

SCOTTISH LAW COMMISSION  
(Scot Law Com No 177)

# **Report on Poinding and Warrant Sale**

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965<sup>1</sup> for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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<sup>1</sup> Now amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I.1999/1802)

# SCOTTISH LAW COMMISSION

*Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*

## **Pounding and Warrant Sale**

To: Jim Wallace, Esq., QC, MSP, Deputy First Minister and Minister for Justice

We have the honour to submit to the Scottish Ministers our Report on Pounding and Warrant Sale.

(Signed) BRIAN GILL, *Chairman*  
PATRICK S HODGE  
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KENNETH G C REID  
JOSEPH M THOMSON

NORMAN RAVEN, *Secretary*  
20 March 2000

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## EXECUTIVE SUMMARY

We have reached the conclusion that the diligence of poinding and warrant sale should be radically reformed and made less easily available but that it should not be completely abolished.

In our view there are good reasons for retaining the diligence when it is used in a commercial context. By contrast major changes to the law are needed where poinding and sale is to be used in dwellinghouses.

We believe that the recommendations for change contained in the Report are the basis for substantial reform of the diligence. If the recommendations were enacted, the effects would be that in all cases poinding and sale could be used only where it would reduce the size of the debt. Poindings in dwellinghouses would take place only where no other diligence could be used and would be confined to use against luxury goods.

The main recommendations are outlined below.

- Poinding should be prohibited unless there are poindable goods of sufficient value to reduce the debt itself.
- Poindings in dwellinghouses should require a special warrant from the sheriff. The creditor's application to the sheriff should be intimated to the debtor who would have an opportunity to oppose it.
- The sheriff should not grant a special warrant unless satisfied that
  - (a) an arrestment of the debtor's earnings or funds cannot be carried out or has been or is likely to be ineffective, and
  - (b) there is a reasonable likelihood that there are sufficient poindable goods in the premises to make a poinding competent.
- Where the creditor is a local authority enforcing arrears of council tax due under a summary warrant, the sheriff should also have to be satisfied that the arrears cannot be collected by means of deduction from social security benefits paid to the debtor.
- Warrant for forcible entry to a dwelling house to carry out a poinding should no longer be contained in an extract decree or its equivalent. Such entry would be authorised only by the special warrant to poind.
- The range of articles exempt from poinding should be increased so as to include
  - (a) A television set, a radio, a microwave oven and a telephone, all of modest value.
  - (b) A computer if reasonably required for the education or training of the debtor or any member of the debtor's household. The current aggregate monetary limit of £500 for such items should be increased to £1,000.

(c) The items exempt if reasonably required for the purposes of a profession, trade or business should expressly include a car or van, and the current monetary limit should be increased from £500 to £1,000.

(d) Items of particular sentimental value should be exempt up to an aggregate value of £150.

- The sheriff should have power to order the creditor to pay the debtor out of the proceeds of sale of a poinded article a specified sum to obtain a cheaper replacement of that article.
- The debtor may apply to the sheriff for an order releasing a car or other vehicle from the poinding on the grounds that it is necessary for the debtor to get to or to obtain employment or to get to shops or essential services. Where the car exceeds £1,000 in value the sheriff may direct the creditor to make over to the debtor a specified sum out of the proceeds of sale to enable the debtor to buy a cheaper replacement vehicle.
- The time limits for a debtor applying for release of goods from a poinding should be extended.
- A charge to pay should be introduced into summary warrant diligence. A poinding or earnings arrestment should be incompetent unless the charge has expired without payment of the debt.
- Time to pay directions and orders should be available in relation to central and local government tax debts and time to pay orders made available in summary warrant procedure.
- Officers of court should report all summary warrant poindings to the sheriff, but it should remain competent to sell goods poinded in pursuance of a summary warrant without a separate warrant to sell from the sheriff.
- The upper limit on debts for which time to pay directions and orders can be made should be increased from £10,000 to £25,000.
- The procedure for applying for time to pay directions and orders should be amended to encourage debtors to make more use of them.
- Statutory guidance should be given to courts to make it clear that they must grant time to pay directions or orders where satisfied that it is reasonable in all the circumstances.
- Some form of debt arrangement scheme should be introduced in order to deal with the problems faced by debtors owing several debts.

## TABLE OF ABBREVIATIONS

### **The Scottish Office Central Research Unit Papers on Evaluation of the Debtors (Scotland) Act 1987**

Fleming, *SOCRU Survey of Poindings and Warrant Sales*

A Fleming, *Evaluation of the Debtors (Scotland) Act 1987: Survey of Poindings and Warrant Sales* (1999) Edinburgh: The Scottish Office Central Research Unit.

Fleming, *SOCRU Study of Facilitators*

A Fleming, *Evaluation of the Debtors (Scotland) Act 1987: Study of Facilitators* (1999) Edinburgh: The Scottish Office Central Research Unit.

Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*

A Fleming and A Platts, *Evaluation of the Debtors (Scotland) Act 1987: Survey of Payment Actions in the Sheriff Courts* (1999) Edinburgh: The Scottish Office Central Research Unit.

Fleming and Platts, *SOCRU Analysis of Diligence Statistics*

A Fleming and A Platts, *Evaluation of the Debtors (Scotland) Act 1987: Analysis of Diligence Statistics* (1999) Edinburgh: The Scottish Office Central Research Unit.

Headrick and Platts, *SOCRU Study of Individual Creditors*

D Headrick and A Platts, *Evaluation of the Debtors (Scotland) Act 1987: Study of Individual Creditors*, (1999) Edinburgh: The Scottish Office Central Research Unit.

Platts, *SOCRU Overview*

A Platts, *Evaluation of the Debtors (Scotland) Act 1987: Overview* (1999) Edinburgh: The Scottish Office Central Research Unit.

Platts, *SOCRU Study of Commercial Creditors*

A Platts, *Evaluation of the Debtors (Scotland) Act 1987: Study of Commercial Creditors* (1999) Edinburgh: The Scottish Office Central Research Unit.

Whyte, *SOCRU Study of Debtors*

D Whyte, *Evaluation of the Debtors (Scotland) Act 1987: Study of Debtors* (1999) Edinburgh: The Scottish Office Central Research Unit.

### **Other materials**

"1985 Report" = Scottish Law Commission, Report on *Diligence and Debtor Protection* (1985) Scot Law Com No 95.

"1987 Act" = Debtors (Scotland) Act 1987.

"Act of Sederunt" = the Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988 (SI 1988/2013) as amended.

*IRRV Report*

Institute of Revenues, Rating and Valuation, *Council Tax Collection Arrangements in Scotland and England & Wales* (1999).

Kennett

"Enforcement of Judgments" (1997) 5 *European Review of Private Law* 321-428.

*LCD Consultation Paper 2*

Lord Chancellor's Department, *Consultation Paper 2: Enforcement Review : Key principles for a new system of enforcement in the civil courts* (1999)

*LCD Consultation Paper 3*

Lord Chancellor's Department, *Consultation Paper 3: Enforcement Review : Attachment of earnings orders, charging orders and garnishee orders* (1999)

OCR

Ordinary Cause Rules [of the sheriff court] 1993 (as amended).

RCS

Rules of the Court of Session 1994 (as amended).

*Stair Memorial Encyclopaedia*

*The Laws of Scotland, Stair Memorial Encyclopaedia* (25 vols, 1986-1995).

# PART 1 INTRODUCTION

## Background to report

1.1 On 2 September 1999, Mr Jim Wallace QC, MSP, the Minister for Justice of the Scottish Executive, gave us a reference<sup>1</sup> in the following terms:

"To reconsider, as a matter of urgency, whether the conclusions, as set out in the Report on *Diligence and Debtor Protection* (1985) Scot Law Com No 95, that the diligence of pouncing and warrant sale should not be abolished remain valid. To consider whether there are alternative measures that might replace and be no less effective than this diligence within the existing structure of the diligence system while still protecting the legitimate interests of creditors in the recovery of legally constituted debt and the interests of debtors. To consult relevant interests and have regard to subsequent developments, research and other relevant factors."

1.2 We understand that this reference was a response by the Minister for Justice to the proposal for a Bill lodged on 19 August 1999 by Mr Tommy Sheridan MSP which led to his introducing the Abolition of Pouncing and Warrant Sales Bill ("the Bill") on 24 September 1999.<sup>2</sup> We published Discussion Paper No 110, *Pouncing and Sale: Effective Enforcement and Debtor Protection*, ("our discussion paper") on 30 November 1999. We also submitted<sup>3</sup> a Memorandum on the Bill to the Justice and Home Affairs Committee, the committee charged with producing a Stage 1 report on the Bill for the Scottish Parliament. One of our Commissioners and a member of our legal staff gave evidence<sup>4</sup> to the Local Government Committee which, together with the Social Inclusion, Housing and Voluntary Sector Committee, was also involved in the Parliamentary proceedings.

## Our 1985 Report and the 1987 Act

1.3 Our terms of reference require us to reconsider whether the conclusions, as set out in our Report on *Diligence and Debtor Protection*<sup>5</sup> ("our 1985 Report"), that the diligence of pouncing and warrant sale should not be abolished remain valid. In 1985 we concluded that an alternative mode of enforcement which was as effective and more socially acceptable could not be devised.<sup>6</sup> Our 1985 Report discussed the aims of reform and the main policy options for achieving them. It affirmed that the general objectives of a good law of enforcing debts by diligence were as follows:

"First, it should seek to provide effective machinery, in which creditors have confidence, whereby creditors can obtain payment of their debts. Second, within the constraints imposed by the need to maintain an effective system of enforcing debts, it should make available procedures which are designed to have proper regard to

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<sup>1</sup> Under the Law Commissions Act 1965, s 3(1)(e).

<sup>2</sup> He lodged a second proposal on 10 September 1999 as the first proposal was too narrow in scope to permit him to introduce the Bill.

<sup>3</sup> On 28 October 1999.

<sup>4</sup> On 18 January 2000.

<sup>5</sup> Scot Law Com No 95.

<sup>6</sup> Paras 2.144-2.145.

protecting those debtors who are subject to diligence from undue economic hardship and personal distress".<sup>7</sup>

Our report found that the then existing system largely attained the first objective but not the second.<sup>8</sup>

1.4 The primary aim of reform in our 1985 Report was therefore to introduce new safeguards protecting debtors subject to or threatened by diligence from undue economic hardship and personal distress. Many of these were enacted in the Debtors (Scotland) Act 1987, the first major reform of poinding and sale for almost 150 years.<sup>9</sup> The bulk of the law on poinding and sale is now contained in the 1987 Act.

### **Consultation and other material**

1.5 In spite of the very short period (two months) that our timetable allowed for consultation we received over 50 responses from a wide variety of organisations and individuals. A list of those who provided written comments on the discussion paper is in the Appendix.<sup>10</sup> We are extremely grateful to all the respondents who sent in such full and detailed comments within or shortly after the consultation period.

1.6 Representatives of the Commission also attended several seminars and conferences on the topic. We have found these instructive and have taken account of the views expressed by the participants. The Justice and Home Affairs Committee, the Social Inclusion, Housing and Voluntary Sector Committee, and the Local Government Committee have taken evidence from many organisations and we have considered carefully the points made in all the sessions.

1.7 Since our discussion paper was published the Scottish Executive Central Research Unit published a report, *Council Tax Collection Arrangements in Scotland and England & Wales* by the Institute of Revenues, Rating and Valuation. We were able to refer to this report in our discussion paper as we were kindly permitted to see a copy before publication. Another recent publication is the Joint Scottish Executive/COSLA Working Group Report *It Pays to Pay: Improving Council Tax Collection in Scotland*, published in January 2000. Both reports contain recommendations on measures to improve recovery of arrears of council tax and community charge to which we have had regard.

1.8 The Justice and Home Affairs Committee published its Stage 1 report on the Bill on 9 March 2000 which recommended that the general principles of the Bill should be accepted. The danger that immediate abolition would leave a gap in the system of diligence is recognised. The Committee therefore proposed that the Bill should become law but should not be brought into force until the Scottish Executive has had an opportunity to bring forward legislation to address other problems of debt recovery.

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<sup>7</sup> Para 2.41.

<sup>8</sup> Paras 2.40 – 2.73.

<sup>9</sup> Debtors (Scotland) Act 1838.

<sup>10</sup> Consultees requesting confidentiality have not been included in the list.

## **The SOCRU evaluation of the 1987 Act**

1.9 The reforms made by the 1987 Act were evaluated on the basis of empirical data obtained in 1991 and 1992 in a series of valuable reports by the Scottish Office [now Scottish Executive] Central Research Unit published in 1999<sup>11</sup> on which we relied in our discussion paper and refer to in this report. The SOCRU reports were confined to ordinary diligence in pursuance of court decrees as distinct from diligence under summary warrants for tax and rates arrears.

### **Structure of the report**

1.10 Part 2 of the report discusses the main policy issues involved in the proposal to abolish the diligence of poinding and sale. We conclude that the diligence should not be abolished but should continue with substantial reform to increase debtor protection, especially where poindings are carried out against individual debtors and in residential premises. In Part 3 we put forward a number of recommendations for reducing the harsh impact of the diligence on debtors. The main thrust of the reforms is to confine the use of poinding and sale to those cases where there are sufficient non-exempt goods to make the diligence economically effective. We also recommend that a poinding may not take place in a dwelling house unless the creditor has obtained a special warrant entitling him to do so. A further recommendation is that the range of goods exempt from poinding should be increased. The recommendations in this Part are confined to poinding and sale in execution of court decrees. Part 4 looks at the different summary warrant poinding procedure used to enforce local and central government taxes. We consider the extent to which the recommendations in Part 3 for the reform of ordinary poinding procedure should be applied to the summary warrant poinding procedure. In Part 5 we look at time to pay directions, time to pay orders and other ways of preventing diligence by allowing those who are unable to pay their debts in a lump sum to enter into binding arrangements with their creditors. Methods for obtaining more information about debtors and their assets in order to improve the effectiveness of diligence are also examined. Part 6 sets out the recommendations made in the earlier Parts of the report. A list of those who submitted written responses to our discussion paper forms the Appendix to this report.

### **Acknowledgements**

1.11 We acknowledged in our discussion paper the help given to us by many individuals and organisations in the production of that document. We wish to place on record in this report our gratitude to them. During the preparation of this report we had the benefit of discussions with Mr Roderick Macpherson, an experienced messenger-at-arms, who provided us with invaluable comments on the practical implications of our proposals. We wish, however, to make it clear that none of those who assisted us in the preparation of our discussion paper and of this report bears any responsibility for the recommendations in our report or any errors in it.

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<sup>11</sup> See the Table of Abbreviations above.

## PART 2 THE POLICY ISSUES

### Introduction

2.1 In this Part of our report we consider the main policy issues involved in the proposal to abolish the diligence of poinding and sale. Poinding and sale is the main diligence used against the (corporeal) moveable property of the debtor which is in his own possession. It involves officers of court visiting the debtor's premises, which in many cases is the debtor's home, to carry out a valuation of sufficient goods to cover the outstanding debt. Poinded goods are removed from the premises for sale by auction, and the proceeds of the sale are applied to pay off the debt.<sup>1</sup>

2.2 Poinding and sale has for a long time been a controversial diligence. Criticism has focused on its perceived harsh impact on debtors and their families, as well as its alleged inefficiency as a method of enforcing debt. In our 1985 Report, we conducted a detailed examination of the diligence as part of our consideration of the overall system of debt recovery in Scotland. In that report we considered proposals that the diligence should be abolished. We were not persuaded by the reasons given for these proposals and we recommended that the diligence should be retained but made subject to a wide range of reforms both to the workings of the diligence itself and to more general aspects of debt enforcement.<sup>2</sup>

### The nature of the proposal to abolish poinding and sale

2.3 The proposal we are considering in this report is that the diligence of poinding and sale should be abolished in its entirety, and that no alternative diligence is to be introduced which would operate against the debtor's moveable property in his own possession.<sup>3</sup> It is crucial in understanding the issues involved to appreciate how extensive would be the effect of implementing this proposal. Total abolition means that it is not possible to use any general diligence against the debtor's moveable property in his own possession to enforce any type of debt. However removing this type of property from the scope of the law of diligence would not mean that it would be beyond the reach of creditors who would instead be required to resort to bankruptcy processes.<sup>4</sup>

2.4 There is a very wide range of cases under the existing law in which poinding and sale is available to a creditor as a measure of debt enforcement. Examples include the following:

- (a) a shop has supplied goods to a (consumer) customer who has defaulted on making payment of the price of the goods;

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<sup>1</sup> For general discussion of the current law see Stair Memorial Encyclopaedia, vol 8, paras 217-246; G Maher & DJ Cusine, *The Law and Practice of Diligence* (1990) ch 7.

<sup>2</sup> 1985 Report, paras 2.142-2.157.

<sup>3</sup> We consider at paras 2.50-2.51 below a different interpretation of 'abolition' whereby the diligence under the present law is replaced with another but similar diligence which operates against moveable property in the hands of the debtor.

<sup>4</sup> The Bill specifically allows for the debtor's moveables in his own possession to be subject to bankruptcy and insolvency law but retains the present rule that goods exempt from poinding are also exempt from bankruptcy.

- (b) a limited company is owed a debt by another limited company;
- (c) a local authority wishes to recover arrears of council tax;
- (d) an ex-employee has made a successful claim for damages at an industrial tribunal against her former employers who now refuse to pay;
- (e) a pursuer in a small claim action is awarded decree for damages against a local firm who carried out shoddy repair work on her house;
- (f) the Child Support Agency is seeking to recover unpaid child support maintenance from the child's absent parent; and
- (g) a Scottish firm holds a decree against a foreign firm which has business assets in Scotland.

2.5 There are many other types of case where poinding and sale can be used to enforce a debt. Total abolition has the effect that the diligence is no longer available to *any* of the persons who are seeking payment in the above examples. The proposal we are considering is that there should be no diligence against the debtor's moveable property in his own possession, no matter the circumstances of the debtor and no matter the circumstances of the creditor.

### **Principles of reform of the diligence**

2.6 In our 1985 Report we reached the conclusion that the diligence of poinding and warrant sale should not be abolished but that the diligence as it then existed had defects which required reform. We stated that conclusion in the following terms:<sup>5</sup>

"2.144 ...[I]n considering whether a particular mode of enforcement has outlived its usefulness and is ripe for abolition, there is an important limiting factor which must be borne in mind. Every society which holds to the belief that people able to pay their debts should be required by law to do so must make available to creditors modes of enforcement from a field of choice which is limited by economic and social realities to diligence against the debtor's person (i.e. civil imprisonment for debt), or diligence against his heritable or moveable property or his income. All these modes of enforcement are necessarily coercive and in any given legal system at any given time it frequently happens that a particular mode of enforcement is especially unpopular....

2.145 In recent years, the diligence of poinding and warrant sale has become probably the most unpopular diligence in Scotland as well as being the most frequently used. It is tempting to conclude from this that the diligence can simply be abolished as a humanitarian reform equivalent to the virtual abolition of civil imprisonment and as the logical next step in the progressive development of the law. We think that this temptation should be resisted unless it can be demonstrated that an alternative mode of enforcement can be devised which would be as effective and

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<sup>5</sup> Paras 2.144 -2.145.

more socially acceptable. Having considered the matter anxiously and at length, we believe that such an alternative cannot be devised."

2.7 The present reference requires us to reconsider whether that conclusion remains valid. The underlying premise of our reasoning in the 1985 Report was set out in the two general objectives which the law of diligence should seek to achieve. Those objectives are as follows:

"First, it should seek to provide effective machinery, in which creditors have confidence, whereby creditors can obtain payment of their debts. Second, within the constraints imposed by the need to maintain an effective system of enforcing debts, it should make available procedures which are designed to have proper regard to protecting those debtors who are subjected to diligence from undue economic hardship and personal distress."<sup>6</sup>

2.8 The conclusion set out in that report was based on the view that the then law in general terms achieved the first objective but failed to achieve the second objective in significant ways.<sup>7</sup> Accordingly the report pursued the general strategy of keeping the diligence of poinding and sale but introducing a wide-ranging set of proposals to secure a much greater degree of debtor protection.<sup>8</sup> The primary aim of reform was therefore to introduce new safeguards protecting debtors subject to or threatened by diligence from undue economic hardship and personal distress. Most of these recommendations were enacted in the Debtors (Scotland) Act 1987. Our recommendations included:

\*the introduction of time to pay directions and orders;<sup>9</sup>

\*wide ranging reforms of poinding and sale;<sup>10</sup>

\*the introduction of earnings arrestments and other continuous diligences against earnings replacing "single shot arrestments";<sup>11</sup>

\*reforms of diligence enforcing fiscal debts including diligence under summary warrants;<sup>12</sup>

\*abolition of civil imprisonment for failure to pay rates or tax;<sup>13</sup> and

\*a package of measures designed to assist unrepresented debtors to make use of the protections provided.<sup>14</sup>

One major recommendation - the introduction of debt arrangement schemes – was rejected.<sup>15</sup>

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<sup>6</sup> Para 2.41.

<sup>7</sup> Paras 2.40 – 2.73.

<sup>8</sup> Paras 2.40 – 2.73.

<sup>9</sup> Chapter 3 implemented by 1987 Act, Part I.

<sup>10</sup> Chapter 5 implemented by 1987 Act, Part II. These are detailed at para 2.42 below.

<sup>11</sup> Chapter 6 implemented by 1987 Act, Part III.

<sup>12</sup> Chapter 7, implemented by 1987 Act, Part IV and Schedules 4 and 5.

<sup>13</sup> 1987 Act, s 74(3).

<sup>14</sup> Chapter 9, implemented by 1987 Act, Part VII.

<sup>15</sup> See paras 5.52-5.61 below. Other reforms included the regulation of the service and profession of officers of court (messengers-at-arms and sheriff officers) Chapter 8, implemented by 1987 Act, Part V.

2.9 The more recent arguments for the total abolition of the diligence of poinding and sale have attacked the diligence for failing on both of the objectives we identified in our 1985 report. It is argued that the diligence is an ineffective method of enforcing debt and that it is also one which has a harsh impact on those debtors who come within its scope.<sup>16</sup>

2.10 In order to assess the continuing validity of our previous conclusion in the light of arguments for total abolition of the diligence, it is necessary to state the general principles of the law of diligence in a more detailed way than appeared in our 1985 Report.

2.11 In that report we identified two basic principles, namely effective enforcement and debtor protection. We now consider that the manner in which those principles were stated could be misleading in that it might suggest that debtor protection is always a secondary consideration and that the primary principle is effective enforcement. Instead our view is that the general law of diligence, as well as the law of particular diligences, must always embody aspects of each of these two principles. Accordingly the law on poinding and sale must satisfy both criteria of effectiveness and debtor protection. The central question is how the balance between the two should be made.

2.12 We return later to a detailed consideration whether the version of the diligence as reformed by the 1987 Act satisfies these two fundamental principles.<sup>17</sup> In addition there are a number of further principles which we believe were implicit in our previous approach but which might be better stated in a more direct fashion.

#### (1) **The rule of law**

2.13 A fundamental principle which must inform any measure of law reform is that the requirements of the rule of law are respected. The basic idea behind the rule of law is that where the law confers a right on any person, it must also supply an effective mechanism to make the right genuine and real in its practical effect. A legal system which confers rights in the abstract and on paper only but does not supply such a mechanism, is taking away with the one hand what it has given with the other. This fundamental principle has an obvious but highly significant application to the present issue, for our legal system confers a right to receive payment on a wide range of persons over a variety of circumstances. This includes persons who hold a court decree in their favour. It is also a feature of the present law on poinding and sale that debtors are given rights to protect their interests against harsher aspects of the diligence.

2.14 How does the proposal to abolish poinding and sale cohere with this fundamental principle? On one view total abolition of poinding and sale would breach the principle of the rule of law. Creditors holding a decree or its equivalent have been granted the right to receive payment of debts owing by their debtors. Where the only property which the debtor owns is moveable property in his own possession, the creditor would be denied a

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<sup>16</sup> These points of criticism, especially the intrusive and potentially traumatic effect on debtors, are well illustrated in the evidence given to the Committees considering the Bill to abolish the diligence. See, for example, Justice and Home Affairs Committee Official Report, 17 November 1999, cols 403-419 (evidence of Tommy Sheridan MSP and Govan Law Centre); *ibid*, 11 January 2000, cols 558-564 (Scottish Consumer Council); Social Inclusion, Housing and Voluntary Sector Committee Official Report, 17 November 1999, cols 307-327 (Communities Against Poverty Network); *ibid*, 12 January 2000, cols 500-512 (Citizens Advice Scotland); Local Government Committee Official Report, 12 January 2000, cols 440-449 (Glasgow City Council Protective Services), cols 449-454 (Glasgow Braendam Link)

<sup>17</sup> See paras 2.25-2.43.

mechanism for giving effect to his right. However where the debtor owns moveable property in the hands of a third party (as with a bank account or earnings), the creditor would be able to take steps to recover the debt. The rights of creditors holding decrees to receive payment would be different for the sole reason that their respective debtors possessed different types of assets. From the perspective of creditors, the law would be failing to treat like cases alike.

2.15 Furthermore from the perspective of certain debtors, abolition would also result in a failure to treat different cases differently. A debtor whose assets consisted of heritable property, or moveable property in the hands of a third party or earnings would find that property liable to be subject to the diligence of creditors. However all debtors whose only assets were in the form of moveables in their own possession would be exempt from diligence altogether. This situation would apply to debtors who owned luxury goods in exactly the same way as it applied to debtors who owned only the basic necessities for living. While there are clear reasons for extending protection to debtors in the second category, there are no obvious policy grounds for equally protecting those in the first.

2.16 We take the view that there is considerable force in this argument. We accept that a legal system should not draw arbitrary distinctions between the rights of creditors. Where a creditor is to be denied the right to enforce a debt against his debtors' moveable property, there must be good reasons for doing so, and these reasons must apply equally to all creditors.

2.17 The rule of law also has a significant role to play in protecting debtors from the harsher aspects of poinding and sale. In our 1985 Report we recommended that debtors facing the prospect of poinding and sale should be granted a package of rights to protect their interests,<sup>18</sup> recommendations which were substantially enacted in the 1987 Act. We later examine the extent to which these rights have failed to help debtors. One reason for this failure, and one which was emphasised by many of our consultees, is that several of the key rights require initial action by debtors who for various reasons, especially lack of awareness of their rights or lack of access to appropriate advice, are unable to take it. We conclude that the 1987 Act did not strike the correct balance between debtors' rights which require action by the debtor and those which are given effect to in a more direct way, for example by rules requiring creditor application or judicial supervision. We also accept that for more effective debtor protection, debtors need greater opportunity for receiving appropriate advice.

## **(2) The principle of least coercion**

2.18 Where a choice is available between the use of different legal procedures, preference should normally be given to that which involves the least coercion. This principle is illustrated by the way in which Scots law has for long preferred diligence against the debtor's property as opposed to diligence against his person. We applied this principle in our 1985 Report. There we adopted the strategy that the diligence of arrestment and the new diligences of arrestments against earnings were less intrusive than was poinding and sale in their operation against the debtor. Accordingly, where a creditor had an option of using more than one diligence to recover a debt, the law should facilitate his opting for

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<sup>18</sup> Para 2.155 and chapter 5.

arrestment or earnings arrestment rather than poinding and sale. On the whole this strategy has been successful. The SOCRU research shows that creditors view the reforms to poinding and sale in the 1987 Act as making the diligence less attractive than other diligences such as earnings arrestment, and in pursuing a debt creditors prefer to use arrestment.<sup>19</sup> The SOCRU research did not deal with recovery under summary warrant. In our discussion paper we noted the views of local authorities on the effectiveness of the different recovery procedures available to them, as set out in the IRRV Report.<sup>20</sup> The overall picture is not straightforward but the most effective mechanism was thought to be deduction from benefit, followed by earnings arrestment. Common law arrestment was rated next equal with poinding alone (ie without sale), followed by poinding and sale.

2.19 The principle of preferring the least coercive mechanism has further applications in the context of the present reference. The vast majority of our consultees were of the view that earnings arrestment and to a lesser extent bank arrestments were less coercive diligences than poinding and sale, and that where a debtor had earnings or other funds, arrestment was to be preferred. However a major obstacle to a creditor using arrestment is that he requires information as to the debtor's employment or bank details, information he is less likely to have than the details of the debtor's address. Accordingly there must be some means whereby this information can be passed on to the creditor. In the discussion paper we asked whether there should be compulsory means enquiries of debtors, one function of which would be to provide information of this type. We take the view that compulsory means enquiries are not likely to be effective and are also in breach of the principle of preferring to minimise the amount of coercion in the debt enforcement process. Virtually all of our consultees agreed with this conclusion.

2.20 In the discussion paper we also canvassed a proposal that failure of a debtor to provide local authorities with details of his employment and bank account should be a criminal offence as opposed to merely leading to a civil penalty as under the current law. We also considered whether there should be a statutory offence of failure by an employee subject to an arrestment against earnings to notify the creditor or sheriff clerk of changes to his employment circumstances.<sup>21</sup> We take the view that as far as possible the process of debt recovery should avoid resort to criminal sanctions, a position adopted by the vast majority of our consultees. Our preference is that the provision of the information required for arrestment to be used instead of poinding and sale should be voluntary on the part of the debtor. We discuss this further in Part 5 of this report.

2.21 There is a further application of the general principle of preferring the least coercive option. All diligence is by its very nature coercive. Accordingly preference should be given to procedures for recovery of debt which bypass diligence altogether. We have been impressed by the evidence before the Parliamentary committees and from our consultees that the current law does not adequately allow for these procedures, especially in relation to time to pay provisions under the 1987 Act, multiple debt, and access to legal advice. We also deal with these issues in Part 5.

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<sup>19</sup> Platts, *SOCRU Overview*, p 46, paras 28 and 29; p 68, para 8.

<sup>20</sup> Paras 2.34-2.43 and Table H.

<sup>21</sup> These procedures currently exist in English law: Local Government Finance Act 1992, Sch 4, para 18; Council Tax (Administration and Enforcement) Regulations 1992, regs 47, 48 and 56; Attachment of Earnings Act 1971, ss 15 and 23.

### **(3) The principle of appropriateness**

2.22 Legal procedures should be designed to achieve their set objectives in as direct a manner as possible and to avoid or minimise having an impact on other procedures with different objectives. This principle requires that the law should identify the objectives of any procedure and set out the most appropriate way of achieving them. In the context of enforcement of debt, this principle requires drawing a distinction between three different objectives which the law may be seeking to achieve. First, the law has to deal with the situation where a person has defaulted on payment of a debt and the law provides a mechanism for attaching the assets of the debtor with a view to realising them (as by sale) to satisfy the debt.<sup>22</sup> We see this objective as being the concern of the law on diligence in execution.<sup>23</sup> A second situation is where a debtor is insolvent, that is he does not have enough assets to pay all his debts. Here the appropriate legal mechanism is the law of bankruptcy which provides a procedure for the orderly realisation of the debtor's assets, followed by distribution of the proceeds to his creditors and release of the debtor from his debts. A third, and further, situation is where a debtor has attachable assets but is faced by demands from a number of creditors. The phenomenon of multiple debt has featured in much of the debate on abolition of pouncing and sale, and we recognise that apart from sequestration (which is primarily dealing with debts owed by an insolvent person), the law does not provide an effective means of dealing with multiple debt.

2.23 This principle has relevance in the present context in various ways. Total abolition of pouncing and sale without a direct replacement diligence requires considering whether other existing diligences could operate against the debtor's moveable property in his own possession. To the extent that pouncing and sale is used as a means of debt enforcement then it is preferable to look for a substitute diligence rather than some other mechanism, for example insolvency procedures. A further point which has been made to us in consultation as an argument against using pouncing and sale is that the diligence is unsuitable where a debtor is in a multiple debt situation and that in practice it is often used in this situation. In principle we accept that individual diligences are not ideally suited for dealing with multiple debt and we consider below how best to resolve problems arising from multiple debt.<sup>24</sup>

2.24 We now consider the extent to which the diligence of pouncing and sale does not achieve the objectives required by the principles of effective enforcement and debtor protection.

### **(4) Effective enforcement**

2.25 One objective which we identified for all diligence, including pouncing and sale, is that it is an effective mechanism for the enforcement of debt. Before we can assess how far pouncing and sale meets this objective, we must re-iterate two important preliminary points

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<sup>22</sup> The law also allows diligence to proceed against the person, as opposed to the property, of the debtor, as in the case of civil imprisonment. Historically Scots law has never given prominence to civil imprisonment as part of the law of diligence and at present civil imprisonment is a very marginal part of the law.

<sup>23</sup> Diligence also serves other functions. Diligence on the dependence provides protection to persons pursuing a claim prior to the determination of the action. In this report we are not concerned with this function of the law of diligence which involves different underlying principles.

<sup>24</sup> Paras 5.52-5.61.

which we made in our 1985 Report and our discussion paper.<sup>25</sup> First, firm and complete information on the amounts recovered at particular stages of debt recovery, court action and diligence is lacking because creditors' records are generally not arranged by reference to these stages but in some other way.<sup>26</sup> It is therefore necessary to rely on the various research reports (which provide valuable information on this matter) and on consultation.

2.26 Second, whether the system of diligence is effective depends to some extent on what criterion of effectiveness is used. On one view the effectiveness of pouncing and sale is to be measured only by looking at the cases in which that diligence has been used to completion. A different approach is to have regard not only to the diligence stage but also to the earlier stages of informal collection by creditors and to the court action stage. For reasons stated below we believe the second approach is the correct one in measuring the effectiveness of pouncing and sale.

2.27 As far as data on debt recovery and diligence are concerned, in our discussion paper we set out figures on<sup>27</sup>

(1) decreases in debt action over the period 1984-1998 and the number of warrant sales executed in each of those years.

(2) each stage of pouncing and sale over roughly the same period.

(3) diligences, including pouncing and sale, proceeding under summary warrant between 1996-1998.

We also summarised the discussion of the diligence's effectiveness made in several of the SOCRU Reports based on data in 1991-92.<sup>28</sup>

2.28 A crucial point in this whole issue is a phenomenon which we have described as the filter effect of debt recovery and enforcement. At any one stage of the debt recovery process and in diligence, fewer and fewer cases proceed to the next stage. This phenomenon comes about because the use by a creditor of one stage carries with it the threat, implicit or explicit, that if the debtor does not make payment, the creditor will proceed to the next stage.

2.29 We wish to make it plain that we see nothing inherently objectionable in using a threat to proceed to court action, and thereafter to the various stages of diligence, as means of eliciting payment from a debtor. It is a fundamental aspect of the rule of law that debts should be paid and that the legal system should provide effective and fair mechanisms for compelling payment where the debtor has defaulted. A system which allowed payment of all debt to be purely voluntary would be unworkable.<sup>29</sup>

2.30 We conclude from the data we examined in the discussion paper that on the whole pouncing and sale is an effective diligence in enforcing debt. It clearly has an impact as part

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<sup>25</sup> 1985 Report, para 2.44; discussion paper, paras 2.23-2.24.

<sup>26</sup> B Doig and A Millar, *Debt Recovery – A Review of Creditors' Practices and Policies*, Central Research Unit, Scottish Office (1981), para 7.5

<sup>27</sup> Paras 2.9-2.21.

<sup>28</sup> Paras 2.25-2.43.

<sup>29</sup> At the same time creditors should not be allowed to make entirely empty threats which trade on debtor ignorance, for example by threatening the use of pouncing or sale where these procedures would be incompetent.

of the filter effect in both the general system of debt recovery, and within the diligence itself, as one stage of the diligence is followed by another stage. On this approach it is perfectly consistent to see the fewer number of cases that proceed to the final stage of warrant sale as an indicator of the diligence's effectiveness.

2.31 In recent discussions three main objections have been raised against regarding pouncing and sale as an effective method of enforcing debt.<sup>30</sup> These are as follows:

(a) the filter effect has its greatest impact at the very earliest stages of the debt recovery process. If pouncing and sale were totally abolished without a replacement diligence, this change would have little impact on the workings of the filter effect as there is no evidence that it is the specific threat of pouncing and sale which induces debtors to pay up at the early stages.

(b) the diligence is inefficient because the number of steps involved in using it to completion adds to the overall cost and increases the amount of debt.

(c) the diligence lacks effectiveness in the cases which proceed to the final stage of warrant sale, as in those cases the diligence virtually never clears the outstanding debt and in some cases has no impact at all on the amount of debt.

2.32 We are of the view that these objections either are not sound or do not justify total abolition of the diligence as opposed to its reform. We consider each objection in turn.

2.33 (a) We question the assumption on which this argument is founded. A debtor who does not believe that a threat to use court action or diligence is real will not react to it by making payment. The efficacy of the earlier stages of the filter process depends upon the debtor's perception that there is a high probability that if payment is not made now, then the creditor will indeed proceed to the next stage, and ultimately to the final stage of using (and completing) diligence. It follows that if debtors are aware that the diligence of pouncing and sale is abolished and no direct replacement made for it, they will know that creditors cannot threaten diligence against their moveable property in their own possession. For any debtor who owns this type of property, the filter effect will be lessened and for a debtor who owns no other type of property, its effect will disappear altogether.

2.34 In our discussion paper we asked consultees how they perceived the effect of total abolition of pouncing and sale on recovery of ordinary debts and tax and rates arrears. Very few consultees thought that for both types of debt there would be no adverse effect. The vast majority considered that the effect would be either serious or very serious in preventing recovery.

2.35 (b) A frequently-made objection to pouncing and sale is that the diligence is a costly one because of the various stages involved in executing it.<sup>31</sup> Each of these stages involves costs which are passed on to the debtor to be recovered by the diligence. The overall effect is that the diligence itself increases the size of the debt. To a considerable extent we accept the

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<sup>30</sup> We are not concerned at this juncture with criticism of the diligence that it does not adequately protect the debtor subject to it. We deal with debtor protection in the next section.

<sup>31</sup> Where the diligence proceeds in execution of a decree the main stages are service of the charge, the carrying out of the pouncing, report of the pouncing, application for warrant of sale, removal of goods for sale, sale by auction, and report of sale. Summary warrant pouncings do not involve all of these stages: see Part 4 para 4.2.

basic premise of this argument but we feel that there are other considerations which reduce its force.

2.36 In the first place the number of stages of the diligence allows for the filter effect to operate so that there are far fewer cases at the final stage than at each preceding stage. But secondly and crucially there are good reasons why the diligence has so many stages. Compared with other diligences, pointing and sale is intrusive as it involves officers of court entering the debtor's premises, which in many cases is his home, both to execute the pointing and to remove the goods for sale. Many of these stages exist as measures of debtor protection and many of them allow for judicial supervision and control in order to protect the debtor from being subjected unnecessarily to the next stage.<sup>32</sup> We believe that this method of debtor protection is justified. As a result of our proposal in our 1985 Report a further stage of the diligence (removal of the goods for sale) was introduced by the 1987 Act. At that time we saw this reform as a key part of debtor protection, and we believe that it has been successful in achieving that objective. Later in this report we recommend that in the case of pointing in dwellinghouses, there should be yet a further stage of the procedure (application for special warrant to point), which we justify as a crucial measure of debtor protection.<sup>33</sup> We fully accept that this proposal does involve the diligence being more complex and potentially more costly to the debtor, but we feel that the need to provide for debtor protection outweighs this ground of objection.

2.37 (c) The third objection focuses on those cases which proceed to the final stage of sale of the pointed goods. Its point is that what the diligence recovers rarely extends beyond the expenses of the diligence itself. A debtor can then find himself taken through all the stages of pointing and sale without there being any reduction of the amount of debt owed by the debtor before the diligence started. The first point to note is how few cases reach the stage of warrant sale, between one in 23 and one in 12 pointings for ordinary debt cases and between one in 45 and one in 30 in summary warrant cases.<sup>34</sup> Secondly it is important to bear in mind the exact extent to which these cases can be said to make no or little impact on the initial debt.<sup>35</sup> The SOCRU survey of the 1991-2 data reported that 8% of sales carried out against business debtors recovered the total debt (initial debt, court expenses and diligence expenses) and in a further 46% of these sales the proceeds recovered all the expenses and some of the initial debt. However the position was different for sales against private individuals. In no case did a warrant sale against a private individual clear the initial debt plus all the court and diligence expenses, and in only 17% of these cases did the proceeds make some inroad into the amount of the initial debt.

2.38 What is clear is that there are cases in which warrant sales are being carried out where the proceeds of sale fail to cover the expenses of sale. We consider that this is a valid criticism of the current law. The 1987 Act sought to prevent this by empowering the sheriff to refuse warrant of sale if the likely aggregate proceeds of sale would not exceed the expenses likely to be incurred in applying for and executing the warrant of sale.<sup>36</sup> We are

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<sup>32</sup> The clearest example of this function is with the separate application for warrant to sell.

<sup>33</sup> Recommendation 3, para 3.27.

<sup>34</sup> See discussion paper, chapter 2, Tables C and D.

<sup>35</sup> Fleming, *SOCRU Survey of Pointings and Warrant Sales*, p 26 Table 16 (individual debtors), p 40 Table 28 (business debtors).

<sup>36</sup> 1987 Act, s 30(2)(a)(ii) as read with s 24(3)(c).

now of the view that although the underlying policy of this provision is correct, it requires to be extended further.<sup>37</sup>

2.39 Our view on this objection is that it is a slender basis on which to base an argument for the total abolition of the diligence. It does point to various difficulties in the present law, but we believe that the problems which do exist as regards the proceeds of sale can be more appropriately dealt with within the general framework of the existing law.

#### (5) Debtor protection

2.40 A further possible ground for the abolition of pouncing and sale is that the present law does not succeed in achieving adequate debtor protection. In our discussion paper we set out extracts from the SOCRU research which clearly show that several of the provisions on debtor protection in the 1987 Act were not fully effective.<sup>38</sup> This is especially the case in relation to the provisions on time to pay. In respect of pouncing and sale the research also indicated that debtors subject to the diligence suffered considerable distress. Debtors described the experience of pouncings variously as frightening, stressful, intrusive, embarrassing, and humiliating. The experience of the uplift of goods was commonly referred to as "traumatic". Some reported that after the pouncing they had suffered health problems which they attributed to the levels of stress that they had experienced.<sup>39</sup> Furthermore a significant number of debtors who experience pouncing saw it not as an effective method of extracting payment but either as a means of punishing debtors or to make an example of some debtors to encourage others to pay.<sup>40</sup> It is also thought that creditors exploit debtor ignorance (for example of their rights to challenge the diligence or to apply for time to pay orders) to threaten them into making payment even although the diligence might not have been successful or valid if carried out.

2.41 We accept the force of these criticisms of the present law. However we do not hold that these defects inevitably lead to the conclusion that pouncing and sale must be abolished in its entirety or that it is not possible to remedy these defects within the general framework of the existing diligence. In particular these criticisms have little application to the use of the diligence in commercial cases.

2.42 We also reject the view that advancing debtor protection by reform as opposed to abolition cannot work. The 1987 Act made a significant number of reforms to the law on pouncing and sale. These include

- (1) *Restriction on power of forcible entry.* Officers are no longer entitled to enter empty houses or houses with unattended children under 16 unless at least 4 days' prior notice of intended entry has been given to the debtor, unless the sheriff's authorisation has been obtained.<sup>41</sup>
- (2) *Exemptions.* The range of exemptions from pouncing of household goods and certain other goods was increased considerably. The range of exempt goods now covers,

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<sup>37</sup> See paras 3.2-3.16.

<sup>38</sup> Paras 2.44-2.50.

<sup>39</sup> Whyte, *SOCRU Study of Debtors*, pp 49-51; 59; 65; 84, 85.

<sup>40</sup> *Ibid*, p 54, para 50.

<sup>41</sup> 1987 Act, s 18.

among other things, a long list of items reasonably required for the use of the debtor and the members of his household.<sup>42</sup>

- (3) *Release and redemption of poinded goods.* The debtor was given increased rights to redeem poinded goods or have them released from the poinding. Under the 1987 Act he can apply to the sheriff for the release of exempt goods and for the release of individual items on the ground of undue harshness.<sup>43</sup> He may also redeem goods at their appraised values,<sup>44</sup> and has a second chance of redemption if the creditor applies for warrant of sale.<sup>45</sup>
- (4) *Recall of poinding or refusal of warrant of sale.* At any time after a poinding and before the creditor applies for warrant of sale, the debtor has a right to apply to the sheriff for recall of the poinding on the ground that:
  - (a) the eventual grant of warrant of sale would be unduly harsh; or
  - (b) the total appraised value of the poinded goods is substantially below their likely total open market value; or
  - (c) the likely proceeds of sale would not be likely to cover the expenses incurred in applying for warrant of sale and in completing the diligence.<sup>46</sup>

These are also the grounds on which the sheriff may refuse to grant warrant of sale at the later stage when the creditor applies for such a warrant.<sup>47</sup> Thus in cases where warrant of sale would not be granted, the debtor need not remain under the uncertain threat of sale but can have the poinding recalled. Recall of the poinding is also competent on the ground that the poinding is invalid or has ceased to have effect (for example if the debt has already been paid).<sup>48</sup>

- (5) *Debtor's right to oppose warrant of sale.* The debtor has a right to be informed of the creditor's application to the sheriff for warrant of sale, and a right and opportunity to intervene to oppose the application on any of the grounds mentioned above.<sup>49</sup>
- (6) *No newspaper advertisements publicising sales.* Before the 1987 Act, debtors disliked and indeed feared newspaper advertisements of sales in the home even more than the sale itself, and the problem of low prices at warrant sales was well known. On social grounds and to secure so far as possible better prices, the 1987 Act provides that warrant sales of goods poinded in a debtor's or other person's dwelling should take place in an auction room rather than in the dwelling. Sales in a dwelling are permitted only if the occupier, and if he is not the occupier, the debtor, has

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<sup>42</sup> 1987 Act, s 16(1) and (2).

<sup>43</sup> 1987 Act, ss 16(4), 23(1). The release of goods from a poinding would not bring the whole poinding to an end unless all the goods were released. Release is thus to be contrasted with recall of a poinding which always terminates the whole diligence.

<sup>44</sup> 1987 Act, s 21(4). The officer values each item when poinding it. The value put on it is termed the appraised value. For valuable or unusual items the officer may obtain a valuation from an expert valuer.

<sup>45</sup> 1987 Act, s 33(2).

<sup>46</sup> 1987 Act, s 24(3).

<sup>47</sup> 1987 Act, ss 30(1),(2).

<sup>48</sup> 1987 Act, ss 24(1).

<sup>49</sup> 1987 Act, ss 30(3),(4).

consented in writing. Public notices of warrant sales must not identify the debtor unless the sale is, with his consent, to be held in his premises.<sup>50</sup> As a result of these reforms, sales in dwellinghouses and the newspaper advertisements publicising such sales have been virtually abolished.<sup>51</sup>

- (7) *Restriction on second poinding in same premises for same debt.* To ensure that debtors do not remain perpetually under threat of poinding for a particular debt, a restriction is imposed on second poindings on the same premises for the same debt.<sup>52</sup>
- (8) *Relaxing time limits to allow payment arrangements after poinding.* To enable adequate informal instalment arrangements to be made, a period of one year (instead of six months under the previous law and practice) between the poinding and the application for warrant of sale is allowed, subject to extension by the sheriff on cause shown.<sup>53</sup>
- (9) *Relaxing time limits to allow payment arrangements after warrant of sale.* In order to encourage instalment settlements, following the grant of warrant of sale, the creditor is entitled to cancel arrangements for the sale and make an instalment arrangement secured by an extension of the poinding. To prevent the diligence from continuing indefinitely, this is possible on two occasions only and the extension is limited in time.<sup>54</sup>
- (10) *No threat of uplifting goods after sale.* Creditors to whom poinded goods are transferred in default of sale are prevented from using the threat of uplifting them as a means of putting further pressure on debtors to pay.<sup>55</sup>

2.43 These measures have achieved considerable success in increasing debtor protection. A crucial point which emerges from the SOCRU research is that the debtor protection measures of the 1987 Act have greater success when they are in the form of rules which call for application to be made by the creditor rather than by the debtor or which require judicial supervision of the diligence. Comparatively little use has been made of applications by debtors for release of goods from poinding or for recall of the poinding. Few debtors have objected to the creditor's application for warrant of sale. By contrast, the statutory list of goods exempt from poinding has on the whole had the desired effect of ensuring that reasonably required household goods are not poinded and sold. The number of sales in dwellinghouses has fallen significantly. We conclude that proceeding by reform of the

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<sup>50</sup> 1987 Act, ss 32(1)-(3) and 34(5).

<sup>51</sup> The SOCRU research found that officers hardly ever sought consent for a sale in a dwellinghouse (Fleming, *SOCRU Study of Facilitators*, p 49, para 36); that no sheriff interviewed could remember granting warrant to sell in a dwellinghouse (*Ibid*, p 79, para 32); and that no warrant sale instructed against an individual took place in that person's home (Fleming, *SOCRU Survey of Poindings and Warrant Sales*, p 27, para 33). It is true that the *Civil Judicial Statistics: Scotland for 1989 – 1993* record that between 15% and 19% of all warrants for sale designated the place of sale as the debtor's home. However the SOCRU researchers, after analysis of the court records, considered that these figures overstate the proportion of sales in homes (Fleming and Platts, *SOCRU Analysis of Diligence Statistics*, p 20, para 10).

<sup>52</sup> 1987 Act, s 25.

<sup>53</sup> 1987 Act, s 27(1) and (2).

<sup>54</sup> 1987 Act, s 36.

<sup>55</sup> 1987 Act, s 37(6) and (7).

existing law can achieve greater debtor protection. We accept that as far as possible proposals for additional debtor protection should be in the form of rules requiring creditor application and judicial supervision rather than provisions entitling debtors to apply to the court for protective orders.

### **Avoiding legal isolationism**

2.44 A point which has been made in recent calls for reform is that Scots law should not be out of step with other legal systems in methods of debt enforcement. This principle has been invoked as an argument for abolition of the entire diligence or radical reform to some part of it. For example, it is sometimes said that Scotland is unique in having a debt enforcement procedure which attaches moveable property in the debtor's possession or that Scots law is the only legal system, or one of a very few, which grants officers of court power of entry in executing the diligence.<sup>56</sup> These specific views involve a misunderstanding of the position in other legal systems. Nonetheless we accept that the principle on which they are based is a relevant one. When making any recommendation for reform of the law of Scotland, we should seek to give effect to the primary objectives of the branch of law in question. However, an important secondary principle of law reform is that Scots law, as far as is consistent with those primary objectives, should be in conformity with general principles followed in other legal systems.

2.45 In our discussion paper, we set out the position on enforcement against moveable property in England and Wales and in 41 other legal systems in Europe and the Commonwealth.<sup>57</sup> The conclusion we reached was that all of the legal systems we examined provided creditors with a method of enforcing decrees and judgments against articles of corporeal moveable property owned by the debtor in his own possession. In some systems, such as England and Wales, this form of diligence is the most common method of enforcing judgments. In almost every system there are exemptions from the general principle that corporeal moveables are subject to attachment for debt, but in no system does this exemption extend to every type of such property.

2.46 From our survey of other legal systems we conclude that total abolition of diligence and sale would breach the principle of avoiding legal isolationism. What that principle does suggest is that Scots law should retain the diligence subject to reform of any weaknesses in the present law.

### **European Convention on Human Rights**

2.47 In our discussion paper, we considered an argument that the existing law on poinding and sale was itself in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>58</sup> We noted that if this argument was correct, then abolition of the diligence would not simply be an option, but instead a requirement for reform. However on examining the details of the provisions of the Convention itself and the relevant case law, we concluded that the law on poinding and sale did not breach the

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<sup>56</sup> On this last point see, for example, Mr John McAllion MSP, Official Report of the Social Inclusion, Housing and Voluntary Sector Committee, 1 December 1999, col 389; Mr Tommy Sheridan MSP, *ibid*, 12 January 2000, col 508. We deal with powers of entry at paras 3.32-3.39.

<sup>57</sup> Paras 2.54-2.68 and Appendix.

<sup>58</sup> Paras 2.69-2.75.

Convention. We considered cases on article 6 (the right to a fair and public hearing), article 8 (the right to respect for private and family life) and article 1 of protocol no 1 (right to peaceable enjoyment of possessions) but in none of these cases could we find any basis for the claim that the law on pouncing and sale is in breach of those provisions. On the contrary we noted that in the case *K v Sweden*<sup>59</sup> the European Commission on Human Rights examined a procedure in Swedish law which had strong parallels with pouncing and sale (including provisions on forcible entry). The Commission rejected an argument that the Swedish procedure was in breach of article 8 of the Convention. We took the view that the same conclusion applies to pouncing and sale. Since the publication of the discussion paper we have re-examined the provisions of the Convention. We are still of the opinion that abolition of pouncing and sale is not required by the Convention.

2.48 There is a further matter which we did not consider in the discussion paper but which has arisen during the consultation period. We have received the suggestion that total abolition of pouncing and sale without a replacement diligence to attach corporeal moveables in the possession of the debtor would itself be in breach of the Convention and thus beyond the legislative competence of the Scottish Parliament. This view is premised on the position of a creditor who holds a decree for payment but is unable to enforce it even though the debtor has assets in the form of moveables in his own possession. It is argued that such a creditor would be deprived of the right to a fair hearing (contrary to article 6) and to his right of peaceable enjoyment of his property (contrary to article 1 of protocol no 1). We are uncertain whether this argument is well founded and we are unable to identify any direct basis for it in the existing case law on the Convention. Accordingly we do not reach any concluded view on this matter, but we feel that it is right to mention it as something which may have a bearing on the debate on the legislative options on the law of pouncing and sale.

### **Alternative measures**

2.49 Our terms of reference require us to "consider whether there are alternative measures that might replace and be no less effective than this diligence within the existing structure of the diligence system while still protecting the legitimate interests of creditors in the recovery of legally constituted debt and the interests of debtors." We have interpreted these terms widely and have considered alternative measures in the sense of

- (1) a replacement diligence against moveable property in the debtor's possession;
- (2) existing diligences other than pouncing and sale;
- (3) insolvency processes.

#### **(1) A replacement diligence**

2.50 One possible sense of an alternative to pouncing and sale is to devise an entirely new diligence for Scots law, perhaps modelled on those in other legal systems, to be used against the debtor's moveable property. This approach would involve considering the general principles of the new diligence as well as working out its detailed provisions, and the overall

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<sup>59</sup> Application No 13800/88 (1 July 1991).

outcome would be an exercise no different from that in which we engaged in our previous and present reports.

2.51 Potentially the only noticeable change might be that the diligence would have a new name. We recognise that the word 'poining' and even more the phrase 'warrant sale' have highly emotive connotations, and that there may be some symbolic value in changing the name of the diligence while retaining its substantive provisions. However we would stress the limited nature of this change. It is not one we recommend.

## **(2) Existing diligences**

2.52 In our discussion paper, we examined other existing diligences available to creditors generally, namely civil imprisonment, common law arrestment, arrestments against earnings, admiralty arrestments, adjudication, and inhibition. We took the view that if poining and sale were abolished none of these other diligences could be used as a means of identifying and attaching the moveable property of debtors in their possession.<sup>60</sup> The overwhelming majority of respondents agreed with this view.

2.53 We also considered whether any of the other existing diligences could provide an adequate incentive for payment (the so-called spur to payment role).<sup>61</sup> We specifically looked at civil imprisonment in this context. In terms of the general principle identified at paras 2.18-2.22 above, replacing poining and sale by civil imprisonment would breach the principle of preferring the least coercive process. As we pointed out in our discussion paper, civil imprisonment either as a direct form of diligence or as a part of a compulsory means enquiry procedure would be likely to cause much greater distress to debtors than does the existing procedure of poining and sale. We expressed the opinion that introducing civil imprisonment as a central part of the law of diligence would be regarded as retrograde and unacceptable on grounds of social policy.<sup>62</sup>

2.54 Although one or two respondents thought that civil imprisonment could have a role to play in the law of diligence over and above its present use in the recovery of aliment, the vast majority agreed with our tentative conclusion on this point.

2.55 We also suggested that none of the other existing diligences could provide an incentive to pay where a debtor's only assets were goods in his possession or whose arrestable funds or earnings were unknown to the creditor.<sup>63</sup> Again the vast majority of respondents agreed with this view.

2.56 We asked a further question whether there were any other mechanisms which we had not examined (whether a diligence or not) that could take over the place of poining and sale if that diligence were abolished. A number of respondents argued that a key element in securing payment of debts was providing creditors and courts with detailed information about the debtor's financial circumstances and that the present law did not easily allow this. It was also suggested to us that the need for diligence to provide incentives for payment would be less if the legal system made available a mechanism for

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<sup>60</sup> Para 3.13.

<sup>61</sup> *Ibid*, paras 3.15-3.26.

<sup>62</sup> *Ibid*, para 3.21.

<sup>63</sup> *Ibid*, para 3.23.

debt management and debt arrangement. We think that both of these points are of some importance and we discuss each of them later.<sup>64</sup>

### **(3) Insolvency procedures**

2.57 We also considered whether an alternative to pouncing and sale could be found in insolvency procedures.<sup>65</sup> The Bill to abolish pouncing and sale would still allow creditors to proceed against debtors' moveable property under these procedures (which are subject to the exemptions from pouncing currently in the 1987 Act). At the level of general principle this state of affairs is undesirable as sequestration and winding up are designed to deal with situations of debtor insolvency and are not debt enforcement procedures as such. In our discussion paper we asked whether sequestration or winding up would be satisfactory alternatives to pouncing and sale if that diligence were abolished. We argued that both sequestration and winding up were more costly than pouncing and sale, and that the effect of the insolvency procedures on debtors was no less, and probably greater, than that of the diligence. Ordinary debtors would be faced with the possible stigma and trauma of a process which was just as invasive and much more public than pouncing and sale. Business debtors would be forced to cease trading needlessly and prematurely.

2.58 We also noted that if insolvency procedures were to be used as an alternative to pouncing and sale it would be necessary to reconsider the level of debt (currently £1,500) which allows for the procedures to be initiated.

2.59 Virtually every one of our respondents rejected the use of insolvency procedures as an alternative to pouncing and sale. Many mentioned the greater costs involved in these procedures, and most were of the view that sequestration and winding up were not procedures which were designed as, or could be easily adapted to be, forms of debt enforcement.

### **The distinction between commercial and non-commercial cases**

2.60 A key point which was made in our 1985 Report and in our discussion paper is that there is a clear distinction between using pouncing and sale in commercial contexts and in non-commercial contexts. Virtually all of the problems which appear to exist with the diligence arise in respect of non-commercial debtors. Should commercial and non-commercial cases be treated in the same way? One argument which might justify the same approach to both (and this appears to have been used in arguing for total abolition) is that it is difficult to distinguish commercial and non-commercial cases. The law draws this distinction in other contexts, but we accept that the distinction may not be suitable in the context of the law of diligence where sheriff officers have to apply the law in practical situations in which resort to legal advice may not be quickly at hand. However we feel that a different way of distinguishing commercial and non-commercial cases can be made by reference to the premises on which goods are kept. The 1987 Act itself refers in several key provisions to pouncings in dwellinghouses, and we take the view that the distinction between dwellinghouse and non-dwellinghouse pouncings is one which can be made straightforwardly in the vast majority of cases.

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<sup>64</sup> Paras 5.52 to 5.79.

<sup>65</sup> These procedures are sequestration under the Bankruptcy (Scotland) Act 1985 and creditors' winding up under the Insolvency Act 1986.

## (1) Poiniding and sale in non-residential premises

2.61 In our 1985 Report we expressed the view that there never had been any controversy over the propriety of a creditor poiniding commercial goods owned by a trader in order to recover debts from that trader.<sup>66</sup> However the Bill would abolish the poiniding and sale of commercial goods in non-residential premises as well as goods in debtors' dwellinghouses. In many ways the acid test for total abolition of the diligence is whether the diligence is ineffective and unfair to debtors even in a commercial context.

2.62 In our discussion paper, we pointed out that the SOCRU research on 1991-92 data found that creditors tended to distinguish between poiniding and sale in domestic and commercial situations and that issues of the morality of using the diligence in commercial cases did not arise to the same degree as in domestic cases.<sup>67</sup>

2.63 Furthermore there is clear evidence that the diligence is effective in its use against business debtors. We set out this evidence from the SOCRU research at some length in our discussion paper.<sup>68</sup> In summary that research shows that business debt poinidings yield items up to 78% of the total value of the debt as it stood at the time of poiniding. By contrast the figure for domestic debtors is 34%.<sup>69</sup> In 45% of business debt cases which reach the stage of a warrant sale the appraised value of the goods is over £750.<sup>70</sup> By contrast only 11% of cases involving domestic debtors reach the warrant sale stage with goods valued at over £750.<sup>71</sup> The average amount of the principal sum in each case will be different. In cases of domestic debt 66% of debts reaching warrant sale stage are for less than £750; in cases of business debt the proportion is only 51%.<sup>72</sup> The SOCRU research points to a clear improvement since its 1980 research in the proportion of debts which creditors may realise through warrant sales against business debtors.<sup>73</sup>

2.64 Compared with domestic poinidings, poinidings and sales against business debtors progress relatively quickly. The SOCRU research shows that 57% of business debt cases went from a charge for payment to a poiniding in less than six weeks. In the context of domestic debtors only 26% of cases were as rapid.<sup>74</sup> Furthermore, 54% of business debts move from a poiniding to an application for a warrant of sale within 8 weeks, while this number is reduced to 23% of domestic poiniding cases.<sup>75</sup>

2.65 The evidence referred to above suggests to us that from the standpoint of both effective enforcement and debtor protection, any case for abolishing poiniding of goods in non-residential premises is quite distinct from the case for abolishing poiniding of goods in debtors' dwellinghouses.

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<sup>66</sup> Para 2.147.

<sup>67</sup> Para 3.37.

<sup>68</sup> Para 3.38.

<sup>69</sup> Fleming, *SOCRU Survey of Poinidings and Warrant Sales*, p 42, para 35.

<sup>70</sup> *Ibid*, p 37, Table 25.

<sup>71</sup> *Ibid*, p 22, Table 13.

<sup>72</sup> *Ibid*, p 19, Table 10 and p 34, Table 22.

<sup>73</sup> In 1980 it was reported that 23% of the value of the total debt was recovered through warrant sale. The more recent SOCRU research now puts this figure at 36%. See Fleming, *SOCRU Survey of Poinidings and Warrant Sales*, p 39, para 22.

<sup>74</sup> Fleming, *SOCRU Survey of Poinidings and Warrant Sales*, p 21, Table 12 and p 36, Table 24.

<sup>75</sup> *Idem*.

2.66 We are of the view that poinding and sale in non-residential premises is an effective diligence and we can identify no reason why creditors should be forced to use insolvency procedures to attach assets kept in those premises. Furthermore from the perspective of debtor protection, the case for abolishing poinding and sale of goods in debtors' dwellinghouses rests on considerations of morality and social policy. The same considerations do not seem to arise, at any rate with the same strength, in poindings of goods in commercial premises. Furthermore using sequestration as an alternative to poinding and sale would be likely to have serious adverse effects on self-employed or small business debtors. Sequestration compels those debtors to cease trading. Winding up dissolves a debtor company. Poinding and sale does not necessarily have these drastic effects for business debtors.

2.67 In our discussion paper we asked consultees if they considered that poinding and sale in non-residential premises should be abolished.<sup>76</sup> Of the 37 consultees who answered this question not one expressed unqualified support for abolition. A small number of consultees took the view that retention was justified only if no alternative diligence against moveable assets could be devised. The vast majority strongly favoured retention of the diligence in non-residential premises, mainly on the basis that the troublesome aspects of poinding and sale arose only in connection with its use in dwellinghouses and had no application in commercial settings.

2.68 For these reasons we take the view that no case has been made for abolishing poinding and sale in non-residential premises and that there are good reasons for maintaining the diligence in these cases.

2.69 One further matter which arose during this part of the consultation was whether the exemption from poinding for tools of trade and other business items should be reviewed. Under the present law the exemption applies only up to the value of £500.<sup>77</sup> Several consultees argued that this exemption had a particular relevance for small businesses and that the level for the exemption should be reviewed. We consider this issue in Part 3.<sup>78</sup>

## **(2) Poinding in dwellinghouses**

2.70 In our discussion paper, we summarised the main arguments for and against abolition of poinding and sale used against goods in dwellinghouses.<sup>79</sup>

### **(a) The case for abolition**

- (1) Poinding and sale imposes undue personal distress on debtors and their families. The level of personal distress is well documented by the recent SOCRU research.
- (2) It imposes undue economic hardship on debtors and their families. Sheriff officers' fees increase the total debt. Replacing items included in a warrant sale means incurring greater expense than the re-sale value and possibly further debt.

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<sup>76</sup> Question 3.7, para 3.44.

<sup>77</sup> 1987 Act, s 16(1)(b).

<sup>78</sup> Paras 3.52.

<sup>79</sup> Paras 3.46-3.47.

- (3) It is ineffective from the standpoint of creditors and not cost-effective. The transaction costs and therefore the expenses borne ultimately by debtors are too high relative to the low yield to creditors and the corresponding small or nil effect of warrant sales in reducing the debt. It benefits operators of the system but nobody else.
- (4) It is primarily an immoral method of punishing poor debtors rather than recovering debts. It gives officers of court too much power to force their way into the family homes of debtors, predominantly poor people, to invade their privacy and to intimidate, harass and humiliate them and their families.

**(b) The case for retention**

- (1) Poining and warrant sale (or a similar method of attachment and sale) is the only method (outside of sequestration or liquidation for the benefit of all creditors) which enables a creditor pursuing a single debt to satisfy his debt out of the proceeds of sale of valuable non-exempt moveable goods of the debtor in his possession. It is also normally the only diligence available to creditors who are unable to identify their debtors' arrestable assets or earnings, and the only means of deterring debtors from evading their creditors' legally constituted claims by converting their assets into corporeal moveable property in their dwellinghouses.
- (2) The use or threatened use of the stages of poining and warrant sale is often the only available incentive to payment which a creditor can use to elicit payment from a debtor.
- (3) The problem of cost-effectiveness in the attachment and sale of moveable goods would not be solved but would be made worse by recourse to sequestration or liquidation in place of poining and sale.
- (4) In all legal systems, the modern approach to protection of debtors from attachment and sale of moveable goods is invariably by way of exemptions. This is a more discriminating solution than abolition. The evident and strong moral case for exempting goods to protect a modest standard of living of debtors and their families does not apply to what are clearly luxury goods.

2.71 After considering this issue further and in the light of comments made by our consultees, we have reached the conclusion that the case for the complete abolition of poining in dwellinghouses has not been made out. We accept that there are defects both in the current law on poining and sale and in the way that the law has been used. However we believe that these defects can be remedied by measures specifically aimed at preventing hardship to debtors and abuse of the diligence rather than by wholesale abolition. Furthermore we consider that there are good reasons why the diligence should remain available to creditors, at least in certain types of case. The grounds on which these conclusions were reached are as follows:

2.72 (i) *'Luxur' goods in dwellinghouses.* The effect of abolition of poining in dwellinghouses is that the diligence would be incompetent in such premises, no matter the types of goods kept there. The policy of the present law (which we accept is not fully achieving its objectives) is that personal and household goods which are required for anyone

to continue with a viable but modest standard of living are exempted from the diligence. This general policy is a central element of debtor protection in pouncing and sale. However we see no reason why this policy should be extended to include luxury items. No argument of principle has been advanced to us why luxury items should be exempt from diligence. What is undoubtedly crucial here is how the distinction between exempt and luxury goods is to be drawn but we are in no doubt that the distinction is valid and important.

2.73 Some respondents argued that instances of pouncing, and especially sale, of luxury items such as expensive cars, paintings, antique furniture and the like are mythical. This is not so. We are aware of cases where items exactly like these have been subject to both pouncing and sale. Accordingly we take the view that the real issue is where to draw the line between goods which should be exempted from pouncing and goods which should not be exempted.<sup>80</sup>

2.74 (ii) *Commercial goods in dwellinghouses.* We consider that this argument applies even more strongly in respect of commercial goods in dwellinghouses.<sup>81</sup> We have argued that there are no major objections to pouncing and sale against goods in non-domestic premises. However problems may arise where premises are used for both commercial and domestic purposes, or where a trader stores stock or business equipment at home. An anomaly would arise if it were accepted that pouncing and sale should continue against goods in non-domestic premises but become unavailable against all goods in dwellinghouses. In such a situation a commercial debtor could easily evade the diligence by removing his business stock and equipment to his home.

2.75 (iii) *Pouncing and sale and incentives to pay.* We have argued that a key function which pouncing and sale plays is to provide a debtor who has sufficient assets, including property in his own possession, with an incentive to pay a lawfully constituted debt. We consider that abolition of pouncing and sale in respect of every conceivable type of moveable property in a dwellinghouse would seriously weaken this role. The diligence would lose its main basis for being an effective method of enforcing debt against debtors who owned this type of property.

### **Our strategy for reform**

2.76 We now draw together the various strands of reasoning set out in this Part and present our general strategy for reform. The specific recommendations which give effect to this strategy are set out in the remainder of this report.

- (1) The case for the total abolition of pouncing and sale has not been made out. On the contrary there are good reasons for retaining the diligence. However it is clear that there are defects in the present law which call for major reform. The strongest criticisms that can be levelled against pouncing and sale are made in the context of non-commercial cases, primarily on the basis of inadequate debtor protection and to a lesser extent lack of effectiveness as a means of debt enforcement. However no substantive argument has been advanced for the total abolition of the diligence in a commercial context. In

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<sup>80</sup> Paras 3.41-3.54.

<sup>81</sup> Not all items of commercial property are subject to pouncing. Under section 16 (1)(b) of the 1987 Act various types of tools of trade are exempt from pouncing. We recommend extension of this exemption at paras 3.52 and 3.54.

commercial cases the present law should remain subject to various measures of reform. By contrast we consider that although abolition in non-commercial cases is not appropriate a more radical approach is called for than in commercial cases.<sup>82</sup>

- (2) A major recommendation, to apply in both commercial and non-commercial cases, is that a warrant to sell pointed goods is not to be granted unless the likely proceeds of the sale will reduce the principal debt to a significant extent. We accept as a justified criticism of the diligence that it can proceed to its final stages and still not leave the debtor any better off in terms of reducing his debt. We consider that this state of affairs is inherently unsatisfactory and is open to abuse by creditors. We sought to deal with this problem in recommendations made in our 1985 Report, which were enacted in the 1987 Act. We are now of the view that those provisions did not go far enough and we make recommendations to strengthen them. Furthermore the principle that the diligence is to proceed only where it is likely to have an impact on the principal debt is to operate from the first stages of the diligence. A pointing is not to proceed or is to be recalled where any subsequent warrant sale would not lead to reduction in the debt.<sup>83</sup>
- (3) Subject to this key recommendation we consider that in commercial contexts the diligence works well. However for non-commercial cases further and more far-reaching reforms are required.
- (4) This general approach is to be advanced by using the distinction already contained in the 1987 Act between pointings in dwellinghouses and pointings in other premises. We recommend that the warrant to execute diligence contained in an extract decree (or its equivalent) should no longer authorise execution of a pointing in a dwellinghouse. Instead a creditor seeking to carry out a pointing in a dwellinghouse should have to apply for a separate warrant to do so.<sup>84</sup> The onus should be on the creditor to show that no other diligence is appropriate to recover the debt and that it is likely that there are goods which can be pointed. Furthermore the warrant to use forcible entry to a dwellinghouse would no longer be part of the general warrant contained in the extract decree but would be contained in the special warrant for pointing in a dwellinghouse. We regard the proposal for a special warrant for dwellinghouse pointings to be a central one in our reforms of the diligence. It is an important part of promoting debtor protection, and does not require debtors to make application to a court for it to become effective. The need for special warrant for dwellinghouse pointings will also prevent or minimise the use of the diligence as an empty threat.
- (4) We consider that section 16 of the 1987 Act, which details various types of goods that are exempt from pointing, has been a successful measure of debtor protection. However we take the view that the provisions on exempt goods need to be revised and expanded. We make various recommendations to achieve those objectives.<sup>85</sup>
- (5) It is beyond the scope of our reference to consider general questions relating to the use and justification of summary warrants which are available to various public bodies as a part of the recovery of taxes and other similar public charges. However we consider that

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<sup>82</sup> Paras 3.17 to 3.27.

<sup>83</sup> Paras 3.2 to 3.16.

<sup>84</sup> Paras 3.17-3.40.

<sup>85</sup> Paras 3.41-3.64.

the issues of debtor protection apply equally to poindings and sales under summary warrant. Accordingly we recommend that the proposed changes to the diligence should apply to poinding and sale under summary warrant.<sup>86</sup>

- (6) Many of the problems encountered in the use of poinding and sale could be by-passed if greater use were made of the provisions of the 1987 Act on time to pay directions and time to pay orders. These measures are considerably under-used at present and we set out various recommendations for reform of the law and practice of these provisions.<sup>87</sup>
- (7) We also adhere to our previous view that the law should provide some mechanism for closing off the use of diligence (including poinding and sale) where a debtor has multiple debts. In our 1985 Report we recommended that debt arrangement schemes should be introduced to deal with the problems of multiple debt. This recommendation was not enacted in the 1987 Act. In this report we make proposals for introducing such schemes.<sup>88</sup>
- (8) We have been impressed by evidence which suggests that if creditors had greater access to information on the financial circumstances of debtors there would be less use of diligence generally and arrestment would be used in preference to poinding and sale. We consider that the law should promote the provision of this information but that it should not do so by threatening or using criminal sanctions.<sup>89</sup>

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<sup>86</sup> Paras 4.2-4.20.

<sup>87</sup> Paras 5.2 -5.51.

<sup>88</sup> Paras 5.52-5.61.

<sup>89</sup> Paras 5.62-5.79.

## PART 3 REFORM OF POINDING AND SALE

### Introduction

3.1 In Part 2 of this report we concluded that the diligence of poinding and sale should be reformed rather than abolished. In line with this approach we now consider how the many and varied criticisms can be met by changes to the present law and practice. Our recommendations for change relate mainly to domestic poindings and individual debtors where most of the criticisms and concerns are directed. However, some of the recommendations would also affect poindings in commercial premises. This Part deals only with the poinding procedure as used to enforce court decrees and equivalent documents. The different procedure used in pursuance of summary warrants for central and local government taxes is considered in Part 4.

### Preventing economically ineffective poindings and sales

3.2 One of the major criticisms of the diligence is that it is often ineffective in the sense that even if the goods are sold, the proceeds of sale are less than the expenses of poinding and selling them. The SOCRU research showed that in the sample examined no sale involving an individual debtor resulted in the debt and expenses being satisfied in full. In only 17% of the sales the diligence expenses were paid in full and some inroads were made in the debt. Further analysis by the SOCRU researchers showed that 54% of sales recovered the expenses of sale together with some of the expenses of earlier steps in the diligence. The remaining 29% failed to recover even the expenses of sale.<sup>1</sup> Sales where the debtor was a business enjoyed a much higher rate of recovery. 8% resulted in payment of the debt and expenses in full, while a further 46% paid off the expenses and made some inroads into the debt.<sup>2</sup> We turn now to consider ways of preventing ineffective poindings or sales occurring. The recommendations we put forward apply to commercial as well as domestic poindings.

3.3 Officers of court are entitled to poind goods up to the value of the debt and a reasonable estimate of the total diligence expenses.<sup>3</sup> There is no minimum amount that has to be poinded. At the warrant of sale stage the sheriff may refuse to grant warrant on the ground (among others) that the likely proceeds of sale of the poinded articles would not exceed the likely expenses of selling them, the so called "not worth it" test. The expenses of sale include the expenses of the creditor's application for warrant of sale on the basis that it is unopposed.<sup>4</sup> The sheriff may refuse warrant on this ground on his own initiative as well as on an objection by the debtor. The debtor need not wait for the creditor to apply for a warrant of sale, but may apply to the sheriff for the poinding to be recalled on the ground that any future sale would not be worth it.<sup>5</sup> The SOCRU research indicates that few debtors object to the granting of a warrant of sale.<sup>6</sup> The sheriffs interviewed said they tended to look for errors in the application and relevant documents that would invalidate it, but that it was difficult in the absence of information to refuse warrant on the ground of the sale proceeds

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<sup>1</sup> Fleming, *SOCRU Survey of Poindings and Warrant Sales*, p 26, para 30.

<sup>2</sup> Fleming, *SOCRU Survey of Poindings and Warrant Sales*, p 40, para 24.

<sup>3</sup> 1987 Act, s 19(1).

<sup>4</sup> 1987 Act, s 30 as read with s 24(3)(c).

<sup>5</sup> 1987 Act, s 24(3)(c).

<sup>6</sup> Fleming, *SOCRU Study of Facilitators*, p 78, para 30.

being likely to be less than sale expenses. However, in one court the practice was to estimate that the sale expenses would be £150 and this was compared with the officer's appraised values.<sup>7</sup> Also a number of sheriffs said that they took a more relaxed attitude to warrant sales since the 1987 Act had given debtors rights to protect themselves. In the absence of any objections by debtors these sheriffs were less likely to intervene than they were before the 1987 Act.<sup>8</sup>

3.4 In our discussion paper we asked whether warrant of sale should be refused if the likely proceeds of sale did not exceed a specified proportion of the debt and diligence expenses.<sup>9</sup> We also asked whether a pouncing should be incompetent if the appraised value of the pounceable goods found on the premises was insufficient to ensure that warrant for their sale would be granted.<sup>10</sup> As we pointed out, the test at the two stages - pouncing or warrant of sale - has to be the same. Three options for the specified proportion were put forward. The first was the existing law - that the likely proceeds of sale of the pounced goods must at least equal the likely expenses of sale. The second was that the likely proceeds of sale must at least equal the whole diligence expenses incurred and to be incurred in selling the pounced goods. The final option was that the likely proceeds of sale had to equal the whole diligence expenses plus some portion of the debt.

3.5 Opinion was fairly evenly divided amongst those responding. Twelve consultees thought that the test should remain as it is - the first option. Eight considered that the likely proceeds of sale should cover at least the likely expenses of the whole diligence, while twelve consultees were in favour of the likely proceeds of sale being sufficient to pay off all or part of the debt as well as the whole diligence expenses. The suggested proportion of the debt required to be satisfied varied from 10% to 100%. Three consultees suggested other approaches. We are in favour of the third option so that the proceeds of sale should have to be sufficient to pay some of the debt itself as well as all the diligence expenses. The present law requiring only the expenses of sale to be met seems to us to be wrong. It may result in debtors being subjected to an experience which they find humiliating and distressing but confers no benefit on them or their creditors. The only beneficiaries would be those who carry out the various steps of the diligence and its associated procedures. We do not think that such a process should be used as an incentive to payment. The second option, that the proceeds of sale must at least equal the whole diligence expenses, would prevent diligence which fails to confer any economic benefit on either the debtor or the creditor, but it has the disadvantage that a pouncing or sale would be allowed even though its effect would be only a trifling reduction in the debt. On the other hand, requiring the likely proceeds of sale to meet the diligence expenses and the debt in full seems too severe a test. Creditors should be entitled to use diligence which results in recovery of part of the debt. Many other diligences, such as arrestment, often fail to satisfy the creditor in full. We think that the potential proceeds of sale should be such that the whole diligence expenses and a not insubstantial proportion of the debt itself would be paid. However, we do not think that the test of competence can be expressed in some such general way. Officers of court require more precise guidance in order to know whether they are entitled to pounce the non-exempt goods found or whether they must refrain from pouncing them. We suggest that the likely proceeds of sale should have to recover a prescribed percentage of the debt, or a prescribed

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<sup>7</sup> Fleming, *SOCRUI Study of Facilitators*, p 78, para 30.

<sup>8</sup> Fleming, *SOCRUI Study of Facilitators*, p 81, para 43.

<sup>9</sup> Question 4.3, para 4.36. It would also be a ground for recall of the pouncing.

<sup>10</sup> Question 4.5, para 4.43.

sum of money, whichever is the lesser, as well as the whole diligence expenses. The numerical values of the prescribed percentage and sum are a matter of judgment, but requiring the diligence to recover at least 10% of the debt or £50, whichever is the lesser, seems to us to strike a reasonable balance between the interests of debtors and creditors. The figures initially selected may well need adjustment in the light of experience. We think that they should be capable of being varied by the Scottish Ministers.

3.6 **Poining** A clear majority of those responding were in favour of a poining being incompetent if the circumstances were such that warrant of sale would be refused. The University of Aberdeen Working Party was against this approach since the creditor would not be able to challenge any under-valuation at the poining stage. While revaluation by a different officer could be introduced we think it would give rise to too many problems. The debtor would be subjected to two visits by different officers, and the creditor could use the threat of instructing a second visit to put further pressure on the debtor to pay. The Society of Messengers-at-Arms and Sheriff Officers was also against changing the law on several grounds. First, it would place an unreasonable responsibility on officers. Officers would risk action by debtors if they over-valued goods in order to carry out a poining and action by creditors if they under-valued them so that poining was incompetent. We do not regard this responsibility as unreasonable. Liability for errors in valuation exists at present, for example if warrant of sale is refused on the ground that the goods have been substantially undervalued,<sup>11</sup> or the appraised value is well above what the articles sell for at auction. Second, the Society considered that it would preclude officers from searching the premises, making enquiries of the debtor and inventorying goods. This criticism is misplaced. We envisage that the officer of court (with a witness) would go round the premises, inventorying and appraising any poindable goods found. If insufficient goods were found the officer would not poind them and the diligence would end there and then. Where there were goods of sufficient value the officer would complete a poining schedule and the diligence would proceed as normal. It would be awkward to provide for a poining to start<sup>12</sup> and then for it to be invalidated when the officer failed to find sufficient goods to make it competent. If there were insufficient goods found the officer should make a formal report to the creditor, detailing what goods were present and their appraised values, together with a note of the likely total diligence expenses. The officer might have an opportunity to talk to the debtor during the visit in order to suggest payment arrangements or find out employment and financial particulars.

3.7 The Society's principal objection and one that probably lies behind the objections of other respondents is that it removes the incentive to payment function of the diligence. It commented that the proposal reflected the current English procedure which is criticised, especially by creditors there. We understand that this refers to the practice of county court bailiffs<sup>13</sup> not levying where there appears to be insufficient goods to make their removal and

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<sup>11</sup> 1987 Act, s 30(2) as read with s 24(3)(b).

<sup>12</sup> The 1987 Act is silent as to when a poining starts (except that it is after the officer exhibits the warrant to poind, demands payment of the debt and enquires as to ownership of goods), but it is probably when the officer starts the valuation process. The poining is executed when the officer delivers the poining schedule or leaves it on the premises, s 21(7).

<sup>13</sup> The Court Service *Bailiffs Handbook*, para 6.1.7. We understand that sheriff's officers enforcing writs of *fieri facias* often levy in this situation as an incentive to payment but do not remove and sell the goods where the cost of doing so exceeds the proceeds of sale. A return of *nulla bona* includes the situation where the proceeds of sale are insufficient to meet the costs of the levy (Keith, Podevin and Sandbook, *The Execution of Sheriffs' Warrants* (1995) p 204).

sale worthwhile. We appreciate the concern of creditors that debtors with insufficient goods to be worth selling could ignore any threat to poind, but we do not regard this as an objection. Indeed in our view it is the principal merit of the proposed change. Allowing a poinding to be carried out if there are insufficient goods trades on the ignorance of debtors. It has been suggested that a levy in England and Wales in such circumstances may be disproportionate interference in the debtor's private life and hence a breach of article 8 of the European Convention on Human Rights.<sup>14</sup> If warrant for sale will be refused on the grounds of insufficiency<sup>15</sup> the creditor's application for such a warrant, the threat to apply for one and the poinding itself is a bluff. Many individuals subject to poinding were found to be unsure of the law and the steps that the creditor could take.<sup>16</sup> Some creditors were aware that the effectiveness of poindings as an incentive to payment depends on the continued ignorance of debtors.<sup>17</sup> We think that the law should not allow a procedure which is bound to fail at a later stage to be used in this way, and should be changed so as to prevent the poinding of insufficient goods. It is not sufficient to rely on the debtor's entitlement to apply for recall. Under the existing law a debtor may apply to have a poinding recalled on the grounds that the goods are not worth selling.<sup>18</sup> The SOCRU research found that very few debtors make such applications.<sup>19</sup> In our opinion the only effective way to protect debtors from poindings that would not reduce their indebtedness, or would reduce it by only a trifling extent, is to have a rule making them incompetent. The sheriff should be under a duty to refuse to receive a report of poinding that breaches such a rule. Refusal brings the diligence to an end.<sup>20</sup> The debtor should not be left in ignorance as to the result of the officer's visit. Where the officer has poinded articles a schedule of poinding is given to, or left on the premises for, the debtor.<sup>21</sup> We suggest that similar notification should be given where the officer finds insufficient goods to make a poinding competent. Notification could take the form of a copy of the formal report to the creditor with an explanatory leaflet in plain English.

3.8 The Society of Messengers-at-Arms and Sheriff Officers and one other commentator pointed out that the expenses of the diligence would not be known with certainty until after any sale, but our recommendation involves only the likely expenses. The officer would know the expenses already incurred with certainty and ought to be able to estimate the future expenses or at least put a minimum figure on them. At present, probably due to an oversight, the officer's fee for arranging a poinding but not being able to execute it<sup>22</sup> is not chargeable against the debtor.<sup>23</sup> This gives officers an incentive to poind some article however small. We think that this anomaly should be rectified. The fee of an officer who is unable to find sufficient articles to make a poinding competent should be chargeable against the debtor. This would enable the creditor to set it against any payments made to account by the debtor.

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<sup>14</sup> *Independent Review of Bailiff Law: A Consultation Paper*, Professor J Beatson QC, University of Cambridge, Centre for Public Law (2000), para 2.16.

<sup>15</sup> See Recommendation 2, para 3.16 below.

<sup>16</sup> Whyte, *SOCRU Study of Debtors*, p 87, para 22.

<sup>17</sup> Whyte, *SOCRU Study of Debtors*, p 53, para 48; Platts, *SOCRU Study of Commercial Creditors*, p 77, para 66.

<sup>18</sup> 1987 Act, s 24(3)(c).

<sup>19</sup> Fleming and Platts, *SOCRU Analysis of Diligence Statistics* p 22, Table 15.

<sup>20</sup> 1987 Act, s 22.

<sup>21</sup> 1987 Act, s 20(6).

<sup>22</sup> Act of Sederunt (Fees of Sheriff Officers) 1999 (SI 1999/150), Table, Item 3(b).

<sup>23</sup> It is not included in the steps mentioned in 1987 Act, Sch 1, para 1.

3.9 We recommend that:

**1 (1) A poinding should be incompetent if the total appraised value of the non-exempt goods situated in the premises does not exceed the total of the diligence expenses already incurred and likely to be incurred in selling them plus 10% of the debt or £50, whichever is the lesser. The percentage and sum should be capable of being varied by the Scottish Ministers.**

**(2) Where a poinding is incompetent by reason of paragraph (1) the officer should make a formal report of insufficient goods to the creditor, detailing what goods were present, their appraised values and the estimated total diligence expenses on which the decision not to poind was based. A copy of this report should be handed to, or left on the premises for, the debtor. The expenses of these steps should be chargeable against the debtor.**

**(3) The sheriff should refuse to receive a report of poinding which is incompetent by reason of paragraph (1).**

3.10 Some debtors will possess goods in two or more different premises, such as a shop or office and their homes. It should be possible to combine two or more poindings for the same debt if each separate poinding would be incompetent due to an insufficiency of goods but the combined appraised value was sufficient.

3.11 **Warrant of sale** Where a poinding is incompetent by reason of insufficiency of goods the diligence would end there and then. A competent poinding could normally be completed by a sale since the proceeds of sale have already been adjudged sufficient to meet the whole diligence expenses plus a not insubstantial proportion of the debt. Sometimes, fewer goods will be available to be sold than were poinded. Poinded articles may have been released on the grounds that they were exempt from poinding,<sup>24</sup> articles may have been redeemed by the debtor on paying the creditor the appraised value<sup>25</sup> or articles may have been removed. Accordingly the "not worth it" test is still needed at this later stage although it will probably be used only occasionally.

3.12 At the poinding stage the officer has to use the appraised values to decide whether poinding is competent. We rejected the idea that creditors should be able to challenge an under-valuation which made poinding incompetent. At the warrant of sale stage however the sheriff is involved so that it would be possible to raise valuation issues then. In our discussion paper we asked whether the appraised value of the poinded goods should be taken to be the likely proceeds of sale, although the sheriff could use a higher value if satisfied that it was likely to be obtained.<sup>26</sup> This was agreed by the overwhelming majority of respondents. We think that the appraised value of the goods has to be a starting point for estimating the likely proceeds of sale. This information is already before the court in the report of poinding. In the absence of any dispute as to valuation it would not be sensible to order a revaluation for the purposes of deciding whether or not to grant warrant of sale. The SOCRU research shows that in the sample warrant sales examined against individual

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<sup>24</sup> 1987 Act, s 16(4).

<sup>25</sup> 1987 Act, s 21(4).

<sup>26</sup> Question 4.4(2), para 4.37.

debtors 58% of poinded articles were sold at their appraised value, 26% went for more and 16% for less.<sup>27</sup> In warrant sales against business debtors 83% of articles sold for their appraised value, 9% for more and 9% for less.<sup>28</sup> The Scottish Legal Action Group and the University of Aberdeen Working Party suggested that the debtor should be able to argue that the goods had been over-valued. We are grateful for this suggestion which would serve as a brake to over-valuation in order to obtain warrant of sale.

3.13 Under the present law the sheriff has a power, but not a duty, in certain circumstances to refuse warrant of sale or recall a poinding, but as indicated in paragraph 3.3 above some sheriffs do not refuse warrant of sale in the absence of objections by the debtor. We therefore asked whether the sheriff should be under a duty to recall a poinding or refuse warrant if satisfied that one of the grounds applies, for example that the likely proceeds of sale did not reach the required amount.<sup>29</sup> The overwhelming majority of those who responded was in favour of replacing the sheriff's discretionary power to refuse warrant of sale or recall a poinding with a duty once satisfied that the ground for doing so applies. The main effect of this change would be to prevent warrant of sale being granted if the likely proceeds of sale were insufficient. Even where the debtor does not object the sheriff would have to consider whether the likely proceeds were sufficient and refuse warrant if they were not. The sheriff cannot recall a poinding on any of the grounds or refuse warrant on the ground of undue harshness unless the debtor applies. Sheriffs may refuse warrant on the ground of substantial under-valuation of the goods on their own initiative, but in practice opposition by the debtor is required to provide information to challenge the officer's valuation unless it is patently absurd.<sup>30</sup> Turning the power into a duty would not alter this. Some concern was expressed that having to scrutinise all unopposed applications for warrants for sale would increase the workload of sheriffs. But we think that our other recommendations for reform of poindings would cut down quite substantially the number of applications for warrant of sale, especially in relation to domestic poindings. Moreover, unopposed applications could be checked first by court staff and those that appeared not to meet our recommended insufficiency test could be brought to the attention of the sheriff. Given the low level of applications for recall of poinding or objections to warrant of sale by debtors, we think that sheriffs should in future be under a duty to exercise the powers that they have been given in order to protect debtors from sales which will confer little or no benefit on them or their creditors. The SOCRU research found that there were a substantial proportion of such sales at least in the sample examined from a period in 1991-1992. Nearly one third (29%) of poindings against individual debtors proceeded to a sale even though the proceeds of sale did not cover the expenses of sale.<sup>31</sup>

3.14 In order to exercise their duty in the previous paragraph, sheriffs will need information as to the likely diligence expenses. We asked in our discussion paper whether creditors should be required to produce this information when applying for warrant of sale.<sup>32</sup> Most consultees were in favour although it was pointed out that the expenses of sale could not be known with certainty until the sale had been carried out. Our test only requires the future expenses to be estimated and we do not envisage the diligence being set aside

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<sup>27</sup> Fleming, *SOCRU Survey of Poindings and Warrant Sales*, p 27, para 32 and Table 18.

<sup>28</sup> *Ibid.*, pp 40-41, para 27 and Table 30.

<sup>29</sup> Question 4.8, para 4.47.

<sup>30</sup> *Scottish Gas Board v Johnstone* 1974 SLT (Sh Ct) 65.

<sup>31</sup> Fleming, *SOCRU Survey of Poindings and Warrant Sales*, pp 27-28, para 35.

<sup>32</sup> Question 4.4(1), para 4.37.

later if the expenses of sale turn out to be substantially higher than could have been anticipated.

3.15 A poinding may be recalled on the same grounds as apply to a refusal of warrant of sale.<sup>33</sup> The procedure is different in that the debtor has to apply and the sheriff has no power to recall on his own initiative. Application of the "not worth it" test to recall would involve the applicant debtor furnishing the court with an estimate of the expenses of the diligence.

3.16 We recommend that:

**2 (1) The sheriff should be under a duty to recall a poinding or refuse warrant of sale if satisfied that the likely proceeds of sale would not exceed the total of the diligence expenses already incurred and likely to be incurred in selling them plus 10% of the debt or £50, whichever is the lesser. The percentage and sum should be capable of being varied by the Scottish Ministers.**

**(2) An application for warrant of sale or recall of a poinding on the ground in paragraph (1) should be required to state the expenses of all previous steps of the diligence and the likely expenses of selling the poinded articles.**

**(3) The likely proceeds of sale should be taken to be the appraised value of the poinded articles unless the sheriff is satisfied that a different value is likely to be attained.**

### **Special warrant to poind in dwellings**

3.17 At present the warrant for execution contained in an extract of a decree or other enforceable document authorises (among other diligences) the charging of the debtor to pay the sum due, and if the sum due is not paid, the poinding of articles belonging to the debtor.<sup>34</sup> In our discussion paper we asked whether poinding of goods situated in a dwellinghouse should cease to be authorised by the warrant in the extract decree and should require a special warrant from the sheriff.<sup>35</sup> There is much concern about poinding in dwellinghouses and our proposal was intended to confine poinding to those cases where other diligences could not be used effectively. The warrant in the extract decree would however continue to authorise the charging of the debtor to pay and the poinding of goods in non-residential premises, such as a shop or office.

3.18 Most of those who responded were not in favour of the proposed special warrant. They saw it as making the diligence more expensive and thought that the extra procedure would not confer any real benefits on debtors. We view the application for special warrant as an essential element of our policy of confining domestic poindings to debtors who possess a substantial amount of luxury household goods. We have recommended that a poinding should be incompetent unless goods with sufficient total appraised value were available.<sup>36</sup>

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<sup>33</sup> 1987 Act, ss 24(3) and 30(2).

<sup>34</sup> 1987 Act, s 87.

<sup>35</sup> Question 4.9, para 4.52.

<sup>36</sup> Recommendation 1, para 3.9.

While that recommendation would prevent many poindings in modestly furnished dwellings, it would not prevent officers of court coming to the debtor's dwellinghouse, entering it, using their powers of entry and searching it to ascertain whether there were sufficient non-exempt goods, activities which debtors find distressing and humiliating. The threat to carry out a poinding in the debtor's dwellinghouse would still be a potent one for all classes of debtors. We are firmly of the opinion that the prospect of a domestic poinding should not be used as a threat in situations where the poinding itself could not be carried out. Debtors with little or nothing beyond the normal household furnishings exempt from poinding should be exempt from the threat of poinding too. The best way of achieving this result is for a domestic poinding to require a special warrant from the sheriff which would be granted only if poinding was likely to be effective, that is to say that there were goods of sufficient appraised value to pay part of the debt as well as the whole diligence expenses, and no other diligences were available or likely to be effective in that debtor's case. The special warrant would also implement another of our policy objectives – diverting where possible creditors from domestic poindings to the less intrusive and more direct diligence of arrestment and in the case of local authorities pursuing arrears of council tax deductions from social security benefits.

3.19 We think that the distinction between dwellinghouses and other premises is a workable one. The concept of a dwellinghouse is already used in several places in the Debtors (Scotland) Act 1987<sup>37</sup> and as far as we are aware has not given rise to any problems. "Dwellinghouse" is defined to include a caravan, a houseboat and any structure adapted for use as a residence.<sup>38</sup> We would adopt that definition here. Some premises have a mixed use, part business and part residential, such as a hotel with a self-contained suite of rooms for the owner. We think that a special warrant should be required for these premises too in order to avoid disputes about the extent of the officer's powers under an ordinary warrant for execution.

3.20 In general officers should be able to decide whether or not premises are residential and so require a special warrant before arriving to poind. Most charges to pay are hand served which involves an officer going to the premises to deliver the documents to the debtor or another person present or leave them there for the debtor. Inspection of the premises or enquiries of any person present should elicit the necessary information. The charge should also state that the debtor should contact the officer if the premises are or contain a dwellinghouse. Where an officer arrives to poind at what he thinks are non-residential premises he should ask any person present if the premises, or any part of them, are used as a dwellinghouse.<sup>39</sup> On receiving an affirmative answer the officer would not be entitled to enter and poind by virtue of an ordinary warrant for execution and would have to apply for a special warrant. Similarly, if the apparently commercial premises are empty but the officer realises after entry by virtue of an ordinary warrant for execution that they appear to have a residential part, he should withdraw.

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<sup>37</sup> S 16(2), articles exempt if situated in a dwellinghouse; s 18, no entry to empty dwellinghouse unless prior notice given; s 30 no sales in dwellinghouses without consent of debtor and occupier.

<sup>38</sup> 1987 Act, s 45.

<sup>39</sup> S 20(1) of the 1987 Act requires the officer to question any person present about the ownership of goods that are to be poinded.

3.21 Vehicles in the street outside the debtor's dwellinghouse would remain poindable without the need for a special warrant.<sup>40</sup> The warrant in the extract decree would suffice. We also think that vehicles should be so poindable if situated outside in the curtilage of the dwellinghouse, for example in the drive. Other articles, such as a horse, an unoccupied caravan or garden furniture outside in the curtilage should be treated in the same way. However, vehicles and other items in an enclosed garage or other structure within the curtilage should require a special warrant, even if the garage or other structure was a separate building from the dwellinghouse itself. Debtors would regard entry by officers of court to a garage or other domestic outbuildings in much the same way as they regard entry to the house itself.

3.22 We concede that an application for a special warrant to poind in a dwellinghouse increases the complexity and expense of the diligence. However, a warrant would be granted only if there were thought to be sufficient goods in the house to meet all the diligence expenses plus a not insubstantial part of the debt. The scheme we recommend aims to minimise the extra expense. First, the application should be intimated to the debtor by post, rather than by the more costly hand service by officer of court.<sup>41</sup> Second, the application should be capable of being made by an officer acting on behalf of the creditor.<sup>42</sup> Another objection was that a special warrant would not protect debtors since few would bother to oppose the application. Given the current low level of objections to applications for warrant of sale it is likely that few debtors will oppose applications for special warrant. But under our scheme the sheriff would not grant unopposed applications as a matter of course. The sheriff is to question the applicant and grant special warrant only if satisfied that it is appropriate to do so.<sup>43</sup> Moreover, the requirement to apply for a special warrant and the associated expense will discourage creditors from applying for a warrant to poind in dwellinghouses unless they are fairly confident of success. The expenses of an unsuccessful application should not be chargeable against the debtor.

3.23 We turn now to consider the criteria for granting a special warrant in more detail. We have modelled our scheme on section 33(1) of the Child Support Act 1991. That provision entitles the Secretary of State to apply for a liability order authorising poinding (among other diligences) if it appears to him that it is inappropriate to make a deduction from earnings order (akin to an earnings arrestment) against the debtor or such an order has proved ineffective. We think that the sheriff dealing with an application for a special warrant should have to be satisfied that an arrestment or earnings arrestment either cannot be used or is or would be wholly or substantially ineffective.<sup>44</sup> Thus an earnings arrestment could not be used if the debtor was unemployed or self-employed or if the creditor lacked sufficient information about the debtor's employment. Similarly a bank arrestment could not be used if the debtor has no bank account or the creditor has insufficient information about the account. An earnings arrestment would be ineffective if the debtor's earnings were below the minimum level required for making deductions, while a bank arrestment would be ineffective if the account was not in credit.

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<sup>40</sup> See discussion paper, para 4.49.

<sup>41</sup> See para 3.28 below.

<sup>42</sup> See para 3.29 below.

<sup>43</sup> See para 3.29 below.

<sup>44</sup> The alternative diligences that the sheriff has to consider are confined to arrestment of earnings or funds. Neither adjudication nor inhibition produce payment directly and are available only if the debtor owns heritable property.

3.24 Substantial ineffectiveness would arise where an arrestment of a self-employed debtor's bank account attached some money but not enough to pay the debt in full. The creditor ought to be able to recover the balance by poinding, if there was no other diligence available. Another example would be where an earnings arrestment was in effect but the deductions were such that it would take several years before the debt was paid. We think that the creditor should not be debarred from poinding luxury household goods in order to accelerate payment. In these situations the sheriff would have to exercise a discretion, balancing the benefits to the creditor against the distress to the debtor of a domestic poinding.

3.25 We also think that domestic poinding should be reserved for those cases where it is likely to be effective in the sense that the appraised value of the goods was sufficient to meet the total expenses of the diligence were it to proceed to a sale of the goods plus a portion of the debt itself. The creditor should therefore have to satisfy the sheriff that there was a reasonable likelihood of sufficient goods being situated in the premises to make a poinding of them competent.<sup>45</sup> We think that creditors would normally have the necessary information on this point. The officer who had previously charged the debtor to pay would in most cases have been to the premises<sup>46</sup> and would have reported on the prospects for poinding. Even if the officer had not been inside the premises, the general state of the premises and their situation would yield some indication as to whether a poinding was worth pursuing. The unpaid sellers of substantial luxury items which the debtor had bought would be at an advantage for they would be able to satisfy the sheriff that sufficient poindable goods were likely to be found.

3.26 The Society of Messengers-at-Arms and Sheriff Officers did not favour the introduction of the special warrant because it would prevent officers going round to a small trader's residence to poind, having found insufficient goods in the trader's business premises. We think the creditor should be entitled to put the officer's report of goods poinded in the business premises before the sheriff hearing the application for special warrant. The sheriff should consider the value of the goods in both premises. The Society was also concerned that business goods would be kept in dwellinghouses to defeat the diligence. The nature of the goods likely to be in a dwellinghouse should be a factor that the sheriff takes into account.

3.27 We recommend that:

**3 (1) The warrant for execution in the extract of a decree or other enforceable document should not authorise the poinding of articles situated within premises which constitute or include a dwellinghouse or within a building within the curtilage of a dwellinghouse. The poinding of such articles should require a special warrant from a sheriff of the sheriffdom in which the premises are situated.**

**(2) The sheriff should not grant a special warrant unless satisfied that:**

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<sup>45</sup> See Recommendation 1, para 3.9 above.

<sup>46</sup> Most charges to pay are hand served by officers of court visiting the debtor's premises. Postal charges are competent for certain summary cause decrees, Execution of Diligence (Scotland) Act 1926, s 2.

- (a) an arrestment of the debtor's earnings or funds cannot be carried out or is or would be wholly or substantially ineffective, and
- (b) there is a reasonable likelihood that sufficient poindable goods are situated in the premises which, taken together with other articles belonging to the debtor poinded elsewhere, would make the poinding competent in terms of Recommendation 1 above.

3.28 The application for a special warrant should normally be intimated to the debtor. In order to minimise expense we suggest that this should be done by recorded delivery post rather than hand service by officer of court. Hand service should be used only if the recorded delivery letter was returned as undelivered. Intimation would give the debtor an opportunity to oppose the application, furnish the creditor with employment or bank account details in order for arrestment to be done, or apply for a time to pay order. Receipt of the intimation might also prompt payment of all or part of the debt. On the other hand intimation may also give the debtor time to move poindable goods from the dwellinghouse in order to defeat a poinding. Section 18 of the 1987 Act allows officers to enter empty dwellinghouses or those where only children under 16 are present if they have given four days notice of their intended visit. The sheriff may, on application by the creditor,<sup>47</sup> dispense with the requirement of prior notice if satisfied that it was likely to prejudice the poinding. We would adopt the same solution here. The creditor should be entitled to apply to the sheriff for an order dispensing with the requirement to intimate to the debtor the application for special warrant to poind. Applications to dispense with notice under section 18(2) are rare and we think that applications to dispense with intimation would be equally uncommon.

3.29 Even if the application for a special warrant is unopposed we think that the applicant should have to attend court to be questioned by the sheriff as to the factual background to the averments and the appropriateness of the proposed domestic poinding. The procedure used for an application for interim interdict before service of the initial writ seems a suitable model. There the applicant has to appear before a sheriff in chambers and will be questioned on the averments in the application so that the sheriff can be satisfied that the remedy is one that may properly be granted.<sup>48</sup> The applicant's presence will avoid applications containing standardised averments being granted as a matter of course. We think that an officer of court should be entitled to apply for the warrant on behalf of the creditor. This is already the situation with many applications in connection with poinding under the 1987 Act.<sup>49</sup> The officer of court would usually be better placed than the creditor to speak to the likelihood of finding sufficient poindable goods in the dwellinghouse.

3.30 We recommend that:

- 4 (1) An application for warrant to poind articles situated in a dwellinghouse should be capable of being made by the creditor or an officer of court on the creditor's behalf.**

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<sup>47</sup> Which need not be intimated to the debtor; 1987 Act, s 18(2).

<sup>48</sup> Macphail, *Sheriff Court Practice* (2nd edn), para 21-89.

<sup>49</sup> S 21(1) immediate sale of perishables, s 27(2) extension and duration to pay, s 29(2) application if goods damaged or destroyed, s 30(1) application for warrant of sale, s 35(1) alteration of arrangements for sale, s 43(1) application to conjoin poindings.

(2) The application should be intimated to the debtor who should be given an opportunity to oppose it, unless the sheriff is satisfied that intimation is likely to prejudice the proposed poinding.

(3) Where the application is opposed the sheriff should hold a hearing before determining the application.

(4) Where the application is unopposed the applicant should be required to appear before the sheriff in support of the application.

### Information about amount arrested

3.31 A creditor who had arrested the debtor's bank account would need to know how much, if anything, had been arrested before applying for a special warrant. In our discussion paper we revisited a recommendation in our Report on *Statutory Fees for Arrestees*<sup>50</sup> to the effect that an arrestee should be bound to disclose to the arrester free of charge the existence or extent of any funds attached by an arrestment in execution, even if the information is confidential. All but two of our consultees agreed with our recommendation. Significantly the Committee of Scottish Clearing Bankers had no objection provided the arrestee is paid an administrative fee by the arrester when the arrestment is lodged. It should be noted that statutory changes would be required to the bank's duty of confidentiality before this could be implemented. It has long been a criticism of ordinary arrestments that the arrestee is not under any duty to inform the arresting creditor what, if anything, has been arrested. Faced with a refusal to provide this information the creditor has to proceed to an action of furthcoming which might prove fruitless. We therefore recommend that:

- 5 **In an arrestment in execution, including an arrestment on the dependence converted into an arrestment in execution by decree, the arrestee should be bound (on payment of a reasonable fee) to disclose to the arrester the amount of any funds and the existence of other moveable property attached by the arrestment. Such a disclosure should not be a breach of any duty of confidentiality owed by the arrestee to the debtor with respect to those funds or property.**

### Powers of entry for execution of poindings in a dwellinghouse

3.32 At present, a warrant for executing diligence authorises the opening of shut and lockfast places if necessary for the purpose of executing a poinding. An officer of court is therefore entitled to use force if necessary to gain entry to a debtor's premises, including a dwellinghouse, and to open internal doors and cupboards. Contrary to popular belief officers do not "batter down" or "kick in" doors. Locksmiths are engaged to open locked doors. Use of the power of entry must be in accordance with section 18 of the 1987 Act, which states that an officer of court is not entitled to enter an empty dwellinghouse or one which appears only to contain children below 16 years of age, unless the officer has given at

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<sup>50</sup> (1992) Scot Law Com No 133, paras 4.2 – 4.12, recommendation 16.

least four days notice of intended entry or the sheriff has authorised entry without prior notice.<sup>51</sup> This provision followed from a recommendation in our 1985 Report.<sup>52</sup>

3.33 Our discussion paper contained some comparative research into the position in other legal systems in Europe and the Commonwealth.<sup>53</sup> It was found that in many legal systems a power of forcible entry existed.<sup>54</sup> Further examination shows that a number of other systems, such as Germany, Greece, Belgium, Luxembourg, Austria and Italy, allow an enforcement officer to use force to enter premises if necessary. In England and Wales, however, no such power exists<sup>55</sup> unless the bailiff is attempting to regain entry, having been ejected from a dwelling which he had previously entered peaceably. In addition an English bailiff may forcibly enter the premises of a third party if he believes that a debtor's possessions have been moved there to avoid execution.<sup>56</sup> It seems clear that a power to use force in order to gain entry to a debtor's premises for poinding or seizure of goods is the norm.

3.34 In some systems forcible entry requires a special court order.<sup>57</sup> Germany has had such a requirement since 1979 in order that the constitutional right to privacy in that country is not infringed. However even in Germany this requirement can be overridden if there is reason to believe that delay in entering a debtor's premises would result in goods being dissipated.<sup>58</sup> In France a court order is necessary in certain circumstances independently of whether force is required or otherwise.<sup>59</sup> Nevertheless a court order is not universally required. In Greek law it appears that no such order is required despite article 9 of the constitution allowing a right of privacy and providing that no search of a house may occur except in accordance with the law and in the presence of representatives of the judiciary.<sup>60</sup> In practice it has been interpreted as applying only to criminal law, and in any event the enforcement officers are regarded as representatives of the judiciary.

3.35 Other systems require the enforcement officer to be accompanied by witnesses or public officials.<sup>61</sup> In our discussion paper we discussed this requirement in relation to Malta where two witnesses must be present if the executing officer chooses to break down any inner or outer door, or any container.<sup>62</sup> Furthermore we looked at the situation in the Netherlands, Norway, some Australian States and Territories and France where the executing officer may call upon the assistance of the police or public authorities if resistance

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<sup>51</sup> 1987 Act, s 18.

<sup>52</sup> Recommendation 5.18.

<sup>53</sup> At paras 4.54 to 4.56 and Appendix.

<sup>54</sup> Specifically France, Ireland, Malta, the Netherlands, Norway, Sweden, at least three of the Australian States and South Africa. It should be noted that exclusion from this list did not necessarily connote a lack of such a power but merely meant we had no information on other systems.

<sup>55</sup> *Vaughan v McKenzie* [1969] 1 QB 557.

<sup>56</sup> *Johnson v Leigh* (1815) 6 Taunt. 246.

<sup>57</sup> Eg Germany and France. For a full exposition see W. Kennett, "Enforcement of Judgments" (1997) 5 *European Review of Private Law*, 321-428. See para 73 of the Appendix to our discussion paper for this requirement in relation to the Australian Capital Territory.

<sup>58</sup> See Kennett, p 360.

<sup>59</sup> Eg in a small claims case, where seizure may only be effected if the creditor has exhausted all other remedies unless he has obtained a court order authorising the remedy. See Kennett, p 360.

<sup>60</sup> See Kennett, p 360.

<sup>61</sup> This is the case in Germany, France, Belgium, Luxembourg, the Netherlands, Greece, Malta and Austria. See further Kennett, and P. Kaye (ed.), *Methods of Execution of Orders and Judgments in Europe* (1996).

<sup>62</sup> Appendix, para 38.

is faced.<sup>63</sup> Subsequent research reveals that a large number of other legal systems require the enforcement officer to bring witnesses.<sup>64</sup>

3.36 In Germany two witnesses must accompany an enforcement officer where force is to be used to gain access to a debtor's premises. Alternatively the German enforcement officer may be accompanied by a single police officer or local official.<sup>65</sup> In France, a similar requirement exists.<sup>66</sup> Belgian law requires one witness to be present regardless of whether force is to be utilised, and also requires at least one public official to be present where force is used.<sup>67</sup> Similarly two witnesses must be present in any *saisie* executed in Luxembourg, regardless of whether force is used. Forcible entry requires the additional presence of a *Juge de Paix* or *Police Judiciaire*.<sup>68</sup> In the Netherlands the code specifies a number of named officials, one of whom must attend any forced entry.<sup>69</sup> In both Greece and Austria, witnesses are required where the debtor is not present at the seizure.<sup>70</sup> Italian law appears to have no provision requiring witnesses to attend an *espropriazione forzata*,<sup>71</sup> and nor does Irish law or the laws of the states and territories of Australia examined in the Appendix to our discussion paper.

3.37 The law of Scotland is in conformity with the requirement found in many other legal systems for witnesses to be present when an officer attempts a forcible entry. The 1987 Act provides that officers of court shall be accompanied at a poinding by one witness.<sup>72</sup> In our discussion paper we considered whether current Scots law on poinding and sale was in breach of any of the provisions of the European Convention on Human Rights. We concluded, on the basis of the case *K v Sweden*,<sup>73</sup> that the Scottish law regulating forcible entry for poinding introduced for the protection of debtors by the 1987 Act complies with the debtor's right under Article 8 of the Convention to "respect for his private and family life, his home and his correspondence". Our conclusion has been confirmed by the legal advisers to the Foreign and Commonwealth Office from whom we sought a second opinion. The Office was of the view that forcible entry was not by itself incompatible with Article 8, but the manner of entry had to pay due regard to the circumstances of the occupants, particularly where the sheriff had dispensed with the requirement to give prior notice of entry. The SOCRU research found that the section 18 notice procedure has resulted in fewer doors having to be forced open because no-one was in the premises. Applications to the sheriff to dispense with notice appear to be rare. Moreover, a dispensation is not an arbitrary act since it has to appear to the sheriff that giving notice would be likely to prejudice the execution of the poinding. Scots law also contains safeguards in that a debtor may complain to the appropriate sheriff principal about any misconduct of officers when executing diligence.

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<sup>63</sup> Appendix, paras 10, 39, 72 and 73.

<sup>64</sup> These are discussed in Kennett, p 361.

<sup>65</sup> *Zivilprozessordnung*, Art 759. See Kennett, p 361.

<sup>66</sup> *Loi No 91-650*, Art 21; see Kennett, p 361.

<sup>67</sup> *Ger W*, Arts 1501 and 1504. See Kennett, p 361.

<sup>68</sup> *Code de Procedure Civile*, Arts 585 and 587.

<sup>69</sup> *Rechtsvordering*, Art 444.

<sup>70</sup> *Code of civil procedure*, Art 930 II (Greece), *Exekutionsordnung*, §26(1) (Austria).

<sup>71</sup> See Kennett, p 361.

<sup>72</sup> S 20(3).

<sup>73</sup> Application No 13800/88 (European Commission of Human Rights 1 July 1991).

3.38 In our discussion paper we asked for views on whether the present law on powers of entry to debtors' dwellinghouses was satisfactory.<sup>74</sup> Of the consultees who responded, the vast majority were of the opinion that the current system was satisfactory and required no amendment. Citizens Advice Scotland thought that further research on the use of forcible entry and its effects on debtors was necessary. Evidence was presented to the Social Inclusion, Housing and Voluntary Sector Committee of the frightening effect forcible entry or the threat of forcible entry can have on debtors and their families.<sup>75</sup> Professor Willock said that forcible entry was a grave breach of privacy and a special warrant should have to be obtained. We have previously recommended that poinding in dwellinghouses should require a special warrant. We think that that special warrant should authorise officers to open shut and lockfast places in connection with a poinding in the dwellinghouse in question, in the same way as the warrant in the decree will authorise a poinding in, and entry to, commercial premises. The use of this warrant for entry to dwellinghouses would be subject to the provisions of section 18 of the 1987 Act described in paragraph 3.28 above.

3.39 We recommend that:

- 6 **The special warrant to poind in a dwellinghouse should authorise officers to open shut and lockfast places if necessary for the purpose of poinding articles in the dwellinghouse in question. The exercise of this authority would be subject to section 18 of the Debtors (Scotland) Act 1987.**

3.40 Section 18 of the 1987 Act, which followed from a recommendation in our 1985 Report,<sup>76</sup> states that where a dwellinghouse is empty or appears only to contain children below 16 years of age the officer of court is not entitled to enter it unless he has given at least four days notice of his intended entry or has been authorised to enter by the sheriff. We understand that this has generally worked well and has reduced the need for officers to engage locksmiths to open empty houses. One body in responding to the question on powers of entry thought that a section 18 notice should have to be given before an officer was entitled to enter any dwellinghouse to poind. We disagree as it would increase the diligence expenses unnecessarily. If the debtor or some other adult was in the dwellinghouse when the officer came to poind, we do not see what point would be served by requiring the officer to hand in a notice stating that another visit would be made in four days time. Mr Jann, a retired officer of court, suggested that the section 18 notice should specify the time (within a two hour period) when the officer would return to avoid debtors having to be off work or stay in all day. We consider it should be good practice for the officer to indicate a return time, but do not think that this should be made mandatory by legislation. Making it a rule of law would invalidate the notice were the officer to be slightly late.

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<sup>74</sup> Question 4.10, para 4.55.

<sup>75</sup> Official Report; col 318 17 Nov 1999, cols 477 and 482 12 Jan 2000.

<sup>76</sup> Recommendation 5.18.

## Exemptions from pouncing

3.41 The present law on exemptions from pouncing is, with some minor exceptions,<sup>77</sup> contained in section 16 of the 1987 Act. Section 16(1) and (2) provide

"16. - (1) The following articles belonging to a debtor shall be exempt from pouncing at the instance of a creditor in respect of a debt due to him by the debtor:

- (a) clothing reasonably required for the use of the debtor or any member of his household;
- (b) implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any member of his household in the practice of the debtor's or such member's profession, trade or business, not exceeding in aggregate value £500 or such amount as may be prescribed in regulations made by the Scottish Ministers;
- (c) medical aids or medical equipment reasonably required for the use of the debtor or any member of his household;
- (d) books or other articles reasonably required for the education or training of the debtor or any member of his household not exceeding in aggregate value £500 or such amount as may be prescribed in regulations made by the Scottish Ministers;
- (e) toys for the use of any child who is a member of the debtor's household;
- (f) articles reasonably required for the care or upbringing of a child who is a member of the debtor's household.

(2) The following articles belonging to a debtor shall be exempt from pouncing if they are at the time of the pouncing in a dwellinghouse and are reasonably required for the use in the dwellinghouse of the person residing there or a member of his household:

- (a) beds or bedding;
- (b) household linen;
- (c) chairs or settees;
- (d) tables;
- (e) food;
- (f) lights or light fittings;
- (g) heating appliances;
- (h) curtains;
- (j) floor coverings;
- (k) furniture, equipment or utensils used for cooking, storing or eating food;
- (l) refrigerators;
- (m) articles used for cleaning, mending or pressing clothes;
- (n) articles used for cleaning the dwellinghouse;
- (o) furniture used for storing:
  - (i) clothing, bedding or household linen;

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<sup>77</sup> Money and negotiable instruments in the debtor's possession may be exempt at common law, *Alexander v McLay* (1826) 4 S 439, while railway rolling stock is exempt in terms of section 4 of the Railway Companies (Scotland) Act 1867, as extended by the Carriage by Railway Act 1972, s 6(4).

- (ii) articles used for cleaning the dwellinghouse; or
- (iii) utensils used for cooking or eating food;
- (p) articles used for safety in the dwellinghouse;
- (q) tools used for maintenance or repair of the dwellinghouse or of household articles."

Regulations may add to the list or delete or vary any of the items,<sup>78</sup> but no regulations have so far been made.

3.42 Our discussion paper examined the exemptions in England and Wales, Northern Ireland, most of the European countries, the Canadian provinces, the Australian states and territories, New Zealand and South Africa. All these legal systems allow seizure of a debtor's goods with various exceptions. Some countries have more generous exemptions than others. The Canadian prairie provinces have special protections for farmers. To illustrate the range we give details of the exemptions from three legal systems.

3.43 In England and Wales the exemptions from execution against the goods of any person under High Court writs of *fiery facias* and county court warrants, and from distress enforcing council tax arrears, are as follows:

- "(i) such tools, books, vehicles and other items of equipment as are necessary to that person for use personally by him in his employment, business or vocation;
- (ii) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of that person and his family".<sup>79</sup>

In our discussion paper we reported the widely held view that the level of these exemptions was lower than the exemptions in Scotland.<sup>80</sup>

3.44 In Sweden, the following exemptions from seizure apply.<sup>81</sup>

## **"Chapter 5: Exemptions from seizure**

### **Exemptions which take account of the debtor's needs**

§1 The following are exempt from seizure:

1. Clothes and other articles which are exclusively intended for the debtor's personal use, up to a reasonable value;
2. Furniture, household goods and other equipment, to the extent that the property is necessary for the running of the home;

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<sup>78</sup> 1987 Act, s 16(3). The power to make regulations is now exercisable by the Scottish Ministers: Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 (SI 1999/678) and Scotland Act 1998, s 53.

<sup>79</sup> Supreme Court Act 1981, s 138; County Courts Act 1984, s 89(1) both inserted by the Courts and Legal Services Act 1990, s 15; Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992/613), reg 45, paragraph (1A) inserted by Council Tax (Administration and Enforcement) (Amendment) (No 2) Regulations 1993 (SI 1993/773), reg 5.

<sup>80</sup> Para 4.20.

<sup>81</sup> *Utsökningsbalken* (Enforcement Code), translated for us by Miss Marie-Sofie Sveidqvist, LL.B.; see also P. Kaye, *Methods of Execution of Orders and Judgments in Europe* (1996) p. 313.

3. Work-tools and other equipment necessary for the debtor's work/occupation or vocational training, as well as animals and food and other articles essential to their care, all up to a reasonable value;
  4. Objects which are of such sentimental value to the debtor that it must be considered manifestly unjust to seize them;
  7. Money/cash, bank balances in credit, debts owing and basic necessities (subject to any provisions to the contrary, and to the extent that access to these is reasonably necessary for the upkeep/maintenance of the debtor until such a time as he can expect an income which will cover this need though, in the absence of extraordinary reasons, not for any period longer than one month).
- §2 Where the debtor has a family, reasonable consideration should also be given to the use/consumption and needs of the family when determining what may be exempt in terms of §1.

If the debtor or a person in his family suffers from a disability or serious illness, this shall also be taken into consideration."

We understand that luxury items such as videos are not exempted, but that a TV may be if it is of low value and the debtor has children.<sup>82</sup>

3.45 A much more generous range of exemptions than the current Scottish exemptions is found in some Australian States – notably Victoria,<sup>83</sup> Queensland,<sup>84</sup> and South Australia<sup>85</sup> - which apply the federal bankruptcy law exemptions<sup>86</sup> to execution against goods.<sup>87</sup> Household property of a kind prescribed by regulations is exempt. This is defined as being household property "(including recreational and sports equipment) that is reasonably necessary for the domestic use of the bankrupt's household, having regard to current social standards".<sup>88</sup> The regulations further provide a non-exhaustive list of such items:

- (a) in the case of kitchen equipment, cutlery, crockery, foodstuffs, heating equipment, cooling equipment, telephone equipment, fire detectors and extinguishers, anti-burglar devices, bedding, linen, towels and other household effects – that property to the extent it is reasonably appropriate to the household...;
- (b) sufficient household furniture;
- (c) sufficient beds for the members of the household; and
- (d) educational, sporting or recreational items (including books) that are wholly or mainly for the use of children or students in the household;
- (e) 1 television set;

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<sup>82</sup> Information supplied by Miss Marie-Sofie Sveidqvist, LL.B.

<sup>83</sup> Supreme Court Act 1958 (Vic), s 63C inserted by Judgment Debt Recovery Act 1984 (Vic), s 27.

<sup>84</sup> Supreme Court of Queensland Act 1991(Qld), Sch 2.

<sup>85</sup> Enforcement of Judgments Act 1991(SA), s 7(2).

<sup>86</sup> Bankruptcy Act 1966 (Commonwealth of Australia), s 116. The Law Reform Commission of Australia, Report on *General Insolvency Inquiry* (1988) ALRC 45, para 866 suggested that the Australian States should adopt the Commonwealth Bankruptcy Act 1996 exemptions.

<sup>87</sup> The same approach is recommended for Western Australia by the Law Reform Commission of Western Australia, Report on *Enforcement of Judgements of Local Courts, Project No 16 Part II* (1995), Part 7.

<sup>88</sup> Bankruptcy Regulations, reg 6.03.

- (f) 1 set of stereo equipment;
- (g) 1 radio;
- (h) either:
  - (i) 1 washing machine and 1 clothes drier; or
  - (ii) 1 combined washing machine and clothes drier;
- (i) either:
  - (i) 1 refrigerator and 1 freezer; or
  - (ii) 1 combination refrigerator/freezer;
- (j) 1 generator, if relied on to supply electrical power to the household;
- (k) 1 telephone appliance;
- (l) 1 video recorder.<sup>89</sup>

In addition to this exemption for household property, there are exemptions for "property that is for use by the [debtor] in earning income by personal exertion not exceeding in total the limit prescribed by the regulations"<sup>90</sup> and for property used by the debtor primarily as a means of transport provided it does not exceed the limit set in the regulations.<sup>91</sup>

3.46 In our discussion paper we asked about altering the exemptions in sections 16(1) and (2) of the 1987 Act.<sup>92</sup> There was virtually no support for decreasing the range of articles currently exempt. Only the Institute of Revenues, Rating and Valuation and one individual respondent were in favour of a decrease. The Institute reiterated the view in its report that the exemption levels in Scotland are more generous than in England and Wales and that this had adversely affected the recovery levels of arrears of council tax and community charge.<sup>93</sup> It stated that the exemptions should be substantially reduced from their present level. We do not agree with this view.

3.47 Our 1985 Report recommended exemptions (which were implemented virtually unchanged by section 16 of the 1987 Act) based on three principles.

\*The range of exempt goods must not be so great that no poindable goods could be found in a normal debtor's home. Otherwise pouncing would lose its effectiveness as a spur to payment;

\*The sale of household goods inflicts greater hardship on debtors than it benefits creditors since their sale value is low and much less than their replacement value; and

\*The exemptions must be workable.<sup>94</sup>

Exemptions must clearly be workable, but we think that it is no longer acceptable to limit the exemptions so that pouncing of goods in normal homes remains an effective diligence. We now prefer to base exemptions on the principle that articles should be exempt if they are reasonably required, having regard to current social standards, to allow debtors and their

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<sup>89</sup> Bankruptcy Regulations, reg 6.03(3).

<sup>90</sup> Currently fixed at \$2,600; Bankruptcy Regulations, reg 6.04.

<sup>91</sup> Currently \$5,500; see reg 6.04.

<sup>92</sup> Question 4.1, para 4.25.

<sup>93</sup> *IRRV Report*, chapter 4, paras 28-31.

<sup>94</sup> Para 5.46.

families to enjoy a modest standard of living. This formula seems to us to express better the underlying purpose of exemptions - to protect debtors from undue hardship. In addition we think that some other items ought to be exempt as they enable people to keep in touch with society and prevent social exclusion. One organisation suggested that the legislation should state what domestic goods can be poinded rather than list exemptions. This seems to us unworkable as it is impossible to list every luxury item that could be found in dwellinghouses.

3.48 In our discussion paper we asked whether the range of exempt goods should be extended to cover the following goods located in a dwelling house:<sup>95</sup>

one television set, one radio, one video recorder, one set of stereo equipment, one CD player, or similar home entertainment items;

one home computer; or

one microwave oven or similar kitchen electrical goods.

Consultation revealed a sharp division of opinion between those who opposed any further exemptions on the ground that poinding would lose its effectiveness and those who were in favour of exempting some or all of the listed items because they were no longer luxuries, but reasonably required by today's standards. We think that one television and one radio are now part of a modest or frugal lifestyle. Moreover, they enable people to keep in touch with the world around them and current affairs and are a cheap form of entertainment. Virtually every household now has them.<sup>96</sup> The exemptions should however be restricted to items of modest value. Expensive luxury models should remain poindable,<sup>97</sup> and equipment for receiving satellite broadcasts should not be included in a television set. Video recorders, CD players and hi-fi equipment are in our opinion still luxuries and should remain poindable. Deprivation of these items would not give rise to the same hardship or social exclusion as deprivation of a television set or radio.

3.49 Microwave ovens seem to us to lie on the border line between being part of a modest lifestyle and a luxury. A microwave oven which is the only cooking appliance should always be exempt. Indeed it would be exempt at present as reasonably required "equipment ...used for cooking ... food".<sup>98</sup> We think that a microwave oven should be exempt even if it is used in addition to other cookers. Children who cannot be left to use an ordinary cooker can use a microwave. Disabled adults could be in the same position. Money Advice Scotland stated in its response that many low income debtors buy frozen food at budget freezer shops and require a microwave to heat it. Again the exemption should be restricted to a basic appliance of modest value, so that a large luxury model owned in addition to another cooker would remain poindable.

3.50 Exemption of a home computer of modest value can in our opinion be justified as a reasonably required educational article if there are children in the debtor's household or any member of the household is undertaking a course of study or training. We favour such an

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<sup>95</sup> Question 4.1(2), para 4.25.

<sup>96</sup> 97% of UK households have a colour television; Office for National Statistics, Social Survey Division, *Living in Britain: Results from the 1996 General Household Survey* (1998), p 26.

<sup>97</sup> But the debtor should be entitled to the cost of a modest replacement out of the proceeds of sale, see Recommendation 10, para 3.63 below.

<sup>98</sup> 1987 Act, s 16(2)(k).

item being expressly added to paragraph (d) of section 16(1) in order to put the matter beyond doubt. The exemption should be limited to a computer of modest value. The current limit for educational articles is £500. This has not been altered since 1987. Based on changes in the Retail Price Index between January 1987 and January 2000 the figure ought to be increased to £833. We suggest rounding this up to £1,000, which would assist in exempting computers of only modest value. It may be that in the future computers will form such an important link to the outside world that they should be automatically exempt, but in our view that day has not yet arrived.

3.51 We also asked in our discussion paper whether any other items should be added to the list of those exempt in section 16.<sup>99</sup> Sheriff Principal Nicholson suggested a telephone on the basis that it enabled people to contact the emergency services. Until recently telephones were fairly basic and usually rented and consequently could not be poinded or were not considered worth poinding. Telephones are now often owned and can have many additional features such as fax and voice mail or be expensive "designer" articles. We think that a basic telephone of modest value should be exempt. A fax telephone or a similar elaborate instrument could be exempt as business equipment if the debtor or another member of the household used it for business purposes.

3.52 At present section 16(1)(b) of the 1987 Act exempts "implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any member of his household in the practice of the debtor's or such member's profession, trade or business, not exceeding in aggregate value £500 or such amount as may be prescribed in regulations" made by the Scottish Ministers. This figure has not been increased since 1987. Three consultees suggested that the current level was too low. We think that some increase is justified by the change in the value of money over the intervening 13 years. Based on the change in the Retail Price Index between January 1987 and January 2000 the current figure would be £833,<sup>100</sup> but we suggest a figure of £1,000. It is not clear whether a car or a van is exempt under section 16(1)(b) as it is not a tool of trade, a book or an implement and is arguably not "other equipment" either.<sup>101</sup> We think that this doubt should be clarified by expressly including a car or van. Many small business people need a car, especially in rural areas, to visit their customers or transport stock or materials. Only modest vehicles would be exempt as they would be included in the recommended new aggregate monetary limit. Some consultees suggested that a computer should also be exempt. It would be exempt as "other equipment" if used for business purposes,<sup>102</sup> but we do not think it should be exempt in addition to the £1,000 worth of business items.

3.53 The Dumbarton Law Centre and the Scottish Legal Action Group mentioned a family car as being worthy of exemption in certain circumstances. We are not in favour of exempting family cars from poinding<sup>103</sup> but a car that is essential in the debtor's particular circumstances should be capable of being released.<sup>104</sup>

3.54 Summing up the preceding paragraphs we recommend that:

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<sup>99</sup> Question 4.1(3), para 4.25.

<sup>100</sup> Office of National Statistics.

<sup>101</sup> It had been held before the 1987 Act that the motor cycle needed by a photographer in connection with his work in remote country areas was not exempt as a tool of trade, *Steele v Eagles* 1922 SLT (Sh Ct) 30.

<sup>102</sup> See para 3.50 above for exemption if required for education.

<sup>103</sup> See para 3.52 above for business vehicles.

<sup>104</sup> See para 3.64 below.

7 (1) The list of exempt articles in section 16(2) of the Debtors (Scotland) Act 1987 should be added to so as to include:

(a) one television set

(b) one radio

(c) one microwave oven

(d) one telephone

but only in so far as the item is of modest value.

(2) A computer and accessory equipment should be expressly included in the list of items in section 16(1)(d) as exempt if reasonably required for the education or training of the debtor or any member of the debtor's household. The aggregate value of such items, currently £500, should be increased to £1,000.

(3) A car, van or other vehicle should be expressly included in the list of items in section 16(1)(b) that are exempt if reasonably required for the purposes of a profession, trade or business. The aggregate value of such items, currently £500, should be increased to £1,000.

3.55 At present (with the minor exception of children's toys which are unconditionally exempt) any article must be reasonably required for the relevant use before it is exempt. The decision as to whether an article is reasonably required is made initially by the officer of court carrying out the pouncing. The debtor may apply to the sheriff for release of the article on the ground that it is reasonably required. The application has to be made within 14 days after the date of the pouncing.<sup>105</sup> Few applications for release were made in the period 1989 to 1993 when such statistics were collected. The number of applications ranged from 22 in 1989 to 78 in 1992.<sup>106</sup> The only reported case of which we are aware is *Irvine v Strathclyde Regional Council*<sup>107</sup> where it was held that a single debtor did not reasonably require a three piece suite.

3.56 In our discussion paper we asked whether it should continue to be a requirement for exemption of articles in a dwellinghouse that the articles were reasonably required for use of the persons resident there.<sup>108</sup> Most of those replying to this question agreed that the test of reasonably required should be retained. We think that in general this is the correct approach. Households vary so much in their composition and requirements that what would be an excess in one house would be reasonably required or even necessary in another. There has to be an element of discretion in the system. Sheriff Principal Nicholson made the useful suggestion that an officer completing the report of pouncing must note if the debtor challenged the inclusion of an article on the ground that it was reasonably required. The report of pouncing already has to note any assertion that a pounced article does not

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<sup>105</sup> S 16(4).

<sup>106</sup> Civil Judicial Statistics 1989-1993, Table 5.2.

<sup>107</sup> 1995 SLT (Sh Ct) 28.

<sup>108</sup> Question 4.2, para 4.28.

belong to the debtor.<sup>109</sup> Sheriffs should not however be entitled to release items on their own initiative simply because of the note in the pointing report. The debtor should still have to apply for release.

3.57 The Scottish Consumer Council and the Scottish Sheriff Court Users Group suggested that some items on the list should be automatically exempt. The former body also thought that the test for the remainder should be that they were "required" and that certain items (such as a refrigerator) should be presumed to be required. We are not in favour of such a change. It would make section 16(1) and (2) even more complicated than they are already. Officers do not in practice point items such as beds, bedding, household linen, food or articles used for safety in the dwellinghouse. Few, if any, homes will have a surplus of these items and even if they did they would have a very low resale value. We are not in favour of substituting "required" for "reasonably required", as this would not remove the discretionary element. The officer would still need to consider the particular circumstances of the household. Indeed "required" is arguably a more exacting standard than "reasonably required" and might result in fewer items being exempt. The Australian federal bankruptcy legislation uses the concept of sufficiency - sufficient beds or sufficient household furniture.<sup>110</sup> We see no benefit in changing over to that formula.

3.58 We therefore recommend that:

- 8 **The officer of court should note in the report of pointing any claim that a pointed article should have been exempted as being reasonably required.**

#### **Items of sentimental value**

3.59 Section 23(1) of the 1987 Act empowers the sheriff to release an article from the pointing if it appears to the sheriff that "its continued inclusion in the pointing or its sale under warrant of sale would be unduly harsh in the circumstances". The application for release is made by the debtor or any person in possession of the pointed article. If the article is released, the sheriff may authorise the pointing of other articles so that the value of the pointing is restored.<sup>111</sup> Section 23 enables debtors to get various articles released, including items of sentimental value, but it has not been widely used. Between 1989 and 1993 the number of applications under section 23 made each year ranged between 22 and 48.<sup>112</sup> Almost half the applications made (on grounds of undue harshness or that the article was exempt from pointing) was granted. No information is available on what sort of articles were released on grounds of undue harshness or the number of applications for release on this ground which were granted.

3.60 In the Scandinavian countries there is an express exemption from seizure of items of sentimental value. In Norway "objects which have a particular personal value for the debtor or any member of his household are exempt provided the value is low enough to make it obviously unreasonable to put the objects up for forced sale".<sup>113</sup> Similarly in Sweden "objects which are of such sentimental value to the debtor that it must be considered manifestly

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<sup>109</sup> 1987 Act, s 22(2).

<sup>110</sup> See para 3.45 above.

<sup>111</sup> S 23(2).

<sup>112</sup> Fleming and Platts, *SOCRU Analysis of Diligence Statistics*, p 21, Tables 12 and 13.

<sup>113</sup> Creditors Recovery Act 1984, s 2-3(c).

unjust to seize them" are exempt.<sup>114</sup> We understand that Swedish practice restricts the exemptions to items of small or modest value so that valuable family heirlooms may still be seized.<sup>115</sup> The Danish law is similar to that of Sweden.<sup>116</sup> Given the reluctance of debtors to take advantage of the various protective provisions in the 1987 Act by applying to the courts for release and other remedies, we consider that there should be an express exemption of items of sentimental value but modest monetary value. This would prevent officers pouncing war medals, sports trophies or trinkets. Items of no commercial value - such as a family photograph album - are exempt at present.<sup>117</sup>

3.61 There is no overall monetary limit in Denmark, Norway or Sweden. A limit would clarify what constituted modest value and would assist officers conducting a pouncing. We suggest an aggregate value of £150 which could be varied from time to time by regulations made by the Scottish Ministers. We therefore recommend that:

- 9 Items of particular sentimental value to the debtor or any member of his household should be exempt from pouncing up to an aggregate appraised value of £150 or such other sum as may be prescribed by the Scottish Ministers.**

### **Substitution of luxury items**

3.62 The debtor may possess only luxury or expensive versions of articles that are reasonably required for use in the dwellinghouse or for business. For example, the debtor's only chairs may be valuable antiques, or a piano teacher may have an expensive grand piano. If these items were pounced the debtor could apply for their release on grounds of undue harshness. The sheriff on granting an order for release may authorise the pouncing of other articles to restore the value of the pouncing.<sup>118</sup> We imagine that in most cases there would not be any other goods that could be pounced instead. Release of a valuable item from the pouncing without replacement would severely prejudice the creditor, but failure to release could cause the debtor hardship.

3.63 In Germany, the enforcement officer may seize expensive necessary items on replacing them with cheaper equivalents.<sup>119</sup> We are not in favour of this approach. It would complicate the task of officers of court and deprive debtors of any choice in the replacement. It could also lead to disputes about the suitability of the replacement and claims against officers if the replacement broke down shortly afterwards. We prefer the Norwegian solution whereby the creditor has to provide the debtor with sufficient money from the proceeds of sale to purchase a cheaper equivalent.<sup>120</sup> The debtor should have to apply to the court for an order setting aside sufficient money for a replacement. The application should be capable of being made from after the pouncing up until expiry of the period during which the debtor may object to the creditor's application for warrant of sale. The period lasts for 14

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<sup>114</sup> *Utsökningsbalken* (Enforcement Code), Chapter 5, § 1(4), translated for us by Miss Marie-Sofie Sveidqvist, LL.B.

<sup>115</sup> Information supplied by Miss Marie-Sofie Sveidqvist, LL.B.

<sup>116</sup> *Retsplejeloven* (Administration of Justice Act), s 509.

<sup>117</sup> J Graham Stewart, *The Law of Diligence* (1898), p 344.

<sup>118</sup> 1987 Act, s 23.

<sup>119</sup> Code of Civil Procedure, s 811.

<sup>120</sup> Creditors Recovery Act 1984, s 2-3(c).

days starting from the date of the creditor's application.<sup>121</sup> The sheriff would fix the amount that had to be set aside for this purpose. We recommend that:

- 10 (1) **The sheriff should have power, on application by the debtor, to order the creditor to pay the debtor out of the proceeds of sale of a poinded article a sum specified in the order to obtain a cheaper version of that article.**
- (2) **This power should be available only if a cheaper version of the article would be exempt as being reasonably required for use in the dwellinghouse, business etc in terms of section 16(1) or (2) of the Debtors (Scotland) Act 1987.**
- (3) **The debtor's application may be made at any time after the execution of the poinding until 14 days after the creditor's application for warrant of sale.**

### **Release of cars and other vehicles**

3.64 The Dumbarton Law Centre and the Scottish Legal Action Group suggested that a family car should be capable of being exempted from poinding. In paragraph 3.52 above we considered the case of a car or other vehicle used for business purposes and recommended that it should be part of business equipment which should be exempt up to an aggregate value of £1,000. We are not in favour of an automatic exemption for a family car or other vehicle which is not used for business purposes, even if it is worth less than a prescribed value. Debtors should not be entitled to continue to have the use and possession of such a valuable asset which is in general a luxury or convenience. However, in some parts of Scotland having a car is essential in that without one the debtor or a member of the household cannot get to work or is excluded from the labour market or cannot reach necessary services such as shops or a doctor's surgery. In these circumstances (which we envisage as being exceptional) the debtor should be entitled to apply to the sheriff for release of the car from the poinding. Where the debtor had an expensive vehicle the sheriff should have power to refuse release, but to order the creditor to pay the debtor a specified sum out of the proceeds of sale so that he may obtain a cheaper vehicle. The application should be capable of being made from after the poinding up until the period expiry of the period during which the debtor may object to the creditor's application for warrant of sale. The period lasts for 14 days starting from the date of the creditor's application.<sup>122</sup> We recommend that:

- 11 (1) **The debtor may apply to the sheriff for an order releasing a car or other vehicle (other than a car or other vehicle used for business purposes) from the poinding.**
- (2) **The sheriff should grant the application if satisfied that the car or other vehicle is necessary for the debtor (or a member of the debtor's household) to get to or obtain employment or to get to shops or other**

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<sup>121</sup> 1987 Act, s 30(3).

<sup>122</sup> 1987 Act, s 30(3).

essential services and its appraised value does not exceed £1,000 or such other sum as may be prescribed by the Scottish Ministers.

(3) Where the sheriff is satisfied that the car or other vehicle is necessary as in paragraph (2) above but its appraised value exceeds £1,000 or the prescribed sum, the sheriff should instead of ordering release be empowered to order the creditor to make over to the debtor a specified sum out of the proceeds of sale to enable the debtor to buy a cheaper replacement vehicle.

(4) The application should be capable of being made at any time after the pouncing up until 14 days after the date of the creditor's application for warrant of sale.

### Time of application for release

3.65 An application for release of an article from pouncing on the ground that it is exempt<sup>123</sup> or on the ground of undue harshness<sup>124</sup> has to be made within 14 days of the date of the pouncing. The need for finality at an early date as to what goods were included in the pouncing was the reason put forward for this time limit in our 1985 Report.<sup>125</sup> The time limit may however prevent debtors from having goods released that are exempt or whose sale would be unduly harsh. Although the schedule of pouncing will alert debtors as to the time limit they may fail to take action within 14 days. We are unconvinced as to the need for early finality and note that debtors can obtain release of articles at the application for warrant of sale stage by paying the creditor their appraised value. Clearly, any application has to be made and determined before warrant of sale is granted, but there seems no need to impose an earlier time limit. We think that an application should be capable of being made from after the pouncing up until the expiry of the period during which the debtor may object to the creditor's application for warrant of sale. The period lasts for 14 days starting from the date of the creditor's application.<sup>126</sup> Accordingly we recommend that:

**12 An application for release of an article under sections 16(4) or 23 of the Debtors (Scotland) Act 1987 should be capable of being made at any time after the pouncing up until 14 days after the creditor's application for warrant of sale.**

### Other grounds for recall or refusal

3.66 Sections 24(3) and 30(2) of the 1987 Act set out the grounds for recall of a pouncing or refusal of warrant of sale respectively. Apart from insufficiency of goods (which we have considered above<sup>127</sup>) these are that:

- (a) the articles are in aggregate substantially undervalued;
- (b) a sale of the articles would be unduly harsh; or

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<sup>123</sup> 1987 Act, s 16(4).

<sup>124</sup> 1987 Act, s 23.

<sup>125</sup> Para 5.62.

<sup>126</sup> 1987 Act, s 30(3).

<sup>127</sup> Recommendation 2, para 3.16.

- (c) the poinding is invalid or has ceased to have effect.

In our discussion paper we asked whether these grounds should continue in effect and, if not, what amendments should be made.<sup>128</sup>

3.67 Most of those responding to this question favoured retention of the existing grounds unchanged. Three bodies considered that it should no longer be a ground for recall or refusal that the articles were in aggregate substantially undervalued. We disagree and consider it an essential safeguard for debtors. The SOCRU research showed that in the warrant sales studied, 27% of household articles were adjudged in default of sale to the creditor at their appraised value, while a further 35% sold at their appraised value.<sup>129</sup> Sales of business items were even worse. Forty-two per cent of articles were adjudged and 37% were sold at their appraised value.<sup>130</sup> The debtor is credited with the greater of the appraised value or the sale price. Substantial under-valuation will severely prejudice debtors where goods are adjudged or sold at this appraised value. Moreover, the low values placed by officers on their goods is a matter of concern to debtors. The sheriff's power to recall a poinding or refuse warrant on this ground serves as a check to substantial under-valuation.

3.68 The Scottish Consumer Council thought that consideration should be given to replacing "undue harshness" as a ground by "likely to cause undue personal or economic hardship to debtors or their families". Our recommendations making poinding or sale incompetent if there are insufficient articles to cover the whole diligence expenses plus a portion of the debt address the economic hardship aspect.<sup>131</sup> In our view "undue personal hardship" is not sufficiently different from "unduly harsh" to warrant changing the current formula.

### Redesigning the forms

3.69 In our discussion paper we drew attention to the fact that the form of application for recall of poinding<sup>132</sup> does not specify the prescribed grounds for refusal but simply invites the debtor to state the reasons for the application and refers to section 24 of the 1987 Act.<sup>133</sup> We asked whether the statutory grounds for recall set out in section 24 should be specified in the form.<sup>134</sup> There was unanimous approval of this suggestion. Many of those responding also thought the forms should be redesigned and written in plain English. We would agree and have made a similar recommendation in relation to forms relating to time to pay directions and orders.<sup>135</sup> We recommend that:

- 13 The forms relating to poinding and sale should be redesigned after consultation with debt advice workers and others involved in debt recovery. In particular forms of applications for various remedies and the accompanying notes should give applicants sufficient information to**

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<sup>128</sup> Question 6, para 4.45.

<sup>129</sup> Fleming, *SOCRU Study of Poindings and Warrant Sales*, pp 26-27, tables 17 and 18.

<sup>130</sup> *Ibid*, pp 40-41, tables 29 and 30.

<sup>131</sup> Recommendations 1 and 2, paras 3.9 and 3.16 respectively.

<sup>132</sup> Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988, Form 11.

<sup>133</sup> Para 4.46.

<sup>134</sup> Question 4.7, para 4.46.

<sup>135</sup> See Recommendation 22, para 5.32 below.

**enable them to complete the forms without having to refer to the Debtors (Scotland) Act 1987 or other sources of information.**

## **PART 4 SUMMARY WARRANTS FOR ARREARS OF CENTRAL AND LOCAL GOVERNMENT TAXES AND SIMILAR CHARGES**

### **Preliminary**

4.1 Local authorities,<sup>1</sup> the Inland Revenue<sup>2</sup> and HM Customs and Excise<sup>3</sup> may obtain a summary warrant from the sheriff in respect of arrears of various taxes, non-domestic rates, water and sewerage charges and other levies. Pounding and sale is one of the diligences authorised by a summary warrant. The stages of the recovery of central and local taxes by the different public authorities concerned up to and including the grant of a summary warrant are regulated by specific enactments and fall outwith our terms of reference. In this Part we examine three issues peculiar to summary warrants: the pounding and sale procedure used to enforce them; the exclusion of time to pay measures; and collection of arrears by deduction from social security benefits. While many more poundings are executed under summary warrants than under court decrees, far fewer sales are carried out.<sup>4</sup> The greater use of warrant sales by ordinary creditors is all the more remarkable in that some important statutory safeguards for debtors in ordinary diligence, for example time to pay directions and orders and applications to the sheriff for warrant of sale, do not apply in summary warrant diligence.

### **A: POINDING AND SALE PROCEDURE**

4.2 The provisions regulating pounding and sale under summary warrants follow closely the provisions on ordinary pounding and sale procedure.<sup>5</sup> An important point of resemblance is that the exemptions from pounding are the same. There are however some important differences, notably:

- \*the execution of a pounding is not preceded by a charge for payment;<sup>6</sup>
- \*no report of pounding is made to the sheriff;
- \*there is no application to the sheriff for warrant of sale; and
- \*no report of sale is made to the sheriff after the sale is executed.

In this Section we consider whether there should be changes to the summary warrant pounding procedure and to what extent the recommendations we made in Part 3 for poundings in pursuance of ordinary decrees should apply to summary warrant poundings.

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<sup>1</sup> Local Government (Scotland) Act 1947, s 247 (non-domestic rates); Abolition of Domestic Rates Etc. (Scotland) Act 1987, Sch 2, para 7 (community charge); Local Government Finance Act 1992, Sch 8, para 2 (council tax).

<sup>2</sup> Taxes Management Act 1970, s 63.

<sup>3</sup> Finance Act 1997, s 52.

<sup>4</sup> 1998: ordinary poundings 6,282, ordinary sales 394; summary warrant poundings 16,779, summary warrant sales 119. Civil Judicial Statistics, Table 5.2.

<sup>5</sup> Set out in the 1987 Act, Sch 5.

<sup>6</sup> 1987 Act, s 90(2).

4.3 In our discussion paper we asked whether the poinding and sale procedure used to enforce court decrees should apply to summary warrant poinding and sale.<sup>7</sup> Opinion was fairly evenly divided amongst those who responded to this question. Many thought that there was no need to change the existing summary warrant poinding procedure. A fast-track procedure was justified both by the volume of defaulters and by the nature of the creditors who could be relied on to act responsibly in their approach to debt recovery. At the other end were those who were in favour of a complete replacement of the summary warrant procedure with the ordinary procedure. In their view it was confusing to have two separate procedures and the summary warrant procedure gave debtors far less protection than the ordinary decree procedure. The assertion by supporters of summary warrant procedure that public bodies could be trusted to act more correctly and less oppressively than ordinary creditors was also questioned. Some of the opponents of summary warrant procedure, such as the Scottish Consumer Council and the Scottish Legal Action Group, went further and wished to see summary warrants themselves abolished on the grounds that the protection of ordinary court procedures was lacking and that local authorities were too quick to use them. As we mentioned in paragraph 4.1 above, the question of whether summary warrants should be abolished is outwith the scope of this report.

4.4 A substantial number of respondents took an intermediate stance. They considered that summary warrant procedure should be different from ordinary procedure, but wished to see some of the steps in the latter incorporated into the former. The steps included charging the debtor to pay, the officer's report on poinding to the sheriff and the sheriff's granting warrant of sale on the creditor's application. In the following paragraphs we look at some possible changes to summary warrant poinding procedure.

### **Charge for payment**

4.5 Our 1985 Report recommended that a charge to pay should continue to be a necessary preliminary to enforcing a decree debt by poinding.<sup>8</sup> The requirement of a prior charge was also recommended for the new diligence of earnings arrestment.<sup>9</sup> Both these recommendations were implemented in the 1987 Act.<sup>10</sup> Summary warrant poindings have never required a prior charge and there was no pressure for introducing charges in the early 1980s. Our 1985 Report did not recommend charges in summary warrant poindings or earnings arrestments.<sup>11</sup> A charge to pay serves three main purposes. First, service of a charge on the debtor may prompt payment of the debt or the making of instalment arrangements, and allows the debtor to apply for a time to pay order.<sup>12</sup> Second, it helps to prevent diligence being done against those who have had a decree against them granted in error or who have subsequently paid the debt. Finally, it notifies debtors that decree has been granted and that the creditor intends to enforce it. Officers arriving to poind without any prior notification of the granting of the decree would give rise to much resentment.

4.6 A number of those responding to our question about summary warrant procedure specifically mentioned the introduction of charges for payment. The Faculty of Advocates

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<sup>7</sup> Question 5.1, para 5.14.

<sup>8</sup> Recommendation 5.1, para 5.9.

<sup>9</sup> Recommendation 6.7, para 6.59.

<sup>10</sup> S 90(1).

<sup>11</sup> Paras 7.19-7.20 and Recommendation 7.3, para 7.18.

<sup>12</sup> Recommendation 18, para 4.27 below.

said that charges would be particularly useful where a mistake had been made, for example if a person included in the summary warrant had paid. Citizens Advice Scotland reported their bureaux' experiences that the lists of defaulters in local authority summary warrants were not always correct. They also mentioned the resentment caused where a pouncing to enforce long-standing arrears was carried out without any warning. In addition, as we have said, a considerable number of consultees wished to see summary warrant procedure either replaced by ordinary procedure or brought more into line with ordinary procedure.

4.7 One reason for not requiring a charge for payment in summary warrant procedure is that in practice most summary warrant creditors intimate to the debtor that a summary warrant has been granted. This informal letter also warns debtors that diligence might follow if there is continued non-payment. Furthermore the costs of sending this intimation is considerably less than that of a formal charge which is served by an officer of court who, along with a witness, attends the debtor's premises. However we have been impressed by the point that defaulters do not receive intimation of the creditor's application for summary warrant and have no opportunity to oppose it, unlike an ordinary court action. The extra steps in ordinary action procedure which help to identify and eliminate errors are absent. Although the creditors usually make informal intimation after obtaining summary warrant, they are not required to do so. As a consequence the first occasion on which the debtor may be aware that a legal process has been invoked to recover payment from him is at the pouncing itself. We regard this state of affairs as unsatisfactory. The lack of prior formal contact between creditor and debtor means that the filter effect of using legal processes does not operate until an advanced stage has already been reached.

4.8 Accordingly we see merit in the argument that there should be a formal intimation made by a summary warrant creditor to the debtor. We considered whether the present practice of the creditor sending an informal letter should be made mandatory. This would achieve most of the benefits of charges without too much additional expense. However we have reached the conclusion that if a step in procedure is a prerequisite for taking further stages in diligence, there should be no difficulties in being able to prove that that step had been taken. Accordingly we take the view that if there is to be a requirement of formal intimation on the debtor to allow diligence to proceed, the service of a charge for payment is the most straightforward way of achieving this objective. The major disadvantage of requiring service of a charge is expense. However we believe that there are advantages which outweigh the costs of such a requirement. In the first place, service of a charge should lead to parties making arrangements for payment at an earlier stage than at present. As a result there will be a decrease in the number of summary warrant pouncings, with consequent savings in the overall cost which pouncings give rise to. Furthermore service of a charge will provide summary warrant creditors with some of the information they require if they need to apply for special warrant to execute a pouncing in a dwellinghouse.<sup>13</sup>

4.9 We are of the view that the requirement of serving a charge for payment should apply to diligence under summary warrant in the same way as it does to diligence in execution of decrees or their equivalents. A creditor would not be entitled to execute an earnings arrestment<sup>14</sup> or a pouncing until the days of charge have expired without payment

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<sup>13</sup> At paras 4.11-4.14 we consider whether our recommendations in respect of dwellinghouse pouncing in Part 3 should be applied to summary warrant pouncings.

<sup>14</sup> Or apply for a conjoined arrestment order.

in full. An ordinary arrestment would, however, be competent without a prior charge, as is the case with arrestment to enforce a decree.

4.10 We recommend that:

- 14 The execution of a poinding or an earnings arrestment in pursuance of a summary warrant should not be competent unless a charge for payment has been served on the debtor and the days of charge have expired without payment being made.**

### Special warrant to poind in dwellings

4.11 In Part 3 we recommended that a poinding of articles in a dwellinghouse should be incompetent unless a special warrant had been obtained from the sheriff.<sup>15</sup> We are firmly of the view that this requirement and the procedure recommended for obtaining a special warrant should be extended to summary warrant procedure. This requirement was recommended to prevent domestic poindings being used as an incentive to make payment where other diligences have not been considered and where there is little or no likelihood of there being sufficient goods to make the diligence economically viable. In our opinion these considerations apply whatever the nature of the debt. Public debt should not be enforced more harshly than private debt. Moreover, failure to extend this requirement to summary warrant debtors might have the effect of denying its protection to the majority of those subject to poinding. In 1998 there were nearly three times as many summary warrant poindings as ordinary poindings.<sup>16</sup>

4.12 In terms of our previous recommendation, the sheriff could not grant a special warrant unless satisfied that:

- (a) an arrestment of the debtor's earnings or funds cannot be carried out or is or would be wholly or substantially ineffective, and
- (b) there is a reasonable likelihood that sufficient poindable goods are situated in the premises which taken together with other articles belonging to the debtor poinded elsewhere would make the poinding competent in terms of Recommendation 1 above.<sup>17</sup>

Local authorities holding a summary warrant for arrears of council tax and community charge may enforce the debt by deductions from the debtor's income support or jobseeker's allowance.<sup>18</sup> The local authority applies to the Department of Social Security for a deduction order to be made. A domestic poinding in our view should be a diligence of last resort and should not be available where deductions from benefit can be made. The local authority seeking a special warrant should therefore have to satisfy the sheriff that the arrears due

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<sup>15</sup> Recommendation 3, para 3.27.

<sup>16</sup> 6,282 ordinary poindings, 16,779 summary warrant poindings; Civil Judicial Statistics 1998, Tables 5.2 and 5.5. Once a charge for payment is made a part of summary warrant procedure it is likely that there will be a drop in the number of summary warrant poindings. However given the volume of debt subject to summary warrant it is probable that there will continue to be more summary warrant poindings than ordinary debt poindings.

<sup>17</sup> The appraised value of the goods would have to exceed the total diligence expenses plus the lesser of £50 or 10% of the debt, see para 3.9 above.

<sup>18</sup> Council Tax (Deductions from Income Support) Regulations 1993, SI 1993/494 and Social Security (Jobseekers Allowance Consequential Amendments) (Deductions) Regulations 1996, SI 1996/2344; see also para 4.28.

cannot be collected by means of deductions from benefit. Sometimes a local authority will have two or more summary warrants against the same debtor for arrears of council tax and community charge or for arrears of council tax for two or more different years. The Department will process only one application for deductions at a time. Once deductions are being made for one summary warrant, other later applications have to wait. We think that deduction from benefit in respect of any summary warrant should be a bar to the granting of a special warrant for poinding in a dwellinghouse in respect of all summary warrants held by the local authority in relation to that debtor.

4.13 Local authorities have statutory powers to require debtors against whom a summary warrant or decree has been granted to give details of their employment and bank accounts.<sup>19</sup> A civil penalty of £50 payable to the authority may be imposed for failure to supply information or for knowingly supplying inaccurate information.<sup>20</sup> The penalty rises to £200 for each subsequent failure.<sup>21</sup> The local authority should therefore be in a position to satisfy the sheriff that an arrestment of earnings or funds could not be carried out or is or would be wholly or substantially ineffective. Earlier we recommended that service of a charge for payment should be introduced into summary warrant procedure.<sup>22</sup> One effect of that recommendation is that summary warrant creditors would be able to obtain information on the likelihood that there are sufficient poindable goods in the dwellinghouse where the poinding is to take place.

4.14 We recommend that:

- 15 (1) **It should be incompetent for a creditor in pursuance of a summary warrant to poind articles situated within premises which constitute or include a dwellinghouse or within a building within the curtilage of a dwellinghouse. The poinding of such articles should require a special warrant from a sheriff of the sheriffdom in which the premises are situated.**
- (2) **The creditor's application for a special warrant should be intimated to the debtor who should be given an opportunity to oppose it, unless the sheriff is satisfied that intimation is likely to prejudice the proposed poinding.**
- (3) **The sheriff should not grant a special warrant unless satisfied that:**
  - (a) **an arrestment of the debtor's earnings or funds cannot be carried out or is or would be wholly or substantially ineffective, and**
  - (b) **there is a reasonable likelihood that sufficient poindable goods are situated in the premises which taken together with other articles belonging to the debtor poinded elsewhere would make the poinding competent in terms of Recommendation 16.**

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<sup>19</sup> Local Government Finance Act 1992, Sch 8, para 5; Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (SI 1992/1332), reg 31.

<sup>20</sup> Local Government Finance Act 1992, Sch 3, para 2(2).

<sup>21</sup> Local Government Finance Act 1992, Sch 3, paras 2(3) and (4).

<sup>22</sup> Recommendation 14, para 4.10.

**(4) The sheriff should not grant a special warrant to a local authority creditor unless satisfied that recovery of the debt by way of deduction from social security benefits is not competent (unless the reason for its incompetence is that the authority is already receiving deductions from the debtor's benefits in respect of another debt).**

### **Insufficiency of goods**

4.15 We recommended in Part 3 that it should not be competent to poind goods or obtain warrant for their sale unless their appraised value is such that the whole diligence expenses plus some portion of the debt would be likely to be met by selling them.<sup>23</sup> We would extend these recommendations to summary warrant procedure with some modifications. In that procedure there is no application for warrant of sale so that the sheriff could not refuse warrant on the ground of insufficiency of goods. Although debtors would be entitled to apply for a recall of the poinding on that ground,<sup>24</sup> it affords insufficient protection as so few debtors make applications for recall of poinding. In our discussion paper we suggested placing a duty on officers of court not to poind or sell goods in pursuance of a summary warrant if their appraised value did not exceed the same proportion of the debt and expenses that applied in ordinary poinding procedure.<sup>25</sup> The overwhelming majority of those responding were in favour of the same rules applying to summary warrant poindings as to ordinary poindings. We agree. Summary warrant debtors are entitled to the same protection against uneconomic poindings as ordinary decree debtors. Two local authorities raised the issue of what the incentive to payment would be if poinding could not be carried out. The alternatives available in the vast majority of cases are arrestment of earnings or funds or deduction from social security benefits. If none of these is applicable, local authorities could well be left with no effective method of enforcing council tax and other debts against certain debtors. This consequence of restricting the availability of poindings has to be accepted as the price for increasing the level of debtor protection, but it is not one that is unique to summary warrant creditors. A firm of officers of court suggested that a summary warrant creditor should have to apply for warrant of sale and that the sheriff should have unfettered discretion whether to grant or refuse warrant. We are not in favour of introducing warrants of sale into summary warrant procedure for the reasons set out in paragraph 4.19 below. Moreover, an unfettered discretion would leave sheriffs uncertain as to what to do and lead to wide variations in practice between courts.

4.16 The officer may have competently poinded the debtor's goods but discovers at the sale stage that there are insufficient articles for the likely sale proceeds to pay the whole diligence expenses and a portion of the debt. For example, the debtor may have redeemed some articles by paying the creditor their appraised values or the sheriff may have released articles as being exempt from poinding. We recommended that in this situation the sheriff in ordinary poinding procedure should refuse warrant of sale.<sup>26</sup> We would extend that recommendation to summary warrant procedure by prohibiting the officer from selling the goods.

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<sup>23</sup> Recommendation 1, para 3.9; Recommendation 2, para 3.16.

<sup>24</sup> 1987 Act, Sch 5, para 8.

<sup>25</sup> Question 5.4, para 5.21.

<sup>26</sup> Recommendation 2, para 3.16.

4.17 We recommend that:

- 16 (1) An officer of court should not be entitled to poind or sell articles in pursuance of a summary warrant if the total appraised value of non-exempt articles situated in the premises does not exceed the total of the diligence expenses already incurred and likely to be incurred in selling them plus 10% of the debt or £50 whichever is the lesser. The percentage and sum should be capable of being varied by the Scottish Ministers.
- (2) Where an officer visits the debtor's premises to poind but finds insufficient goods the officer should make a formal report to the creditor detailing what non-exempt articles were found, their appraised values and the likely total diligence expenses on which the decision not to poind was based. A copy of the report should be given to, or left in the premises for, the debtor. The expenses of these steps should be chargeable against the debtor.

### Reports of poinding

4.18 In our discussion paper we considered that the existing position, whereby no report of a summary warrant poinding has to be submitted to the sheriff, should be retained.<sup>27</sup> Judicial supervision seemed to us unnecessary as public authorities could be trusted to conduct poindings responsibly, and summary warrant procedure is meant to be quick and relatively inexpensive. The requirement to submit a report of poinding would slow the diligence down and increase the expense. Most of those responding to the question of whether summary warrant procedure should be the same as ordinary poinding procedure were in favour either of making the ordinary procedure available for all debts or of bringing the summary warrant procedure more into line with ordinary procedure. On reconsideration we now think that officers should submit reports of summary warrant poindings. Our restriction on poinding in Recommendation 16 is such a new and significant protection for debtors that we think there should be some independent monitoring of compliance. The sheriff should be directed to refuse a report that disclosed that the total appraised value of the articles poinded did not exceed the likely total diligence expenses plus some portion of the debt. Enforcement of the restriction would then not depend on the debtor making an application. Introducing the requirement to submit a report of poinding to the sheriff would not slow down the diligence to any appreciable extent or add much to the expense. The officer's fee for submitting a report of poinding is currently only £6.10.<sup>28</sup> We therefore recommend that:

- 17 (1) An officer of court who has poinded articles in pursuance of a summary warrant should be required to submit a report of poinding in prescribed form to the sheriff within 14 days of the poinding.
- (2) The sheriff should refuse to receive a report that discloses that the officer was not entitled to have carried out the poinding by virtue of Recommendation 16(1), and the poinding should thereby cease to have effect.

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<sup>27</sup> Paras 5.7-5.8.

<sup>28</sup> Act of Sederunt (Fees of Sheriff Officers) 1999, SI 1999/150.

## Warrants of sale

4.19 We are not in favour of introducing into summary warrant procedure a requirement that the creditor applies for warrant of sale. Adding this stage would make summary warrant procedure equivalent to ordinary procedure as we have already recommended the introduction of a charge to pay and a report of pouncing. Making summary warrant procedure exactly the same as ordinary procedure was not supported by the majority of those consulted. The annual number of summary warrant sales presently carried out is just over 100.<sup>29</sup> Adding such a major procedural stage with attendant delay and expense is, in our view, not worth it for such a small number of sales. Debtors already have the protection of being entitled to apply for recall of the pouncing on the same grounds as in an ordinary pouncing,<sup>30</sup> and would be further protected by our recommendation that sheriffs should bring a pouncing to an end if the report of pouncing disclosed an insufficiency of goods.<sup>31</sup>

## Exempt goods

4.20 At present the articles that are exempt from pouncing in pursuance of a summary warrant are exactly the same as those exempt in ordinary pouncing procedure. We asked in our discussion paper whether this should continue to be the position or whether, as in some other countries,<sup>32</sup> there should be fewer exemptions where central and local government debts were concerned.<sup>33</sup> All but one of the respondents agreed that the exemptions should be the same. The dissenting organisation thought that no articles should be exempt when a pouncing was carried out in pursuance of a summary warrant. We reject this. We adhere to our view expressed in the discussion paper that debtors should be left with items that are reasonably required for a basic standard of living for themselves and their families, and that this protection should apply whatever the nature of the debt sought to be enforced or the process by which it is enforced.<sup>34</sup>

## B: TIME TO PAY AND SUMMARY WARRANT DILIGENCE

4.21 Our 1985 Report recommended that time to pay directions and orders should be available in cases of rates and tax arrears.<sup>35</sup> This was despite the fact that time to pay orders may be thought incompatible with the nature of summary warrant procedure.<sup>36</sup> Furthermore it was recognised that there is more of a non-payment culture for rates and taxes than there is for ordinary debts.<sup>37</sup> Nevertheless it was thought that a debtor should be given time to pay where he truly cannot pay and that sheriffs would not grant a time to pay order in an opposed application unless the debtor was genuinely unable to pay.<sup>38</sup>

4.22 The 1987 Act makes no provision for time to pay where the debt consists of arrears of specified taxes or is collected by summary warrant. The government of the day gave a number of reasons for this omission. First, it was contended that central and local

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<sup>29</sup> 1996, 123; 1997, 132; 1998, 119: Civil Judicial Statistics 1996-98, Table 5.5.

<sup>30</sup> 1987 Act, Sch 5, para 8.

<sup>31</sup> Recommendation 17, para 4.18 above.

<sup>32</sup> Norway for example.

<sup>33</sup> Question 5.3, para 5.19.

<sup>34</sup> Para 5.19.

<sup>35</sup> Recommendations 3.3 and 3.13.

<sup>36</sup> Para 3.55.

<sup>37</sup> *Idem.*

<sup>38</sup> *Idem.*

government collectors could be relied upon to give time to pay to those most in need.<sup>39</sup> Second, allowing time to pay in Scotland would create a cross-border difference in an area where the whole of the UK had traditionally been treated in the same way.<sup>40</sup> Finally, it was thought that, because taxes and similar charges were often a continuing liability, allowing an extended period to pay could create problems for debtors when the next assessment became due.<sup>41</sup>

4.23 In our discussion paper we re-examined the issue.<sup>42</sup> We sought views on whether time to pay orders should be available where the debt is arrears of central or local government taxes due under a decree or summary warrant. The question divided consultees but generally it was thought that such orders should be available.

4.24 Of those who were against the introduction of orders the primary concern was that debtors are already given time to pay on an informal basis by local authorities. There was also concern that allowing time to pay for arrears would mean that the current year's liability would not be paid. A recent Scottish Executive/COSLA report dealt with this concern.<sup>43</sup> It seems that the usual practice is to allocate any payment received from the debtor to the earliest debt due. The result of this practice is that many debtors fail to meet their current liability and therefore remain perpetually in arrears.<sup>44</sup> Of course it would be possible for the sheriff to set a repayment period so that the debt would be cleared before the new tax debt was payable. However this would make little difference in practice. The Scottish Executive/COSLA report recommended that councils should be encouraged to attribute payments to the debtor's current liability first, in order to "stabilise the position and provide a base from which earlier years' debts could be reduced".<sup>45</sup> We support this recommendation.

4.25 Many consultees involved in money advice expressed concern that some local authorities used the summary warrant procedure irresponsibly and failed to take into account the individual debtor's circumstances.<sup>46</sup> The lack of time to pay orders in summary warrant diligence was a specific concern in evidence before the committees of the Scottish Parliament.<sup>47</sup> It was further felt that, whilst informal arrangements may work well in practice, they are dependent on the will of the creditor. Even where the creditor is perceived as being "responsible" it is considered that debtors deserve the legal right to time to pay free from the threat of diligence. We find this a persuasive argument.

4.26 We have recommended that a charge to pay should have to be served on the debtor before a summary warrant poinding could be done.<sup>48</sup> The charge should inform the debtor of the right to time to pay and enclose an application form. There may be concerns about

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<sup>39</sup> First Scottish Standing Committee, 17 March 1987, col 20.

<sup>40</sup> *Ibid*, cols 20 and 21.

<sup>41</sup> *Ibid*, col 20.

<sup>42</sup> Paras 5.15-5.17, and Question 5.2.

<sup>43</sup> Scottish Executive/COSLA, *It Pays to Pay: Improving Council Tax Collection in Scotland*, (2000).

<sup>44</sup> *Ibid*, para 110.

<sup>45</sup> *Idem*.

<sup>46</sup> This also emerged from the evidence to committees of the Scottish Parliament. See Local Government Committee, 12 January 2000, *Official Report*, cols 452 and 453.

<sup>47</sup> Justice and Home Affairs Committee, 17 November 1999, *Official Report* cols 405 (Mike Dailly, Govan Law Centre) and 416 to 417 (Tommy Sheridan MSP); Social Inclusion, Housing and Voluntary Sector Committee, 1 December 1999, *Official Report* cols 391 and 393 (Frank Johnstone, Law Society of Scotland).

<sup>48</sup> See Recommendation 14, para 4.10 above.

delays in the enforcement process if time to pay orders are introduced. Certainly there will be some amount of delay by the very nature of the order. However the rules on default would be the same as the rules in ordinary debts and therefore two missed instalments would lead to the entire debt becoming enforceable.<sup>49</sup> Furthermore the rule would remain that a time to pay order could be applied for only once, and default on an order would mean that time to pay could not be granted a second time. If the order was successful then the debt would, of course, be recovered and the issue of delay would be immaterial. Where the creditor pursues arrears of tax by ordinary action the debtor should be entitled to apply for a time to pay direction to be attached to the decree.

4.27 We recommend that:

**18 (1) A debtor should be entitled to apply for a time to pay order where the debt is arrears of central or local government taxes and similar charges due under a decree or summary warrant. Where the arrears are being pursued by ordinary action the debtor should be entitled to apply for a time to pay direction to be attached to the decree.**

**(2) The charge to pay served on the debtor should inform him of his right to apply for a time to pay order. An application form should accompany the charge.**

## **C: SUMMARY WARRANTS AND DEDUCTION FROM BENEFITS**

4.28 An order for deductions at source from income support and jobseeker's allowance<sup>50</sup> is available only to special classes of creditor enforcing special classes of debt. These classes of debt include arrears of council tax;<sup>51</sup> rent arrears; mains gas and electricity charges;<sup>52</sup> unpaid fines and compensation orders;<sup>53</sup> and child support maintenance.<sup>54</sup> To illustrate how such orders work, we give as an example the council tax scheme. A local authority which has obtained a summary warrant for arrears of council tax against a debtor in receipt of income support may apply to the Secretary of State requesting that deductions be made in order to satisfy the debt. A sum equal to 5% of the personal allowance for a single claimant aged 25 or over (£52.60<sup>55</sup>) may be deducted each week. The deduction is therefore just over £2.60 per week. The deductions are paid over to the local authority at agreed intervals of no longer than 13 weeks.

4.29 Like earnings arrestments, orders for deduction of income support at source have lower transaction costs than poinding and sale and cause less personal distress. In our discussion paper we pointed out that many local authorities use deductions from income support as a more humane method of enforcement than subjecting those who are on very

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<sup>49</sup> 1987 Act, s 11.

<sup>50</sup> Extended to jobseeker's allowance by the Social Security (Jobseeker's Allowance Consequential Amendments)(Deductions) Regulations 1996 (SI 1996/2344).

<sup>51</sup> Council Tax (Deductions from Income Support) Regulations 1993 (SI 1993/494).

<sup>52</sup> Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), reg 35 and Sch 9.

<sup>53</sup> Fines (Deductions from Income Support) Regulations 1992 (SI 1992/2182).

<sup>54</sup> Child Support Act 1991, s 43 and the Child Support (Maintenance Arrangements and Special Cases) Regulations 1992, (SI 1992/1815), regs 13 and 28.

<sup>55</sup> From April 2000.

low incomes to poinding and sale.<sup>56</sup> However, a local authority can apply for a deduction from benefit order only after a summary warrant has been granted against the debtor. This requirement to obtain a summary warrant has been criticised in evidence to the Scottish Parliament and in seminars at which we were represented.<sup>57</sup> It imposes a 10% surcharge on the amount of the arrears, adding an unnecessary burden on the debtor. We think it should be sufficient for the local authority to state in its application to the Department of Social Security that all the requirements for the granting of a summary warrant have been met in the debtor's case.

4.30 We recommend that:

- 19 A local authority should be entitled to apply to the Department of Social Security for deductions to be made from the debtor's benefits in respect of arrears of council tax or community charge without first having to obtain a summary warrant or a decree.**

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<sup>56</sup> Para 2.50.

<sup>57</sup> Social Inclusion, Housing and Voluntary Sector Committee, 17 November 1999, *Official Report* col 314, (Mary Patterson, Communities Against Poverty Network).

# **PART 5 MEASURES TO FACILITATE BY-PASSING POINDING AND SALE**

## **Introduction**

5.1 In Part 2 we concluded that poinding and sale should be retained with reforms rather than abolished. Central to that reform is increased debtor protection. We also referred to what we called the principle of least coercion, which we argued had two important consequences in the context of reforming the diligence of poinding and sale. In the first place the principle of least coercion suggests that if diligence can be avoided altogether by resort to other procedures then those procedures are preferable methods of recovering a debt. For this reason we consider in section A of this Part the so-called diligence stoppers of time to pay measures and debt arrangement schemes. Secondly, where a creditor has an option of using more than one type of diligence to recover a debt, the law should facilitate his opting for the least coercive type. Accordingly a creditor should attempt to use arrestment or earnings arrestment rather than poinding and sale. However it was also noted in Part 2 that to achieve this objective a creditor would require accurate information about a debtor's bank account and employment details, information which he would not often obtain in previous dealings with the debtor. Accordingly in this Part we consider (at Section B) how such information can be made available.

## **A: DILIGENCE STOPPERS**

5.2 The 1987 Act implemented Chapter 3 of our 1985 Report regarding time to pay directions and time to pay orders.<sup>1</sup> These provisions allow the debtor an opportunity to settle the debt by instalments (or by way of a deferred payment in a lump sum) free from the threat of diligence in cases where he cannot make immediate payment in a single lump sum. For this reason they have been termed "diligence stoppers". Another measure which would have the effect of freezing diligence, the debt arrangement scheme, was also recommended in our 1985 Report but not implemented. Debt arrangement schemes differ from time to pay measures in that they deal with problems arising from multiple indebtedness of a debtor but during their operation these schemes would have the effect of preventing diligence.

## **6. TIME TO PAY DIRECTIONS AND ORDERS: THE PRESENT POSITION**

### **Time to pay directions**

5.3 Time to pay directions, as introduced by the 1987 Act, can be made a part of a sheriff court or Court of Session decree for the payment of money (other than for expenses). The debtor must apply before the decree is granted and an application form is to be included with the summons or initial writ served on the debtor.<sup>2</sup> The debtor applies by returning to

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<sup>1</sup> 1987 Act, Part I.

<sup>2</sup> RCS 44.2 and Forms 44.2A and 44.2B (Court of Session), OCR 5.2(2) and Form O3 (Ordinary Cause). In summary causes and small claims the application form is part of the printed form summons, Summary Cause Rules, Form Ab; Small Claims Rules, r 3(2) and Form 2.

the clerk of court a completed application form setting out his financial position and his proposals for payment.

5.4 If the debtor chooses not to attend court, the debtor's proposal (but not the entire application form) is forwarded to the creditor. If the creditor does not object to the proposal the court will grant the direction in the terms specified by the debtor. If there are objections they are disposed of at a hearing after which the court may grant the direction as proposed, or in such other terms as seem fit, or indeed may refuse to grant the direction at all.<sup>3</sup> Most time to pay directions provide for payment by instalments, but a direction may instead allow for payment of the debt in a lump sum at a specified future date.<sup>4</sup>

5.5 Time to pay directions are not available for certain classes of debt.<sup>5</sup> The primary categories are central and local government taxes, rates and charges, and debts of over £10,000. Time to pay directions are also not available for payment of arrears of child maintenance due under a liability order, fines and other sums imposed in criminal proceedings, aliment, and orders for financial provision on divorce or nullity of marriage. Furthermore a direction can only be applied for by an individual debtor or his tutor, judicial factor or curator bonis.<sup>6</sup> Debts due by a company or a partnership cannot be the subject of a time to pay measure.

5.6 Where a time to pay direction is granted the creditor must intimate the extract of the decree containing the direction to the debtor. Instalments are payable from a specified period after intimation and any period of deferment runs from the date of intimation.<sup>7</sup>

5.7 The creditor is prohibited from using any form of diligence, with the exception of inhibition, while a time to pay direction is in effect. The direction does not, however, prevent secured creditors from enforcing their securities or utility companies from discontinuing supply to the debtor. Once a direction lapses, however, the creditor may proceed to enforce the debt by diligence without further court proceedings or intimation to the debtor.

5.8 An instalment time to pay direction lapses automatically if at any time an amount equal to two instalments is in arrears when an instalment becomes due. In the case of a deferred lump sum payment the direction lapses if full payment is not made within 24 hours of the due date.

5.9 There are provisions for variation or recall of the direction. On application by either the debtor or creditor the court may vary or recall the direction on change of circumstances. These provisions would allow, for example, a court to alter the amount to be paid in each instalment where a debtor had lost his job or had a fall in his income. However there appears to be little use made of the provisions on variation.

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<sup>3</sup> OCR 7.3.

<sup>4</sup> 1987 Act, s 1(1)(a) and (b). In the SOCRU research on data from 1989 to 1993 the number of instalment directions as a percentage of all directions granted ranged from 78% to 94%. See Fleming and Platts, *SOCRU Analysis of Diligence Statistics*, p 12, Table 4.

<sup>5</sup> 1987 Act, s 1(5).

<sup>6</sup> 1987 Act, s 14(1).

<sup>7</sup> 1987 Act, s 1(1).

## Time to pay orders

5.10 A time to pay order may be applied for by the debtor once diligence to enforce the debt has been commenced. Application may be made after a charge has been served, a non-earnings arrestment executed or an action of adjudication commenced.<sup>8</sup> Application may be made up to the advanced stages of diligence, eg before the granting of a decree of furthcoming or a warrant of sale.<sup>9</sup> Debtors may apply for a time to pay order even though their earnings are subject to an earnings arrestment. Time to pay orders are subject to the same restrictions with regard to the type of debt as time to pay directions.<sup>10</sup> In addition a time to pay order may not be granted where a debtor has previously defaulted on a time to pay direction or earlier order.<sup>11</sup>

5.11 An application for a time to pay order is made to a sheriff court, irrespective of the court which granted the decree.<sup>12</sup> The debtor completes the application form by setting out details of the debt and the terms of the order he is seeking (which may be for payment by instalments or by deferred lump sum). The sheriff clerk sends a copy of the application to the creditor along with the sheriff's order sisting diligence. If the creditor does not object within 14 days, the order will be granted in the terms of the application. The creditor may object or may make counter-proposals for a repayment scheme. If no agreement can be reached between the debtor and creditor a hearing will be arranged after which the sheriff may refuse the application or grant it in such terms as seem fit.

5.12 A time to pay order is intimated to the debtor by the sheriff clerk, who informs the creditor of the intimation. Instalments are due from a specified period after intimation and any deferred period commences from the date of intimation.<sup>13</sup> The effect of a time to pay order is to preclude a creditor from serving a charge to pay, executing any arrestment, earnings arrestment or poinding, or commencing an action of adjudication. On the granting of an order the sheriff must recall any existing earnings arrestment, but has discretion whether to recall a poinding or to recall or restrict an arrestment of funds. If the diligence is not recalled the sheriff will prohibit any further steps being taken in the diligence, apart from certain minor steps.<sup>14</sup>

5.13 The provision for recall, lapse and variation of a time to pay order closely follow those for a time to pay direction.<sup>15</sup>

## 7. REFORM OF TIME TO PAY MEASURES

5.14 We continue to accept the principle behind the time to pay measures, namely that a debtor should be able to defer payment or pay his debt by instalments where he cannot afford an immediate lump sum. The effectiveness of the provisions on time to pay has been hampered by the low take-up rate by debtors.<sup>16</sup> The SOCRU research showed that between 15% and 20% of debtors apply for and obtain time to pay directions, whereas only 1% of

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<sup>8</sup> 1987 Act, s 5(1).

<sup>9</sup> 1987 Act, s 5(5).

<sup>10</sup> 1987 Act, ss 5(4) and 15(3).

<sup>11</sup> 1987 Act, s 5(4)(b).

<sup>12</sup> See 1987 Act, s 15(3) for the jurisdiction of the sheriff.

<sup>13</sup> 1987 Act, s 5(2).

<sup>14</sup> 1987 Act, s 9(4).

<sup>15</sup> 1987 Act, ss 10-11.

<sup>16</sup> Discussion paper, paras 7.15-7.20, and tables Y and Z.

eligible debtors apply for time to pay orders. The research suggests a number of reasons for this low rate. Debtors (and their advisers) are often unaware of the measures or do not fully understand how they operate (as for example the possibility of having the terms of a direction or order varied on change of the debtor's circumstances). It also appears that money advisors prefer to negotiate informally on the debtor's behalf rather than use court-based measures. In our discussion paper we put forward a number of options for reform with a view to increasing the use made of time to pay directions and orders.

#### **(a) Monetary levels of time to pay directions and orders**

5.15 Under the 1987 Act time to pay measures are only available in respect of debts not exceeding £10,000.<sup>17</sup> This limit does not include interest or expenses. The limit was suggested in our 1985 Report<sup>18</sup> on the basis that applications for time to pay measures for larger debts might be hotly contested and lead to delays and further expense. It was also felt that inability to pay debts of this size would be more appropriately dealt with through bankruptcy and insolvency procedures.

5.16 The SOCRU research found that only 7% of debts sued for in the sheriff courts were above this level in 1996.<sup>19</sup> Some consultees felt that the limit should be raised to £25,000 in order to bring it into line with the consumer credit legislation. This legislation allows debtors to apply for "time orders", which are similar in nature to a time to pay order.<sup>20</sup> A majority of consultees felt that there should be no change to the monetary limit. It was argued that debtors with larger debts would not be unprotected as the courts still have the common law power to "supersede extract", delaying the extract of the decree and thereby giving debtors a short period to realise assets free from the threat of diligence. However we think that superseding extract is not a satisfactory alternative to a time to pay measure, especially for larger debts where more time to pay will inevitably be required.

5.17 There does not appear to be a valid reason why time to pay directions and orders are not brought into line with the consumer credit limits, especially as the two types of measure interact. Where a time order has been granted under the Consumer Credit Act 1974, a subsequent time to pay direction or order under the 1987 Act is not competent. Conversely where there has been a time to pay measure under the 1987 Act, a subsequent time order under the 1974 Act cannot be granted. If the £10,000 figure were adjusted in line with the retail price index since 1987 it would work out to around £16,500 in today's values. We do not therefore feel that a £25,000 limit would be unreasonable.

5.18 We recommend that:

- 20 The upper monetary limit on debts in respect of which time to pay directions and time to pay orders under the Debtors (Scotland) Act 1987 are competent should be raised to £25,000, in line with time orders under the Consumer Credit Act 1974.**

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<sup>17</sup> 1987 Act, ss 1(5); 5(4). Power to alter these limits by regulation lies with the Scottish Ministers, by virtue of The Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 (SI 1999/678) and Scotland Act 1998, s 53.

<sup>18</sup> Recommendation 3.6 and para 3.22.

<sup>19</sup> Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, pp 15-16, para 17 and Table 10.

<sup>20</sup> Consumer Credit Act 1974, ss 129-130.

## **(b) Prior default and time to pay orders**

5.19 The present law states that a debtor may not be granted a time to pay order if he has already defaulted on a previous time to pay direction or order.<sup>21</sup> In our discussion paper views were sought on whether this rule ought to be changed. The responses that were received were almost equally split between those who felt that the rule should be changed and those who did not. There was a very small majority in favour of no change.

5.20 The main argument advanced for changing the rule is that debtors often offer to pay more than they can afford in the first instance out of fear that the offer would otherwise be rejected. As a consequence those debtors most deserving of consideration are also those most likely to default. However, even a number of those in favour of a change in the rules recognised the need to prevent unreasonable delay in the creditor receiving payment which might arise if debtors were to default continually but be allowed to re-apply for time to pay orders. Most consultees also recognised that, if a second application were to be allowed, a previous default would have to be taken into account by the sheriff in deciding whether to grant an application.

5.21 The primary problem appears to be a lack of awareness amongst debtors, not just of the existence of time to pay measures itself, but also of the provisions for variation of the terms of directions and orders. It has been suggested that many debtors simply resign themselves to default if they go through a change of circumstances which leaves them unable to pay the agreed instalments. We think that more should be done to boost awareness of the variation provisions of time to pay directions and orders. We revert to this below.<sup>22</sup>

5.22 Slightly more of those consulted felt that no change should occur in the present law. Among the reasons for this were that having a right to re-apply would lead to unacceptable delays in the system during which time diligence could not be used. Furthermore, the right to re-apply would be likely to lead to an increase in the rejection of orders by creditors, primarily because of concerns over delays. We accept these arguments and do not recommend any change.

## **(c) Increasing awareness of time to pay directions and orders and of the variation provisions**

5.23 In our discussion paper we noted that a lack of awareness did not seem to be a major problem with regard to time to pay directions.<sup>23</sup> Most debtors seemed aware of their existence,<sup>24</sup> and most advice workers were similarly aware, but chose to negotiate informally instead.<sup>25</sup>

5.24 The situation is significantly different in respect of time to pay orders.<sup>26</sup> A possible contributory factor to differences in debtor awareness is that the initial writ or summons

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<sup>21</sup> 1987 Act, s 5(4)(b). A time to pay order may not be granted if there has been an earlier time order in respect of the same debt under the Consumer Credit Act 1974.

<sup>22</sup> Paras 5.23-5.27.

<sup>23</sup> Paras 7.27-7.28.

<sup>24</sup> Platts, *SOCRU Overview*, p 19, para 9.

<sup>25</sup> Fleming, *SOCRU Study of Facilitators*, p 16, para 17.

<sup>26</sup> Platts, *SOCRU Overview*, p 19, para 10.

served on the debtor will refer to time to pay directions. By contrast no diligence documents served on the debtor currently mention time to pay orders.<sup>27</sup> We asked for views on whether the charge to pay should be accompanied by a short note explaining time to pay orders and enclosing an application form. The overwhelming majority of those offering comment suggested that the charge to pay should be accompanied by such a note in clear and simple language along with an application form.

5.25 A slightly smaller majority of those who commented were in favour of other diligence documents containing similar information. Many stated that all "relevant" or "appropriate" documents served on the debtor during the diligence should contain such information. Others named specific documents such as the schedule of poinding and the application for warrant of sale, both of which are intimated to the debtor.<sup>28</sup> It was further commented by some that the note should include details of where to find money advice in the debtor's area. Several consultees made useful suggestions on how to get a debtor to notice the note amongst the official forms (eg using different colours of paper). Many consultees felt that the official diligence forms themselves were particularly unhelpful to the debtor and required urgent review. We revert to this argument below.<sup>29</sup>

5.26 In Part 2 above we argued that where a debtor is given a right as a measure of debtor protection, the legal system should strive to make that right a meaningful one. Increased awareness of the provisions on time to pay orders is an important step in ensuring greater use of these measures. Accordingly we are of the view that a charge and other diligence documents should contain a note. This note should very clearly set out the debtor's rights in respect of his entitlement to apply for a time to pay order, the effect of the order, and the debtor's rights to vary the order on change of circumstances.

5.27 We recommend that:

- 21 (1) **The charge for payment served on a debtor who is eligible to apply for a time to pay order should be accompanied by a note on time to pay orders and an application form. The note should clearly set out the debtor's rights and duties in respect of applying for, complying with and varying an order.**
- (2) **Other documents served or intimated to the debtor during the course of diligence should contain a similar note and an application form.**

5.28 In our discussion paper we noted the work of the Edinburgh in-court advisory scheme.<sup>30</sup> This is a pilot scheme designed to advise those involved in raising and defending small claims and summary cause actions.<sup>31</sup> Our discussion paper asked consultees to consider whether the introduction of such schemes on a nation-wide basis would increase the awareness of time to pay measures. It was almost unanimously accepted that it would. We also noted that where debtors attended court in support of time to pay applications,

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<sup>27</sup> *Idem.*

<sup>28</sup> Comments of the Society of Messengers-at-Arms and Sheriff Officers.

<sup>29</sup> Paras 5.28 – 5.30.

<sup>30</sup> Para 7.35.

<sup>31</sup> See further E. Samuel, *Supporting Court Users: The Pilot In-Court Advice Project in Edinburgh Sheriff Court*, SOCRU (1999).

there is a greater chance of a time to pay direction or order being granted.<sup>32</sup> We have been very impressed by the experience of those who have used the Edinburgh sheriff court scheme. It has made a significant contribution to increasing access to civil justice to many persons who otherwise have no easy means of obtaining legal advice.

5.29 The in-court advisory service has a much wider scope than simply advising on time to pay measures, and accordingly we make no formal recommendations on the issue of whether the scheme should be extended to all sheriff courts. However we are firmly of the opinion that the extension of this scheme would lead to an increase in the awareness of time to pay measures and in the number of measures granted.

#### **(d) Redesigning the forms**

5.30 Our discussion paper noted that debtors find the existing application forms or combined summons and application forms difficult to understand.<sup>33</sup> The SOCRU research found that 80% of debtors did not respond to the summons and over half of these debtors stated that they had difficulties in understanding the language used in the summons and application forms.<sup>34</sup> Solicitors involved with debtors and other advice workers reported that many debtors did not fully understand the application process or how to complete the form. Many reported serious misunderstandings by debtors as to the operation of time to pay measures.

5.31 There was virtually unanimous approval for the proposal in our discussion paper to improve the application forms by redesigning them after consultation with debt advice workers and others involved in debt recovery.<sup>35</sup> Many consultees suggested additional help should be sought from experts in the use of plain English. Others referred to various specific problems with the current forms, for example lack of adequate space for detailing the debtor's income and expenditure.

5.32 We recommend that:

- 22 **Application forms for time to pay directions and time to pay orders should be redesigned after consultation with debt advice workers and others involved in debt recovery.**

#### **(e) Debtor's application to be copied to the creditor**

5.33 Our discussion paper highlighted the fact that the creditor is often not furnished with full information as to the debtor's income and outgoings. This is because the full application form for time to pay, which contains this information, is only sent to unrepresented pursuers where the sheriff clerk has served the summons. In all other cases only details of the debtor's offer itself will be sent. This potentially leaves creditors with insufficient information to judge whether the debtor's offer is reasonable or otherwise. The SOCRU

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<sup>32</sup> Para 7.33.

<sup>33</sup> Paras 7.30-7.31.

<sup>34</sup> Whyte, *SOCRU Study of Debtors*, pp 27 and 30, paras 11 and 24.

<sup>35</sup> Question 7.4, para 7.31.

research found that many creditors, as well as solicitors and debt collectors, want more information to be available as to the debtor's financial position.<sup>36</sup>

5.34 There was unanimous agreement amongst those who commented, that the sheriff clerk should send the creditor not simply the details of the debtor's offer but also a copy of the application form which contains financial information furnished by the debtor. One issue raised was whether the debtor would be informed that the information would be passed on to the creditor. This should be made clear to a debtor in the application form.<sup>37</sup>

5.35 We recommend that:

- 23 The clerk of court should send the creditor a copy of the debtor's completed application form for a time to pay direction or order, rather than merely sending details of the debtor's offer, as at present.**

**(f) Greater guidance to sheriffs on time to pay**

5.36 The SOCRU research showed that sheriffs take a variety of factors into account in deciding whether to grant a time to pay application where a creditor rejects the debtor's offer.<sup>38</sup> At present the 1987 Act does not give any specific guidance to the sheriff on dealing with this issue. This lack of guidance appears to have resulted in inconsistency and variation in the approach taken by different sheriffs.

5.37 In our discussion paper we identified one of the most important factors as the length of the proposed repayment period.<sup>39</sup> It seems that it is quite rare to find a sheriff willing to allow a repayment period of more than three years. More usually repayment is expected within a single year.

5.38 This shrieval attitude has a knock-on effect on the debt recovery process. Creditors tend to focus on the repayment period, whilst debtors and their advisors feel compelled to offer larger instalments than they can afford out of fear of the offer being rejected.

5.39 Most consultees felt that the 1987 Act should be amended to prevent time to pay applications being rejected solely on the basis that their repayment period would exceed one year.<sup>40</sup> It was widely felt that arbitrary periods should be discouraged and that each case should be examined solely on its merits, not just on the length of the repayment period. It was pointed out that many loan agreements run far beyond one (and even three) years, and that the sheriff should also enquire into the terms of the original credit agreement as a matter of course. One consultee felt that guidance should be given to the sheriff as to the size of debt which would warrant a repayment period of one year (eg up to £2,000). We consider however, that such guidance would amount to an arbitrary period and would defeat the purpose of each case being tailored to the individual circumstances of the debtor, having regard to his income and outgoings.

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<sup>36</sup> Platts, *SOCRU Overview*, p 22, para 24.

<sup>37</sup> Note also Recommendation 22, para 5.32 above.

<sup>38</sup> Fleming, *SOCRU Study of Facilitators*, p 73, paras 9-12.

<sup>39</sup> Paras 7.38 to 7.40.

<sup>40</sup> An error in our discussion paper saw Question 7.7 talking in terms of three years at p 155 and one year at p 178. Unless specifically stated by the consultee, it is assumed that they were referring to the question as phrased at p 178.

5.40 Our discussion paper also recognised a further extra-statutory hurdle which may have been denying many worthy debtors the chance of time to pay. The SOCRU research identified that sheriffs generally felt they needed "very good reasons" to agree to a time to pay direction or order once it had been rejected by the creditor.<sup>41</sup> We sought views on whether this hurdle should be removed by a statutory direction to sheriffs not to be bound by a creditor's prior rejection of an offer.<sup>42</sup>

5.41 Consultees were equally divided over whether to change the law in this way. Many thought that the attitude of the creditor was irrelevant. Others considered that it was something which the court should take into account. However it was almost unanimously accepted that, if it were to be considered at all, the creditor's attitude should not be the overriding concern of the court, but rather one of a number of factors. We agree with this assessment.

5.42 We take the view that in dealing with a time to pay application the sheriff should seek to give effect to the objectives of this part of the 1987 Act. We feel that the 1987 Act needs to be changed to give the sheriff better guidance as to what issues are relevant to dealing with an application. We do not think that any single consideration is more important than any other. But we consider that the law would be better stated as requiring the sheriff to grant an application if satisfied that the debtor's proposals for payment are reasonable.

5.43 We recommend that:

**24 The Debtors (Scotland) Act 1987 should be amended to make it clear that the court shall grant a time to pay direction or time to pay order if satisfied that it is reasonable in all circumstances. In particular, and without prejudice to the generality of this principle, the court should consider:**

- (a) the length of the proposed repayment period;**
- (b) the length of the original credit or loan agreement (if applicable);**
- (c) the debtor's financial position;**
- (d) the reasonableness of the creditor in his rejection of the offer.**

**(g) Instalments and default**

5.44 The majority of applications for time to pay directions and orders offer monthly instalments.<sup>43</sup> However it has been found that creditors generally prefer weekly instalments.<sup>44</sup> The primary reason for this preference is that a time to pay direction will not lapse until two instalments are owing when a third becomes due, regardless of the period of the instalments. A weekly arrangement will therefore lapse sooner than a monthly arrangement, leaving a creditor free to proceed with diligence. It is possible therefore that a

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<sup>41</sup> Fleming, *SOCRU Study of Facilitators*, p 73, para 9.

<sup>42</sup> Question 7.8, para 7.41.

<sup>43</sup> Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, p 25, paras 19-21 and Table 17.

<sup>44</sup> Platts, *SOCRU Study of Commercial Creditors*, p 58, para 48; Fleming, *SOCRU Study of Facilitators*, p 27, para 15 (b) (solicitors) and p 61, para 28 (debt collectors).

creditor may reject an offer solely on the grounds that it is expressed in terms of monthly instalments.

5.45 There are various reasons why a debtor may prefer monthly instalments to weekly instalments. For example he may be paid monthly. In addition some creditors may prefer monthly instalments because weekly instalments can be more costly to administer. In our discussion paper we asked whether there should be different default rules where the period of instalment is monthly or longer as opposed to weekly. There was virtually no support for this proposal and it is not one we recommend.

5.46 Our discussion paper also asked consultees to consider whether it should be compulsory for a creditor to write to a debtor after an instalment has been missed reminding him of the consequences of default.<sup>45</sup> This question was rooted in the findings of the SOCRU research to the effect that many creditors do not send out such reminders, preferring to let time to pay orders and directions lapse in order to obtain an open decree.<sup>46</sup>

5.47 In general consultees thought that this would be an unnecessary step and would lead to delays for the creditor. It would also lead to an increase in the costs of enforcement, which would ultimately be borne by the debtor. There would need to be a statutory form of letter to ensure consistency and the question would arise as to sanctions against a creditor for failure to send the letter in the correct form, or at all. Above all it is noted that the conditions of time to pay are notified to the debtor at the time the order or direction is made. We take the view that the extra procedure involved would not produce benefits outweighing the disadvantages and we make no recommendations on this point.

#### **(h) Intimation of the decree with direction**

5.48 Under the 1987 Act the duty to intimate the decree containing a time to pay direction on the debtor lies with the creditor.<sup>47</sup> This provision followed a recommendation in our 1985 Report where we suggested two reasons for it. First, creditors are almost always legally represented, and, secondly, the creditor will need to know the exact date of intimation in order to calculate when default occurs.<sup>48</sup> Our discussion paper asked consultees to consider whether this duty should be transferred to the clerk of the court.

5.49 Our consultees put forward a number of reasons for such a change. First, and perhaps most importantly, it was felt that a debtor would treat a document from the court with more weight than a document intimated by the creditor. Secondly creditors would no longer have to bear the expense of administration and intimation. It was also argued that some creditors may delay intimation, which causes confusion for a debtor who becomes unsure when to begin making payments. In addition to these points it can be argued that our 1985 conclusions are not entirely valid. The mere fact that a creditor is legally represented is hardly a valid reason to require him to intimate the decree. In any case, many pursuers are not legally represented, particularly in small claims procedures. Furthermore, a creditor does not have to make the intimation to find out the precise date it was made. As

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<sup>45</sup> Question 7.10, para 7.49.

<sup>46</sup> Fleming, *SOCRU Study of Facilitators*, p 62, paras 31-32.

<sup>47</sup> 1987 Act, s 1(1)(a).

<sup>48</sup> Para 3.44 and Recommendation 3.10(1), para 3.45.

with time to pay orders<sup>49</sup> clerks of court could intimate the decree containing the direction to the debtor and send to the creditor an extract of the decree endorsed with a note of when intimation was made.

5.50 The clerks of court already have responsibility for intimation of other court documents to various parties to legal proceedings. We accept that requiring them to intimate the decree with direction would add to their workload. However this consequence must be balanced against the increased efficacy of time to pay directions which may result if a debtor takes more notice of the intimation.

5.51 We recommend that:

**25 The intimation to the debtor of an extract decree containing a time to pay direction should be made by the clerk of court rather than by the creditor.**

## 8. DEBT ARRANGEMENT SCHEMES

5.52 Our 1985 report recommended the introduction of debt arrangement schemes.<sup>50</sup> The purpose of a debt arrangement scheme was to assist a debtor with multiple debts to make orderly and regular payments to his several creditors. Research at the time showed that 49% of debtors examined against whom diligence had been done were in arrears for other debts.<sup>51</sup> It was recognised that such debtors were in need of time to pay their debts free from the threat of diligence. We noted that, "[t]he plight of a debtor subjected to diligence by one creditor may be bad enough but may be considerably worsened if he is pressed on all sides by several creditors".<sup>52</sup>

5.53 Our 1985 Report advanced recommendations for introducing a new type of process, to be called a debt arrangement scheme, designed primarily to assist a wage or salary earner or a small trader owing multiple debts to make orderly and regular payment of his debts to his several creditors. Debt arrangement schemes as proposed were intended to focus on multiple indebtedness and would have complemented time to pay directions and orders which were designed to deal with single debts. Whereas time to pay measures give a debtor an extension of time to pay, a debt arrangement scheme would have given a debtor not only an extension of time to pay but also in appropriate cases a discharge of debts on payment of a composition of less than their full amounts. In this sense they would have been of the nature of an insolvency procedure rather than a mere diligence stopper, the important distinction being that the scheme would act as a sequestration over income only and not of assets. A scheme would have run for up to three years, with the option of an extension to five years. An administrator, appointed by the sheriff, would have supervised the process and monitored compliance. The administrator (intended to be the sheriff clerk in most cases) would receive the payments and distribute them to creditors, all of whom would rank *pari passu*.

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<sup>49</sup> 1987 Act, s 7(4).

<sup>50</sup> Chapter 4.

<sup>51</sup> *The Origin and Consequences of Default – An Examination of the Impact of Diligence*, M Adler & E Wozniak, Edinburgh University Dept of Social Administration, Report No 5, Central Research Unit Papers (1981), cited in our 1985 Report, para 4.4.

<sup>52</sup> 1985 Report, para 4.6.

5.54 Our proposals were rejected by the government of the day for a number of reasons. First, it was felt that voluntary arrangements brokered by money advice workers and debt counsellors worked well in practice, and that this precluded any need for a statutory basis. Secondly, it was felt that a voluntary trust deed would be more appropriate in many cases. Linked to this was the argument that there was no need for a process so closely resembling sequestration in bankruptcy. Thirdly, it was felt that our recommendations were too complicated.<sup>53</sup> Fourthly, it was argued that the scheme would be unfair to subsequent creditors, who would not benefit from the scheme and yet could not enforce their debts against the debtor during the currency of the scheme. Fifthly, the experience of other legal systems was that such schemes would be unsuccessful as debtors usually failed to keep up payments. It was therefore thought that the scheme would simply be an additional administrative burden with a high failure rate, offering no long-term comfort to the debtor. Sixthly, it was thought that the schemes were set up at too late a stage of the debtor's indebtedness. Multiple debt should be tackled at an earlier stage, through debt counselling for example. Finally, it was argued that the schemes would have implications for the public purse, which would have to be met by the taxpayer. Given the expected high failure rate, and the fact that the schemes were unlikely to significantly reduce the number of sequestrations, it was considered that the benefits would not outweigh the expense and could not be justified.

5.55 Attempts were made during the parliamentary debates to introduce debt arrangement schemes.<sup>54</sup> They were unsuccessful for the reasons stated above. In debates in the House of Lords on the Bankruptcy (Scotland) Bill 1992-93 the issue was raised again.<sup>55</sup> Once again attempts to introduce such schemes were unsuccessful.

5.56 The SOCRU research has found that multiple debt problems persist.<sup>56</sup> Many debtors find it difficult to cope with deductions made from an earnings arrestment or even with payments on a time to pay direction or order when they are attempting to pay off other creditors.<sup>57</sup> For this reason we re-opened the issue of debt arrangement schemes in our discussion paper and asked for views on whether such schemes should be introduced.<sup>58</sup>

5.57 Some of our consultees did not favour the introduction of debt arrangement schemes. Those against the introduction of the schemes were primarily local authorities who felt that the schemes would be inappropriate in respect of local authority debt. It was argued that local authorities already set up informal schemes for time to pay and that there would be no need for councils to be bound by a formal debt arrangement scheme. Renfrewshire Council were against the schemes on a number of grounds. First, local taxes would have no preference over the debts of ordinary creditors. Secondly, the annual cycle of taxation would be incompatible with a repayment period of three to five years. Thirdly, the sisting of diligence during the currency of a scheme would dilute the incentive for payment function of diligence. Fourthly, the involvement of the sheriff clerk would add to the expense of the process, which would be borne by the public purse.

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<sup>53</sup> 1985 Report, Chapter 4 and the draft Bill.

<sup>54</sup> *Hansard, Parl Deb*, HL, 1986-87, vol 484, cols 340 to 353; *ibid*, HC, 1986-87, Standing Committees, vol IV, 1<sup>st</sup> Scot., 24 March 1987, cols 63 to 66.

<sup>55</sup> *Hansard, Parl Deb*, HL, 1992-93, vol 540, cols 20 and 31; vol 541, cols 51 to 55.

<sup>56</sup> Platts, *SOCRU Overview*, p 70, para 16.

<sup>57</sup> *Idem*.

<sup>58</sup> Paras 7.53 to 7.65 and Question 7.13.

5.58 However the overwhelming majority of our consultees supported the introduction of debt arrangement schemes. It was widely felt that voluntary arrangements did not go far enough to protect the debtor, as they were dependent on the goodwill of the creditor. Citizens Advice Scotland took the view that the majority of debt schemes would continue to be voluntary, but that the introduction of a compulsory system could be used to persuade creditors to cooperate. Many consultees noted that in-depth consideration would be required as to the exact workings of such schemes. We agree with this and do not propose to make detailed recommendations here. We do think, however, that consultation is required with workers on both sides of debt recovery, ie those advising debtors and creditors, to consider how such schemes would operate.

5.59 Specific mention was made of some issues. Many consultees commented that the schemes should be administered through the courts, presumably using the sheriff clerk as an administrator. Professor Gordon made the interesting suggestion that the schemes could be linked with an in-court advisory service, a proposal which would be of considerable merit if such a service were to be introduced in every court.<sup>59</sup> The Accountant in Bankruptcy suggested that a debt arrangement scheme could take the form of a summary bankruptcy procedure. If coupled with a means enquiry this may provide both a way of recovering as much of the debt as possible and a way of writing off the debt for those who simply cannot pay. Presumably such a scheme would be administered by the Accountant in Bankruptcy himself. We mention these proposals merely as suggestions and offer no further comment.

5.60 The question remains however, whether such a scheme should be extended to local and central government tax arrears. Our original proposals in 1985 would have applied to such debts. We mentioned above a number of objections to the imposition of debt arrangement schemes to council tax debts and we find some of these arguments more compelling than others. However from the perspective of a debtor who is facing multiple indebtedness, the problems remain exactly the same whether or not one of his debts is owing to a local authority and we incline to the view that on principle local authority taxes should not be exempt from any system of debt arrangement schemes. We take the same view as regards central government taxes.

5.61 We recommend that:

- 26 (1) **Consideration should be given to the introduction of debt arrangement schemes to assist a debtor in the orderly and regular payment of his debts to his several creditors. The precise workings of such schemes should be the product of consultation with both debtor and creditor representatives.**
- (2) **Arrears of central and local government taxes and charges should be included in a debt arrangement scheme.**

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<sup>59</sup> See paras 5.28 and 5.29 above.

## B: ENHANCING DEBTOR ADVICE AND INFORMATION PROVISION

### Introduction

5.62 The SOCRU research recognised that creditors outside of the summary warrant system tend to view the use of poinding and warrant sale as a last resort.<sup>60</sup> Ordinary creditors tend to prefer earnings and bank account arrestments to poinding and warrant sale. In many cases poinding is utilised only where the creditor does not have sufficient information to use any other diligence. It is intended that the recommendations of this report will reinforce the status of poinding and sale as a diligence of last resort. However the question remains how a creditor may gain information enabling him to target diligence more effectively and humanely. Our discussion paper noted this problem and sought views on a number of innovations designed to alleviate it.<sup>61</sup>

#### (a) Means enquiries in aid of diligence

5.63 A means enquiry in aid of diligence could be one mechanism to achieve this objective. Such an enquiry would allow the sheriff, on the creditor's application, to examine the debtor orally as to his attachable assets and means. The information derived from the enquiry would assist the creditor in choosing the most appropriate form of diligence. As the enquiry would be in aid of diligence, it need not have been a compulsory prerequisite to diligence and therefore diligence could have proceeded without it. In council tax cases an analogous provision confers a duty on the debtor to disclose certain information on the request of the levying authority.<sup>62</sup> We discuss this special provision below.<sup>63</sup>

5.64 There are both advantages and disadvantages to means enquiries. A summons to appear may itself act as an incentive to pay. However there would inevitably be a question as to sanctions against a debtor who fails to appear. Forcing a debtor to submit to such an enquiry would almost certainly be contrary to some of the principles considered in Part 2 above.

5.65 The position in England and Wales may serve as a guide to how such a system works in practice. There a creditor can apply to the court for oral examination of the debtor, on payment of a fee. The court then informs the debtor of the date when he must appear at court and be examined by the Master, District Judge or officer of court. The examiner, along with the creditor if he is present, will choose the questions to ask. The information is given on oath and the penalties for giving false information are potentially draconian, including imprisonment, although this is rare. Failure of the debtor to attend will bring a direction to attend an adjourned hearing by the court. This direction takes the form of an order hand-served on the debtor personally at least 10 days before the hearing.<sup>64</sup> Failure to attend the second hearing may result in a warrant for committal to prison being issued, or alternatively

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<sup>60</sup> Platts, *SOCRU Overview*, pp 42-43, paras 15 and 18.

<sup>61</sup> Part 6.

<sup>62</sup> Local Government Finance Act 1992, Sch 8, para 5; Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (SI 1992/1332), reg 31. Information usually relates to employment details or bank or building society accounts.

<sup>63</sup> Paras 5.69-5.70.

<sup>64</sup> County Court Rules 1981, Order 25, rule 3(4), (5A) and (5B).

the arrest of the debtor by bailiffs after which they will bring him before the court, either straight away or at a specified time thereafter.<sup>65</sup>

5.66 We think that the introduction of such a coercive system in Scotland would be unpopular and in all likelihood unsuccessful. It has been recognised in England and Wales that the system is not particularly successful. The *LCD Consultation Paper No 2*, for example, states that in many oral examinations "the information requested is either not forthcoming – because the debtor deliberately refuses to provide it, or simply avoids acknowledging the need to take action through fear, ignorance or indifference – or the information is incomplete and inaccurate".<sup>66</sup> Responses to our discussion paper<sup>67</sup> revealed very little enthusiasm for their introduction, and virtually no support was given for following the English model. There is also the experience of the lack of success manifested in the means enquiry courts in Scottish criminal proceedings.<sup>68</sup> It seems clear that compulsory means enquiries in aid of diligence are not an acceptable way forward in Scots law.

5.67 Nonetheless, we are of the opinion that some form of information exchange should take place between debtor and creditor. We strongly believe that lack of adequate information is a significant problem facing creditors wishing to enforce their debts. Built into our recommended system for poindings in dwellinghouses<sup>69</sup> is a requirement that a creditor can obtain a special warrant to poind only where no other diligence would be successful. A debtor who informs the creditor as to his employment, bank account or any other information upon which a creditor could base another diligence would free himself from the possibility of poinding by doing so. We do not think that there is justification for a system which coerces debtors into supplying such information. It is clearly in the debtor's interests to supply such information in order to avoid a poinding. We are of the opinion that it should be supplied voluntarily. Whilst we accept that many debtors will not wish to provide information, we are of the view that a non-coercive system available for those who wish to use it is preferable to a mandatory system which would almost certainly be unsuccessful.

5.68 The effectiveness of the system requires provision of information to debtors as to their rights, and we have recommended that this information should be supplied when a charge to pay is served.<sup>70</sup> This information could also include giving advice to seek debt counselling and money advice as well as reminding the debtor that he can inform the court, whether by personal appearance or by letter, as to his means and assets. This information would clearly assist the sheriff greatly in deciding whether to grant a warrant to poind in a dwellinghouse.

5.69 We think that such a voluntary system of information exchange is preferable by far to any coercive mandatory system, which would frighten and intimidate a debtor. We have stated repeatedly in this report that an empty threat to pursue diligence is unacceptable. We

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<sup>65</sup> County Court Rules 1981, Order 25, rule 3(5), applying Attachment of Earnings Act 1971, s 23(1) (imprisonment for up to 14 days for failure to attend court or refusal to be sworn to give evidence) and (1A) (inserted by the Contempt of Court Act 1981, Sch 2, para 6).

<sup>66</sup> Para 2.5.

<sup>67</sup> Question 6.1, para 6.13.

<sup>68</sup> See discussion paper, para 6.9.

<sup>69</sup> See Parts 3 and 4, above.

<sup>70</sup> See Recommendation 21, above.

would oppose any system which replaced such empty threats with other threats designed to intimidate and elicit payment that cannot be afforded. We believe that a compulsory means enquiry would be such a system.

5.70 George Walker & Co suggested the adoption of the *Constat* procedure used in France, Belgium, Luxembourg, Holland and Quebec. Under this system the officer of court, together with a witness, would call at the house of the debtor and complete a statement of facts analogous to a precognition in criminal law. The statement would be admissible in court as evidence. We are grateful for the suggestion. The debtor should not be compelled to give information which he does not wish to give. We would suggest that an informal version of such an interview may be good practice if the sheriff officers took note of information imparted by the debtor when the charge is served. The officer could then use the information to advise the creditor as to his best course of action. If a creditor decided to proceed with an application for a special warrant to poind, the officer's notes could be taken into consideration by the sheriff. However we do not make any formal recommendation on this point.

#### **(b) Duty of council tax defaulter to give information**

5.71 There is currently a statutory power for local authorities in Scotland to require a debtor to give information as to his employment and bank account.<sup>71</sup> This is compulsory for the debtor and subject to a £50 civil penalty for non-compliance or for provision of false or inaccurate information.<sup>72</sup> Any subsequent failures will result in a £200 civil penalty on each occasion.<sup>73</sup> In our discussion paper we noted calls for this power to be backed by criminal sanctions, as it is in England and Wales.<sup>74</sup> We asked whether such a change to the law should be made in Scotland.<sup>75</sup>

5.72 The Institute of Revenues, Rating and Valuation and a small number of our other consultees suggested that the statutory powers of local authorities should be backed by criminal sanctions. We do not see any practical benefit in such a move as the only socially acceptable sanction would be a fine, which is the equivalent of the current sanction, with the addition of imprisonment for its non-payment. The only purpose of such a move would be to further humiliate a debtor by adding criminality to his indebtedness. We do not think that this should be the purpose of reform.

#### **(c) Obtaining information from third parties**

5.73 Our discussion paper touched upon the controversial debate whether a creditor should be allowed to gain access to information on the debtor held by third parties, where no information is forthcoming from the debtor himself. We noted the governmental, fiscal, commercial and civil liberties interests which are at stake in such a proposal. We also noted

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<sup>71</sup> Local Government Finance Act 1992, Sch 8, para 5; Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (SI 1992/1332), reg 31.

<sup>72</sup> Local Government Finance Act 1992, Sch 3, para 2(2).

<sup>73</sup> *Ibid*, paras 2(3) and 2(4).

<sup>74</sup> Local Government Finance Act 1992, Sch 4, para 18; Council Tax (Administration and Enforcement) Regulations, reg 56(1).

<sup>75</sup> Question 6.2, para 6.19.

that such a rule would require to comply with the European Convention on Human Rights and the Data Protection Act 1998.

5.74 We asked consultees to consider whether the court should have the power, on the creditor's application, to require a third party to furnish information relating to a debtor's attachable assets for the purpose of facilitating diligence against those assets. Alternatively we asked whether the creditor should be entitled, by statutory notice, to obtain such information himself. Specifically we asked whether information should be available from banks and building societies,<sup>76</sup> other deposit-taking institutions, the Department of Social Security, the Driver and Vehicle Licensing Agency and the Inland Revenue.<sup>77</sup>

5.75 Whilst some consultees were in favour of some sort of mechanism for retrieving information in this way, there were a number of objectors. The Committee of Scottish Clearing Bankers felt that the current procedures of commission and diligence used to seek information from banks, are often deployed as a fishing expedition. They believed that a strengthening of such powers would increase this type of use. The Department of Social Security pointed out that changes to the procedures for disclosure of information held by them would require action by the UK Parliament. Many consultees were worried by the data protection and human rights implications of such a move. We had previously noted in our discussion paper the objection by the Inland Revenue that disclosure from their records may discourage taxpayers from making full and frank returns.<sup>78</sup>

5.76 We are of the opinion that allowing a creditor to obtain information in this manner would be damaging to relations between individuals and their banks or building societies and also between individuals and public bodies. If our arguments against compulsory means enquiries are accepted then the concept of giving creditors a power which could be used as a lever to obtain information from debtors directly would defeat the idea of a debtor voluntarily giving information.

5.77 We consider that it is in the debtor's best interests to furnish the creditor with information to allow for the least coercive diligence to be used. We think that debtors who are sufficiently aware of their rights will recognise this and give the information voluntarily. If they choose not to, they should not be pressured into doing so. Accordingly we do not think that there is sufficient grounds for introducing a system to force the information from debtors and as a consequence breach long-standing duties of confidentiality.

#### **(d) Tracking debtors to new jobs through the PAYE system**

5.78 In our discussion paper we referred to a suggestion made in *LCD Consultation Paper 3* designed to furnish the creditor with more information as to the debtor's employment details. Under the proposal a system would be put in place to track debtors through the PAYE system when they change jobs. We asked consultees to consider whether such a

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<sup>76</sup> We have recommended in Part 3 above, that banks and building societies should disclose the existence of funds and other moveable property once an arrestment in execution has been served. This is very different from the suggestion that a bank or building society should be obliged to disclose confidential information to a creditor before an arrestment has even been executed.

<sup>77</sup> Question 6.5, para 6.34.

<sup>78</sup> Paras 6.27 and 6.30.

system would be justified in Scots law,<sup>79</sup> noting that it would require legislation by the UK Parliament to implement it.

5.79 There was a mixed response to this question. Many consultees favoured such a scheme, although many of those who did were concerned about the cost implications on the public purse. The Faculty of Advocates contended that there would be considerable legal difficulties, particularly as regards confidentiality and human rights. Money Advice Scotland put forward similar arguments. We are of the opinion that such a system is not required. When a creditor ceases to receive payments from an earnings arrestment he will realise that the employment has come to an end. The creditor can then approach the debtor himself and informally request the information as to new employment. We think that this is preferable to the perceived 'big brother' system of tracking a debtor through the PAYE system. It is also more in line with the principle of least coercion.

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<sup>79</sup> Question 6.6, para 6.37.

## **PART 6 LIST OF RECOMMENDATIONS**

### **Preventing economically ineffective poindings and sales**

1. (1) A poinding should be incompetent if the total appraised value of the non-exempt goods situated in the premises does not exceed the total of the diligence expenses already incurred and likely to be incurred in selling them plus 10% of the debt or £50, whichever is the lesser. The percentage and sum should be capable of being varied by the Scottish Ministers.  
  
(2) Where a poinding is incompetent by reason of paragraph (1) the officer should make a formal report of insufficient goods to the creditor, detailing what goods were present, their appraised values and the estimated total diligence expenses on which the decision not to poind was based. A copy of this report should be handed to, or left on the premises for, the debtor. The expenses of these steps should be chargeable against the debtor.  
  
(3) The sheriff should refuse to receive a report of poinding which is incompetent by reason of paragraph (1).

(Para 3.9)

2. (1) The sheriff should be under a duty to recall a poinding or refuse warrant of sale if satisfied that the likely proceeds of sale would not exceed the total of the diligence expenses already incurred and likely to be incurred in selling them plus 10% of the debt or £50, whichever is the lesser. The percentage and sum should be capable of being varied by the Scottish Ministers.  
  
(2) An application for warrant of sale or recall of a poinding on the ground in paragraph (1) should be required to state the expenses of all previous steps of the diligence and the likely expenses of selling the poinded articles.  
  
(3) The likely proceeds of sale should be taken to be the appraised value of the poinded articles unless the sheriff is satisfied that a different value is likely to be attained.

(Para 3.16)

### **Special warrant to poind in dwellings**

3. (1) The warrant for execution in the extract of a decree or other enforceable document should not authorise the poinding of articles situated within premises which constitute or include a dwellinghouse or within a building within the curtilage of a dwellinghouse. The poinding of such articles should require a special warrant from a sheriff of the sheriffdom in which the premises are situated.

- (2) The sheriff should not grant a special warrant unless satisfied that:
- (a) an arrestment of the debtor's earnings or funds cannot be carried out or is or would be wholly or substantially ineffective, and
  - (b) there is a reasonable likelihood that sufficient poindable goods are situated in the premises which, taken together with other articles belonging to the debtor poinded elsewhere, would make the poinding competent in terms of Recommendation 1 above.

(Para 3.27)

4. (1) An application for warrant to poind articles situated in a dwellinghouse should be capable of being made by the creditor or an officer of court on the creditor's behalf.
- (2) The application should be intimated to the debtor who should be given an opportunity to oppose it, unless the sheriff is satisfied that intimation is likely to prejudice the proposed poinding.
- (3) Where the application is opposed the sheriff should hold a hearing before determining the application.
- (4) Where the application is unopposed the applicant should be required to appear before the sheriff in support of the application.

(Para 3.30)

#### **Information about amount arrested**

5. In an arrestment in execution, including an arrestment on the dependence converted into an arrestment in execution by decree, the arrestee should be bound (on payment of a reasonable fee) to disclose to the arrester the amount of any funds and the existence of other moveable property attached by the arrestment. Such a disclosure should not be a breach of any duty of confidentiality owed by the arrestee to the debtor with respect to those funds or property.

(Para 3.31)

#### **Powers of entry for execution of poindings in a dwellinghouse**

6. The special warrant to poind in a dwellinghouse should authorise officers to open shut and lockfast places if necessary for the purpose of poinding articles in the dwellinghouse in question. The exercise of this authority would be subject to section 18 of the Debtors (Scotland) Act 1987.

(Para 3.39)

## **Exemptions from pouncing**

7. (1) The list of exempt articles in section 16(2) of the Debtors (Scotland) Act 1987 should be added to so as to include:
- (a) one television set
  - (b) one radio
  - (c) one microwave oven
  - (d) one telephone

but only in so far as the item is of modest value.

(2) A computer and accessory equipment should be expressly included in the list of items in section 16(1)(d) as exempt if reasonably required for the education or training of the debtor or any member of the debtor's household. The aggregate value of such items, currently £500, should be increased to £1,000.

(3) A car, van or other vehicle should be expressly included in the list of items in section 16(1)(b) that are exempt if reasonably required for the purposes of a profession, trade or business. The aggregate value of such items, currently £500, should be increased to £1,000.

(Para 3.54)

8. The officer of court should note in the report of pouncing any claim that a pounced article should have been exempted as being reasonably required.

(Para 3.58)

## **Items of sentimental value**

9. Items of particular sentimental value to the debtor or any member of his household should be exempt from pouncing up to an aggregate appraised value of £150 or such other sum as may be prescribed by the Scottish Ministers.

(Para 3.61)

## **Substitution of luxury items**

10. (1) The sheriff should have power, on application by the debtor, to order the creditor to pay the debtor out of the proceeds of sale of a pounced article a sum specified in the order to obtain a cheaper version of that article.

(2) This power should be available only if a cheaper version of the article would be exempt as being reasonably required for use in the dwellinghouse, business etc in terms of section 16(1) or (2) of the Debtors (Scotland) Act 1987.

(3) The debtor's application may be made at any time after the execution of the pouncing until 14 days after the creditor's application for warrant of sale.

(Para 3.63)

### **Release of cars or other vehicles**

11. (1) The debtor may apply to the sheriff for an order releasing a car or other vehicle (other than a car or other vehicle used for business purposes) from the pouncing.

(2) The sheriff should grant the application if satisfied that the car or other vehicle is necessary for the debtor (or a member of the debtor's household) to get to or obtain employment or to get to shops or other essential services and its appraised value does not exceed £1,000 or such other sum as may be prescribed by the Scottish Ministers.

(3) Where the sheriff is satisfied that the car or other vehicle is necessary as in paragraph (2) above but its appraised value exceeds £1,000 or the prescribed sum, the sheriff should instead of ordering release be empowered to order the creditor to make over to the debtor a specified sum out of the proceeds of sale to enable the debtor to buy a cheaper replacement vehicle.

(4) The application should be capable of being made at any time after the pouncing up until 14 days after the date of the creditor's application for warrant of sale.

(Para 3.64)

### **Time of application for release**

12. An application for release of an article under sections 16(4) or 23 of the Debtors (Scotland) Act 1987 should be capable of being made at any time after the pouncing up until 14 days after the creditor's application for warrant of sale.

(Para 3.65)

### **Redesign of forms**

13. The forms relating to pouncing and sale should be redesigned after consultation with debt advice workers and others involved in debt recovery. In particular forms of applications for various remedies and the accompanying notes should give applicants sufficient information to enable them to complete the forms without having to refer to the Debtors (Scotland) Act 1987 or other sources of information.

(Para 3.69)

## Pounding and sale procedure in pursuance of a summary warrant

14. The execution of a pouncing or an earnings arrestment in pursuance of a summary warrant should not be competent unless a charge for payment has been served on the debtor and the days of charge have expired without payment being made.

(Para 4.10)

15. (1) It should be incompetent for a creditor in pursuance of a summary warrant to pound articles situated within premises which constitute or include a dwellinghouse or within a building within the curtilage of a dwellinghouse. The pouncing of such articles should require a special warrant from a sheriff of the sheriffdom in which the premises are situated.

(2) The creditor's application for a special warrant should be intimated to the debtor who should be given an opportunity to oppose it, unless the sheriff is satisfied that intimation is likely to prejudice the proposed pouncing.

(3) The sheriff should not grant a special warrant unless satisfied that:

(a) an arrestment of the debtor's earnings or funds cannot be carried out or is or would be wholly or substantially ineffective, and

(b) there is a reasonable likelihood that sufficient poundable goods are situated in the premises which taken together with other articles belonging to the debtor pounced elsewhere would make the pouncing competent in terms of Recommendation 16.

(4) The sheriff should not grant a special warrant to a local authority creditor unless satisfied that recovery of the debt by way of deduction from social security benefits is not competent (unless the reason for its incompetence is that the authority is already receiving deductions from the debtor's benefits in respect of another debt).

(Para 4.14)

16. (1) An officer of court should not be entitled to pound or sell articles in pursuance of a summary warrant if the total appraised value of non-exempt articles situated in the premises does not exceed the total of the diligence expenses already incurred and likely to be incurred in selling them plus 10% of the debt or £50, whichever is the lesser. The percentage and sum should be capable of being varied by the Scottish Ministers.

(2) Where an officer visits the debtor's premises to pound but finds insufficient goods the officer should make a formal report to the creditor detailing what non-exempt articles were found, their appraised values and the likely total diligence expenses on which the decision not to pound was based. A copy of the report should be given to, or left in the premises for, the debtor. The expenses of these steps should be chargeable against the debtor.

(Para 4.17)

17. (1) An officer of court who has poinded articles in pursuance of a summary warrant should be required to submit a report of poinding in prescribed form to the sheriff within 14 days of the poinding.

(2) The sheriff should refuse to receive a report that discloses that the officer was not entitled to have carried out the poinding by virtue of Recommendation 16(1), and the poinding should thereby cease to have effect.

(Para 4.18)

#### **Time to pay and summary warrant diligence**

18. (1) A debtor should be entitled to apply for a time to pay order where the debt is arrears of central or local government taxes and similar charges due under a decree or summary warrant. Where the arrears are being pursued by ordinary action the debtor should be entitled to apply for a time to pay direction to be attached to the decree.

(2) The charge to pay served on the debtor should inform him of his right to apply for a time to pay order. An application form should accompany the charge.

(Para 4.27)

#### **Summary warrants and deductions from benefits**

19. A local authority should be entitled to apply to the Department of Social Security for deductions to be made from the debtor's benefits in respect of arrears of council tax or community charge without first having to obtain a summary warrant or a decree.

(Para 4.30)

#### **Monetary limit on time to pay**

20. The upper monetary limit on debts in respect of which time to pay directions and time to pay orders under the Debtors (Scotland) Act 1987 are competent should be raised to £25,000, in line with time orders under the Consumer Credit Act 1974.

(Para 5.18)

#### **Increasing awareness of time to pay**

21. (1) The charge for payment served on a debtor who is eligible to apply for a time to pay order should be accompanied by a note on time to pay orders and an application form. The note should clearly set out the debtor's rights and duties in respect of applying for, complying with and varying an order.

(2) Other documents served or intimated to the debtor during the course of diligence should contain a similar note and an application form.

(Para 5.27)

### **Improving the forms**

22. Application forms for time to pay directions and time to pay orders should be redesigned after consultation with debt advice workers and others involved in debt recovery.

(Para 5.32)

### **Debtor's time to pay application to be copied to creditor**

23. The clerk of court should send the creditor a copy of the debtor's completed application form for a time to pay direction or order, rather than merely sending details of the debtor's offer, as at present.

(Para 5.35)

### **Greater guidance to sheriffs on time to pay**

24. The Debtors (Scotland) Act 1987 should be amended to make it clear that the court shall grant a time to pay direction or time to pay order if satisfied that it is reasonable in all circumstances. In particular, and without prejudice to the generality of this principle, the court should consider:

- (e) the length of the proposed repayment period;
- (f) the length of the original credit or loan agreement (if applicable);
- (g) the debtor's financial position;
- (h) the reasonableness of the creditor in his rejection of the offer.

(Para 5.43)

### **Intimation of decree with direction**

25. The intimation to the debtor of an extract decree containing a time to pay direction should be made by the clerk of court rather than by the creditor.

(Para 5.51)

### **Debt arrangement schemes**

26. (1) Consideration should be given to the introduction of debt arrangement schemes to assist a debtor in the orderly and regular payment of his debts to his several creditors. The precise workings of such schemes should be the product of consultation with both debtor and creditor representatives.
- (2) Arrears of central and local government taxes and charges should be capable of inclusion in a debt arrangement scheme.

(Para 5.61)

## APPENDIX

### LIST OF THOSE SUBMITTING WRITTEN COMMENTS ON DISCUSSION PAPER No 110 POINDING AND SALE: EFFECTIVE ENFORCEMENT AND DEBTOR PROTECTION

Aberdeenshire Council  
The Accountant in Bankruptcy  
The Advice Shop, Edinburgh  
Advisory Council on Messengers-at-Arms and Sheriff Officers  
Angus Council, Law and Administration Department and Finance Department  
Argyll and Bute Council, Head of Legal Services  
T J Bailey, Revenues Manager, Dundee City Council (Personal)  
Certificated Bailiffs Association  
Citizens Advice Scotland  
Civil Court Users Association  
Committee of Scottish Clearing Bankers  
Mr R C Connal, Solicitor, Messrs McGrigor Donald  
Mr Stephen Cowan, Solicitor, Messrs Yuill & Kyle  
Credit Services Association (Memorandum and Evidence to Scottish Parliament  
Committees)  
Department of Social Security  
Dundee City Council, Finance Department  
The Faculty of Advocates  
Finance and Leasing Association  
George Walker & Co, Messengers-at-Arms and Sheriff Officers  
Glasgow Anti-Poverty Project  
Professor William M Gordon, University of Glasgow  
Professor George Gretton, University of Edinburgh  
Inland Revenue and Customs and Excise  
Institute of Credit Management  
Institute of Revenues, Rating and Valuation (IRRV), Scottish Branch  
Mr Horace Jann, Retired Sheriff Officer  
The Law Centre, Dumbarton  
The Law Society of Scotland, Consumer Law and Diligence Committees  
Professor Michael Meston  
Money Advice Scotland  
Mr Peter Mowat, Money Advisor  
Dr F Namdaran  
National Consumer Credit Federation  
North Ayrshire Council, Welfare Rights and Money Advice Team  
Perth and Kinross Council, Financial Services and Administration of Legal Services  
The Poverty Alliance  
Renfrewshire Council  
Scottish Borders Council  
Scottish Consumer Council  
Scottish Homes

Scottish Law Agents Society  
Scottish Legal Action Group  
Scottish Sheriff Court Users Group  
Sheriff Principal Gordon Nicholson, QC  
Society of Local Authority Lawyers and Administrators in Scotland  
Society of Messengers-at-Arms and Sheriff Officers  
South Lanarkshire Council  
University of Aberdeen, School of Law Working Party  
Mr James C Weir  
Professor Ian D Willock, University of Dundee  
Mr Scott Wortley, University of Strathclyde  
The WS Society