditors the same access to information held by bodies carrying out reserved functions as are to be enjoyed by creditors in England and Wales.

1237. In the ECOS consultation¹⁴⁹, the Executive referred to DCA proposals and asked a number of questions about access to information on debtors held by a third party such as Government, namely:

- Would access to information held by third parties assist towards achieving more effective enforcement?
- If so, what type of information held by which third parties should be permitted?
- Should the same types and sources of information be uniformly accessible in the different UK jurisdictions?

1238. The majority of respondents were strongly in favour of some form of information disclosure. Suggested sources of information for sharing included:

- Her Majesty Revenue and Customs (“HMRC”),
- Department of Works and Pensions (“DWP”),
- Licensing authorities, including the Driver and Vehicle Licensing Agency,
- Scottish local authorities,
- Banks and other financial institutions, and
- Employers.

¹⁴⁸ Formerly known as the Lord Chancellor’s Department of ‘LCD’.

¹⁴⁹ See the discussion in paragraphs 3.76 to 3.82, and the consultation questions at paragraph 3.113.

1239. There was also strong agreement that the same types and sources of information should be available in different UK jurisdictions in terms of equal treatment. Some raised the potential benefit of managing cross border enforcement more effectively if there was a uniform scheme throughout the UK.

1240. In the Bill consultation the Executive noted the responses to the ECOS consultation, and that DCA were continuing to develop policy for the planned IDO scheme.

Policy objectives

1241. The state does not guarantee or enforce payment of debt to creditors. Information is therefore the key to effective enforcement. It has long been recognised by both the UK and Scottish Governments that if creditors are to make rational decisions when enforcing debt then they will need to have access to more and better information.

Policy discussion

1242. Diligence provides creditors with the means to enforce debts owed to them. The types of income and property that debtors may have vary widely. For that reason different forms of diligence have developed for different types of property. For example, attachment works against corporeal moveable property (for example, a car or artwork) and arrestment catches obligations to account (for example, funds in a bank account).

1243. The creditor has to pay to use diligence and therefore hopes to recover the extra costs from the debtor. The public, through the court system, incurs diligence costs when (for example) a debtor opposes an exceptional attachment order on the basis that it will not pay enough to justify the order. It is therefore in the interests of creditors and debtors, and in the public interest, that the enforcement system is as effective as possible.

1244. One of the key ways in which to make diligence more effective is to improve the flow of information. Creditors, after all, do not like throwing good money after bad. It is not efficient for a creditor to use a '5 Bank' arrestment in the hope of catching a salary or wage payment in an account somewhere. The creditor wastes money on court officer fees and the potential arrestees' waste time and resource checking for a non-existing account.

1245. In a well designed enforcement system the creditor would have some way of finding out if there is a bank account, and if so where it is. This information is held by a wide range of third parties, including most important Government in all its manifestations. Access to such information would therefore enable creditors to target their efforts to best effect. Time and expense would be saved, and there would be a reduction in the inconvenience caused by ineffective diligence.

1246. Improving flows of information is not the same thing as moving to state enforcement of debts. Such a radical shift is not justified by any existing concern about the enforcement system. The creditor should not therefore have an automatic right to data held by third parties. Apart from anything else, that would raise the risk that the courts were swamped by applications from creditors.

1247. The courts should therefore have discretion to order or refuse disclosure, and to consider factors such as the efforts that creditors make to help themselves. It is also important to take due account of the private and sensitive nature of the data by having a 2 stage disclosure in the IDO scheme. The creditor applies to the court which if satisfied disclosure is justified orders or requests data from specified holders. The court then sifts data received and, if the creditor asks, releases the minimum needed for a particular diligence, for example bank account details for a proposed arrestment.

1248. There are 3 classes or types of data that can be covered by a Scottish IDO scheme. They are information held by:

- ‘Devolved’ bodies and persons, such as the Executive and local authorities,
- ‘Reserved’ bodies and persons, such as HMRC and DWP, and
- Private bodies and persons, such as banks and employers.

1249. Responsibility for gathering this information can relate to either side of the devolved/reserved boundary, although that does not mean that making provision for that information is reserved. Information held by the Executive or a local authority is held for a generally devolved purpose. Information held by HMRC and DWP is held for a generally reserved purpose. Information held by private bodies and persons could be either, although some regulatory issues affecting (for example) financial services and limited companies are reserved to Westminster.

1250. The UK government can develop a comprehensive IDO system for England and Wales, but in Scotland options are more limited. The Executive has therefore been working closely with DCA both before and after their publication of *‘Effective enforcement’* to consider how a Scottish IDO can tie into UK arrangements covering information held for or regulated under a reserved purpose.

1251. The Executive has agreed with UK interests, at least at this stage, that the ‘UK’ and Scottish IDO schemes will develop in tandem. It has also been agreed that IDO will not start with a ‘big bang’. A very wide range of data is held by an equally wide range of third parties, and the best approach is therefore to start with a focused IDO scheme covering a limited range of information.

1252. The Bill is an opportunity to deliver the framework needed to support the framework for the intended Scottish IDO. The planned UK Courts and Tribunals Bill is expected to introduce the analogous framework for IDO in England and Wales. In both jurisdictions legislation is intended to provide for a power on the part of the courts to administer a two stage information disclosure process.

1253. It is intended that the IDO provision in both Bills will put in place the framework needed to support IDO in the long term. However, in the short to medium term it is not envisaged that the courts on either side of the border will order any third party to disclose data to the courts. This is because it is intended that the first type of information to be disclosed under IDO is data held by HMRC and DWP.

1254. Those bodies are part of UK government and do not need to be compelled to take part in a Government scheme. Instead, data held by them will be released to the courts through an information request process presently being developed. The courts in Scotland will still have an important role to play. The courts must make an order that it is appropriate for information to be disclosed to the creditor before the planned information request can be sent from the courts to HMRC or DWP.

1255. The Bill should do all that is necessary to develop a Scottish IDO scheme. The information request element of the planned IDO scheme affects information held for reserved purposes, and this Bill will not cover that either directly or indirectly through subordinate legislation. However, it will be possible to make a consequential order under section 104 of the Scotland Act extending the function of disclosing information to cover a request arising from the Scottish IDO scheme. UK interests have agreed to support such an order.

1256. The Bill will provide the skeleton for IDO, and that framework will be fleshed out by subordinate legislation. The Scottish Executive is developing policy on the content of that legislation in partnership with DCA. Scottish interests will, for example, be represented on a UK working group involving all the key Government interests. The working group will examine issues such as the feasibility of electronic data transfers from DWP and HMRC to the courts, and the development of standard forms and documentation.

1257. It is intended that the draft regulations governing the IDO scheme will be subject to full consultation. It is thereafter in the view of the Executive appropriate for the first set of IDO regulations made under the Bill to be subject to affirmative procedure, as that will allow for proper parliamentary scrutiny of the details of the planned scheme. It should thereafter be appropriate for later amending regulations to be subject to negative procedure.

1258. In Scotland, IDO will be operated by the Scottish Court Service which is an agency of the Executive. The Financial Memorandum, published separately, sets out an estimate of the cost of developing the scheme. The planned IDO scheme is breaking new ground, and needs to be made to work in the first instance across the whole of the UK. Given this, and the necessary investment in infrastructure and people, the Executive expects that the IDO scheme will become operational in 2009/2010.

1259. In the longer term it is envisaged that the effect of the planned IDO scheme will be analysed and reviewed, and extended by subordinate legislation if that is appropriate. In Scotland the intended SCEC will lead on the analysis and investigation.

Proposals

1260. The Scottish Executive intends to provide powers for the courts:

- to make an information disclosure order requiring specified third parties to disclose information about the debtor to the courts, and
- to release the information so closed to the creditor.

1261. It is intended that subordinate legislation made under the Act, and under section 104 of the Scotland Act 1998, will specify the detailed procedure including the request procedure and the categories of persons who may be required to make disclosure.

Alternative approaches

Distinctive Scottish approaches

1262. The Executive considered two alternative approaches to information disclosure, which can be characterised as ‘do nothing’ and ‘go it alone’.

No IDO for Scotland

1263. The UK Government intends to introduce IDO for England and Wales. Their decision to have a court based process rather than an information gateway will make it harder to deliver IDO for Scotland as what will work in the rest of the UK will not necessarily work here. For example, additional effort will be needed to ensure that holders of ‘reserved information’ adapt their systems to take account of Scottish differences. These are arguments that favour not developing a Scottish IDO.

1264. However, if an IDO scheme were only to be available in England and Wales, this would put Scottish creditors and debtors at a disadvantage when compared with their English and Welsh counterparts. It would also compound the existing cross border enforcement issues as (say) an English creditor could get information about a Scottish debtor from a ‘reserved’ source, but the opposite would not be true. It was therefore considered that the ‘do nothing’ option would not be in the interests of the people of Scotland.

Scottish only IDO

1265. The Executive considered the possibility of a voluntary IDO scheme for Scotland. Government would, in effect, have facilitated data sharing arrangement amongst creditors.

1266. However the lack of statutory backing, and probable data protection issues, would have seriously undermined the effectiveness and therefore the credibility of such a scheme. In particular, it would have been difficult for bodies with reserved functions such as HMRC to have taken part because of statutory obligations to keep private information confidential.

1267. The Executive also considered a devolved only IDO for disclosure from (for example) local authorities. This would work, but the quality and quantity of information would be limited in comparison to the scheme selected. It would also represent a lost opportunity to share administrative effort across the whole of Government in the UK.

Single gateway

1268. At the time of the ECOS consultation it was not clear whether the IDO scheme would be court based. The intended SCEC could have been a ‘single gateway’ for Scotland duplicating what ever gateway arrangements had been in place for England and Wales. In the event, DCA opted for a court based system, and it therefore makes sense for the Scottish IDO scheme to take

the same route. This will deliver consistency across the UK, and make it easier for Scottish creditors to access ‘reserved’ information.

1269. A voluntary IDO scheme could have operated through the Scottish Civil Enforcement Commission rather than the courts, as to some extent could the intended IDO scheme. However the Executive that, even leaving aside compatibility with the UK, an element of judicial oversight is needed in a scheme involving disclosure of sensitive personal information.

Failed attempt at diligence

1270. As mentioned above, the creditor should not have an automatic right to data held by third parties. The Executive therefore considered whether IDO should be set up as a last resort. In that event the creditor would not have been able to apply for an IDO unless they tried and failed to obtain payment by using some other diligence such as attachment.

1271. The Executive considered that this would add an unnecessary, and possibly expensive, barrier to the release of information. There is little advantage in forcing a creditor to use a diligence that is bound to fail only to open the door to the IDO scheme. The Executive therefore decided that the courts should be left to consider the issues in the round, and that previous attempts at recovery should be a factor the courts can take into account when deciding whether to make an order.

PART 16: GENERAL AND MISCELLANEOUS

1272. This Part of the Bill includes provision for transitional arrangements and ancillary provision.

Transitional arrangements

1273. It is intended that Scottish Ministers will have the power when making regulations to provide for the transitional arrangements needed to support implementation of the Bill. For example, it is expected that transitional arrangements will deal with–

- Commencement of (say) money attachment where powers are conferred on court messengers and the Enforcement Part is not then in force, and
- The abolition of the old court officer professions where some officers are not fully qualified and need a ‘grace’ period in which (say) to complete extra training.

Ancillary provision

1274. It is intended that Scottish Ministers will have the power when making orders to make any necessary ancillary provisions. For example, it is expected that ancillary provisions could deal with–

- any consequential amendments needed to other legislation on commencement of any provision of the Bill, and
- making supplementary provision on court messenger business names when the existing professions are abolished.

IMPACT ASSESSMENTS

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

1275. In developing our proposals, we have considered their impact on particular groups. The Scottish Executive has sought at all times to eliminate any differential impact arising from any person's gender, marital status, race, disability, age, sexual orientation, language or social origin, or religious belief.

Consultation and engagement

1276. The Executive is satisfied that all proposals in the Bill have been the subject of consultation. No equality issues were raised directly by consultees. Whilst some policy has been more fully developed since the consultation phase, final plans do not deviate from the initial policy proposals which were subject to consultation.

1277. It is intended that a significant amount of guidance and regulations will support Bill implementation, and the Executive expects that this material will also be subject to consultation with key stakeholders, and where appropriate working groups will contribute to policy development. In convening such groups, efforts will be made to ensure a broad representation of interests helping to ensure that diversity is respected.

1278. Advice was sought prior to introduction of the Bill from the Scottish Executive Equality Unit and an approach made to the Equality Co-ordination Group. This resulted in further dialogue with the Commission for Racial Equality, the Scottish Interfaith Council and representatives of the Muslim and Jewish faiths to modify our proposals in relation to interest bearing accounts.

Bill proposals

1279. The remainder of this equal opportunities assessment examines the effect of the Executive's proposals on bankruptcy, the intended Scottish Civil Enforcement Commission, diligence and floating charges. It examines policy development from an equality perspective, and explains where applicable how proposals have been modified from earlier drafts in order to have due regard to equality issues.

1280. Where possible the Executive has used contextual data and research evidence to develop its proposals. However, in many cases such data or research is limited, highlighting the need for this gap to be addressed in implementing and monitoring the future impact of the intended reforms.

Bankruptcy and equal opportunities

1281. Our bankruptcy proposals do not represent a radical overhaul of the law, rather a set of modernising and streamlining measures, consistent with an enterprise culture that will ensure a

level playing field for businesses across the UK whilst recognising the distinctive approach in Scotland to the management of personal debt.

1282. The Executive is not aware of any disproportionate number of (say) woman or ethnic minorities being sequestrated. Having said that, existing systems do not permit collection of data on the gender or ethnicity of those facing bankruptcy. The AiB is currently developing a new IT system to support their work, and that provides an opportunity to address this. It is expected that overcoming this lack of data will lead to better informed policy making in this area.

1283. In principle, the Executive's intended bankruptcy reforms will affect all those facing bankruptcy equally, and will indeed assist in removing the stigma often associated with bankruptcy. The reduction of the discharge period to one year, coupled with new protections for business and the public, will ensure that any impact on others is consistently managed.

1284. The Bill addresses a concern about the impact of bankruptcy on the family home. At present a family home forms part of the sequestrated estate for an indefinite period. In practice trustees can retain property in the hope of realising some equity. This has left members of the debtor's household without security of tenure and uncertainty.

1285. We propose therefore to limit the period where action can be commenced to 3 years after which the home will revert back to the debtor. This measure represents a significant improvement in the protection offered to spouses, civil partners, cohabitees, children, and all other household members affected by the financial status of the home owner.

1286. The Bill reforms will require the trustee in sequestration to hold monies in an interest bearing account whilst the administration runs its course. We are concerned that such arrangements may conflict with the religious beliefs of individuals from those faiths whose teaching prohibits the receiving of interest.

1287. The Executive notes that funds are held by the trustee (not the debtor) for the benefit of creditors. Similarly, the trustee does not benefit directly. In the small number of cases where there is a surplus after realisation of the estate, the balance is returned to the debtor. This would be the only circumstance under which a debtor could receive the benefit of interest. In those circumstances it would be possible for the debtor to seek the return of monies without interest.

1288. Funds distributed to the creditors will, unless refused, include an element attributable to interest on funds invested by the trustee. In those circumstances, it would be equally possible for the creditor to request payment without interest.

1289. The Executive concludes, therefore, that any requirement to hold funds in an interest bearing account does not necessarily compromise the views of those with faith based objections to such practices. The exception to this is circumstances where a creditor is Muslim. We will develop guidance for trustees to make it clear that alternative forms of investment vehicles should be offered in these cases. Many financial institutions offer "Sharia compliant" products. Creditors will mandate how monies are to be invested to avoid any later allegations that Trustees

have not made the best financial gain possible. In order to limit any impact as far as possible this issue will be kept under review during the development of supporting materials.

1290. It will be noted that many textual amendments to earlier legislation in the bankruptcy part of the Bill (and indeed other parts) include gender specific references such as “him”. This is unavoidable if amendments to previous legislation which was not gender neutral are to read properly in their context. In all other respects, the legislation in this Bill is gender neutral.

1291. Previous consultation highlighted that there may be people with little or no assets for whom none of the available debt relief options work. This has an adverse impact on the health and family lives of people from lower income socio-economic groups. As set out above, the Executive convened the Debt Relief Group to examine this issue and is now considering the report.

Floating charges and equal opportunities

1292. The Bill is intended to improve the law relating to the registration of floating charges. This reform is not expected to have any specific adverse effect on diversity.

Scottish Civil Enforcement Commission and equal opportunities

1293. The Executive’s proposal to establish the court messenger profession marks a significant modernisation of the traditional roles of sheriff officers and messengers-at-arms. The campaign for the abolition of poinding and warrant sale led to a review of current arrangements in the ECOS consultation.

1294. What the Executive proposes will make enforcement activity more transparent and subject to more proportionate regulation and monitoring. The creation of the SCEC presents a significant opportunity to promote equality interests in this area. The reforms will address a number of perceived or actual weaknesses in the way in which current arrangements address equality issues. The SCEC will facilitate the delivery of better services to the people of Scotland.

1295. The new Commission will regulate and monitor the activities of court officers for the first time. The SCEC will be required to do so in a manner which encourages respect for equal opportunities. This means that the SCEC will be required to exercise all of its functions in a manner which prevents, eliminates and regulates discrimination. The SCEC will therefore need to develop a broad range of statistics on enforcement activity.

1296. Data on such activity has been historically weak in Scotland, and this has affected understanding of the impact of current arrangements on equality and other matters. At present anecdotal reporting suggests that the profession, while showing some welcome diversity, remains male dominated with an older age profile. No equal opportunities monitoring is involved in the recruitment, training or day to day work of the profession.

1297. The SCEC, and where appropriate Scottish Ministers, will address this weakness when making regulations and developing codes of practice and guidance. The Financial Memorandum, published separately, includes provision for the sums needed to fund independent

research on the equality aspects of diligence, and to conduct market research to elicit views and opinions of service users.

1298. It is intended that the recruitment and training of officers will be reviewed, and outdated rules on localised recruitment and a 20 to 70 year old only age restriction will be removed. The new qualification structure will include mandatory training on equal opportunities and diversity. The professional qualification will be reviewed in line with equality of access, and opportunities taken to build in compulsory continued professional development.

1299. It is intended that all officers will be obliged to provide statistics about their work which will include routine collection of equality monitoring information. Efforts will be made to better engage with younger people and women to attract a broader profession. For example, college based modular qualifications are being investigated as they have the potential to extend training opportunities wider than at present.

1300. It is intended that all officers will be subject to codes and guidance which will routinely cover equal opportunities issues. These codes will include guidance on how to deal appropriately with people from a diverse range of groups and how to deal with equality issues as they arise in their day to day work. All officers will be obliged to join a professional body, itself to be regulated in a way consistent with equality requirements. This will avoid any potential split in the professional body and promote a broader and more democratic body than at present.

1301. It is intended that all officers will be subject to investigation and disciplinary arrangements on allegations of misconduct. These will include conduct issues affecting respect for equality and diversity. There is scope for non-members of the SCEC to sit on such disciplinary hearings, in response to a need to enlist the advice of others with expertise on equality and diversity issues where needed. Similarly, the SCEC will be able to establish sub-committees of broad interests to consider issues including equality.

1302. The Executive has amended its proposals considerably since the end of formal consultation, and some of these changes directly address equality concerns—

- Where an investigator is appointed to consider a conduct issue, there is provision for payment except in the case of a full time civil service, a change to ‘employed by the civil service’ that recognises those in other working arrangements,
- Recruitment to the SCEC will now be by both statutory nomination and open competition following current public appointments best practice,
- The weighting in favour of judicial interest has been reduced to support a broader balance of interests,
- The Chair will no longer automatically be a Court of Session judge, so that the Commissioners can appoint a Chair from amongst themselves,
- The 5 year experience requirement for solicitors has been removed to address potential gender and age discrimination, and
- The appointment period for Commissioners has been extended to up to 5 years to enable a broader membership.

Diligence and equal opportunities

1303. Little is known about the equality impact of diligence itself. There is however a broader body of research which describes the profile of those who get into debt, although these individuals are not necessarily subject to enforcement. Indeed, a distinction should be made between the 'could pay' and 'can't pay' who should be supported through debt relief and debt management, and the 'won't pay' who should be subject to rigorous enforcement.

1304. Evidence from research has suggested that women have increasing financial independence, and that levels of debt are rising amongst this group. Research by Bellany and Rake (2005) and the UK Office of the Deputy Prime Minister (2004) suggests that women are more likely to be economically disadvantaged and in debt than men. This is due to higher levels of part time working, and undertaking unpaid caring work in the home. Women are also more unlikely to own their own financial products than men (except store cards).

1305. Census data suggests that women are becoming home owners in greater numbers, with women constituting 21% of the first time buyers market as compared to 30% of men (HBOS 2002). A study by the Institute of Social and Economic Research shows that marital splits (defined as a transition from a marriage or cohabitation to living apart) are, on average, accompanied by substantial declines in real incomes for wives or female partners whereas the real income for husbands or male partners changes little (Graham and Warren 2001).

1306. Research on the ethnic profile of those in debt is very limited but the Commission for Racial Equality have identified some trends—

- People from ethnic minorities are more at risk of adverse enforcement (including bankruptcy) because of their concentration in self employment, particularly in the retail and catering trades where economic changes tend to have an immediate impact. (Analysis of ethnicity data in 2001 Census, Scottish Executive 2004), and
- The risk of such enforcement is aggravated where ethnic minority communities lack access to advice and assistance, either in a specialised form from enterprise agencies, or in a preventative form through public education or in a helping form, due to poor access to advice agencies. (Minority Ethnic Enterprise in Scotland: A National Scoping Study. Scottish Executive 2005).

It is intended that gaps in knowledge will be addressed through research sponsored by the new Commission.

1307. In addition to the studies cited previously, there is evidence that older people are increasingly liable to debt problems. A joint study by the Consumer Credit Counselling Service and Age Concern (2004) shows that those in their 50's owe more than younger people, and on average significantly more relative to their income. Older people are thought to feel more guilt about debt, and to be less likely to take early advantage of debt management options.

1308. In considering the impact of diligence reform the Executive intention is that the enforcement system is fair and open for all. The reforms will therefore strike a better balance between the legitimate interests of creditors and the reasonable needs of vulnerable debtors for protection. The Executive has built on earlier legislation, on the experience of developing DAS

with stakeholder partners in the money advice and general advice sectors, to ensure that the reforms help to ‘Close the Opportunity Gap’.

1309. The Executive has therefore in developing policy for the Bill introduced a number of measures that will improve information and advice open to debtors during the enforcement process. In particular–

- Wider distribution by law of the Debt Advice and Information Pack,
- making the DAIP available in different languages and formats, and
- Extending Time to Pay Orders to give the ‘could pays’ time to make good on realistic payment proposals, and introducing charge to pay on summary warrant to enable debtors to use a final chance to resolve problems before recovery.

1310. Further, some of the diligence reforms will address equality issues in order to avoid an otherwise harsh impact on family life–

- Introducing a protected minimum balance in a bank arrestment, in part to protect lower income groups with benefits paid direct into accounts, and
- Money attachment will exclude the family home.

1311. The intended new diligence of land attachment has raised concerns about increased homelessness due to forced sales. In order to address those concerns the Executive has developed its policy in order to protect family life better. It is now intended that notice of a sale application will go to a wider range of parties, including spouses, cohabitees, civil and same sex partners and tenants. The courts will consider the availability of alternative accommodation, providing greater protection to families and other third parties.

1312. The new Commission will have broad powers to gather the data on diligence and undertake the research that will inform future policy development. This will be the first stage in addressing any unintentional and unwanted policy impacts on diversity.

1313. The SCEC also has a clear role in the provision of information to the public on the officer profession and enforcement issues in general. This will mean that specific gaps in knowledge amongst certain groups or communities will be able to be addressed, and tailored information and publicity campaigns developed as needed.

1314. The Scottish Court Service (“SCS”), an agency of the Executive, has an important role to play in delivering diligence reform and in helping to addressing access to justice issues. SCS is committed to respecting diversity, and staff there attend compulsory training in diversity and equality. They are due to review their Race Equality Scheme in the near future, and will consider access to justice issues raised by the intended diligence reforms in that context.

1315. SCS has longer term plans to deliver other statutory schemes addressing matters of disability and gender. The new Commission will look to work in partnership with the SCS to collect the information and conduct the analysis that will help inform delivery of those plans.

1316. SCS is addressing access to justice issues arising from the need to respect diversity through the work that has been done to support ethnic minority people who use, or are brought to, the courts. The ‘language line’ service, for example, offers an in-court translation service and translations of court documents on request. SCS ensure, for example, that people of different faiths have their beliefs respected when called to give evidence on oath or affirmation.

1317. All these facilities and services will be available to help people who need assistance in making or defending court applications under the Bill. The system is under continuous review, and the Executive is determined to ensure that diversity is respected in all public services including the Commission and the courts.

1318. Many issues affecting diversity do not reach the courts, or any Government agency. Anecdotal evidence from sheriff officers suggests that when (say) a charge to pay is served some debtors do not appear to understand the effect of service due to language barriers or visual impairment. They must rely on family or neighbours to provide support and, hopefully, access to translation services and advice as needed.

1319. The Executive recognises that this issue must be addressed during implementation of the intended diligence reforms. The Executive will work, directly or through the SCS and other agencies, as needed–

- To signpost in different languages in the DAIP the availability of translation services,
- To provide in the DAIP a simple explanation of each diligence, and to extend information about advice to cover the availability of services that support diversity,
- To produce a simple explanatory leaflet on enforcement issues, signposted in different languages and formats, to be served along with any appropriate court papers, and
- To ensure where needed that people can apply to the court to extend the period of the notice prior to enforcement being competent, to allow time for any translation services.

Human rights

1320. The enshrining of European human rights within UK law in the Human Rights Act 1998, and their introduction as an integral part of the Scottish civil justice system in the Scotland Act 1998, make human rights compatibility a central issue for the Scottish enforcement system. In that broad sense, enforcement includes bankruptcy and diligence.

1321. The requirements of the European Convention on Human Rights (“ECHR”) as developed by the European Court of Human Rights focuses not only on the rights of the debtor, but also on the rights of the person who needs to use enforcement action. For example, the Court regards the ability to enforce court decisions, in particular within a reasonable time, as a key part of the right to a fair trial in article 6 of the ECHR¹⁵⁰.

Bankruptcy

1322. The main aspect of the ECHR which could be engaged by the bankruptcy and protected trust deed provisions is Article 1 Protocol 1 (“A1P1”), which establishes the right to peaceful

¹⁵⁰ *Hornsby v Greece*, (1997) 24 European Human Rights Reports 250

enjoyment of possessions and the general right not to be deprived of possessions except in the public interest.

ECHR Article 1 Protocol 1

1323. Regimes for personal insolvency exist in all Convention states, and such regimes are ECHR compatible provided that creditors are treated fairly. Insolvency triggers all sorts of problems, and States are given a wide margin of appreciation which allows the different regimes to be tailored to meet the particular public interest in (say) giving employees preferences over other creditors.

1324. Provided these measures are proportionate and designed to meet social and economic needs, they are within competence. There are few cases on this topic because the public interest in orderly insolvencies is so well recognised. However, important cases reported this year the European Court of Human Rights¹⁵¹ considered A1P1 issues. In those cases Finnish and Italian creditors complained that the writing off of debt in procedures similar to a trust deed and sequestration respectively infringed their A1P1 rights.

1325. In that case the UK government made representations to the Court. It argued that even if A1P1 were to be engaged, any interference with the rights of creditors was justified as an insolvency involves the cancellation of debts in whole or in part. Debtors can be insolvent for reasons which are not of their own making, and bankruptcy and other insolvency regimes are aimed mainly at the financial and social rehabilitation of debtors.

1326. The absence of such a regime could have adverse social consequences as the very existence of debts might prevent an individual from carrying on certain activities. If debtors who had failed in business could not be discharged from their debts, this could act as a deterrent to entrepreneurship and responsible risk-taking.

1327. Creditors such as the applicant in the Finnish case can be presumed to be acting in the knowledge of insolvency law and its consequences. In any event, they could protect their position by:

- not dealing with a particular debtor,
- by inquiring into the debtor's financial position,
- by asking for a security; by taking out an insurance policy, or
- by obtaining a guarantee from a third party¹⁵².

1328. The Court agreed that A1P1 rights had not been infringed, and that giving debt relief did not infringe A1P1 rights as the measure in question (the trust deed equivalent) was indeed designed to meet social and economic needs and proportionate as respects the creditor rights.

¹⁵¹ *Back v Finland*, (2005) 48 EHRR 1187, and *Luordo v. Italy*, (2005) 41 EHRR 26

¹⁵² In Scotland this is known as finding caution (pronounced kay-shun).

Floating charges

1329. The Bill provisions which reform the law of floating charges do not impact on any aspects of the ECHR, and the Executive is therefore satisfied that those provisions are compatible with ECHR rights.

Enforcement

1330. The Bill provisions which create the Scottish Civil Enforcement Commission and reform the existing court officer professions will impact on aspects of ECHR. The Executive is, however, satisfied that those provisions are compatible with ECHR rights.

ECHR Article 1 Protocol 1

1331. The Bill provisions which may require a court messenger to pay an annual fee, and those dealing with court officer regulation which could enable the right of practice as a court messenger to be restricted, engage A1P1. The Executive considers that those provisions are enacted to further the legitimate aim of better regulation of the practices of court officers. The provisions are proportionate measures to achieve this aim.

Article 6

1332. Article 6 guarantees practical and effective access for the determination of civil rights (and criminal liability) to an independent and impartial court or tribunal established by law which is able to determine the necessary aspects of the dispute and thereafter to give a binding judgement.

1333. Article 6 is engaged by certain of the Bill provisions which relate to the rights of court officers to carry on their business. Given the existence of appropriate appeal mechanisms which form part of the court officer regulation process, the requirements of Article 6 are met by the Bill's provisions.

Diligence

1334. Certain of the Bill provisions which reform the law on diligence will impact on aspects of the ECHR. The Executive is satisfied that those provisions are compatible with ECHR rights of the affected persons.

ECHR Article 1 Protocol 1

1335. The main aspect of the ECHR which could be engaged by the diligence provisions is again A1P1 which establishes the right to peaceful enjoyment of possessions and the general right not to be deprived of possessions except in the public interest.

1336. The Bill's provisions which reform the existing law on diligence and create new diligences are concerned with mechanisms for enforcing payment. The Bill relates to the property rights of debtors with whose property there may be interference by operation of diligence. In dealing with debts at the stage when it has been established they are due (for

example by order of the court), the Bill also has an effect on the property rights of creditors because the right to recover a debt is a “possession” within the meaning of A1P1.

1337. In so far as they relate to debtors’ property and creditors’ rights, therefore, all of the diligence aspects of the Bill engage A1P1. Thus, the provisions relating to land attachment, residual attachment, inhibitions, earnings arrestment, arrestment, money attachment and all diligences on the dependence, including admiralty arrestments are relevant in the context of A1P1.

1338. The Executive consider that all of these provisions are being made in relation to the legitimate aim of reforming the law on diligence to modernise the current range of enforcement methods. The provisions create a fairer and more proportionate balance between debtor and creditor interests.

1339. In particular, the Bill makes provision which will provide debtor safeguards to ensure that the enforcement procedures which are being reformed and those new ones being provided for do not have disproportionate consequences for the debtor.

1340. The balance between creditor and debtor interests is well illustrated by provisions relating to arrestment. For example, where an application is made by a creditor for warrant to arrest a debtor’s bank account on the dependence of a court action for payment, the court will be given the power to limit the amount attached by the arrestment on the dependence to ensure that an excessive amount is no longer attached. Provision is also being made to ensure that a minimum balance is left in a debtor’s bank account upon which an arrestment has been effected so as to avoid a debtor facing hardship.

1341. At the same time, it is not disproportionately difficult for a creditor to enforce payment. In the context of arrestment, the Bill provides for a new automatic release procedure which will facilitate creditor recovery of funds attached by arrestment, although debtor protections are again built into this procedure by providing a court based objection procedure available to the debtor in respect of the automatic release.

1342. One of the main areas in which A1P1 is engaged is by the new diligence of land attachment which is being created to replace the old and ineffective diligence of adjudication. That will enable creditors who effect diligence in execution to obtain a security for debts over land, including buildings and then to be entitled to sell it or foreclose on it to realise the security. It is envisaged that land attachment will mostly be used for the purpose of obtaining a security and that realisation of the security will be rare. Creation of this new diligence is undoubtedly an interference with a debtor’s property in terms of A1P1. It is, however, considered by the Executive as a justifiable and proportionate means for creditors to facilitate the recovery of debt.

1343. Proportionality is integral to land attachment policy and is ensured by the inclusion of robust debtor protections such as giving the courts the power to suspend the effect of a warrant for sale of land for up to 1 year or to refuse to grant a warrant for sale of land, where it is necessary to avoid undue hardship.

1344. In addition to the “undue hardship test”, particular protections are provided for in the case of domestic property. These include giving tenants or other persons living with a homeowner the right to raise objections to a sale and automatic notifications to local authorities that a person may become homeless.

ECHR Article 6

1345. The provisions in the Bill which reform summary warrant procedure do not engage Article 6. This is confirmed by recent case law¹⁵³ from the European Court of Human Rights –, in which it was held that tax disputes fall outside the scope of civil rights and obligations which are protected by Article 6. Such disputes are about public rights and obligations and subject to different considerations, as discussed above for the proposed reforms of summary warrant enforcement.

ECHR Article 8

1346. Certain of the Bill provisions may on the face of it appear to engage Article 8 of ECHR which protects the right to respect for private and family life. In particular, when executing a land attachment warrant may authorise entry into dwelling houses where necessary to enable sale.

1347. Respect for home within the meaning of Article 8 does not, however, include questions relating to rights and obligations arising from matters which more properly fall to be considered under A1P1. As stated above, the existence of debtor protections will operate to ensure the system is proportionate. Thus, the need to enter into a dwelling house will be rare and will only occur when the court is satisfied that it will not cause undue hardship.

1348. Other provisions in the Bill relating to disclosure of information may engage Article 8, however, the Executive is satisfied that any such engagement is wholly compatible with the requirements of that Article.

Island communities

1349. People in island communities, and indeed many rural areas, can find it harder to access necessary services. This Bill provides for the centralisation of some functions and the Scottish Executive has therefore considered the potential impact of such changes on outlying areas.

Bankruptcy

1350. The Bill provides that debtor applications will be dealt with administratively by the Accountant in Bankruptcy. In effect, this means that they will be processed in their planned new office in Kilwinning. Debtors will therefore no longer be able to apply to their local sheriff court.

1351. Applications will not be made in person, but there will still be cases where it is necessary for the trustee in sequestration to interview the debtor. In most cases the trustee will be the AiB,

¹⁵³ *Ferrazzini v. Italy*, (2001) EHRR 1068.

and it would be an unnecessary barrier to using sequestration to insist that people from (say) Lewis attend an office in Ayrshire.

1352. In order to overcome that barrier to access for Island communities the AiB can appoint a local insolvency practitioner to act as agent. It will be also be possible to use a telephone interview to gather the required information. The existing AiB enquiries helpline will be expanded to deal with the calls generated by debtor applications, and the AiB website will be developed to provide access to a wider range of on-line documents and guidance.

Enforcement

1353. The Bill provides that the existing profession of sheriff officer is replaced by the new profession of court messenger. Sheriff officers hold a commission for a particular sheriffdom, and there are 21 officers authorised to execute diligence in the Sheriffdom of Grampian, Highlands and the Islands. Of those officers, 9 are understood to have a place of business in a sheriff court district covering island communities¹⁵⁴.

1354. Court messengers will be authorised to execute diligence across Scotland, in the same way as messengers-at-arms do now for Court of Session decrees. This will give people in island communities' access to a wider pool of qualified citation and enforcement professionals.

1355. Better access is a good thing, but there is sometimes a need to act quickly to preserve or seize property. People in remote communities may not be able to get to a qualified professional quickly enough. With that in mind, this Bill modernises the Execution of Diligences (Scotland) Act 1926, which provides special rules for diligence in the islands of Scotland and for any area with no resident court officer.

1356. It is proposed, subject to continuing discussions with the existing court officer professions, that there will be more flexible means of study for people wishing to qualify as court messengers. People in island communities may therefore be able to study using distance learning packages.

Diligence and floating charges

1357. The intended diligence and floating charge reforms modernise the legal framework for court enforcement and corporate securities respectively. They will have no distinctive impact on island communities.

Local government

1358. The reforms in this Bill will not have a distinctive impact on local government. They will affect local government in the same kind of way as they do any other creditor, debtor or lender.

1359. Having said that, the reforms will have a quantitatively greater impact on local government to the extent that the sector is significant user of bankruptcy and of enforcement

¹⁵⁴ The sheriff court districts of Fort William, Kirkwall, Lerwick, Lochmaddy, Oban, Portree and Stornoway.

measures. Modernising the law in those two areas will therefore be of clear benefit to local authorities.

1360. Further, the reforms in Part 12 (Summary warrants, time to pay and charges to pay) will have a distinctive impact on public creditors. The planned extension of time to pay to public debt and charge to pay to summary warrant enforcement will impact on local government as part of the public sector. The Executive considers that the impact will be modest and proportionate.

1361. Time to pay decrees and time to pay orders are the two diligence stoppers for single debts introduced in the 1987 Act. The court must be satisfied that the debt will be paid in a reasonable time, which in most cases means about 12 months. The Executive considers that a reasonable local government creditor would already accept payment over that kind of period if offered in good faith. The Executive notes that longer payment periods are already lawful for multiple debts under the Debt Arrangement Scheme.

1362. A charge to pay is the established 'final warning' before enforcement. It looks serious, and it is. On the other hand, the Executive considers that debtors do not always understand the importance of a summary warrant. Practice varies widely across the public sector, and information in administrative notices given to debtors is of mixed quality. Charge to pay will help change that, and should lead to earlier payment offers and administrative savings by cutting down on informal notices. Lastly, the cost of the charge will be recoverable from the debtor through the diligence.

Sustainable development

1363. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The fundamental aim of sustainable development is therefore to secure our quality of life in the future. If we are to meet the challenges of satisfying our needs and promoting prosperity then we must be more efficient in using resources.

1364. Achieving a sustainable Scotland is a major challenge, so practical action can be directed to best effect by setting out priority areas and measurable targets. In April 2002 the Scottish Executive published '*Meeting the Needs: Priorities, Actions and Targets for Sustainable Development in Scotland*'. A copy of the paper and is available on the Scottish Executive website at <http://www.scotland.gov.uk/library5/rural/mtnsd-00.asp>.

1365. 'Meeting the Needs' lists the 24 indicators that the Scottish Executive has adopted to enable us to measure progress towards sustainability. It sets out our vision for a sustainable Scotland and identifies resource use, energy and travel as the three key priorities.

1366. Our most valuable resource is the people of Scotland, and social justice is therefore central to the view the Scottish Executive has of sustainable development. Policy must promote a just society that encourages social inclusion, sustainable communities and personal well-being. This Bill supports sustainable development in three ways.

Work: people as a resource

1367. A high employment rate is a key sustainable development objective. Employment enables people to meet their own needs and by contributing to the economy they benefit the whole of society. This second indicator in 'Meeting the Needs' is measured against the percentage of unemployed working age people in Scotland.

1368. The Scottish Executive recognises the need to support risk-taking as a means of growing the economy. The provisions of this Bill promote the kind of entrepreneurial culture that will lead to a strongly growing business sector, and that in turn will reduce unemployment by making it easier for people to work for themselves or take up new employment opportunities.

1369. The intention is that creation and registration of floating charges can in due course be effected electronically. It is anticipated that the register will be held in electronic form and that information from the register will be available in electronic formats.

Home life

1370. Getting the best from our most valuable resource means giving every child the best possible start in life. This eighteenth indicator in 'Meeting the Needs' is measured against the percentage of children living in workless households, and the provisions in this Bill promote stronger home life by encouraging the business activity that will lead to higher employment.

Health

1371. Sustainable development means working towards a Scotland in which everyone lives in good health or has access to help if that is not the case. This twenty-fourth indicator in 'Meeting the Needs' is measured against life expectancy at birth.

1372. Living with unmanageable debt is very stressful, and high levels of stress lead directly to depression and other serious health problems. This Bill promotes sustainable development by reducing the stress that leads to the medical problems that affect all health measures including life expectancy.

1373. This Bill reduces the stress of debt for the could pays by making it easier for the could pays to get protection from their creditors so that they can repay their debts in a managed way. It reduces stress for can't pays by promoting humane access to methods of clearing their debts, and giving them a chance to start again after insolvency.

Impact on business, charities and voluntary bodies

1374. Insolvency, failure or inability to pay debts, and the means of financing and securing debt, have a major effect on business, and some effect on the charitable and voluntary sectors. Changes to bankruptcy, diligence and floating charges have therefore a significant impact on economic activity in general. In that broad sense the reforms in this Bill will impact for the better on businesses, charities and voluntary bodies.

1375. The impact of the reforms on individual businesses, charities and voluntary bodies is a different matter. This Bill changes the framework through which other important economic and social activity takes place. With few and limited exceptions this Bill does not impose any unavoidable burdens on businesses or other bodies, and where it does the burden is either modest, or expected to be proportionate in relation to the intended benefit.

1376. As a general point, it is important to be clear that the decision on when and how to use bankruptcy, diligence or the security of a floating charge is left to the individual, business or other body concerned. There is in general no compulsion in these reforms. The changes in this Bill increase choice, for example by introducing the new diligence of land attachment, but the individual business remains free to choose.

Bankruptcy

1377. Bankruptcy does not create insolvency. For businesses, the bankruptcy of customers is an effect or consequence of insolvency. Indeed, the reforms in this Bill are largely intended to encourage personal and business re-start, and improve business prospects for all. What matters to the individual business or body is how much of debt is written off in bankruptcy, and how much paid.

1378. In particular, this Bill doesn't change the core principal that in sequestration and PTD all the assets of a debtor go to the trustee in sequestration and are divided amongst the creditors. The introduction of a one year discharge for debtors will, for example, have no effect on the amount paid to the creditors in the bankruptcy.

1379. Bankruptcy reform has a general effect on (say) the business sector, rather than on identifiable categories in that sector. No new burden falls on individual creditors, but rather bankruptcy remains an option available to a business that can if it chooses ask the court to bankrupt a customer. Where the reforms impose duties on individuals they do so on the trustee in sequestration or the Account in Bankruptcy, who act for a body of creditors or in the public interest respectively.

1380. Reforms in the Bankruptcy Part do of course benefit debtors, but they don't do so at the expense of individual creditors. The planned restriction on dealing with a debtor's home, for example, still leaves an ample 3 years in which to take any necessary action. The planned discharge after one year of the right to payment from a possible future inheritance will have some impact at some point, but the overall effect for creditors will be very minor.

1381. Many of the reforms in the Bankruptcy Part are technical or administrative in nature. The new office of trustee in sequestration, for example, is intended to streamline the existing roles of the interim and permanent trustees. Some reforms look on the face of it as if they will have a direct impact on business and other bodies. They are worth a closer examination.

Duration of sequestration

1382. The reduction of the sequestration period from three years to one year will have no impact on existing creditors. All of the debtor's estate will still go to the trustee in sequestration

as above, and the trustee is not discharged from the duty to realise and divide the estate until that job is complete even it takes more than one year. The trustee will still be able to ask the court to defer the debtor's discharge in those rare cases when that is needed to protect the creditor's interests.

1383. For future creditors, the fact of the bankruptcy will be on the public record as before. The reduction in the discharge period will not affect the debtors' credit rating.

Bankruptcy restrictions orders and undertakings

1384. The new bankruptcy restriction regime has no direct impact on business on any particular business. They will rather benefit business in general by delivering better protection for the public from bad business practices, or reckless use of credit.

1385. This reform does not impose any new duties on business or other bodies. Bankruptcy restriction undertakings are if appropriate agreed between the debtor and the trustee in sequestration, and bankruptcy restriction orders are granted by the court on the application of the Accountant in Bankruptcy. The only involvement by creditors would when they chose to provide information or information to the trustee or Accountant.

Debtor applications

1386. Taking debtor applications out of the courts and dealing with them administratively will reduce business costs by restricting the need for court involvement where businesses choose to challenge a customer's bankruptcy.

Income payment orders

1387. This reform will benefit business in general by making it easier for the trustee in sequestration to require debtors who can afford it to make a contribution from income. An income payment order can last for up to 3 years, which is the same as the present sequestration period, so there is no reduction in the potential benefit for business creditors.

Composition

1388. This reform will again benefit creditors in general. In 2005 the average dividend paid to creditors in sequestrations was 18.4 pence in the pound, and at no time in the last 5 years has that dividend been more than 25 pence. Reform of composition will make it easier for debtors to end their sequestration, but they must still guarantee to pay the debtors at least 25 pence in the pound, and so business creditors can expect a better than average return.

Debt Advice and Information Package

1389. The 2002 Act requires creditors seeking to attach moveable property of a debtor to provide that debtor with a copy of a debt advice and information package in the form determined by Scottish Ministers.

1390. This Bill extends the use of the debt advice and information package. It is intended that creditors seeking to sequester a debtor must first provide that debtor with a copy of that

package. The cost of doing so is not recoverable, so that reform imposes additional costs on those businesses that chose to bankrupt a debtor.

1391. The additional costs are very minor. The package is printed and distributed by the Scottish Executive, and freely available to any creditor or agent who needs one. There is no requirement for it to be formally served, and creditors can therefore choose from a number of options including personal delivery at (say) a meeting, ordinary post, or sheriff officer if that is convenient. Many firms of sheriff officers and messengers-at-arms hold stocks of the package for just that purpose.

Debtor's property: homes and inheritances

1392. The reforms that put new time limits on creditors claims against family homes and inheritances are dealt with in the discussion above. They will have no impact on business creditors where the trustee in sequestration deals properly with any value in the family home, and a minor impact in respect of the value of inheritances after the discharge as such claims are in practice rare.

Protected Trust Deeds

1393. This Bill provides for wider enabling powers that will in due course enable the intended reform of PTD by subordinate legislation. That reform is an exception to the general statement that Scottish Executive's programme for the reform of bankruptcy will have a macro level impact on business and other sectors, but not a small or micro level effect on individual business interests.

1394. The Bill does not itself affect the reform of PTD. Choice will also remain a key factor. The Scottish Executive proposes to strike a new balance on PTD, and when that happens then the change will affect the choices that debtors and creditors make. There are a small number of insolvency practitioner businesses that could be said to rely on PTD work for success. Those businesses could feel the impact of the proposed new balance.

Impact of Bankruptcy Part

1395. For the reasons set out above, the Scottish Executive is of the view that a regulatory impact assessment is not needed to support the reforms in the Bankruptcy Part of this Bill. However, reform of PTD is in a small way a special case. It is therefore our intention to prepare a Regulatory Impact Assessment to support that proposed reform.

Floating charges

1396. The Financial Memorandum provides an estimate of the costs associated with the creation of the intended new register of floating charges. These changes to floating charges represent improvements to a broad regime already being operated by businesses and lenders across the UK. The Scottish Executive has therefore worked closely with the Department for Trade and Industry to consider the impact on business and other affected bodies.

Impact of Floating Charges Part

1397. The DTI has published a Regulatory Impact Assessment ‘The *Registration of Companies’ Security Interests (Company Charges)*’ on 19 July 2005. This Assessment was of all the proposals for registering companies’ security interests that has been separately proposed by the Scottish Law Commission and the Law Commission. The Scottish Law Commission’s proposals cover both devolved and reserved issues. The recommendations of the two Commissions reflect the differences in the two legal systems.

1398. The recommendations are not therefore the same for each jurisdiction, but they can’t be considered in isolation as many companies have assets in both jurisdictions.

1399. The Scottish Executive was therefore involved in the preparation of the Regulatory Impact Assessment that covered Great Britain, and did not prepare a separate Scottish assessment. Executive officials were present at meetings held with the Committee of Scottish Clearing Banks and the Law Society of Scotland to discuss the DTI assessment. The Scottish responses which have been received have all been supportive of the Scottish Law Commission’s proposals relating to floating charge reform.

Enforcement

1400. The Enforcement Part of this Bill is intended to make or facilitate two changes, one with no impact on business and other sectors, and another which may impact strongly on a particular small sector.

Scottish Civil Enforcement Commission

1401. It is intended that this Bill will create a Scottish Civil Enforcement Commission, and that the Commission will be a non-departmental public body. The Financial Memorandum, which is published separately, provides details of the costs associated with that body. That reform will have no impact on business and other sectors.

Creation of Messenger of Court

1402. It is also intended that the Enforcement Part will abolish the existing court officer professions of sheriff officer and messenger-at-arms, and replace them with the new profession of court messenger.

1403. The existing professions are regulated by the 1987 Act, which is supplemented to a limited extent by common law powers of the courts. The creation of the new profession and the associated changes in the Bill represent improvements to existing arrangements, and not a new type of regulation. They will mainly affect some 160 individual practitioners, and do not in themselves have a significant impact on business. They have no impact on charities or voluntary bodies.

1404. There are, however, two ways in which changes in subordinate legislation enabled by this Bill may impact on existing on the business interests of members of the existing professions.

1405. Businesses run by or employing members of the existing professions will need to manage the change from the present regulatory structure to the intended one. This is expected to be a significant managerial challenge, raising issues that will be addressed in part by transitional arrangements made at commencement.

1406. Scottish Ministers may provide for types and structures of business association set up by members of the new profession to carry out official functions. Those powers might be used (for example) to require that court messengers form business partnerships only with other messengers, or to specify the arrangements that must be in place for handling client money. Such changes would require individual businesses to re-organise

1407. The exact nature of those transitional and business arrangements will be resolved in the government/professional working groups set up to support and inform the change process.

Impact of Enforcement Part

1408. For the reasons set out above, the Scottish Executive is of the view that a regulatory impact assessment is not needed to support the reforms in the Enforcement Part of this Bill. However, like reform of PTD, transitional arrangements needed for the change to the new structure and regulation of business arrangements are a special case. It is therefore our intention to prepare a Regulatory Impact Assessment to support those proposed measures.

Diligence

1409. The provisions in this Bill strike a new and better balance between the debtor and creditor interest in civil enforcement. In doing so there are gains and losses from the different perspectives. Commercial firms for example are creditors when business prospers and debtors when it doesn't. What businesses lose as creditors they gain as debtors, and vice versa.

New and reformed diligences

1410. A core principle of diligence is that the debtor must pay reasonable enforcement costs. That principle will apply to the new diligences created by this Bill. It follows that no new burden is imposed on business and other bodies. If they judge that the debtor is good for the money then, they have the same freedom of choice in respect of the new diligences as they do for existing ones.

Information disclosure orders

1411. The intended information disclosure order scheme is not a diligence. The Financial Memorandum provides an estimate of the costs associated with that scheme. The proposed application fee will be an additional cost for business and other bodies that use the scheme. The Scottish Executive intends to extend the 'debtor pays' principle, and the application fee will be recoverable.

Debt advice and information package

1412. It is therefore fair to say that this Bill has an overall neutral impact on business, charities and voluntary bodies. The Bill will, however, impose modest compliance costs in 3 areas. Business and other bodies using diligence, employers and the banking sector.

1413. This Bill extends the use of the debt advice and information package to the new diligences. To that extent it imposes additional costs on businesses and other bodies, but they are minor as discussed above.

Diligence against earnings

1414. The intended reform of diligence against earnings will require employers in the business and other sectors to change the way they calculate deductions from income. This change is however an adjustment to an existing system, that on the whole operates smoothly. Many employers use software to calculate deductions, and the necessary adjustment could be made with minimum inconvenience as part of a regular programme update.

Arrestment in execution

1415. The intended reform of arrestment in execution will impose new duties on banks and other organisations that offer customer accounts, including some not-for-profit organisations like credit unions. They will need to provide information about arrested funds, and in some cases operate the intended 'automatic release' procedure. The costs of this cannot be recovered from the creditor. They may be recovered from the debtor if the particular contract provides for that, but otherwise can only be passed on to customers more generally.

1416. These costs, so far as falling on the bottom line, will have a similar effect to the changes to diligence against earnings. Banks, for example, already provide some information informally. The Bill extends that practice and will not impose significant additional costs.

1417. The new release procedure is automated, so software can be written or developed to handle payments. There will be a one off cost associated with that, but the work may well be rolled up into regular programme update. Against that, the new procedure will save on the costs of handling paper mandates authorising release. That saving is a long term benefit for affected bodies.

Impact of diligence part

1418. For the reasons set out above, the Scottish Executive is of the view that a regulatory impact assessment is not needed to support the reforms in the Diligence Part of this Bill.

Conclusion

1419. A regulatory impact assessment has not been prepared to support this Bill. The Scottish Executive does however intend to develop separate regulatory impact assessments for the subordinate legislation that will support the intended reforms of the existing court officer professions and of protected trust deeds.

ANNEX A

List of definitions and terms

Act of 1617	The Arrestments Act 1617 (APS c.17).
1838 Act	The Debtors (Scotland) Act 1838 (c.114)
1956 Act	The Administration of Justice Act 1956 (c.46)
1985 Bankruptcy Act	The Bankruptcy (Scotland) Act 1985 (c.66).
1985 Companies Act	The Companies Act 1985.
1986 Act	The Insolvency Act 1986 (c.46).
1987 Act	The Debtors (Scotland) Act 1987 (c.18).
1993 Act	The Bankruptcy (Scotland) Act 1993 (c.6).
2002 Act	The Debt Arrangement and Attachment (Scotland) Act 2002.
1952 Convention	<i>International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships</i> signed at Brussels on 10 May 1952, and ratified by the UK.
1999 Convention	The 1999 Geneva ship arrest Convention, not ratified by the UK.
1989 Discussion Paper	Scottish Law Commission <i>Discussion Paper on Diligence on the Dependence and Admiralty Arrestments</i> (SLC DP 84)
1985 Report	Scottish Law Commission <i>Report on diligence and debtor protection</i> (SLC No.95).
1992 Report	Scottish Law Commission ‘ <i>Report on Statutory Fees for Arrestees</i> ’ (SLC No.183).
1998 Report	Scottish Law Commission <i>Report on Diligence on the Dependence and Admiralty Arrestments</i> (SLC No.164).
2000 Report	Scottish Law Commission <i>Report on Pounding and Warrant Sale</i> (SLC No.177).
2001 Report	Scottish Law Commission <i>Report on Diligence</i> (SLC No.183).
A1P1	Article 1 of Protocol 1 to the European Convention of Human Rights sets out the right to peaceful enjoyment of possessions.
Adjudication	An old diligence against land and buildings, and property not caught by any other diligence, abolished by this Act.
Attachment	Diligence against corporeal moveable property, such as paintings or motor vehicles, when held by a debtor. Sometimes referred to as ‘ordinary’ attachment.
Admiralty arrestment	Diligence in admiralty action attaching property of the debtor, or an obligation on a third party to account to a debtor for property, where a separate action of furthcoming is not needed to authorise sale

Arrestment in execution	Diligence attaching an obligation on a third party to account to a debtor for property, such as funds in a bank account or corporeal moveable property held by that third party. The sale or realisation is obtained through a separate action of furthcoming, or by the intended automatic release procedure
Admiralty arrestment on the dependence	An admiralty arrestment used in the course of an unfinished court action. Creditors can attach property or an obligation but do nothing else until, and if, they get decree for payment
Arrestment on the dependence	An arrestment used in the course of an unfinished court action. Creditors can attach an obligation but do nothing else until, and if, they get decree for payment
AiB	The Accountant in Bankruptcy, an officer created by section 1 of the 1985 Act, whose holder is responsible to Scottish Ministers
Bankruptcy consultation	<i>'Personal Bankruptcy Reform in Scotland: a modern approach'</i> published by the Scottish Executive on 19 November 2003.
Bill consultation	<i>'Modernising Bankruptcy and Diligence in Scotland: draft Bill and Consultation'</i> , published by the Scottish Executive on 2 July 2004.
BRU	Bankruptcy restrictions undertaking
BRO	Bankruptcy restrictions order
COSA	A certificate of summary administration, introduced for sequestrations by the 1993 Act and abolished by the Bill.
Corporeal moveable property	Goods in the 'real' world that do or can move, such as furniture, vehicles, machine tools.
Court messenger	The new citation and diligence officer profession, replacing sheriff officers and messengers-at-arms
DAIP	The Debt Advice and Information Package, provided for debtors by creditors who intend to take enforcement action.
DAS	Debt Arrangement Scheme, the third diligence stopper.
DAS Regulations	The Debt Arrangement Scheme (Scotland) Regulations S.S.I. 2004/468, as amended by S.S.I. 2004/470.
DCA	The Department of Constitutional Affairs, part of the UK Government.
DWP	The Department of Work and Pensions, part of the UK Government.

DPP	A debt payment programme approved under the Debt Arrangement Scheme.
DTI	The Department of Trade and Industry, part of the UK Government. The UK Insolvency Service is a DTI agency.
Debt Relief Group	Short term working group on debtor access to debt relief, that reported to the Deputy First Minister in June 2005.
Document of debt	A document of debt is anything enforceable as if it were a decree of the Court of Session or the sheriff court. For example, a separation agreement registered for execution in the Books of Council and Session.
Diligence stopper	A diligence stopper gives a debtor extra time to pay, and to do so stops creditors from sequestrating or using diligence. There are three diligence stoppers, and they are <ul style="list-style-type: none">• Time to pay decree,• Time to pay order, and• Debt Arrangement Scheme.
ECHR ECOS consultation	European Convention on Human Rights <i>'Enforcing Civil Obligations in Scotland'</i> , published by the Scottish Executive on 22 April 2002.
Furthcoming	A court action raised by a creditor for payment from funds arrested. See arrestment in execution above.
HMRC	Her Majesty's Revenue and Customs, part of the UK Government combining the former Departments of the Inland Revenue and HM Customs and Excise.
Heritable property	Land and buildings are the main form of heritable property, so called because of the different succession rules that apply on death. Also called fixed property because it doesn't move.
IPA	Income payment agreement.
IPO	Income payment order.
Incorporeal moveable property	Goods that do not exist in the 'real' world but do or can move, such as intellectual property (copyright etc.) and rights under insurance contracts.
Inhibition	Diligence preventing a debtor selling or securing a loan against any land or property. The remedy is a separate court action to reduce (cancel) an offending deed.
Inhibition on the dependence	An inhibition used in the course of an unfinished court action. Creditors cannot

Karl	reduce a potentially offending deed until, and if, they get decree for payment. <i>Karl Construction Ltd v Palisade Properties Plc</i> 2002 Session Cases 270, a leading case on diligence on the dependence.
LLP	Limited liability partnership.
Maills and duties	An old diligence for recovery of rent, abolished by this Act.
Moveable property	There are two forms of moveable property, corporeal and incorporeal. This way of looking at property arose, as with heritable property, from succession rights.
NINA	No Income No Assets.
PTD	Protected trust deed, a less formal type of bankruptcy.
Partnership Agreement	'A Partnership for a Better Scotland: Partnership Agreement', agreed by the coalition partners in government and dated 14 May 2003.
Property Registers	The two Scottish registers for interests in land. They are the Register of Sasines which registers deeds, and the Land Register for Scotland which registers ownership and is in the process of replacing the Sasine Register.
SCS	Scottish Courts Service, an Executive Agency of the Scottish Executive.
SMASO	The Society of Messengers-at-Arms and Sheriff Officers, the professional body of the existing enforcement and citation officer professions.
S.S.I	Scottish Statutory Instrument.
Sequestration	Bankruptcy.
Sequestration for rent	An old diligence for recovery of rent, abolished by this Act.
TTPD	Time to Pay Decree, the first diligence stopper.
TTPO	Time to Pay Order, the second diligence stopper..
Taylor	<i>Advocate General for Scotland v. Taylor</i> 2003 Scots Law Times 1340, a leading case on diligence on the dependence.

Scottish Law Commission: diligence reform

Reports during 1985 to 2001

Report on Diligence and Debtor Protection, (SLC No 95), (1985), covering–

- Diligences against earnings, and
- Time to pay (diligence stoppers).

Report on Statutory Fees for Arrestees, (SLC No 133), (1992), covering–

- Statutory fees for arrestees, and
- Disclosure of arrested sums.

Report on Diligence on the Dependence and Admiralty Arrestments, (SLC No 164), (1998), covering–

- Reform of diligence on the dependence,
- Interim attachment,
- Admiralty arrestments and actions
- Admiralty arrestment on the dependence and demise charters,
- Ranking of diligence, and
- Private international law issues.

Report on Poinding and Warrant Sale, (SLC No 177), (2000), covering–

- Reform of poinding,
- Summary warrant enforcement, and
- Reform of time to pay (diligence stoppers).

Report on Diligence, (SLC No 183), (2001), covering–

- abolition of adjudication for debt
- land attachment
- residual attachment (was attachment order)
- reform of inhibition, and
- money attachment.

Consultative memoranda and discussion papers during 1980 to 1999

Consultative Memorandum No 49, Third Memorandum on Diligence: Arrestment and Judicial Transfer of Earnings, (SLC CM No 49), (1980).

Consultative Memorandum No 51, Fifth Memorandum on Diligence: Administration of Diligence (SLC CM No 51), (1980).

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Adjudication for Debt and Related Matters, (SLC DP No 78), (1987).

Equalisation of Diligences, (SLC DP No 79), (1987).

Diligence on the Dependence and Admiralty Arrestments, (SLC DP No 84), (1989).

Statutory Fees for Arrestees, (SLC DP No 87), (1989).

Diligence against Land, (SLC DP No 107), (1999).

Attachment Orders and Money Attachment, (SLC DP No 108), (1998).

Poinding and Sale: Effective Enforcement and Debtor Protection, (SLC DP No 110), (1999).

Scottish Law Commission: floating charge reform

Discussion paper

Discussion Paper on Registration of Rights in Security by Companies (SLC DP No 121), 2002

Report

Report on Registration of Rights in Security by Companies (SLC No 197), 2004

Engagement by the Scottish Executive

Meetings held by Scottish Executive officials

Meeting with Department of Work and Pensions, December 2003

Bill Consultation public meeting–

- Aberdeen August 2004
- Dundee August 2004
- Dumfries August 2004
- Edinburgh September 2004
- Glasgow September 2004
- Inverness September 2004

Bill Consultation insolvency practitioners meeting–

- Aberdeen August 2004
- Dundee August 2004
- Edinburgh August 2004
- Glasgow August 2004

Meeting with Lord Lyon October 2004

Meeting with admiralty arrestment consultant November 2004 and May 2005

Shelter/CAS meeting on land attachment January 2005

Meeting with land attachment consultant March 2005

Meeting with Muslim Council, August 2005

Meetings attended by Scottish Executive officials

Committee of Scottish Clearing Bankers–

- August 2003
- November 2004
- March 2005
- May 2005
- August 2005

Department of Constitutional Affairs–

- December 2003
- March 2004

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- May 2004
- September 2004
- December 2004
- February 2005
- August 2005

Cross-Party/Parliamentary Working Group on Tackling Debt in Scotland, January 2004

UK Insolvency Service, London—

- February 2004, and
- March 2005

Insolvency Practices Council, June 2004

Society of Messengers-at-arms and Sheriff Officers—

- October 2004,
- March 2005
- April 2005

Official Receiver's Office, Newcastle, May 2005

Local Taxation Working Group, July 2005

Australian Insolvency Service, Edinburgh, July 2005

Institute of Chartered Accountants of Scotland (“ICAS”), July 2005

Conferences and seminars attended by either Scottish Executive officials or Ministers

Citizens Advice Scotland (“CAS”) annual conference—

- 2002
- 2003
- 2004
- 2005

ICAS Insolvency Practitioners annual conference—

- 2003
- 2004

Money Advice Scotland annual conference—

- 2003
- 2004
- 2005

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Institute of Payroll and Pensions Management annual conference–

- 2004
- 2005

Sheriff's Conference, Edinburgh 2004

CAS Debt Seminar, Edinburgh, March 2004

Edinburgh Insolvency Discussion Group, February 2004

Northern Ireland Money Advice Day (OR Representative), Belfast June 2005

Conferences and seminars organised by the Scottish Executive officials or Ministers

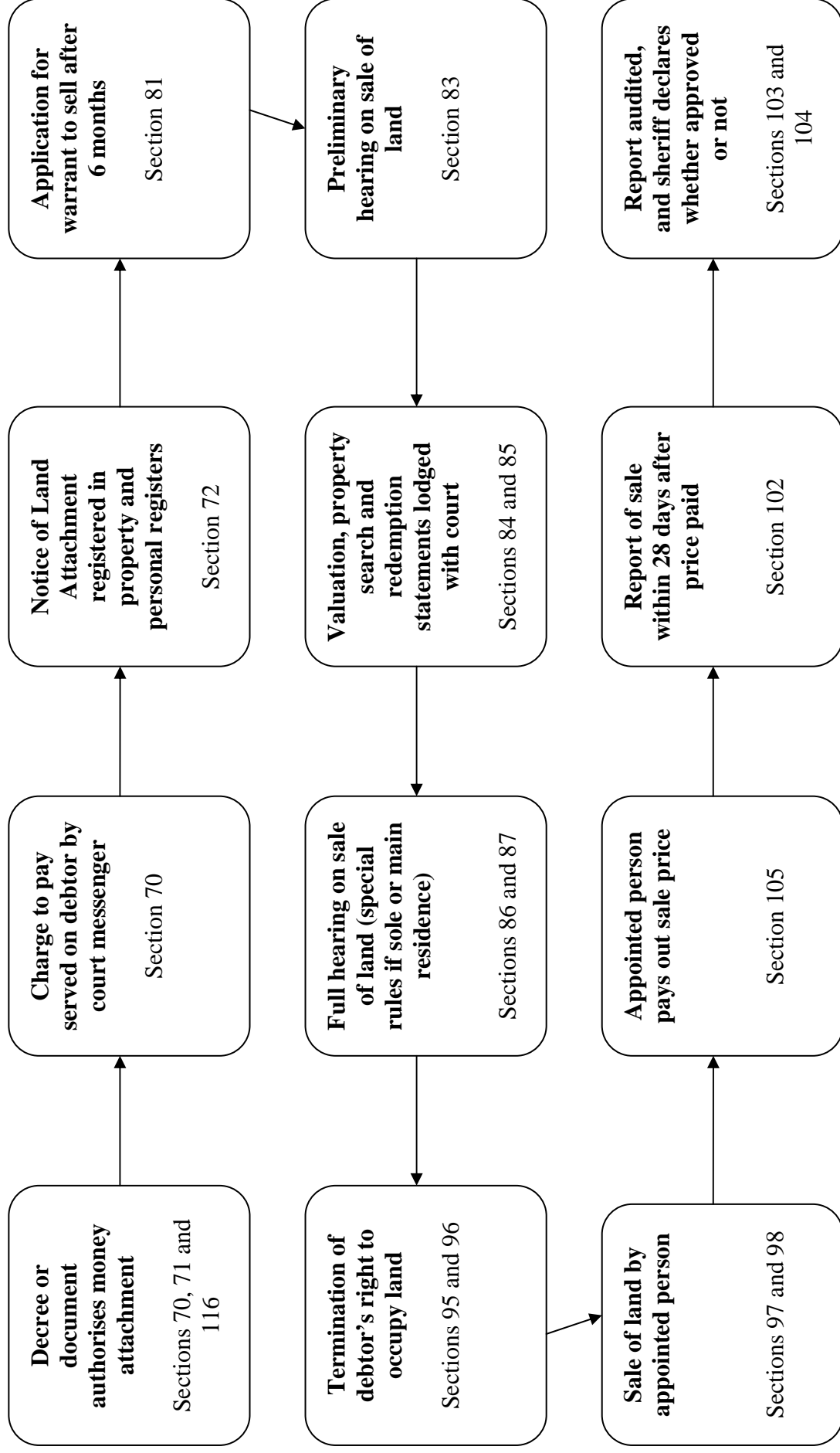
Scottish Civil Enforcement Commission conference and workshop, Dunblane May 2005

Debt Relief Working Group Meeting–

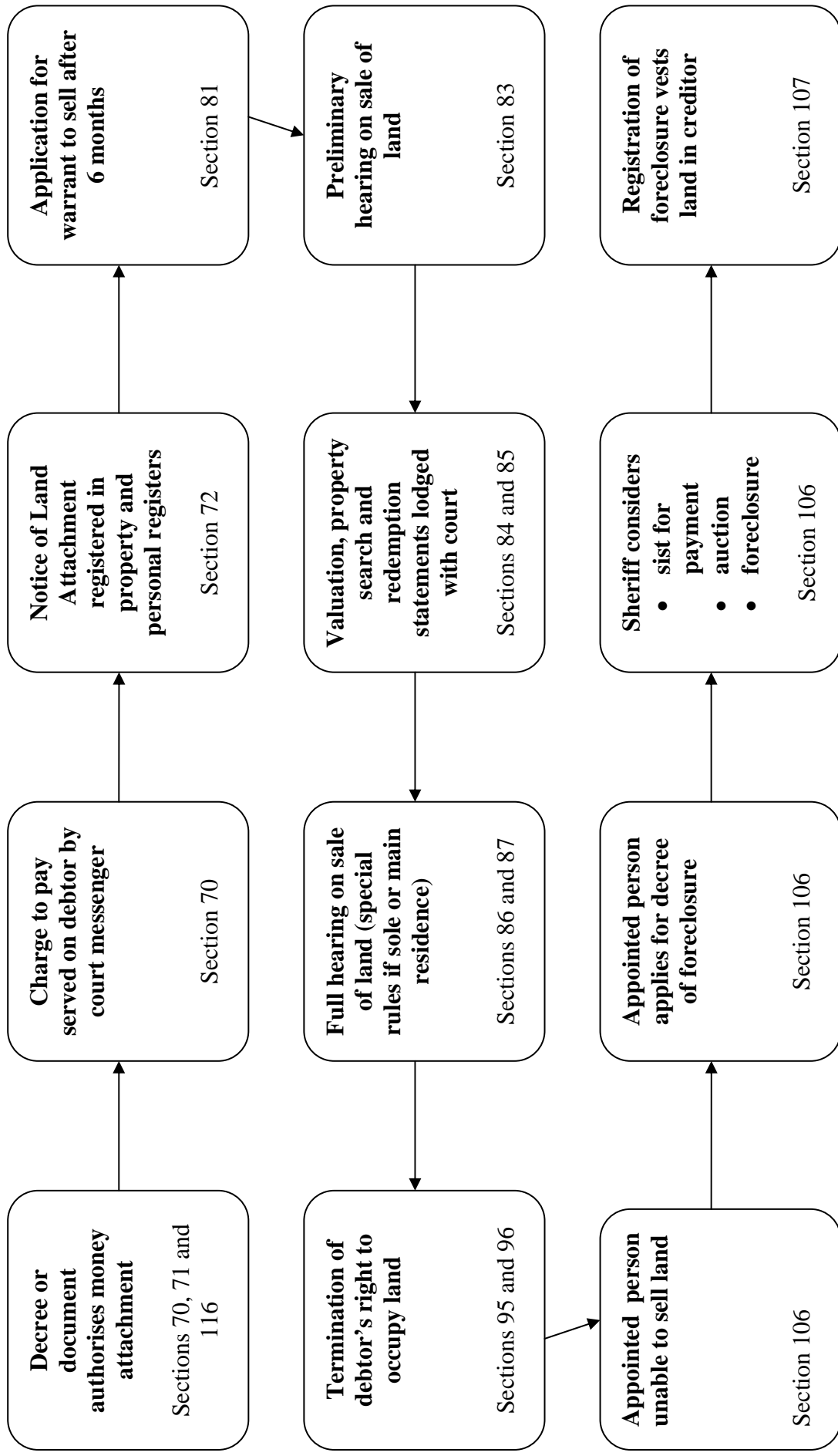
- 25 November 2004
- 14 January 2005
- 16 March 2005
- 29 April 2005
- 24 May 2005

LAND ATTACHMENT SALE

ANNEX D

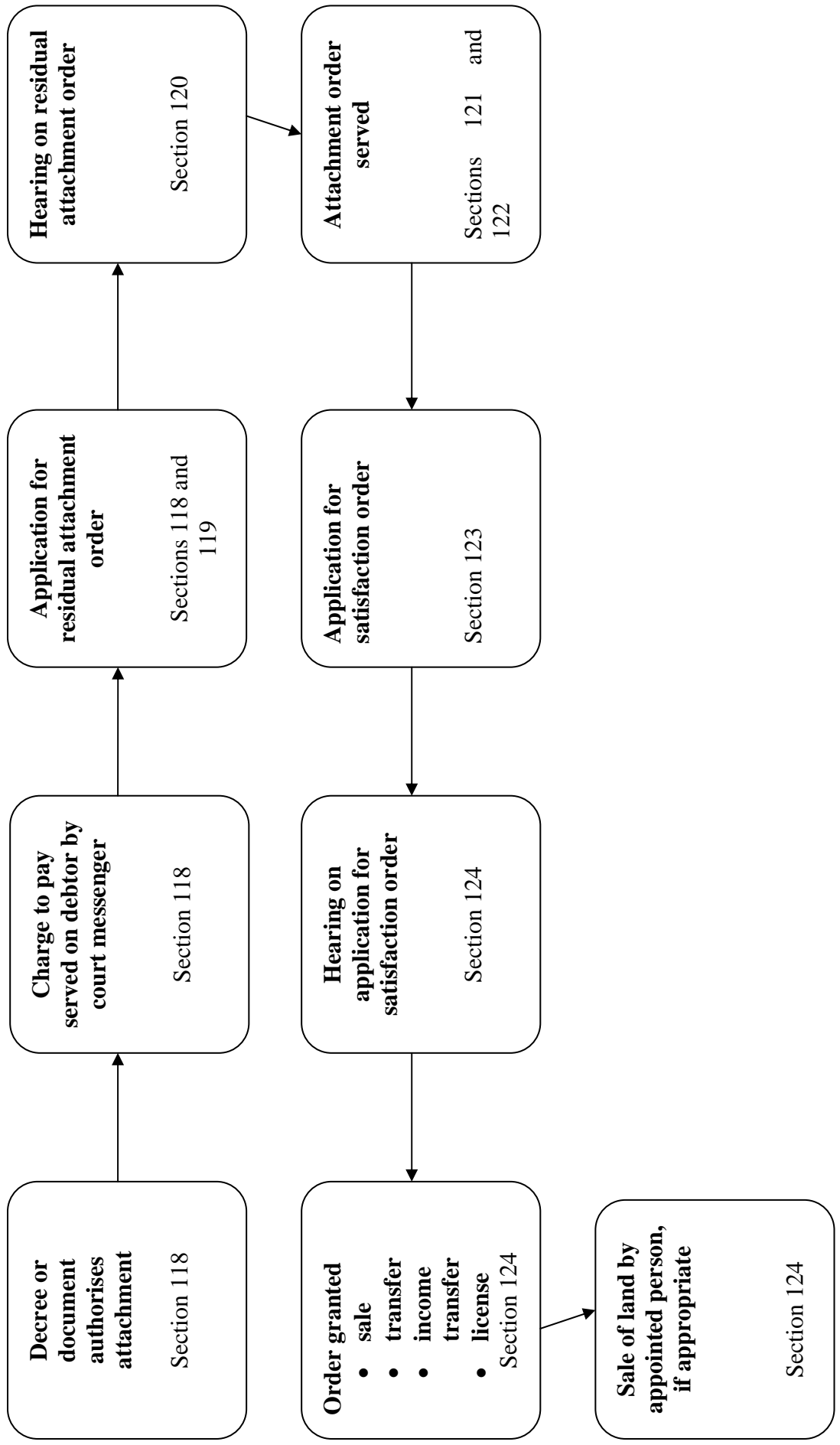


LAND ATTACHMENT FORECLOSURE



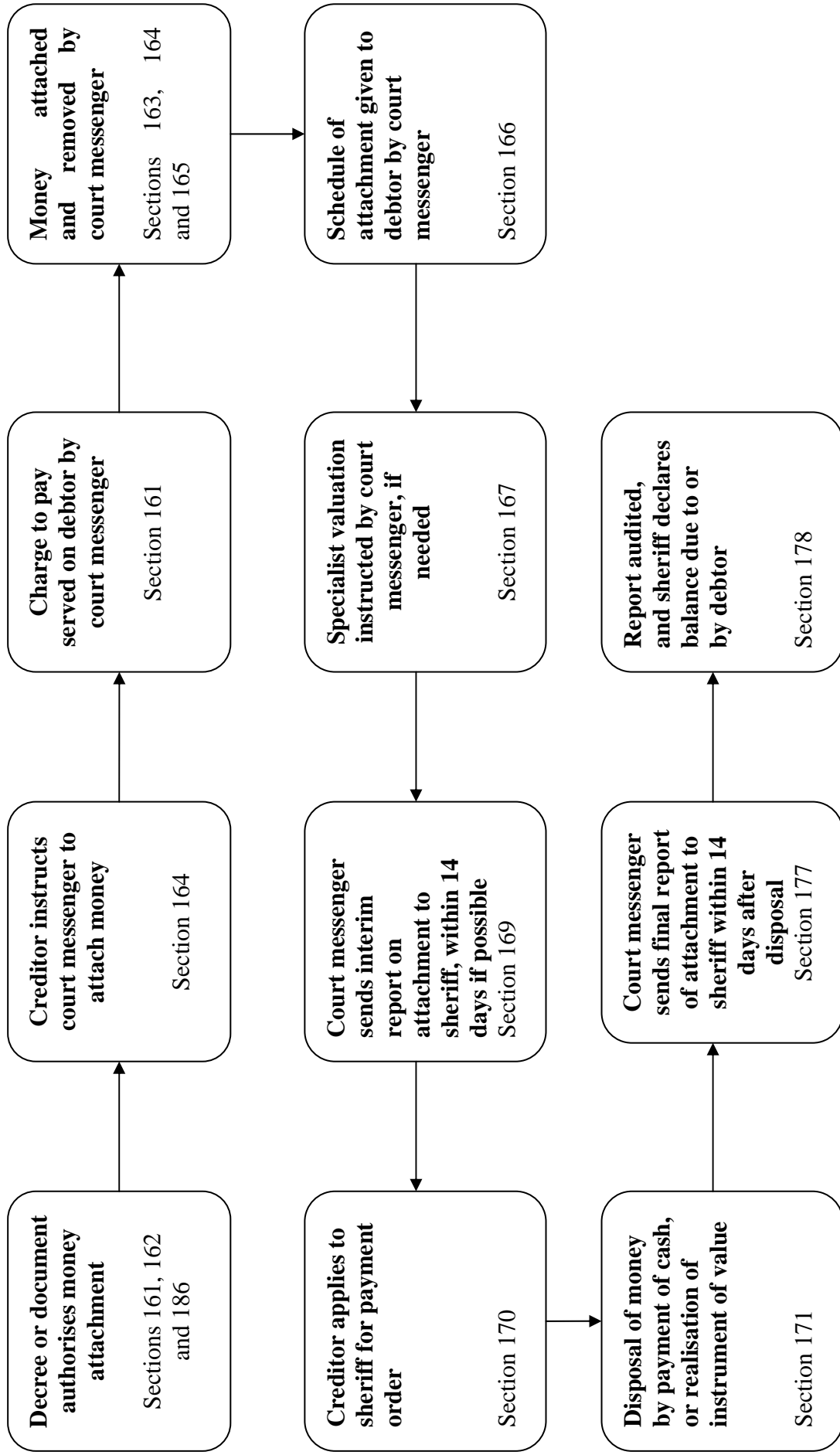
ANNEX E

RESIDUAL ATTACHMENT REALISATION



ANNEX F

MONEY ATTACHMENT



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BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) BILL

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