

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This supplementary Memorandum has been prepared by the Scottish Executive in accordance with Rule 9.7.10 of the Parliament's Standing Orders to assist consideration by the Subordinate Legislation Committee in accordance with Rule 9.7.9.

2. It explains changes to the powers to make subordinate legislation under the Bankruptcy and Diligence etc. (Scotland) Bill made as a consequence of amendments at Stage 2. It describes the purpose of each amended provision conferring powers to make subordinate legislation. This supplementary Memorandum should be read in conjunction with the original Memorandum.

3. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily. Affirmative procedure is in general used where the order or regulation making powers allow for the modification of any enactment, or where there is significant public interest. Negative resolution procedure is used otherwise.

Amendments to delegated powers

4. During the Stage 2 proceedings, 17 new powers for the Scottish Ministers to make orders or regulations were introduced in the Bill, 1 power was removed, and 12 powers were altered or amended. Outlined below are descriptions of the relevant powers and explanations as to why the additions, removals, amendments or alterations are considered appropriate.

PART 1 - BANKRUPTCY

Section 1 – Discharge of debtor

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Negative resolution of the Scottish Parliament

5. Section 1 has been amended to remove the changes made by that section to section 72 of the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”). Those changes were intended to ensure

that the new power of Scottish Ministers to prescribe the minimum period that a debtor must remain sequestrated under section 54(1) of the 1985 Act is subject to affirmative procedure.

6. This change was intended to be part of a package made in response to the recommendation by the Enterprise and Culture Committee that the power in section 1 to vary the discharge period should be removed, as a key policy decision of that kind should only be changed by primary legislation. The Scottish Ministers agreed with the Committee and continue to agree with them about this. Therefore a further amendment has been lodged at stage 3 to remove the words “(or such other period as may be prescribed)”, as introduced by section 1(2) of the Bill, from section 54(1) of the 1985 Act.

Section 12 – replacement of trustee acting in more than one sequestration

7. Section 12 of the Bill inserts a new section 28A into the 1985 Act.

Section 28A of the 1985 Act – replacement of trustee acting in more than one sequestration

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

8. New section 28A of the 1985 Act has been amended so that the power of the Court of Session under section 28A(3) to prescribe the procedure in a petition for the replacement of a trustee acting in two or more sequestrations, may in particular make provision for intimation of such a petition to a sheriff to whom a sequestration has been transferred under section 15(2) of that Act, as well as to the sheriff who awarded the sequestration.

9. The amendment helps to clarify that the new section, which enables transfers of multiple sequestrations, shall operate together with the existing power of the courts to transfer individual sequestrations. It has therefore only a modest effect on the scope of the rule making power granted to the Court of Session by the new section.

Section 14A – Debtor applications by low income, low asset debtors

10. Section 14A of the Bill was inserted by amendment at stage 2, and itself inserts a new section 5A into the 1985 Act.

Section 5A of the 1985 Act – debtor applications by low income, low asset debtors

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative resolution of the Scottish Parliament

11. New section 5A of the 1985 Act is complemented by new section 29A of the Bill (inserted at stage 2), which amends section 72 of the 1985 Act to provide for the procedure to be followed in making regulations made under section 5A.

12. Section 5A creates a new category of persons who are entitled to apply to the Accountant in Bankruptcy for their own sequestration. Those persons will not need to be ‘apparently insolvent’ under the current law.

13. A person will be able to apply if he or she meets the ‘low income, low asset’ criteria set out in that section. They will meet the criteria if they—

- Have a weekly income of £100, or such other sum as may be prescribed,
- Do not own any land, and
- The total value of the debtor’s assets (less liabilities) does not exceed £1000, or such other sum as may be prescribed.

14. In addition to prescribing new income and asset thresholds, section 5A confers power on Scottish Ministers to make provision as to how income and assets are to be determined (including a power to exclude particular descriptions of income or asset), make different provision for different classes or descriptions of debtor, and provide for further conditions which must be met before a debtor application may be made.

15. Section 5A is intended to help people who need debt relief through sequestration, but can’t get it as they are not apparently insolvent because (say) a creditor considers that attempting to enforce their debt will be throwing good money after bad. It supplements rather than replaces apparent insolvency, and it is intended that there should be no undue overlap between the different routes into sequestration.

16. Section 5A sets out the basic eligibility criteria, but these will require to be fine tuned in order to make sure that the right balance is struck. In particular, the intention is that the eligibility criteria are set at a level that ensures as far as possible that only persons with no other route into sequestration can apply under that section. Provision of that sort is better made in regulations than on the face of the Bill.

17. The powers to prescribe may (for example) be used to provide that income based state benefits are not to be taken into account when calculating whether the £100 income weekly income threshold has been met. Such persons are unlikely to be able to prove apparent insolvency under current laws, no matter how much they need debt relief.

18. Sequestration has serious consequences for debtors, and the cancellation of debt otherwise due can have a significant impact on creditors. Regulations made under section 5A will determine whether or not sequestration is an option for particular debtors. It is considered that weighty issues of that kind should be subject to a high level of parliamentary scrutiny, and that affirmative parliamentary procedure is appropriate.

Section 17 – Debtor’s home and other heritable property

19. Section 17(2) of the Bill as introduced inserts a new section 39A into the 1985 Act.

Section 39A of the 1985 Act – debtor’s home ceasing to form part of the sequestrated estate

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative resolution of the Scottish Parliament

20. Section 39A provides that a debtor’s home shall cease to form part of the sequestrated estate at the end of a period of three years beginning with the date of sequestration, unless any of the events listed in section 39A(3) has occurred in that period.

21. The events listed in section 39A(3) are various steps that the trustee can take to realise or preserve the creditors right in the home. For example, the home will not re-vest in the debtor if the trustee concludes missives for sale. Scottish Ministers have power under section 39A(4) to modify the list in section 39A(3) so as to add, remove or vary any matter referred to there.

22. New section 29A of the Bill as introduced at stage 2 amends section 72 of the 1985 Act to provide for the procedure to be followed in making regulations made under section 39A. Section 72 now provides that any regulations made under section 39A(4) of the 1985 Act will be subject to affirmative procedure.

23. This change was made in response to the recommendations of both the Subordinate Legislation Committee and the Enterprise and Culture Committee that the power in section 39A(4) deals with matters of such importance that any regulations should be subject to affirmative procedure.

24. The Executive agrees that the determination of the circumstances in which a home is to continue to form part of a sequestrated estate is an important matter that should be subject to a high level of scrutiny. It is therefore better suited to affirmative procedure.

Section 18 – modification of provisions relating to protected trust deeds

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: First set of regulations subject to affirmative resolution of the Scottish Parliament, but otherwise subject to negative resolution.

25. Section 18 of the Bill amends schedule 5 to the 1985 Act. It inserts a new enabling power into that schedule, under which Scottish Ministers may by regulations make provision as to the conditions which require to be fulfilled in order for a trust deed for creditors to be granted the status of a protected trust deed, and related matters.

26. Trust deeds are a voluntary arrangement under which debtors convey all their assets to a trustee for their creditors. The trustee gathers in the assets, and if possible pays a dividend to the creditors. The creditors will then discharge the debtor in the deed from having to pay any outstanding debts.

27. A trust deed only binds the creditors who agree to it. A protected trust deed binds all the creditors whether they agree to the arrangement or not. It is therefore a form of bankruptcy, although one with a much reduced impact on a debtor when compared with sequestration.

28. The expectation is that creditors will be paid more out of a trust deed than a sequestration. This is not always true. This has led to complaints by creditors about trust deeds. For example, it is said that:

- Available assets are not sold,
- Income contributions are less than the debtor can afford, and
- Trustees charge excessively high fees.

29. The Executive therefore considers that some trusts become protected where that is not in the best interests of the creditors. The power in paragraph 5 of schedule 5 will be used to make trust deed regulations, and an Executive consultation on draft regulations proposed to be made under section 18 closed in April 2006.

30. The main proposals for reform are:

- Debtor to be given better information before granting a trust deed,
- ‘Cooling off’ period for debtor,
- Guaranteed minimum payment to creditors of 30 pence in the pound,
- Power for Accountant in Bankruptcy to give direction to trustees,
- Power for the Accountant to take over trusts, and
- Increased powers for the Accountant to audit trustee fees and outlays.

31. The issues raised by stakeholders during both the passage of the Bill and the consultation are still being considered.

32. New section 29A of the Bill as introduced at stage 2 amends section 72 of the 1985 Act to provide for the procedure to be followed in making regulations under paragraph 5 of schedule 5. Section 72 now provides that the first regulations made under paragraph 5 of schedule 5 to the 1985 Act will be subject to affirmative procedure.

33. This change was made in response to the recommendation by the Subordinate Legislation Committee, which thought that at very least the first set of regulations made under Schedule 5 should be affirmative.

34. Any form of bankruptcy has serious consequences for debtors, and the cancellation of debt in a trust deed can have a significant impact on creditors. For example, credit unions are concerned about the impact of rising number of trust deeds.

35. Regulations made under paragraph 5 of schedule 5 will determine whether or not a trust deed becomes protected. The first set of regulations will establish a framework that is likely to

remain in use for many years. However, later sets of regulations are expected to make relatively minor technical changes to this basic framework.

36. It is therefore considered that only the first set of regulations should be subject to a high level of parliamentary scrutiny, and is therefore suitable for affirmative parliamentary procedure. This is the model successfully used for the Debt Arrangement Scheme Regulations made in 2004 using the powers in section 7 of the Debt Arrangement and Attachment (Scotland) Act 2002.

Section 28A – power to provide for lay representation in sequestration proceedings

Power conferred on: Court of Session

Power exercisable by: Act of Sederunt

Parliamentary Procedure: None

37. The Court of Session has power under section 32(1) to regulate and prescribe by Act of Sederunt the procedure to be followed in any civil proceedings in the sheriff court, which without prejudice to that generality extends to the matters listed in the paragraphs of that subsection.

38. New section 28A has been inserted into the Bill by amendment at stage 2. Section 28A inserts a new paragraph (m) into section 32(1) of the Sheriff Courts (Scotland) Act 1971.

39. Section 32(1)(m) has the effect that the power to regulate and prescribe procedure extends to permitting a debtor appearing before the sheriff under section 12 of the 1985 Act to be represented by a person who is neither an advocate nor a solicitor.

40. Section 12 of the 1985 Act has also been amended to enable the sheriff to continue a creditor application for sequestration if satisfied that a debt payment programme under the debt arrangement scheme (DAS) will be applied for. A debtor can only apply for approval of a DAS programme through an approved money adviser. The Court of Session could (for example) use the new power to provide that a DAS approved money adviser may represent a debtor who wishes to oppose a creditor application in those circumstances.

41. Rules providing for representation in court are administrative and procedural. In the same way that there is no need for Scottish Ministers to make them, there is no need for the Parliament to approve or annul them. It is therefore appropriate for them to be made by Act of Sederunt, and not therefore subject to any parliamentary procedure.

PART 3 – ENFORCEMENT

Section 43 – Scottish Civil Enforcement Commission

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative resolution of the Scottish Parliament

42. Section 43 of the Bill as introduced provides for a corporate body to be known as the Scottish Civil Enforcement Commission. Scottish Ministers may by regulations made under section 43(4) and (5) confer on, remove from or modify functions of the Commission. Such regulations may also by virtue of section 43(5) transfer functions to the Commission, and modify enactments in consequence of such a transfer.

43. Section 201(4) of the Bill has been amended at stage 2 so that regulations made under section 43(4) are subject to affirmative procedure.

44. This change was made in response to the recommendation by the Enterprise and Culture Committee that the exercise of the power in section 43(4) should be subject to affirmative procedure as it may raise important policy issues.

45. The Executive agrees that the exercise of the power may in some cases raise important policy issues. It is of course not possible to say at this time whether (say) the conferring of some currently unknown future function will raise a major policy issue. That being so the Executive agrees that it is best to err on the side of caution, and to ensure that in all cases there is the high level of scrutiny available under affirmative procedure.

Section 62 – Disciplinary committee’s powers

46. Section 62 of the Bill sets out the powers of the Commission to deal with misconduct or criminal behaviour by a messenger of court. Section 62(4)(c) as introduced provided that one such power was to make an order imposing a fine not exceeding level 4 on the standard scale, or any other sum prescribed by Scottish Ministers in regulations.

47. The power to prescribe such other sum has been removed by amendment at stage 2. This change was made in response to the recommendation by the Enterprise and Culture Committee that the use of the power in section 43(4) would raise an important policy issue, and should therefore be subject to affirmative procedure.

48. The Executive considers on reflection that the power to vary the level of fine is not needed at all, as the standard scale of fines is already reviewed from time to time and is therefore ‘future proofed’.

Section 64 – Appeals from decisions under sections 52, 59 and 62

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

49. Section 64 of the Bill as introduced gave a right of appeal to the Court of Session to any person affected by a decision of the Commission to appoint a court messenger, or a decision of the disciplinary committee to suspend or discipline a court messenger. Section 64(3) provides that the Court of Session may by Act of Sederunt prescribe the procedure in such an appeal.

50. The Bill has been amended at stage 2 so that:

- The name of the new profession is changed from ‘messenger of court’ to ‘judicial officer’,
- A judicial officer shall be appointed to, or deprived from, office by the Lord President of the Court of Session on the recommendation of the Commission,
- A judicial officer has a duty under new section 55A to notify the Commission of an insolvency event,
- The Commission has power under new section 60A to refer such a matter to the disciplinary committee if the event is not intimated or gives rise to concerns about the officer (falling short of misconduct or the commission of an offence which are already dealt with), and
- The disciplinary committee may on such a referral make an order suspending an officer from practice, recommending that the Lord President deprives the officer of office, or restricting the functions or activities of the officer.

51. Section 64 of the Bill has also therefore been amended at stage 2 in consequence of these changes so that (for example) appeal lies against the decision of the Commission to refuse to recommend an appointment, rather than a decision to refuse to appoint.

52. The power of the Court of Session to regulate procedure in respect of such any appeal under that section by Act of Sederunt has not in itself changed. The Executive considers that it is still appropriate to provide that power, as any rules made by the Court will be procedural and administrative. In the same way that there is no need for Scottish Ministers to make them, there is no need for the Parliament to approve or annul them.

PART 4 – LAND ATTACHMENT AND RESIDUAL ATTACHMENT

Section 72 – Notice of land attachment

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative resolution of the Scottish Parliament

53. Section 72 of the Bill as introduced provides for registration by a creditor of a notice of land attachment, and was amended at stage 2 by the insertion of new subsections (1A) and (1B).

54. Sections 72(1A) and (1B) have the effect that it will not be competent to register a notice of land attachment unless the debtor has been charged to pay a debt of at least £3000, or such other sum as may be prescribed by Scottish Ministers by regulations. Section 201(4) of the Bill has also been amended at stage 2 so that regulations made under section 72(1B) are subject to affirmative procedure.

55. Land attachment is a diligence with a potentially severe impact on the debtor, and it is therefore appropriate to build in robust debtor protections. A key protection is that land should not be capable of being attached or sold unless the debt due to the creditor exceeds a lower debt

limit. Scottish Ministers should have power to review the lower debt limit, and change it as needed from time to time. For example, the value of the protection given to the debtor should not be eroded by inflation.

56. Land is a valuable asset, and may of course be the debtor's home. Any exercise of the power to prescribe the level of the lower debt limit will therefore raise significant policy issues. For example, the Executive believes that the law will not strike the right balance between the interests of creditors and debtors unless the lower debt limit in land attachment is aligned with the qualifying debt limits for sequestration in section 5 of the 1985 Act. Sequestration is significantly more severe for the debtor than land attachment, and maintaining that alignment will ensure that the creditor does not have an incentive to bankrupt the debtor to realise the value locked up in land.

57. The Executive therefore believes that the exercise of this power requires a high level of scrutiny, and should therefore be subject to affirmative procedure. The Executive has also lodged Stage 3 amendments aligning the qualifying debt limits for sequestration and the power to amend those limits is also to be subject to affirmative procedure.

Section 81 – Application for warrant to sell attached land

58. Two powers in section 81 of the Bill have been affected by amendment at stage 2.

Section 81(2) – the prescribed sum

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary Procedure:	Affirmative resolution of the Scottish Parliament

59. Section 81 of the Bill as introduced provide that a creditor may apply to the sheriff for a warrant to sell attached land if 6 months has expired since the date of registration of the land attachment, and if the sum recoverable by the land attachment exceeds the “prescribed sum”.

60. Section 81(2) as introduced provided that the prescribed sum was £1500, or such other sum as may be prescribed by Scottish Ministers by regulations. The prescribed sum is the lower debt limit discussed in paragraphs 52 to 54 above.

61. Section 81(2)(a) was amended at stage 2 by substituting the figure of “£3000”, so increasing the lower debt limit. Section 201(4) of the Bill has also been amended at stage 2 so that regulations made under section 81(2) are subject to affirmative procedure. It is believed that this is appropriate for the reasons discussed in paragraphs 55 to 57 above.

Section 81(5A) – further provision about reports on searches

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations
Parliamentary Procedure:	Negative resolution of the Scottish Parliament

62. Section 81(3)(c) of the Bill as introduced provides that an application for warrant to sell attached land must be accompanied by (amongst other things) a search in the Register of Sasines or the Land Register of Scotland brought down to a date no later than 3 clear days before the day on which the application is made.

63. Section 81(3)(c) was amended at stage 2 to omit the provision on the date of the search, and to add a new paragraph (ia) requiring that a report in the Register of Inhibitions in respect of the debtor and any common owner shall accompany the application. Sight of the report in the Register of Inhibitions will enable the court to take account of any caveat (request for notice of application) by a buyer from the debtor under section 80 of the Bill, which is a result of amendment at stage 2 to be registered in that Register.

64. New subsection (5A) of section 81 was inserted by amendment at stage 2. It provides that Scottish Ministers may by regulations make further provision about the reports on searches in the property and inhibition registers mentioned in section 81(3)(c).

65. The power will enable Scottish Ministers to ensure (for example) that the searches start and finish at the appropriate dates, and include any information on previous owners that the court may need to form a judgement on the application. In short, it ensures that the court has the information it needs to be satisfied that the debtor is indeed the owner of the land in question.

66. A power is to be preferred to provision on the face of the Bill, as conveyancing and search practices change over time. The requirement on the creditor to produce searches can therefore be modified to reflect current practice as needed from time to time. This is a technical matter raising no major policy issues, and therefore suitable for negative resolution procedure.

Section 85 – Creditor’s duties prior to full hearing on application for warrant for sale

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Negative resolution of the Scottish Parliament

67. The court must fix a preliminary hearing under section 83 of the Bill as introduced on receiving an application for a warrant to sell attached land. The main purposes of this hearing are to fix the date of the final hearing under section 86 of the Bill as introduced, and to appoint a surveyor or other suitably qualified person to report on the value of the attached land.

68. Section 85(1) of the Bill as introduced provides that a creditor must (amongst other things) lodge with the court a continuation of the search in the Register of Sasines or the Land Register of Scotland brought down to a date of lodging of that valuation report. This is to enable the court to ensure that there has been no material change since the date of the application.

69. Section 85(1) was amended at stage 2 to omit the provision on the date of the search, and to add a new paragraph (ba) requiring that a continuation of the report in the Register of Inhibition shall also be lodged. This is to enable the court to ensure that no caveat has been registered since the date of the application.

70. New subsection (4) of section 85 was inserted by amendment at stage 2. It provides that Scottish Ministers may by regulations make further provision about the reports on searches in the property and inhibition registers mentioned in section 85(1).

71. This power has the same purpose as discussed for the similar change to section 81 discussed in paragraphs 65 and 66 above, and is therefore considered suitable for negative resolution procedure.

Section 86 – Full hearing on application for warrant for sale

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary Procedure: Affirmative resolution of the Scottish Parliament

72. Section 86(5) of the Bill as introduced provides that the sheriff must refuse to grant a warrant for sale if satisfied that any of the grounds in section 86(6) apply. One of those grounds is that if the attached land were sold the likely net sale proceeds would not exceed the sum mentioned in section 86(7).

73. Section 86(7) of the Bill as introduced provided that the sum so mentioned is the aggregate of:

- The expenses of the attachment chargeable against the debtor, and
- The lower of £500 or 10% of the sum the debtor was charged to repay.

74. This is called the ‘not worth it’ test, and is intended to protect the debtor from the potential harm caused by the sale of a significant asset for a small debt. The section also provides that Scottish Ministers may by regulations prescribe some other sum or other percentage.

75. Section 86(7) was amended at stage 2 by substituting the figure of “£1000”, so increasing the value of the ‘not worth it test’ in proportion to the increase in the value of the lower debt limit. Section 201(4) of the Bill has also been amended at stage 2 so that regulations made under section 86(7) are subject to affirmative procedure.

76. It is believed that this is appropriate in view of the close link between the test and the limit, the significance of the issues raised by any change (as discussed in paragraphs 55 to 57 above), and the desirability of changing the test and the limit at the same time in a single instrument.

PART 6 – DILIGENCE ON THE DEPENDENCE

Section 156 – Diligence on the dependence

77. Section 156 of the Bill as introduced inserts a new Part 1A on Diligence on the Dependence into the Debtors (Scotland) Act 1987, after section 15 of that Act. The 13 sections in the new Part are numbered from 15A to 15N respectively.

Section 15K of the 1987 Act – Recall of diligence on dependence

Power conferred on: Court of Session

Power exercisable by: Act of Sederunt

Parliamentary Procedure: None

78. Section 15K of the 1987 Act as introduced sets out the procedure for applying to the court for recall or restriction of a warrant for diligence on the dependence, or any arrestment or inhibition executed on the authority of that warrant. Section 15K(6) lists the matters on which if the court is no longer satisfied it shall make an order recalling a warrant and any such diligence.

79. A new subsection (2A) has been inserted into section 15K by amendment at stage 2. Section 15K(2A) provides that an application for an order recalling or restricting a warrant, recalling or restricting any such diligence, or determining any question relating to the validity, effect or operation of the warrant, shall be in (or as nearly as may be in the form) prescribed by Act of Sederunt.

80. The form in question is intended to ensure that the court will have the information it needs to fix a hearing on the application, and may (for example) include a requirement to state the reason why the applicant thinks an order should be made.

81. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe this form by Act of Sederunt.

Section 15L of the 1987 Act – Variation and recall of conditions

Power conferred on: Court of Session

Power exercisable by: Act of Sederunt

Parliamentary Procedure: None

82. Section 15L of the 1987 Act as introduced sets out the procedure for applying to the court for—

- variation of an order restricting a warrant for diligence on the dependence, made under section 15K(4) of the 1987 Act when the court is satisfied that the warrant is valid but an arrestment or inhibition executed on the authority of the warrant is irregular or ineffective, or
- variation or removal of a condition (such as a requirement to consign money with the court) made when refusing to grant such a warrant under section 15F(6), or recalling or restricting such a warrant or any diligence under section 15K(8).

83. A new subsection (1A) has been inserted into section 15L by amendment at stage 2. Section 15L(1A) provides that an application for an order for such variation or removal shall be in (or as nearly as may be in the form) prescribed by Act of Sederunt.

84. The form in question is intended to ensure that the court will have the information it needs to fix a hearing on the application, and may (for example) include a requirement to state the reason why the applicant thinks an order should be made.

85. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe this form by Act of Sederunt.

PART 6 – INTERIM ATTACHMENT

Section 160 – Interim attachment

86. Section 160 of the Bill as introduced inserts a new Part 1A on Interim Attachment into the Debt Arrangement and Attachment (Scotland) Act 2002, after section 9 of that Act. The 16 sections in the new Part are numbered from 9A to 9R respectively.

Section 9GA of the 2002 Act – Order for security of attached articles

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

87. Section 9GA of the 2002 Act was inserted into the Bill by amendment at stage 2. It provides that the court may at any time after an attachment make an order for the security of an attached article on the application of the creditor, the debtor or the judicial officer. For example, the court could order that an attached article is moved from a damaged building to one that is wind and water tight.

88. Section 9GA(2)(a) provides that an application for such an order shall be in (or as nearly as may be in the form) prescribed by Act of Sederunt.

89. The form in question is intended to ensure that the court will have the information it needs to fix a hearing on the application, and may (for example) include a requirement to state the reason why the applicant thinks an order should be made.

90. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe this form by Act of Sederunt.

Section 9K of the 2002 Act – Duration of interim attachment

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

91. Section 9K of the 2002 Act as introduced provides that an interim attachment shall have effect until 6 months after the expiry of a qualifying interlocutor (judgement) of the court, which in most cases means a decree for payment. Section 9K(4) provides that in exceptional circumstances the court may on the application of the creditor extend that 6 month period.

92. A new subsection (4A) has been inserted into section 9K by amendment at stage 2. Section 9K(4A) provides that an application for extension of the 6 month period shall be in (or as nearly as may be in the form) prescribed by Act of Sederunt.

93. The form in question is intended to ensure that the court will have the information it needs to fix a hearing on the application, and may (for example) include a requirement to state the reason why the applicant thinks an extension should be granted.

94. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe this form by Act of Sederunt.

Section 9L of the 2002 Act – Recall of interim attachment

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

95. Section 9L of the 2002 Act as introduced sets out the procedure for applying to the court for an order recalling or restricting a warrant for interim attachment, an order recalling or restricting any interim attachment executed on the authority of that warrant, an order determining the validity, effect or operation of the warrant and any ancillary order to these orders. It sets out the court's powers and the criteria determining whether and how those powers should be exercised. For example section 9L(6) lists the matters on which if the court is no longer satisfied it shall make an order recalling a warrant and any such attachment.

96. A new subsection (2A) has been inserted into section 9L by amendment at stage 2. Section 9L(2A) provides that an application for an order recalling or restricting a warrant, recalling or restricting any such attachment, or determining any question relating to the validity, effect or operation of the warrant, shall be in (or as nearly as may be in the form) prescribed by Act of Sederunt.

97. The form in question is intended to ensure that the court will have the information it needs to fix a hearing on the application, and may (for example) include a requirement to state the reason why the applicant thinks an order should be made.

98. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe this form by Act of Sederunt.

Section 9M of the 2002 Act – Variation and recall of conditions

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

99. Section 9M of the 2002 Act as introduced sets out the procedure for applying to the court for—

- variation of an order restricting a warrant for interim attachment, made under section 9L(4) of the 2002 Act when the court is satisfied that the warrant is valid but an attachment executed on the authority of the warrant is irregular or ineffective, or
- variation or removal of a condition (such as a requirement to consign money with the court) made when refusing to grant such a warrant under section 9E(6), or recalling or restricting such a warrant or any attachment under section 9L(9).

100. A new subsection (1A) has been inserted into section 9M by amendment at stage 2. Section 9M(1A) provides that an application for an order for such variation or removal shall be in (or as nearly as may be in the form) prescribed by Act of Sederunt.

101. The form in question is intended to ensure that the court will have the information it needs to fix a hearing on the application, and may (for example) include a requirement to state the reason why the applicant thinks an order should be made.

102. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe this form by Act of Sederunt.

PART 10 – ARRESTMENT IN EXECUTION AND ACTION OF FURTHCOMING

Section 192 – Arrestment in execution

103. Section 192 of the Bill as introduced inserts a new Part 3A on Arrestment and Action of Furthcoming into the Debtors (Scotland) Act 1987, after section 73 of that Act. The 15 sections in the new Part as introduced are numbered from 73A to 73P respectively, although further sections have been added by amendment.

Section 73A of the 1987 Act – Arrestment and action of furthcoming to proceed only on decree or document of debt

Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary Procedure: Negative resolution of the Scottish Parliament

104. Section 73A of the 1987 Act as introduced sets out the circumstances in which an arrestment in execution is competent, including that the diligence (and any subsequent realisation of arrested property) is only competent on a decree or document of debt.

105. Section 73A(4) defines “decree” and “document of debt” for that purpose, and section 73A(5) as introduced provided that Scottish Ministers may by regulations modify those definitions by adding or removing types of decree or document, or varying their description.

106. Section 73A(5) was amended at stage 2 so that “order” was substituted for “regulations”. This makes the provision in that section consistent with sections 116(3), 133(2), 134(9) and 186(2) of the Bill. The effect of this change is that a single order may change or modify the definitions of decree or document of debt for the purposes of land attachment, residual attachment, inhibition in execution, money attachment and arrestment in execution.

Section 73MA of the 1987 Act – Application for release of property where arrestment unduly harsh

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

107. Section 73MA of the 1987 Act was inserted into the Bill by amendment at stage 2. It applies where a creditor:

- obtains final decree in an action on the dependence of which the creditor executed an arrestment, or
- arrests in execution of a decree or document of debt,

and the arrestment attaches funds due to or other moveable property of the debtor.

108. The debtor may in those circumstances apply to the sheriff under section 73MA(2) for an order providing that the arrestment shall cease to have effect in whole or in part, and requiring the arrestee to release funds or property to the debtor. Section 73MB (also inserted by amendment at stage 2) has the effect that the sheriff court may only make such an order if satisfied that the arrestment is unduly harsh to the debtor (or where the debtor is an individual) a person connected with the debtor such as a child of less than 16 years.

109. Section 73MA(3)(a) provides that an application for such an order shall be in (or as nearly as may be in the form) prescribed by Act of Sederunt.

110. The form in question is intended to ensure that the court will have the information it needs to fix a hearing on the application, and may (for example) include a requirement to state why the applicant thinks the arrestment is unduly harsh.

111. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe this form by Act of Sederunt.

PART 13 – AMENDMENTS OF THE DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) ACT 2002

Section 195A – Debt payment programmes with debt relief

112. Section 195A was inserted into the Bill by amendment at stage 2. Section 195A (3) inserts a new section 7A (debt payment programmes: power to make provision about debt relief) into the Debt Arrangement and Attachment (Scotland) Act 2002.

113. Section 195A(4) amends section 62 (regulations and orders) of the 2002 Act. It has the effect that regulations made under new section 7A of that Act are subject to affirmative parliamentary procedure.

Section 7A of the 2002 Act – Debt payment programmes: power to make provision about debt relief

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: Affirmative resolution of the Scottish Parliament

114. Section 7A of the 2002 Act enables Scottish Ministers by regulations to make such further provision as they think fit in connection with debt payment programmes under the Debt Arrangement Scheme, for the purpose of enabling such programmes to provide for payment of part only of money owed by the debtor.

115. The effect of section 7A is that regulations may provide for the cancellation of debt, the freezing or cancellation of interest on debt, or cancellation of charges in relation to debts. The Executive has said that if this power becomes law it will be used to make regulations providing for the freezing of interest and charges on approval of a debt payment programme, and cancellation on completion. The effect of any such change will be evaluated, and relief may thereafter be extended to include cancellation of debt.

116. Section 7A also enables such regulations to make different provision in relation to different types of debtors, provide that such different provision has effect for a specified period, and enables Scottish Ministers to determine that the provision shall continue to have effect on expiry of such a period. This has the effect of enabling Scottish Ministers to pilot the extension of debt relief to debt payment programmes.

117. Lastly, section 7A enables such regulations to modify any enactment, including any provision in the 2002 Act.

118. Cancellation of debt has a potentially severe impact on creditors, and can be justified only where the debtor is insolvent and has a clear need for debt relief. In making the regulations it may also prove necessary to amend other enactments. The exercise of the power to make regulations in section 7A will therefore raise very important policy issues. Nevertheless the Executive considers it appropriate to implement these reforms through regulations rather than in the primary legislation. This is consistent with the existing legislation concerning debt payment programmes as the detailed rules about the operation of these programmes is contained in regulations. But the exercise of this power naturally requires a high level of scrutiny, and the Executive therefore considers that any regulations should be subject to affirmative procedure.

Section 196 – Amendments of the Debt Arrangement and Attachment (Scotland) Act 2002

Power conferred on: Scottish Ministers

Power exercisable by: Order

Parliamentary Procedure: Negative resolution of the Scottish Parliament

119. New subsections (2A) and (3) were inserted into section 196 of the Bill by amendment at stage 2.

120. Section 196(2A) inserts a new subsection (3) at the end of section 3 (money advice) of the 2002 Act. That new subsection provides that the existing requirements of that section, which require a debtor to obtain money advice prior to making an application for the approval or variation of a debt payment programme, are subject to any contrary provision in regulations made under section 7(1) (debt payment programmes: power to make further provision) of that Act.

121. Section 3(3) of the 2002 Act has the effect that the requirement to obtain money advice in section 3 of the 2002 Act may be removed by regulations made under section 7(1). Such regulations could (in light of the further changes made to section 7 as discussed below), for example, provide that a debtor is entitled to apply for approval or variation of a debt payment programme without obtaining the advice of a money adviser, or that such an application need not be signed by a money adviser, nor specify the name and address of the money adviser, or any combination of those things.

122. Section 196(3A) amends section 7(2) of the 2002 Act, which provides examples of the power of Scottish Ministers under section 7(1) of that Act to make such further provision as they think fit in connection with debt payment programmes. In particular it expands section 7(2) by inserting into it new paragraphs which set out that regulations may make further provision in areas that are not already explicitly authorised by section 7 of the 2002 Act. Those new paragraphs have the effect of providing that regulations may prescribe:

- the circumstances in which some or all of the functions of a money adviser under section 3 of that Act may be discharged instead by an approved intermediary,

- the class of person who may be such an intermediary, which might (say) be an advice agency or a professional person,
- other functions of such an intermediary, which might be different from the existing functions of a money adviser under the 2002 Act,
- the circumstances in which a debtor may apply for approval of a debt payment programme without using a money adviser or an approved intermediary, and
- the manner in which a debtor seeking creditors' consent to a proposed debt payment programme, or applying for approval of such a programme, may affect the rights and remedies of creditors or third parties, which might (say) include a freeze on enforcement until an application is approved or rejected.

123. Section 62 of the 2002 Act has the effect that the first exercise of the power to make regulations under section 7 of that Act will be subject to affirmative procedure, and all later exercises of that power will be subject to negative procedure. Parliament agreed that approach on the basis that the first regulations would establish the form of the Debt Arrangement Scheme, and all later regulations would modify and improve that basic model.

124. Regulations made in reliance on the extended powers being introduced by the Bill will not change the form of the Scheme, in contrast to regulations giving effect to debt relief. Rather regulations made using the extended powers in section 7 of the 2002 Act will modify and improve the Scheme, by (for example) suspending enforcement when creditors are asked to consent to a debt payment programme.

125. Regulations made using the extended power will not be the first exercise of the power in section 7 of the 2002 Act, and will therefore be subject to negative procedure as provided for by section 62 of that Act. The Executive considers that this is still the appropriate level of scrutiny for this power for the reasons set out in the preceding paragraph.

PART 14A – ACTIONS FOR REMOVING FROM HERITABLE PROPERTY

126. A new part 14A on actions for removing from heritable property was inserted into the Bill by amendment at stage 2. The new Part contains 5 sections numbered 197A to 197E.

Section 197A – Expressions used in this Part

Power conferred on: Scottish Ministers

Power exercisable by: Order

Parliamentary Procedure: Negative resolution of the Scottish Parliament

127. Section 197A(1) provides that in the new Part “a decree for removing from heritable property” means a decree or warrant as defined in section 197A(2), or a document as defined in 197A(3).

128. Section 197A(4) provides that Scottish Ministers may by order modify sections 197A(2) and 197A(3) by adding or removing types of decree, warrant or document, or varying their description.

129. This is consistent with the approach taken in sections 116(3), 133(2), 134(9) and 186(2) of the Bill, and in section 73A(5) of the 1987 Act as discussed in paragraphs 104 to 106 above. A single order may therefore change or modify the definition of “decree” as is thought appropriate in future.

130. Reviewing or modifying definitions of this kind raises some policy issues, and therefore parliamentary scrutiny of the exercise of the power is appropriate. However, it is intended to use the power as needed to ensure that the definitions in the Bill keep pace with changes in court procedure and enforcement practice. This is a largely technical process and it is therefore thought that negative procedure provides the right level of scrutiny.

Section 197B – Service of charge before removing

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary Procedure: Negative resolution of the Scottish Parliament

131. Section 197B(1) provides that a defender may be removed from subjects or premises by virtue of a decree for removing from heritable property, but only if the defender has been charged to remove on 14 days notice and the days of the charge have expired without the defender removing.

132. Section 197B(6) provides that Scottish Ministers may by regulations prescribe the form of charge. It is appropriate to prescribe the form so that the content of this important document can be modified as needed from time to time in the light of changing circumstances.

133. In most cases a form of this kind that needs to be prescribed would be as set out in court rules made by the Court of Session by Act of Sederunt. There are therefore two reasons why it is thought to be appropriate for Scottish Ministers to prescribe this particular form.

134. The first reason is that persons being removed from premises may be particularly vulnerable. For example, a tenant may be being ejected from their home. If Scottish Ministers exercise this power then the form (or a variant of it) could provide information about help with homelessness in a way that is consistent with a wider package of measures designed to assist people in those circumstances.

135. The second reason is that policy on reform of the law on removing from heritable property has developed in response to a lack of consistency across different types of action and procedure. The form or forms prescribed by Scottish Ministers will by definition be consistent across all the initiating decrees, warrants or documents covered by the new Part.

136. Prescribing a new form raises some policy issues as discussed above, and parliamentary scrutiny of the exercise of the power is therefore appropriate. However, given that the form by itself serves a relatively narrow purpose it is thought that negative procedure provides the right level of scrutiny.

Section 197C – When removing not competent

Power conferred on: Court of Session
Power exercisable by: Act of Sederunt
Parliamentary Procedure: None

137. Section 197C(1) provides that it is not competent to execute a decree for removing from heritable property on a Sunday, a local public holiday, or such other day as may be prescribed by Act of Sederunt. It is intended to ensure that people are not ejected during unsocial hours, unless the court is persuaded that there is a reason for doing so.

138. The new section mirrors similar provisions for money attachment in part 8 of the Bill, and for the new diligence of attachment in the Debt Arrangement and Attachment (Scotland) Act 2002. It will therefore make removings consistent with other enforcement processes.

139. Court procedures should be both certain and consistent, but are of interest mainly to court users, and regulating such issues does not involve policy issues that need to be determined by Scottish Ministers or to be subjected to detailed scrutiny by Parliament. It is therefore appropriate for the Court of Session to prescribe any other days on which a decree for removing may not be executed.

PART 15 – DISCLOSURE OF INFORMATION

Section 198 – Information disclosure

140. Three powers in section 198 of the Bill have been affected by amendment at stage 2.

Section 198(1) – Information disclosure regulations

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: First set of regulations subject to affirmative resolution of the Scottish Parliament, but otherwise subject to negative resolution.

141. Section 198(1) of the Bill as introduced provides that Scottish Ministers may by regulations make provision for the obtaining by the sheriff of information about debtors, and disclosure of that information to creditors to facilitate diligence to enforce payment of debts due by virtue of decrees and documents of debt.

142. Section 198(6) of the Bill, which provides that the first information disclosure regulations made under section 198(1) of the Bill shall be contained in a statutory instrument and be subject to affirmative parliamentary procedure, has been omitted.

143. A new paragraph has been inserted into section 201 of the Bill, which provides that certain regulations made under the Bill are subject to affirmative parliamentary procedure, including the first information disclosure regulations made under section 198(1) of the Bill.

144. The purpose of these changes is to ensure that the provisions setting out that the regulations are to be made by statutory instrument and the applicable parliamentary procedure are found in the same place as the similar provisions for other regulation making powers in the Bill.

145. The level of scrutiny provided for the proposed information disclosure regulations is the same that applies to debt arrangement scheme regulations made under section 7 of the Debt Arrangement and Attachment (Scotland) Act 2002, and it is thought to be appropriate for the same reason. The first regulations would establish the form of the Information Disclosure Scheme, and all later regulations would modify and improve that basic model.

146. The Executive therefore continues to believe that only the first exercise of the power in section 198(1) requires a high level of scrutiny, and should therefore be subject to affirmative procedure.

Section 198(2) – Examples of the power in section 198(1)

Power conferred on: Scottish Ministers
Power exercisable by: Regulations
Parliamentary Procedure: First set of regulations subject to affirmative resolution of the Scottish Parliament, but otherwise subject to negative resolution.

147. Section 198(2) of the Bill as introduced provides examples of the power of Scottish Ministers under section 198(1) of the Bill to make provision on information disclosure.

148. Section 198(2) has been amended at stage 2 by modifying paragraphs (c), (f) and (g) of subsection (2), inserting a new paragraph (ga) into that subsection, and inserting new sections (3A) and (3B) into that section. Those changes provide further examples of the power in section 198(1), and have the effect regulations may make further provision in areas that are not explicitly authorised by section 198 as introduced.

149. In particular, the changes have the effect that regulations may provide—

- about the functions of the sheriff, rather than the powers, and as the term “functions” includes both powers and duties, the regulations may (say) impose duties on the sheriff,
- “about” rather than “for” the—
 - consequences of failing to disclose information,

○ disclosure of information to the creditor, and as amended any other person, which has the effect of making the scope of the power in those two respects slightly wider than it was at introduction, and

- for unauthorised use or disclosure of information to be an offence.

150. Sections 198(3A) and (3B) will limit the maximum penalty that may be imposed by regulations in the event that they do provide for the unauthorised use or disclosure of information to be an offence.

151. As the amendments extend the scope of regulations that may be made under section 198(1), and as regulations can only be made after the power is agreed by the Parliament, the Executive's position on scrutiny is as discussed in paragraphs 145 and 146 above.

Section 198(6A) – definitions of “decree” and “document of debt”

Power conferred on: Scottish Ministers

Power exercisable by: Order

Parliamentary Procedure: Negative resolution of the Scottish Parliament

152. The terms “decree” and “document of debt” as used in section 198(1) are as defined in section 199 of the Bill, which is the general interpretation section.

153. A new subsection (6A) was inserted into section 198 by amendment at stage 2. It provides that Scottish Ministers may by order modify the definitions of “decree” and “document of debt” in section 199 of the Bill, for the purposes of section 198, by adding or removing types of decree or document, or varying their description.

154. This is consistent with the approach taken in sections 116(3), 133(2), 134(9) 186(2) and 197A(4) of the Bill, and in section 73A(5) of the 1987 Act as discussed in paragraphs 104 to 106 above. A single order may therefore change or modify the definition of “decree” and “document of debt” as is thought appropriate in future.

155. Reviewing or modifying definitions of this kind raises some policy issues, and therefore parliamentary scrutiny of the exercise of the power is appropriate. However, it is intended to use the power as needed to ensure that the definitions in the Bill keep pace with changes in court procedure and enforcement practice. This is a largely technical process, and it is therefore thought that negative procedure provides the right level of scrutiny.

This document relates to the Bankruptcy and Diligence etc. (Scotland) Bill as amended at Stage 2 (SP Bill 50A)

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM