Scottish Law Commission

Discussion Paper No 110

Poinding and Sale: Effective Enforcement and Debtor Protection

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this discussion paper were submitted by 28 January 2000. Comments may be made on all or any of the matters raised in the paper. All correspondence should be addressed to:

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NOTES

1. In writing a later report on this subject, the Commission may find it useful to be able to refer to, and attribute, comments submitted in response to this paper. If no request for confidentiality is made, the Commission will assume that comments on the paper may be used in this way.

2. Those who wish copies, or further copies, of this paper for the purpose of commenting on it should contact the Commission at the above address.

SUMMARY OF ARGUMENT

1. This discussion paper implements our obligation to consult on a reference under the Law Commissions Act 1965, section 3(1)(e), from the Minister for Justice of the Scottish Executive 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 poinding 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."

The reference is a response to the Abolition of Poindings and Warrant Sales Bill (SP Bill 3) (introduced by Mr Tommy Sheridan, MSP on 24 September 1999) or rather to an earlier similar Bill now superseded.

2. **The roles of poinding and sale**. The diligence of poinding and sale, whether under court decrees or summary warrants for recovering central or local taxes, is not merely a method by which a creditor can attach and realise moveable goods in the debtor's possession to satisfy his debt (the realisation role). That is its best known function. In practice, it has three other roles.

> * In those many cases where the creditor is unable to identify arrestable assets (eg funds in bank accounts) or earnings of the debtor but does know the debtor's private or business address, he may identify and poind non-exempt goods located at that address with a view to sale (the identification role).
>
> * It is also a means of preventing debtors from evading their creditors' legally constituted claims by converting their assets into corporeal moveable property (the deterrent role).
>
> * Finally, the use and the threatened use of the stages of poinding and warrant sale frequently operate as a more or less effective spur to payment without the final stage of a warrant sale being reached (the spur to payment role).

See paras 2.2 and 3.2

3. **How poinding and sale under court decrees and summary warrants work**. All these roles are important. The last role is often overlooked but it is very important for reasons explained in Part 2. To understand this role, it is necessary to pay regard to the inter-dependent nature of the stages of debt recovery. These are illustrated by the flow charts at Figure 1 (court action and diligence) and Figure 2 (local authority summary warrant diligence) in Part 2, pages 9 and 16. At each stage of the debt recovery process, there are fewer cases than at the previous stage. (See Tables A to F in Part 2). This decrease in numbers results from the settlement of the debt or the creditor's decision to abandon pursuit. Only a very small proportion of default debts reach the stage of diligence, and in the case of charge, poinding and warrant sale only a tiny fraction reach the final stage of warrant

sale. This decrease occurs in diligence under both court decrees and summary warrants for recovery of central and local government tax arrears. It is found in other legal systems, eg England: paras 2.55 – 2.66. The stages of debt recovery are inter-related: the early stages would be ineffective in eliciting payment if the later stages did not exist. If the early stages were ineffective, more cases would proceed to the later stages. The use or threatened use of poinding, or of warrant sale, or of both, is still regarded by many creditors as an effective spur to payment.

4. Having regard to these different roles of poinding and sale, the abolition of poinding and sale could impact on the general effectiveness of enforcement not only in the relatively few cases at the poinding and sale stage but also in the much larger number of cases at the earlier stages of court action or summary warrant procedures. The criteria for assessing effectiveness are complex. Poinding and sale has high transaction costs so that in the case of poinded household goods, it is more effective when used as a spur to payment than as a means of realisation through warrant sale.

5. **Assessment of poinding and sale.** The main question is whether poinding and sale attains the twin objectives of a good law of diligence (ie methods of debt enforcement), namely effective enforcement and debtor protection. Poinding and sale was reformed by the Debtors (Scotland) Act 1987 which attempted to strike a reasonable balance between these two objectives. Part 2 shows that:

* in enforcement of debts due under court decrees, the use of poindings has declined by over half since the Act (about 14,200 in 1987 to under 6,300 in 1998: Tables B and C at p 12);

* in enforcement of both court decrees and local tax summary warrants, poinding and sale has become a diligence of last resort. Poindings are no longer the most commonly used diligence being outstripped by earnings arrestments (introduced by the 1987 Act and generally recognised as successful) and arrestments of bank accounts and other funds; see Table D at p 17 showing about 23,000 poindings; 85,000 earnings arrestments; and 101,000 arrestments in 1998.

* local authorities pursuing council tax use orders for deductions at source of income support and jobseeker's allowance in preference to poinding and sale;

* poindings, however, remain the most commonly used diligence under Inland Revenue and Customs and Excise summary warrants Tables E and F (p 18);

* diligences including poindings for ordinary debts are now less numerous than diligences under summary warrants for tax and rates arrears;

* in 1998 there were 513 warrant sales consisting of 394 under court decrees of which it is estimated only about a third (132) may be against private individuals and the rest against commercial debtors; 40 for council tax or community charge (all private individuals); and 79 for rates and central taxes : see Table D and para 2.48;

* poinding and sale is much more effective when used against commercial goods than against household goods;

* debtors are not applying for time to pay directions as much as was hoped; are using time to pay orders hardly at all; and under-use rights to oppose warrant of sale and to obtain recall of the poinding for undue harshness.

6. There are conflicting views on whether the 1987 Act has achieved its aims. Part 2 shows that:

* some creditors and their agents criticise poinding and sale as having lost much of its former effectiveness blaming mainly the increased exemptions introduced by the 1987 Act. Nevertheless commercial and public authority creditors, including local authority revenue officers, generally regard poinding and sale as still effective in appropriate cases;

* debtors and some bodies representing them criticise poinding and sale severely on grounds that it fails to attain either of its objectives of debtor protection and effective enforcement. In particular it causes undue economic hardship and undue personal distress to debtors who are generally unable rather than unwilling to pay their debts. The emphasis is on protecting those debtors, generally consumer debtors or council tax defaulters and often the poorest and most vulnerable members of society, from poinding and sale of goods in their dwellinghouses. The criticisms rest mainly on considerations of morality and social policy.

Comparative law

7. In the debate on reform, appeal has rightly been made to the laws of other nations. These provide standards of law reform obtainable in no other way. The paper shows that:

* all 42 legal systems outside Scotland so far examined (22 in Europe and 20 in the Commonwealth) make available to unsecured creditors an analogous method of enforcement against moveables in the debtor's possession. See paras 2.67, 2.68 and the Appendix.

* In English law (see paras 2.55 – 2.66), warrants for execution against goods (almost 590,000 in 1998) enforcing court orders are at least nine times more numerous than warrants for all the other methods of enforcement put together (para 2.55; Tables I, J and K). Attachment of goods is used far more in England and Wales than in Scotland where it is a diligence of last resort: less than 6,300 poindings of goods under court decrees compared with over 10,800 earnings arrestments and over 4,500 arrestments of bank accounts and other funds in 1998. See Table D at p 17.

The European Convention on Human Rights

8. An analysis of the case law relating to attachment and sale in legal systems (eg The Netherlands, Scotland and Sweden) of Contracting States shows that the Scottish diligence of poinding and sale, properly executed, conforms to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 (the right to a fair and public hearing); Article 8 (the right to respect for private and family life and the home); and Article 1 of protocol No 1 (the right to peaceable enjoyment of possessions). See paras 2.69 – 2.75.

The main options for reform (Part 3)

9. Part 3 discusses the main options for reform.

10. **Is no legislative change an option?** One conceivable outcome is that the views and interests of creditors and debtors cancel out. On that view, the 1987 Act does achieve a reasonable balance between creditors' and debtors' interests. Though the Act derives from our report of 1985 (Scot Law Com No 95), we are certainly not wedded to that view but wish to be guided by consultees. (See paras 3.5 – 3.8).

11. **Is there a more socially acceptable and no less effective alternative method of enforcement?** Criticising poinding and sale is easy. Finding a more socially acceptable and no less effective alternative method of enforcement presents intractable problems. We consider this at length and cannot find such an alternative. None of the other existing forms of diligence is well adapted, or readily adaptable, to the attachment and sale of moveable goods in the debtor's possession (paras 3.10 - 3.13). Nor can we find any satisfactory replacement of poinding and sale in its role as a spur to payment (paras 3.15 – 3.26). Re-introducing civil imprisonment for example is likely to be regarded as retrograde (paras 3.18 – 3.21). However we invite views.

12. **Use of insolvency procedures (sequestration or compulsory winding up) in place of poinding and sale?** Resort to insolvency proceedings (sequestration in bankruptcy of an individual or partnership and compulsory winding up of a company), which is the solution adopted in the Abolition of Poindings and Warrant Sales Bill, would generally be against the interests of creditors, debtors and public policy. Business debtors and self-employed tax defaulters would be unnecessarily forced to cease trading. Companies would be unnecessarily dissolved. The Scottish courts cannot wind up English or foreign companies many of which trade with poindable goods in Scotland. These expensive and drastic procedures would be even less cost-effective than poinding and sale for small debts due to one creditor. Moreover about two-thirds of poindings under court decrees enforce debts of less than the minimum amount of indebtedness for sequestrations (£1,500). What would happen to these debts is unclear. Comparative research suggests that no modern legal system adopts this solution. (See generally paras 3.27 – 3.35).

13. **Poinding of goods in non-residential premises.** About one-third of poindings and two-thirds of warrant sales under court decrees are against commercial debtors: para 2.48. In our provisional view, the abolition of poinding and sale of goods located in non-residential premises (primarily commercial goods) would not be justified on grounds of effective enforcement or debtor protection or otherwise. Scottish Office [now Executive] Central Research Unit research suggests that poinding and sale of the commercial goods of business debtors is significantly less open to criticism than poindings of goods in debtors' dwellinghouses (domestic poindings): see paras 3.37 – 3.39; 4.30 – 4.43. The case for abolishing domestic poindings rests mainly on considerations of morality and social policy. The same considerations do not arise in poindings of goods in commercial premises. Moreover the principle of effective enforcement cannot justify depriving creditors in business debts of the choice between poinding commercial goods and insolvency proceedings and forcing them to use the latter. See paras 3.40 – 3.44.

Poinding of moveable goods in dwellinghouses: abolition or retention and reform?

14. The main remaining question, the core of our discussion paper, is whether poinding and sale of moveable goods in debtors' dwellinghouses should be abolished (as proposed in the Abolition of Poindings and Warrant Sales Bill 1999) or retained and made subject to further reforms (paras 3.45 – 3.55).

15. **Luxury goods in debtors' dwellings.** According to research on 1991/92 data, creditors who disliked using poinding and sale on grounds of morality and its ineffectiveness nevertheless drew a distinction between the "average" household and the household with luxury goods. They thought that use of the diligence against households with luxury goods was morally justifiable and effective. This seems to us a tenable point of view. Those who do pay their debts and taxes, including those on low incomes who forego the purchase of luxury goods in order to meet their liabilities, may regard it as unfair that debtors and tax defaulters should keep luxury goods free from attachment by creditors.

16. On this view, abolition of domestic poindings would be an undiscriminating solution. Arguably a better approach is not to abolish poinding of all luxury goods in all debtors' dwellings but to retain the diligence and to introduce further reforms on the lines of those considered in Parts 4 to 7 of the discussion paper. (See paras 3.48 - 3.55).

17. **What reforms should be considered in place of abolition?** From the standpoint of debtor protection, the most important of these reforms might include:

> *reforms to poinding and sale such as (a) a review and clarification of the range of exempt goods or (b) provision ensuring that a poinding is not executed, and warrant of sale is not granted, unless the appraised values show that the proceeds of sale would contribute significantly to the payment of the debt (Parts 4 and 5);
>
> *measures designed to assist a creditor in acquiring information about the assets or income of the debtor which is necessary for instructing arrestments or earnings arrestments and thereby to avoid unnecessary resort to poinding (Part 6);
>
> *measures designed to make time to pay directions and time to pay orders under the 1987 Act more accessible to debtors (Part 7, Section B); and
>
> *the introduction of 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 free from the threat of poinding and sale or other diligence (Part 7, Section C).

(See para 3.50)

Strengthening creditors' other remedies?

18. If poinding and sale were abolished or made ineffective against most ordinary debtors and tax defaulters, the principle of effective enforcement might well require the introduction of new remedies for creditors or the strengthening of existing remedies. These would not attach moveables and so would not be proper alternatives to poinding and sale. The paper considers possible measures, namely (1) means enquiries to help creditors to identify arrestable assets or income; (2) land attachment; (3) money attachment; and (4)

making available to ordinary creditors orders for deduction at source of social security (income support and jobseeker's allowance). See paras 3.56 – 3.67.

Reforms of poinding and sale (Part 4)

19. **Exemptions from poinding and sale.** A very important issue is: where should the law draw the line between "exempt" and "luxury" goods? Exemption of household goods required for a reasonable (if frugal) standard of living appears to be the approach adopted in all modern legal systems. Some are more liberal than others (see paras 4.8 – 4.15). Much depends on the criteria for defining exemptions which can point different ways.

> *One possible criterion is that the range of exempt household goods must not be so great that no poindable goods could be found in a normal debtor's home. Otherwise poinding would lose its general effectiveness as a spur to payment.
>
> *Another possible criterion has regard to the fact that the sale of household goods often inflicts greater hardship on debtors than it benefits creditors since their re-sale value is low and much less than their replacement value. (para 4.22)

Then what about "entertainment goods"? Research in 1991-92 showed that most domestic poindings attach consumer durables such as electrical household goods including electrical "entertainment goods" (50%), and electrical kitchen equipment (12%). (Furniture was 30%). See para 4.16 and Table R. An exemption of common entertainment goods could leave insufficient items to make the diligence worthwhile save in exceptional cases of genuine luxury goods with a high re-sale value, a result close to abolition of domestic poindings. On the other hand, those items, which have a low re-sale value and high replacement value, or some of them might nowadays be no longer regarded as luxury goods. We seek views at paras 4.21– 4.25.

20. **The prevention of unjustifiable sales.** It is agreed on all sides that a warrant sale should not go ahead if the likely proceeds of sale would not cover even the future expenses of removal to an auction room and sale, ie a sale would be "not worth it". There is however another issue. What elements of the debt should the estimated proceeds of sale cover before sale is allowed? Should warrant of sale be refused if the likely proceeds of sale do not exceed either (a) the likely future expenses of sale and the expenses of all previous steps in the diligence, or (b) that sum and some proportion of the sum in the decree? See paras 4.29 – 4.36.

21. **The prevention of unjustifiable poindings.** At present, non-exempt goods can be poinded even though it can be predicted that warrant of sale would not be granted. Views are invited on whether a sheriff officer should be required to refrain from executing a poinding if the poindable goods, though not technically exempt, could not be sold because the sheriff would be obliged to refuse warrant of sale (ie the appraised values do not cover the estimated future expenses and other defined elements of the debt). This would be an important new restriction on poindings. (paras 4.38 – 4.42) Other possible reforms are considered in Part 4.

Poinding and sale under summary warrants (Part 5)

22. The main issues here are how far the simpler procedure in poinding and sale under summary warrants for the recovery of central and local taxes should continue to diverge

from ordinary poinding procedure and how far amendments of ordinary procedure (eg as to exemptions) should apply to summary warrant procedure. These are considered in Part 5. Generally warrant sales are used by local authorities much less than by ordinary creditors and the formal safeguards of ordinary procedure (involving eg supervision by the sheriff) are probably unnecessary.

Diversion of enforcement from poinding and sale: means enquiries and information-gathering (Part 6)

23. Poinding and sale is a diligence of last resort, chosen by the creditor only because he does not have the information about the debtor's other assets or income of the debtor which is necessary for instructing other diligence eg arrestments or earnings arrestments. Better information would help creditors to target diligence more accurately and thereby avoid unnecessary resort to poinding. Part 6 considers methods of information-gathering along the lines already available to creditors in English law or canvassed in recent Lord Chancellor's Department consultation papers. These include compulsory means enquiries of debtors in aid of diligence and court orders requiring various bodies (such as banks, or the Inland Revenue) to disclose information.

Measures to make time to pay directions and orders more accessible and effective.

24. Part 7 considers measures to make time to pay directions and time to pay orders more accessible to debtors. Research discloses that debtors do not make full use of the measures provided in the Act which allow them time to pay their debts free from the threat of diligence or allow them to protect themselves following the onset of diligence. Time to pay directions have the potential to remove large numbers of debtors from the enforcement process.

Debt arrangement schemes

25. 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. The recommendations focussed on multiple indebtedness and would have complemented time to pay directions and orders which were designed to deal with single debts. A debt arrangement scheme would have given a debtor not only an extension of time to pay but would have been an insolvency process allowing in appropriate cases a discharge of debts on payment of a composition of less than their full amounts. Part 7, Section C seeks views on whether debt arrangement schemes merit serious re-examination by the competent authorities.

CONTENTS

PART 6: DIVERSION OF ENFORCEMENT FROM POINDING AND SALE: MEANS ENQUIRIES AND INFORMATION GATHERING

PART 7: DILIGENCE STOPPERS: TIME TO PAY DIRECTIONS AND ORDERS AND DEBT ARRANGEMENT SCHEMES

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.

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M Adler & E Wozniak, *The Origins and Consequences of Default An Examination of the Impact of Diligence* (Report No 5 for Scottish Law Commission) Department of Social Administration, University of Edinburgh (1981).

Connor, *CRU Warrant Sales Report*

A Connor, *The Characteristics of Warrant Sales* (Report No 2 for Scottish Law Commission), Scottish Office Central Research Unit Papers (1980).

Graham Stewart

J Graham Stewart, *The Law of Diligence* (Edinburgh, 1898).

IRRV Report

Institute of Revenues, Rating and Valuation, *Report on Research Project on Council Tax In-Year Collection Arrangements in Scotland and England* (1999).

Kaye

P Kaye (ed), *Methods of Execution of Orders and Judgments in Europe* (1996).

LCD Consultation Paper 1

Lord Chancellor's Department, Consultation Paper *Enforcement of Civil Court Judgments* (1998)

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)

Lown, *Civil Enforcement Legislation in Canada*

P J M Lown, *Civil Enforcement Legislation in Canada* (1998) unpublished paper for Uniform Law Conference of Canada, August 1998.

OCR

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

RCS

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

Scot Law Com No 95

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

Scottish Office/ COSLA Consultative Document

Consultative Document by the Scottish Office/Convention of Scottish Local Authorities Working Group on Council Tax Collection, *It Pays to Collect* (1998).

Stair Memorial Encyclopaedia

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UIHJ, *16ème Congres*,

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PART 1: INTRODUCTION

Terms of reference

1.1 On 2nd September 1999, Mr Jim Wallace QC, MSP, the Minister for Justice of the Scottish Executive, gave us a reference[1] 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 poinding 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."

We understand that this reference was a response by the Minister for Justice to the impending introduction in the Scottish Parliament by Mr Tommy Sheridan, MSP, of a Bill to abolish poinding and warrant sale.[2] That Bill was subsequently withdrawn and replaced by the Abolition of Poindings and Warrant Sales Bill (SP Bill 3) introduced by Mr Sheridan on 24th September 1999 and currently before the Scottish Parliament.

1.2 This paper implements our obligation to consult and seeks the views of interested persons on the matters within our terms of reference.

The conclusions of our 1985 Report against the abolition of poinding and warrant sale

1.3 Our terms of reference require us to reconsider whether the conclusions, as set out in our 1985 Report, that the diligence of poinding and warrant sale should not be abolished remain valid.

1.4 These conclusions were put in the following terms:[3]

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

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[1] Under the Law Commissions Act 1965, s 3(1)(e).
[2] Debtors Amendment Bill 1999 introduced on 10th September 1999.
[3] Scot Law Com No 95, paras 2.144, 2.145.

Our 1985 Report and the 1987 Act

1.5 It is however necessary to fit these conclusions into a wider context. 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 protecting those debtors who are subject to diligence from undue economic hardship and personal distress".[4]

Our report found that the system largely attained the first objective but not the second.[5]

1.6 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. Many of these were enacted in the Debtors (Scotland) Act 1987, the first reform of poinding and sale for almost 150 years.[6] These included:

*the introduction of time to pay directions and orders;[7]

* the introduction of debt arrangement schemes (which were not implemented);[8]

*wide ranging reforms of poinding and sale;[9]

*the introduction of earnings arrestments and other continuous diligences against earnings replacing "single shot arrestments";[10]

*reforms of diligence enforcing fiscal debts including diligence under summary warrants;[11]

*enactment of the rule that "no person shall be imprisoned for failure to pay rates or any tax" (ie abolition of civil imprisonment of defaulting ratepayers);[12] and

*a package of measures designed to assist unrepresented debtors to make use of the protections provided.[13]

One major recommendation - the introduction of debt arrangement schemes – was rejected.[14] Other reforms included the regulation of the service and profession of officers of court

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[4] Scot Law Com No 95, para 2.41.
[5] Scot Law Com No 95, paras 2.40 – 2.73.
[6] Debtors (Scotland) Act 1838.
[7] Scot Law Com No 95, Chapter 3 implemented by 1987 Act, Part I.
[8] Scot Law Com No 95, Chapter 4. See Part 7, Section C (para 7.53 *sqq*) below.
[9] Scot Law Com No 95, Chapter 5 implemented by 1987 Act, Part II.
[10] Scot Law Com No 95, Chapter 6 implemented by 1987 Act, Part III.
[11] Scot Law Com No 95, Chapter 7, implemented by 1987 Act, Part IV and Schedules 4 and 5.
[12] 1987 Act, s 74(3).
[13] See Part 3 below.
[14] See Part 7, Section C (para 7.53 *sqq*) below.

(messengers-at-arms and sheriff officers).[15] Exemptions from arrestments of bank accounts were not overlooked but rejected on the basis of consultation.[16]

The SOCRU evaluation of the 1987 Act

1.7 So far as relating to ordinary diligence (as distinct from diligence under summary warrants for tax and rates arrears), the reforms were evaluated on the basis of empirical data obtained in 1991 and 1992 in a series of valuable reports by the Scottish Office [now Executive] Central Research Unit published in 1999[17] on which we have relied in this discussion paper.

Changes since 1987

1.8 The main changes since the 1987 Act took effect are that:

*in diligence for ordinary debts, the use of poindings has declined and poindings are no longer the most commonly used diligence being outstripped by earnings arrestments and arrestments of bank accounts;

*creditors criticise poinding and warrant sale as relatively ineffective blaming mainly the increased exemptions introduced by the 1987 Act;

*earnings arrestments have proved effective;

*arrestments of funds in bank and building society accounts have become more common and pressure has arisen for exemptions from such arrestments;

*debtors are not applying for time to pay directions as much as was hoped and are using time to pay orders hardly at all;

*diligence for ordinary debts is now much less important in statistical terms than diligence under summary warrants for tax and rates arrears; and

*the community charge has come and gone and has had adverse consequences for the system of enforcement which are difficult to interpret.

The shadow of the community charge

1.9 The community charge, a very unpopular flat rate, capitation tax, was in force in Scotland for four years (1989/90 – 1992/93)[18] after which it was replaced by council tax [19] which works well and is generally regarded as fair. The forthcoming, important *IRRV Report* shows that in the financial year 1997/98, the in-year collection rate of council tax (receipts as a percentage of net collectable debt) was only 87.3%, which was 8.2% lower than

[15] Scot Law Com No 95, Chapter 8, implemented by 1987 Act, Part V.
[16] Scot Law Com No 95, paras 6.285, 6.286.
[17] See the Table of Abbreviations above.
[18] Introduced by the Abolition of Domestic Rates Etc (Scotland) Act 1987 and replaced by council tax under the Local Government Finance Act 1992.
[19] A type of property tax in which the main unit of charge is the taxpayer's dwelling, but with a personal element.

in England (95.5%) and 6.7% lower than Wales (94.0%).[20] The same report shows that effective collection and enforcement of council tax is hindered by (among other things):

> *a burden of community charge arrears (£503 million at 31 March 1998) approximately greater in Scotland than England on a per dwelling basis by a factor of ten;
>
> *political resistance to poinding and warrant sales by some local authorities; and
>
> *public resistance since the community charge to paying local taxes.

1.10 In a recent consultation paper it has been authoritatively observed [21] that:

> "The difficulties experienced in the early 1990s over Community Charge or 'Poll Tax' have left a residual problem in some areas of non-payment of local taxes. This creates a real problem for councils in collecting the money. It is also manifestly unfair on the vast majority of people who pay their taxes. Those who do not pay their rightful share increase taxes for those who do. If councils are not able to collect all the money due for whatever reason, there is a direct effect on the level and/or quality of local services they can provide. There is some evidence that collection rates in Scotland are less than elsewhere in the UK. Thus there is a clear responsibility, indeed a need, to improve collection levels of council tax in Scotland".

We understand that the Joint Scottish Executive/COSLA working group on council tax collection is due to submit to the Scottish Executive soon a report on measures to improve recovery of arrears of council tax and community charge. This report could have implications for poinding and sale by ordinary creditors as well as by local authorities under summary warrant.

1.11 Arrears of community charge seem to have adversely affected the enforcement system in several different ways. First, it seems likely that the unpopularity of poinding and sale from the debtor's standpoint has been increased by its use to enforce community charges. Second, arrears of community charge are still being enforced five years after its abolition. Though diligence enforcing community charge arrears is diminishing,[22] some arrears will continue to be recoverable for at least another 15 years.[23] Third, it has been suggested that "efforts to improve council tax collection levels are being hampered because many of those with both council tax and poll tax debts cannot pay both. In some cases it could take years before they start to eat into their council tax debts".[24] Fourth, if liability for local tax arrears adversely affects ability (as distinct from willingness) to pay current local taxes, it must also reduce the ability to pay ordinary debts.

1.12 For these and other reasons,[25] the high volume of community charge and council tax arrears springs from very unusual causes unlikely to recur. Possible cures, such as "writing off" community charge arrears, lie outside our terms of reference. In our view, the system of

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[20] *IRRV Report*, chapter 1.
[21] Consultative Document by the Joint Scottish Office/ COSLA Working Group on Council Tax Collection, *It Pays to Collect*, (November 1998), Foreword by Mr H McLeish MP, Minister of State at the Scottish Office and Mr K Geddes, President of COSLA.
[22] As Table D (at p 17) shows.
[23] The period of the long negative prescription.
[24] Mr Sandy Brown, President of Scottish Branch, Institute of Revenues, Rating and Valuation, Closing Address to IRRV Scottish Conference, Glasgow (10th September 1999); *The Scotsman* 10th September 1999.
[25] Eg the re-organisation of Scottish local authorities coincided with the introduction of council tax and there have been administrative and transitional problems: see *IRRV Report*, and para 2.36 below.

diligence should not be altered irretrievably in order to meet short term, non-recurrent problems. As we interpret them, our terms of reference require us to make recommendations which will endure for the foreseeable future.

Scope and arrangement

1.13 The scope and arrangement of the discussion paper are described in the Summary of Argument at the beginning of the Paper.

Consultation

1.14 In Part 8 we summarise the questions raised in this paper.

1.15 Our terms of reference require us to report to the Minister for Justice "as a matter of urgency". We should be grateful therefore if comments were submitted to us by **Friday, 28th January 2000**. We recognise that this time-table is very short but we cannot guarantee that comments submitted thereafter will be considered.

Acknowledgments

1.16 We are pleased to acknowledge with gratitude the assistance given to us by (among others) Mr Henning Brath, Norwegian Ministry of Justice; Ms Catriona Hayes and Ms Diane Machin, Scottish Executive Central Research Unit; Mrs Moira Hepworth, Institute of Revenues, Rating and Valuation; Mr George L Kerr, The Accountant in Bankruptcy; Professor Peter J M Lown QC, Director, Alberta Law Reform Institute; Mr Roderick A Macpherson, Messenger-at-Arms and Sheriff Officer; Ms Susan A McPhee, Citizens Advice Scotland; Mr Jon Roberts and Ms Gulsun Mehmet, Lord Chancellor's Department; and Miss Marie-Sofie Sveidqvist LL.B (who translated provisions of the Swedish Enforcement Code). None of these persons, however, bears any responsibility for any policy views or errors in this paper.

PART 2: THE ROLES OF POINDING AND WARRANT SALE: AN OVERVIEW

A. PRELIMINARY

2.1 In this Part we set the diligence of poinding and warrant sale within the general framework of the system of debt recovery and diligence.[1] On the basis of recent research, we make a preliminary and provisional assessment of the diligence which involves evaluating the extent to which it meets the twin objectives of effective enforcement and debtor protection.[2] We then reconsider other legislative options for the protection of debtors originally examined in our 1985 Report (Scot Law Com No 95).[3] In the debate on reform, it is sometimes said that Scots law should follow the example of other countries and legal systems in their approach to attachment of moveables. To assist in informing this debate, the next Section deals with the law on enforcement against moveable goods in England and Wales and in other countries in Europe and the Commonwealth.[4] Finally, we examine the way in which the European Convention for the Protection of Human Rights and Fundamental Freedoms is applied by decisions of the Court and Commission to the laws of European Contracting States on the attachment and sale of moveables.[5]

B. THE ROLES OF POINDING AND WARRANT SALE WITHIN THE EXISTING SYSTEM OF DEBT RECOVERY

2.2 The criteria for assessing the effectiveness of poinding and sale, whether under court decrees or summary warrants, are complex reflecting the different roles which it plays in actual practice. These roles consist of or include the following.

> (1) **Realisation.** It is a means of realising valuable non-exempt moveable goods (eg a car, caravan or other vehicle; or antiques; or other "luxury" goods) in the debtor's possession. This may be necessary or desirable even if the debtor also has known arrestable assets or income.
>
> (2) **Identification.** In those many cases where the creditor is unable to identify arrestable assets (eg funds in bank accounts) or earnings of the debtor but does know the debtor's private or business address, he may use poinding and sale against non-exempt goods located at that address.
>
> (3) **Deterrence.** As critics point out, many or most debtors experiencing poinding and sale are unable to pay their whole debt in a lump sum out of funds or income. If however poinding and sale were abolished and not replaced by another form of attachment and sale of moveable goods, debtors unwilling to pay could take advantage of the wide gap in the methods of enforcement created by its abolition. It is a means of preventing debtors from evading their creditors' legally constituted claims by converting their assets into corporeal moveable property.

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[1] Section B.
[2] Section C.
[3] Section D.
[4] Section E.
[5] Section F.

(4) **Spur to payment.** Finally, the use and the threatened use of the stages of poinding and warrant sale very frequently operate as an effective spur to payment without the final stage of a warrant sale being reached.

All these roles are important. The importance of the last role is often overlooked. To understand this role, it is necessary to pay regard to the inter-dependent nature of the stages of debt recovery. These are illustrated by the flow charts at Figure 1 (court action and diligence enforcing ordinary debts) and Figure 2 (local authority summary warrant diligence).

Enforcement of ordinary debts

2.3 As Figure 1 shows, the recovery of debts by the normal process of court action and diligence falls naturally into three stages:

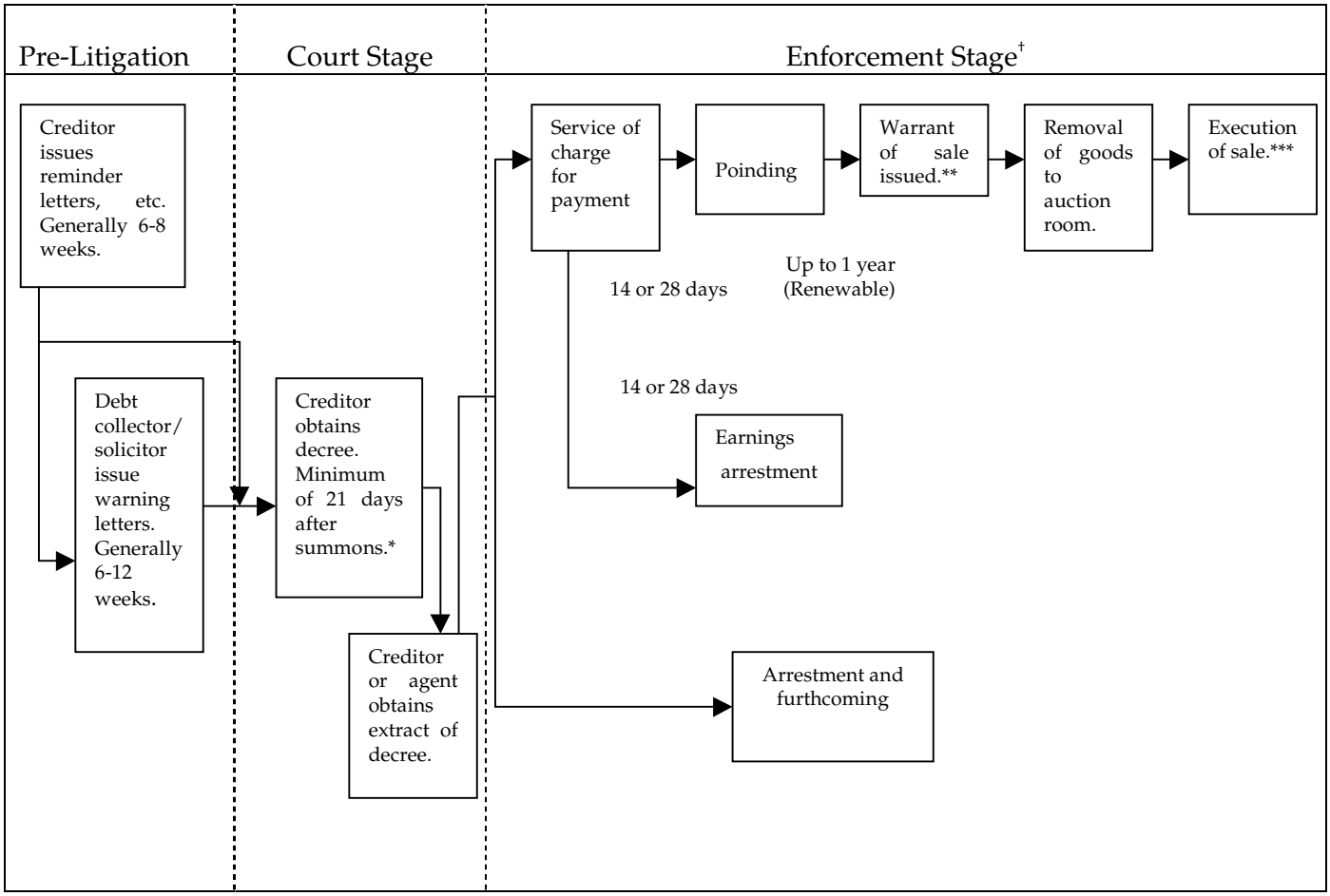
(a) the stage at which the creditor or an agent acting on his behalf makes "informal" attempts at collection;

(b) the stage of a court action for payment; and

(c) the stage when the court decree for payment is followed by further attempts at collection or the enforcement of the decree by diligence.

2.4 The various steps which may be taken at each of these three stages and the kind of time-scale involved are illustrated by the flow-chart at Figure 1. This shows that the formal stages of sheriff court summary cause proceedings (the most frequently used procedure in debt claims) and enforcement of the decree by diligence are somewhat complicated.

Figure 1: Debt recovery procedures: court action and diligence



† Assuming no time to pay directions or orders

* Two-thirds of small claims and summary cause actions conclude within 2 months and more than nine-tenths conclude within 4 months; see Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, p. 18, para. 3.

**Out of all applications for a warrant of sale 82% are made within 12 weeks of poinding; see Fleming, *SOCRU Survey of Poinding and Warrant Sales*, p. 36, Table 24.

***76% of cases proceed from the issue of a warrant of sale to a sale within 8 weeks; see Fleming, *SOCRU Survey of Poindings and Warrant Sale*s, p. 36, Table 24.

2.5 **The "filter effect" and inter-dependence of the stages of the debt recovery process.** At each stage of the debt recovery process, there are fewer cases than at the previous stage. This diminution in numbers results from the settlement of the debt or the creditor's decision to abandon pursuit. Thus, the protracted process of debt recovery acts as a kind of filter so that only a very small proportion of default debts reach the stage of diligence, and in the case of charge, poinding and warrant sale only a tiny fraction reach the final stage of warrant sale. This is illustrated by Tables A, B, C and D. The stages of debt recovery are inter-related: the early stages would be ineffective in eliciting payment if the later stages did not exist. If the early stages were ineffective, more cases would proceed to the later stages. This inter-relation between the stages and the filter effect are described more fully in the following paragraphs.

2.6 **Role of debt action.** The purpose of an action for payment is threefold: first, it gives a defender who has a defence an opportunity to dispute liability for the debt or its amount; second, in all types of action for payment of debt, it also gives him the opportunity to apply to the court for a time to pay direction;[6] and, third, subject to these safeguards for the debtor, it enables the creditor to obtain a decree containing a warrant for enforcement of the debt by diligence. Except when considering whether to make a time to pay direction, the court is not concerned to assess whether the defender can afford to pay the debt or what the effect will be on the debtor if decree is granted and enforcement proceedings begin.

2.7 The court action itself can have a filter effect since the defender may respond to receipt of the summons by paying the debt.[7]

Enforcement stage: the use of diligence

2.8 After the issue of the extract decree for payment authorising diligence and perhaps following a further letter or letters requesting payment, if there is no time to pay direction, the next step is that the creditor or his agent (solicitor or debt collection agency) sends the decree to the officer of court with instructions to enforce the decree by diligence.

2.9 In the case of charge, poinding and warrant sale, only a small number of cases in which decree for debt is granted reach the final stage of warrant sale: see Tables A, B, C and D.

[6] See Part 7, Section B below for a description of time to pay directions.
[7] See Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Court*.

Table A

Warrant sales executed as a proportion of debt decrees: 1984 -1998

Year	Debt decrees					Sales executed	Sales executed as a proportion of debt decrees
	Court of Session	Sh Ct ordinary cause	Sh Ct summary cause	Sh Ct small claims	Total Debt Decrees		
1984	913	11656	67872	-	80441	512	1:157
1985	887	13838	63683	-	78408	693	1:113
1986	940	15050	67882	-	83872	678	1:123
1987	800	15914	68105	-	84819	650	1:130
1988	941	16715	58217	-	75873	714	1:106
1989	1196	12931	18309	39465	71901	496	1:144
1990	1021	15545	13196	51880	81642	634	1:128
1991	756	18140	12501	51406	82803	640	1:129
1992	871	18889	12203	47773	79736	334	1:238
1993	1016	17082	11997	44910	75005	369	1:203
1994	796	13103	9728	38007	61634	373	1:165
1995	553	13507	8568	36872	59500	534	1:111
1996	567	13048	8226	36964	58805	513	1:114
1997	299	14049	8270	34105	56723	477	1:119
1998	172	15450	9039	33865	58526	394	1:148

Source: *Civil Judicial Statistics Scotland - Tables 3.10, 5, 8* and *9* (1984-1988), *Tables 3.6, 3.11, 5, 8* and *9* (1989-1991), *Tables 3.5, 3.8, 5, 8* and *9a* (1992-1993), *Tables 2.5, 3.7, 3.9, 3.11* and *5.2* (1994-98)

Table B

The stages of poinding and warrant sale, 1985-1988

STAGE	1985	1986	1987	1988
Reports of poinding	16468	14704	14208	14859
Warrants of sale	5916	5836	6927	6173
Applications for warrants of sale as % of reports of poindings	36	40	49	42
Reports of sale	693	678	650	714
Reports of sale as a % of reports of poindings	4	5	5	5

Source: The Scottish Office Central Research Unit, *"Evaluation of the Debtors (Scotland) Act 1987: Analysis of Diligence Statistics"*, Table 10.

Table C

The stages of poinding and warrant sale 1989 - 1998

STAGE	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**
Poinding	11,198	9,225	8,674	7,612	7,809	6,975	6,211	5,996	6,079	6,282
Application for warrant of Sale	3,530	3,975	3,633	3,531	3,630	2,790	2,800	2,666	3,621	3,017
Sale	496	634	640	334	369	373	534	513	477	394
Sales as a proportion of Poindings	1:23	1:15	1:14	1:23	1:21	1:19	1:12	1:12	1:13	1:16

Source: *Civil Judicial Statistics Scotland 1989-1998,* Tables 5.4 and 10 (1989-90), Tables 5.4 and 11 (1991-93) and Tables 5.2 (1994-98). Ratios rounded to nearest whole number.

Scale of use of charge, poinding and warrant sale

2.10 Before a poinding can be executed, the officer of court must serve a charge on the debtor (usually by hand service rather than postal service). The charge requires the debtor to pay the debt, within a specified period (normally 14 days), and warns him that, failing payment within that period, his goods may be poinded. When serving the charge, the sheriff officer may have a chance to assess whether the debtor has poindable goods or may obtain information on the debtor's financial circumstances so that he can report to the creditor on the prospects of recovery. There are no current statistics on charges, which are not reported to the court. The only survey was in 1978 which estimated that about 46,000 charges were served and followed by 20,000 poindings, less than one-half of the number of charges. This numerical decrease was not attributable entirely to payment of the debt: the creditor may decide to write-off the debt on the basis that further steps in the diligence would not elicit payment and that the expenses incurred relative to the amount of the debt would not justify further pursuit. The SOCRU research of 1978 suggested that the service of a charge induced the majority of debtors to make payment arrangements. However the SOCRU research of 1991-92 suggests that the charge elicits payment only in a minority of cases.[8]

2.11 Under the 1987 Act, an officer of court cannot enter an empty dwellinghouse unless he has given 4 days' notice warning to the debtor of his intended entry.[9] Though intended as a measure of debtor protection (as indeed it is), service of this notice is often effective in eliciting payment without the need for a poinding.[10]

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[8] See Headrick and Platts, *SOCRU Study of Individual Creditors* chapter 3, paras 15 and 16. Of 42 creditors serving a charge only 17% (or 7 creditors) received full payment and 3 creditors (7%) received part payment. Platts, *SOCRU Study of Commercial Creditors* chapter 6, para 20 reported that all commercial creditor organisations served charges, but does not give information on its effectiveness in inducing payment.

[9] 1987 Act, s 18.

[10] Platts, *SOCRU Overview*, chapter 4, para 22.

2.12 The warrant in a decree authorises a charge and poinding but not a sale. Accordingly, once the poinding has been executed[11] and reported to the sheriff, the next step is for application to be made to the sheriff for a warrant to sell the poinded goods. This application is intimated to the debtor who has an opportunity to oppose the grant of warrant on certain statutory grounds. The sheriff has a limited discretion to refuse warrant of sale.[12] A warrant to sell household goods no longer provides for the sale to take place in the debtor's home. The warrant of sale is intimated to the debtor.

2.13 After a poinding, there is a considerable decrease in the number of cases going on to the later stages of diligence as creditors obtain payment or abandon pursuit. This decrease was very marked before the 1987 Act took effect as is shown by Table B. The decrease is still pronounced under the 1987 Act as is shown by Table C but less so than before that Act. A comparison of Table B with Table C shows that there has been a very considerable decrease in the number of poindings since the 1987 Act took effect which has not been matched by a corresponding decrease in applications for warrant of sale and of sales executed. "This means that, once started, the diligence is as likely, if not more so, to progress to the later stages compared to when the Act was first introduced".[13] Since 1989 (the first full year when the 1987 Act was in force) the proportion of sales executed to poindings executed has fluctuated ranging from 1:23 (in 1989 and 1992) to 1: 12 (in 1995 and 1996): see Table C. As Table A shows, the proportion of sales executed to debt decrees containing warrant for diligence is even smaller. In the period 1984 to 1998 it has ranged from 1 sale: 238 debt decrees in 1992 to 1 sale: 111 debt decrees in 1995.

Summary warrants for recovery of rates and taxes

2.14 Local authorities[14] and the Boards of Inland Revenue[15] and Customs and Excise[16] may obtain from the sheriff court summary warrants for the recovery of rates and taxes without the need for a court action. Prior to application for a summary warrant certain procedures must be followed. In the case of arrears of council tax, the stage when the local authority makes demands for payment following default may and often does take up to 70 days from the time of default in payment of an instalment to the application for a summary warrant.[17] This is illustrated by the flow chart in Figure 2.

2.15 Scottish local authorities take on average 42 days longer to obtain summary warrants than English authorities take to obtain liability orders.[18] It is customary for collectors of taxes to apply for a single summary warrant in respect of many debtors. The local authority's application to the sheriff is not intimated to the debtor who, at that stage, has no opportunity to

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[11] Poinding procedure is regulated by the 1987 Act, ss 20 and 21. A poinding is executed by an officer of court (accompanied by a witness) who among other things exhibits his warrant to poind; demands payment; makes enquiry as to ownership of the goods; values the goods; delivers a poinding schedule (describing the goods and their appraised values) or leaves it (and the goods) on the premises. The officer must inform the debtor of his right to redeem the goods at valuation.

[12] See para 4.30 *sqq* below.

[13] Platts, *SOCRU Overview*, chapter 4, para 8.

[14] 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).

[15] Taxes Management Act 1970, s 63.

[16] Finance Act 1997, s 52.

[17] *IRRV Report* chapter 3, Table 10 :14 days of grace before 1st reminder; 14 days before outstanding balance becomes payable; 14 days to clear queries and responses to instalment reminders; 14 days from issue of final reminder before application can be made to court; 14 days of grace to clear queries and responses to final notices.

[18] This a finding of the *IRRV Report*.

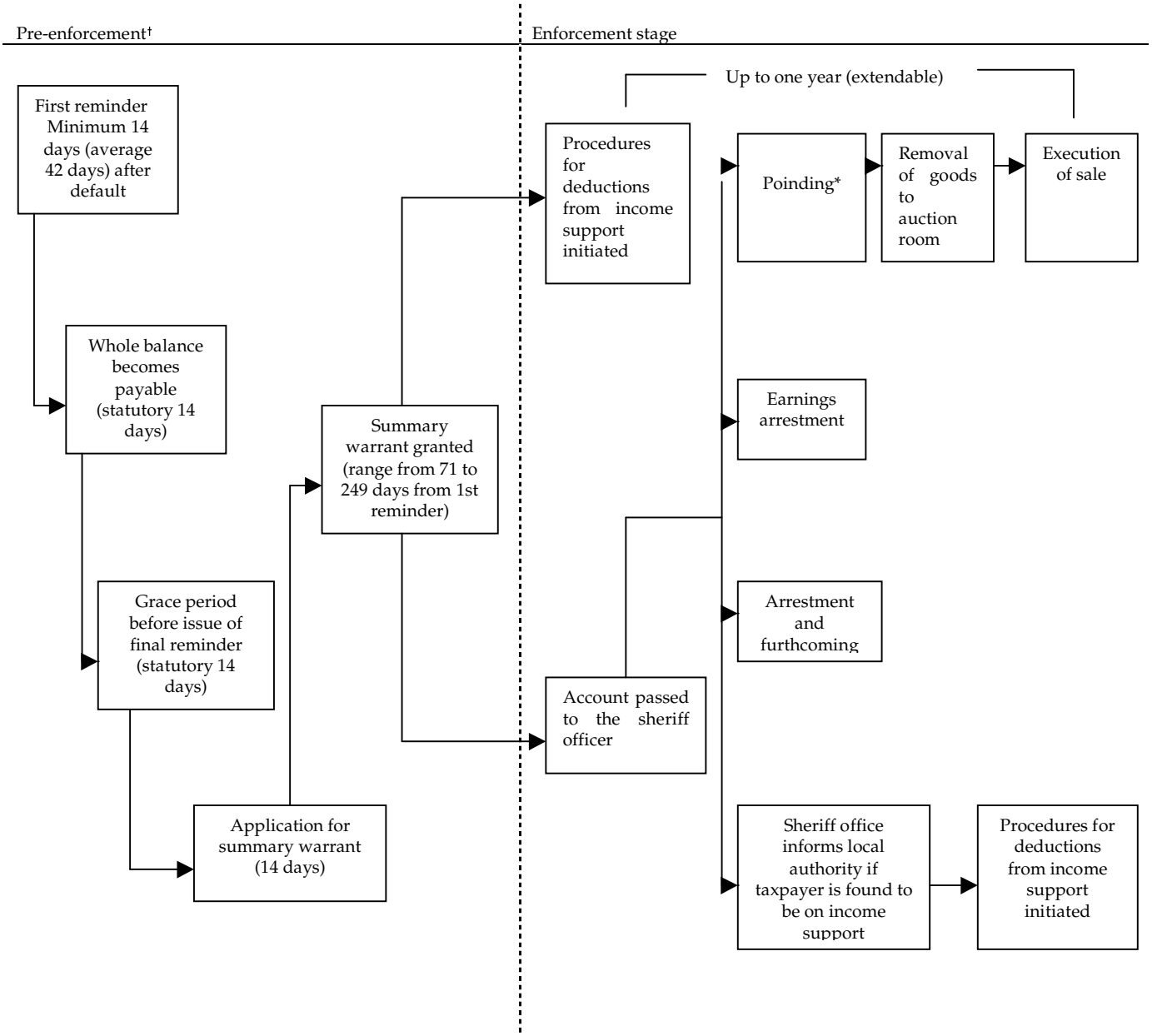
object. Summary warrants avoid the publicity attendant on appearance of the debtor's name in court records (which can lead to black-listing by credit reference agencies).[19] The public authority creditor incurs strict liability in damages for wrongful diligence if the debtor establishes that the certificate supporting the application for summary warrant was erroneous.[20] A summary warrant authorises the use of poinding and sale, earnings arrestment and arrestment (of bank accounts and funds other than earnings) and action of furthcoming. An action by a local authority for payment of council tax arrears is competent but only if the warrant has not been executed.[21]

2.16 Summary warrants are enforced by special poinding procedures which are simpler than the normal procedure of charge, poinding and warrant sale.[22] A charge is not served prior to the poinding, the poinding procedure is not subject to the supervision of the sheriff in the same way as in an ordinary poinding, and there is no warrant of sale.

2.17 Summary warrant diligence is now much more frequently used than ordinary diligence whereas in the early 1980s it was probably the other way round.[23] This change is partly attributable to the arrears which accumulated in the four years when the community charge was levied (1989/90 – 1992/93)[24] and other factors explored in the *IRRV Report*.[25] The *SOCRU* research on 1991/2 data did not cover summary warrant diligence. Diligence under rates and tax warrants also has a filter effect. This is illustrated by Tables D, E and F below.

[19] Cf Scot Law Com No 95, para 7.3.
[20] *Grant v Magistrates of Airdrie* 1939 SC 738.
[21] Local Government (Scotland) Act 1947 s 247(5) (non-domestic rates); Abolition of Domestic Rates Etc (Scotland) Act 1987, Sch 2, para 7(6) (community charge): Local Government Finance Act 1992, Sch 8, para 2(5) (council tax).
[22] 1987 Act, Sch 5; see Part 5 below.
[23] Statistics for summary warrant diligence in the 1980s were not published, but see Scot Law Com No 95, Chapter 7.
[24] Introduced by the Abolition of Domestic Rates Etc (Scotland) Act 1987 and replaced by council tax under the Local Government Finance Act 1992.
[25] See para 2.35 *sqq*, below.

Figure 2: Proceedings in recovery of council tax arrears



†Source: this chart, framed by us, is based on information in the *IRRV Report* chapter 3. Based on timescales likely to be adopted by a model council, except where average and range figures are quoted.

*Note that whilst no charge for payment is required prior to summary warrant diligence, it is the usual practice to issue a letter warning the debtor of the situation, or in some cases to make visits to the debtor's premises, prior to the execution of diligence.

NB the Table does not show all the informal collection practices, such as letters or visits to debtors, adopted by many local authorities and sheriff officers.

Table D
Comparison of ordinary diligence and summary warrant diligence in Scotland 1996-1998

Type of diligence	**1996**	**1997**	**1998**
Poinding and sale			
Poinding			
Ordinary	5,996	6,079	6,282
Local authority s/w *	7,796 (946)	12,962 (916)	11,001 (747)
Other s/w**	5,313	6,018	5,778
Total poindings	**19,105**	**25,059**	**23,061**
Sale			
Ordinary	513	477	394
Local authority s/w*	31 (1)	40 (19)	40 (3)
Other s/w**	92	92	79
Total sales	**636**	**609**	**513**
Earnings arrestment			
Ordinary	9,374	9,590	10,853
Local authority s/w*	97,230 (48,784)	86,814 (31,654)	72,845 (18,630)
Other s/w**	1,887	1,338	1,355
Total earnings arrestments	**108,491**	**97,742**	**85,053**
Arrestment			
Ordinary	4,641	4,862	4,584
Local authority s/w*	76,883 (41,011)	85,852 (34,436)	92,489 (20,778)
Other s/w**	4,823	3,789	4,218
Total arrestments	**86,347**	**94,503**	**101,291**

"Ordinary" = diligence other than summary warrant including warrants in ordinary cause, summary cause and small claim actions in sheriff court; Court of Session actions; extract registered writs etc.
* "s/w" = summary warrant. Figures include both council tax and community charge (the numbers of the latter being also specified in brackets after the aggregate figure).
** "Other s/w"= summary warrants for the recovery of local authority non-domestic rates arrears and of central government taxes etc arrears: eg Social Security Administration Act 1992, s 121B (social security contributions); Finance Act 1997 s 52 (eg most excise and customs duties, VAT; insurance premium tax, landfill tax, EC agricultural levies); Taxes Management Act 1970, s 63 (income tax, corporation tax and capital gains tax); Car Tax Act 1983, Schedule 1 (car tax).

Source: *Civil Judicial Statistics Scotland 1996-1998*, Tables 5.2, 5.4 and 5.5.

Table E

Diligence under summary warrant under Taxes Management Act 1970, section 63: 1 April 1998-31 March 1999

Number of items of debt for which summary warrant granted	30,235 (tax liability: £55,608,000)
Poindings executed	4,302
Warrant sales	32
Arrestments and earnings arrestments	2,007

Source: information supplied to the Scottish Law Commission by The Solicitor (Scotland) of the Inland Revenue.
Notes: (1) Separate statistics for arrestments and earnings arrestments were not available. (2) In addition, the Inland Revenue raised 371 ordinary cause actions and 17 summary cause actions in the sheriff court in the same year. Summary warrant diligence however is the main process for recovery of tax arrears.

Table F

Diligence under summary warrant for VAT arrears under the Finance Act 1997, section 52: 1 April 1998 – 31 March 1999

Number of items of VAT arrears for which summary warrant granted	1,670
Visits by officer of court to debtor	1,178
Poindings executed	545
Warrant sales	36
Arrestments	40
Earnings arrestments	None

Source: information supplied to the Scottish Law Commission by H M Customs and Excise.

2.18 **The filter effect within poinding and sale.** It will be seen from Table D that far fewer summary warrant poindings enforcing council tax and community charge arrears proceed to warrant sale than in the case of poinding and sale by unsecured creditors enforcing ordinary debts. In the years 1996, 1997 and 1998 the ratio of council tax/community charge sales to poindings was only 1:251; 1:324 and 1:275 respectively. In ordinary debts, the corresponding warrant sale/poinding ratios were 1:12; 1:13 and 1:16 respectively. To some extent, like is not being compared with like. The statistics on poinding and sale by ordinary creditors covers debts due by business debtors as well as by debtors who are individuals (personal or consumer debtors) and more warrant sales are instructed against business debtors than against personal debtors.[26] By contrast, the statistics on summary warrant poinding and sale to recover council

[26] Fleming, *SOCRU Survey of Poindings and Warrant Sales*, p 46 found that one in 50 domestic poindings and one in 25 business poindings by ordinary creditors resulted in a warrant sale. Note: this is a higher sale/poinding ratio than

tax or community charge cover only personal debtors.[27] Nevertheless the difference remains remarkable. In the case of Inland Revenue summary warrants the corresponding ratio is 1 sale:134 poindings, and in the case of VAT summary warrants it is 1 sale:15 poindings.

2.19 The differences between the use of poinding and sale by ordinary creditors under extract decrees and by local authorities under summary warrants are all the more remarkable in that some important statutory safeguards for debtors in ordinary diligence - eg time to pay directions and orders and applications to the sheriff for warrant of sale – do not apply in summary warrant diligence.[28] The reasons for the differences have not been explored in any empirical study, but the *IRRV Report* (comparing Scottish and English differences in local authority law and practice) throws light on the use of summary warrant poinding and sale by local authorities. Local authority policies in pursuing local tax arrears are clearly very important.

2.20 **Arrestments on the dependence and in execution.** In Table D, arrestments on the dependence as well as arrestments in execution have been included in the figures of arrestments. Poinding and sale is not competent on the dependence.[29] However an arrestment on the dependence is converted by decree into an arrestment in execution and the numbers where that occurs are not clear. Table G shows the numbers of arrestments on the dependence and in execution.

Table G

Arrestments of funds other than earnings 1996 - 1998

	1996	1997	1998
Arrestments on the dependence	2,483	2,857	2,606
Arrestments in execution	2,158	2,005	1,978
Totals	4,641	4,862	4,584

Civil diligence in criminal proceedings

2.21 Civil diligence is competent to recover fines and sums under compensation orders in criminal proceedings in the High Court, sheriff court and district court.[30] In 1998-99, almost 17,500 (17,443) district court fines were enforced by civil diligence though the use of poinding

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the *Civil Judicial Statistics* record for 1991 and 1992: see Table B showing ratios of 1 sale/14 poindings in 1991 and 1 sale/23 poindings in 1992.

[27] Poinding and sale for non-domestic rates due is excluded from the council tax/community charge statistics.

[28] See paras 5.15 *sqq* below.

[29] In our Report on *Diligence on the Dependence an Admiralty Arrestments* (1997) Scot Law Com No 164, Part 4, we recommend the introduction of interim attachment of moveables on the dependence but excluding goods in debtors' dwellings and their curtilage.

[30] Criminal Procedure (Scotland) Act 1995, ss 221 and 252.

and sale is not separately recorded.[31] There are no comparable statistics on High Court or sheriff court fines. In 1997-98, the district court figure was 34,071, almost twice the 1998-99 figure. The reduction by almost half was due to a large drop in use by Glasgow City, where several thousand means enquiry warrants had been withdrawn and transferred to sheriff officers in an attempt to collect more fines. The scheme, however, was not successful, so the court reverted to police warrants.[32]

C. PROVISIONAL ASSESSMENT OF POINDING AND WARRANT SALE

The objectives of the system of enforcing debts by diligence

2.22 In order to evaluate the diligence of poinding and warrant sale, it is necessary to assess how far it achieves the general objectives of a good system of enforcing debts by diligence. In our report of 1985, we defined those objectives as follows:

> "First, [the system of diligence] 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 subject to diligence from undue economic hardship and personal distress".[33]

We adhere to that statement. Another yardstick is that any reform must be cost-effective, that is, it must make the best and most economic use of public resources and cause as little expense to creditors and debtors as is possible consistently with attaining the objectives of the system. Moreover it should not impose too heavy burdens on third parties such as arrestees.[34]

First objective: effective enforcement

2.23 Before describing the results of the 1990s research on this matter, we repeat two preliminary points made in our 1985 Report which are still valid. First, firm and precise information on the amounts recovered at particular stages of debt recovery and diligence is lacking probably because creditors' records are generally not arranged by stage in debt recovery or diligence reached but in some other order.[35] It is therefore necessary to rely on the various research reports (which yield valuable information on this matter) and on consultation.

2.24 Second, whether the system of diligence is effective depends to some extent on what criterion of effectiveness is employed, and on this opinions may differ. One approach to this problem is to say that in assessing the effectiveness of the diligence stage of debt recovery, it is necessary to have regard not only to that stage but also to the earlier stages of informal collection by creditors or their agents and to the court action stage. The justification for this is that the earlier stages would be less effective in eliciting payment if the later stages of diligence did not exist as a credible ultimate sanction. Some creditors themselves believe that this is a correct approach.[36] Another approach is to look only at the debts which are enforced by poinding and sale and arrestment or earnings arrestment procedures. In poinding and sale,

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[31] Scottish Executive Justice Department, *Scottish District Courts Statistical Bulletin 1998-99* (1999) pp 3 and 4 and Table A.
[32] *Ibid*, p 3.
[33] Scot Law Com No 95, para 2.41.
[34] Cf our Report on *Statutory Fees for Arrestees* (1992) Scot Law Com No 133 (not implemented).
[35] B Doig and A Millar, *Debt Recovery – A Review of Creditors' Practices and Policies* Central Research Unit, Scottish Office, (1981).
[36] *Ibid*, paras 1.18 and 7.7 to 7.9. See also paras 2.30 – 2.33 below.

again the filter effect has to be taken into account. The effectiveness of poinding and sale is not judged by the few cases which proceed to sale but by reference to the greater number of cases where the poinding itself, or its associated procedures such as the notice of intended entry for poinding, elicits payment. As we demonstrate below, a comparable measure is adopted in England and Wales in assessing the effectiveness of execution against goods.[37]

Effectiveness of poinding and sale enforcing court decrees for payment

2.25 The SOCRU research based on data in 1991/2 evaluated how the 1987 Act is working in practice and the extent to which it is meeting its two main objectives and achieving an equitable balance between them.[38] The following is an authoritative broad summary of the main findings on the extent to which the reformed system achieves effective enforcement.[39]

> * "Despite discontent with the system, creditors continue to make use of the 2 main diligences available for use in consumer debt cases, ie poinding and warrant sale and arrestment of earnings.[40]
>
> *The reforms of the 1987 Act have, however, resulted in the earnings arrestment becoming the most commonly used diligence in such cases, while the use of poindings and warrant sales has decreased significantly.
>
> *Because of the need to protect debtors, the circumstances in which poinding and warrant sale can be used effectively have been reduced and this is reflected in use of the diligence.
>
> *It was, though, generally felt that the existence of the diligence as a 'final sanction' in the debt enforcement system still represented an effective lever in obtaining payment from debtors.
>
> *In relation to time to pay directions and orders, creditors were generally happy with the principle of receiving payment of debts through such arrangements, although there were some reservations about the amounts received."

2.26 **The measure of effectiveness of poinding and sale.** It is necessary to address the criticism that poinding and warrant sale is an inefficient mode of debt recovery and hence that its harsh or potentially harsh impact on debtors cannot be justified on grounds of economic benefit to creditors. This criticism has validity in relation to some of those few cases (between one in 12 or one in 16 poindings)[41] which go the length of a warrant sale. The SOCRU survey of 1991/2 data reported that in warrant sales instructed against private individuals, the proceeds of sales actually carried out amounted to 22% of the outstanding debt, while in relation to sales instructed against businesses the proceeds amounted to 36% of the outstanding debt.[42] None of

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[37] See paras 2.55 *sqq*.
[38] See Table of Abbreviations above. The SOCRU programme of research uncovered a great deal of information about how the 1987 Act is working in practice. The detail of this is contained in the individual research reports relating to different aspects of the programme see Appendix and in Platts, *SOCRU Overview*, chapters 2 – 5.
[39] Platts, *SOCRU Overview* , Chapter 6, paras 2 – 4 (bullet points and footnote added).
[40] Since the research was conducted, statistics show that arrestments (which were not regulated by the 1987 Act) are also frequently used: see Table D.
[41] See Tables C and D above.
[42] *SOCRU Survey of Poindings and Warrant Sales*, chapter 5, para 17. Cf Connor, *CRU Warrant Sales Report*, para 7 showed that of 285 warrant sales against "personal" or non-business debtors executed in 1977, the sale recovered the

the personal warrant sales realised the outstanding debt and 58% realised less than half the expenses of sale. A higher level of recovery was recorded for business sales: 8% of sales recovered the total debt (principal sum and all expenses) while only 28% recovered less than half the expenses. There has been a decline in the effectiveness of warrant sales since the survey of 1977 data. In 1977 warrant sales of goods of individual debtors were reported as realising assets equal to 40% of the overall debt whereas in 1991/2 the figure had declined to 22%.

2.27 The proportion of cases which did not pay off the expenses of the cases (let alone the original debt) had doubled from 40% to 82%.[43] It seems that sales are being instructed where the proceeds of sale fail to cover the expenses of sale. The 1987 Act sought to prevent this by requiring the sheriff to refuse warrant of sale if the aggregate appraised values of the poinded articles is substantially below the aggregate of the prices which they would have been likely to fetch if sold on the open market, or 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.[44] In Part 4 below, we seek views on proposals designed to ensure that the 1987 Act operates as it was intended to operate.

2.28 The criticism would therefore be justified if the final stage of a warrant sale could be taken in isolation from the earlier stages in the diligence and, indeed, the whole debt recovery process of which it forms part. We remain of the view, however, that the amounts recovered in warrant sales which actually take place do not provide an accurate measure of the economic efficiency of diligence against moveable goods. That efficiency has to be measured not by reference to the success or otherwise of the final stage in the diligence process, but by reference to the success of the diligence process *as a whole* in eliciting payment of debt in the far greater number of cases which do not proceed to that final stage.

2.29 **Reports of poindings and reports of sale.** An analysis of reports of poinding and reports of sale found that payments by individual debtors amounted to only 10% of the debt.[45] This figure does not give an accurate measure of the effectiveness of the diligence. Creditors are likely to instruct poindings against those debtors who have failed to enter into satisfactory payment arrangements as a result of earlier stages. The officer's report of poinding has to be submitted within 14 days of the poinding[46] and this would be too soon to show payments made as a result of the poinding. This is borne out by the finding that most debtors contacted the creditor or officer after poinding to arrange a settlement, although less than a quarter had paid the debt in full by the time they were interviewed.[47] Similarly, warrant sales would usually be carried out against debtors who are unable or unwilling to enter into any payment arrangements. It is therefore not surprising that the reports of sale do not show significant payments to account.

2.30 **Views and experiences of individual creditors.** Most debts are pursued by commercial organisations but individual (consumer or business) creditors should not be overlooked. Their

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relevant debt and legal and diligence expenses in only 3% of such sales. In 57% of sales, all expenses and part of the debt were paid and in 40% of sales only part of the expenses were paid.

[43] Fleming, *SOCRU Survey of Poindings and Warrant Sales*, chapter 5 , paras 21 and 22.

[44] 1987 Act, s 30(2)(a)(ii) as read with s 24(3)(b) and (c).

[45] Fleming, *SOCRU Survey of Poinding and Warrant Sales* chapter 3, para 23.

[46] 1987 Act, s 22, unless the sheriff allows the officer to submit it later.

[47] Fleming, *SOCRU Survey of Poinding and Warrant Sales* chapter 4, para 37.

difficulties are illuminated by the SOCRU research.[48] It presents a worrying picture. The majority of those attempting to enforce a decree did not recover their money and many took no enforcement action or abandoned recovery without instructing diligence.[49] There was a high level of dissatisfaction with the operation of the diligence system and a desire for more information to be provided to creditors at an earlier stage to make informed decisions about debt recovery. They desired improvement in the length of time an action took and the cost of enforcement. The criticisms were not related to the reforms of the 1987 Act but to low knowledge levels, the perceived impotence of the creditor's situation and dissatisfaction with the final outcome of cases.[50] However the creditors appreciated the futility of attempting to recover money from debtors who had no money, and that the failure of the diligence was not necessarily a result of the ineffectiveness of the procedure itself. If the debtor could not pay there was little that could be done regardless of the system in operation.[51] The rationale for creditors in instructing a poinding was generally to "frighten" debtors into payment or "to show they were serious". As with commercial creditors, there was a degree of reluctance to instruct warrant sales, which were regarded with distaste[52] In some cases even poinding was not an option because of the expense with the possibility of no return.[53]

2.31 **Views of commercial creditors and their agents.** Poinding and warrant sale is the least popular diligence. Its use by commercial organisations has declined since the 1978-79 SOCRU research and it has become a diligence of last resort.[54] The 1991-92 SOCRU research found that creditors put forward two broad types of reason for not using it, one relating to morality and the other relating to its ineffectiveness.[55] Creditors however drew distinctions between personal and commercial debtors and between the "average" household and the household with luxury goods. They thought that use of the diligence against commercial debtors or households with luxury goods was morally justifiable and effective.

2.32 At face value criticisms by some creditors might suggest that the 1987 Act reforms and other factors[56] have made poinding and sale no longer "effective machinery for the recovery of debts". However SOCRU observe that a closer assessment presents a different picture. They remark:[57]

> "29. The SLC intended the diligence to remain effective in situations where debtors 'can, but will not, pay their debts'. The experience of creditors and their agents suggests that in many instances they were attempting to use the diligence against debtors who, in the terms of the SLC, would be classed as 'can't pays', rather than 'won't pays'. Interviewees believed the diligence to be no longer effective in the majority of domestic situations because, having taken account of the list of exempt goods, either at the stage of the charge or the poinding itself, it was considered not worthwhile, given the available assets, to proceed with the diligence, and interviewees were critical of this. However, this is surely what the SLC intended; that a warrant sale should only be an available option in situations where the debtor had adequate saleable property beyond that prescribed by the list of exempt goods. And the fact that creditors bemoan the ineffectiveness of the poinding and sale in the domestic situation can be seen as a measure of the success of the SLC in protecting the 'can't pays' from the diligence. Particularly telling were the claims (or complaints) that the diligence was now only effective in relation to commercial debtors or in relation to domestic

[48] Headrick and Platts, *SOCRU Study of Individual Creditors*.
[49] *Ibid*, chapter 5, paras 13 – 16.
[50] *Idem*.
[51] *Ibid*, chapter 4, para 73.
[52] *Ibid*, chapter 4, paras 53, 55 and 74.
[53] *Ibid*, chapter 4, para 74.
[54] Platts, *SOCRU Study of Commercial Creditors* chapter 6, para 41.
[55] Platts, *SOCRU Overview* para 18. See also Platts, *SOCRU Study of Commercial Creditors* chapter 6.
[56] Notably reduced demand for second-hand consumer and household goods; developments in consumer protection law increase in consumer debts; poor circumstances of debtors: see Platts, *SOCRU Overview* para 25.
[57] Platts, *SOCRU Overview* chapter 4, paras 28 and 29.

situations where the debtor had obvious poindable items. These would appear to be the very situations in which the SLC intended the diligence to remain effective. In such situations the resulting hardship and personal distress are likely to be minimal and the availability of poindable goods suggest that the debtor is able to pay their debts, albeit through realising non essential assets.

30. In addition, the vocal criticism of interviewees with regard to the effectiveness of the diligence in ordinary domestic situations has to be assessed in the context of the aim of the SLC to 'strike a proper balance between the interests of debtors and creditors'. Thus, the 'ineffectiveness' of the diligence can be justified because of the need (generally accepted by all parties) to protect debtors in poor circumstances, unable to pay their debts. At the same time, though, creditors and their agents viewed the diligence as effective when used as a threat to encourage payment in most domestic situations and when used with a view to realising assets in commercial situations and domestic situations where items of value were available for poinding. So, despite the protestations of interviewees, the diligence would appear to continue to be effective in recovering debts by realising assets in the circumstances deemed appropriate by the SLC, and when viewed as a 'final sanction' encouraging payment at earlier stages in the process."

2.33 In summary the SOCRU research found that the 1987 Act:

"has provided effective machinery for creditors to enforce their debts... The new earnings arrestments have proved to be particularly successful, while poindings and sales are still used effectively as a threat to encourage payment, and as a way of realising assets in those cases where the debtor has sufficient goods once account has been taken of those items exempt from the diligence. Creditors were often critical of what they saw as its reduced effectiveness, but the curtailment of their use of the diligence is a reflection of the need to protect debtors".[58]

Effectiveness of poinding and sale enforcing summary warrants for arrears of taxes and rates

2.34 The main public authorities entitled to use diligence under summary warrants are the Inland Revenue, the Customs and Excise and local authorities recovering arrears of council tax, community charge, water and sewerage charges and non-domestic rates. We were informed by the Boards of Inland Revenue and Customs and Excise that poinding and sale is an effective, and indeed essential, means of enforcement on which they rely heavily.[59]

2.35 There is controversy about the extent to which the use by Scottish local authorities of poinding and sale under summary warrants is effective. Much light on this problem is shed by the *IRRV Report* which examined whether the differing statutory arrangements and procedures in Scotland and in England and Wales are responsible for the higher council tax collection levels south of the border. The *IRRV Report* made a comparative assessment of local authority procedures and practices in council tax collection and the relative effectiveness of those procedures based on data relating to the financial year 1997/1998.[60]

2.36 The *IRRV Report* identifies very many reasons for the cross-border difference some of which are administrative and transitional and others of which may reflect deeper social differences. Among these reasons the Report highlights:

*The legacy of the disruption caused by complete reorganisation of Scottish authorities was still being felt in 1997/98, only the second year of unitary authorities.

[58] Platts, *SOCRU Overview* chapter 6, para 8.
[59] See Tables E and F above.
[60] The main findings are set out in the Executive Summary. We have had regard to some of the legislative proposals for reform below so far as they relate to our terms of reference.

*Some Scottish unitary authorities faced particular difficulties in relation to the selection of information technology solutions for their revenue systems.[61]

*In Scotland the Debtors (Scotland) Act 1987 affords considerable protection to the debtor in terms of how, and against what goods, recovery action may be taken. Debtors in England do not enjoy such levels of protection under any comparable legislation.[62]

The factors which impacted on the ability of Scottish authorities to achieve comparable in-year collection rates with England in 1997/98 included:

- the legacy of community charge debt, which was approximately greater in Scotland than England on a per dwelling basis by a factor of ten;
- the impact of the Debtors (Scotland) Act 1987; which provides for greater restrictions in the range of goods that can be taken and sold in settlement of a debt than does the corresponding legislation in England;
- political resistance to poinding and warrant sales by some local authorities;
- greater impact of the local government re-organisation which took place in 1996 and which gave rise to changes that are still settling down;
- higher council tax bills in Scotland which incorporate water and sewerage charges collected on behalf of the water authorities; and
- greater public resistance/inurement to paying local taxes.[63] [64]

2.37 Other mainly legal provisions which were thought to give advantages to English local authorities included the power to issue *individual* summonses to debtors[65] and the means enquiries and civil imprisonment for wilful refusal or culpable neglect to pay.[66]

2.38 The *IRRV Report* found that a higher percentage of debt was passed to sheriff officers for council tax recovery action in Scotland than was passed to bailiffs in England and Wales in 1997/98. The percentage of debt outstanding at the end of the year in the hands of the sheriff officers was however much higher than the percentage of the debt in the hands of the English bailiffs.[67] This was attributed by the *IRRV Report* to (a) the effect of the Debtors (Scotland) Act 1987 (notably the high level of exempt goods); (b) the prevailing political environment; and (c) the communications between the local authorities and sheriff officers.[68] The *IRRV Report* recommended that the exemption levels in Scotland should be reviewed.[69]

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[61] *IRRV Report*, Executive Summary, para 5.
[62] *IRRV Report*, Executive Summary, para 6.
[63] *IRRV Report*, Executive Summary, para 8.
[64] Another difference was that a lesser proportion of cases requiring applications for attachments of Income Support via the Benefits Agency, and therefore fewer difficulties in terms of application backlogs, principally because of the absence of water and sewerage charges.
[65] Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992/613) regs 32 – 36.
[66] Council Tax (Administration and Enforcement) Regulations 1992, regs 47 and 48.
[67] *IRRV Report*, chapter 4, para 26.
[68] *Idem*.
[69] *IRRV Report*, Executive Summary, para 10.

2.39 As regards factor (a), the *IRRV Report* observed that the value of the sanction of poinding and warrant sale is regarded by most of the Scottish respondents as being closely linked with the debtor's perception of the likelihood of the warrant sale actually taking place.[70] Most Scottish revenues officers felt that the provisions of the Debtors (Scotland) Act 1987, section 16, were so extensive in the restriction of goods available to be poinded, that few household items of reasonable value would be available in low to middle income group households to make a warrant sale realistic.[71] This view was shared by some sheriff officers.[72]

2.40 In line with the filter theory underlying our 1985 Report and the 1987 Act, the *IRRV Report* contended that it is the threat of removal of personal goods for a warrant sale that is more effective than the actual event itself.[73] One Revenues Officer for example indicated that a warrant sale was carried out in 1998 which was reported in local newspapers. The effect was that a significant number of defaulters made a voluntary approach to the local authority Revenues Section to settle their outstanding arrears.[74] Again a firm of sheriff officers which acts for several councils, in the year to the end of August 1999, made 41,000 visits with a view to carrying out a poinding, but executed only 1,626 poindings. The main reasons for not carrying out the poinding were settlement of the debt; agreement on a payment arrangement; the set up of Income Support deductions; or the absence of poindable effects sufficient to cover the debt.[75] Though precise statistics were lacking, the first two reasons constituted a large proportion of the cases in which poinding did not proceed. The *IRRV Report* concluded that warrant sales, when seen as being a real option for use in an area, underscore the value to the debtor of maintaining arrangements made for payment.[76]

2.41 The *IRRV Report* also found that poinding is a tool for the local authority to prove that a debtor has insufficient assets to meet the council tax bill, and as such it provides the authority with a firm base for writing off the debt where all other diligences have been exhausted.[77]

2.42 As regards factor (b) (the prevailing political environment), it was found, on the evidence of sheriff officers, that the (unwritten) policy of a number of Scottish local authorities to discourage warrant sales has an inhibiting effect on the officers' ability to enforce the recovery of the debt.[78] Some sheriff officers were forbidden to use the word "poinding" in correspondence.[79] The sheriff officers considered that the use of poinding and sale as a spur to payment would improve recovery without a substantial increase in the number of warrant sales executed.[80] It has been reported in the press that recently one local authority's finance committee has decided to draw up new specifications for sheriff officers which would stop them using or threatening warrant sales.[81]

2.43 The *IRRV Report* give the results of a survey of the opinion of Scottish local authorities as to the effectiveness of various forms of recovery and enforcement action for the recovery of

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[70] *IRRV Report*, chapter 4, para 28.
[71] *IRRV Report*, chapter 4, para 29.
[72] *IRRV Report*, chapter 4, para 31.
[73] *IRRV Report*, chapter 4, para 32.
[74] *Idem.*
[75] *IRRV Report*, chapter 4, para 33.
[76] *Idem.*
[77] *IRRV Report*, chapter 4, para 34.
[78] *IRRV Report*, chapter 4, para 37.
[79] *Idem*.
[80] *Idem*.
[81] *The Evening Times*, 22 September 1999.

council tax arrears. The results are set out in Table 23 of that Report[82] which is reproduced here as Table H with the authors' permission.

TABLE H

"Showing opinions of local authorities regarding effectiveness of recovery and enforcement actions - Scotland

	Very Effective	Effective	Not Very Effective	Ineffective	No Opinion	Total
Methods of Enforcement	%	%	%	%	%	%
Deductions from Income Support/JSA	7	63	13	0	17	100
Requests for Information	0	17	40	17	27	100
Poinding	13	30	27	7	23	100
Poinding and Warrant Sale	10	17	17	3	53	100
Earnings Arrestments	43	30	0	0	27	100
Arrestment and Action of Furthcoming	13	30	23	0	33	100
Procedures leading to Insolvency/Sequestration	7	17	20	3	53	100
Inhibitions	13	17	13	3	53	100
Special Arrangements to pay	7	40	13	3	37	100

Note 30 councils made comment."

It will be seen that of those councils who responded, more thought that poinding alone was very effective or effective (43%) than thought it not very effective or ineffective (34%). Moreover more councils thought poinding and sale very effective or effective (27%) than thought it not very effective or ineffective (20%). Despite the difficulties presented by high exemption levels, it seems that summary warrant poinding and sale can be effective when used in the right circumstances.

[82] *IRRV Report*, chapter 4, para 95.

Second objective: debtor protection

Debtor protection and poinding and sale under court decrees for payment

2.44 The SOCRU research showed that the 1987 Act has been less successful in achieving its second objective of protecting debtors. It pointed out:[83]

> *"Debtors ... do not appear to make full use of the measures provided in the Act which allow them time to pay their debts free from the threat of diligence or allow them to protect themselves following the onset of diligence.
>
> *The low usage of time to pay directions is particularly significant because this measure could potentially remove large numbers of people from the enforcement process.
>
> *Advisers working on behalf of debtors (both advice workers and solicitors) made only limited use of the protections of the 1987 Act, preferring instead to use informal negotiations with creditors, often because they found this approach more appropriate in the cases of clients with multiple debts. Agents working on behalf of creditors also noted instances where they chose to side-step the provisions of the 1987 Act by employing such strategies as door-to-door collection of debts as an alternative to formal enforcement. In both cases, however, these practices appear to be influenced by the introduction of the Act. Advisers felt that their position was strengthened because of the perceived desire of creditors to avoid formal procedures; creditors and their agents were indeed inclined to opt for informal recovery as they saw their options limited in terms of formal procedures (eg. because of the perceived ineffectiveness of poindings and warrant sales). Much in the same way as parties can be said to be 'bargaining in the shadow of the law' following a dispute,[84] creditors and debtors (or more likely their advisers) can be said to be negotiating in the shadow of the law as it is the existence of the 1987 Act which gives rise to the behaviour patterns identified in the research. Thus, beyond the actual use of the provisions of the 1987 Act, there are subtleties to the way it has operated, by influencing the attitudes and behaviour of those involved in the debt recovery system.
>
> *While the use of time to pay directions and orders does appear to be limited, it is nevertheless important to note that those debtors who did make applications found it relatively easy to do so and most applications were granted. As such, therefore, the provisions allowed some debtors to pay their debts free from the threat of diligence."

2.45 The personal distress suffered by debtors experiencing poinding and warrant sale, or only poinding, is well documented by the recent SOCRU research. Debtors described the experience of poindings 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 poinding they had suffered health problems which they attributed to the levels of mental stress they had experienced. [85] Other evidence points in the same direction. Citizens Advice Scotland told us: "CABx have reported again and again the fear and distress that clients face when threatened with a poinding".

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[83] Platts, *SOCRU Overview*, chapter 6, paras 5 – 7 (bullet points and footnote added)
[84] Citing H Genn, *Hard Bargaining* (1987).
[85] Whyte, *SOCRU Study of Debtors* pp 49-51; 59; 65; 84,85.

2.46 Other forms of diligence, such as earnings arrestments and arrestments of bank accounts, are not stress-free and often have a harsher economic impact. The trauma induced by the threat of ejection from a dwellinghouse for non-payment of rent is unlikely to be less than poinding and sale and may often be greater. Repossession of hire-purchase goods or heritably secured land or buildings by an unpaid creditor are other examples. Nevertheless these forms of enforcement are accepted in Scotland as necessary evils. Despite the reforms in the 1987 Act, it is poinding and sale of goods in dwellings which is especially resented by debtors and their representatives.

2.47 The reasons for this resentment seem to spring from the following differences between poinding and sale and the arrestment diligences.

*Poinding and sale of household goods involves an intrusion into the privacy of the home.[86] Earnings arrestments and arrestments of bank accounts do not.[87]

*Most household goods have a relatively low re-sale value, are expensive to replace, and may have a sentimental value impossible to replace. These are not features of arrestment of earnings or money in bank accounts.

*The valuation of household goods is not an exact science. It is indeed notoriously difficult and involves a subjective element. Officers of court find it very difficult but according to SOCRU research perform the task satisfactorily.[88] Nevertheless they feel, and indeed are, between a rock and a hard place. The 1987 Act, section 37(9) provides that where the goods are sold at a price below the appraised value, the debtor is credited with that value. If the officer's appraised value is too high, creditors are disadvantaged. If it is substantially below the market value, the debtor may apply for recall or refusal of warrant of sale.[89] Debtors find valuations too low.[90] The requirement of valuation done by officers of court at poinding is a measure of debtor protection which may be unique to Scots law.[91] Yet debtors' dissatisfaction with valuations (justified or not) heightens their dislike of the diligence.[92] By contrast, the amount attached by an arrestment of earnings or funds in a bank account is itself money. Criticisms of unfair valuation cannot arise.

*The transaction costs of poinding and sale, especially if goods are removed for sale, are necessarily higher than arrestment or earnings arrestment and accordingly the legal expenses chargeable against the debtor are also higher.

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[86] Though warrant sales in the home and associated newspaper advertisements are abolished, debtors feel that neighbours know about poindings: Whyte, *SOCRU Study of Debtors* chapter 4, para 33.
[87] Since at least the time of the community charge, earnings arrestments do not seem to have a seriously adverse impact on relationships at the debtor's place of work though there are exceptions: Whyte, *SOCRU Study of Debtors* chapter 4, paras 14 – 17.
[88] Fleming, *SOCRU Study of Facilitators* chapter 5, para 31; Fleming, *SOCRU Survey of Poindings and Warrant Sales* chapter 3, para 32 showing that in warrant sales of individual debtors' goods, over half the poinded goods sold for their appraised value, while 16% sold below the appraised value and a further quarter above the appraised value.
[89] 1987 Act, s 24(3)(b); 30(2)(a)(ii). See Platts, *Overview* chapter 4, para 21; Fleming, *SOCRU Study of Facilitators* chapter 5, paras 28 – 31.
[90] Whyte, *SOCRU Study of Debtors* chapter 4 paras 68 – 70.
[91] It is designed to protect debtors by providing a redemption price and a basis on which the sheriff can refuse warrant of sale.
[92] Fleming, *SOCRU Study of Facilitators* chapter 5 paras 28 – 31.

* The decreased effectiveness of poinding and sale (partly as a result of the 1987 Act reforms) as a means of realising assets has had the result that a significant number of debtors experiencing poinding see the diligence not as an effective method of extracting money but either as a means of punishing debtors or to make an example of debtors to encourage other debtors to pay.[93] The effectiveness of accurately targeted arrestments and earnings arrestments is not in doubt.

*Whereas arrestment and earnings arrestment are directly effective, poinding and sale is indirectly effective because it is the threat which elicits payment. This justification for the diligence has become itself a source of criticism from the standpoint of debtors. It appears that creditors often suspect that a debtor might have no exempt goods worthy of poinding but threaten poinding in reliance on the debtor's ignorance of the detail of the procedures.[94] The creditors may refrain from instructing poinding lest their bluff is called. There may be a view that such reliance is unjustifiable.[95] However it is not the function of creditors (as distinct from the court or diligence system) to advise those who owe them money of safeguards against their own diligence. Creditors at many stages of debt recovery make threats of going on to the next stage which they may not carry out.

It is entirely understandable that debtors and bodies representing them should hold these views. It does not necessarily follow however that poinding and sale should be abolished. Other factors have to be weighed in the balance which we discuss in Part 3 below.

2.48 To keep the problem (serious though it is) in perspective, it should be noted that the use of poinding and sale for ordinary debts has declined greatly since the 1987 Act, - from 14,208 in 1987 (before the 1987 Act came into force)[96] to less than half that number (6,282 or 44%) in 1998[97]. Moreover its use against private individuals has fallen even more steeply. In 1978 over three-quarters of warrant sales and over four-fifths of poindings involved debtors who were private individuals.[98] In 1991-92, these figures had fallen to under one-third (31%) of warrant sales and under two-thirds (64%) of poindings.[99] The numbers of warrant sales against private individuals is therefore now very small indeed. In the three years 1996 to 1998, there were respectively 513, 477 and 394 warrant sales enforcing decrees. If only 31% of these were individuals, it would mean that in these years respectively, only 159, 148 and 132 individual debtors experienced warrant sales. As has been observed:[100]

> "Such figures certainly suggest that private individuals are being protected from the harsher aspects of the diligence by the very fact that the extent to which it ... is used against such debtors has decreased. This decrease in use has taken place in a period when the use of diligence overall has increased but creditors have opted to use other enforcement procedures, particularly earnings arrestments, rather than poindings and sales".[101]

2.49 The SOCRU research concluded that although significant protections were included in the legislation, there is a continuing problem of non-use which has contributed significantly to

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[93] Whyte, *SOCRU Survey of Debtors* chapter 4, para 50.
[94] Such as the high exemption levels or the right to apply for time to pay orders: see Platts, *SOCRU Study of Commercial Creditors* paras 66 and 67.
[95] Whyte, *SOCRU Survey of Debtors* chapter 4, para 48.
[96] *Civil Judicial Statistics, Scotland 1987* Table 3.10.
[97] See Tables C and D.
[98] Connor, *CRU Warrant Sales Survey* (1980).
[99] Fleming, *Survey of Poindings and Warrant Sales* (1999).
[100] Platts, *SOCRU Overview* chapter 4, para 32.
[101] Citing Fleming and Platts, *SOCRU Analysis of Diligence Statistics*.

the limited success of the Act. Debtors do not make full use of the measures contained in the Act and so remain vulnerable to undue harshness and personal distress.[102]

Debtor protection and poinding and sale under summary warrants

2.50 We are not aware of any research specifically directed at debtor protection and poinding and sale under summary warrants. The focus of central government concern has been towards improving the unsatisfactory level of recovery of local government taxes.[103] The *IRRV Report* and statistical evidence[104] suggests that in many areas debtors are protected from poinding and sale by the hostile attitude of elected members of local authorities to that form of diligence. Local authorities, however, unlike ordinary creditors, are not free to decide not to use effective legal means of enforcement. They owe a fiduciary duty to council tax payers to ensure, so far as practicable, that no avoidable loss falls on them.[105] In extreme cases where a local authority acts unreasonably, the Court of Session may intervene by way of judicial review of its act.[106] The *IRRV Report* found that in the recovery of local taxes, local authorities generally exercised their limited discretionary powers responsibly and to the benefit of all members of the community.[107] Most local authorities for example chose to use applications for attachment of Income Support rather than subject those who are on very low incomes to recovery by diligence.[108] On the other hand, the *IRRV Report* found that greater use should be made of poinding and sale and suggested that the exemptions[109] of goods from poinding were too wide and should be reviewed.[110] In their view, debtors were over-protected.

D. RADICAL REORGANISATION OF WHOLE SYSTEM OF ENFORCEMENT OF DEBTS?

2.51 Our report of 1985 concluded that the primary aim of reform should be to introduce safeguards protecting debtors who are subject to diligence, or the threat of diligence, from undue economic hardship and personal distress.[111] This was widely accepted. There was, however, disagreement as to whether a radical change to the whole system of debt recovery or diligence should be made. Our 1985 report stated that a choice had to be made between the following different types of system, namely:[112]

(1) a system whereby diligence enforcing a debt could not be used unless and until the court, or a newly created special tribunal or arbiter, in an application by the creditor for enforcement by diligence, decided on the basis of an enquiry into the debtor's means that enforcement by diligence was appropriate in the circumstances of the case;

(2) a system which would allow a creditor to pursue his debt by court action and diligence as under the present law, but would confer on the debtor a new right,

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[102] Platts, *SOCRU Overview*.
[103] See *Scottish Office /COSLA Consultative Document* (1998).
[104] See Table D above.
[105] Cf *Bromley LBC v Greater London Council* [1983] 1 A C 768(HL); *Innes v Kirkcaldy Royal Burgh* 1963 SLT 325; *Martin v City of Edinburgh D C* 1988 SLT 329.
[106] *Stair Memorial Encyclopaedia* vol 1, *sv* "Administrative Law" para 240.
[107] *IRRV Report*, chapter 2, para 48.
[108] *Ibid*. para 47.
[109] Under the 1987 Act, s 16.
[110] Executive Summary, para 10.
[111] Scot Law Com No 95, vol 1, para 2.74.
[112] Scot Law Com No 95, vol 1, para 2.78.

exercisable at early or late stages of the debt recovery process, to apply to a special tribunal or arbiter for an order controlling diligence;

(3) a system whereby, after a charge had been served following on a decree, diligence was replaced by a summary bankruptcy procedure; and

(4) a system on the lines of that described at head (2) above but with the important modification that the debtor would apply to the court, rather than a special tribunal or arbiter, for an order controlling diligence .

Our present terms of reference require us to consider whether alternative measures exist that might replace poinding and sale "within the existing structure of the diligence system".[113] We interpret this as meaning that recommendations for a radical reorganisation of the whole structure of the system of diligence on the lines of any of these options falls outside our remit. But in any event we do not think that a radical reorganisation is necessary or desirable.

2.52 We are fortified in this view by the Lord Chancellor's Department's recent Consultation Paper No 2, *Enforcement Review: Key principles for a new system of enforcement in the civil courts*.[114] It was a common feature of the radical alternative enforcement systems rejected by our 1985 report that they were designed to distinguish, at an early stage in the enforcement process, between debtors able but unwilling to pay and debtors unable to pay. Such a system has recently been provisionally rejected in England and Wales by *LCD Consultation Paper No 2*. The paper accepted that the distinction between "can't pays" and "won't pays" is

> "crucial in any debate on enforcement. Creditors do not want to waste time and money taking action against debtors who do not have the means to pay a debt. Equally, debtors who genuinely cannot pay must be protected from over-zealous creditors. A proper identification of 'can't pay' debtors would also free up court resources for the pursuit of those resisting payment."[115]

The paper however acknowledged the difficulty of applying the distinction in practice: "any attempt to arrive at universally accepted categories, into which every debtor could be placed, was clearly doomed to failure, not least because many debtors would fall somewhere within the wide spectrum between the extremes".[116] The paper suggested that "it would be a mistake to require every creditor, or the courts, to determine, at the outset of the enforcement process, whether a particular debtor was someone who could not pay or one who would not pay, since the information required to make that distinction would be too demanding".[117] The conclusion was "that there was no scope for a two-track enforcement system, with one track dealing leniently with those in genuine difficulty, and a second track dealing more severely with those deliberately evading payment".[118] Instead they thought the enforcement system should continue to be a single-track system, incorporating adequate safeguards to ensure that "can't pay" debtors are dealt with appropriately.

2.53 Compared with the compulsory means enquiry systems examined in 1985, we adhere to the opinion expressed in our 1985 Report[119] that, despite its faults, over-all the present system:

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[113] See para 1.1 above.
[114] (1999) (available on LCD website **www.open.gov.uk/lcd**).
[115] *LCD Consultation Paper No 2,* para 1.1.
[116] *Ibid*, para 1.4.
[117] *Idem*.
[118] *Idem*.
[119] Scot Law Com No 95, para 2.117.

(a) makes the best and most economic use of resources (for which the public or parties must pay) by using the existing court structure and by restricting court procedures to cases either where debt actions are in dependence or the risk of diligence has become real and substantial; and

(b) avoids any need to impose sanctions (such as the inappropriate penalties of fines or imprisonment) on unco-operative debtors other than liability for the expenses of diligence and is therefore less coercive in important respects than a two-track system of enforcement based on compulsory means enquiries before any diligence is done.

The third advantage identified in our 1985 Report[120] was that the system was by and large effective from the standpoint of creditors, (dependent as it was, and is, on the sanctions underlying the gradual evolution of a protracted debt recovery process giving debtors who can do so ample opportunity to pay), while giving debtors unable to pay a debt outright opportunities and rights to obtain an extension of time to pay and safeguards in appropriate cases for existing or threatened diligence procedures. The SOCRU evidence suggests that the present system is now less effective than it was in 1985 and that debtors do not use the opportunities or exercise the rights which the 1987 Act provided to the extent that we had envisaged. Nevertheless as at present advised we doubt whether a radical reorganisation of the whole system would cure these defects.

E. ENFORCEMENT AGAINST MOVEABLES IN OTHER LEGAL SYSTEMS

2.54 It is sometimes said that attachment of moveables or of household goods is unique to Scotland. This is a misconception.

(a) England and Wales

2.55 In England and Wales, the most common method of enforcing judgments is by warrant of execution against a debtor's goods in county courts and the High Court, as Tables I, J and K show. Indeed, county court warrants for execution against goods are issued about 9 times more frequently than warrants for all the other English county court methods of enforcement put together.[121] The contrast is even greater in the High Court.[122] In Scotland since the reforms effected by the 1987 Act, the position is reversed.[123]

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[120] *Idem*.
[121] See Table I below showing that in 1998 in the county courts there were 543,848 warrants for execution against goods and 60,844 warrants or orders for other types of enforcement.
[122] See Table J below.
[123] See Table D above.

Enforcement proceedings in England and Wales, 1998

Table I

Enforcement proceedings for debt in the county court in England and Wales 1998

Nature of enforcement	
Warrants of execution against goods issued	543,848
Garnishee summons issued	3,646
Charging order applications issued	13,758
Attachment of earnings to secure judgment debt	
Applications for attachment of earnings orders	65,685
Orders made (including re-direction of order)	43,440

Source: Lord Chancellor's Department, *Judicial Statistics Annual Report 1998* Tables 4.19 and 4.20.
Notes: (1) A garnishee order ordains that a third party, normally a bank, holding money for the judgment debtor, pay it to the judgment creditor direct. It is broadly equivalent to a Scottish arrestment of funds other than earnings. But unlike an arrestment, it is not available on the dependence, and instead a *Mareva* injunction pending suit is used. (2) A charging order gives the creditor a security over the debtor's property eg usually land. Once the charging order is made absolute, the plaintiff may apply for an order for sale. (3) Attachment of earnings orders were introduced in 1971 and are judicial discretionary orders in which the court fixes the levels of deductions unlike earnings arrestments where a sliding scale of deductions is fixed by statute. It appears that applications for attachment of earnings orders increased by 3% from 1997 but orders made were 37% fewer. (4) Orders for delivery and orders for possession (not being for debt) are excluded.

Table J

Enforcement proceedings for debt issued in the High Court, Queen's Bench Division, 1998

Nature of enforcement	
Writs of fi-fa (*fieri facias*)	44,000
Charging orders	1,452
Garnishee orders absolute	591
Total	46,043

Source: *Judicial Statistics Annual Report 1998*, Table 3.11.
(1) A writ of *fieri facias* (fi-fa) directs the High Court enforcement officer (called "the sheriff") by his officers to seize and if necessary sell the debtor's goods to raise money to pay off the debt. (2) On garnishee orders and charging orders, see notes to previous table. (3) The High Court does not grant attachment of earnings orders outside matrimonial proceedings.

Table K

Total proceedings initiated for enforcement against goods in England and Wales: 1998

Nature of enforcement	
High Court writs of fi-fa (*fieri facias*)	44,000
County court warrants of execution against goods	543,848
Total	587,848

Source: Tables I and J above.

2.56 **Comparison between execution against goods in England and Wales and poinding and sale in Scotland**. It is not easy to compare in detail the actual operation of English execution against goods with Scottish poindings. No cross-border study has ever been mounted. There are gaps in the relevant published statistics.[124] The detailed procedures differ and therefore the units of comparison differ. However hitherto unpublished statistics set out in Table L illustrate the operation of county court execution against goods.

Table L

Disposal of county court warrants of execution against goods: 1998

Enforceable warrants	
(1) Warrants fully paid	242,438
(2) No goods	62,641
(3) Refused peaceful entry	2,210
(4) Unable to meet	19,184
(5) Other enforceable warrants not paid	3,099
(6) *Enforceable total*	329,572
(7) Unenforceable warrants	364,171
(8) *Total disposals*	693,743

Source: the Lord Chancellor's Department.

2.57 To assist the Scottish reader to understand Table L, we give a short description of the process. The purpose of a warrant of execution is to secure payment of an outstanding debt by

[124] For example, no English statistics are available of the number of cases in which an actual levy on goods was imposed or an agreement for "walking possession" made (together equivalent to a poinding) or actual sales under county court warrants of execution (equivalent to a warrant sale).

seizing the debtor's goods and selling them to pay off the debt and costs. In the county court the process is carried out by bailiffs. In Scotland, the extract decree automatically gives the creditor warrant to poind for the whole debt.[125] By contrast in England the creditor applies to the county court for a warrant of execution. The warrant must be issued for either the balance due under the judgment or order, or if the judgment is payable by instalments, a minimum sum of £50 or one monthly instalment (or 4 weekly instalments), whichever is the greater amount.[126]

2.58 Once the county court grants warrant for execution, the debtor is sent a warning notice by post notifying him that the creditor has authorised bailiffs to act.[127] This notice is equivalent to a charge to pay in Scottish procedure but a charge is served by hand not by post and involves a visit by the officer of court to the debtor's premises. If the county court notice does not elicit payment within 7 days, the bailiffs will visit the debtor's dwelling or other premises stated on the warrant. The bailiff is not entitled to make forcible entry[128] (unless he has obtained peaceable possession and is ejected or refused re-entry or obtained a "walking possession" agreement).[129] Item (3) in Table L shows the number of cases (2,210) in which peaceful entry was refused. In Scotland, like many European countries, forcible entry after due notice is allowed.[130] If after several visits, the bailiff is unable to make contact with the debtor, an "unable to meet" return (formerly called a "3 visit" return) is made to the county court and creditor, and the bailiff ceases to make further attempts to levy execution under that warrant. Table L, Item (4) shows that in the year surveyed 19,184 "unable to meet" returns were made.

2.59 If the bailiff obtains payment from the debtor, the court remits the amount to the creditor. Table L, Item (1) shows that in the year surveyed, 242,438 warrants were fully paid. This does not mean that the whole debt due to the creditor was paid but only the sum on which execution was levied.

2.60 If the bailiff enters the premises, he may levy execution on sufficient goods to cover the amount of the warrant and the costs of removal and sale. In Scotland,[131] to protect the debtor, the officer of court has to report a formal valuation of the poinded goods to the court, and the creditor requires to apply for warrant of sale. There is no English equivalent to these protective provisions nor to the Scottish court's power to release goods from a poinding, or to recall a poinding, or to refuse warrant of sale, on the ground of undue harshness or that the aggregate values are substantially below the likely open market prices.[132] If the bailiff levies execution on goods, he either removes the goods to a sale room or enters into a "walking possession agreement". Under such an agreement the debtor agrees that pending satisfaction of the debt, he will not remove or dispose of goods levied upon and authorises the bailiff to re-enter the premises.[133] In Scotland, poinded goods are also generally left on the premises[134] and a walking possession agreement is unnecessary since a poinding by itself prohibits removal of goods

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[125] 1987 Act, s 87.
[126] Civil Procedure Rules (CPR), CCR, Sch 2, Order 26, rule 1(1).
[127] CPR, Sch 2, CCR Order 26, rule 1(4).
[128] *Vaughan v McKenzie* [1969] 1 QB 557.
[129] See *County Court Practice* (1994) notes to County Courts Act 1984, s 89.
[130] 1987 Act, s 18.
[131] 1987 Act, s 22.
[132] 1987 Act, s 30. 1987 Act, ss 23, 24 and 30(2).
[133] A form of walking possession agreement is incorporated in the warrant for execution. A walking possession agreement may be signed by a responsible person in the debtor's house such as his wife even though the debtor objects: *National Commercial Bank of Scotland Ltd v Arcam Demolition and Construction Ltd* [1966] 2 QB 593.
[134] 1987 Act, s 20(7); 21(1)(a).

without the consent of the creditor or court.[135] Further, there can normally be no removal of goods for sale unless the sheriff grants warrant of sale.[136]

2.61 In English law, if a portion only of the amount for which a warrant for execution has been realised by levy, a second or subsequent levy can be made for the balance under the same warrant.[137] Moreover warrants not wholly executed can be renewed a year at a time,[138] and second or subsequent warrants can be obtained. There is no provision for debtor protection comparable to the Scottish provision under which where articles are poinded in any premises, another poinding in the same premises to enforce the same debt is not competent except in relation to articles subsequently brought on to the premises.[139]

2.62 If the bailiff finds no (or insufficient) goods on which to levy he makes a return of non-execution, which the court notifies to the creditor. The provisions on exemptions in England and Wales and in Scotland are compared in Part 4 below.[140] Item (2) in Table L shows that 62,641 returns of non-execution were made in the year surveyed.

2.63 *LCD Consultation Paper 1* observes: "In practice, goods are rarely removed and sold. More commonly, the debtor comes up with some money, or makes an arrangement to pay by instalments, although the threat of removal can remain throughout the payment period".[141] It seems that statistics on sales in England and Wales are not kept centrally. We were informed however that recently in four of the larger county court areas, the ratio of sales to enforceable warrants varied between about 1:220 and about 1:750.[142] In other words, the system operates by way of a filter and a spur to payment just as in Scotland. The same is true of the English system of distress for council tax arrears.[143]

Measuring the success of county court execution against goods

2.64 In measuring the success of county court execution against goods, the Court Service in England and Wales differentiates between "enforceable" and "unenforceable" warrants. The category of enforceable warrants includes cases in items (1) to (5) in Table L, ie 329,572 warrants (item (6)). The second category of "unenforceable warrants" covers warrants which the bailiff considers to have an invalid address (where eg the debtor has moved or the creditor has supplied the wrong address) and warrants where there is a legal impediment to execution (eg bankruptcy proceedings). Item (7) in Table L shows that in the year surveyed 364,171 warrants were unenforceable in this sense.

2.65 The Court Service therefore calculates two figures to measure its success. The overall success rate (warrants fully paid specified in item (1) as a percentage of all the 693,743 warrants

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[135] 1987 Act, s 28.
[136] 1987 Act, s 30(2).
[137] Cf *Jordan v Binckes* (1849) 13 QB 757.
[138] CPR, Sch 2, CCR, Order 26, rule 6.
[139] 1987 Act, s 25.
[140] See paras 4.7 and 4.9.
[141] *LCD Consultation Paper* 1, p 15.
[142] Information supplied by the Lord Chancellor's Department on 28 October 1999. The sales related to the previous 12-months, and the enforceable warrants to the calendar year 1998. The precise figures were Manchester 7 sales:3,669 enforceable warrants; Birmingham 8:6,104; Wandsworth 10: 2,484; West London 5:1,110. We were also informed that in Manchester, the bailiffs went to premises to remove goods 41 times in the year to the end of October 1999 and in 34 cases the debtor paid in full on the bailiffs' arrival at the premises.
[143] The Institute of Revenues, Rating and Valuation told us in October 1999 that a major firm of bailiffs had recently collected statistics showing that of 110,000 listings of goods made by them (broadly equivalent to poindings), only one-half of one per cent (0.5%) progressed to a sale.

issued specified in item (8)) was just over a third (34.9%). However the success rate on the smaller number of 329,572 "enforceable" warrants –that is to say item (1) as a percentage of item (6) - was almost three-quarters (73.6%). We were informed that the Court Service contends that it has no control over "unenforceable" warrants and that when creditors fail to provide accurate information, its bailiffs' performance measures should not suffer as a result. The contention is that the success rate on "enforceable" warrants gives a better picture of how bailiffs actually perform.

Summary of cross-border comparisons

2.66

- Exact cross-border comparisons are impossible because the Scottish and English procedures differ markedly.

- In England and Wales, the most common method of enforcing judgments is by warrant of execution against a debtor's goods in county courts and the High Court.

- In particular, execution against goods is used far more in England and Wales than other methods of enforcement such as attachment of earnings or garnishment of bank accounts and funds other than earnings. Indeed warrants for execution against goods are issued about 9 times more frequently than warrants for all the other methods of enforcement put together. By contrast, in Scotland since the reforms effected by the 1987 Act, poinding and sale is used much less than earnings arrestment and arrestment of bank accounts.

- The measures of debtor protection in Scots law relating to poinding and sale are at least as strong overall as those in English law. Debtors can only suffer one poinding in the same premises for the same whereas in English law repeated warrants, and repeated levies, for the same debt are allowed. The exemptions from poinding are specified in greater detail, and there is a view that the range of exempt goods is wider, in Scots law than in English law. There are judicial restrictions in Scotland but not England on the creditor's power to sell.

- In England initial forcible entry is not permitted but it is in Scotland if required (as in some European legal systems).

- In both Scots law and English law, goods are rarely removed from the debtor's premises and sold. The English system of execution against goods operates by way of a filter and a spur to payment just as in Scotland.

- The success of execution against goods is not measured by the very small number of cases which proceed to a compulsory sale but by reference to the much larger number of cases in which the threat of compulsory sale elicits payment.

- It is easier to measure the success of attachment of goods in England and Wales than in Scotland because there are official records there but not here. Recent English statistics show that county court execution against goods can be effective though different measures of effectiveness give widely different results. The number of warrants fully paid (252,282) is currently about one third of all ("enforceable" and

"unenforceable") warrants issued and about three quarters of all "enforceable" warrants.

(b) Other legal systems

2.67 All the 41 other legal systems in Europe and the Commonwealth which we have so far been able to examine, however briefly, make available to unsecured creditors a system of attachment and sale of moveable property analogous to poinding and sale. Aspects of these are reviewed in the Appendix hereto. They include, in addition to Scotland and to England and Wales, the following 21 European legal systems:[144]

Austria	Iceland	Malta
Belgium	Ireland	Netherlands
Denmark	Isle of Man	Northern Ireland
Finland	Italy	Norway
France	Jersey	Spain
Germany	Liechtenstein	Sweden
Greece	Luxembourg	Switzerland.

The same is true of all the 10 Canadian provinces and territories, namely:

Alberta	Newfoundland	Quebec
British Columbia	North West Territories	Saskatchewan
Manitoba	Prince Edward Island	Yukon Territory
New Brunswick.		

It is also true of New Zealand, South Africa and all 8 legal systems in Australia: Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia. Statistical information has not, or not yet, been collated. It appears however that in Germany enforcement against moveables is becoming less significant. Nevertheless, it is competent and 26,474 forced sales of moveable goods were executed in 1995.[145]

2.68 The Appendix shows that all of the legal systems surveyed make available to an unsecured creditor a method of enforcing decrees and judgments against articles of corporeal

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[144] See the useful survey in P Kaye (ed), *Methods of Execution of Orders and Judgments in Europe* (1996).

[145] E Beischall in UIHJ, *16ème Congres* (1997): p 16: "Sur un nombre de 9,562,098 mandats d'exécution enregistrés, seules 26,474 ventes forcées ont été réalisées".

moveable property owned by the debtor and in his or her possession. Several systems allow forcible entry into the debtor's dwelling or other premises.[146] The exemptions from attachment are formulated in various ways. The most common forms of exemption relate to: (a) articles necessary for the standard of living (variously defined) of the debtor and his or her family or household including food, fuel for heating dwellings, clothing, and various types of household furniture and plenishings; (b) medical aids; (c) books and equipment used for education or vocational training; (d) articles used for the purpose of a profession, trade or business, including in some legal systems (eg some Canadian provinces) generous exemptions for farm equipment, seed, crops, and the like. Unlike Scots law, many systems allow money to be seized. Many exemption laws describe the exempt articles. Others take the form of a monetary ceiling on the value of the exempt articles. Some use a combination of these techniques. Some define the order of attachment and sale. We revert to the exemptions in Part 4 below.

F: POINDING AND SALE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

2.69 It has been alleged from time to time that the diligence of poinding and warrant sale is in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This allegation, if well founded, would impose a duty on the Scottish Parliament to abolish poinding and sale and is therefore of some importance. Enforcement procedures involving the attachment and sale of moveables (including household goods) have in fact been challenged under various provisions of the Convention which require consideration.

2.70 **The right to peaceable enjoyment of possessions**. Article 1 of protocol No 1 provides:-

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control these properties in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In applying the article, especially, the second sentence on deprivation of possessions, the European Court of Human Rights will "examine 1) whether the deprivation had a 'public interest' aim; 2) whether the measure was proportionate in relation to the aim pursued; and 3) whether the measure was lawful".[147] The question of whether possessions are expropriated in the public interest (see second sentence of Article 1) is generally subjected by the organs of the ECHR[148] to a narrow review merely to determine that there is no abuse of power or manifest arbitrariness. In the case of *James and Others v United Kingdom* [149] the European Court of Human Rights observed –

> "The notion of public interest is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve considerations of political, economic and social issues on which opinion within a democratic society may reasonably differ widely. The court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is in the public interest unless that judgment be manifestly without reasonable foundation."

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[146] For example Norway and Sweden.
[147] P van Dijk *et al*, *Theory and Practice of the European Convention on Human Rights* (3d edn; 1998) p 631.
[148] Ie originally the European Commission of Human Rights and the European Court. Protocol Number 11 to the Convention created the single Court of Human Rights which took over the functions of the Commission and the original Court as from 1st November 1998.
[149] 21 February 1986, A 98.

The Court further noted: "The compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate aim for promoting the public interest." In *Gasus Dosier- und Fördertechnik GmbH v The Netherlands* [150] the Court considered Dutch legislation which enabled the Dutch tax authorities in certain circumstances to seize and sell a third party's assets to satisfy a tax-payer's debts for which the third party was not liable. The Court held that such a system of recovery of tax arrears was not uncommon and not incompatible *per se* with the requirements of protocol No 1. The Scots law is even less open to challenge because in principle it is not competent to poind and sell A's property for B's debts and a third party's goods which have been poinded in error must be released from the poinding.[151]

2.71 **The right to respect for private and family life and the home.** Article 8 of the Convention protects among other things the right to respect for privacy, family life and the home. It provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

This application of this provision to forcible entry to attach and sell moveable goods in a dwellinghouse was considered in *K v Sweden*[152] which involved a complaint relating to the execution of the Swedish procedure for seizure or attachment of moveables - the direct equivalent of the Scottish diligence of poinding and warrant sale. The applicant K was the former wife of H K who owed arrears of government taxes and other debts due to a private creditor. In order to recover those debts, the Swedish Enforcement Office (*kronofogdemyndigheten*) of Värnamo decided to effect a seizure of moveables. Representatives of the Office (a bailiff), assisted by a locksmith, made a forcible entry to the applicant's house while she was in hospital (a fact of which the bailiff was unaware) and seized moveable property, such as sofas, paintings, carpets and tables, and cash (30,000 Swedish kroner) hidden under a carpet, in the house where the applicant was cohabiting with HK.[153] No prior notice of intended entry was given by the Office to the applicant. H K had been informed of the risk of seizure but not the time and place of seizure in order (according to the Swedish Government) to prevent the seizure from being obstructed. The seizure was urgent because other property had been seized at the house of relatives of the applicant and her ex-husband on the same day. A lock on one of the two outer doors was changed. There was a dispute between the applicant and Swedish Government as to whether a note had been left on the door informing the applicant and whether the house had been left in disorder. The Swedish Court of Appeal found that the applicant had failed to prove ownership.[154] In her application to the Commission K complained of the lack of prior notice of entry; the change in the door lock; and the fact (as she alleged) that her belongings, kept in drawers, were thrown over the floor.

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[150] 23 February 1995, A 306-B.
[151] 1987 Act, s 40 (ordinary poinding); Sch 5, para 21 (summary warrant poinding).
[152] Application No 13800/88 (European Commission of Human Rights sitting on 1 July 1991).
[153] The decision to seize was based on a presumption of ownership of private property possessed by a cohabiting couple: Code of Enforcement 1981, Chapter 4, section 19.
[154] The Enforcement Office's handling of the matter was considered by the Swedish Parliamentary Ombudsman who held that he could not blame the Enforcement Office for not having informed the applicant about the time set for enforcement or the forcible entry. The Commission took account of this.

2.72 The Commission considered that the complaints disclosed an interference with the applicant's right to respect for her private life and her home within the meaning of Article 8, para (1). However such an interference can be justified if it satisfies three conditions namely (a) that it is "in accordance with the law"; (b) that it pursues one or more of the legitimate aims enumerated in Article 8 para 2; and (c) that it is "necessary in a democratic society" for those aims. The Commission decided, first, that the measures were in accordance with Swedish law whose "quality" was "compatible with the rule of law". The enforcement legislation was formulated in a precise manner though giving discretion as to prior notice of entry; and the seizure was subject to review by the Swedish courts. Second, the protection of creditors' rights was a legitimate aim under Article 8, para 2 covered by the expression "for the protection of the rights ... of others". Third, the enforcement was "necessary in a democratic society" in the interest of creditors. The notion of necessity implies that the interference corresponds to a pressing social need and that it is proportionate to the legitimate aim pursued. Further a "margin of appreciation" is left to the Contracting States. The Commission noted that the parties disagreed on the facts and that the bailiff's duties by their very nature were bound to cause some difficulties for the applicant. They also noted that the manner in which the execution was effected would in normal circumstances be considered to be harsh. However in the circumstances, in particular the special problems in enforcing the claim against the ex-husband H K, the Commission found that the enforcement not only conformed to Swedish law but was proportionate to the legitimate aim pursued. The application was held inadmissible.

2.73 It seems to follow from *K v Sweden* that poinding and sale, and in particular the Scottish provisions regulating forcible entry for poinding introduced for the protection of debtors by the 1987 Act,[155] comply with Article 8. These provisions prohibit an officer of court from entering a dwellinghouse to execute a poinding if there appears to him to be nobody or only children under the age of 16 years present unless either 4 days' prior notice of intended entry has been given, or the sheriff, on an *ex parte* application by the officer of court, has dispensed with notice upon the ground that it would be likely to prejudice the poinding. In considering the sheriff's dispensing power, it should be noted that in *K v Sweden* the Commission observed that a law which confers discretion is not in itself struck down by Article 8 provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

2.74 **The right to a fair and public hearing.** Article 6, paragraph 1 of the Convention provides:

> "In the determination of his civil rights or obligations ...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly...".[156]

In *Smith v United Kingdom*,[157] which involved the use by a Scottish local authority of a summary warrant to recover arrears of community charge, the procedure in the grant by the sheriff of the summary warrant was challenged on the ground that it violated Article 6, para. 1 of the Convention. In particular the main complaint was that the *ex parte* procedure in the levying authority's application for summary warrant did not give the alleged tax defaulter an opportunity to defend the application by contesting that the requisite notices demanding

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[155] 1987 Act, s 18 (poinding under extract decrees); Sch 5, para 3 (poinding under summary warrant).
[156] The remaining provisions relate to criminal proceedings.
[157] Application No 25373/94.

payment of arrears had been served and that any sum due from him remained unpaid.[158] The UK Government contended that the challenge fell outside Article 6 since it related to assessments to tax not civil rights and obligations within the meaning of the Convention; but that even if Article 6 did apply, its provisions had been complied with since an alleged defaulter may appeal against an entry in the Community Charge Register, appeal against the initial demand note for payment; and challenge the lawfulness of the summary warrant.[159] These contentions were upheld by the Commission which found the challenge inadmissible.

2.75 **Summary.** These cases do not support the claim that the Scottish diligence of poinding and sale breaches the European Convention on Human Rights and we have not found any case which does. On the contrary the cases cited support the proposition that poinding and sale generally, and in particular use of the diligence against goods in dwellinghouses, including poinding and sale under summary warrant, conform to:

Article 6 (the right to a fair and public hearing);

Article 8 (the right to respect for private and family life and the home); and

Article 1 of protocol No 1 (the right to peaceable enjoyment of possessions).

This conclusion, if it be accepted, gives no room for complacency but should at least remove from the debate what otherwise would have been a fundamental objection to the retention in Scots law of poinding and sale.

[158] Abolition of Domestic Rates Etc (Scotland) Act 1987, Sch 2, para 7.
[159] Viz by reduction and interdict, or suspension and interdict or damages for wrongful diligence. Therefore domestic remedies had not been exhausted within the meaning of Article 26 of the Convention.

PART 3: THE MAIN OPTIONS FOR REFORM

A. PRELIMINARY

(1) The main issues

3.1 In this Part, we consider the following issues.

First, is no legislative change an option? (Section B)

Second, if poinding and sale were abolished, could the law provide an alternative method of enforcement which would be more socially acceptable and no less effective? (Section C)

Third, would abolition of the poinding and sale of goods located in non-residential premises be justifiable from the standpoint of effective enforcement or debtor protection or otherwise? (Section D)

Fourth, should poinding and sale of goods located in debtors' dwellings be abolished or should it be retained and made subject to further reforms (including a review of exemptions) on the lines discussed in Parts 4 to 7 below? (Section E)

Fifth, if poinding and sale were abolished or gravely weakened, should creditors' remedies be strengthened in other ways? (Section F)

Before we consider these issues, it may be convenient to raise some preliminary matters. One concerns some important factual questions relevant to evaluating the options for reform. The other requires us to explain the general principle of universal attachability underlying our law of debt enforcement and the pattern on which that law is organised.

(2) Assessing the effect of abolition without replacement on recovery levels

3.2 In evaluating the various policy options, it will obviously be necessary to assess their probable effect in fact on the effectiveness of our system of enforcement of debts to which our terms of reference expressly require us to pay regard.[1] It would be very helpful, and even essential, for us to obtain views from persons having knowledge of our system on the two following questions. These are primarily factual. (We address the policy issues later).

The roles of poinding and warrant sale

Do you agree that, in the system of enforcement of debts by diligence, the use or threatened use of charge, poinding and warrant sale performs the following roles namely:

(1) a means of attaching and realising valuable non-exempt moveable goods in the debtor's possession ("the realisation function");

[1] See para 1.1 above.

(2) in the absence of knowledge of arrestable assets or earnings, a means of identifying non-exempt goods located at the debtor's home or business address with a view to poinding ("the identification function");

(3) a means of preventing debtors from evading their creditors' legally constituted claims by converting their assets into corporeal moveable property ("the deterrence function"); and

(4) as a spur to payment without the final stage of a warrant sale being reached ("the spur to payment function")?

(Question 3.1)

The effect of abolition without replacement

(1) What would be the effect of abolishing poinding and warrant sale without adequate replacement on:

(a) **the enforcement of ordinary debts; and**

(b) **the enforcement of tax and rates arrears?**

(2) If you think that abolition would or might have some adverse effect on the ability of unsecured creditors to enforce their debts by diligence, would the effect be (a) very serious; (b) serious; (c) moderate; or (d) negligible?

(Question 3.2)

(3) The principle of universal attachability

3.3 The basic principle of our law on the enforcement of debts by diligence is that all of a debtor's property and income should be attachable[2] by the diligence of his creditor to satisfy the debt subject only to exemptions provided by law in order to protect the debtor and his family from undue hardship. This principle of universal attachability is very common in modern legal systems. So in the most recent Canadian report the Alberta Institute of Law Reform, affirming this principle, recommended:

> "All the property of a judgment debtor should be subject to enforcement regardless of its form or character, excepting only property that has been excluded deliberately from enforcement. No property should be 'exempt' from enforcement for lack of an enforcement procedure".[3]

In similar vein, the Norwegian Creditors Recovery Act of 1984, section 2-2 provides:

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[2] "Attachment" is a generic term for executing those diligences (eg poinding, arrestment, earnings arrestment, adjudication) which give the creditor a right to have the debt paid out of the property attached and a priority in competitions with other creditors. Attachment normally also brings the attached property under the control of the court. By contrast inhibition is mainly a personal prohibition against disposing of land and does not attach the land.

[3] Alberta Institute of Law Reform, Report No 61 on the *Enforcement of Money Judgments* (1991) vol 1, Recommendation 1 (p 25).

> "2-2 Main Rule Concerning the Attachment
> Except as otherwise provided by statute or other valid provision, the creditors have the right to seek satisfaction in any property which belongs to the debtor at the time of attachment, and which can be sold, leased or otherwise converted into money".[4]

Scots law is the same[5] except that money in the debtor's possession cannot be taken by any diligence.[6] The principle of universal attachability is consistent with the view of the Hughes Report that:

> "where the debtor has some resources at his disposal it is obviously important that our system of justice provides a reasonably efficient means for the creditor to gain possession of whatever proportion of them is needed to extinguish the debt".[7]

The principle is also consistent with the rule in sequestration of an individual under which "the whole estate" of the debtor vests in the permanent trustee for the benefit of the general body of creditors subject to the same humanitarian exemptions as apply in poinding and sale.[8] Liquidation of a debtor company under the Insolvency Act 1986 is similar (but there are no exemptions). Whereas diligence enforces a debt due to a single unsecured creditor, sequestration and liquidation are global diligences for the benefit of all creditors.

(4) The forms and pattern of diligence

3.4 The pattern of the law of diligence is simple and logical. Each type of asset (property or income) is attachable by a mode of diligence which is suited to that type of asset. This is shown in Table M. In addition, aliment arrears are enforceable by civil imprisonment, - a diligence against the debtor's person rather than his property - but civil imprisonment has long ceased to be a general creditor's diligence.[9]

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[4] Attachment and sale of goods in Norway is regulated by the Act on Enforcement 1992 and the Creditor's Recovery Act 1984. An official certified English translation of the latter is accessible on the Internet: http://www.ub.uio.no/ubit/ulov/.

[5] It is for this reason that adjudication for debt performs the role of a residual diligence available where other diligences are not available.

[6] See Table A below. This exception from diligence is not a deliberate policy choice by law-makers but an accident of historical development. See note 11 below.

[7] Report of the Royal Commission on *Legal Services in Scotland* (1980) Cmnd 7946 (chairman: the Rt Hon Lord Hughes) para 12.2.

[8] Bankruptcy (Scotland) Act 1985, s 31(1) and 33(1)(a).

[9] It has been recently suggested in the debate that Scots law permits civil imprisonment to enforce VAT arrears. That is a misunderstanding: see Debtors (Scotland) Act 1987, s 74(3): "No person shall be imprisoned for failure to pay rates or any tax". On civil imprisonment generally, see paras 3.24 *sqq*.

Table M

Types of asset and forms of diligence

Type of asset	**Appropriate form of diligence**
Moveable property in debtor's possession	Poinding and sale
Ships	Admiralty arrestment and sale[10]
Earnings (wages or salary)	Earnings arrestment; or current maintenance arrestment; conjoined arrestment order; Deduction from earnings order under Child Support Act 1991, s 31
Pension	Earnings arrestment; or current maintenance arrestment; conjoined arrestment order
Funds or moveable property in hands of third party (eg bank or building society a/c) owed to debtor; shares in companies and other liabilities of third parties to account to debtor	Arrestment and action of furthcoming
Money in debtor's possession	None[11]
Land (immoveable property)	Adjudication for debt (very rarely used) or inhibition[12]
Intellectual property (patents, copyright etc) and other special types of property not covered by any other form of diligence	Adjudication for debt (very rarely used)[13]
Certain social security benefits (income support and jobseeker's allowance)	Deduction from income support orders (under specific enactments) enforcing certain types of debt [14]

[10] See our Report on *Diligence on the Dependence and Admiralty Arrestments* (1997) Scot Law Com No 164.
[11] For provisional proposals to introduce money attachment subject to safeguards, see our Discussion Paper No 108 on *Attachment Orders and Money Attachment* (1998) Part 3.
[12] For provisional proposals to replace the archaic adjudication for debt with a new diligence of land attachment and to reform inhibitions see Discussion Paper No 107 on *Diligence against Land* (1998). Further consultation on land attachment and debtor protection is to be undertaken.
[13] For provisional proposals to introduce attachment orders replacing adjudication for debt against intellectual property and other special types of property, see our Discussion Paper No 108 on *Attachment Orders and Money Attachment* (1998) Part 2.
[14] See paras 3.63 *sqq* below.

It will be seen that the modes of enforcement by diligence are limited by the practical consideration that the types of property or income which a debtor can own are themselves limited.

B. IS NO LEGISLATIVE CHANGE AN OPTION?

3.5 The criticisms of poinding and sale from the standpoint of debtors are highlighted in Part 2 and the research referred to there. These criticisms are based on the view that, despite the reforms of the 1987 Act, poinding and sale still causes undue economic hardship and undue personal distress to too many debtors and is ineffective in recovering debts at least in most poindings of consumer (non-business) goods. On the other hand, the research mentioned in Part 2 also shows that, in the view of some creditors, the 1987 Act has tilted the balance too far towards debtor protection and that the aim of any further legislative reform should be to improve the effectiveness of poinding and sale as a creditor's remedy.

3.6 Against this background, we have had to make a provisional judgment as to the direction of any further reform. The present state of public and Parliamentary opinion, and the circumstances in which the present section 3(1)(e) reference was given to us, suggest that any legislation must not decrease the present level of debtor protection. Rather the expectation in many quarters is that any legislative reform must aim at improving the level of debtor protection. But our terms of reference also refer to "alternative measures that might replace and be no less effective than this diligence"[15] which suggests that any legislative reform aimed at improving debtor protection should not make the system less effective from the standpoint of creditors. How is this circle to be squared?

3.7 One conceivable outcome is that the views and interests of creditors and debtors cancel out. In other words, the 1987 Act does achieve a reasonable balance between creditors' and debtors' interests. Though the 1987 Act was based on our 1985 report, we are certainly not wedded to that view. On the contrary, on such an important general question of social policy, we earnestly wish to be guided by consultees.

3.8

> **Does the present law and practice of poinding and sale, as reformed by the 1987 Act, strike an equitable balance between the interests of creditors and debtors so that legislative reform is unnecessary?**
>
> **If not, what should be the primary aim of reform: the improvement of debtor protection or of effective enforcement ?**
>
> **(Question 3.3)**

C. IS THERE A MORE SOCIALLY ACCEPTABLE AND NO LESS EFFECTIVE ALTERNATIVE TO POINDING AND SALE?

3.9 **Overview.** 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

[15] See para 1.1 above.

creditors in the recovery of legally constituted debt and the interests of debtors". Suppose the Abolition of Poindings and Warrant Sales Bill 1999 were to become law with the effect that poinding and sale is abolished. What measures would be available to take its place? In particular (a) could existing or new or reinstated diligences or methods of enforcement provide a more socially acceptable and no less effective alternative to poinding and sale? Alternatively, (b) would sequestration and liquidation be satisfactory replacements?

(1) Existing general creditors' diligences as an alternative to poinding and sale?

3.10 We first address the question: can the existing general creditors' diligences provide a more socially acceptable and no less effective alternative to poinding and sale? To answer this question from the standpoint of effective enforcement, we need to assess whether there is an alternative method of enforcement which could perform the four roles which, in our provisional view, poinding and sale perform in Scots law. We identified these above as including the realisation, identification, deterrence and spur to payment roles of the diligence. It is convenient to deal with the first three roles here and the fourth (spur to payment) role below.[16]

3.11 The realisation and deterrent roles of poinding and warrant sale were well described in 1981 in a debate in the United Kingdom Parliament. After referring to the need to reform poinding and sale and to this Commission's Consultative Memorandum,[17] an MP entered a word of caution against total abolition without replacement:

> "The commission's recommendation is that the process should survive and that we cannot do without it. There are persuasive practical arguments in its favour such as 'What shall we put in its place?' For instance, if someone owes money, and he is the cunning type of gentleman whose assets are all tangible – goods and property – it is annoying if he says 'I cannot pay your £500 bill. I have no money in the bank, and no money that you can arrest,' and yet he is sitting surrounded by a veritable Aladdin's cave of property. If there is no equivalent to the warrant sale procedure nothing can be done about it".[18]

3.12 As indicated above, our law of diligence is organised on a simple and logical pattern: each type of asset (property or income) is attachable by a mode of diligence which is tailored specially so as to suit that type of asset. This means that poinding and sale, whether under court decrees or summary warrants, is the only general creditor's diligence adapted for the attachment and sale of articles of moveable property in the debtor's possession.[19] Legislation could change the procedure (though, as we note in Parts 4 and 5 below, the scope for that may well be limited) and call it by another name. That however might be justifiably criticised as not creating an alternative but rather as mere cosmetic surgery.

3.13 We take it to be evident, and we hope it is agreed on all sides, that none of the other diligences (as distinct from insolvency proceedings) could perform the realisation, identification and deterrence roles of poinding and sale.[20] None of them is well adapted or

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[16] See para 3.15.
[17] Consultative Memorandum No 48, *Second Memorandum on Diligence: Poindings and Warrant Sales* (1980).
[18] *Hansard, Parl Deb (HC) First Scottish Standing Committee*, 27th January 1981, col 182 (debate on Local Government (Scotland) Bill) (Mr Donald Dewar MP).
[19] Technically poinding and sale is competent to attach moveable goods of the debtor in the hands of a third party but in practice, arrestment and furthcoming is always used.
[20] If it were otherwise, one would have expected that the author of the Abolition of Poindings and Warrant Sales Bill would have made provision to stop another diligence from being used in place of poinding and sale. Quite rightly, the Bill makes no such provision.

readily adaptable to the attachment and sale of moveable goods in the debtor's possession. This becomes obvious even on a quick look at the other diligences.

*Civil imprisonment can clearly perform none of these roles though it could be a spur to payment.

*Arrestment and earnings arrestment involve laying a schedule in the hands of a third party (an arrestee or employer) but in attachment and sale of moveable goods in the debtor's possession, no third party is involved.

*Admiralty arrestments, though capable of execution against a vessel in the owner's possession (unlike ordinary arrestments), have many special rules peculiar to maritime law.

*Adjudication (or land attachment) generally creates a subordinate real right in immoveable property registrable in the property registers (Land Register or Register of Sasines) but real rights in moveable property are not registrable in the property registers. It is an archaic and cumbersome diligence unsuited to attachment and sale of moveables in the debtor's possession.

* Inhibition (a personal prohibition against disposing of land) at one time applied to moveable property but was rightly restricted to land as long ago as the 17th century[21] because it impeded greatly commerce in moveables.

Do you agree that, if poinding and sale were abolished, none of the other existing diligences could be used, or could be readily adapted to be used, as a means of identifying and attaching the moveable property of debtors in their possession?

(Question 3.4)

3.14 If there is no diligence which could replace poinding and sale in its realisation, identification and deterrence roles, recourse could be had to insolvency procedures at least in some cases.[22] We revert to these below.[23]

(2) Is there any more socially acceptable and no less effective alternative to poinding and sale in its role as a spur to payment?

3.15 We saw in Part 2 that few ordinary poindings, and even fewer summary warrant poindings, progress to sale.[24] It follows that poinding and sale is much more commonly used in its role as a spur to payment than as a direct method of realising goods by warrant sale. The question of how far the diligence is indeed an effective spur to payment is uncertain because of lack of records monitoring payment by stage of diligence reached. However we also saw in Part 2 that the English procedure of execution against goods (which is used far more than in Scotland) also operates primarily as a spur to payment; that unlike Scotland records exist allowing its success to be monitored; and that these records show that

[21] Graham Stewart, p 526.
[22] We pass over the fact that a compulsory means enquiry (considered in Part 6 below) might in some cases take the place of poinding as a means of identifying goods located at the debtor's home or business address (the identification role) because such an enquiry would be pointless if the goods at that address could not be attached.
[23] See para 3.27 *sqq*.
[24] See Tables C, D, E and F.

execution against goods is reasonably effective in that role.[25] It is possible but seems unlikely that Scotland is significantly different. At all events there is evidence that poinding and sale is effective in some cases as a catalyst for payment arrangements by instalments or otherwise.

3.16 The role of poinding and sale as a spur to payment can be criticised on grounds of social policy. It may be argued that if poinding cannot be used to contribute directly to payment of the debt through a cost-effective warrant sale, it should not be used at all and in particular should not be used as an indirect means of eliciting payment. That however is a ground for amending the law on poinding and sale and not a ground for its abolition. Whether it should be so amended is a controversial question addressed in Section E of this Part and Part 4 below. We simply note here that a system of enforcement providing for the threat of an ultimate sanction which is rarely carried out has advantages as well as disadvantages.

3.17 The use or threatened use of other existing forms of diligence could elicit payment indirectly and to some extent earnings arrestments, bank arrestments and inhibitions already do. In theory at least other forms of diligence could be either reinstated (eg civil imprisonment) or devised (land attachment and money attachment) which might operate as a spur to payment in place of poinding and sale. The question arises whether these would be no less effective and more socially acceptable than poinding and sale.

(a) Civil imprisonment

3.18 Civil imprisonment can only operate as a spur to payment. It never elicits payment directly. It was abolished as a general creditor's diligence for ordinary debts in Scotland in 1880[26] and in England in 1971.[27] Following a recommendation in our 1985 report, the 1987 Act, section 74(3) abolished civil imprisonment for failure to pay rates and taxes, which had in any event been very rarely used.[28]

3.19 Nowadays the only type of pecuniary debt enforceable by civil imprisonment is aliment,[29] which is governed by the Civil Imprisonment (Scotland) Act 1882, section 4.[30] This applies only if the debtor's failure to pay is wilful. The number of applications for warrant for imprisonment of wilful aliment defaulters can be seen in Table N.

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[25] See paras 2.55 *sqq*.
[26] Debtors (Scotland) Act 1880, s 4.
[27] Administration of Justice Act 1970, s 11.
[28] See Scot Law Com No 95 (1985) paras 7.70 - 7.80. At para 7.73 we observed that there had been no civil imprisonment of rates defaulters in Scotland under the Local Government (Scotland) Act 1947, s 247(5) since 1972.
[29] Ie in the strict legal sense which excludes periodical allowance on divorce. Child support due under a liability order is enforceable by the Secretary of State by application under the 1882 Act, s 4: Child Support Act 1991, s 40(14).
[30] As originally introduced, the Bill which became 1882 Act would have abolished civil imprisonment of aliment defaulters but the Select Committee on the Bill reinstated imprisonment for wilful default: see *Report of Select Committee on the Civil Imprisonment (Scotland) Bill*, Parl. Papers, 1882 (288) VIII.1; Bill to amend the law relating to civil imprisonment in Scotland: 1882 (19) i.483; Am. by Sel. Com., 1882 (245) i.487.

Table N

Applications for civil imprisonment for aliment 1989-1998

1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
35	79	N/a	66	47	74	41	32	11	13

Source: *Civil Judicial Statistics Scotland 1990 – 1998*, Table 10 (1990); Tables 3.8 (1992.1993); Tables 3.12 (1994-1998); in 1991 aliment cases are not distinguished from other applications for civil imprisonment.

These are only applications to the court, not cases where civil imprisonment was ordained. Separate statistics of prison receptions of aliment defaulters are not published but Table O, which covers all civil imprisonments,[31] suggests that the numbers are indeed very small.

Table O

Receptions to penal establishments of civil prisoners (including *ad factum praestandum*, lawburrows, and aliment cases): 1989-1998

1989	1990	1991	1992	1993	1994	1995	1996	1997-1998	1998-1999
15	21	25	34	37	27	25	32	21	10

Source: Scottish Office, *Prison Statistics, Scotland 1996* (1997) CrJ/1997/8 Table 7 (1989-1996); Scottish Prison Service, *Annual Report and Accounts for 1998-1999* (1999) Parl Papers HC 638, Appendix 4 (1997-1998 and 1998-1999).

The last official review of civil imprisonment for aliment was made in 1974 by the Finer Report which considered that the small amount of civil imprisonment in Scotland (compared with England) resulted from two factors.[32] The first was the reluctance of unsupported wives and their solicitors to take this extreme step. The second was the stricter application of the law by professional judges in the sheriff courts than by some of the lay magistracy in England, there being no material difference between the provisions of the law in either case. At present, there are no plans to amend the law on civil imprisonment for wilful failure to pay aliment.

3.20 Generally civil imprisonment for wilful failure to pay a debt does not exist in Scotland as a "final sanction" or spur to payment alternative to poinding and sale. The Scottish tradition in diligence, for all its faults, has at least long been hostile to that drastic remedy. A recent Accounts Commission Report on council tax collection[33] however proposed that Scottish local authorities should be provided "with the power to seek the

[31] Presumably these consist of or include civil imprisonments on the following grounds, namely, failure to comply with a decree *ad factum praestandum*; contravention of lawburrows; wilful failure to pay aliment; breach of interdict; and contempt of a civil court.
[32] Report of the Departmental Committee on *One-Parent Families* (Cmnd. 5629; 1974)para 4.461 (chairman: Sir Morris Finer).
[33] Quoted in Joint Scottish Office/COSLA Working Group Consultation Paper (November 1998), Annex C, p 16.

imprisonment of defaulters similar to the legislation available to English authorities".[34] The Joint Scottish Office/COSLA Consultative Document on council tax collection did not endorse this proposal but did record the view of some council revenue practitioners that "the threat of imprisonment for council tax debtors acts as an effective inducement on taxpayers to pay and consequently maximises revenue". On the other hand the *IRRV Report* pointed out that in England and Wales the threat of committal to prison produces payment of arrears of council tax. Only a very small percentage of "threats" of committal are followed by service of committal notices,[35] and only a tiny number result in prison sentences.[36]

3.21 It seems likely that the threat of civil imprisonment, and even its associated procedure of a compulsory means enquiry, would cause greater, probably much greater, personal distress to debtors than do poinding and sale under the present law.[37] We suspect that any legislative attempt to reintroduce civil imprisonment whether as a general creditor's diligence, or a special diligence for council tax arrears, would be regarded in Scotland as retrograde and unacceptable on grounds of social policy. We seek views on this matter.

(b) Other diligences

3.22 We have seen that each type of asset is attachable by a particular form of diligence which is suited to that type of asset.[38] So each form of diligence can only act as a spur to payment if the debtor has assets liable to be attached by that diligence. Since no diligence other than poinding and sale can be used to attach moveable goods in the debtor's possession, there is no alternative form of diligence which could be used as a spur to payment against debtors whose only assets are moveable goods in their possession. Such debtors could refuse to pay, secure in the knowledge that no steps could be taken against them.[39]

3.23 Poinding and sale is in practice used in many cases as a spur to payment where the debtor has arrestable assets or earnings, and the creditor does not have the details needed to use an arrestment or earnings arrestment but does know the debtor's home or business address. There is no other diligence which can be used in this way.

(c) Other modes of enforcement?

3.24 There are other modes of enforcement for particular debts, eg actions of removing for arrears of rent followed by the diligence of ejection and discontinuance of supply by fuel suppliers for non-payment of charges for electricity or gas. Clearly these cannot become general creditors' diligences.

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[34] See Local Government Finance Act 1992 Sch 4, para 8 (and regulations under Sch 4 para 1(1)). The remedy applies where the authority has sought and failed to levy arrears by the remedy of distress (equivalent to poinding); the magistrates' court has inquired (in the debtor's presence) into his means; and the court is of the opinion that the default is due to wilful refusal or culpable neglect.

[35] Only 5.5% for one local authority and 3% for the remaining authorities: *IRRV Report*, Chapter 4, para 80 and Table 22.

[36] *IRRV Report*, Chapter 4, paras 73 - 85.

[37] Whyte, *SOCRU Study of Debtors* p 50 reports that one debtor, in describing how she came to terms with several poindings for different debts, observed: "Life goes on and nobody comes and arrests you".

[38] See para 3.4.

[39] Other than in some cases the extreme case of sequestration.

3.25 As mentioned below,[40] in England and Wales, a recent consultation paper[41] sought views on a range of sanctions against a debtor for refusal to co-operate in the enforcement procedures (rather than for non-payment for debt). It is possible that some of these might be used as a spur to payment. The *IRRV Report* also mentions alternative sanctions to diligence for recovery of council tax.[42] These however were designed to supplement rather than supplant poinding and sale.

3.26 Views are sought on the following questions.

(1) Leaving aside the special case of civil imprisonment for arrears of aliment, do you agree that civil imprisonment should not be reintroduced as a general diligence for enforcing ordinary debts or taxes?

(2) Do you agree that none of the other existing diligences can replace poinding and sale as a spur to payment against debtors whose only attachable assets are goods in their possession or whose arrestable funds or earnings are unknown to the creditor?

(3) If poinding and sale were abolished would any other sanction not mentioned above (whether a diligence or not) be a no less effective and more socially acceptable alternative to poinding and warrant sale in its role as a spur to payment?

(Question 3.5)

(3) Use of sequestration or liquidation in place of poinding and sale?

3.27 Insolvency procedures (sequestration under the Bankruptcy (Scotland) Act 1985 or creditors' winding up under the Insolvency Act 1986) can nearly always be used in place of any diligence provided the total amount of the debts (including interest) due to all creditors is £1,500.[43] At present the exemptions in diligence and in sequestration in bankruptcy are the same.[44] This is common in many legal systems for obvious reasons. "If it is decided that certain basic property is essential for a minimum standard of living, this cannot be less true when a debtor is subject to the enforcement of a judgment in favour of one creditor than when that debtor is subject to a formal insolvency administration for the benefit of all creditors".[45]

3.28 The Abolition of Poindings and Warrant Sales Bill 1999 does not exempt all moveable goods in the debtor's possession from sequestration under the Bankruptcy (Scotland) Act 1985 (or creditors' compulsory liquidation under the Insolvency Act 1986). It keeps alive the provisions on exemptions in the 1987 Act, section 16, so that they can continue to apply in sequestrations.[46] So it seems to be intended that an alternative to poinding and sale should continue to be available to creditors but only if they resort to sequestration of an individual debtor or winding up a debtor company. The proposition

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[40] See paras 6.11 *sqq*.
[41] *LCD Consultation Paper 2*.
[42] *IRRV Report*, chapter 4.
[43] Bankruptcy (Scotland) Act 1985, s 5.
[44] Bankruptcy (Scotland) Act 1985, s 33(1)(a) providing that "property exempted from poinding for the purpose of protecting the debtor and his family" does not vest in the permanent trustee.
[45] Law Reform Commission of Australia, Report on *General Insolvency Inquiry* (1988) ALRC 45, para 866.
[46] Under the Bankruptcy (Scotland) Act 1985 s 33(1)(a).

that moveable goods as a class should not be attachable by creditors outside insolvency proceedings is not precedented in any other modern legal system of which we are aware.

3.29 This approach raises a number of questions.

*Is sequestration or compulsory winding up (global diligences for the benefit of the general body of creditors) a good method of promoting debtor protection where only one debt is owed to one creditor?

*Is the solution a principled alternative to abolition of poinding and sale? Indeed is it an alternative at all? It does mean abandoning the principle of universal attachability by diligence outside sequestration. Does that matter? Put the question another way. Is there a practical reason or rational ground for stating that the debtor's moveable goods *as a class* should be unattachable outside insolvency proceedings if they are in the debtor's possession, but not if they are in a third party's possession (when apparently they will continue to be arrestable)?

*Is exclusive reliance on sequestration or creditors' winding up as the sole means of attaching goods in the debtor's possession in the interest of creditors?

*Is it in the interest of debtors? Would the economic impact of sequestration on small trader debtors be the same as on consumer debtors? Would the trauma and stigma of sequestration proceedings for any debtor be less or more than the trauma of poinding and sale?

*Is it in the public interest, including the public interest in the economy, that debtors (whether individuals, partnerships or registered companies) should be forced prematurely to ceased trading by insolvency proceedings at the instance of a single creditor in circumstances where there are sufficient attachable moveables in their possession to satisfy the debt?

*Are insolvency proceedings more cost-effective than poinding and sale as a means of attaching moveable goods in the debtor's possession?

*What would be the implications for the public purse of the summary administration by the Accountant in Bankruptcy of the estates of debtors if sequestration were made necessary by the abolition of poinding and sale?

These seem to cover the main issues. But there are other less frequently occurring problems. Take as an example cross-border or international trade by container lorry. There could be circumstances where a creditor might be forced to commence bankruptcy proceedings outside Scotland in order to attach a container lorry and its contents owned and possessed by an English or foreign debtor (individual or partnership) in Scotland[47] simply because the Scottish courts have no jurisdiction to award sequestration of that debtor's estate.[48] It is difficult to see why Scottish creditors should be at a disadvantage compared with their

[47] Eg a container lorry owned by an English or foreign partnership exporting goods in the lorry into Scotland.
[48] The Bankruptcy (Scotland) Act 1985, s 9 provides that the Scottish courts have jurisdiction where the debtor at any time within one before the presentation of the petition for sequestration either habitually resided, or had an established place of business, in Scotland. Goods owned by a foreign partnership importing goods to Scotland and held in a third party's warehouse in Scotland would be arrestable.

English or foreign counterparts none of whose legal systems have abolished attachment and sale of moveable goods.

3.30 **Sequestration.** Sequestration under the Bankruptcy (Scotland) Act 1985 is available to a creditor only if the total amount of the debts (including interest) due to all creditors is £1,500.[49] About two-thirds of debts enforced by poinding fall below that lower limit.[50] This raises some more questions. What is to happen to these debts? How is a creditor with a debt below £1,500 to find another creditor to make up the difference? Should the creditor have to bother about the existence of other creditors any way? Suppose there is none? Adopting sequestration as the sole method of attaching moveable property in the debtor's possession would appear to force our legal system to choose between two solutions: all debts under £1,500 would either (a) have to be diverted into sequestration; or (b) simply be unenforceable against moveable goods in the debtor's possession altogether. Is either of these solutions more satisfactory than the retention of poinding and sale?

3.31 Then there is the question: would sequestration be more cost-effective than poinding and sale? The average net cost to the public purse of administering a sequestration in which there is no dividend to creditors is about £930 if the Accountant in Bankruptcy is trustee and about £1,260 if an insolvency practitioner is trustee. Table P shows the costs of a sequestration administered by the Accountant in Bankruptcy in cases where the debtor's non-exempt assets are worth £200, £500 and £1,000 respectively.

Table P

The cost of administering a sequestration under the Bankruptcy (Scotland) Act 1985

	[a] Assets £200	**[b] Assets £500**	**[c] Assets £1,000**
Fees	£500	£500	£500
Court dues and Gazette notices	£125	£125	£125
Gross Costs	**£625**	**£625**	**£625**
Less Receipts [assuming realisation costs of 5%]	£190	£475	£950
Net Cost to Public Funds	£435	£150	[£325]

Source: information supplied by The Accountant in Bankruptcy, October 1999.

[49] Bankruptcy (Scotland) Act 1985, s 5. Citizens Advice Scotland have pressed for a reduction of the £1,500 limit to £750 to allow more debtors to petition for their own sequestration. The Scottish Office/COSLA Consultative Document, Question 4 (para 3.2.7) sought views on lowering the limit to £750 to allow more local authorities to enforce council tax arrears by petition for sequestration.

[50] *Civil Judicial Statistics Scotland 1998* Table 5.2 showing 4,114 poindings (summary cause, upper limit £1,500) and 2,168 poindings (non-summary cause).

In addition, the expenses of the petition for sequestration amounting to about £300 (borne by the creditor) have to be added to the gross costs making total costs of about £925. The expenses of the petition are borne by the creditor. Only in example (c) would the creditor recover that cost.

3.32 These costs must be compared with the costs of poinding and sale as shown in Table Q.

Table Q

Poinding and sale: sheriff officer's and solicitor's fees for a summary cause debt, Band 3

Step in procedure	**Value of goods £200**	**Value of goods £500 or £1,000**
Officer executing poinding	61.25	94.90
Officer reporting poinding to court	5.90	5.90
Officer applying for warrant of sale	9.65	9.65
Officer intimating application to debtor by hand service (1)	41.00	41.00
Officer arranging sale, preparing advertisement and giving public notice	15.10	15.10
Officer intimating warrant and arrangements for sale to debtor by hand service (1)	41.00	41.00
Officer attending auction in sale room	56.25	56.25
Officer reporting sale to court	11.55	11.55
TOTAL	£241.70	£275.35

Information derived from Act of Sederunt (Fees of Sheriff Officers) 1994 as amended by SI 1998/2669 for work done after 1 January 1999.
Notes: (1) Service on the debtor by hand involves visiting the debtor's home or place of business. Postal service would cost £9.95.
(2) The Table relates to Band 3 charges (over 18 miles travelling).

Certain steps (the service of a charge to pay, the costs of removing the goods to an auction room and the auctioneer's fee) are omitted from Table Q since they would be incurred in a sequestration too. Comparing Tables P and Q, it will be seen that sequestration is considerably more expensive than poinding and sale: about £925 for a sequestration as compared with £241 or £275 (as the case may be) for a poinding. Moreover, unlike poinding and sale, sequestration can impose costs on the public purse.

3.33 **Compulsory winding up**. Where the debtor is a company registered under the Companies Acts, a compulsory winding up under the Insolvency Act 1986 on the ground of inability to pay its debts[51] is a possible alternative to poinding and sale in some cases. The Scottish courts however have jurisdiction to wind up only a company registered in Scotland.[52] Unlike sequestration, it is not enough that the company has an established place of business in Scotland.[53] Many companies trading in Scotland are English or foreign. If a company is registered in England and Wales the application for winding up has to be brought in that jurisdiction.[54] Companies created by the law of a foreign country can generally be wound up only by the courts of that country. Many companies operate on bank overdrafts so that bank arrestments are ineffective. Alternatively the company's bank account may be unknown. If the company has poindable goods at its premises in Scotland, poinding may be the cheapest, easiest and most obvious diligence, especially (but not only) for a consumer creditor dissatisfied with goods or services supplied by the company.

3.34 Winding up is a drastic remedy because it dissolves the company. Of course, a threat of winding up may induce payment. But if the threat is not credible or does not work, the creditor has to bear the expense of the petition to the court and any subsequent proceedings in the winding up. Even in a winding up by the Scottish courts, there is no provision for summary administration by the Accountant in Bankruptcy. The cost to a creditor in petitioning for compulsory winding up is to some extent governed by the market in the fees charged by insolvency practitioners which is currently depressed. Even at present, however, we understand that the aggregate expenses and outlays connected with such a petition is unlikely to be less than £1,000. This is only the cost of obtaining the appointment of the liquidator. Thereafter the cost of the administration by the liquidator of the winding up has to be added which could be many times that amount. A poinding and sale would normally be much more cost-effective.

3.35

(1) If poinding and sale were abolished, would:

(a) sequestration under the Bankruptcy (Scotland) Act 1985 or personal bankruptcy proceedings in another country; or

(b) where the debtor is a company, a compulsory winding up by the court in Scotland or in another country,

be a satisfactory alternative to poinding and warrant sale from the standpoint of effective enforcement and debtor protection or otherwise?

Please give reasons for your opinion.

(2) If in your opinion sequestration would be a satisfactory alternative to poinding and sale, should any amendment be made to the provision in section 5(2B)(a) of the Bankruptcy (Scotland) Act 1985 under which a creditor may petition for the

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[51] Insolvency Act 1986, s 122(1)(f); s 123. The expiry of a charge without payment suffices: s 123(1)(c).
[52] Insolvency Act 1986, s 120(1).
[53] Cf Bankruptcy (Scotland) Act 1985 s 9.
[54] 1986 Act, s 117(1).

debtor's sequestration only if the total amount of the debts (including interest) due to all creditors is £1,500?

(Question 3.6)

D. ABOLITION OR RETENTION OF POINDING OF GOODS IN NON-RESIDENTIAL PREMISES?

3.36 In our 1985 report we expressed the view that there never had been any controversy over the propriety of a creditor poinding commercial goods owned by a trader in order to recover debts from that trader.[55] We did not think that abolition of diligence against moveable goods as a class was seriously contemplated. However the Abolition of Poindings and Warrant Sales Bill 1999 would abolish the poinding and sale of commercial goods in non-residential premises as well as goods in debtors' dwellings. This view therefore requires re-consideration.

3.37 **The SOCRU research.** The SOCRU research on 1991-92 data suggests that poinding and sale in the context of business debtors is less open to criticism than poindings of goods in debtors' dwellings. It was found that most creditors "made a distinction between domestic and commercial situations" and were "more willing to use the diligence in the latter situation because the same issues of morality were not seen to arise".[56] Furthermore the threat of raising a court action was thought to provoke a greater response from businesses than from individuals.[57] In practice, business debtors tend to be treated less leniently as regards compliance with informal arrangements such as instalment plans.[58] It seems that applications for time to pay directions in the context of business debts are more likely to be rejected than those concerning domestic debts.[59]

3.38 In cases where the debt goes as far as court action, it is felt by many that, as regards realising assets, this can be done to best effect by poinding against businesses.[60] This is supported by statistical evidence. Certainly the SOCRU research shows that business debt poindings yielded items up to 78% of the total value of the debt as it stood at the time of poinding. By contrast the figure for domestic debtors was 34%.[61] In 45% of business debt cases which reach the stage of a warrant sale the appraised value of the goods is over £750.[62] By contrast only 11% of cases involving individual debtors reach the warrant sale stage with goods valued at over £750.[63] The average amount of the principal sum in each case will be

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[55] Scot Law Com No 95, para 2.147.
[56] Platts, *SOCRU Overview*, chapter 4, para 18; see also Platts, *SOCRU Study of Commercial Creditors*, chapter 6, para 45.
[57] Fleming, *SOCRU Study of Facilitators*, chapter 4, para 8; this was "attributed to the fear of obtaining a bad debt record". See also Platts, *SOCRU Study of Commercial Creditors*, chapter 6, para 54, where one interviewee explains: "a business debtor… ha[s] no choice but to repay the money owed to release the goods from the poinding in order to get the business running again".
[58] See further, Fleming, *SOCRU Study of Facilitators*, chapter 6, para 15.
[59] *Ibid*, para 26: "[a] debt collector [who] was largely involved in business debts reported rejecting 75% of offers made".
[60] Fleming, *SOCRU Study of Facilitators*, chapter 4, para 51. Also Platts, *SOCRU Study of Commercial Creditors*, chapter 6, para 54: "Because of the list of exempt goods contained in the Act some interviewees believed that the diligence was now only credible… where the debtor 'had a lot of nice things' or where the poinding was carried out in commercial premises", although note Fleming, *SOCRU Study of Facilitators*, chapter 6, para 43, where one interviewee states: "[q]uite often we're finding with regard to commercial debts, a lot of companies' assets are leased. We find that quite a lot now".
[61] Fleming, *SOCRU Survey of Poindings and Warrant Sales*, chapter 4, para 35.
[62] *Ibid*, chapter 4, Table 25.
[63] *Ibid*, chapter 2, Table 13.

different. In domestic debt situations 66% of debts reaching warrant sale stage are for less than £750; in business debt situations the proportion is only 51%.[64] 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.[65]

3.39 Compared with domestic poindings, poindings 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 poinding in less than six weeks. In the context of domestic debtors only 26% of cases were as rapid.[66] Furthermore, 54% of business debts move from a poinding to an application for a warrant of sale within 8 weeks, while this number is reduced to 23% of domestic poinding cases.[67]

3.40 **Policy considerations.** This evidence suggests to us that from the standpoint of effective enforcement and debtor protection, any case for abolishing poinding of goods in non-residential premises is quite distinct from the case for abolishing poinding of goods in debtors' dwellinghouses. It has to be argued separately.

3.41 Take debtor protection first. 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 or in the commercial sphere. As mentioned above creditors who view warrant sales in domestic poindings with distaste do not themselves believe that the same issues of morality arise in poindings of commercial goods. But the abolition of poinding and sale could have well have serious adverse effects on self-employed or small business debtors. If creditors of business debtors are forced by the lack of any alternative to use sequestration, it will compel those debtors (often small traders) to cease trading. Winding up will dissolve a debtor company. As already mentioned, poinding and sale does not necessarily have these drastic effects for business debtors. Poinding under summary warrant is the main method of enforcing arrears of income tax and VAT[68] and is also used to enforce arrears of non-domestic rates. It is unlikely to be in the interest of self-employed or business tax and rates defaulters if their arrears were enforced by insolvency proceedings instead of the less draconian remedy of poinding and sale.

3.42 Then from the standpoint of effective enforcement, we noted above that sequestration and compulsory winding up are even less cost-effective than poinding and sale as a means of realising the value of moveable goods to satisfy a single creditor's debt. Under the present law, creditors of business debtors with goods in commercial premises have a choice. They can use an expired charge either as a ground of poinding or as a ground of insolvency proceedings (sequestration or compulsory winding up). If the latter remedy is more effective, they have the right to resort to it. It is difficult to see how any principle of effective enforcement can be relied on as a reason for depriving them of that choice. There may however be some important consideration which we have missed and we would be grateful for views.

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[64] *Ibid*, chapter 4, Tables 10 and 22.
[65] 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 Poindings and Warrant Sales*, chapter 4, para 22.
[66] Fleming, *SOCRU Survey of Poindings and Warrant Sales*, chapters 3 and 4, Tables 12 and 24.
[67] Idem.
[68] See Tables E and F at para 2.17 above.

3.43 We note in passing that there is an exemption from poinding for "tools of the trade", business equipment and the like up to a value of £500[69] and that that might be reviewed.[70] That however presupposes that poinding and sale of business goods is not abolished.

3.44

Do you agree that the abolition of poinding and sale of goods in non-residential premises would not be justified on grounds of effective enforcement or debtor protection or otherwise?

(Question 3.7)

E. POINDING OF MOVEABLE GOODS IN DWELLINGHOUSES: ABOLITION OR RETENTION AND REFORM?

3.45 The main remaining question is whether poinding and sale of moveable goods in debtors' dwellinghouses should be abolished (as proposed in the Abolition of Poindings and Warrant Sales Bill) or retained and made subject to further reforms.

The case for abolition

3.46 In summary, the case for abolition appears to depend mainly on the following arguments.

(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. Debtors described the experience of poindings variously as frightening, stressful, intrusive, embarrassing, and humiliating. The experience of the uplift of goods was commonly referred to as "traumatic". The high level of mental stress can cause health problems.

(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.

(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 debtors and their families there.

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[69] 1987 Act, s 16(1)(b).

[70] See Platts, *SOCRU Overview*, chapter 4, para 34, referring to the criticism that poinding of tools of the trade can restrict the ability of the debtor to earn a living and pay off the debt.

The case for retention

3.47 The case for retention appears to depend mainly on the following arguments.

(1) Poinding and warrant sale (or a similar method of attachment and sale) is the only method (outside sequestration or liquidation for the benefit of all creditors) of enabling a single 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 debtor's 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 dwellings or business premises.

(2) The use or threatened use of the stages of poinding and warrant sale is often the only available spur 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 poinding 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 the reasonable standard of living of debtors and their families does not apply to genuine luxury goods.

If our summary of the arguments for and against abolition are thought to be incomplete, unrepresentative or otherwise defective, we should be glad to know where we have gone wrong and how the defects may be removed.

Retention with reform?

3.48 **Luxury goods in debtors' dwellings.** As mentioned in Part 2 above,[71] the SOCRU research discloses that creditors who dislike the use of poinding and sale put forward two broad types of reason for not using it, one relating to morality and the other relating to its ineffectiveness.[72] The creditors however drew a distinction between the "average" household and the household with luxury goods. They thought that use of the diligence against households with luxury goods was morally justifiable and effective. This seems to us a tenable point of view. We wish to find out how widespread that view is. Those who do pay their debts and taxes, including those on low incomes who forego the purchase of luxury goods in order to meet their liabilities, may regard it as unfair that debtors and tax defaulters should keep luxury goods free from attachment by creditors. Of course much depends on the definition of "exempt" and "luxury" goods. It seems to us arguable that abolition of poindings of the household goods of those who do not pay their debts and taxes would operate unfairly against the interests of those who do. On this approach, the

[71] See para 2.31.
[72] Platts, *SOCRU Overview* para 18. See also Platts, *SOCRU Study of Commercial Creditors* chapter 6.

properly focussed question for reform is not whether household poindings should be retained or abolished but rather where the law should draw the line between "exempt" and "luxury" goods.

3.49 If that is right, a more fruitful path to reform - which is at least worth considering - is not to abolish poinding of all luxury goods in all debtors' dwellings but to retain the diligence and to introduce further reforms on the lines of those considered in Parts 4 to 7 below.

3.50 **What reforms should be considered in place of abolition?** From the standpoint of debtor protection, the most important of these reforms might consist of or include:

> *reforms to poinding and sale such as (a) a review and clarification of the range of exempt goods or (b) provision ensuring that a warrant for sale is not granted unless the appraised values show that the proceeds of sale would contribute significantly to the payment of the debt (Parts 4 and 5);
>
> *measures designed to assist a creditor in acquiring information about the assets or income of the debtor which is necessary for instructing arrestments or earnings arrestments and thereby to avoid unnecessary resort to poinding (Part 6);
>
> *measures designed to make time to pay directions and time to pay orders under the 1987 Act more accessible to debtors (Part 7, Section B); and
>
> *the introduction of 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 free from the threat of poinding and sale or other diligence (Part 7, Section C).

3.51 **Exemptions compared with abolition.** It may be argued that such an approach could never be sufficiently radical to achieve the desired social policy of promoting debtor protection. This is a misconception. In fact reforms on these lines could have a major impact on household poindings not far removed from abolition. For example an apparently innocuous and relatively minor increase in, and clarification of, the categories of the range of exempt goods (eg to exempt consumer durables such as electrical household goods, including electrical "entertainment goods", and electrical kitchen equipment) could exempt over 60% of goods which are currently poinded in dwellinghouses.[73] This would leave insufficient items to make the diligence worthwhile save in exceptional cases of genuine luxury goods with a high re-sale value. So it should not be thought that alternatives to abolition could not be radical.

3.52 **Poinding and sale as a spur to payment and the prevention of unjustifiable sales.** We recognised above[74] that the role of poinding and sale as a spur to payment has been strongly criticised on ground of social policy. The argument has to be considered that if poinding cannot be used to contribute directly to payment of the debt through a cost-effective warrant sale, it should not be used at all and in particular should not be used as an indirect means of eliciting payment. There are various reasons for this view based on social

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[73] See para 4.23 below.
[74] See para 3.22.

policy. One is that the spur to payment role puts a premium on debtors' ignorance of the law and practice of poinding and sale. Debtors who know the rules may realise that the threat of warrant sale is empty. Debtors who lack the necessary knowledge are at a disadvantage and may fear the ultimate sanction of a warrant sale in circumstances where, by reason of the safeguards precluding sale at the stage of the sheriff's hearing on whether to grant warrant of sale, the sale will not be carried out.

3.53 On the other hand, poinding is a diligence of last resort and if debt recovery levels are to be maintained, it may be unrealistic to expect that it should operate only as a direct means of eliciting payment though warrant sale. The diligence would lose its main claim to effectiveness in very many of the cases the majority) where poinding is used. If there is no satisfactory alternative to the use or threatened use of poinding and sale as a spur to payment, further restrictions on the grant of warrant of sale could have a very serious detrimental effect on the enforcement of debts. Coercive pressure is an inescapable feature of debt collection and enforcement generally in Scotland and other countries where common experience shows that debt recovery cannot be left to debtors' consciences. These are important conflicting considerations which consultees may wish to consider in answering Question 4.3 below which relates to the prevention of unjustifiable sales.[75]

3.54 **Summary warrant poinding and sale.** In our view, so far as based on morality and social policy the case for abolition or reform is broadly the same whether the poinding enforces an ordinary debt or arrears of central or local government taxes. However the law sometimes gives special privileges to public authorities in the collection and enforcement of local and central taxes for various reasons. Moreover, it may be that the Inland Revenue and Customs and Excise and other interests would be concerned if, in the enforcement of central government taxes, too great a disparity emerged as between summary warrant poindings in Scotland and distress against goods in England and Wales. We therefore seek views on whether the same or a different solution should apply to summary warrant poindings.

3.55

(1) Should poinding and warrant sale of goods in residential premises:

(a) be abolished; or

(b) be retained subject to possible reforms on the lines considered in Parts 4 to 7 below?

(2) Should the same solution apply to poinding and sale:

(a) for ordinary debts under Part II of the 1987 Act; and

(b) for arrears of central and local government taxes and non-domestic rates under Schedule 5 to the 1987 Act (poinding and sale under summary warrants)?

If there should be a difference what should it be?

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[75] See para 4.36.

Please give the main reasons for your opinion.

(Question 3.8)

F. STRENGTHENING CREDITORS' REMEDIES IF POINDING AND SALE ABOLISHED OR GRAVELY WEAKENED?

3.56 The abolition or reform of poinding and sale cannot be considered in isolation. If poinding and sale were abolished either generally or in relation to goods in dwellinghouses, or if possible reforms of poinding and sale outlined in Part 4 below were to make it ineffective against most debtors, the principle of effective enforcement might well require the introduction of new remedies for creditors or the strengthening of existing remedies. These would not attach moveables and so would not be proper alternatives to poinding and sale. Moreover there is a case for these measures whatever happens to poinding and sale. But that case becomes stronger if poinding were to be abolished or made much less effective. We now turn to consider possible measures, namely (1) means enquiries in aid of diligence; (2) land attachment; (3) money attachment; and (4) orders for deduction at source of income support and jobseeker's allowance.

(1) Means enquiries in aid of diligence

3.57 In Part 6 below, we observe that if better information relating to the debtor's arrestable funds or earnings were available to creditors, it would help them to target diligence more accurately towards arrestments and earnings arrestments and thereby avoid unnecessary resort to poinding which they regard as a diligence of last resort.

3.58 In that Part, therefore, we consider measures designed to divert enforcement away from poinding and sale towards arrestments such as means enquiries, and creditors' ancillary rights to require information from third parties, in aid of diligence. Means enquiries are not a diligence but experience in England and Wales shows that debtors will sometimes pay rather than submit to a means enquiry. Unfortunately there are potentially serious disadvantages from the standpoint of debtor protection. If means enquiries in aid of diligence in civil proceedings were introduced, we anticipate that there would be many cases in which debtors, who had been required by citation to appear, would fail to obey the citation and attend court.[76] Statistics on means enquiry courts in criminal proceedings in district courts in 1997-98 show that over 68% of citations resulted in warrants for arrest.[77] This is a very high figure. The SOCRU research findings as to debtors' inactivity in the face of diligence suggest that means enquiries in aid of civil diligence in civil proceedings are unlikely to be much different.

3.59 Our present law of diligence, for all its faults, does avoid threats of arrest or civil imprisonment or penal sanctions. Nevertheless, if goods in most debtors' dwellings were to be exempt from poinding and sale, the case for introducing these means enquiries backed by these sanctions would become very strong indeed because of the need to maintain a system of effective enforcement.

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[76] See para 6.9.

[77] See para 6.9 below citing Scottish Office Home Department, *Scottish District Courts Statistical Bulletin* 1998-99, Table 6(a). The only available statistics relate to district courts.

(2) Land attachment

3.60 In a recent discussion paper we have provisionally proposed the introduction of a new diligence - to be called "land attachment" - against heritable or immoveable property (ie land or buildings) to replace the archaic and rarely used diligence of adjudication for debt.[78] It would take the form of an attachment of land followed by a sale under the sheriff's warrant. In some respects land is a more appropriate object of diligence than moveable goods because it tends to have a high and generally appreciating resale value.

3.61 If creditors are not to be allowed to attach moveables in all or most debtors' dwellings, should they be allowed to attach the dwelling itself?[79] There are difficult social policy questions relating to the use of land attachments against dwellings. Its use against a debtor's only dwellinghouse might run counter to the Scottish Executive's current policy against homelessness.[80] We are currently examining possible answers to this difficult problem and intend to consult on them.[81] But if poinding and sale were abolished or gravely weakened, the principle of effective enforcement might require that dwellings be made subject to land attachment.

(3) Money attachment

3.62 As Table M at paragraph 3.4 above shows, there is no form of diligence for attaching money in dwellings. Money attachment is cheaper than poinding and sale because there are minimal transaction costs and, soon after seizure, the money can be handed over to the creditor by the court or officer of court. Most if not all other legal systems allow money attachment subject to exemptions eg sufficient money to maintain the family for a month or other period.[82] In a recent discussion paper[83] we sought views on whether such a diligence should be introduced at least in exceptional cases which could be justified in a special application to the sheriff. This proposal met with a mixed reaction and we are reconsidering the matter. However if poindings were abolished or made largely ineffective, arguably the case for introducing money attachment would be strengthened.

(4) Orders for deduction at source from income support and jobseeker's allowance

3.63 Most forms of diligences are available to ordinary unsecured creditors as a general method of enforcement for ordinary debts. There is however one form of diligence, namely

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[78] Discussion Paper No 107 on *Diligence against Land* (October 1998) Part 2 and Appendix A. Adjudication for debt has not been properly reviewed since its introduction by an Act of the Scottish Parliament, the Adjudication Act 1672.

[79] If it is owned and not rented by the debtor. As a general rule residential tenancies should not be subject to land attachment most debtors who experience poinding and sale are tenants and there would need to be a minimum debt of several thousand pounds before land attachment could be used because such a heavy and expensive diligence cannot be justified for small debts.

[80] Cf The Scottish Office Green Paper, *Investing in Modernisation – An Agenda For Scotland's Housing* (February 1999) Cm 4272.

[81] Other arguments against the introduction of land attachment against dwellings were put to us on consultation. (a) The relatively high expenses involved in executing land attachment would increase the debt unduly without benefiting the creditor. (b) Creditors already have sufficient diligences available to them under the existing law so that the introduction of land attachment is unnecessary. (c) Land attachment could prejudice other creditors unfairly. (d) Widespread use of land attachment might induce competing creditors to petition for the sequestration of the debtor under the Bankruptcy (Scotland) Act 1985 thereby increasing the use of sequestration. (e) If land attachment were to prevail over concluded missives under which the debtor contracts to sell his land, ordinary conveyancing transactions would be prejudiced as purchasers lose the benefit of their bargain.

[82] See Appendix.

[83] Discussion Paper No 108 on *Attachment Orders and Money Attachment* (1998) Part 3.

an order for deductions at source from income support and jobseeker's allowance,[84] which is only available to special classes of creditor enforcing special classes of debt. These classes of debt include arrears of council tax;[85] rent arrears, mains gas and electricity charges;[86] unpaid fines and compensation orders;[87] and child support maintenance.[88] Poinding and sale is often used against persons in receipt of social security. The question arises whether if poinding and sale were abolished or gravely weakened, an ordinary creditor should be entitled to apply for an order for deduction at source and payment to the creditor of a prescribed portion of social security benefits (income support and jobseeker's allowance).

3.64 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 (£51.40) may be deducted each week. The current deduction is just over £2.50 per week. The deductions are paid over to the local authority at agreed intervals of no longer than 13 weeks. Only one application for council tax arrears may be given effect at any one time. The others are put aside to be dealt with when the first one comes to an end, and are disposed of in the order in which they were received. The local authority is not barred from enforcing the summary warrant by other diligence while deductions are being made.

3.65 Like earnings arrestments, orders for deduction of income support at source have lower transaction costs than poinding and sale and cause less personal distress. As mentioned in Part 2, most local authorities use deductions from income support as a more humane method of enforcement than subjecting those who are on very low incomes to poinding and sale.[89] However, allowing ordinary creditors to obtain payment of their debts directly out of their debtors' social security benefits would certainly be a major innovation of principle. Income support and jobseeker's allowance are paid by the State to those without the means to support themselves. The classes of debt for which deductions are currently allowed all have special features. If they have a common feature, it seems to be that the competent authorities have determined that, as a matter of public policy, the debt is one which a person on income support should pay in priority to other ordinary debts. Some are central or local government debts (such as council tax or fines), others are connected with benefits (such as recovery of overpayment of benefit or arrears of child support maintenance where the parent with care is on benefit), and yet others relate to expenditure essential to maintain a home (rent and fuel charges, for example).

3.66 There is also a United Kingdom dimension. Though diligence is a devolved matter, social security is a reserved matter. There may be difficulties as to the legislative competence of an Act of the Scottish Parliament introducing such orders as a general creditor's remedy and difficulties in securing cross-border equality of treatment of persons in receipt of social security.

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[84] Extended to jobseeker's allowance by the Social Security (Jobseeker's Allowance Consequential Amendments)(Deductions) Regulations 1996 (SI 1996/2344).
[85] Council Tax (Deductions from Income Support) Regulations 1993 (SI 1993/494).
[86] Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), reg 35 and Sch 9.
[87] Fines (Deductions from Income Support) Regulations 1992 (SI 1992/2182).
[88] Child Support Act 1991, s 43 and the Child Support (Maintenance Arrangements and Special Cases) Regulations 1992, (SI 1992/1815), regs 13 and 28.
[89] See para 2.50.

Question

3.67

If poinding and sale were abolished, or made much less effective by reforms promoting debtor protection, do you consider that the principle of effective enforcement would require that creditors' remedies should be strengthened for example by :

(a) the introduction of means enquiries in aid of diligence as discussed in Part 6 below;

(b) the introduction of land attachment (replacing adjudication for debt as proposed in our Discussion Paper No 107) affecting debtors' immoveable property including possibly their dwellinghouses subject to safeguards;

(c) the introduction of money attachment affecting money in the debtor's possession (as proposed in our Discussion Paper No 108), including money in debtors' dwellinghouses, subject to exemptions of money required for the needs of debtors and their families for a suitable period; or

(d) allowing an ordinary creditor to obtain an order for deduction at source of a prescribed portion of income support or jobseeker's allowance?

(Question 3.9)

PART 4: REFORMS OF POINDING AND WARRANT SALE

A. INTRODUCTION

4.1 In this Part we seek views on further measures of debtor protection on the basis that the diligence of poinding and sale is to be retained.[1] We deal here mainly with the poinding and warrant sale procedures for enforcing court decrees. Issues peculiar to summary warrant poinding and sale are discussed in Part 5 below.

B. 1987 ACT REFORMS TO POINDING AND SALE

4.2 The 1987 Act did not change the basic structure of poinding and sale. It continues to take the form of an attachment followed by a sale arranged by an officer of court under the supervision of the sheriff. The main stages of the diligence continue to be the charge, the poinding, the grant of warrant of sale on the creditor's application and the sale itself. See the flow chart in Figure 1 in Part 2 above.

4.3 The main measures of debtor protection retained or introduced by the 1987 Act are the following.

(1) **The charge to pay.** The charge is retained as a means of notifying the debtor of the decree, of warning him that poinding may follow in default of payment and of informing him of his rights to apply for a time to pay order or a debt arrangement scheme. The service of a charge is intended to operate as a catalyst for payment arrangements and a means of enabling sheriff officers to report to creditors on the prospects of recovery.[2]

(2) **Restriction on power of forcible entry.** Creditors continue to be entitled to ascertain the extent of the debtor's poindable goods and this necessarily implies that officers of court executing a poinding may exercise a power of entry to the debtor's premises, by force if necessary. But they 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.[3]

(3) **Exemptions.** The range of exemptions from poinding of household goods and certain other goods, which were increased by the 1987 Act is capable of amendment by statutory instrument. The range of exempt goods covers, among other things, all items reasonably required for the use of the debtor and the members of his household.[4]

(4) **Debtor's continued possession of poinded goods.** Poinded goods normally remain in the debtor's possession unless and until, at a later stage in the procedure, (which in the great majority of cases is not likely to be reached), the goods have to be removed for sale.[5]

(5) **Release and redemption of poinded goods.** After the poinding, the debtor has rights to apply to the sheriff for the release of exempt goods and for the release of individual items on the ground of undue harshness.[6] He may redeem goods at their appraised values,[7] and has a second chance of redemption if the creditor applies for warrant of sale.[8]

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[1] See paras 1.15 and 1.16 above.
[2] 1987 Act, s 90(1) and (2).
[3] 1987 Act, s 18.
[4] 1987 Act, s 16(1) and (2).
[5] 1987 Act, s 20(7).
[6] 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.

(6) **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.

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. 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 (eg if the debt has already been paid).[9]

(7) **Debtor's right to oppose warrant of sale.** The debtor has a right to be informed of the creditor's Bapplication to the sheriff for warrant of sale, and a right and opportunity of intervening to oppose the application on any of the grounds mentioned above.[10]

(8) **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 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.[11] As a result of these reforms, sales in dwellinghouses and the newspaper advertisements publicising such sales have been virtually abolished.[12]

(9) **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.[13]

(10) **Relaxing time limits to allow payment arrangements after poinding.** To enable informal instalment arrangements secured by poinding to be made providing for smaller amounts than are possible under the present practice, 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.[14]

(11) **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.[15]

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[7] 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.

[8] 1987 Act, ss 16(4), 21(4), 23(1) and 33(2).

[9] 1987 Act, ss 24(1), 24(3), 30(1) and 30(2).

[10] 1987 Act, ss 30(3) and (4).

[11] 1987 Act, ss 32(1)-(3) and 34(5).

[12] The SOCRU research found that officers hardly ever sought consent for a sale in a dwellinghouse (Fleming, *SOCRU Study of Facilitators*, chapter 5, para 36); that no sheriff interviewed could remember granting warrant to sell in a dwellinghouse (*Ibid*, chapter 7, 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*, chapter 3, para33). 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*, chapter 4, para 10).

[13] 1987 Act, s 25.

[14] 1987 Act, s 27(1) and (2).

[15] 1987 Act, s 36.

(12) **No threat of uplifting goods after sale.** Creditors to whom pointed 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.[16]

C. PROPOSED REFORMS OF POINDING AND SALE

4.4 The SOCRU research found that of the safeguards for debtors introduced by the 1987 Act, those based on statutory rules have generally proved more effective than those which depend on the debtor making an application to the court. Comparatively little use has been made of applications by debtors for release of goods from poinding or 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 in the list are not pointed and sold. Sales in dwelling houses have been virtually abolished since the introduction of a rule prohibiting them unless the debtor and any other occupiers consent. We have therefore attempted wherever possible to frame our proposals for additional debtor protection in the form of rules rather than provisions entitling debtors to apply to the court for protective orders.

(1) What goods should be exempt from poinding?

4.5 In some ways the definition of the range of exempt goods lies at the core of the development of poinding and sale and its various roles. As we mentioned in paragraph 3.51, there may be very little difference in practice between abolition of poindings in dwellinghouses and the formulation of a very wide range of exempt goods.

(a) Exemptions in Scotland

4.6 Before the 1987 Act, the Law Reform (Diligence) (Scotland) Act 1973 exempted domestic furniture and plenishings in a prescribed list[17] if they were reasonably necessary to enable the debtor and any person living in the family with him to continue to reside in the dwellinghouse without undue hardship. There were also exemptions at common law for tools of trade[18] and clothes.[19]

4.7 Implementing recommendations in our 1985 Report,[20] these provisions were replaced and greatly extended by the Debtors (Scotland) Act 1987, section 16(1) and (2) which provide:

> "16. - (1) The following articles belonging to a debtor shall be exempt from poinding 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 Lord Advocate;

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[16] 1987 Act, s 37(6) and (7).
[17] Ie beds or bedding material, chairs, tables, furniture and plenishings providing facilities for cooking, eating or storing food and furniture and plenishings providing facilities for heating.
[18] Which was construed as applying to items of relatively modest value: *McMillan v Barrie and Dick* (1890) 6 Sh Ct Reps 103, (sewing machine of dressmaker).
[19] So far as not extravagant for the social position of the debtor: Graham Stewart, p 345.
[20] Paras 5.40 – 5.57.

(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 Lord Advocate;
(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 poinding if they are at the time of the poinding 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;
(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,[21] but no regulations have been made. Identical provisions apply to poinding under summary warrants.[22]

(b) Exemptions in other legal systems

4.8 In assessing these exemptions it may be helpful to pay regard to the exemptions in other legal systems. Information on exemptions in many other legal systems is contained in the Appendix and examples are given in the following paragraphs.

4.9 **Exemptions in England and Wales.** In England and Wales the exemptions from execution against the goods of any person under High Court writs of *fieri 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".[23]

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[21] 1987 Act, s 16(3).
[22] 1987 Act, Sch 5, para 1.
[23] 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.

4.10 **Exemptions in continental Europe.** Some examples may give the flavour of the modern approach to exemption in continental Europe. In France, Article 14.4) and 14.5) of the Law of 11 July 1991 provide an exemption for:

> "4) Moveable goods necessary to the life and the work of the debtor and his family, if the debt is not for the payment of their price, within the limits fixed by *"décret"* in the *Conseil d'Etat*, ...; they remain available for attachment, however, if they are in a different place from that where the debtor usually resides or works, or if they are goods of value due to their importance, their subject matter, their rarity, their age or their luxurious character, or if they lose their characteristics of necessity due to their quantity, or if they form corporeal elements of the goodwill of a business.
>
> 5) Objects necessary to handicapped persons or intended for the care of sick people
>
> Goods referred to in 4) may not be seized, even for payment of their price, when they are the property of recipients of Children's Allowance, as seen in articles 150 to 155 of the Family Code, and social assistance."

In Germany the exemptions from attachment[24] are aimed at maintaining a modest standard of living both at work and at home. So clothes, furniture, a refrigerator, a washing machine or a vacuum cleaner are all exempt. German law allows the enforcement officer to replace expensive necessary items with cheaper equivalents. A colour television may be seized provided a black and white one is put in its place, or an expensive watch may be seized if it is replaced with a cheaper model.[25]

4.11 A similar approach is adopted in Scandinavia. In Denmark, moveable property required for the immediate support of the debtor and his or her family is exempt. This includes property up to a value of 3,000 Danish *kroner* (about £270) used by the debtor or a member of his family for work or vocational training.[26] Property of sentimental value or property required due to illness cannot be seized.[27] The debtor may direct which property may be subject to the attachment, but cannot force the creditor to attach "troublesome" items.[28] In Finland, the exemptions include the usual domestic appliances, goods necessary for work or study, sums of money necessary for the debtor's needs or the upkeep of his family for one month, if he has no income, and medical aids in case of sickness or accident.[29] Usual domestic appliances include necessary furniture such as chairs, beds and tables and such appliances as the refrigerator and cooker. However even these may be seized if they hold an abnormally high value as the law only protects a "normal, modest lifestyle".[30]

4.12 In Sweden, the following exemptions from seizure apply.[31]

> "Chapter 5: Exemptions from seizure
>
> **Exemptions which take account of the debtor's needs**
> §1 The following are exempt from seizure:

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[24] Code of Civil Procedure, s 811.
[25] See further Kaye, p 116.
[26] *Retsplejeloven* (Administration of Justice Act), s 509.
[27] *Ibid*. s 515.
[28] *Ibid*. s 517, see Kaye, p. 44.
[29] *L'Union Internationale des Huissiers et Officiers Judiciaires, 16ème Congres* (Stockholm 1997) (Papers of conference on execution against moveable goods) p 25.
[30] *Idem*.
[31] *Utsökningsbalken (*Enforcement Code), translated for us by Miss Marie-Sofie Sveidqvist, LL.B.; see also Kaye, p. 313.

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;
3. Work-tools and other equipment necessary for the debtor's work/occupation or vocational training, as well as animals and goods and other articles essential to their case, 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.[32]

4.13 In Norway, the exempt items are defined by the Creditors Recovery Act of 1984, s 2-3 as follows:

"a) Clothes and other objects for the personal use of the debtor or any member of his household and furniture, equipment, and similar moveables which the debtor needs in his home, provided the value of the objects is low enough to make it reasonable under the circumstances to except them;

b) utensils, means of transportation and similar equipment which the debtor or any member of his household requires in the conduct of his profession or for his education, limited to a combined value equivalent of two thirds of the national insurance basic amount (rounded off to the nearest hundred kroner and currently about £4,000). Goods and materials intended for sale or processing are not comprised under these rules;
c) objects which have a particular personal value for the debtor or any member of his household, provided the value is low enough to make it obviously unreasonable to put the objects up for forced sale".[33]

In addition "reasonable consideration" must be taken if the debtor or any member of his household suffers from illness or disability. In such circumstances the monetary limits may be relaxed. Furthermore, where belongings exceed the monetary limits, the debtor must be given sufficient money from the proceeds of the sale to purchase a cheaper equivalent.[34]

4.14 **Exemptions in Commonwealth countries.** A similar approach is found in many Commonwealth countries. In New Zealand for example, the bailiff may not seize the necessary tools of trade of a debtor (to a value not exceeding $500) or his necessary household furniture and effects, including wearing apparel of himself and his family, to a value not exceeding $2000.[35] The Appendix, at Section (2), below[36] reviews the exemptions in

[32] By Miss Marie-Sofie Sveidqvist, LL.B.
[33] Creditors Recovery Act of 1984, section 2-3; official English translation available on Internet: http://www.ub.uio.no/ubit/ulov/.
[34] *Idem*.
[35] District Courts Act 1947 (NZ), s. 85(a).

the Canadian provinces and territories, many of which are especially generous to farmers reflecting the concerns of the prairie provinces. Among Australian systems, in New South Wales the exemptions from seizure include (i) any wearing apparel and any bedroom or kitchen furniture, and (ii) any ordinary tools of trade, plant and equipment, professional instruments and reference books, not exceeding in the aggregate $500 in value.[37] The goods must be in use by the debtor or any member of his family.[38]

4.15 A much more generous range of exemptions is found in some Australian States – notably Victoria,[39] Queensland,[40] and South Australia[41]- which apply the federal bankruptcy law exemptions[42] to execution against goods.[43] 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".[44] 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;
(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.[45]

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

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[36] Based on P J M Lown, *Civil Enforcement Legislation in Canada*, (1998), unpublished paper for Uniform Law Conference of Canada, August 1998.
[37] District Court Act 1973 (NSW), s 109; Local Court (Civil Claims) Act 1970 (NSW), s 59.
[38] *Idem*. Similar restrictive exemptions are found in Australian Capital Territory, Northern Territory, Tasmania and Western Australia: see Appendix, Section 3 below.
[39] Supreme Court Act 1958 (Vic), s 63C inserted by Judgment Debt Recovery Act 1984 (Vic), s 27.
[40] Supreme Court of Queensland Act 1991(Qld), Sch 2.
[41] Enforcement of Judgments Act 1991(SA), s 7(2).
[42] 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 exemptions.
[43] 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.
[44] Bankruptcy Regulations, reg 6.03.
[45] Bankruptcy Regulations, reg 6.03(3).

the limit prescribed by the regulations"[46] and for property used by the debtor primarily as a means of transport provided it does not exceed the limit set in the regulations.[47]

(c) The types of goods poinded in dwellinghouses: the SOCRU research

4.16 The SOCRU research throws light on the types of goods which are poinded in dwellinghouses. It analysed the types of poinded goods and the average appraised value in 2,555 poindings executed in 1991/92.[48] Half of all goods valued in household poindings were household electrical goods (eg TVs, videos, hi-fis); nearly a third were household furniture; and 12% were kitchen electrical goods, mainly microwaves. These three categories accounted for 92% of all poinded goods. The findings are set out in the following Table.

Table R

Poindings against individuals: types of poinded items and average appraised value

	No. of goods	% of poinded items	Average value
Household furniture	3182	30	£ 32
Specialist furniture	78	1	£ 73
Household electrical goods	5232	50	£ 55
Kitchen electrical goods	1303	12	£ 43
Car	278	3	£ 804
Other	444	4	£ 127
Total goods	10516	100	£ 71
No. of cases 2555			

Source : Fleming, *SOCRU Survey of Poindings and Warrant Sales,* Table 15 in chapter 3, para 24.

4.17 The Household Survey for 1996 (UK) shows a rise in the availability of consumer durables especially "entertainment items" such as video recorders (82% of households), CD players (58%), and home computers (27%).[49] Ownership of colour television was levelling out at 97%, telephones had reached 94% and a new item, a receiver for satellite television, stood at 18%.[50] Ownership of kitchen equipment stood at deep freezer (91% of households); washing machine (90%); microwave oven (74%); tumble dryer (51%); and dishwasher

[46] Currently fixed at $2,600; Bankruptcy Regulations, reg 6.04.
[47] Currently $5,050; see reg 6.04.
[48] Fleming, *SOCRU Survey of Poindings and Warrant Sales,* chapter 3, paras 24 and 25.
[49] Office for National Statistics, Social Survey Division, *Living in Britain: Results from the 1996 General Household Survey* (1998) p 26.
[50] *Idem*.

(20%).[51] In 1996, 70% of households "had access to" (not necessarily ownership of) a car or van (cf 59% in 1981) and 24% had access to two or more cars.[52]

(d) The impact of the increase in exemptions by the 1987 Act and cross-border comparison

4.18 As observed in Part 2 above, the SOCRU research found that most creditors and their agents considered that the increased exemptions had reduced the effectiveness of the diligence. Some commercial creditors considered that nothing much was now poindable in most debtors' homes.[53] Debt collection firms interviewed thought that the effectiveness of poinding had been reduced since fewer items could be poinded and there were more occasions on which insufficient goods of value existed for a poinding to take place.[54] Officers of court took the same view.[55] Individual creditors were dissatisfied with the level of recovery.[56] Some solicitors however thought that there had never been much of value to poind in poor households, even before the 1987 Act, which had made little difference.[57] This may be doubted.

4.19 Again as mentioned in Part 2 above,[58] the *IRRV Report* takes the view that the increase in exemptions in summary warrant poindings made by the 1987 Act[59] (which was,[60] and still is, the same as in ordinary poindings) had adversely affected the recovery levels of arrears of council tax and community charge.[61] In particular, most Scottish local authority revenue officers considered that the range of exempt goods is now so extensive that few household items of reasonable value are available in low to middle income group households to make a warrant sale realistic.[62]

4.20 The *IRRV Report* also considers that the levels of exemption are higher in Scotland than in England and that that is one factor accounting for the higher recovery levels of council tax arrears in England and Wales than in Scotland.[63] This reflects the view of Scottish sheriff officers and local authority revenue officers. It was also the unanimous view of bailiffs and directors in nine private sector bailiff firms in England who were asked to compare the two lists of exempt articles. They interpreted the Scottish list of exempt items as excluding considerably more items from poinding than does the English list from the levy of distraint.[64] The *IRRV Report* research team states its view "that the issue of the range of goods protected from poinding and warrant sale deserves re-examination, in view of Scottish revenue pratitioners' concerns that it has on their ability to use poinding and

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[51] *Idem.*
[52] *Ibid*, p 25. The Office for National Statistics, *Social Trends 29* (1999), Table 12.7, p 198 states that 45% of households had the regular use of one car and 25% 2 or more cars.
[53] Platts, *SOCRU Study of Commercial Creditors,* chapter 6, para 53.
[54] Fleming, *SOCRU Study of Facilitators,* chapter 6, para 46.
[55] *Ibid*, chapter 5, para 27.
[56] See para 2.30.
[57] *Ibid*, chapter 4, para 40.
[58] Paras 2.34, 2.36 – 2.41 citing *IRRV Report*, chapter 4, paras 29 – 36; para 92.
[59] Sch 5, para 1.
[60] The exemptions in the Law Reform (Diligence) (Scotland) Act 1973 applied also to poindings under summary warrants: see s 1(5) of that Act.
[61] *IRRV Report*, chapter 4, paras 29-31.
[62] *IRRV Report*, chapter 4, para 29, citing one respondent: "The pendulum has swung in favour of debtors and it seems to have stuck on their side".
[63] Compare the Scottish exemptions in para 4.7 above with the exemptions under English law in para 4.9 above. See paras 2.36 and 2.39 above, citing *IRRV Report*, Executive Summary, para 8; and chapter 4, paras 28, 29 and 31.
[64] *IRRV Report*, chapter 4, para 27.

warrant sale effectively".[65] The plain implication is that, in their view, the principle of effective enforcement may require that the items on the Scottish list should be decreased.[66]

(e) Should the range of exempt articles be amended?

4.21 The above survey of exemptions in other legal systems indicates that the modern approach to debtor protection in attachment of moveables in the debtor's possession is by way of reasonable exemptions rather than complete abolition of the diligence. If poinding and sale is to be retained, the issue then becomes: what exemptions are reasonable having regard to the principles of effective enforcement and debtor protection? It is a question of balancing the effectiveness of the diligence against the hardship caused to debtors.

4.22 To some extent the solution will depend on the criteria applied in assessing the current exemptions. Our 1985 report framed the existing exemptions with three criteria in mind namely that:

> *the range of exempt goods must not be so great that no poindable goods could be found in a normal debtor's home. Otherwise poinding 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.[67]

The first criterion reflects both the realisation and "spur to payment" roles of poinding and sale. The second criterion reflects only its "realisation" role.[68] Other criteria are possible. Arguably there is a difference in principle (which is ignored by these criteria) between "entertainment items" and items required for subsistence. Nobody doubts that the latter should be exempt but the exemption of entertainment items is potentially more controversial. Standards change over time and articles once considered as luxury goods can come to be regarded as essential to a basic, if frugal, standard of living. We note that some entertainment items are covered by the liberal Australian bankruptcy exemptions referred to above.[69] These are based on "two dominant principles", namely that "the bankrupt should be left with resources necessary to live an ordinary dignified lifestyle" and "should have the opportunity of financial rehabilitation".[70]

4.23 The SOCRU research found that household electrical goods including entertainment items (such as TVs, videos and hi-fis) made up 50% of poinded items in 1991/92, and

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[65] *IRRV Report*, chapter 4, para 36.
[66] We note in passing that another legislative change which may have reduced the effectiveness of domestic poindings is the Family Law (Scotland) Act 1985, s 25. This contains a presumption that household goods obtained in prospect of or during the marriage are owned by the spouses in equal shares. This presumption applies where such goods are poinded: *Kinloch v Barclays Bank* 1995 SCLR 975. The result is that where only one spouse is the debtor, the other spouse can get any co-owned poinded article released by paying the officer of court the value of the debtor's half share instead of the full value of the article, or may let the sale go ahead and claim the greater of half the proceeds of sale of any co-owned article or half its appraised value: 1987 Act, s 41.
[67] Para 5.46.
[68] On these roles, see para 2.4 above.
[69] Para 4.15 above.
[70] ALRC 45 (note 42 above), para 859.

kitchen electrical goods (for example microwave ovens) a further 12%.[71] If these were to be made exempt from poinding, insufficient poindable goods would be found in a normal debtor's home and, except in commercial cases, poinding would lose much of its effectiveness. On the other hand, the second criterion tends to suggest that such goods should be exempt. The re-sale value of household and kitchen electrical goods is generally low and much less than their replacement value so that, in those few cases of individual debtors where a warrant sale actually takes place, the warrant sale of such goods inflicts greater hardship on debtors than it benefits creditors. The second criterion would also exempt most items of household furniture in most low income households as such items also have a re-sale value which generally is much less than their replacement value.

4.24 A third possible view is that the present law, for all its defects, achieves a reasonable compromise. Such goods can be poinded and so the diligence continues to be a spur to payment. While we sympathise with the views of creditors that the pendulum has swung too far in favour of debtors, we think that there must be a presumption that the humanitarian progress made by the 1987 Act in the matter of exemptions ought not to be reversed. Where there are insufficient goods poinded for the proceeds of sale to meet the expenses of sale, the sheriff has a discretionary power to refuse warrant of sale.[72] In 1991-92 at least, it appears that many sales producing no net proceeds were carried out. Later in this Part, we seek views on proposals (a) to prevent sales which fail to produce sufficient proceeds to cover a required proportion of the debt and expenses[73] and (b) to prohibit poindings where goods of insufficient value exist for a viable or cost-effective sale.[74] These would increase the protection for those debtors with few poindable goods, even if the range of exemptions were to remain as it is at present.

4.25 To elicit views on this important issue, we ask:

(1) Do you agree that the range of articles of moveable property exempt from poinding under the Debtors (Scotland) Act 1987, section 16 and Schedule 5, paragraph 1, (especially those located in a dwellinghouse) should not be decreased?

(2) Should the range of exempt goods be extended to cover the following goods located in a dwelling house:

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?

(3) If the range of articles in debtors' dwellinghouses exempt from poinding is to be extended, what other articles (if any) should be added to the list?

(Question 4.1)

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[71] See Table R, para 4.16 above.
[72] See paras 4.37 and 4.48 below for proposals strengthening debtor protection in this area.
[73] See paras 4.30 - 4.37.
[74] See paras 4.38 – 4.42.

(f) The test of "reasonably required"

4.26 The concept of "reasonably required" in section 16(2) of the 1987 Act has attracted some criticism. To be exempt from poinding an article on the list has to be reasonably required by the debtor or a member of his household. The test of "reasonably required" is applied by officers of court when poinding. The debtor may subsequently apply to the sheriff for release of an article on the ground that it is exempt under that section.[75] The question whether a particular article is "reasonably required" reportedly leads to arguments. These however seem to be resolved informally (if at all) because few applications for release are made. Doubtful items include refrigerators, washing machines, televisions and videos. The last two items are sometimes claimed as exempt on the basis that they are reasonably required for the children's education.[76] The only reported case on section 16 of which we are aware is *Irvine v Strathclyde Regional Council*[77] where release of a three-piece suite owned by a single man was refused. It is not clear whether the small number of applications is due to the way in which officers and creditors interpret the 1987 Act or whether debtors are failing to take advantage of the release provisions.[78]

4.27 Arguably, the concept of "reasonably required" should be retained because debtors' households are so variable in size and composition. A bare list of articles would either produce hardship or be too generous. The articles needed by a debtor with a wife and three children are different from those needed by an unmarried debtor living alone. Moreover, the "reasonably required" test enables officers to poind items on the list in section 16(2) that are disproportionately valuable, such as a set of antique chairs.

4.28 We seek views on the following question:

Should it continue to be a requirement in the Debtors (Scotland) Act 1987, section 16 and Schedule 5, paragraph 1 that, to be exempt from poinding, articles in a dwellinghouse must be reasonably required for use in the dwellinghouse of the person residing there or a member of his household?

(Question 4.2)

(2) Preventing unjustifiable poindings and sales

4.29 In this Section we put forward proposals to protect debtors from poinding and sale where the proceeds of sale would not exceed a specified proportion of the debt and the diligence expenses.

(a) Prohibition of warrant sale where likely proceeds of sale insufficient

4.30 Section 30 of the 1987 Act provides that the sheriff may refuse to grant a warrant of sale 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. The sheriff may refuse warrant on this ground on his own

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[75] 1987 Act, s 16(2). Release on grounds of undue harshness is also available under s 23.
[76] Fleming, *SOCRU Study of Facilitators* chapter 6, para 47.
[77] 1995 SLT (Sh Ct) 28.
[78] Fleming and Platts, *SOCRU Analysis of Diligence Statistics* chapter 4, para 20.

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. The SOCRU research indicates that few debtors object to the granting of a warrant of sale.[79] 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 grounds of substantial undervalue or the sale proceeds being 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.[80] Also a number of sheriffs said that they took a more relaxed attitude to warrant sale 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.[81] This is borne out to some extent by an analysis of 45 warrant sales in 1991-92. In nearly one third (29%) of these the sale expenses were greater than the proceeds of sale.[82] Indeed if anything the situation has become somewhat worse since the 1987 Act came into force. In 1980 it was held in the case of *SSEB v Carlisle*[83] that sheriffs were entitled to refuse warrant of sale if it seemed that the expenses of sale would exceed the proceeds. This case was generally followed and led to the statutory "not worth it" ground for refusal of warrant or recall of poinding in the 1987 Act described above. Research carried out in 1981 showed that out of 261 sales of household goods in only six cases (2%) did the expenses of sale exceed the proceeds of sale.[84] The proportion of debtors who apply for a recall of poinding is also very low, about 1%,[85] and the main ground of recall was undue harshness.[86] Even if applications were made, the sheriffs interviewed said that they often had to be dismissed as the debtor failed to appear at the hearing.[87] This is backed up by the finding that only between 28 and 51% of applications made in 1989-1993 were granted.[88]

4.31 As noted above, at present the sheriff may refuse to grant a warrant of sale if the likely expenses of sale exceed the likely proceeds of sale. This is intended to prevent sales taking place that are "not worth it", in that they leave both the debtor and the creditor worse off. It may be argued that creditors should be allowed to carry out such sales since they may derive an indirect benefit from such sales. By making an example of a few debtors, others are encouraged to pay without a sale having to be carried out. We rejected this argument in our 1985 report when we recommended the present "not worth it" test, and we continue to reject it.[89] We turn now to consider whether the present test strikes the correct balance between the interests of debtors and creditors or whether warrant of sale should be refused unless more, or substantially more, than merely the future expenses of sale are likely to be recovered by a sale.

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[79] Fleming, *SOCRU Study of Facilitators* chapter 7, para 30.
[80] Fleming, *SOCRU Study of Facilitators* chapter 6, para 30.
[81] Fleming, *SOCRU Study of Facilitators* chapter 6, para 43.
[82] Fleming, *SOCRU Study of Poindings and Warrant Sales* chapter 3, para 35.
[83] 1980 SLT (Sh Ct) 98.
[84] Fleming and Platts, *SOCRU Analysis of Diligence Statistics* Table 14.
[85] *Idem*.
[86] Fleming and Platts, *SOCRU Analysis of Diligence Statistics* chapter 4, para 19.
[87] Fleming, *SOCRU Study of Facilitators* chapter 7 para 28.
[88] Fleming and Platts, *SOCRU Analysis of Diligence Statistics* chapter 4, para 18.
[89] Para 5.142.

4.32 The *SOCRU Survey of Poindings and Warrant Sales* analysed the sums recovered by 45 sales where the debtor was an individual.[90] The articles sold were household goods and the occasional car. The results are shown in Table S below.

Table S

The impact of warrant sale on the outstanding debt: individual debtors

	No of Cases	**% of Cases**
Proportion of the total debt covered by sale …		
All of principal sum and all of all expenses	0	0
50%-99% of principal sum and all of expenses	2	4
0%-49% of principal sum and all of expenses	6	13
None of the principal sum and 50%-99% of the expenses	11	24
None of the principal sum and 0%-49% of the expenses	26	58
Total	44	99
Missing cases	1	

Source:Fleming, *SOCRU Survey of Poindings and Warrant Sales*, Table 16.

No sale resulted in the debt and all the expenses being satisfied. As can be seen from Table S, in 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 even to recover the expenses of sale.[91]

4.33 Sales where the debtor was a business enjoyed a much higher rate of recovery. As can be seen from Table T, 8% resulted in payment of the debt and expenses in full, while nearly half (46%) paid off the expenses and made some inroads into the debt.[92]

[90] Chapter 3, paras 26-30.
[91] Fleming, *SOCRU Survey of Poindings and Warrant Sales* chapter 3, para 35.
[92] Fleming, *SOCRU Survey of Poindings and Warrant Sales* chapter 4, para 24.

Table T

The impact of warrant sales on the outstanding debt: business debtors

	No of Cases	% of Cases
Proportion of the total outstanding debt that sale covers …		
All of principal sum and all of all expenses	7	8
50%-99% of principal sum and all of expenses	18	21
0%-49% of principal sum and all of expenses	22	25
None of the principal sum and 50%-99% of the expenses	16	18
None of the principal sum and 0%-49% of the expenses	24	28
Total	87	100
Missing cases	7	

Source:Fleming, *SOCRU Survey of Poindings and Warrant Sales*, Table 28.

4.34 If the present test for refusing warrant to sell were to be replaced, one option would be that the sheriff should refuse warrant unless the debt and all the expenses were likely to be recovered in full out of the proceeds of sale. We think that that would set too high a standard and would seriously prejudice creditors. Creditors should be entitled to take enforcement action against debtors to recover part of the debt due to them. Other diligences, such as arrestment, often fail to recover the full debt and expenses, yet we are not aware of any suggestion that such action should be prohibited. As Tables S and T show the effect of imposing a full recovery requirement would be that virtually no warrants for sale against individual debtors would be granted and only a very small proportion of commercial poindings would be allowed to proceed to a sale. This would have serious consequences on the effectiveness of the earlier steps in the diligence.

4.35 Another option is that warrant of sale should be refused unless the likely proceeds of sale exceeded the full diligence expenses, i.e. the expenses of steps already taken to enforce the decree up to the application for warrant of sale and the likely future expenses of the sale. Sales that would not result in some of the debt (the amount due under the decree[93]) itself being paid would therefore not go ahead. Such sales do not benefit debtors since they would have lost the use of the goods that were sold while their debt remains the same as it was at the start of the diligence (or increases if interest is running).[94] On the other hand, creditors who have spent money on charging the debtor to pay and carrying out a poinding arguably ought to be entitled to recover, as they are under the present "not worth it" test, at least some of these expenses by way of a sale of the poinded articles. The effect of using this option would be, on the basis of Tables S and T, that over 80% of domestic sales and nearly 50% of business sales would not be allowed to proceed. If warrant of sale is refused, the

[93] This amount will include the expenses of court action and interest to the date of the decree (if due and claimed) as well as the principal sum.
[94] Any unrecovered expenses cease to be chargeable against the debtor, 1987 Act, s 93(1).

poinding comes to an end and the expenses incurred by the creditor cannot thereafter be recovered from the debtor by that diligence or any other legal process.[95]

4.36

Should the sheriff refuse warrant of sale, or recall a poinding, if the likely proceeds of sale do not exceed:

(a) the likely expenses of sale (the present position),

(b) the likely expenses of sale and the expenses of all the previous steps in the diligence, or

(c) the likely expenses of sale and the expenses of all the previous steps in the diligence and some proportion of, or all of, the sum due under the decree, and if a proportion what should the proportion be?

(Question 4.3)

4.37 As noted above,[96] sheriffs were found to be reluctant to act on their own initiative by refusing warrant of sale. Partly this is because they considered that the 1987 Act gave debtors rights to object to the creditor's application and they should not intervene if debtors fail to use provisions designed for their protection. But it was also due to a lack of information enabling them to compare the likely expenses of sale with the likely proceeds of sale. We suggest that rules of court should provide that creditors must state in their application for warrant of sale the diligence expenses (incurred and likely to be incurred) and the likely proceeds of sale. The former would not be difficult to calculate as the various fees and outlays are either fixed by statutory instrument or can be fairly readily estimated. The likely proceeds of sale should be taken, in the first instance at least, to be the total appraised value of the goods as set out in the report of poinding. The *SOCRU Survey of Poinding and Warrant Sales* found that in the 45 warrant sales studied 61% of all goods were sold, 27% were adjudged to the creditor at their appraised values and the remaining 12% were missing. Of the goods sold, 74% were sold at or below their appraised value.[97] The end result is that only about one in six articles realise more than their appraised value, although it should be open to the creditor to show that the poinded goods are likely to sell for more than their appraised value. It would assist sheriffs and court staff if the form of application for warrant of sale were designed so that the total appraised value of goods to be sold could be compared readily with whatever proportion of the debt and expenses they were required to cover.[98] We think that the above suggestions, combined with the imposition of a duty on the sheriff to refuse warrant if the ground for doing so was established,[99] would prevent sales which confer no benefit on either debtors or creditors being carried out or threatened. Accordingly we ask the following questions:

(1) Should creditors be required to state in their form of application for warrant of sale the sum representing the proportion of the likely expenses of the

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[95] 1987 Act, s 93.
[96] Para 4.31.
[97] Chapter 4, para 17, Table 26.
[98] See Question 4.3 above.
[99] See para 4.48 below.

diligence and the debt that in terms of Question 4.3 above must be covered by the proceeds of sale?

(2) Should the sheriff be required to treat the total appraised value of the poinded goods as the likely proceeds of sale, unless satisfied that a higher price is likely to be obtained?

(Question 4.4)

(b) Prohibition of poinding where likely proceeds of sale insufficient

4.38 We turn now to consider whether the diligence should be halted at the poinding stage if the officer finds insufficient goods which could be sold. This would be a major innovation. It can be argued on grounds of social policy that poinding and sale should not be used as a spur to payment where the proceeds of sale will not produce at least the required proportion of the debt and expenses.[100] Allowing the diligence to proceed if there are insufficient goods trades on the ignorance of debtors. If warrant of sale must be refused on the grounds of insufficiency,[101] the creditor's application for a warrant of sale of the poinded goods or the threat to do so is a bluff, which knowledgeable debtors will be aware of. Many individuals subject to poinding were found to be unsure of the law and the steps that the creditor could take.[102] Some creditors were aware that the effectiveness of poindings as a spur to payment depended on the continued ignorance of many debtors.[103] It is true that debtors could apply for recall of a poinding of insufficient goods, but that depends on them knowing their rights and making the application, which few do. If creditors are to be prevented from using such poindings as a spur to payment, it is arguably better to do it by a fixed rule at the poinding stage.

4.39 On the other hand, prohibiting poindings where insufficient goods exist would render the diligence incompetent in many cases where it is currently used. This would have an adverse effect not only on the effectiveness of poindings as a spur to payment, but could well have a consequential effect diminishing the coercive effect of previous steps in the debt recovery process (the previous charge to pay and court action, or in summary warrant procedure the pre-enforcement billing and collection stage). These effects are very difficult to quantify.

4.40 The SOCRU research compared the appraised values of the goods poinded with the debt and expenses. Table U gives the results for poindings where the debtors were individuals.

[100] See Question 4.3 at para 4.37 above for what the proportion might be.
[101] The debtor would also be entitled to apply for the poinding to be recalled.
[102] Whyte, *SOCRU Study of Debtors* chapter 7, para 22.
[103] Whyte, *SOCRU Study of Debtors* chapter 4, para 48.

Table U: The estimated impact of the poinding on the outstanding debt: individual debtors

	All	Poinding	Application for warrant of sale	Warrant Sale
	% of cases	% of cases	% of cases	
Proportion of the outstanding debt the total poinded value covers				
All of principal sum and all of all expenses	17	16	20	16
50%-99% of principal sum and all of expenses	16	16	16	18
0%-49% of principal sum and all of expenses	39	57	42	36
None of the principal sum and 50%-99% of expenses	22	23	19	22
None of the principal sum and 0%-49% of expenses	7	8	3	9
Total percentage	101	100	100	101
Number of cases	2571	1914	612	45
Missing Cases	0	0	0	0

Source: Fleming, *SOCRU Survey of Poindings and Warrant Sales*, Table 14

It can be seen that if the test for allowing a poinding to proceed were that the appraised values were not less than the debt and full expenses then only 17% of poindings would have gone ahead. However, if only the full diligence expenses (assuming a sale of the goods) have to be covered then over two-thirds of poindings (71%) could have been carried out. The Table also shows that the value of the goods poinded did not in general affect the likelihood of the diligence proceeding to an application for a warrant of sale or even a sale.[104]

4.41 Commercial poindings – ie those where the debtor was a business - were found to have been much more successful. As can be seen from Table V, in 61% of such poindings the appraised value covered the debt and full expenses. Only 5% covered some or all of the

[104] Fleming, *SOCRU Survey of Poindings and Warrant Sales* chapter 4, para 22.

expenses. On this evidence, prohibiting poindings where there are insufficient goods is likely to have a very small impact on commercial poindings.

Table V: Estimated impact of the poinding on the outstanding debt: commercial debtors

	All	Poinding	Application for warrant of sale	Warrant Sale
	% of cases	% of cases	% of cases	
Proportion of the outstanding debt poinded value covers				
All of principal sum and all of all expenses	61	60	64	32
50%-99% of principal sum and all of expenses	18	17	18	31
0%-49% of principal sum and all of expenses	17	17	15	29
None of the principal sum and 50%-99% of expenses	3	4	1	5
None of the principal sum and 0%-49% of expenses	2	1	2	3
Total percentage	101	99	100	100
Number of cases	2111	1058	959	94
Missing cases	0	1	0	0

Source: Fleming, *SOCRU Survey of Poindings and Warrant Sales*, Table 26.

4.42 Prohibiting poindings where there are insufficient goods would not remove the identification role from the diligence.[105] The creditor would remain entitled to instruct an officer of court to visit and enter the debtor's premises in order to ascertain whether sufficient non-exempt articles are there.

4.43 In Question 4.3 at paragraph 4.36 above, we asked whether a warrant of sale should be refused if the likely proceeds (as measured by the appraised value of the poinded goods) failed to exceed: (a) the likely expenses of sale, (b) the whole diligence expenses, or (c) all or a proportion of the debt as well as the diligence expenses. If an insufficiency of goods is to

[105] See para 2.2 above.

prevent the execution of a poinding, then the test has to be the same as at the warrant of sale stage. The test cannot be stricter at the poinding stage, otherwise creditors would be able to sell in circumstances where they could not poind. A less strict test at the poinding stage would fail to prevent threats (which the creditor knows are empty) to take further steps in the diligence. Though we have not consulted on this matter, we think that it would be feasible for officers to work with whatever test is adopted. They should be able to estimate the likely future expenses of selling the goods and will know the fees chargeable for the various steps in the diligence. Already they have to put a value – the appraised value – on the goods as part of the poinding procedure. In order to monitor officers' compliance with the new rule they should have to include in the report of sale the sum (proportion of debt and expenses) which the appraised value has to exceed. The officer should not be required to lodge a report where the poinding cannot be completed due to an insufficiency of goods.

Should a poinding be incompetent if the appraised value of the poindable goods does not exceed the officer's estimate of the sum in terms of Question 4.3?

(Question 4.5)

(3) Other grounds of recall of a poinding or refusal of warrant of sale

4.44 Section 30 of the 1987 Act provides that the sheriff may also refuse to grant a warrant of sale on the ground that:

- The poinding is invalid or has ceased to have effect.
- The articles are in aggregate substantially undervalued.
- Granting warrant of sale would be unduly harsh.

The sheriff may refuse warrant on the first two grounds on his own initiative as well as on an objection by the debtor. The last ground applies only on an objection by the debtor.[106] The last two grounds also apply to an application by the debtor to the sheriff for a recall of the poinding.[107] The sheriff may act on his own initiative or on an application by the debtor to declare the poinding invalid or to have ceased to have effect.[108]

4.45 There have been few decisions reported on the grounds for refusing warrant of sale or recalling poindings set out in the previous paragraph. All have involved applications by the debtor for the poinding to be recalled. In *Norris v Dumfries and Galloway Regional Council*[109] a poinding was recalled as invalid because the schedule of poinding prepared by the officer of court was not in the prescribed form as it omitted information to the debtor about his rights under the 1987 Act. *MacIver v Strathclyde Regional Council*[110] concerned the substantial under-valuation of a car and the poinding was recalled. Undue harshness was the ground of recall in *McCallum*[111] where equipment belonging to a partnership but purchased by the applicant was poinded for a pre-partnership personal debt of the other

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[106] 1987 Act, s 30(2) as read with s 24(3).
[107] 1987 Act, s 24.
[108] 1987 Act, s 24(1) and (3).
[109] 1991 SLT (Sh Ct) 30.
[110] 1992 SLT (Sh Ct) 7.
[111] 1990 SLT (Sh Ct) 90.

partner. Cases where consent to the sale of a bankrupt's dwellinghouse has been refused suggest that the courts might interpret undue harshness as including situations where either the debtor or the debtor's spouse was severely physically or mentally ill.[112] The outcome of the reported cases seem satisfactory and we are not aware of any criticism of the grounds themselves. Nevertheless we ask the following question in order to obtain views:

Should it continue to be a ground for recall of a poinding or refusal to grant warrant of sale that:

(a) the articles are in aggregate substantially undervalued,

(b) a sale of the articles would be unduly harsh, or

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

If not, what amendments should be made?

(Question 4.6)

(4) Form of application for recall of a poinding

4.46 The form of application for recall of a poinding does not inform the debtor of the grounds for recall. It simply invites the debtor to state the reasons for the application and the form contains a reference to section 24 of the Debtors (Scotland) Act.[113] One of the debt collection firms interviewed said that debtors tended to apply on the ground that the poinding was "not fair", rather than on one of the statutory grounds.[114] The notice sent to the debtor of the creditor's application for warrant of sale, by contrast, sets out in detail the grounds on which the debtor may object to warrant being granted.[115] We ask:

Should the form of application for recall of a poinding detail the grounds for recall as set out in section 24 of the Debtors (Scotland) Act?

(Question 4.7)

(5) Replacing sheriff's power to recall a poinding or to refuse warrant of sale by a duty

4.47 The provisions relating to recall of a poinding or refusing warrant of sale generally give the sheriff a discretion. He *may* recall or refuse on any one of the statutory grounds, except where the poinding is invalid or has ceased to have effect.[116] For this ground there is a difference between the two provisions. Section 24(1) of the 1987 Act provides that the sheriff *shall* if satisfied that the poinding is invalid or has ceased to have effect make an order declaring that to be the case. Section 30(2), however, merely empowers the sheriff to refuse to grant a warrant of sale on the ground that the poinding is invalid or has ceased to have effect. We think that sheriffs should be under a statutory duty to recall a poinding or refuse to grant warrant of sale if one or more of the grounds is made out. This change from a

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[112] *Hunt's Tr v Hunt* 1995 SCLR 973; *Gourlay's Tr v Gourlay* 1995 SLT (Sh Ct) 7.
[113] Act of Sederunt (Proceedings under the Debtors (Scotland) Act 1987) 1988, Form 11.
[114] Fleming, *SOCRU Study of Facilitators* chapter 6, para 54.
[115] Act of Sederunt (Proceedings under the Debtors (Scotland) Act 1987) 1988, Form 21.
[116] 1987 Act, ss 24 and 30.

discretion to a duty should prevent warrant of sale being granted where the proceeds of sale do not exceed the required proportion of the diligence expenses and debt, even if the debtor fails to object.[117] We ask:

Should sections 24(3) and 30(2) of the Debtors (Scotland) Act 1987 be amended so that the sheriff would have a duty to recall a poinding or refuse to grant warrant of sale if satisfied that one of the grounds applies?

(Question 4.8)

(6) Should poinding of goods in a dwellinghouse require a special warrant?

4.48 At present an extract of a decree contains a warrant for charging the debtor to pay and for poinding articles belonging to him, as well as other diligences.[118] It is for consideration whether, after the expiry of a charge without payment,[119] the creditor should have to apply to the sheriff for a special warrant to poind moveable goods in a dwellinghouse (or in the residential part of mixed use premises), with the effect that such a poinding should no longer be authorised by the decree itself. There is a precedent in the Child Support Act 1991.[120] Debtors would continue to be charged to pay by virtue of an extract. If the creditor is to be required to apply for a warrant to poind, we suggest that the sheriff should have to be satisfied that the creditor is unable to use another diligence (either earnings arrestment or an ordinary arrestment) or that such diligences are unlikely to be effective in recovering the debt. Creditors should be regarded as unable to use arrestment where they do not have the required information about the debtor's employment or location of arrestable funds as well as where an earnings arrestment or ordinary arrestment is incompetent (for example where the debtor is self-employed). A test of "unlikely to be effective" would cover the situation where an employed debtor had a job or jobs with net pay at or below the minimum deduction level[121] or a debtor had a bank account with a small credit balance.

4.49 The proposal above is confined to goods in dwellinghouses. There is much less concern about commercial poindings which remain relatively effective in enforcing business debts. Poinding is regarded as a key method for the enforcement of business debts[122] although creditors expressed concern at the number of steps in the diligence and "the bureaucracy" involved. We suggest a definition by reference to the location of the poinding. A restriction either by reference to the type of debt (eg consumer debts) or the type of debtor

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[117] See Question 4.3 above. Applications for recall of a poinding have to be made by the debtor and the sheriff has no power to recall on his own initiative.

[118] 1987 Act, s 87 and Sch 5; Sheriff Court (Scotland) Extracts Acts 1892, s 7.

[119] A charge is a precursor to an earnings arrestment as well as a poinding; 1987 Act s 48(1)(c). The charge often allows the officer of court serving it an opportunity to contact the debtor, to assess the potential for recovery, and to report back to the instructing creditor.

[120] If an absent parent is in arrears with payment of child support maintenance the Secretary of State may make a deduction from earnings order: section 31. Deduction from earnings orders are very similar in their effect to earnings arrestments. Where a deduction from earnings order is not appropriate (for example the debtor is not employed) or has proved ineffective, the Secretary of State may apply to the sheriff for a liability order: section 33. The liability order authorises the charging of the debtor to pay and poinding his goods. It also authorises an ordinary arrestment and grounds a bill for letters of inhibition and an action of adjudication: section 38.

[121] £63 per week, Debtors (Scotland) Act 1987, Sch 2 as substituted by the Diligence Against Earnings (Variation) (Scotland) Regulations 1995, SI 1995/2878.

[122] Fleming, *SOCRU Study of Facilitators* chapter 6 (Debt Collectors), para 40.

(an individual as distinct from a firm or corporate body) would be impractical.[123] The main focus of the current public concern relates to poindings in dwellinghouses. This suggests that the appropriate criterion is the place where the poinding is to be executed. Poinding articles in shops and offices or vehicles in the street or in driveways or garages (whether or not attached to dwellinghouses) would continue to be authorised by the warrant in an extract decree.

4.50 The advantages of requiring a special warrant would be to target poinding and sale at those cases where other diligences cannot be effectively used. There are some cases, though few,[124] in which creditors or their agents prefer to use poinding rather than arrestments or earnings arrestments against individuals. The need for a special warrant should reduce the number of domestic poindings and hence the personal distress amongst debtors and their families. Service of the creditor's application on the debtor might prompt the latter to make arrangements for payment or volunteer information on arrestable funds or earnings.

4.51 However the requirement of a special warrant would have several disadvantages:

* It would add another layer of expenses to a form of diligence which already involves high transaction costs, benefiting neither debtor nor creditor.

*In most cases the extra expenses would be futile because already most creditors use poindings in dwellinghouses only where there are no other enforcement options or where the debtor is thought to have a substantial amount of non-exempt goods.[125]

*Though conceived of as a measure of debtor protection, if the normal rule that the necessary diligence expenses of a creditor are chargeable against the debtor were followed, the debtor would paradoxically have to pay more in expenses.

*Even if the debtor had an opportunity to object, experience with other judicial safeguards suggests that he would usually not take it. The sheriff could not refuse warrant on his own initiative.

*In general, safeguards for debtors should where possible be based on statutory rules which cost nothing and are easy to apply, rather than applications to the court.

4.52 We ask:

Should a special warrant be required for the poinding of articles of moveable property located within a dwellinghouse?

(Question 4.9)

(7) Power of entry for execution of poinding in dwellinghouses

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[123] The decree would not necessarily reveal whether the debt was a business debt or a consumer debt or whether an individual was sued as an ordinary consumer or user of services or as trader.
[124] Fleming, *SOCRU Study of Facilitators* chapter 5, para 23.
[125] Eg Fleming, *SOCRU Study of Facilitators* chapter 4, para 32; chapter 5, para 20.

4.53 Court decrees for payment and other warrants for poinding and sale contain warrants to open shut and lockfast places ("warrants to open" for short)[126] which give officers of court the power to enter a debtor's premises, including his dwellinghouse, by force if necessary. Our 1985 Report took the view that creditors should continue to be entitled to ascertain the extent of the debtor's poindable goods (if any) and that this necessarily implied that officers of court executing a poinding should continue to have a power of entry to the debtor's premises, by force if necessary.[127] But we recommended that officers of court should not be entitled to enter empty houses or houses where only children under 16 were present, unless at least four days' prior notice of intended entry had been given to the debtor or unless the sheriff's authorisation had been obtained. This was implemented by the 1987 Act.[128]

4.54 **Comparative law.** As the Appendix shows, the laws of European states generally confer powers of forcible entry on enforcement officers or (as in France and in the Netherlands) provide for the officers to be assisted by the authorities or the police in order to gain entry to the debtor's premises by force. Often the officer may obtain the assistance of a locksmith as well as the police if he feels it necessary. In Ireland and Malta, for example, the executing officer has a power of forcible entry, although in Malta the officer requires one witness if he is to use the power. In Sweden the officer may open locked doors or places in the process of execution. The officer may not gain entry to a home in the occupier's absence, unless notice of the time of execution has been sent by post or given in some other way, and it can therefore be assumed that he is deliberately absent or some other special circumstances apply. In order to execute seizure, officers may use force to the extent that it is necessary in all the circumstances. However, force against a person may be used only if the officer meets resistance and to an extent which can be considered justifiable in view of the purpose of the execution.[129]

4.55 In 1987 the Law Reform Commission of Australia[130] recommended that the powers of the bailiff with respect to entry ought to be "restricted in some ways and extended in others".[131] More specifically:

> "A bailiff should not be entitled to force entry into premises, to enter premises merely because a door or window is open, to break down inner doors or break open boxes or cupboards… [I]f consent [to entry] is withheld or if no contact can be made with the debtor, the bailiff should be entitled to seek an order of the court allowing forced entry and search".[132]

In the Australian Capital Territory, the bailiff must make an application to the court for authorisation to enter the debtor's premises using such force as is necessary.[133] Once the application is granted he may request the assistance of police officers if he or she feels it necessary.[134] On the other hand in Victoria the sheriff may "take with him or her such assistants as he thinks desirable" if it is felt that resistance will be met.[135] Furthermore, in South Australia a sheriff may use "such force as is necessary for the purpose" of entering

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[126] 1987 Act, s 87.
[127] Paras 5.79 – 5.85.
[128] 1987 Act, s 18.
[129] *Utsökningsbalken (*Enforcement Code), chapter 2, § 17 translated for us by Miss Marie-Sofie Sveidqvist, LL.B.
[130] Australian Law Reform Commission, Report on *Debt Recovery and Insolvency*, ALRC Report No 36 (1987).
[131] Ibid. para 211.
[132] Idem.; footnotes removed.
[133] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 349.
[134] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 349(2).
[135] Supreme Court Act 1986 (Vic), s 121.

land in pursuance of a warrant of seizure and sale.[136] South African law also allows for forcible entry, if required, by a bailiff.

4.56 The present requirement in section 18 of the 1987 Act to give notice of return to the debtor if on the first visit the officer finds the house empty avoids many forcible entries. We tend to think that if there is no-one in the house on the date given for the officer's return visit or if entry is refused at any time, then the officer ought to be entitled to use such force as is reasonable to obtain entry. To require officers of court to apply to the sheriff to obtain a warrant for forcible entry would not necessarily do much to stop the invasion of privacy, but would add to the complexity and expense of the procedure. We invite views on this matter and ask:

(1) Is the present law on powers of entry to debtors' premises satisfactory?

(2) If not, what amendments should be made?

(Question 4.10)

D. THE PROBLEM OF COST-EFFECTIVENESS AND DEBTOR PROTECTION

(1) Preliminary

4.57 Compared with an arrestment of money in a bank account or an earnings arrestment, poinding is an expensive diligence. The SOCRU research found that in 1991-92 the average expenses of the diligence against individual debtors were £72 after poinding had been carried out and £246 after a warrant sale.[137] The corresponding figures for diligence against commercial debtors were £141 and £344.[138] The diligence expenses are often well in excess of the initial debt where the debt is small. A case study in the *SOCRU Study of Debtors*[139] is a good illustration. A debt of £15.98 had been increased to £255.80 by the time the warrant sale had been completed as a result of adding the expenses of court action and the diligence expenses. Some of the solicitors and officers of court interviewed also thought that poinding and warrant sale was expensive[140]. In the following paragraphs we consider three possible ways of reducing the expenses, namely:

*simplifying the procedure;

*lowering the level of fees charged by officers of court; or

*a public subsidy for executing diligence.

(2) Simplifying the procedure?

4.58 The diligence of poinding and warrant sale involves many steps. The basic ones where the debt sought to be enforced is due under a decree are:

(a) the charge to pay served by an officer of court on the debtor;

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[136] Enforcement of Judgments Act 1991 (SA), s 7(3)(a).
[137] Fleming, *SOCRU Survey of Poindings and Warrant Sales* chapter 3, para 34.
[138] *Ibid*, chapter 4, para 29.
[139] Whyte, *SOCRU Study of Debtors* chapter 4, para 60.
[140] Fleming, *SOCRU Study of Facilitators* chapter 4, para 32 (solicitors), chapter 5, para 37 (officers of court).

(b) the poinding of the debtor's goods carried out by an officer of court and a witness;

(c) the report of the poinding lodged by the officer with the sheriff court;

(d) an application to the sheriff for warrant to sell the poinded goods;

(e) the officer's intimation to the debtor of the granting of the warrant of sale and the arrangements made for sale or uplifting the goods for sale;

(f) carrying out the sale;

(g) the report of the sale lodged by the officer with the sheriff court and its audit there.

Some debt collectors interviewed in the SOCRU research said that there were too many steps in the diligence and that it was "over-bureaucratic".[141] Some officers expressed the same view, but others considered that the various steps provided an opportunity for officers to make contact with debtors and encourage settlement of the debt.[142] One way of reducing the expenses and complexity of the diligence would be to do away with some of the above steps.

4.59 There seems little if any scope for reducing the steps in the diligence. Some of them are essential; the poinding (b) and the sale (f). The others serve a useful function in alerting debtors to the various steps or protecting them. The charge to pay warns the debtor that non-payment may lead to diligence. In the absence of any notification by the court that decree has been granted the charge may be the first notification debtors receive. Service of the charge gives officers an opportunity to contact debtors directly in order to explain the consequences of non-payment and to encourage them to contact their creditors and to find out if the debtor is employed and what the prospects for poinding are. Even in summary warrant diligence where a charge is not required before a poinding or an earnings arrestment can be executed, debtors are often written to, or visited by, officers of court or others. Thirdly, charges are an important element in the filter effect of the diligence. As indicated in Part 2 above, in 1978 it was estimated that about 46,000 charges were served but only some 20,000 poindings executed.[143] In our 1985 Report[144] we thought it likely that the majority of debtors charged to pay had made payment arrangements. There are no recent statistics on the number of charges as compared with the number of poindings, but commercial creditors consider the charge to be an effective step in debt recovery as it brings home to debtors the seriousness of the situation.[145]

4.60 Scotland seems to be unique in having the goods formally valued at the poinding stage. Dispensing with the valuation would not save much money since valuation is done by officers unless the items are unusual and the officer considers that they should be valued by an expert.[146] Moreover, many of the debtor protection provisions rely on a valuation

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[141] *Ibid*, chapter 6, para 42.
[142] *Ibid*, chapter 5, paras 37-38.
[143] B Doig, *The Nature and Scale of Diligence* SOCRU (1980), p 8.
[144] Para 2.29.
[145] Platts, *SOCRU Study of Commercial Creditors* chapter 6, para 6.
[146] 1987 Act, s 20(4).

having been carried out at the poinding stage. For example, debtors may have an item released from the poinding by paying its value to the creditor[147] and the sheriff may refuse to grant warrant of sale if the goods are in aggregate substantially undervalued.[148]

4.61 Requiring a report of the poinding and an application for warrant to sell the poinded goods enables the court to exercise control over the diligence. The application for warrant to sell gives debtors another opportunity to redeem some or all of their goods at their appraised values and to argue that warrant should be refused on various grounds. Before the 1987 Act an application for warrant of sale was not intimated to debtors who thus had no opportunity to oppose it or redeem their goods. We do not think that either of these steps could be omitted without losing the protections afforded to debtors. Indeed elsewhere in this Part we suggest that sheriffs should have an increased role in refusing certain applications for warrant of sale.[149]

4.62 The officer intimating to the debtor the granting of the warrant of sale and arrangements made for the sale of goods on the premises or for uplifting the goods for sale elsewhere should not be dispensed with. Unless debtors are aware of the arrangements the premises may be unoccupied and the sale or uplift will have to be postponed. Postponement may result in a great deal of money being wasted.

4.63 The final step in the diligence is the officer lodging a report of the sale with the sheriff court. This provides an opportunity for the court to check that the diligence has been carried out properly and that the correct expenses have been charged. It is a useful debtor protection element which adds little to the overall cost of the diligence. The officer's fee is only £11.95 and the court makes no charge for auditing and approving the report.[150]

4.64 It seems difficult to make the diligence much simpler without losing measures which either serve to protect debtors or increase the efficiency of the diligence. However, in order to elicit views we ask:

> **Should any steps in the diligence of poinding and warrant sale be no longer required and if so which?**
>
> **(Question 4.11)**

(3) Reducing the level of fees?

4.65 Another way in which the expenses of the diligence of poinding and warrant sales might be reduced is by lowering the level of fees. These are charged to the creditor but the debtor is ultimately liable for them. No fees are payable to the sheriff court in connection with proceedings under the 1987 Act.[151] The diligence expenses are therefore the fees of the officers of court (and solicitors in instructing the officers) and any outlays they incur. These fees are regulated by act of sederunt made by the Court of Session. Whether the level of fees has been set correctly is a matter which is outwith our expertise. A large majority of the debtors interviewed in the *SOCRU Study of Debtors* considered that the officers' fees were too

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[147] 1987 Act, s 21(4).
[148] 1987 Act, s 30. The debtor may also apply to have the poinding recalled on the same ground, s 24(3)(b).
[149] See paras 4.37, 4.38 and 4.48.
[150] Sheriff Court Fees Order 1997, (SI 1997/687), art 9(2).
[151] *Ibid*.

high.[152] However, apart from that, we are not aware of evidence that the fees are too high viewed as remuneration for work done.

Should any of the fees charged by officers of court in connection with poindings and warrant sales be altered and if so in what way?

(Question 4.12)

(4) A public subsidy?

4.66 The only other way that occurs to us of reducing the expenses of poinding and warrant sales is to introduce an element of public subsidy for these diligence expenses. There is already an element of public subsidy for helping creditors to execute diligence under the Legal Aid and Legal Advice and Assistance schemes. But that does not reduce the expenses chargeable against debtors. A public subsidy system for diligence in the remote areas was introduced by the Remote Areas Diligence Payment Scheme of 1959, but we understand that that was a total failure.

4.67 The case for a public subsidy rests on the idea that if for reasons of public social policy, measures of debtor protection are built in to the procedure in poinding and sale, and the diligence thereby is made more expensive for creditors then the public should pay. That is particularly true given that the expenses may be chargeable against the very debtors whom the measures are designed to protect. If the public want it, let the public pay.

4.68 On the other hand there are factors which raise doubt whether a public subsidy would be justified. First, court fees are now generally set so that they pay for the work involved; arguably diligence fees should be in the same position. Second, it would be anomalous to subsidise poinding and warrant sales but not any of the other diligences. Finally, subsidising the most unpopular form of diligence does not seem a credible or realistic policy. Such a subsidy might well have the effect of increasing its use. It might cease to be a diligence of last resort.

Should part or all of the expenses involved in a poinding and sale against an individual debtor be paid for out of public funds?

(Question 4.13)

[152] Whyte, *SOCRU Study of Debtors* chapter 4, paras 54-55.

PART 5: POINDING AND SALE UNDER SUMMARY WARRANTS

(1) Preliminary

5.1 Local authorities,[1] the Inland Revenue[2] and HM Customs and Excise[3] 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. Poinding and sale is one of the diligences authorised by a summary warrant. The pre-enforcement, collection stages of the recovery of central and local taxes by the different public authorities concerned are regulated by the specific enactments governing the collection of each of those taxes. These fall outside our terms of reference. It has to be borne in mind however that the inter-dependent nature and filter effect of the various stages of the recovery of tax arrears means that changes to the summary warrant poinding and sale procedure could impact on the much larger number of tax default cases which never go beyond the pre-enforcement, collection stage. In this respect summary warrant diligence resembles ordinary diligence under court decrees.

5.2 Local authorities however experience special difficulties in enforcing council tax and outstanding community charge by diligence and some of these are referred to in Parts 1 and 2 above.[4] The collection and enforcement by local authorities of council tax[5] will be reviewed by the forthcoming *IRRV Report*[6] and Joint Scottish Executive/COSLA Working Group report.

5.3 In this Part we examine some of the issues peculiar to summary warrant poinding and sale. While many more poindings are executed under summary warrants than under court decrees, far fewer sales are carried out by local authorities under summary warrants than by ordinary creditors under decrees.[7] The greater use of warrant sales by ordinary creditors under decrees compared to local authorities under summary warrants is all the more remarkable in that some important statutory safeguards for debtors in ordinary diligence - eg time to pay directions and orders and applications to the sheriff for warrant of sale – do not apply in summary warrant diligence.[8] The factors suggest that some at least of the extra procedures required for debtor protection in ordinary poinding procedure are not in practice required in summary warrant poindings. Indeed as noted in Part 2 above,[9] the *IRRV Report* and other evidence suggests that the difficulty is not that council tax defaulters require protection from summary warrant poinding and sale but that local authorities are too reluctant to use, or threaten the use, of that diligence.[10]

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[1] 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).
[2] Taxes Management Act 1970, s 63.
[3] Finance Act 1997, s 52.
[4] Paras 1.9-1.12; above; paras 2.14 – 2.19; paras 2.34 – 2.43 (effective enforcement); paras 2.50 – 2.53 (debtor protection). Local authorities holding summary warrants can use a special diligence - orders for deduction at source of income support – not available to ordinary creditors doing diligence under court decrees. See para 3. 63.
[5] See Figure 2 in Part 2 and para 2.15.
[6] *IRRV Report*, Chapter 3.
[7] Table D at para 2.17 above.
[8] See paras 5.15 *sqq* below.
[9] Eg paras 2.36 and 2.50.
[10] See paras 2.34 – 2.43 (especially para 2.42); and para 2.50 above

(2) Should poinding and sale procedure under court decrees apply to poinding and sale under summary warrants?

5.4 **The main differences from ordinary procedure.** The provisions regulating poinding and sale under summary warrants follow closely the provisions on ordinary poinding and sale procedure. This can be seen by comparing the flow charts at Figures 1 and 2 in Part 2 above. A comparison of the detailed provisions is shown in Table W. An important point of resemblance is that the exemptions from the diligence are the same. There are however some important differences, notably:

*the execution of a poinding is not preceded by a charge for payment;[11]

*no report of poinding is made to the sheriff;

*there is no need for an application to the sheriff for warrant of sale because such a warrant is contained in the summary warrant itself; and

*no report of sale is made to the sheriff after the sale is executed.

In this Section we consider whether these differences should be removed.

[11] 1987 Act, s 90(2).

Table W

Poinding and warrant sale: comparison of provisions in ordinary procedure and summary warrant procedure

Subject matter of provision	Ordinary procedure	Summary warrant procedure	Comment
The charge	Charge required	None	
Exemptions	Section 16	Sch 5, para 1	The same
Restriction on time of poinding	Section 17	Sch 5, para 2	The same
Power of entry and notice of intended entry	Section 18	Sch5, paras 3 and 24	The same
Value of articles poindable etc	Section 19	Sch 5, para 4	The same
Poinding procedure	Sections 20 & 21	Sch 5, paras 5 & 6	Very similar; no conjoining of summary warrant poindings
Debtor's right to redeem at value	Section 21(4)	Sch 5, para 6(4)	The same
Report of execution of poinding	Section 22	None	
Release of article for undue harshness	Section 23	Sch 5, para 7	The same
Invalidity, cessation, recall	Section 24	Sch 5, para 8	The same
No second poinding on same premises	Section 25	Sch 5, para 9	The same
Sist of poinding of mobile home	Section 26	Sch 5, para 10	The same
Duration of poinding	Section 27	Sch 5, para 11	The same
Removal, destruction etc of poinded goods	Sections 28 and 29	Sch 5, paras 12 and 13	The same
Application for warrant of sale	Section 30	None	
Arrangements for sale	Sections 31 and 32	Sch 5, para 14	Similar provision on removal to auction room
Release or redemption of poinded articles	Section 33	Sch 5, para 15	The same
Intimation and publication of sale	Section 34	Sch 5, para 16	The same
Alteration of arrangements for sale	Section 35	Sch 5, para 17(1)-(3)	Similar
Payment agreements	Section 36	Sch 5, para 17 (4),(5)	Similar
The sale	Section 37	Sch 5, para 18	Similar
Disposal of proceeds of sale	Section 38	Sch 5, para 19	The same
Report of sale to sheriff	Section 39	None	
Report of sale to creditor	None	Sch 5, para 20	
Release of articles of third party	Section 40	Sch 5, para 21	Similar
Articles in common ownership	Section 41	Sch 5, para 22	Similar
Expenses chargeable against debtor	Section 44 and Sch 1	Sch 5, para 25	Similar

(a) Charge for payment

5.5 Under ordinary procedure the service of a charge for payment has been a required prelude to poinding since at least 1669.[12] Our 1985 report concluded that charges "should continue to be a necessary preliminary to the execution of a poinding to enforce [a] debt".[13] This conclusion was reached in the light of unanimous approval from those who commented on the proposal contained in the earlier consultative memorandum.[14]

5.6 One of the main reasons for the retention of the charge in diligence under decrees was that it warns the debtor of the possibility that failure to pay may lead to diligence.[15] In a significant number of ordinary (ie non-summary warrant) cases, a settlement of the debt is made after service of the charge.[16] It also allows the officer to report to the creditor on the prospects of recovery and prevents unproductive poindings. These factors make the charge an important measure of debtor protection in ordinary procedure. Summary warrant poindings however have never required a charge for payment, and our 1985 report disclosed that there was no pressure from consultees for their introduction. Part of the reason for this was the fact that the public authority creditors – who are all local authorities or central government departments – and the sheriff officers acting for them have developed administrative practices to elicit payment from tax defaulters[17] after the grant of a summary warrant and prior to poinding. These may be cheaper than a charge for payment, which has to be served by an officer of the court whose expenses are added to the overall costs of the diligence.[18] Having regard to the reluctance of local authorities to allow enforcement by poinding and sale,[19] we doubt whether a charge is necessary. Sheriff officers for example are frequently instructed by local authorities to accept extended instalment arrangements for paying off council tax arrears.[20] The administrative practices of local authorities enforcing arrears of council tax[21] will be examined in detail in the forthcoming *IRRV Report* and are currently being considered by the Joint Scottish Executive/COSLA Working Group. It would not be desirable for us to consult on introducing charges prior to summary warrant poindings when the whole context of such a charge – the in-year collection arrangements of local authorities after (as well as before) summary warrant- is subject to detailed review by the Working Group.

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[12] See the Poinding Act 1669, c. 5.
[13] Recommendation 5.1, para 5.9.
[14] Consultative Memorandum No. 48.
[15] Although a SOCRU survey shows that very few debtors fully appreciate the importance of the charge, and that only half of those interviewed could even remember the charge being served: See Whyte, *SOCRU Study of Debtors,* chapter 4, para 4.
[16] A survey of 132 creditors shows that 24% of those surveyed who had served a charge for payment received either full (17%) or part (7%) payment at that stage. See Headrick and Platts, *SOCRU, Study of Individual Creditors*, chapter 3, paras 15 and 16 and Table 12.
[17] Eg informal warning letters; reminders; telephone calls; or home visits.
[18] There are, or could be, disadvantages in informal arrangements eg for warning letters. Firstly, there is no *obligation* upon a creditor to follow them. There may therefore be cases where no warning letter is sent. Secondly, if the attitudes of debtors as reported in the SOCRU research is correct and debtors do not realise the significance of a charge for payment (Whyte, *SOCRU Study of Debtors,* chapter 4, para 4), they may be even less likely to appreciate the significance of an informal letter.
[19] Eg *IRRV Report*, chapter 4, para 37 cited at para 2.42 above.
[20] *IRRV Report*, chapter 4, para 48.
[21] Covering such matters as communications between local authorities and sheriff officers; codes of practice and service level agreements; the quality of information transferred; the monitoring by local authorities of sheriff officers' case-loads; special payment arrangements etc: see *IRRV Report*, chapter 4, paras 39 *sqq*.

(b) Report of poinding

5.7 A report in a prescribed form of the execution of poinding must be submitted, by the sheriff officer, to the sheriff in all ordinary poindings.[22] This must be done within 14 days of the execution of the poinding.[23] If the sheriff refuses to receive the report,[24] the poinding ceases to have effect.[25]

5.8 The report of poinding enables the sheriff to supervise the diligence, and thereby to protect both creditor and debtor. It also provides a formal record of the goods which have been poinded and may detail the actions of the officer for the purposes of further procedure such as applying for a warrant of sale. Nevertheless, a report of poinding is not required for summary procedure. There are a number of reasons for this. Firstly, sheriffs have never supervised summary warrants in the same way as ordinary proceedings.[26] The law trusts public authorities not to be over-zealous and to conduct poindings responsibly so that judicial supervision is thought to be unnecessary. Secondly, as recognised in our 1985 report, the summary warrant procedure is meant to be quick (and relatively inexpensive). It was recommended in 1985 – and consultees agreed – that summary warrant poinding procedure should retain the advantage of speed. A requirement to lodge a report of poinding could slow the process unnecessarily. In a summary procedure, extra steps are best avoided unless strictly necessary. We adhere to these views.

(c) Warrant of sale

5.9 In an ordinary poinding and sale, a warrant of sale must be applied for after the initial poinding.[27] The debtor may object to the application within 14 days.[28] Moreover, the debtor must be informed of certain of his rights, notably his statutory right to redeem the poinded articles.[29] In addition to this, if the sale is to be held in a dwellinghouse, any application for a warrant of sale must also produce the consent required of the debtor and (if this is not the debtor) the occupier.[30]

5.10 By contrast under summary warrant procedure there is no requirement to apply for a warrant of sale.[31] As there is no requirement to apply for a warrant of sale, there is no need to present the permissions for sales in a dwellinghouse to the sheriff, although these permissions are required by the 1987 Act in identical terms for summary poindings as for ordinary poindings.[32]

5.11 As with ordinary poindings, the debtor can apply to the sheriff to have the poinding recalled. This can be done at any point before the sale of the poinded articles.[33] The grounds

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[22] The report must be in accordance with section 22 of the 1987 Act and Rule 15 of the Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988 (SI 1988/2013) as amended ("the Act of Sederunt").
[23] 1987 Act, s 22.
[24] Ie on grounds that it is not in the form prescribed by rule 15 of the Act of Sederunt.
[25] 1987 Act, s 22(3).
[26] See the Local Government (Scotland) Act 1947, s 247(2).
[27] 1987 Act, s 30.
[28] Act of Sederunt, rule 26.
[29] 1987 Act, s 33(2).
[30] 1987 Act, s 32; Act of Sederunt, rule 26(3)(a).
[31] A warrant of sale is incorporated into the summary warrant: see Act of Sederunt, rule 68(1) and Forms 61 and 62, as amended by SI 1992/2964.
[32] Sch 5, para 14(2).
[33] Sch 5, para 8.

of recall are the same as for ordinary poindings.[34] So the debtor has in law the same protection in a poinding and sale under summary warrant as he has in a poinding and sale under an ordinary decree. The absence of an application for warrant of sale by the creditor means that the debtor cannot obtain protection by objecting to the grant of warrant on the above grounds, but this is merely a procedural difference. It is true that we have advanced proposals in Part 4 to strengthen applications for warrant of sale as a measure of debtor protection.[35] There are however far fewer sales in poindings under summary warrants enforcing council tax than in poindings under court decrees.[36] This suggests that the additional protection proposed in Part 4 is unnecessary.

(d) Report of sale

5.12 Under an ordinary poinding a report of sale is required to be made to the sheriff within 14 days of the sale taking place.[37] The report must detail the goods sold and the price each item fetched, which articles (if any) remain unsold, the expenses chargeable against the debtor, any surplus paid to the debtor and any balance due by or to the debtor. On receiving the report of sale the sheriff passes it to the auditor of the court who checks it and notes any errors or irregularities which ought to be brought to the court's attention. The sheriff then considers both the report of sale and the report of the auditor and makes an order declaring the balance as certified by the auditor. If the auditor has made changes or has exposed a significant irregularity the sheriff may declare a modified balance as certified by the auditor or may declare the poinding and sale to be void, provided he allows all interested persons an opportunity to be heard.

5.13 Under a summary warrant a report of sale in the same form is sent to the creditor and the debtor, however it is not passed to the sheriff as under the ordinary procedure. Again this appears linked to the notion of the sheriff having less of a supervisory role in summary poindings. The report may be remitted by the creditor or debtor to the auditor of court so that it may be taxed, but schedule 5 of the 1987 Act does not contain a power for the auditor to review the report in the same way as under an ordinary poinding.[38] Furthermore the auditor does not make a report to the sheriff as he would in an ordinary poinding.

5.14 In our 1985 report we recommended that summary warrants should continue to be enforceable by a special statutory procedure rather than by ordinary poindings. We observed that people have a different attitude towards paying local and central government imposts and refuse or delay payment when they would regard it as wrong to keep ordinary creditors out of their money. Moreover, the fact that the creditors are public bodies who retain direct control of diligence justifies a lesser degree of control by the sheriff.[39] We are not aware of any criticism of the fact that summary warrant procedure is different but ask:

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[34] Namely that the sheriff is satisfied that it would be unduly harsh for the poinded articles to be sold; or that the aggregate of the appraised values was substantially below the aggregate of the likely open market prices; or that the likely aggregate proceeds of sale would not exceed the expenses likely to be incurred in future steps in the diligence, assuming that such steps are unopposed. See paras 4.3, head (6); 4.43,4.44 above; 1987 Act ,s 24(1) and (3); Sch 5, para 8(3).

[35] See eg Questions 4.3 (para 4.36); 4.4 (para 4.37); and 4.8 (para 4.47).

[36] See Part 2, Table D and para 2.18 above.

[37] The form of the report is prescribed in rule 31 and form 26 of the Act of Sederunt.

[38] Sch. 5, para. 20(3).

[39] Para 7.19 and recommendation 7.4 at para 7.20.

Do you agree that the poinding and warrant sale procedure used to enforce court decrees should not apply to summary warrant poinding and sale?

(Question 5.1)

(3) Time to pay orders

5.15 A time to pay order is not competent where the debt is arrears of one of the central or local government taxes specified in the 1987 Act [40] or due under a summary warrant.[41] In our 1985 report, we recommended that time to pay orders should be competent in these cases. Although we recognised that there was a more substantial non-payment culture for rates and taxes than for ordinary debts and that time to pay orders might be regarded as incompatible with the summary nature of summary warrant diligence, we thought that the absence of any prior court action or opportunity to obtain a time to pay direction justified allowing time to pay orders. Our view was that if the tax collector opposed the debtor's application, the court would grant it only if the debtor was genuinely unable to pay.[42] If time to pay orders were introduced in summary warrant cases, we envisage that an application for the order would be competent between the granting of the summary warrant[43] and the date of intimation to the debtor of the sale or removal of goods for sale.[44] The latter is also the date after which the debtor may no longer apply to the sheriff for a summary warrant poinding to be recalled on various grounds.[45].

5.16 However, the government of the day decided not to implement our recommendation. The arguments were that

> *central and local government collectors could be relied on to give time to pay to those in genuine difficulties,
>
> *to allow time to pay orders in Scotland would introduce a substantial cross-border difference in an area where traditionally all parts of the United Kingdom are treated in the same way; and
>
> *taxes and similar charges were often a continuing liability so that to allow an extended period to pay would merely create problems for the debtor when the next assessment became payable.[46]

5.17 Experience suggests that these arguments have much force. In council tax cases, the general tenor of the *IRRV Report* is that local authorities should take more prompt action to recover arrears both at the collection and enforcement stages. Introducing time to pay orders would run counter to this policy. Furthermore, the evidence suggests that local authorities do indeed give council tax defaulters time to pay by instalments and are not

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[40] 1987 Act, s 5(4)(e), (f).
[41] 1987 Act, s 5(4)(c).
[42] Para 3.55 and recommendation 3.13 at para 3.58.
[43] In practice the debtor would become aware of the summary warrant only when informal notification is received or officers arrive to poind.
[44] In ordinary procedure, the debtor may apply for a time to pay order at any time after the service of the charge up to the granting of the warrant of sale. Summary warrant procedure contains neither a charge nor a warrant of sale.
[45] Sch 5, para 8(3).
[46] First Scottish Standing Committee, 17 March 1987, columns 20 and 21.

over-zealous in pursuing diligence. If anything the difficulty is to persuade local authorities to use, or to threaten to use, poinding and sale. This suggests that, as the government predicted in 1987 the introduction of formal time to pay orders is unnecessary.

Should a debtor be entitled to apply for a time to pay order where the debt is arrears of central or local government taxes due under a decree or summary warrant?

(Question 5.2)

(4) Exemptions from poinding

5.18 In some countries in seizures to enforce payment of tax some of the normal exemptions do not apply or apply to a lesser extent. For example, in Norway the normal rules for exemption of moveables and personal belongings are set aside to the extent considered reasonable where enforcement takes place for a claim for taxes and public charges.[47] We understand that little use is made of this privilege as the normal exemptions secure a minimum living standard for the debtor.[48] In England and Wales the goods protected from distress for council tax are the same as those protected from execution for ordinary debts.[49]

5.19 In Scotland the exemptions are also the same in ordinary and summary warrant poindings.[50] We do not consider that there should be any change in the Scottish summary warrant exemptions. The principle underlying the exemptions, that debtors should be left with items that are reasonably required for a basic standard of living for themselves and their family, applies whatever the nature of the debt sought to be enforced or the process by which it is enforced.

Should the articles exempt from poinding in pursuance of a summary warrant be the same as those exempt from poinding in execution of a decree?

(Question 5.3)

(5) Debtor protection provisions

5.20 In ordinary poinding procedure, the debtor can apply to the sheriff for a poinding to be recalled, and can also object to the granting of a warrant of sale, on the grounds that a sale would be unduly harsh, or that the goods are in aggregate substantially undervalued or that the likely proceeds of sale do not exceed the likely future expenses of sale.[51] The sheriff may refuse warrant of sale on his own initiative on the second and third grounds when considering the creditor's application for warrant of sale.[52] As there is no warrant of sale in

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[47] Creditors Recovery Act 1984, ss 2-8.
[48] Personal communication from Mr Henning Brath of the Norwegian Ministry of Justice.
[49] See para 4.9 above.
[50] 1987 Act, Sch 5, para 1 which sets out the exemptions from poindings and sales in pursuance of summary warrants is in identical terms to section 16 of the Act containing the exemptions from poinding to enforce decrees. As to the latter see para 4.7 above.
[51] 1987 Act, ss 24 and 30. See paras 4.30 - 4.36 above.
[52] 1987 Act, s 30.

summary warrant procedure, the debtor can only apply for recall[53] and the sheriff has no opportunity to refuse warrant on his own initiative.

5.21 In Part 4 we put forward proposals to improve these provisions for the better protection of debtors. Only a few debtors apply for recall or object to the grant of warrant of sale.[54] We therefore suggested that the sheriff should be furnished with information about the likely proceeds of sale and the likely expenses of the diligence and be under a duty to refuse warrant if the proceeds did not exceed the required proportion of the debt and expenses.[55] We consider that this should be extended to summary warrant procedure. Because the sheriff is not involved in granting warrant of sale in summary warrant procedure, the duty would have to be placed instead on the creditor - the collecting authority or officer of court acting on its behalf. We also suggested that a poinding should not be competent if the appraised value of the non-exempt goods found in the premises did not exceed the require proportion of the debt and expenses.[56] Accordingly we ask:

> **Should an officer of court be permitted to poind or sell goods in pursuance of a summary warrant if their appraised value does not exceed the sum representing the proportion of the likely expenses of the diligence and the debt that, in terms of Questions 4.3 and 4.5 above, must be covered by the appraised value ?**
>
> **(Question 5.4)**

[53] Sch 5, para 8(3).
[54] See para 4.31 above.
[55] See paras 4. 38 and 4.48.
[56] See para 4.44.

PART 6: DIVERSION OF ENFORCEMENT FROM POINDING AND SALE: MEANS ENQUIRIES AND INFORMATION GATHERING

The problem of access to information about debtor's assets and income

6.1 The SOCRU research on the use of diligence other than summary warrants found that, except where obvious poindable assets can be targeted and except when enforcing business debts, creditors only opt for poinding and sale where no other type of diligence is available.[1] In other words, if they have a choice, creditors will generally use earnings arrestments or arrestments of bank accounts in preference to poinding and sale. So in many cases, poinding and sale is chosen by the creditor only because he does not have the information about other assets or income of the debtor which is necessary for instructing arrestments or earnings arrestments. On this view if better information were available to creditors, it would help them to target diligence more accurately and thereby avoid unnecessary resort to poinding. It would also help to avoid the trouble and expense of abortive "fishing" diligence. In this Part, we consider two types of measure designed to divert enforcement away from poinding and sale.

6.2 Table X shows however that there is a marked difference in the pattern of use of diligence as between ordinary creditors and summary warrant creditors and as between different classes of summary warrant creditor.

[1] Platts, *SOCRU Overview*, chapter 4, paras 15 and 18.

Table X

Ratios of poindings to earnings arrestments and arrestments 1996-1998

Type of diligence	1996	1997	1998
Ordinary creditor			
Poinding	5,996	6,079	6,282
Earnings arrestment	9,374 (1:1.5)	9,590 (1:1.6)	10,853 (1:1.7)
Arrestment	4,641 (1:0.8)	4,862 (1:0.8)	4,584 (1:0.7)
*Local authority s/w**			
Poinding	7,796	12,962	11,001
Earnings arrestment	97,230 (1:12.5)	86,814 (1:6.7)	72,845 (1:6.6)
Arrestment	76,883 (1:9.9)	85,582 (1:6.6)	92,489 (1:8.4)
*Other s/w***			
Poinding	5,313	6,018	5,778
Earnings arrestment	1,887 (1:0.4)	1,338 (1:0.2)	1,355 (1:0.2)
Arrestment	4,823 (1:0.9)	3,789 (1:0.6)	4,218 (1:0.7)

"Ordinary" = diligence other than summary warrant.

*"s/w" = summary warrant for recovery of council tax and community charge.
**"Other s/w"= summary warrants for the recovery of local authority non-domestic rates arrears and of central government taxes etc arrears.
Source: Table D in Part 2 above.

6.3 It will be seen that, for every 10 poindings used by ordinary creditors, they also use between 15 and 17 earnings arrestments and 7 or 8 ordinary arrestments. By contrast, for every 10 poindings used by local authority summary warrant creditors pursuing council tax or community charge, they use between 66 and 125 earnings arrestments and between 66 and 99 ordinary arrestments. In the case of other summary warrant diligence (local authorities pursuing non-domestic rates and UK departments pursuing taxes) the pattern is different again. For every 10 poindings, there are as few as between 2 and 4 earnings arrestments (no doubt reflecting the high incidence of the self-employed among individual tax defaulters) and 6 and 9 ordinary arrestments (broadly the same as ordinary creditors' diligence).

6.4 Several reasons have been suggested to us for the high incidence of local authority arrestments and earnings arrestments. Some local authorities have access to information not available to ordinary creditors. There is a special statutory provision under which a council tax defaulter against whom a summary warrant or decree has been granted is under a duty to supply, on request, certain information (eg details of the debtor's employment or bank or

building society account) to the levying local authority.[2] The *IRRV Report* recorded that of 30 local authorities surveyed none found requests for information very effective; 17% found them effective; 40% not very effective; 17% ineffective; 27% offered no opinion.[3] Local authorities are in a position to use earnings arrestments against those of their own employees who have defaulted. We have been told that at the time of the community charge, some local authorities made determined efforts to ascertain details of defaulters' employment or bank accounts (eg through enquiry agents) and that some of that information can be and is still being used for council tax. On the other hand, it has been suggested that many of the arrestments in execution by local authorities are "fishing arrestments" (eg against the four Scottish clearing banks) for the same debt, so that the high incidence of bank arrestments may reflect a lack of information rather than better targeting by local authorities. It would seem that ordinary creditors would be the prime beneficiaries of new measures designed to help creditors to obtain better information concerning debtors' assets but that local authorities might also benefit.

(1) Means enquiries in aid of diligence

6.5 The first measure to be considered is a judicial means enquiry or oral examination in aid of diligence.[4] In this system, the sheriff, on the creditor's application, would make an oral examination of the debtor as to his attachable assets and means (income, expenditure, employment and bank accounts) in order to assist the creditor to choose the most appropriate form of diligence. There is no such procedure under Scots law. Indeed there is no duty on the part of the debtor to disclose his means to a creditor outside sequestration under the Bankruptcy (Scotland) Act 1985. The nearest to it is the special provision on council tax mentioned above.[5]

6.6 **Oral examination procedure in England and Wales.** An oral examination procedure is available in England and Wales in both the county court[6] and High Court[7] to assist plaintiffs to determine the most appropriate method of enforcing a judgment debt. It is not by itself a form of enforcement. Nevertheless the fact that the debtor is ordered to attend court to provide details of his means often induces the debtor to pay the debt.[8] The number of applications filed in county courts for oral examination in 1998 was 69,278, a decrease of 6% from 73,769 in 1997.[9]

6.7 In the English system, the creditor applies to the court for oral examination enclosing the fee. The court informs the debtor of the application and the date when he must attend

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[2] Local Government Finance Act 1992, Sch 8, para 5; Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (SI 1992/1332) reg 31. This information could facilitate earnings arrestments or arrestment of bank accounts or the like. A similar duty is prospectively imposed, on persons liable for child support under liability orders, to supply relevant information to the Secretary of State: Child Support Act 1991, 37(2) (not yet in force).

[3] *IRRV Report*, Table 23, in chapter 4.; reproduced as Table H (para 2.43) above.

[4] This would differ from a system in which an oral examination or means enquiry is a compulsory prerequisite to the execution of any diligence by a creditor against a debtor. In that type of system the creditor could do no diligence in execution until an oral examination or means enquiry had been held.

[5] See footnote 2 above.

[6] County Court Rules 1981, Order 25, rule 3. (SI 1981/1687). Where this procedure is not available, the county courts may make an order for disclosure of assets: Supreme Court Act 1981, s 37(1) as applied by County Courts Act 1984, s 38.

[7] Rules of the Supreme Court 1965, Order 48, rule 1.

[8] Lord Chancellor's Department, *Judicial Statistics Annual Report 1998* p 45. In 1998 in the Queen's Bench Division there were 1,431 oral examinations by officers of the court: *ibid*, Table 3.11.

[9] *Idem*.

court. The examination is carried out by a Master, District Judge or officer of the court and he, and the creditor if present or represented, chooses what questions to ask. There is no standard questionnaire. The examination is intended to be a searching cross-examination of the severest kind.[10] The debtor gives information on oath and is liable to imprisonment or fine if he perjures himself by giving false information though such penalties are rare. If the debtor fails to attend, the court will direct him to attend an adjourned hearing by an order served personally on the debtor at least 10 days before the hearing.[11] Service is by the county court bailiff or, in the High Court, by the creditor. If the debtor fails to attend the second hearing the judge may order his committal to prison and a warrant for committal will be issued. The judge, in lieu of warrant for committal to prison, may order the debtor to be arrested by bailiffs and brought before the court either forthwith or at a specified time.[12]

6.8 **Should means enquiries be introduced in Scotland?** As in England and Wales means enquiries could assist creditors to target their diligence more accurately, although this might not result in any substantial decrease in the number of poindings executed. Also a request to attend court for oral examination would elicit payment of the debt from many debtors. However, there would be considerable disadvantages in introducing means enquiries or oral examinations in Scotland. First, though there are currently about 70,000 applications for oral examinations in England, nevertheless execution against goods is still by far the most frequently used method of enforcement.[13] Second, the *LCD Consultation Paper No 2* states that in many means enquiry cases, "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 provided is incomplete or inaccurate".[14]

6.9 Third, we anticipate that there would be many cases in which debtors, who had been required by citation to appear, would fail to obey the citation and attend court. Given that many Scottish debtors fail to apply for time to pay directions and orders when it is to their advantage,[15] they are likely often to ignore citations to an oral examination in aid of diligence. Moreover experience with means enquiry courts in Scottish criminal proceedings points the same way. In district courts in 1997-98, for example, almost 66,000 citations to appear at means enquiry courts were served and almost 45,000 warrants for arrest were issued to compel appearance.[16] So over 68% of citations resulted in warrants for arrest. If the procedure was used as much as in England and Wales there might be about 7,000 applications and citations for oral examination annually. This could result in many, perhaps several thousand, warrants of arrest. Indeed if the criminal statistics percentage (68%) is any guide, the number could be over 4,750 warrants of arrest per year. Yet the number of all warrant sales under decrees is only between 394 and 513 and the number against

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[10] *Galbraith v McKenna* [1940] 4 All E R 303; *Republic of Costa Rica v Strousberg* (1880) 16 Ch D 8 (CA) at p 12. The debtor must give all necessary particulars to enable the judgement creditor to recover, including attachable assets: *Watkins v Ross* (1893) 68 LT 423 at p 425, *Interpool Ltd v Galani* [1988] QB 738.

[11] County Court Rules 1981, Order 25, rule 3(4);(5A)(5B).

[12] 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 or to give evidence) and (1A) (inserted by the Contempt of Court Act 1981, Sch 2, para 6).

[13] See para 2.55 Tables I, J & K

[14] *LCD Consultation Paper No 2*, para 2.5.

[15] See Part 7 below.

[16] Scottish Office Home Department, *Scottish District Courts Statistical Bulletin* 1998-99, Table 6(a): more precisely 65,674 citations and 44,959 warrants for arrest.

individuals may be less than a third of that number (between 120 and 160).[17] The analogy of criminal statistics may of course be false. Creditors might be far less likely than the public prosecutors to apply for warrants of arrest. However the imposition of extra duties on debtors which are not enforced in practice would not encourage respect for the law.

6.10 Fourth, there would also be grave difficulty in devising a socially acceptable sanction. The *Scottish Office/COSLA Consultative Document* sought views on whether in place of the civil penalty of £50 there should be a criminal penalty for failure by a council tax defaulter to implement his statutory duty of providing information on request to the levying authority.[18] In general it might well be considered counter-productive to impose a fine on a debtor who in most cases will already find it difficult to pay his debts and will often be insolvent (unable to pay debts as they fall due) or verging on insolvency. If fines would be useless, civil imprisonment could be even worse.

6.11 In England bailiffs execute a warrant of arrest and take the recalcitrant debtor to the court for oral examination. The *LCD Consultation Paper 2* rejected fines, but suggested retention of imprisonment, as a sanction against a debtor's deliberate refusal to co-operate. It also sought views on a range of alternative sanctions including suspension of passport; a bar on future credit; inhibiting disposal of assets; publication in the press of the debtor's contempt of court; withdrawal of tax concessions; and loss of protection from the Statute of Limitations for debt-related transactions.[19] Sanctions canvassed by the *Scottish Office/COSLA Consultative Document* for non-payment could be adapted to non-disclosure in the case of council tax arrears eg a council could be empowered to prohibit the sale of a house under the "right to buy" and / or withhold any loan to be awarded under the "lender of last resort" scheme.[20]

6.12 Bearing in mind that oral examinations or means enquiries are intended to be a means to divert enforcement from poinding and sale on grounds of social policy, it would be self-defeating to introduce sanctions for failure to attend such enquiries which are just as objectionable as poindings on those grounds. It is for consideration whether if debtors in Scotland fear and resent poindings, they would be likely to fear and resent arrest by sheriff officers and compulsory appearance in court even more. Moreover, even after an oral examination, a poinding may be necessary. An oral examination cannot necessarily be relied on to show that the debtor has non-exempt poindable goods. Indeed it may show that the debtor has poindable goods but no bank account or earnings.

6.13 Finally, there is the expenses factor. The creditor would have to send the debtor money to meet his travelling expenses for attending the enquiry. There would be other costs to creditors in money and delay. Even if all the expenses were chargeable against the debtor, they might in practice prove irrecoverable.

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[17] See para 2.48 above.
[18] *Scottish Office/COSLA Consultative Document*, paras 3.4.5-7 and Q.8
[19] *LCD Consultation Paper 2*, para 3.11. Other sanctions were dismissed as disproportionate, unworkable or too costly to administer: eg suspension of driving licence; imposition of penalty points on a driving licence; clamping a debtor's car; withdrawal of the ability to reclaim VAT; initiating winding up procedures; and disqualification of company directors: see *ibid*, para 3.10.
[20] *Scottish Office/COSLA Consultative Document.* para 3.3.6 and Q.6.

(1) Should the creditor be entitled to require the debtor to submit to a means enquiry in aid of diligence?

(2) If such enquiries were to be introduced, what sanctions should be imposed where a debtor cited to appear fails to turn up for oral examination by the court?

(Question 6.1)

(2) Duty of council tax defaulter to give information and means enquiries in aid of diligence under summary warrants

6.14 Local authorities in Scotland have statutory powers to require a debtor against whom a summary warrant or decree has been granted to give details of his employment and bank account.[21] A civil penalty of £50 payable to the authority may be imposed for failure to supply information or for knowingly supplying inaccurate information.[22] The penalty rises to £200 for each subsequent failure.[23]

6.15 In England there are similar powers with similar sanctions.[24] However in England, unlike Scotland, there is an additional sanction. The failure (without reasonable excuse) of a council tax defaulter to provide information to the council is a criminal offence which may be prosecuted in the magistrates court.[25] The defaulter is liable on summary conviction to a fine not exceeding level 2 (£500) on the standard scale of offences and, if false information is given the fine may be up to level 3 (£1,000).[26]

6.16 In England, unlike Scotland, there is yet another method of eliciting information from council tax defaulters about their means. When distress has been attempted but the bailiff or other person levying the distress has been unable to find sufficient goods on which to levy the arrears, a local authority can apply to the magistrates court for an enquiry into the council tax defaulter's means and for commitment of the defaulter to prison.[27] We deal with civil imprisonment for debt in Part 3.

6.17 In Scotland and in England and Wales, where the local assessor requires an owner or occupier of a dwelling to provide information to assist the assessor in compiling the valuation list, and the owner or occupier fails to supply the information, he is guilty of a criminal offence and liable on summary conviction to a fine on level 2.[28] An owner or occupier knowingly supplying false information may be liable on summary conviction to a term of imprisonment not exceeding 3 months or a fine not exceeding level 3.[29] The *IRRV Report* put the question: why are such powers available to the local assessor to assist him in his duties, while the local authority is not given these powers to assist it in carrying out its

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[21] Local Government Finance Act 1992, Sch 8, para 5; Council Tax (Administration and Enforcement) (Scotland) Regulations 1992 (SI 1992/1332), reg 31.
[22] Local Government Finance Act 1992, Sch 3, para 2(2).
[23] Local Government Finance Act 1992, Sch 3, para 2(3) and (4).
[24] Local Government Finance Act 1992, Sch 4, para 4; Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992/613) reg 36.
[25] Local Government Finance Act 1992, Sch 4, para 18; Council Tax (Administration and Enforcement) Regulations 1992, reg 56(1).
[26] Council Tax (Administration and Enforcement) Regulations 1992, reg 56(5) and (6).
[27] Local Government Finance Act 1992, Sch 4, para 8; Council Tax (Administration and Enforcement) Regulations 1992, regs 47 and 48.
[28] Local Government Finance Act 1992, s 90(6).
[29] Local Government Finance Act 1992, s 90(7).

functions?[30] The Report pointed out however that the survey sample and interviews did not reveal any use of this power in either Scotland or England during 1997/98 probably as they proved ineffectual under community charge.[31] Nevertheless the Report suggested that the local authority should have the same powers as the assessor, that is to say that the local authority's notices requiring information should be backed by criminal sanctions.[32]

6.18 One answer to the *IRRV Report's* question may possibly be that like is not being compared with like. Owners and occupiers receiving statutory notices to supply information to a local assessor are not likely to be in debt and there is no real alternative to a criminal sanction. On the other hand, the functions of the local authority considered here are collection and enforcement from council tax defaulters all of whom are debtors to the local authority. The Scottish tradition and the modern Scottish view of debt enforcement avoids not only criminal sanctions but even civil imprisonment. In consonance with this view, the *IRRV Report* quotes statements by two Scottish respondents that there seemed little point to pursue this penalty as it simply added to levels of debt for an individual, especially when there is little prospect of recovering the primary debt.[33]

6.19

Should the failure (without reasonable excuse) of a council tax defaulter to provide information to the local authority be a criminal offence?

(Question 6.2)

(3) Other statutory provisions requiring debtors and employers to furnish information: tracking debtors to new jobs

6.20 In England and Wales the Attachment of Earnings Act 1971 imposes a duty on a debtor to notify the court in writing within 7 days of each occasion on which he leaves any employment or becomes employed or re-employed.[34] On becoming re-employed he must notify the court of particulars of his earnings and anticipated earnings.[35] A new employer who knows of the attachment of earnings order has a similar duty of notification.[36] Failure to comply is a statutory offence.[37] These provisions relate to ordinary creditors. In England and Wales, very similar provisions apply to attachment of earnings orders made by a local authority affecting the earnings of a council tax defaulter against whom a magistrates court has made a liability order.[38] In this case, the attachment of earnings order is made not by a

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[30] *IRRV Report*, chapter 4, para 61.
[31] *IRRV Report*, chapter 4, para 62.
[32] *IRRV Report*, Executive Summary, para 10.
[33] *IRRV Report*, para 62.
[34] Attachment of Earnings Act 1971, s 15.
[35] *Idem*.
[36] *Idem*.
[37] Attachment of Earnings Act 1971, s 23. The debtor is liable, if he fails to notify the court, to a fine up to level 2 on the standard scale of fines or if he makes a false statement to a fine up to level 3 or up to 14 days imprisonment.
[38] Council Tax (Administration and Enforcement) Regulations 1992, reg 40.

court but by the local authority pursuing the council tax arrears[39] and therefore the notification is made direct to the local authority.[40]

6.21 The *IRRV Report* pointed out that in Scotland when a debtor subject to an earnings arrestment leaves an employment, he is not under any duty to inform the sheriff officer or the creditor-local authority of details of any new employment.[41] Sheriff officers stated to the Report's authors that earnings arrestments were the most potent methods for enforcing payments, but to be fully effective they need greater powers to obtain employment details of debtors. The *IRRV Report* recommended that there is merit in requiring this information to be supplied, as in England.[42]

6.22 The recent *LCD Consultation Paper 3* however states that the sanction appears to be little used and in any case to have little effect.[43] The Paper suggests that the PAYE system might be used to track debtors who change jobs. We have discussed this above.[44]

6.23

(1) Should a duty be imposed on

(a) a debtor subject to an earnings arrestment or current maintenance arrestment to notify the creditor or officer of court; and

(b) a debtor subject to a conjoined arrestment order to notify the sheriff clerk

in writing within 7 days of each occasion on which he leaves any employment or becomes employed or re-employed?

(2) Is it necessary to impose a duty on an employer operating an earnings arrestment, current maintenance arrestment or conjoined arrestment order, to notify the creditor, officer of court or (as the case may be) the sheriff clerk of any termination of employment?

(3) If so, what sanction should be imposed for breach of these duties?

(Question 6.3)

(4) Disclosure by banks of sums arrested in execution

6.24 Our Report on *Statutory Fees for Arrestees*[45] made a recommendation (not yet implemented) 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 that information is confidential. In this way an arrester could find out whether an

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[39] Local Government Finance Act 1992, Sch 4, para 5: Council Tax (Administration and Enforcement) Regulations 1992, regs 37 – 41.
[40] Council Tax (Administration and Enforcement) Regulations 1992, reg 40.
[41] *IRRV Report*, chapter 4, para 64.
[42] *Idem*; and Executive Summary, para 10.
[43] *LCD Consultation Paper 3*, para 1.50.
[44] Para 4.35.
[45] (1992) Scot Law Com No 133, paras 4.2 - 4.12.

arrestment in execution had been successful without proceeding to action of furthcoming. The recommendation did not apply to arrestments on the dependence.

6.25 Summary warrants authorise arrestment and action of furthcoming. The statistics show that arrestments are much used by local authorities.[46] The *IRRV Report* stated that arrestments are considered to be a potentially useful tool by Scottish local authority Revenues Officers, but only in cases where the debtor has an account, the banks co-operate and release details of a debtor's account, and there are sufficient funds in an account. There has been difficulty in operating with these arrestments in the past, according to revenue practitioners. A few Scottish local authority revenues officers commented that for this enforcement method to be truly effective, there had to be a greater compulsion on the banks to provide details of whether or not an account had actually been arrested. This complaint would be met if our recommendation just mentioned were implemented. We adhere to that recommendation.

6.26

Do you agree with recommendation 16 in our Report on *Statutory Fees for Arrestees* to the effect that in an arrestment in execution (including an arrestment on the dependence converted by decree into an arrestment in execution) the arrestee should be bound to disclose to the arrester free of charge the existence or extent of any funds and other moveable property attached by the arrestment, and that such disclosure should not be treated as a breach of a duty of confidentiality owed by the arrestee to the debtor with respect to those funds or property?

(Question 6.4)

(5) Obtaining information from third parties

6.27 If it is not possible to obtain information as to their assets from the debtors themselves, the only alternative would be a provision enabling creditors to obtain information from third parties. This has been considered from time to time by advisory bodies and is controversial. There are governmental, fiscal, commercial and civil liberties interests at stake. To the extent that disclosure could breach confidentiality and prejudice relations between the third party and the debtor, legislation could be resisted by bodies representing third parties. The Inland Revenue, for example, apprehend that disclosure from their records could deter taxpayers from making full and frank returns.[47]

6.28 Any provision requiring disclosure would require to comply with the European Convention on Human Rights.[48] The Data Protection Act 1998[49] restricts the disclosure of personal data held on computer or some paper records and prohibits disclosure of personal data for a purpose incompatible with the purpose for which it was obtained. There are exemptions from the 1998 Act restrictions in cases where the disclosure is required by or under statute or the order of a court or in connection with legal proceedings.[50] In order to comply with these provisions, it may be necessary to provide for judicial control over access;

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[46] See Part 2 above, Table D.
[47] See para 6.30 below .
[48] Quoted at para 2.69 above.
[49] Replacing the Data Protection Act 1984 which restricted disclosure of personal data on computer.
[50] Data Protection Act 1998, the Act binds the Crown: s 63(1).

and to specify clearly the type of information to be disclosed and the specific purpose for which it is required.[51]

6.29 **Access to information held by banks relating to their customers.** We commented above on the need for banks to disclose funds arrested in execution.[52] That is very different, however, from requiring banks to furnish confidential information to a customer's creditor so that an arrestment not yet executed can be directed at their customers. The *IRRV Report* recorded the views of Revenues officers that banks were understandably reluctant in dealing with blanket requests for account details relating to lists of debtors. They attributed this to the fact that arrestments went against the banks' promotion of their accounts as safe repositories of money.[53] A more fundamental reason is that a bank owes a legal duty of confidentiality to its customers except in limited circumstances (eg compulsion by law or a public duty).[54] Assisting creditors to do diligence against their customers' bank accounts does not fall within any of the exceptions. The Jack Report referred with disquiet to a torrent of legislation in recent decades requiring or permitting bankers, in a wide range of specified circumstances,[55] to disclose confidential information in the public interest.[56] The Report recommended that the Government should not further extend the statutory exceptions to the banker's duty of confidentiality to its customers, without taking full account of the consequences for the banker-customer relationship.[57]

6.30 **Access to information held by Inland Revenue.** The Inland Revenue's records will contain details of the taxpayer's employment, bank accounts and other assets. But the Inland Revenue is generally not empowered to disclose information about taxpayers unless authorised by statute.[58] No statute allows disclosure in aid of recovery of local tax arrears, and the *Scottish Office/COSLA Consultative Document* sought views on whether it would be desirable for councils pursuing council tax arrears to be given access to Inland Revenue records in prescribed cases.[59]

6.31 **Other third-party sources of information.** In addition to the foregoing, the *LCD Consultation Paper 2* referred to two other key sources of information namely the Department of Social Security (for information about any benefits paid to a debtor) and the Driver and Vehicle Licensing Agency (for information about vehicle ownership relevant to execution against goods or poinding). The Consultation Paper suggested that these four key sources of information would cover most cases but identified other sources which might be tapped.[60]

6.32 So far as these four main sources are concerned, any legislation would require to be enacted by the United Kingdom Parliament.

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[51] See *LCD Consultation Paper 2*, p 12.
[52] See para 6.24 .
[53] *IRRV Report*, Chapter 4, para 68.
[54] *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.
[55] Eg circumstances relating to insider dealing; company fraud; insolvency; drug trafficking; breaches of the Consumer Credit Act 1974; tax evasion; inquiries into the affairs of charities; extradition ; mental incapacity; and suspicion of a long list of other criminal offences.
[56] Report by the Review Committee on *Banking Services: Law and Practice* (1989) Cm 622 (chairman R B Jack CBE) para 5.07; and Appendix Q.
[57] Jack Report, recommendation 5(3) (p 39).
[58] Eg legislation permits disclosure from Inland Revenue records for use in the prevention, detection, investigation and prosecution of offences relating to social security.
[59] *Scottish Office/COSLA Consultative Document*, section 3.4.
[60] Notably creditors and their associates; debtors' advisers or representatives; other non-governmental third parties eg employers, landlords, heritably secured lenders, credit reference agencies, other financial service providers, other trade suppliers/ creditors.

6.33 **Machinery for obtaining information from third parties.** In England the *LCD Consultation Paper 2* provisionally proposes that disclosure from third parties would be required to be authorised by a discretionary court order, which would specify both the debtor and the information required, on a case-by-case basis. Penalties for wilful non-compliance would be prescribed. The trigger for the creditor's application would be failure by the debtor to provide information requested in a statement of means enquiry form or at an oral examination. The safeguards for the debtor would be achieved by judicial control over the procedure for disclosure and the information disclosed which would be relayed via the court to the creditor and not direct.[61] The expense would be borne initially by the creditor. It would be for consideration whether it would be chargeable against the debtor.[62] If means enquiries were to be introduced in Scotland then the scheme outlined above could be adopted. If not, then some other trigger would have to be used, such as the debtor's refusal to provide the information on being served with a statutory demand for it. It is for consideration whether court authorisation is necessary or desirable, or whether creditors should be entitled to serve statutory demands for information about their debtors' assets.

6.34

(1) Should the court have power, on the creditor's application, to order a third party to furnish to the creditor or the court information relating to the debtor's attachable assets for the purpose of facilitating diligence against those assets? If so, what restrictions and safeguards should be imposed to protect debtors and third parties?

(2) Should the creditor be entitled, by statutory notice, to require a third party to furnish such information to the creditor? If so, what restrictions and safeguards should be imposed to protect debtors and third parties?

(3) Should information be obtainable from:

(a) banks, building societies and other authorised deposit-taking institutions;

(b) the Department of Social Security;

(c) the Driver and Vehicle Licensing Agency; or

(d) the Inland Revenue?

Are there any other third parties from whom information should be obtainable?

(Question 6.5)

(6) Earnings arrestments: tracking debtors to new jobs through PAYE system

6.35 We referred above[63] to the creditors' need to obtain employment details in order to use an earnings arrestment in preference to a poinding and sale. In England and Wales, the *LCD Consultation Paper 3* considered that the obvious mechanism for tracking debtors who change jobs would be through the PAYE system. The PAYE system would record that an

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[61] *LCD Consultation Paper 2,* para 2.24.
[62] As proposed by *LCD Consultation Paper 2,* para 2.25.
[63] Para 6.1.

attachment of earnings exists and this information would be brought to the attention of the new employer who would be obliged to ensure that the order continues to be paid.[64] The paper identified problems, however, notably that there are around 11-12 million job cessations every year, only a small proportion of which (probably less than 1%) involve an attachment of earnings order. Further it would not be easy to deliver the computer changes required to operate the system and would impose an additional administrative burden on employers. In short, the scheme might be regarded as taking a sledgehammer to crack a nut.[65] The paper sought views on whether the difficulties presented by debtors changing jobs were sufficient to justify a system for tracking debtors to new jobs, and whether there are any other options.[66]

6.36 If such a mechanism were introduced in England and Wales operated by the United Kingdom government through the PAYE system, there would be a virtually unanswerable case for adapting the mechanism for the benefit of Scottish creditors using earnings arrestments and current maintenance arrestments and sheriff clerks operating conjoined arrestment orders. Since in Scotland the deduction levels are fixed by law rather than by a discretionary order of the court,[67] the information requiring to be passed through the PAYE system to the new employer would be minimal, but would still require legislation by the United Kingdom Parliament.

6.37

Are the difficulties presented to creditors using earnings arrestments by debtors changing jobs sufficient to justify a system for tracking debtors subject to earnings arrestments to new jobs through the PAYE system?

(Question 6.6)

[64] *LCD Consultation Paper 3,* paras 151, 1.52.
[65] *Idem.*
[66] *Ibid*, para 1.53, Question 6.
[67] 1987 Act, Part III.

PART 7: DILIGENCE STOPPERS: TIME TO PAY DIRECTIONS AND ORDERS AND DEBT ARRANGEMENT SCHEMES

A. INTRODUCTION

7.1 In this Part we consider two types of safeguard for debtors. The first is time to pay directions and time to pay orders which were recommended in our 1985 Report[1] and introduced by Part I of the 1987 Act. These enable a debtor to pay his or her debts by instalments or deferred lump sum free from the threat of poinding and other diligence. They are sometimes called "diligence stoppers". The second type of safeguard also recommended by our 1985 Report is the introduction of debt arrangement schemes[2], but that recommendation has never been implemented. Creditors would not have been entitled to do diligence against a debtor subject to a debt arrangement scheme.

B. TIME TO PAY DIRECTIONS AND ORDERS

(1) The existing position

7.2 Time to pay directions and orders were introduced because research carried out in the late 1970s and early 1980s showed that most debtors were willing to pay their due debts, but could not afford to do so in a single lump sum.[3]

7.3 **Time to pay directions**. A time to pay direction may be added to a decree for the payment of money (other than expenses) by the court when granting decree. Time to pay directions are competent in both the Court of Session and the sheriff court.[4] The debtor must apply before decree is granted. Where the circumstances are such that a time to pay direction may be applied for in a payment action, an application form must be enclosed with the summons or initial writ served on the debtor.[5] The debtor may apply by returning the application form to the clerk of court completed to show his proposals for payment and details of his financial position before the return date specified in the documents served on him. The debtor may choose not to attend court, in which case the debtor's proposals are sent to the creditor. Unless the creditor objects to the debtor's proposals, the sheriff will grant a time to pay direction in the terms proposed by the debtor. Any objections will be disposed of at a hearing after which the court may grant the direction in such terms as seem fit or refuse to grant a direction.[6] In summary causes and small claims a debtor may opt to attend court (personally or by a representative) to apply orally and a creditor who intends to oppose the granting of the time to pay direction would have to attend to do so.[7]

7.4 A time to pay direction may take one of two forms. The first type of direction permits the debtor to pay the amount due by instalments of a specified amount at specified

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[1] Chapter 3.
[2] Chapter 4.
[3] Chapter 2.
[4] 1987 Act, ss 1(1) and 15(2), "the court".
[5] RCS 44.2 and Forms 44.2-A and B (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.
[6] OCR 7.3.
[7] Summary Cause Rules, Form Ab, Small Claims Rules, Form 2.

intervals, for example £30 per week or £100 per month. The second type of time to pay direction is for payment of the debt in a lump sum at some specified future date.[8] Most time to pay directions are of the instalment variety.[9]

7.5 Time to pay directions can be applied for only by an individual who is either personally liable for the debt or is liable as the representative of another living individual (a curator bonis to a mentally incapable debtor for example).[10] Debts due by a company or a partnership cannot be the subject of a time to pay direction.

7.6 Time to pay directions cannot be granted in relation to certain categories of debt.[11] The main exceptions are:

- Central and local government taxes, rates or charges (whether pursued by payment action or application for summary warrant),
- Debts over £10,000,
- A decree for expenses only.

Other debts for which a time to pay direction is not available are arrears of child maintenance due under a liability order, fines and other sums imposed in criminal proceedings, aliment, and financial provision on divorce or nullity of marriage.

7.7 If a time to pay direction is granted the creditor has to intimate the extract of the decree containing the direction to the debtor. Any instalments start to be payable a specified period after intimation and any period of deferment runs from the date of intimation.[12]

7.8 While a time to pay direction is in effect the creditor cannot enforce the amount due under the decree by serving a charge, arresting funds other than earnings, arresting earnings, executing a poinding, or bringing an action of adjudication.[13] The creditor may however still use inhibition. A time to pay direction does not prevent secured creditors from enforcing their securities or utility companies from discontinuing the supply to the debtor.

7.9 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.[14] A deferred lump sum direction lapses if the debt is not paid in full within 24 hours after the end of the specified period of deferment.[15] As soon as the direction lapses the creditor may proceed to enforce the debt by diligence without further court proceedings or intimation to the debtor.

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[8] 1987 Act, s 1(1)(a), (b).
[9] Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, Table 17, 94% instalments, 6% deferred lump sum.
[10] 1987 Act, s14(1).
[11] 1987 Act, s 1(5).
[12] 1987 Act, s 1(1).
[13] 1987 Act, s 2.
[14] 1987 Act, s 4(1), (2). There are special rules for the last two instalments.
[15] 1987 Act, s 4(3).

7.10 There are detailed provisions for recovery of interest which has accrued during the time while the direction is in force[16] and for variation or recall of the direction on a change of circumstances by the court on application by either the debtor or the creditor.[17]

7.11 **Time to pay orders**. The debtor may apply for a time to pay order once diligence to enforce the decree or other enforceable document commences. An application may be made as soon as a charge is served, an arrestment of funds other than earnings is executed or an action of adjudication is commenced.[18] But an application is not competent if diligence has reached an advanced stage, ie a decree of furthcoming or warrant of sale has been granted or the adjudging creditor has entered into actual or civil possession of the property adjudged.[19] Debtors may apply for a time to pay order even though their earnings have been arrested. The restrictions on time to pay directions in paragraphs 7.5 and 7.6 above (with the exception of a decree for expenses only) apply equally to time to pay orders.[20] It is also not competent to make a time to pay order if the debtor has previously defaulted on a time to pay direction or order.[21]

7.12 An application for a time to pay order is made to an appropriate sheriff court, irrespective of the court granting the decree or the source of the document.[22] The application is made on a printed form which the debtor completes by setting out details of the debt and the terms of the order sought.[23] Time to pay orders - like time to pay directions - may take the form of instalments or deferred lump sum orders.[24] The sheriff clerk sends a copy of the debtor's application to the creditor together with the sheriff's order sisting diligence (ie preventing the creditor taking further steps in enforcement).[25] If the creditor does not object within 14 days the sheriff will make a time to pay order in the terms sought by the debtor. The creditor may object to the making of a time to pay order or make counter proposals for the terms of any order. If the creditor and debtor cannot reach agreement a hearing will be arranged, at the end of which the sheriff may refuse the application or grant it in such terms as seem fit.[26]

7.13 Where a time to pay order is granted the sheriff clerk intimates it to the debtor and informs the creditor of this intimation. Instalments become payable a specified period after intimation and any period of deferment will run from the date of intimation.[27] The effect of a time to pay order is to preclude the creditor from serving a charge to pay, executing any arrestment, earnings arrestment or poinding, or commencing an action of adjudication. On making a time to pay order the sheriff must recall any existing earnings arrestment but has a discretion whether or not to recall a poinding[28] or to recall or restrict an arrestment of funds other than earnings.[29] If an existing diligence is not recalled the sheriff prohibits the taking of

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[16] 1987 Act, s 1(7), (8).
[17] 1987 Act, s 3.
[18] 1987 Act, s 5(1).
[19] 1987 Act, s 5(5).
[20] 1987 Act, ss 5(4) and 15(3).
[21] 1987 Act, s 5(4)(b).
[22] 1987 Act, s 5(2).
[23] Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988, SI 1988/2013, r 5.
[24] 1987 Act, s 5(2).
[25] 1987 Act, ss 6(3), (6) and (8).
[26] 1987 Act, s 7.
[27] 1987 Act, s 5(2).
[28] 1987 Act, s 9(2)(d).
[29] 1987 Act, s 9(2)(e).

any further steps apart from certain specified minor steps.[30] Creditors may use inhibition to enforce the debt, notwithstanding the granting of the time to pay order.

7.14 The provisions relating to lapse, recall or variation of time to pay orders are very similar to those for time to pay directions set out in paragraphs 7.9 and 7.10 above.[31]

Scale of use of time to pay directions and orders

7.15 Table Y below shows the number of time to pay directions applied for and granted in the period 1989 to 1993.

Table Y: Applications for time to pay directions (TTPDs) made and granted, 1989-1993

	1989	**1990**	**1991**	**1992**	**1993**
Applications for TTPDs	17,293	23,209	18,922	16,739	16,411
TTPDs Granted	15,323	17,524	13,963	10,769	11,521
TTPDs granted as % of applications	89	74	76	64	70
Monetary decrees granted to which TTPD could be attached	71,307	81,198	82,567	80,133	74,714
TTPDs granted as % of monetary decrees granted	21	22	17	13	15

Source: *SOCRU Analysis of Diligence Statistics, Table 2a and Civil Judicial Statistics Scotland 1989-1993, Table 5.1*

> **Note:** The percentage of directions granted in relation to monetary decrees should be somewhat higher as some summary cause and ordinary cause decrees will have been granted for expenses only for which a time to pay direction is incompetent. (The small claims expenses only decrees are separately listed in the Civil Judicial Statistics and have not been counted.) Also some defenders will have been firms and companies who cannot apply for a time to pay direction.

7.16 In 1989, the first full year of the 1987 Act's operation, just over one in five monetary decrees had a time to pay direction attached to them. Thereafter there was a decline and by 1993 one in every seven decrees had an attached direction. Around 70% of all applications for a time to pay direction were granted and this figure has remained fairly steady for 1990-1993.

7.17 In 1996 Fleming and Platts found[32] that 24% of eligible defenders applied for time to pay directions. 71% of the applications were accepted by creditors resulting in the grant of a direction in the terms offered. Of the remaining 29% rejected by creditors, roughly one third

[30] 1987 Act, s 9(4).
[31] 1987 Act, ss 10 and 11.
[32] Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, chapter 3, para 18.

resulted in the court granting a direction in the same or different terms. The overall success rate was therefore 80% resulting in one in five (19.2%) of all eligible debtors obtaining a time to pay direction. Although this proportion of 20% is higher than the 15% in 1993, it is unlikely that there was a substantial rise over the 3 year period. The 1996 figure is a percentage of all eligible debtors whereas the 1989-1993 figures are percentages of a larger class of debtors, some of whom would not have been eligible to apply for a time to pay direction. These statistics are comparable with those for offers by summary cause defenders to pay by instalments.[33] Summary cause instalment decrees were the precursor of time to pay directions and were superseded by them in 1988 when the 1987 Act came into force.

7.18 Table Z shows the number of time to pay orders applied for and granted during the period 1989-1998. The increase in 1994 and 1995 may be spurious due to the inclusion of some time to pay directions by error when Scottish Courts Administration stopped collecting data on directions at the end of 1993. The broad picture however is that only a very small proportion of debtors subject to diligence apply for time to pay orders. The total number of non-summary warrant poindings, arrestments and earnings arrestments was 21,719 in 1998[34], making the proportion of applicants slightly over 1%.

Table Z: Time to pay orders

	1989	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**
Applications for TTPOs	287	245	268	248	232	954	426	359	269	255
TTPOs granted	231	187	221	158	149	N/A	N/A	N/A	N/A	N/A
TTPOs as a % of applications	80	76	82	64	64	N/A	N/A	N/A	N/A	N/A

Source: *SOCRU Analysis of Diligence Statistics, Table 5; Civil Judicial Statistics Scotland 1994-1998,* Table 5.1

7.19 In our 1985 Report we recognised that a proper system of diligence involves finding a publicly acceptable balance between the interests of creditors and debtors. We set out the objectives of a reformed system of enforcing debts by diligence. The first was that the system should provide effective and efficient machinery to enable creditors to obtain payment of their debts. The second was to provide procedures for protecting debtors from undue economic hardship and personal distress, while maintaining an effective enforcement system.[35] Time to pay directions and orders were important components of our debtor protection recommendations. They enabled debtors who were willing to pay their debts, but who were unable to pay in a lump sum immediately, to pay by instalments or by lump sum at some future date free from the threat of diligence. In particular, debtors would be able to avoid their goods being poinded and sold by applying for a time to pay order when a charge

[33] Doig, *Debt Recovery through the Scottish Sheriff Courts*, Scottish Office Central Research Unit (1980).
[34] Civil Judicial Statistics: Scotland 1998, poindings 6,282; arrestments(on dependence and in execution) 4,584, earning arrestments 10,853.
[35] Para 2.41.

to pay was served on them. These recommended measures were enacted in Part 1 of the 1987 Act.

7.20 The overall conclusion of the research into the 1987 Act is that the legislation has generally fulfilled the first objective of providing effective enforcement machinery. The second objective - protection of debtors - has been only partly fulfilled.[36] This is particularly so in relation to time to pay directions and orders which depend on debtors taking the initiative to apply and follow through the procedures. The statistics show that somewhere between 15%-20% of debtors apply for and obtain time to pay directions and only about 1% of eligible debtors apply for time to pay orders. The research does recognise that the situation is more complex than these simple figures would suggest. Advisers and others assisting debtors generally preferred to negotiate informally with creditors rather than use the formal time to pay measures in the 1987 Act.[37] However, the availability of the formal measures was thought to have resulted in creditors being more willing to enter into such negotiations. Negotiations are now being carried out in the shadow of a law more favourable to debtors than that which prevailed prior to the 1987 Act.[38]

(2) Proposals for reform

7.21 In this Section we put forward proposals for reform of the law and practice of time to pay directions and orders. These are designed to increase the use made of these measures.

7.22 Time to pay directions and orders are not available where the debt involved is outstanding tax, rates or charges due to central or local government. This is so whether the collecting authority proceeds by summary warrant or by ordinary action. We discussed this issue in Part 5 above.

(a) Possible removal of restrictions on making time to pay directions and orders

Increasing the monetary limit

7.23 At present time to pay directions and orders are available only if the debt (exclusive of interest and expenses) does not exceed £10,000. This figure can be altered by regulations made by the Lord Advocate[39] but so far no such regulations have been made. In our 1985 Report we recommended a limit of £10,000 as we thought that applications for time to pay larger debts might be hotly contested and lead to unacceptable additional delays and expense.[40] Inability to pay large debts should, we considered, be left to bankruptcy and insolvency law.

7.24 The *SOCRU Survey of Payment Actions in the Sheriff Courts* found that most debts sued for in the sheriff courts were well below this level in 1996.[41] Of the small number of interviewees who expressed an opinion on the appropriateness of the level some thought that the limit was too high and others thought it was too low.[42] Those who favoured an

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[36] Platts, *SOCRU Overview*, chapter 6, paras 50-51.
[37] Platts, *SOCRU Overview*, chapter 6, paras 17-18.
[38] *Ibid*, chapter 6, para 6.
[39] 1987 Act, ss 1(4)(a) and 5(4)(a).
[40] Recommendation 3.6 and para 3.22.
[41] 7% above £10,000: chapter 2, para 17 and Table 10.
[42] Chapter 5, para 42.

increase thought that those with larger debts were more in need of time to pay. On the other hand the inclusion of larger debts could lead to very long repayments or very large instalments. We do not think that there is any need at the present to alter the current limit of £10,000. This does not mean that debtors with larger debts would be left completely unprotected. Courts have a common law power to "supersede extract" i.e. to order that the decree cannot be extracted and hence not enforced until a specified future date.[43] While this power cannot be used to delay enforcement of the decree for a period of years it is available to give debtors some time to realise assets free from the threat of immediate diligence. In order to elicit views we ask the following question:

> **Should the upper monetary limit on the debts in respect of which time to pay directions and time to pay orders may be made (which is currently £10,000) be increased. If so, what should the new limit be?**
>
> **(Question 7.1)**

(b) Time to pay orders to be competent earlier?

7.25 Time to pay orders were introduced to protect debtors from diligence which may be used to enforce decrees which had been granted against them. Some debtors become unable to pay the debt due under the decree in a lump sum only after the decree is granted, while others fail to take the opportunity to apply for a time to pay direction before decree was granted. An application for a time to pay order is competent only once diligence has commenced - i.e. a charge has been served, an arrestment of funds other than earnings executed or an action of adjudication raised.[44] It is for consideration whether an application should be competent as soon as the decree is granted or extracted. In our 1985 Report we expressed the view that applications should be competent only once diligence has commenced, otherwise the courts would get involved with cases that would not have proceeded to diligence.[45] There is also the practical difficulty that the granting or extracting of decrees are not events that are necessarily intimated to debtors. We do not consider that allowing earlier applications would make any substantial difference to the number of time to pay orders applied for. Debtors, their advisers and also creditors prefer to arrive at instalment arrangements for paying sums due under decrees through informal negotiations rather than formal time to pay orders.[46]

Prior default

7.26 If default has occurred on a time to pay direction and it has lapsed the debtor cannot thereafter apply for a time to pay order in respect of that debt. Nor is an application for a second time to pay order competent if a previous order lapsed through default.[47] We tend to think that this restriction should not be removed. Debtors who have failed to pay the instalments due under a previous time to pay arrangement are unlikely to keep up payments under a future time to pay order. If the level of instalments in a time to pay decree proves to be too high or the debtor's financial circumstances take a turn for the worse,

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[43] Maxwell, Court of Session Practice, p 636; Macphail, Sheriff Court Practice (1st ed) para 17.24.
[44] 1987 Act, s 5(1).
[45] Para 3.59.
[46] Platts, *SOCRU Overview*, chapter 2, paras 17-18.
[47] 1987 Act, s 5(4)(b).

the debtor is able to apply to the court for the instalments to be reduced.[48] If creditors thought that debtors could get a "second bite of the cherry" they might reject applications for time to pay orders or directions more frequently than they do at present.

Should debtors be entitled to apply for a time to pay order even though they have defaulted on a previous time to pay direction or order?

(Question 7.2)

(c) Increasing awareness of time to pay directions and orders

7.27 We do not think that lack of awareness of the availability of time to pay directions is a major reason for debtors not applying for them. The *SOCRU Study of Debtors* found that no debtor interviewed stated that they had been unaware of the ability to apply for a time to pay direction.[49] All individual debtors who receive a summons or initial writ ought also to receive a time to pay direction application form since this forms part of or accompanies those documents. The *SOCRU Study of Facilitators* did however report that some advice agencies considered that awareness amongst debtors was low[50] and even found that not all advice workers interviewed were aware of the existence of time to pay directions.[51] However, most advice workers were aware but took a positive decision to use informal negotiations rather than time to pay directions.[52]

7.28 A publicity campaign aimed at debtors and advice workers could be launched, pointing out the benefits of time to pay directions. We doubt whether this in itself would result in a substantially greater uptake, but it might have some positive effect.

7.29 Lack of awareness is much more of a problem with time to pay orders.[53] This is not surprising since none of the diligence documents served on or handed to the debtor mention time to pay orders. One way of bringing the existence of time to pay orders to the attention of debtors would be for the charge to pay to be accompanied by a short note explaining time to pay orders in simple terms and by an application form. The same documents could also be sent to debtors when their bank accounts or other funds were arrested. This however would involve the creditor in taking an extra step since in such an arrestment no document is currently served on or sent to the debtor. The cost of this extra step would have to be borne ultimately by the debtor. Explanatory notes and application forms could also accompany other steps in diligence such as a schedule of poinding which is left on the debtor's premises or the creditor's application for warrant to sell the poinded goods which is intimated to the debtor. There is however danger that too many forms and notices will confuse debtors who generally find official forms difficult to cope with. These documents could instead mention time to pay orders without explaining them or providing application forms. We ask:

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[48] 1987 Act, s 3.
[49] Platts, *SOCRU Overview*, chapter 2, para 9.
[50] Chapter 2, para 23.
[51] Fleming, *SOCRU Study of Facilitators*, chapter 3, para 17.
[52] *Ibid.*
[53] Chapter 2, para 9.

(1) Should the charge to pay served on the debtor draw the debtor's attention to his possible eligibility to apply for a time to pay order and should an application form for such an order accompany the charge?

(2) Should any other diligence documents mention time to pay orders?

(Question 7.3)

(d) Improving the forms

7.30 Debtors find the existing application forms or combined summons and application forms difficult to understand. The *SOCRU Study of Debtors* found that a large majority of debtors (80%) did not respond to the summons and one of the reasons given was that they were unsure of the response to make.[54] For example, the small claims summons offers five options:

(1) do nothing;

(2) admit the claim and pay in full;

(3) admit the claim and make written application to pay by instalments or by deferred lump sum;

(4) admit the claim and attend court to make application to pay by instalments or by deferred lump sum;

(5) deny the claim and attend court to dispute some claim or state a defence or challenge the jurisdiction of the court.[55]

Over half of the debtors who did not respond - who "did nothing" - had difficulties in understanding the language used in the summons and application forms.[56] However it was also found that the majority of debtors who did apply for a time to pay direction were positive about the forms and appeared to have understood them.[57]

7.31 Some solicitors involved with debtors took the view that many did not fully understand the application process or how to complete the form. In particular they thought that debtors were not always clear as to where they should send the form and they had difficulties in working out what they could realistically afford by way of instalments.[58] Advice workers were also found to agree that debtors did not understand the process of applying for a time to pay direction. They said debtors did not understand that if the creditor rejected the offer, the case would call in court when the sheriff would decide the future of the application.[59] The court does not inform the debtor of the creditor's rejection. To find this out the debtor must check with the court shortly before the date set for the case to be heard. The form does not alert debtors to this.[60] This ignorance prevents debtors from

[54] Chapter 2, para 86.
[55] Small Claims Rules, Form 2.
[56] Whyte, *SOCRU Study of Debtors*, chapter 2, para 87.
[57] Platts, *SOCRU Overview*, chapter 2, para 11.
[58] Fleming, *SOCRU Study of Facilitators*, chapter 4, para 13.
[59] Fleming, *SOCRU Study of Facilitators*, chapter 3, para 23.
[60] Platts, *SOCRU Overview*, chapter 5, para 14.

attending court and so improving their chances of obtaining a time to pay direction. A number of debtors thought that whether their application was successful depended wholly on the creditor and so did not apply as previous dealings with the creditor suggested their offer would not be accepted.[61] They also thought that there should be more space on the form for their income and expenditure to be listed and that the notes should give more guidance as to what to include.[62]

Should the application forms for time to pay directions and orders be redesigned after consultation with debt advice workers and others involved in debt recovery?

(Question 7.4)

(e) Attendance at court

7.32 Sheriffs become involved with time to pay directions and orders only if the creditor rejects the debtor's offer or if debtors opt to make an oral application rather than to submit a written offer. Overall it was found that about three quarters of time to pay direction offers were accepted. However, the proportion varies from small claims (greatest accepted) to ordinary causes (least accepted)[63]. About 70% of rejected offers resulted in the grant of an open decree as the sheriff refused the debtor's time to pay application.[64]

7.33 Sheriffs interviewed in the *SOCRU Study of Facilitators* considered that they needed to have a very good reason to overrule the creditor's rejection of the offer and to impose a time to pay direction on an unwilling creditor.[65] The information given on the form by the debtor about their financial situation was often insufficient to enable the sheriff to judge whether the debtor's offer was reasonable.[66] A number of the sheriffs wished that debtors would attend court (personally or by a representative) more frequently in support of their applications.[67] Only 4% of debtors were represented (by solicitors or lay representatives) at the hearing of their time to pay application and a further 27% attended in person. The vast majority (69%) however were absent.[68]

7.34 Debtors are reluctant for a number of reasons to attend court. They regard court proceedings as formal and difficult to understand. Attending court may be inconvenient and expensive if time has to be taken off work or long journeys are involved. It is for consideration whether more official help should be made available to debtors. The 1987 Act contains provisions whereby sheriff clerks may provide certain assistance to debtors in connection with their time to pay applications.[69] The sheriff clerk's role is however limited to providing the debtor with information and assisting in the completion of form, but not in advising what time to pay offer to make.

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[61] Platts, *SOCRU Overview*, chapter 2, para 12.
[62] Platts, *SOCRU Overview*, chapter 5, para 8.
[63] Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, Table 19.
[64] Fleming, *SOCRU Study of Facilitators*, chapter 7, para 22 and Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, Table 23.
[65] Fleming, *SOCRU Study of Facilitators*, chapter 7, para 9.
[66] Fleming, *SOCRU Study of Facilitators*, chapter 7, para 18.
[67] Fleming, *SOCRU Study of Facilitators*, chapter 7, para 23.
[68] Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, Table 14.
[69] S 96.

7.35 A court-based advice service was introduced into Edinburgh Sheriff Court in 1997 as an experiment. The service provides information and advice to those raising and defending small claims and summary causes. Clients are helped in connection with court procedure and advised how best to present their cases and, if defending, what offer to make. Legal advice is also given about the merits of the claim or defence. An evaluation of the service found it to be very successful and to fill a gap in the civil justice system. It had helped a large number of court users and optimised the use of court time and resources.[70] It seems likely that the presence of in-court advisors throughout Scotland would have a substantial impact on the number of time to pay directions applied for and granted. Advisors would also be able to assist debtors to make appropriate applications to the court when decrees against them were being enforced by poinding and other diligence.

Do you think that if in-court advice services modelled on the Edinburgh Sheriff Court pilot scheme were to be introduced in sheriff courts throughout Scotland, it would make time to pay directions and orders and other safeguards for debtors against poinding and sale more accessible and effective?

(Question 7.5)

(f) Debtor's application to be copied to creditor

7.36 The debtor makes an application for a time to pay direction by filling in the printed form annexed to the initial writ or forming part of the summons. The debtor may use the appropriate sections of the form to state his income, outgoings and assets. However, this information is not routinely sent out to creditors[71] and few creditors inspect the application form at court. Creditors may therefore have insufficient information to judge whether the debtor's offer is a reasonable one that ought to be accepted.

7.37 A number of creditors, solicitors and debt collectors were reported to have wished for more information as to the debtor's financial circumstances in order to help them consider time to pay applications.[72] It was suggested that the clerk of court should send out to the creditor not simply details of the debtor's offer to pay but a copy of the application form which contains both the offer and financial information furnished by the debtor. We consider that this is an excellent suggestion as it might encourage creditors to accept offers that they would otherwise reject. Accordingly we ask:

Should the clerk of court send a copy of the debtor's completed application form for a time to pay direction or order to the creditor rather than, as at present, sending only details of the debtor's offer?

(Question 7.6)

(g) Duration of time to pay directions or orders

7.38 The *SOCRU Study of Facilitators* showed that sheriffs take a number of factors into account when deciding whether to grant a time to pay application where the creditor has

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[70] Elaine Samuel, *Supporting Court Users: The Pilot In-court Advice Project in Edinburgh Sheriff Court*, Scottish Office Central Research Unit (1999).
[71] A copy of the form is only sent to unrepresented pursuers where the sheriff clerk has served the summons.
[72] Platts, *SOCRU Overview*, chapter 2, para 24.

rejected the debtor's offer. These were the size of the debt, the nature of the debtor's offer, the time it would take for the debt to be paid off and the nature and circumstances of the debt and the debtor. However, a key factor was the length of time the instalments would have to run in order for the debt to be repaid in full. Some sheriffs looked for repayment within one year, others within two years and a few considered three years at the outside.[73]

7.39 The practice of the courts in turn influences the attitude of creditors[74] and the negotiating stance of those advising debtors.[75] Creditors tend to focus on the repayment period and debtors and their advisers feel constrained to offer larger instalments than is warranted by the debtor's disposable income. A short repayment period denies the benefit of time to pay to those debtors most in need of it - those who have little free income. The practice of imposing a short repayment period may also have an effect on earnings arrestments. The sum deducted by an earnings arrestment is taken from a statutory table of deductions based on what is reasonable for an average debtor to pay.[76] The 1987 Act provides no mechanism within earnings arrestments for a debtor who finds the standard deductions oppressive to apply to the court for them to be reduced. Our 1985 Report envisaged that time to pay orders would be available for this purpose[77], but debtors have not made much use of these, perhaps because of the perception that orders involving smaller deductions and therefore longer repayment periods would not be granted. The *SOCRU Study of Debtors* reported however that many advisers had success in negotiating lower rates of deductions and all the applications for time to pay orders that had been made in this connection had been successful.[78]

7.40 Our 1985 Report contained no recommendation or discussion about time limits on time to pay directions or orders, and the 1987 Act is silent on this aspect too. We would agree that debtors should not be subjected to very long repayment periods and that creditors should not be forced to accept small payments over many years. However, we consider that the widespread informal practice of refusing time to pay applications where the repayment period would exceed a year or two years is unwarranted. It denies the benefit of time to pay to those who are in most need of it - debtors whose income is all but exhausted by normal living expenses and who can consequentially afford only modest instalments. The normal duration of a sequestration is three years, during which the bankrupt's excess income can be used to pay off the debts.[79]

Should the Debtors (Scotland) Act 1987 be amended to make it clear that the sheriff should not refuse to grant an instalment time to pay direction or order solely on the ground that the period of repayment of the debt would exceed three years?

(Question 7.7)

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[73] Chapter 7, paras 9-12.
[74] Platts, *SOCRU Overview*, chapter 2, para 23.
[75] Platts, *SOCRU Overview*, chapter 2, para 40; Fleming, *SOCRU Study of Facilitators*, chapter 3, para 18.
[76] 1987 Act, Sch 2.
[77] Para 6.78.
[78] Chapter 4, para 25.
[79] Bankruptcy (Scotland) Act 1985, s 54.

(h) Time to pay - a privilege?

7.41 The *SOCRU Study of Facilitators* found that the sheriffs interviewed considered that if the creditor had rejected the debtor's time to pay application "there should be very good reasons for them subsequently to agree to a direction or order".[80] Arguably this extra-statutory hurdle is defeating or lessening the effectiveness of time to pay arrangements which the 1987 Act introduced for the protection of debtors. We seek views on this point and ask the following question:

> **Should the courts when considering an application for a time to pay direction or order be directed to disregard the fact that the creditor has rejected the debtor's offer made in the application form?**
>
> **(Question 7.8)**

(i) A pro-active role for the courts?

7.42 The 1987 Act provided procedures which debtors could use in order to protect themselves from the harsher aspects of diligence. Among these measures are the time to pay directions and orders. However, debtors are reluctant to take steps to use the protective procedures available.[81]

7.43 We think that the initiative of applying for time to pay has to remain with the debtor, although various measures can be taken to publicise the availability of these measures and encourage debtors to use them. Any system whereby the creditor had to demonstrate to the court the debtor's ability to pay the debt in a lump sum or that diligence would not subject the debtor to undue economic hardship or personal distress would be impracticable as the creditor does not have the required information . It would also be inefficient in that it would be employed in many cases where it was unnecessary. In 1996 over a third (37%) of small claims resulted in dismissal of the claim or decree for expenses only, due largely to the debt being paid during the course of the action. The proportion is lower in ordinary and summary causes.[82] The ordinary cause and small claims figures for 1998 are much the same as those found by the research in 1996.[83] Moreover, some debtors are commercial entities being sued in connection with their business where elaborate protection would be inappropriate. Yet other debtors dispute their creditors claims, but are willing and able to pay once the court finds in the creditor's favour.

7.44 Another option is for the court to take the initiative in contacting debtors who fail to apply for time to pay directions in order to offer them advice and assistance. We think that adoption of this role would impair the impartiality of the courts. It would also be burdensome as it would involve contacting many tens of thousands of persons, many of whom, unknown to the court, would have settled with their creditors. The in-court advisory

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[80] Chapter 7, para 9.
[81] Platts, *SOCRU Overview*, chapter 5, para 51 and chapter 6, para 51.
[82] Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, Table 27.
[83] Civil Judicial Statistics (Scotland), Tables 3.7 and 3.11. No breakdown is available for summary causes.

service outlined above[85] leaves the initiative with the debtors and avoids any breach of the courts' impartiality.

7.45 We make no proposals for reform along the lines outlined above but would be interested to receive any suggestions for ways in which the courts could improve the proportion of debtors applying for time to pay directions and orders.

(j) Instalments and default

7.46 The *SOCRU Survey of Payment Actions in the Sheriff Courts* found[86] that the majority of the offers made by debtors in their time to pay applications were for monthly instalments. Overall monthly instalments were found in 49% of the applications; 32% and 13% respectively were for weekly and fortnightly instalments. Creditors were found to prefer weekly instalments.[87] The fact that the offer was in the form of monthly instalments could be a reason for rejecting it. From the creditor's point of view monthly instalments suffer from the disadvantage that the time to pay direction will not lapse until two instalments are owing when a third becomes due. If the debtor stops paying there is therefore a delay of at least two months before the decree can be enforced by diligence.

7.47 Some creditors suggested that monthly instalments should be allowed only in exceptional circumstances or where the debtor was paid monthly.[88] We are not in favour of any legislative change. Some creditors will prefer monthly instalments than proportionately smaller weekly instalments which are more costly to administer. However, the application form could warn debtors that an offer of monthly instalments might be more likely to be rejected than an equivalent weekly instalment offer.

7.48 Prior to the 1987 Act instalment decrees were available but only in summary causes. The privilege of paying by instalments lapsed if one instalment remained owing when the next became due. The 1987 Act allows debtors to be two payments in arrears before the time to pay direction or order lapses through default.[89] The change implemented a recommendation to that effect in our 1985 Report.[90] Suggestions have since been made that the present position is too generous to debtors and that the old instalment decree regime should be reinstated, especially for monthly instalments.[91] We tend to think that the present system should be retained. Debtors will have little free income so that an unexpected item of expenditure could prevent an instalment being paid on time. Missing two instalments suggests that the instalment direction is not likely to work. However, we seek views and ask the following question:

> **Should time to pay directions and orders where the debt is to be paid by monthly instalments (or longer period instalments) have different default rules from those involving weekly or fortnightly instalments?**
>
> **(Question 7.9)**

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[85] Para 5.35, above.
[86] Chapter 3, paras 19-21 and Table 17.
[87] Platts, *SOCRU Study of Commercial Creditors*, chapter 5, para 48; Fleming, *SOCRU Study of Facilitators*, chapter 4, para 15(b) (solicitors) and chapter 6, para 28 (debt collectors).
[88] Platts, *SOCRU Study of Commercial Creditors*, chapter 5, para 48.
[89] Ss 4(1) and 11(1).
[90] Recommendation 3.10(3) at para 3.45.
[91] Platts, *SOCRU Study of Commercial Creditors*, chapter 5, para 48.

7.49 Some creditors send debtors written warnings after one (or more) instalments have been missed. Others however do not.[92] The debt collection industry was reported to prefer to let time to pay directions lapse so that creditors would then have an open decree and thus a free hand to move to enforcement. It is for consideration whether a warning letter should be mandatory and if so after how many missed instalments it should be issued. A written warning would encourage some debtors to ensure that no further instalments were missed and would lessen the use of diligence. On the other hand, adding this extra step would increase the creditor's cost of recovery and add to the complexity of the legislation. Our tentative view at this stage is that the extra procedure would not produce benefits outweighing the disadvantages. In order to elicit comments we ask:

Should creditors be required to send a letter to debtors who fall into arrears with their instalments under a time to pay direction or order warning them of the consequences of default?

(Question 7.10)

(k) Intimation of decree with direction

7.50 When a decree is granted with a time to pay direction attached the creditor has to intimate an extract of the decree to the debtor.[93] The first instalment becomes payable a certain number of days (specified in the direction) after intimation. The *SOCRU Study of Commercial Creditors*[94] reported that some creditors considered that the court rather than the creditor should intimate. This they said would cut down the interval between decree being granted and the first instalment becoming due, and creditors would not have to bear the expense and administration of intimation. Also it was felt that the time to pay direction would be regarded as having more weight by debtors if it was received from the court. We think that there is some force in these points, particularly the last one.

7.51 In our 1985 Report we placed the duty to intimate on the creditor rather than the clerk of court for two reasons.[95] First, creditors will almost always be legally represented and second that the creditor needs to know the precise date of intimation to calculate when default occurs.[96] The fact that most pursuers have legal representation would seem to be neutral. Simply because creditors have solicitors who are familiar with intimation is not a reason for requiring them to do it. Clerks of court also intimate other documents to various people involved in legal proceedings. Moreover, although legal representation of pursuers is almost universal in ordinary and summary causes, some 5% of small claims pursuers act for themselves or are represented by a lay person.[97] Unrepresented pursuers would have to be informed of the need to obtain an extract and intimate it. The creditor's need to know the precise date of intimation can be achieved whoever intimates. If clerks of court intimate then they could be required to send to the creditor an extract of the decree endorsed with a note of when it was intimated to the debtor.[98] The main disadvantage of intimation by clerks

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[92] Fleming, *SOCRU Study of Facilitators*, chapter 6, paras 31-32.
[93] 1987 Act, s 1(1)(a).
[94] Chapter 5, para 47.
[95] Recommendation 3.10(1), para 3.45.
[96] Para 3.44.
[97] Fleming and Platts, *SOCRU Survey of Payment Actions in the Sheriff Courts*, chapter 3, paras 7-8 and Table 13a.
[98] This is done for time to pay orders, 1987 Act, s 7(4). In time to pay orders the creditor has no interest to intimate so this has to be done by the court.

of court is that it would increase their work load, although the court fees could be increased to take account of this. Against this has to be set the possible increased efficiency of time to pay directions in that debtors may default less. We ask for views on the following question:

Should intimation to the debtor of an extract decree containing a time to pay direction be made by the clerk of court rather than (as at present) by the creditor?

(Question 7.11)

(l) Direct debits

7.52 Direct debits are a very convenient way of making regular payments from a bank account. It is for consideration whether they should form part of time to pay arrangements. One possible scheme would be for the debtor to state on the form of application for a time to pay direction (or order) whether he has a bank account and if so whether he was willing to sign a direct debit mandate for the instalments being offered. Unwillingness to sign a mandate would be a factor that the creditor and subsequently the sheriff could take into account in deciding whether to refuse the application. We ask:

Should the sheriff be given an express power to grant an application for a time to pay direction or order on the condition that the instalments would be deducted by the debtor's bank under a direct debit scheme?

(Question 7.12)

C. DEBT ARRANGEMENT SCHEMES

(1) The problem of multiple indebtedness

7.53 Default debts often do not come singly. The *OPCS* survey of defenders in 1978[99] found that 15% of defenders in court actions had more than one debt *enforced* against them, less than might be supposed but many more defenders may have other debts at earlier stages of recovery. At the stage of post-decree diligence, the percentage is likely to be much higher.[100] The experience of money advice workers is that debtors subject to diligence often have multiple debts.

(2) Debt arrangement schemes a possible solution

7.54 In our 1985 Report we remarked:[101]

> "The research suggests that procedures are needed to enable multiple debtors to gain time to pay their debts free from the threat of diligence. The 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. In Chapter 2, we saw that particular steps in diligence frequently operate as a catalyst for an instalment settlement. Where the debtor has defaulted on debts due to several creditors, he may find it difficult to

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[99] J Gregory and J Munk, *Survey of Defenders in Debt Actions in Scotland* Social Survey Division, Office of Population Censuses and Surveys (1981) Section 4.2 found that as few as 15% of defenders said that court action was being taken, or likely to be taken, over at least one other debt. However 74% were having difficulty with other bills.

[100] The *SOCRU* debtors survey of 1991/92 examined responses to enforcement of one debt not multiple debt but incidentally found evidence of multiple debt problems. See Whyte, *SOCRU Study of Debtors* p 86, para 19.

[101] Para 4.6.

enter into payment arrangements with all his creditors. Frequently, for any of a variety of possible reasons, he may not respond to invitations by his creditors to make an instalment settlement. If he simply does nothing, then his total indebtedness may be increased considerably since his several creditors may initiate separate court actions, and instruct separate diligences, for the expenses of which the debtor will ultimately be liable."

7.55 Our 1985 report therefore 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. In making this recommendation we paid regard to the existence of county court administration orders in England and Wales,[102] the Cork Report's recommendations (never implemented) to replace such orders by debt arrangement orders,[103] and pressure within Scotland from various quarters including the Royal Commission on *Legal Services in Scotland*.[104] The recommendations focussed 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 directions and orders 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. A debt arrangement scheme would have been not merely a "diligence-stopper" but also in the nature of an insolvency process resembling, in this respect at least, a sequestration under bankruptcy legislation. It would however have operated as a sequestration only of income over a three year period and not of assets. Debt arrangement schemes bear some resemblance to administration orders for financially embarrassed companies.[105]

7.56 In more detail, debt arrangement schemes would have had the following main features:

(a) The overall object of the scheme was to allow a debtor an extension of time to pay his debts in reasonable instalments over a maximum prescribed period, normally three years with possible extension to five years in all, during which the debtor's compliance with the scheme would be supervised by an administrator appointed by the sheriff.

(b) All creditors in existing and future debts were to be generally precluded from doing diligence or petitioning for sequestration while the scheme operated. Existing diligences were to be recalled unless they had reached an advanced stage in which case the sums disbursed to the creditor would be reduced by an amount equal to the net proceeds of the diligence.

(c) The scheme containing the debtor's proposals for payment of all his civil debts would have been submitted in draft to the creditors and would only have come into operation on being confirmed by the sheriff after hearing any objections by creditors.

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[102] In England and Wales, 8,280 administration orders were granted by county courts in 1998, 20% fewer than in 1997. See *Judicial Statistics Annual Report 1998*, Cm 4371, p 45.

[103] Report of the Review Committee on *Insolvency Law and Practice* (1982) Cmnd 8558 (chairman: Sir Kenneth Cork) chapter 6.

[104] (1980) Cmnd 7846 (chairman the Rt Hon Lord Hughes) paras 12.7 and 12.8.

[105] Insolvency Act 1986, Part II.

(d) During the currency of the scheme, the administrator (who was normally to be the sheriff clerk or a member of his staff) would collect payments due by the debtor under the scheme and disburse them to the creditors who would all rank *pari passu* (rateably) on disbursements, with special provision being made for contingent and other creditors included later during the life of the scheme.

(e) The sheriff would have had power to order deductions of appropriate amounts from the debtor's earnings to be made by the employer and paid to the administrator for disbursement to the creditors.

(f) The scheme would have provided either for payment in full of the debts or in appropriate cases for a composition of less than 100p in the pound. The debtor would only have obtained a discharge of debts at the end of the scheme if he had complied with it.

The main differences from sequestrations would have been that the very complicated rules for ranking preferred and secured creditors in bankruptcy would not apply and that the debtor would not be divested of his assets, though he might have been required by the scheme to sell specified assets, the proceeds of which would have been distributed to the creditors by the administrator.

7.57 Our recommendations were not accepted by the Government. Attempts to amend the Debtors (Scotland) Bill 1987 so as to introduce such schemes in Scots law were unsuccessful in both Houses of the United Kingdom Parliament during the debates on that Bill.[106] and again in debates in the House of Lords on the Bankruptcy (Scotland) Bill 1992-93.[107]

7.58 These debates disclosed a number of the reasons for the rejection of debt arrangement schemes. First, pragmatic voluntary arrangements could be made by money advice workers and debt counsellors without reference to statute and can operate extremely well. There was no need to substitute a statutory framework for a voluntary framework. Second, in some cases where the debtor has assets, voluntary trust deeds could be used. Third, there was no need for a process so similar to sequestration in bankruptcy. Fourth, the detailed provisions recommended in Part 4 of our 1985 Report, were too complicated. Fifth, the schemes would prejudice future suppliers and customers of the debtor who would not benefit from the scheme and yet would not be entitled to enforce their debts during the currency of the scheme. Sixth, experience in other legal systems suggested that few schemes would be successful; debtors usually failed to keep up payments. The expected high failure rate would make debt arrangement schemes an additional administrative burden which would ultimately offer no long-term comfort to the debtor. Seventh, the schemes would only be set up at a fairly late stage in the debtor's indebtedness and only if he voluntarily applied for a scheme. Multiple indebtedness should be tackled at a much earlier stage through eg debt counselling. Eighth, debt arrange ment schemes would have resource implications for the public purse eg for court staff. The taxpayer would require to meet the extra cost and the expected low success rate of schemes would probably not justify the

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[106] *Hansard*, *Parl. Deb*., HL, 1986-87, vol 484, cols. 340 - 353 (motion defeated); *ibid*., HC, 1986-87, Standing Committees, vol IV, 1st Scot.,24 March 1987, cols 63 - 66 (motion by leave withdrawn).

[107] In the year 1998/9, over 2,000 unpaid volunteers donated over 525,000 hours to the Citizens Advice Bureaux, which is equivalent to almost 300 full time staff: *CAB Service Facts and Figures* (1999).

additional expenditure. Nor would this extra cost have secured savings in other areas eg by reducing the volume of sequestrations because only in a few cases would such schemes be a viable alternative to sequestration. Ninth, such schemes were not the most enthusiastically recommended proposal in our 1985 Report.

7.59 The *SOCRU Overview* of research on 1991/2 data commented:[108]

> "The incidence of multiple indebtedness also persists. Without the debt arrangement scheme originally proposed by the SLC ..., the 1987 Act did not specifically address the special problem of multiple indebtedness. However, the existence of other debts, not necessarily at the enforcement stage, or even the decree stage, was mentioned by a number of debtors who struggled to cope with deductions made as part of an earnings arrestment or with instalments under a time to pay direction. And dealing with multiple debt situations was a common experience for advice workers. The procedures for time to pay directions and orders do not preclude taking account of other debts, but neither are the procedures geared to this situation. It is unlikely that creditors would make much allowance for debts other than those owing to themselves, and sheriffs do not always consider such wider circumstances in their deliberations. Having said that, it is not clear that the debt arrangement scheme as proposed by the SLC would have been wholly successful in dealing with multiple indebtedness given that it very much depended on debtors taking the initiative in bringing their situation to the attention of the court, even if this was through an advice worker. Nevertheless, at least the SLC scheme acknowledged the existence of the problem and the need to deal with this in a structured way rather than leaving it to the discretion of amenable creditors, interventionist sheriffs and the efforts of individual advice workers."

7.60 We found the arguments for and against such schemes to be fairly evenly balanced. This is the kind of matter which is pre-eminently suitable for determination by Government, having regard inter alia to the implications for court resources and the difficult cost-benefit assessments. On the other hand, we are aware that Citizens Advice Scotland, whose views on this matter carry great weight, support the introduction of debt arrangement schemes and over the years have made repeated representations to the competent authorities for their introduction. We should be grateful for views.

(3) Informal arrangements brokered by money advice workers

7.61 The absence of formal debt arrangement schemes binding creditors means that the heavy burden of brokering arrangements for the payment by a single debtor of multiple debts owed to several creditors continues to be borne mainly by money advice workers in Citizens Advice Bureaux and local Money Advice Projects and debt counsellors in local authority trading standards or social work departments. Scottish Citizens Advice Bureaux, for example, dealt with over 81,000 consumer issues, mainly consumer debt issues, in 1998/9.[109]

7.62 This network of money advice and debt counselling is largely voluntary.[110] Its role in brokering debt arrangements for multiple debtors has been relied on by central government in Westminster Parliamentary debates as a principal ground for rejecting debt arrangement schemes. If the competent authorities continue to rely on this ground, then they may wish to consider whether or how far such reliance carries with it a responsibility to ensure the

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[108] Platts, *SOCRU Overview*, chapter 6, para 16.
[109] *CAB Service Facts and Figures* (1999).
[110] In the year 1998/9, over 2,000 unpaid volunteers donated over 525,000 hours to the Citizens Advice Bureaux, which is equivalent to almost 300 full time staff: *CAB Service Facts and Figures* (1999).

provision of adequate funding to enable the money advice workers to continue to fulfil that role.[111]

7.63 SOCRU research suggests that the reforms of the 1987 Act to poinding and sale have encouraged creditors to accede to informal debt arrangement schemes brokered by money advice workers.[112] The existence of debt arrangement schemes would provide an even greater incentive to creditors to accede to informal arrangements.

7.64 Modifications to debt arrangement schemes could be explored. It may be for consideration whether debt arrangement schemes could, for example, be detached from the sheriff court and operated by approved offices in the network of voluntary agencies, especially Citizens Advice Bureaux. Other persons (such as officers of court and local authority debt counsellors) might also be willing to undertake this difficult function.

Question

7.65

Should debt arrangement schemes be introduced in order to protect debtors in multiple indebtedness from poinding and warrant sale and other diligence?

(Question 7.13)

[111] In 1998/9 the funding of CABx was £3.9m of which £2.3m came from local authorities. Compared with the previous year, 45% of CABx had an increase in funding, 45% a decrease and 10% the same level: *CAB Service Facts and Figures* (1999).
[112] Platts, *SOCRU Overview*, chapter 6, para 6.

PART 8: SUMMARY OF QUESTIONS

THE MAIN OPTIONS FOR REFORM (PART 3)

The roles of poindings and warrant sale

3.1 Do you agree that, in the system of enforcement of debts by diligence, the use or threatened use of charge, poinding and warrant sale performs the following roles namely:

(1) a means of attaching and realising valuable non-exempt moveable goods in the debtor's possession ("the realisation function");

(2) in the absence of knowledge of arrestable assets or earnings, a means of identifying non-exempt goods located at the debtor's home or business address with a view to poinding ("the identification function");

(3) a means of preventing debtors from evading their creditors' legally constituted claims by converting their assets into corporeal moveable property ("the deterrence function"); and

(4) as a spur to payment without the final stage of a warrant sale being reached ("the spur to payment function")?

(Para 3.2)

The effect of abolition without replacement

3.2 (1) What would be the effect of abolishing poinding and warrant sale without adequate replacement on :

(a) the enforcement of ordinary debts; and

(b) the enforcement of tax and rates arrears?

(2) If you think that abolition would or might have some adverse effect on the ability of unsecured creditors to enforce their debts by diligence, would the effect be (a) very serious; (b) serious; (c) moderate; or (d) negligible?

(Para 3.2)

Is no legislative change an option?

3.3 Does the present law and practice of poinding and sale, as reformed by the 1987 Act, strike an equitable balance between the interests of creditors and debtors so that legislative reform is unnecessary?

If not, what should be the primary aim of reform: the improvement of debtor protection or of effective enforcement?

(Para 3.8)

Existing creditors' diligences as an alternative to poinding and sale?

3.4 Do you agree that, if poinding and sale were abolished, none of the other existing diligences could be used, or could be readily adapted to be used, as a means of identifying and attaching the moveable property of debtors in their possession?

(Para 3.13)

Is there any more socially acceptable and no less effective alternative to poinding and sale in its role as a spur to payment?

3.5 (1) Leaving aside the special case of civil imprisonment for arrears of aliment, do you agree that civil imprisonment should not be reintroduced as a general diligence for enforcing ordinary debts or taxes?

(2) Do you agree that none of the other existing diligences can replace poinding and sale as a spur to payment against debtors whose only attachable assets are goods in their possession or whose arrestable funds or earnings are unknown to the creditor?

(3) If poinding and sale were abolished would any other sanction not mentioned above (whether a diligence or not) be a no less effective and more socially acceptable alternative to poinding and warrant sale in its role as a spur to payment?

(Para 3.26)

Use of sequestration or liquidation in place of poinding and sale?

3.6 (1) If poinding and sale were abolished, would:

(a) sequestration under the Bankruptcy (Scotland) Act 1985 or personal bankruptcy proceedings in another country ; or

(b) where the debtor is a company, a compulsory winding up by the court in Scotland or in another country,

be a satisfactory alternative to poinding and warrant sale from the standpoint of effective enforcement and debtor protection or otherwise? Please give reasons for your opinion.

(2) If in your opinion sequestration would be a satisfactory alternative to poinding and sale, should any amendment be made to the provision in section 5(2B)(a) of the Bankruptcy (Scotland) Act 1985 under which a creditor may petition for the debtor's sequestration only if the total amount of the debts (including interest) due to all creditors is not less than £1,500?

(Para 3.35)

Abolition or retention of poinding of goods in non-residential premises?

3.7 Do you agree that the abolition of poinding and sale of goods in non-residential premises would not be justified on grounds of effective enforcement or debtor protection or otherwise?

(Para 3.44)

Poinding of moveable goods in dwellinghouses: abolition or retention and reform?

3.8 (1) Should poinding and warrant sale of goods in residential premises:

(a) be abolished; or

(b) be retained subject to possible reforms on the lines considered in Parts 4 to 7 below?

(2) Should the same solution apply to poinding and sale:

(a) for ordinary debts under Part II of the 1987 Act; and

(b) for arrears of central and local government taxes and non-domestic rates under Schedule 5 to the 1987 Act (poinding and sale under summary warrants)?

If there should be a difference what should it be?

Please give the main reasons for your opinion.

(Para 3.55)

Strengthening creditors' remedies if poinding and sale abolished or gravely weakened?

3.9 If poinding and sale were abolished, or made much less effective by reforms promoting debtor protection, do you consider that the principle of effective enforcement would require that creditors' remedies should be strengthened for example by :

(a) the introduction of means enquiries in aid of diligence as discussed in Part 6 below;

(b) the introduction of land attachment (replacing adjudication for debt as proposed in our Discussion Paper No 107) affecting debtors' immoveable property including possibly their dwellinghouses subject to safeguards;

(c) the introduction of money attachment affecting money in the debtor's possession (as proposed in our Discussion Paper No 108), including money in debtors' dwellinghouses, subject to exemptions of money required for the needs of debtors and their families for a suitable period; or

(d) allowing an ordinary creditor to obtain an order for deduction at source of a prescribed portion of income support or jobseeker's allowance?

(Para 3.67)

REFORMS OF POINDING AND WARRANT SALE (PART 4)

Exemptions from poinding

4.1 (1) Do you agree that the range of articles of moveable property exempt from poinding under the Debtors (Scotland) Act 1987, section 16 and Schedule 5, paragraph 1, (especially those located in a dwellinghouse) should not be decreased?

(2) Should the range of exempt goods be extended to cover the following goods located in a dwelling house:

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?

(3) If the range of articles in debtors' dwellinghouses exempt from poinding is to be extended, what other articles (if any) should be added to the list?

(Para 4.25)

Exemption only if reasonably required?

4.2 Should it continue to be a requirement in the Debtors (Scotland) Act 1987, section 16 and Schedule 5, paragraph 1 that, to be exempt from poinding, articles in a dwellinghouse must be reasonably required for use in the dwellinghouse of the person residing there or a member of his household?

(Para 4.28)

Prohibition of sale where likely proceeds of sale insufficient

4.3 Should the sheriff refuse warrant of sale, or recall a poinding, if the likely proceeds of sale do not exceed:

(a) the likely expenses of sale (the present position),

(b) the likely expenses of sale and the expenses of all the previous steps in the diligence, or

(c) the likely expenses of sale and the expenses of all the previous steps in the diligence and some proportion of, or all of, the sum due under the decree, and if a proportion what should the proportion be?

(Para 4.36)

4.4 (1) Should creditors be required to state in their form of application for warrant of sale the sum representing the proportion of the likely expenses of the diligence and the debt that in terms of Question 4.3 above must be covered by the proceeds of sale?

(2) Should sheriffs be required to take the likely proceeds of sale as the total appraised value of the poinded goods, unless satisfied that a higher price is likely to be obtained?

(Para 4.37)

Prohibition of poinding where likely proceeds of sale insufficient

4.5 Should a poinding be incompetent if the appraised value of the poindable goods does not exceed the officer's estimate of the sum in terms of Question 4.3?

(Para 4.42)

Other grounds of recall of a poinding or refusal of warrant of sale

4.6 Should it continue to be a ground for recall of a poinding or refusal to grant warrant of sale that:

(a) the articles are in aggregate substantially undervalued,

(b) a sale of the articles would be unduly harsh, or

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

If not, what amendments should be made?

(Para 4.44)

4.7 Should the form of application for recall of a poinding detail the grounds for recall as set out in section 24 of the Debtors (Scotland) Act?

(Para 4.45)

Replacing sheriff's power to recall a poinding or refuse warrant of sale by a duty

4.8 Should sections 24(3) and 30(2) of the Debtors (Scotland) Act 1987 be amended so that the sheriff would have a duty to recall a poinding or refuse to grant warrant of sale if satisfied that one of the grounds applies?

(Para 4.46)

Special warrant for poinding of goods in dwellinghouses?

4.9 Should a special warrant be required for the poinding of articles of moveable property located within a dwellinghouse?

(Para 4.51)

Power of entry for execution of poinding in dwellinghouses

4.10 (1) Is the present law on powers of entry to debtors' premises satisfactory?

(2) If not, what amendments should be made?

(Para 4.55)

Simplifying poinding procedures?

4.11 Should any steps in the diligence of poinding and warrant sale be no longer required and if so which?

(Para 4.63)

Reducing the level of fees?

4.12 Should any of the fees charged by officers of court in connection with poindings and warrant sales be altered and if so in what way?

(Para 4.64)

A public subsidy?

4.13 Should part or all of the expenses involved in a poinding and sale against an individual debtor be paid for out of public funds?

(Para 4.67)

POINDING AND WARRANT SALE UNDER SUMMARY WARRANTS (PART 5)

Summary warrant poinding procedure to be the same as ordinary poinding procedure?

5.1 Do you agree that the poinding and warrant sale procedure used to enforce court decrees should not apply to summary warrant poinding and sale?

(Para 5.14)

Time to pay orders

5.2 Should a debtor be entitled to apply for a time to pay order where the debt is arrears of central or local government taxes due under a decree or summary warrant?

(Para 5.17)

Exemptions from poinding

5.3 Should the articles exempt from poinding in pursuance of a summary warrant be the same as those exempt from poinding in execution of a decree?

(Para 5.19)

Preventing unjustifiable poindings and sales

5.4 Should an officer of court be permitted to poind or sell goods in pursuance of a summary warrant if their appraised value does not exceed the sum representing the proportion of the likely expenses of the diligence and the debt that, in terms of Questions 4.3 and 4.5 above, must be covered by the appraised value?

(Para 5.21)

DIVERSION OF ENFORCEMENT FROM POINDING AND SALE: MEANS ENQUIRIES AND INFORMATION GATHERING (PART 6)

Means enquiries in aid of diligence

6.1 (1) Should the creditor be entitled to require the debtor to submit to a means enquiry in aid of diligence?

(2) If such enquiries were to be introduced, what sanctions should be imposed where a debtor cited to appear fails to turn up for oral examination by the court?

(Para 6.13)

Failure to give information to be a criminal offence?

6.2 Should the failure (without reasonable excuse) of a council tax defaulter to provide information to the local authority be a criminal offence?

(Para 6.19)

Tracking debtors subject to earnings arrestments to new jobs

6.3 (1) Should a duty be imposed on

(a) a debtor subject to an earnings arrestment or current maintenance arrestment to notify the creditor or officer of court; and

(b) a debtor subject to a conjoined arrestment order to notify the sheriff clerk in writing within 7 days of each occasion on which he leaves any employment or becomes employed or re-employed?

(2) Is it necessary to impose a duty on an employer operating an earnings arrestment, current maintenance arrestment or conjoined arrestment order, to notify the creditor, officer of court or (as the case may be) the sheriff clerk of any termination of employment?

(3) If so, what sanction should be imposed for breach of these duties?

(Para 6.23)

Disclosure by banks of sum arrested in execution

6.4 Do you agree with recommendation 16 in our Report on *Statutory Fees for Arrestees* to the effect that in an arrestment in execution (including an arrestment on the dependence converted by decree into an arrestment in execution) the arrestee should be bound to disclose to the arrester free of charge the existence or extent of any funds and other moveable property attached by the arrestment, and that such disclosure should not be treated as a breach of a duty of confidentiality owed by the arrestee to the debtor with respect to those funds or property?

(Para 6.26)

Obtaining information from third parties

6.5 (1) Should the court have power, on the creditor's application, to order a third party to furnish to the creditor or the court information relating to the debtor's attachable assets for the purpose of facilitating diligence against those assets? If so, what restrictions and safeguards should be imposed to protect debtors and third parties?

(2) Should the creditor be entitled, by statutory notice, to require a third party to furnish such information to the creditor? If so, what restrictions and safeguards should be imposed to protect debtors and third parties?

(3) Should information be obtainable from:

(a) banks, building societies and other authorised deposit-taking institutions;

(b) the Department of Social Security;

(c) the Driver and Vehicle Licensing Agency; or

(d) the Inland Revenue?

Are there any other third parties from whom information should be obtainable?

(Para 6.34)

Tracking debtors subject to earnings arrestments to new jobs through PAYE system

6.6 Are the difficulties presented to creditors using earnings arrestments by debtors changing jobs sufficient to justify a system for tracking debtors subject to earnings arrestments to new jobs through the PAYE system?

(Para 6.37)

DILIGENCE STOPPERS: TIME TO PAY DIRECTIONS AND ORDERS AND DEBT ARRANGEMENT SCHEMES (PART 7)

Increasing the monetary limit

7.1 Should the upper monetary limit on the debts in respect of which time to pay directions and time to pay orders may be made (which is currently £10,000) be increased? If so, what should the new limit be?

(Para 7.24)

Prior default

7.2 Should debtors be entitled to apply for a time to pay order even though they have defaulted on a previous time to pay direction or order?

(Para 7.25)

Increasing awareness of time to pay orders

7.3 (1) Should the charge to pay served on the debtor draw the debtor's attention to his possible eligibility to apply for a time to pay order and should an application form for such an order accompany the charge?

(2) Should any other diligence documents mention time to pay orders?

(Para 7.29)

Improving the forms

7.4 Should the application forms for time to pay directions and orders be redesigned after consultation with debt advice workers and others involved in debt recovery?

(Para 7.31)

In-court advice services

7.5 Do you think that if in-court advice services modelled on the Edinburgh Sheriff Court pilot scheme were to be introduced in sheriff courts throughout Scotland, it would make time to pay directions and orders and other safeguards for debtors against poinding and sale more accessible and effective?

(Para 7.35)

Debtor's application to be copied to creditor

7.6 Should the clerk of court send a copy of the debtor's completed application form for a time to pay direction or order to the creditor rather than, as at present, sending only details of the debtor's offer?

(Para 7.37)

Duration of time to pay directions or orders

7.7 Should the Debtors (Scotland) Act 1987 be amended to the effect that the sheriff should not refuse to grant an instalment time to pay direction or order solely on the ground that the period of repayment of the debt would exceed one year?

(Para 7.40)

Time to pay – a privilege?

7.8 Should the courts when considering an application for a time to pay direction or order be directed to disregard the fact that the creditor has rejected the debtor's offer made in the application form?

(Para 7.41)

Instalments and default

7.9 Should time to pay direction and orders where the debt is to be paid by monthly instalments (or longer period instalments) have different default rules from those involving weekly or fortnightly instalments?

(Para 7.48)

7.10 Should creditors be required to send a letter to debtors who fall into arrears with their instalments under a time to pay direction or order warning them of the consequences of default?

(Para 7.49)

Intimation of decree with time to pay direction

7.11 Should intimation to the debtor of an extract decree containing a time to pay direction be made by the clerk of court rather than (as at present) by the creditor?

(Para 7.51)

Direct debits

7.12 Should the sheriff be given an express power to grant an application for a time to pay direction or order on the condition that the instalments would be deducted by the debtor's bank under a direct debit scheme?

(Para 7.52)

Debt arrangement schemes

7.13 Should debt arrangement schemes be introduced in order to protect debtors in multiple indebtedness from poinding and warrant sale and other diligence?

(Para 7.64)

APPENDIX
COMPARATIVE LAW

(1) ATTACHMENT OF MOVEABLES IN EUROPE

AUSTRIA

1. Attachment and sale is currently the primary method of execution over moveable property in Austria.[1] Goods attached by the enforcement officer are left with the debtor and the creditor must act to realise the objects, usually by public sale, within one year or the judicial execution will lapse. Money and bills of exchange may be seized by the enforcement officers and taken away on the day of the attachment.[2]
2. Exemptions from attachment include those things necessary for maintenance, specifically clothing and certain furniture, and tools of trade.[3] In addition there are protective clauses against unfairly harsh claims[4] and for the protection of the debtor against attachments in excess of the value of the debt.[5]

BELGIUM

3. Under Belgian law a debtor's tangible and moveable assets may be seized in execution of a money judgment.[6] At least one day prior to the seizure, the enforcement officer must formally request payment from the debtor for the final time. On the day of the seizure a enforcement officer may request the assistance of the police and a locksmith if entry is refused or access to the premises is not possible. Upon entry the enforcement officer draws up an inventory of the seized goods. The debtor will remain in possession of those goods but disposal or destruction of them is a criminal offence. A creditor may request a judge[7] to order the removal of the seized goods if there is a serious risk of the goods being disposed of, damaged or replaced with cheaper copies.[8]
4. The Code of Civil Procedure contains a number of specific exemptions from seizure. These include personal clothing, bedding and dishes. Sale of the seized goods is organised by the enforcement officer and is by public auction. The goods are sold until the proceeds cover the debt plus costs. Any remaining goods and surplus are returned to the debtor.

DENMARK

5. A creditor in Denmark may request enforcement of a demand for payment from the court.[9] As a general rule any of the debtor's moveable property may then be subject to seizure and sale by auction. However a number of exemptions from seizure are provided under Danish law.[10]
6. Once the execution has taken place, the Bailiff's court will refer the case to an auctioneer, who is appointed by the Ministry of Justice, for a compulsory auction. The auction may only take place once all appeals have been heard and decided, or until the period for lodging an appeal has expired. If an appeal has been lodged the auction must be delayed pending its outcome.[11]

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[1] *Exekutionsordnung* (Execution Code of 1895), Art. 249. See P Kaye (ed), *Methods of Execution of Orders and Judgments in Europe* (1996), p. 16.
[2] *Ibid*., arts 261 and 296. See Kaye, p.16.
[3] See *Exekutionsordnung*, arts 250-252 and *Einführungsgesetz zur Exekutionsordnung*, arts VIII, X and XI. See Kaye, p. 16.
[4] *Exekutionsordnung*, art. 250 *et seq*.
[5] *Ibid*., arts 27 and 41(2).
[6] See Kaye, p.33.
[7] The "Judge of Seizures", see Kaye, p.34.
[8] *Ibid*.
[9] See Kaye, p.44.
[10] See Part 4, para 4.11 (above).
[11] *Ibid*. § 542.

FINLAND

7. Judgment debt enforcement in Finland takes a very specific form in that goods are generally seized in a particular order.[12] Firstly the court officer will seize money, if it can be found. Secondly he will attach moveable property. Thirdly he will seize immoveable property, and finally he will take other goods.[13] Usually this last will take the form of property that is difficult to realise or whose ownership is disputed.[14] As in Denmark the debtor has a right to present certain items for attachment. However this right is limited.[15]
8. As in most systems there are a number of exemptions from seizure in order to protect the debtor. These include the usual domestic appliances; goods necessary for work or study; sums of money necessary for the debtor's needs or the upkeep of his family for one month, if he has no income; and medical aids in case of sickness or accident.[16]
9. Property that has been attached is sold at a compulsory auction. Prior to this it may be left in the physical possession of the debtor, marked by the officer as attached. Gold, silver and listed securities may be sold by other means, provided that they realise their full worth.

FRANCE

10. The attachment of corporeal moveable property in satisfaction of a judgment debt is known as a *saisie-vente* (seizure and sale).[17] Eight days prior to the seizure a *huissier* must serve notice on the debtor (known as a *commandement*) that a *saisie* will be carried out if the debt is not satisfied in the interim. After the eight-day period has elapsed the *huissier* may enter the debtor's premises and seize his goods. The *huissier* may seek assistance from the public authorities if he encounters problems when entering the debtor's premises.
11. Once seized, the goods may be left in the physical possession of the debtor or with a third party. Whoever has possession of the goods has a legal duty to keep the seized goods and ensure that they are not diverted.
12. An auction sale usually follows the seizure, however in France a debtor may offer to sell the goods himself to satisfy the debt.[18] The offer is made to the creditor who may accept or reject it. As in most countries, there are some exemptions from seizure which are contained in a law of 9th July 1991.[19]

GERMANY

13. Enforcement against the moveable property of a debtor[20] in Germany must be done in accordance with the Code of Civil Procedure. Upon receipt of a judicially enforceable document, a creditor may apply to the enforcement officer for commencement of enforcement proceedings.[21] During these proceedings the enforcement officer may place an attachment order on the property of the debtor. The placing of the enforcement officer's stamp on the property removes it from the debtor's disposal and, although he may be allowed to retain physical possession of it at the enforcement officer's discretion, he may not continue to use the object.
14. After the goods are attached, the creditor may proceed to the sale of the goods without further application.[22] Sale will be by public auction, the date of which must be publicly advertised[23], unless the creditor believes more money may be realised by another method of disposal, in which case he may apply to the court for that method to be used.[24]
15 Exemptions from attachment are contained in the Code of Civil Procedure[25] and are aimed at maintaining a modest standard of living both professionally and at home.[26]

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[12] Enforcement is regulated by the Enforcement Act (*Ulosottolaki*).
[13] Our translation from UIHJ, *16ème Congres*, at p. 25.
[14] Kaye, p. 77.
[15] *Ibid*.
[16] Our translation from UIHJ, *16ème Congres*, p.25. See Part 4, para 4.11 (above) for further discussion.
[17] See generally, Kaye, p. 97.
[18] It was felt that this provision "humanised" the process. See UIHJ, *16ème Congres*, p. 26.
[19] *Loi No 91-650 du 9 Juillet 1991*, as reproduced in the *Nouveau Code de Procédure Civile* (Dalloz, 1993); for discussion of these exemptions see Part 4, para 4.10, above.
[20] Known in German as *Pfändung*.
[21] See Kaye, p. 115.
[22] Code of Civil Procedure, § 804, see further, Kaye, p.115. This appears somewhat akin to summary warrant procedure in Scotland.
[23] *Ibid*. § 816.
[24] *Ibid*. § 825; the granting of the application is at the discretion of the court, see Kaye, p. 116.
[25] At § 811.
[26] See Part 4, para 4.10 (above).

GREECE

16 The creditor initiates the enforcement procedure after he has received a judgment in his favour, by sending a formal letter to the debtor demanding payment in satisfaction of the judgment. If there is no reply, the creditor may give the enforcement officer an order to proceed with execution.

17 The code of civil procedure allows all moveable property in the debtor's possession to be seized, with the exception of those items which are indispensable for leading his life or for continuing his profession or trade.[27] The enforcement officer will remove only those items which are likely to yield enough to satisfy the debt.[28] After seizure the enforcement officer values the goods and prepares a report, which he submits to the debtor. Within 15 days from that point a 'schedule of auction' must be prepared by the enforcement officer which contains all pertinent information regarding the auction, notably the description of the goods, the name of the auction's clerk, the venue and date of the auction and the offering prices.[29]

18 All auctions must take place before a notary public a minimum of 15 days after the execution was completed. The debtor may not bid at the auction and if goods remain unsold they may be bought by the creditor at the offering price at the creditors request, if no such request is made then another auction will be arranged within 40 days.[30]

ICELAND

19 In general Icelandic law allows for any of a debtor's moveable property, including cash, to be seized in satisfaction of a judgment debt. There are, however, exceptions to the general rule. Thus money which is required for the maintenance of the debtor or his family in the short term may not be taken.[31] Furthermore, necessary furniture and household appliances may not be seized and nor can a debtor's future wages or salary.[32] Moreover, if a debtor does not hold sufficient valuables for satisfying the creditors claim, the action for enforcement will fail.

20 Following attachment of the goods, and provided the debtor does not pay the debt in the interim, the creditor may enforce the debt by sale of the attached property. Such a sale is regulated by Iceland's Forced Sales Act 1991, whereby the creditor may apply for a forced sale after four weeks have elapsed since the date of attachment. Furthermore, if any claim for annulment or invalidation of the enforcement action has been submitted, the sale must await the outcome of the action.

IRELAND

21 As in England and Wales, the type of order the creditor may obtain for enforcement of a judgment debt depends primarily upon the court used. The district courts, circuit courts and High Court will issue decrees, execution orders and writs of *fieri facias* respectively. Once obtained the creditor will usually pass the order to the sheriff (if the debtor resides in Dublin city or county, or Cork city or county) or the County Registrar (if the debtor resides elsewhere). The order authorises the seizure of all assets held by the debtor in the area covered by the registrar or sheriff.

22 The exemptions from seizure are contained in the Enforcement of Court Orders Act 1926.[33] Section 7 of that act provides that "certain chattels" are "exempt from seizure". These chattels are described as "the necessary wearing apparel and bedding of a person against whom an execution shall be levied", as well as that of his family, and "the tools and implements of his trade, not exceeding in the whole the value of fifteen pounds". In addition, perishable items appear to be exempt from seizure.[34] A sheriff or County Registrar has the right to break into premises if necessary for the enforcement of the order. All goods seized must be capable of being sold.[35]

23 The Irish Law Reform Commission, in a report in 1988, advocated the raising of the limit of £15 to an acceptable modern standard, as well as widening the household exemptions.[36] However, to date the old limit remains, as does the low sheriff's fee of 35 pence.

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[27] Code of Civil Procedure, art 953; cited in Kaye, p. 144.
[28] *Ibid*. art 951(2).
[29] Kaye, p. 144.
[30] *Ibid*.
[31] Kaye, p. 153.
[32] *Ibid*.
[33] As amended by the Enforcement of Court Orders Act 1940.
[34] See Kaye, p. 166.
[35] See Kaye, p. 166.
[36] Law Reform Commission, *Report on Debt Collection: (1) The Law Relating to Sheriffs*, LRC 27-1988.

ISLE OF MAN

24 Where a judgment has been awarded against a debtor and execution has been granted on that judgment, the judgment is passed to the coroner for enforcement in accordance with the Administration of Justice Act 1981.[37] This allows the coroner to arrest the assets of the judgment debtor and to enquire as to his means.

25 The enquiry into the debtor's means may take the form of an interview in which the coroner will examine the debtor as to his means and may require him to produce supporting documentary evidence. If a debtor fails to attend the examination, the coroner may apply to the Manx High Court for an order compelling the debtor to attend. The creditor is also entitled to attend the examination and may examine the debtor, and his supporting evidence, himself.[38]

26 The ultimate remedy is the arrestment and sale of property. Once property is arrested the debtor is given a minimum of 28 days to pay the debt before the goods may be sold. Any sale must be advertised at least seven days prior to its taking place. Certain goods are exempt from arrestment and sale. These include tools of trade, basic items of bedding and clothing and household utensils.[39]

ITALY

27 Execution in Italy is initiated by the creditor obtaining an enforceable instrument,[40] which he serves upon the debtor together with a request for payment within a specific time.[41] If payment is not forthcoming the most important means of enforcement is the forced liquidation of assets, known as *espropriazione forzata*. Once proceedings have begun, a judge, whose rulings may only be appealed by either party by instituting separate proceedings, supervises them.[42]

28 The creditor may choose which property is to be liquidated. However he may only choose property up to the value of the debt. If he chooses goods in excess of the amount of the debt the debtor may move to have his selections restricted.

29 Attached property is usually sold at public auction. Once the sale has realised enough to cover the debt, the sale is discontinued. Article 514 of the Code of Civil Procedure (*Codice di Procedura Civile*) lists a number of specific exemptions from attachment. These are religious items and items used for worship, wedding rings, clothing, beds, bedding and linen, dining tables and chairs, wardrobes, chests of drawers, the refrigerator, the cooker, the washing machine, kitchen and household utensils together with a suitable piece of furniture to keep them in, all of which must be indispensable to the debtor and any family residing with him.[43] The exempt items also include food and necessary fuel for one month; indispensable tools of trade; any items, including arms, which the debtor requires for the performance of public service; decorations for valour; letters, records and general writings of the family, except if they form part of a collection.[44]

30 Italian law also recognises classes of goods which are 'conditionally' exempt. These include such things as farm machinery and may only be attached if there are insufficient moveables to meet the debt.[45] After the sale the proceeds are distributed amongst the creditor and any intervening creditors in possession of an enforceable instrument. Any disputes as to the distribution are heard by the *giudice dell'esecuzione*, acting as an examining judge.

JERSEY

31 A creditor in receipt of a judgment in his favour may be authorised to distrain on the goods of the debtor, with the exception of workmen's tools.[46] In the case of a judgment of the Petty Debts Court the authorisation is automatic. In other cases the creditor must be authorised by the terms of the judgment. The order of distraint is valid for 10 years from the date of judgment.

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[37] As amended and supplemented by the Enforcement Rules 1982, and the Enforcement Amendment Rules 1984; see Kaye, p.177.
[38] See Kaye, p. 176.
[39] See Kaye, p. 178.
[40] Referred to in Kaye, p. 187, as the *titolo esecutivo*.
[41] Referred to in Kaye, p. 188, as the *precetto*.
[42] The judge is known as the *giudice dell'esecuzione*.
[43] Our translation, as inserted by the law of 8th May 1971.
[44] Our translation.
[45] Code of Civil Procedure, arts 515 and 516.
[46] Kaye, p. 195.

32 Goods are seized by the Viscount, who usually sells them at public auction, but has the power to sell them privately if he so desires. A debtor may also be incarcerated – at the creditor's expense – for a maximum of one year and one day.[47]

LIECHTENSTEIN

33 An enforceable instrument, in terms of §1 of the *Exekutionsordnung*, is a necessary prerequisite for recourse to execution. Where an enforceable instrument exists, an order granting execution may be obtained from the Court of First Instance, which usually grants execution without prior proceedings and without hearing the judgment debtor.[48]

34 Enforcement is then carried out either directly by the court, or by a enforcement officer on the instructions of the court.[49] The execution must only be sufficient to satisfy the debt as laid down in the writ of execution.[50] The goods are then sold on the application of a creditor.[51]

LUXEMBOURG

35 Execution of a judgment in the creditor's favour must always be preceded by the service of formal notice on the debtor.[52] In principle, all goods belonging to the debtor may be seized, however arts 581, 582 and 592 of the Code of Civil Procedure (*code de procédure civile*) allow for a number of exemptions. These include the clothes of the debtor, his bed, food necessary to feed himself and his family for one month and tools of trade.

36 At least one day prior to seizure, notice – known as a *commandement* - must be served on the debtor.[53] The officer must prepare a minute of seizure, which is also served on the debtor prior to the sale. The sale itself must be publicly advertised and an inventory must be drawn up of the seized goods prior to the sale.[54] The sale itself must be by public auction. After the sale the proceeds are divided between the different creditors, the *saisissant* or distrainer, and the debtor.

MALTA

37 An executive title, as defined in s. 273 of the Code of Organisation and Civil Procedure, may be enforced by an executive act. Executive acts are defined in the same section as including warrants of seizure and judicial sales.

38 An executive act will lapse after three years from the date on which it became enforceable.[55] The executing officer has a power in terms of the Code to break down any outer or inner door or any container in pursuance of a warrant. If he exercises this power he must call in two witnesses.[56]

NETHERLANDS

39 In the Netherlands the enforcement procedure follows a judgment in the creditors favour which the creditor must serve on the debtor. The enforcement itself is carried out by a court enforcement officer who may be assisted by the police.

40 Prior to attaching the moveable assets, the creditor will notify the debtor that he has two days to comply with the judgment. This is usually done by notice served by the enforcement officer.[57] Once the two days have elapsed the property may be attached, which will usually lead to a sale. During the attachment the officer must prepare a detailed report containing all the items which have been attached. There are exemptions for certain personal belongings.[58]

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[47] *Ibid*., p. 196.
[48] *Exekutionsordnung*, § 2; see Kaye, p. 206.
[49] *Exekutionsordnung*, § 12; see Kaye, p. 206.
[50] *Exekutionsordnung*, § 14; see Kaye, p. 206.
[51] *Exekutionsordnung*, § 185; see Kaye, p. 209.
[52] Kaye, p. 218.
[53] Code of Civil Procedure, art. 583; see Kaye, p. 221.
[54] Code of Civil Procedure, arts 616 *et seq.*; see Kaye, p.221.
[55] Code of Organisation and Civil Procedure, s. 258; see Kaye, p. 230.
[56] Code of Organisation and Civil Procedure, s. 278; see Kaye, p. 231.
[57] Kaye, p. 244.
[58] Kaye, p. 245.

NORTHERN IRELAND

41 Enforcement of judgments in Northern Ireland is the function of the Enforcement of Judgments Office (EJO), which is a governmental agency that acts on the creditor's behalf on the payment of a fee. The first step in the enforcement of judgments is the issue of a notice of intention to enforce from the creditor via the EJO.[59] This is essentially the debtor's last chance to settle the debt before the details are published in a local trade publication, and thus many debts are settled at this point.[60]

42 The next stage depends on the creditor's decision and the size of the debt. If the debt is over £3000 the creditor may order a 'discovery report' in which the EJO will examine the debtor as to his means. This may then aid the creditor in deciding whether or not to proceed, but has the disadvantage of potentially adding several months and a good deal of expense to the process.[61]

43 Where a debt is under £3000, or the creditor chooses not to order a discovery report, the next stage involves an application for full enforcement. The EJO will only issue an enforcement order after it has notified its intention to do so to the debtor, thereby giving the debtor an opportunity to object. If no objection is made within eight days the order will be made. In rare cases where objections are raised, they are disposed of by oral hearing before the Master, who exercises the judicial functions of the EJO.[62]

44 All goods belonging to the debtor may be seized by the EJO and sold at auction with the exception of domestic goods and stock-in-trade. In recent years items such as televisions, dishwashers, video recorders and stereos have moved from 'luxury item' status into the realm of domestic goods and are therefore exempt.[63] The result of this is that orders for seizure of goods are now rarely used due to their minimal yield and the EJO now prefer other forms of enforcement.[64]

NORWAY

45 Executions in Norway are regulated by the Act on Enforcement 1992 and the Creditor's Recovery Act 1984. Generally the executions are performed and authorised by the Execution Commissioner and the Court of Enforcement. The first stage in the execution process, after a legal basis of enforcement has been proved,[65] is the procurement of an attachment on assets of the debtor. These may be created by contract, by operation of law (e.g. lien) or by order of the execution authorities, usually the Execution Commissioner.[66] Once an attachment has been attained, the creditor may demand the forced sale of the assets in order to recover the amount of the debt.

46 Application for the seizure of assets is usually made to the Execution Commissioner. He will submit the application to the debtor for comment.[67] If no comments are made, or if the comments made are irrelevant, the Commissioner will proceed to the execution.

47 The debtor may indicate which property he would prefer to be seized; however the final decision regarding the objects to be seized lies with the Execution Commissioner.[68] The enforcement officer must, in making his decision, have regard to those objects that are easier to sell and which are most likely to reap the amount of the claim.[69] Certain items are exempt from attachment and these have been discussed above.[70]The attached property acts as security for the creditor's claim and often the debtor is allowed to keep physical possession of it until such time as it is sold.

48 The Creditor's Recovery Act makes special provision where the collections of "taxes and public charges" are involved. In such cases the rules relating to exceptions may be set-aside "to the extent considered reasonable".[71]

49 The creditor usually makes applications for sale to the enforcement officer. Sale is often at public auction but can also be arranged privately by the enforcement officer or another person nominated by him.

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[59] See Kaye, p. 250.
[60] *Ibid*.
[61] *Ibid*.
[62] *Ibid*., at p. 251.
[63] *Ibid*., at p. 253.
[64] *Ibid*.
[65] For a list of bases of enforcement, see Act on Enforcement 1992, §5-2.
[66] *Ibid*. at p. 260.
[67] The application must contain the information required by the Act on Enforcement 1992, §5-2; see also the exceptions to this contained in §4-18.
[68] See Kaye, p. 262; Recovery Act 1984.
[69] See Kaye, *Ibid*.
[70] Part 4, para 4.11.
[71] *Ibid*. § 2-8.

SPAIN

50 The primary rules for enforcement of judgment debts are contained in the Spanish Code of Civil Procedure.[72] Amongst these rules are the procedures for attachment and forced sale by public auction.

51 Not all goods may be attached and the code contains a number of exceptions. Furthermore the code lays down an order of preference in the seizure of assets.[73] The creditor may attend the execution and indicate which items he would like seized. Exceptions include the debtor's bed and the essential tools of his employment. The debtor may challenge the attachment if it is excessive, or if the order of precedence which the code prescribes is not followed.[74]

52 Money seized will go towards the payment of the debt.[75] Moveables will be sold at public auction, which must take a specific form. Firstly the goods must be valued. If the creditor and debtor cannot agree as to value, a professional valuer may be used. Next the auction must be publicised. At the auction itself the value fixed for the goods becomes their reserve price. If they are unsold at this price they go back into a second auction where the reserve is reduced by 25%. A third auction may be held if the second fails to find a buyer and in the third auction there is no reserve.[76] The proceeds of the sale will be used to pay off the debt and the enforcement costs. Any remaining money is given back to the debtor.

SWEDEN

53 In Sweden there is no need for a specific enforcement order from a court.[77] It is enough that a judgment merely states that a person must do or refrain from doing something. Enforcement is carried out by an enforcement authority, which is separate from the courts.[78] Appeals regarding the actions of the enforcement authorities should be made to the court.[79]

54 Execution may be performed on all forms of property including intangible property.[80] However, all property must be capable of sale.[81] The property distrained must also be capable of yielding more than a negligible amount of money for the creditor, as well as the costs of the execution, which has the priority. As a general rule, the execution authorities must seize property which will bring about the least costs, damage and inconvenience for the debtor before moving on to other items.[82] In practice the result is that cash and other liquid assets are the first to be seized.[83]

55 Further to a number of exemptions from seizure, which have been discussed above,[84] any property or assets which are assigned for a certain purpose by the state, a local government or a foundation and goods which have been collected from amongst the public are also exempt, as are damages for personal or criminal injuries, rights to pensions and life annuities and social benefits.[85] There are limits to the exemptions and thus tools of trade, for example, are only exempt up to a value of 20,000 Swedish kroner.

56 In executing a judgment the enforcement agent may unlock doors or in other ways enter a house for the purpose of finding property that is capable of seizure. However, he may only enter a dwellinghouse if the person in possession of that dwellinghouse is present or has been informed.[86]

57 In general a debtor will be informed of an application for attachment in order to give him an opportunity to settle the debt.[87] However the right to be informed is not absolute, and notice may be dispensed with where it is thought that a debtor may hide or destroy his property, or if the matter is urgent.[88] The

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[72] Arts 919 to 950, 1447 to 1455 and 1481 to 1543, see further, Kaye, p.293.
[73] Code of Civil Procedure, art 1455; see Kaye, p. 297.
[74] Kaye, p.297.
[75] *Ibid*.
[76] Kaye, p. 298.
[77] Execution in Sweden is regulated by the *Utsökningsbalken* (enforcement code), supplemented by the *Utsökningsförordningen* (enforcement act) and the *Förordningen om avgifter vid kronofogdemyndigheterna* (charges at enforcement authorities act). The text of these acts are available, in Swedish, on the Internet: http://www.notisum.se/rnp/sls/default.htm; references will be to the provisions as cited in Kaye unless otherwise stated.
[78] Referred to in Kaye as the *kronofogdemyndigheter*; see Kaye, p. 305.
[79] See Kaye, *Ibid*.
[80] *Utsökningsbalken,* chapter 4, § 2; see Kaye, p. 312.
[81] *Utsökningsbalken*, chapter 5, § 5; see Kaye, p. 312.
[82] *Utsökningsbalken*, chapter 4, § 4; see Kaye, p. 312.
[83] Kaye, p. 312.
[84] Part 4, para 4.11.
[85] *Utsökningsbalken*, chapter 5, §§ 6 and 7; see Kaye, p. 313.
[86] *Utsökningsbalken*, chapter 2, § 17, as described in the case of *K. v Sweden,* Decision of European Commission of Human Rights, 1st July 1991, (Application No. 13800/88)
[87] *Utsökningsbalken*, chapter 4, § 12; see Kaye, p. 315.
[88] *Utsökningsbalken*, chapter 4 § 12; see Kaye, p. 315.

enforcement authority has the right to remove property once it is attached, however it can be left with the debtor if it is marked as attached, if this occurs the debtor may not dispose of the property in a manner which is disadvantageous to the creditor.[89] Once attachment has occurred, the enforcement authority must describe and value the property.[90]

58 The sale of the property is conducted by the enforcement authority, who may appoint another – such as an auctioneer – to carry it out.[91] The enforcement authority may reject the highest bid at auction if it is considered that a considerably higher price may be achieved in a second auction.[92] Furthermore, if it is considered that a private sale may yield more, the enforcement authority may do so.[93] The proceeds will then be given to the creditor in satisfaction of the debt.

SWITZERLAND

59 The Federal Law on Debt Enforcement and Bankruptcy of 1889, as amended, regulates debt enforcement in Switzerland. Enforcement is administered by the individual debt enforcement and bankruptcy authorities of the canton where the enforcement is to take place.[94]

60 The creditor institutes the proceedings by requesting the enforcement authority to issue a summons to pay against the debtor.[95] The debtor will then have ten days to raise an objection, or alternatively 20 days to complete full payment, before execution will take place.[96] If no objection or payment is forthcoming the goods may, at the behest of the creditor, be attached and sold. If an objection is received it is the creditor who must seek to have it set aside. In some circumstances he may seek summary proceedings before the court in the canton where the judgment is to be enforced.[97]

61 A number of exemptions from attachment are available.[98] These include objects reserved for the personal use of the debtor or his family such as his clothes, household utensils, furniture and other moveable property insofar as they are essential, books for religious worship and books, apparatus and tools of trade or profession.[99] In addition article 92 of the law of 1889 contains a list of specific exemptions.

(2) EXEMPTIONS FROM ATTACHMENT OF MOVEABLES IN THE CANADIAN PROVINCES AND TERRITORIES[100]

62 A process known as seizure is present in all Canadian provinces and territories. This involves the attachment and sale of goods belonging to the debtor for the settlement of a debt owed under a court decree. The provinces vary in the extent of the protection offered to the debtor in the form of exemptions.

63 Thus whilst most have some exemptions for personal property, the limits of this exemption vary between provinces. Until recently British Columbia gave a flat $2000 exemption limit for 'goods and chattels', and did not stipulate specific examples as other provinces do. The situation changed in 1997 when necessary clothing and household furnishings up to a value of $4000, along with one motor vehicle up to a prescribed value, tools and other property used to earn income up to $10,000 and dental and medical aids required by the debtor or his dependants became specifically exempt.[101] Alberta, Manitoba and Saskatchewan all have generous exemptions for farm animals and farm equipment necessary to run the farm in question for 12 months. Furthermore, Manitoba, New Brunswick, Newfoundland, North West Territories, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan and Yukon Territory all provide for exemption of chattels necessarily used by the debtor in the pursuance of his trade, albeit with different monetary limits.[102]

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[89] *Utsökningsbalken*, chapter 6, §§ 2 and 4, chapter 4, § 29; see Kaye, pp. 316 and 317.
[90] *Utsökningsbalken*, chapter 6, § 9; see Kaye, p. 316.
[91] *Utsökningsbalken*, chapter 9, § 1, *Utsökningsförordningen*, chapter 9, § 3; see Kaye, p. 317.
[92] *Utsökningsbalken*, chapter 9, §§ 4 and 6; see Kaye, p. 317.
[93] *Utsökningsbalken*, chapter 9, §§ 8 and 9; see Kaye, p. 317.
[94] Known in German as *Betreibungs -und Konkursämter*. See Kaye, p. 327.
[95] Federal Law on Debt Enforcement of 1889, art 69.
[96] *Ibid*.
[97] See Kaye, *Ibid*.
[98] Federal Law on Debt Enforcement 1889, art 92.
[99] Our translation from the French version: *Loi fédérale sur la poursuite pour dettes et la faillite*, Article 92.
[100] This section is substantially based on P J M Lown, *Civil Enforcement Legislation in Canada*, (1998), unpublished paper for Uniform Law Conference of Canada, August 1998, with the author's permission.
[101] Court Order Enforcement Act 1996, s 71, as amended by SBC 1997, c 27, ss 1 to 9.
[102] Thus: Manitoba has a $7500 limit (SM 1980, c 55, s 6); New Brunswick is $6500 (SM 1980, c 31); Newfoundland has a limit of $10,000 (Judicature Act, SN 1984, c 25, s 159); North West Territories and Yukon Territory both have the low limit of $600 (Exemptions Act, RONWT 1956, c 32, s 3 (North West Territories) and RO 1958, c 38, s 3 (Yukon Territory)); Nova Scotia sets a limit at $1000 (Judicature Act, SNS 1972, c 2, s 41); Ontario and Prince Edward Island have a $5000 limit if the debtor is a farmer and a $2000 limit if he is not (SO 1967, c 26, s 1

64 Further exempt goods in the various provinces include artworks that are brought to the province for public exhibition,[103] items required for religious services[104] and the books of a professional person.[105] As regards items of sentimental value, Newfoundland and Quebec have an exemption that applies to such items[106] and, in addition, both Newfoundland and New Brunswick have exemptions for domestic animals used as pets. The Quebecois further exempt alimentary payments which have been judicially awarded and property declared by a donor or testator to be exempt from seizure, however this latter exemption may be overturned by a judge at the creditors application.[107]

65 As regards food and fuel, only one province – British Columbia – does not have an exemption for food. Whilst Nova Scotia limits the exception to 'necessary' food and fuel, Alberta, Newfoundland, North West Territories and Yukon Territory all allow for food necessary for the debtor and his family's upkeep for 12 months.[108] In Manitoba this 12 month period is shortened to six months, whilst in New Brunswick it is only three.

66 In Saskatchewan the law allows a farmer enough of his own produce to "provide food and fuel for heating purposes for the farmer and his family until the next harvest" when converted into cash. In Ontario and Prince Edward Island however food and fuel are included with other household goods up to a value of $2000. The Quebecois code of civil procedure creates an exemption for food, fuel, linens and clothing which is necessary for the life of the household.[109] In fact all provinces exempt clothing, although three of them – Alberta, Newfoundland and Ontario – add a monetary limit to this exemption.[110]

67 In addition to the foregoing, household furniture is exempt in all provinces. Often this is limited to that which is reasonable and necessary, however some provinces have a monetary limit to the exception.[111] In Manitoba this limit is set at $4500, whilst in Alberta, British Columbia and Newfoundland a $4000 limit applies. Ontario and Prince Edward Island both set a limit of $2000, as do Saskatchewan, however the Saskatchewan limit is raised to $10,000 if the debtor is a farmer. The Quebecois code of civil procedure sets a monetary limit of $6000. Both North West Territories and Yukon Territory have much lower limits of $200.[112]

68 If the debtor owns a motor vehicle this too may be exempt. Nova Scotia allows for the debtor to keep one vehicle of a value to be fixed by the regulations, although no such regulations are currently in existence.[113] If a farmer's vehicle is necessary for working the farm or a non-farmers vehicle is required for the debtor's trade, these may be exempt in Manitoba and Saskatchewan, subject to a $3000 limit for the non-farming vehicle.[114] A $3000 limit also applies in New Brunswick without any distinction being made between farmers and non-farmers. A slightly lower limit of $2000 applies in Newfoundland whilst Alberta allows for a $5000 vehicle to be exempt. In British Columbia a $2000 limit is set for maintenance debtors and a $5000 limit applies to non-maintenance debtors. However there are still a significant number of provinces where no motor vehicle exception applies.[115]

69 For farmers, seeds and crops may be exempt. In Manitoba a farmer may retain sufficient seed to sow all of his land under cultivation. Prince Edward Island and Ontario exempt only sufficient seed to sow 100 acres of land.[116] In Saskatchewan an exception exists for sufficient seed to sow two bushels per acre of grain in addition to 14 bushels of potatoes. New Brunswick exempts 40 bushels of oats, 10 bushels of barley, 10 bushels of wheat and 10 bushels of buckwheat, in addition to 35 barrels of potatoes.

(Ontario) and SPEI 1983, c 23, s 1 (Prince Edward Island) and Saskatchewan holds a limit of $4500 regardless of trade (SS 1983, c 41). Finally Alberta has a $10,000 limit for non-farmers whether this is for the pursuit of his trade or otherwise (Civil Enforcement Act Regulations 276/95).

[103] Such an exemption applies in Quebec (Code of Civil Procedure, Art 553.1) and British Columbia (RSBC 1996, c 78, s 72).

[104] This exemption applies in Manitoba and Quebec.

[105] As applied in Saskatchewan.

[106] Judgment Enforcement Act, SN 1996, c J-1.1, up to $500 limit (Newfoundland) and Code of Civil Procedure, Art 553 (Quebec).

[107] Code of Civil Procedure, Art 553.

[108] North West Territories and Yukon Territory also exempt fuel required for a 12-month period.

[109] Article 553.

[110] In Alberta and Newfoundland this limit is $4000 (Civil Enforcement Act Regulations 276/95 (Alberta) and Judgment Enforcement Act, SN 1996, c J-1.1 (Newfoundland)), in Ontario it is only $1000 (SO 1967, c 26, s 1).

[111] Those provinces where furniture is limited to that which is reasonable and necessary include New Brunswick (CSNB 1903, c 128, s 34) and Nova Scotia (Judicature Act, SNS 1972, c 2, s 41).

[112] Exemptions Act, RSNWT 1988, c E-9, s 2 (North West Territories) and RSYT 1986, c 59, s 2 (Yukon Territory).

[113] Currently regulated by the Judicature Act, SNS 1972, c 2, s 41; limit is currently $3000.

[114] SM 1980, c 55, s 6 (Manitoba) and SS 1983, c 41 (Saskatchewan). There is no monetary limit to the farming vehicle.

[115] These are North West Territories, Ontario, Prince Edward Island, Quebec and Yukon Territory.

[116] Ontario further exempts 14 bushels of potatoes and sufficient winter food and bedding for the farmer's livestock (RSO 1950, c 120, s 52).

70 Medical and health aids reasonably required for the debtor and his family are exempt in a number of provinces.[117] Furthermore Quebec makes an exception for property required by a person suffering from a handicap and for any reimbursements of expenses incurred under a contract of accident and sickness insurance.

71 Finally, some benefits may also be exempt. In Alberta, for example, social allowance, handicap allowances and widow's pensions may be exempt, although this only applies where they are not intermixed with other funds. Quebec exempts any benefits payable under a supplemental pension plan or any periodic disability benefits.

(3) ATTACHMENT OF MOVEABLES IN OTHER BRITISH COMMONWEALTH LEGAL SYSTEMS

AUSTRALIAN STATES AND TERRITORIES

BAILIFF'S POWERS OF ENTRY

72 In a number of states the powers of entry of the bailiff or sheriff on execution are expounded in the legislation. In Victoria for example the sheriff, on finding resistance, may "take with him or her such assistants as he or she thinks desirable" to aid him in the execution of a warrant or other process.[118] In South Australia a sheriff may use "such force as is necessary for the purpose" of entering land in pursuance of a warrant of seizure and sale.[119]

73 The Australian Capital Territory has a slightly different system. In that Territory, the bailiff, if refused entry, must apply to the court for authorisation to enter the debtor's premises.[120] On receiving such authorisation the bailiff is entitled to use "such force as is necessary and reasonable, with the assistance of a police officer or officers if the bailiff considers such assistance to be necessary".[121]

EXEMPTIONS FROM SEIZURE

74 A number of states and territories in Australia, specifically Victoria, Queensland and South Australia, operate a system of exemption from execution which is based on the generous provisions of the Commonwealth of Australia bankruptcy laws.[122] For the purposes of the Commonwealth Bankruptcy Act 1966 the Bankruptcy Regulations of 1996 provides an non-exhaustive list of goods which may not be divided amongst creditors in insolvency.

75 The general rule is that household property, including recreational and sports equipment, may not be seized if it is "reasonably necessary for the domestic use of the bankrupt's household, having regard to current social standards".[123] More specifically the third paragraph of regulation 6.03 provides a wide, non-exhaustive list of such items.[124]

76 However narrower exemptions apply in other states. The Australian Capital Territory, New South Wales, Northern Territory, Tasmania and Western Australia all have much more restrictive lists of exemptions.

77 In the Australian Capital Territory the exemptions are limited to "necessary items of clothing, bedding and kitchen furniture, including a stove, oven and refrigerator, but not including a washing machine or automatic dishwasher". Furthermore "ordinary tools of trade, plant and equipment, professional instruments and reference books, the aggregate value of which does not exceed [a] prescribed amount" are also exempt.[125] There is further provision for the debtor to apply to the registrar to have certain of his goods declared exempt if the result of execution would be exceptional hardship.[126]

78 Similarly, New South Wales operates a more restrictive system of exemption from execution. Exempt from seizure in that state are any wearing apparel and any bedroom or kitchen furniture, any ordinary tools

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[117] Namely British Columbia, Manitoba, New Brunswick, Newfoundland and Nova Scotia.
[118] Supreme Court Act 1986 (Vic), s 121.
[119] Enforcement of Judgments Act 1991 (SA), s 7(3)(a).
[120] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 349.
[121] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 349(2).
[122] See Supreme Court of Queensland Act 1991 (Qld), sch 2; Enforcement of Judgements Act 1991 (SA), s 7(2); and Supreme Court Act 1958 (Vic), s 63C. Discussed above, Part 4, para 4.13.
[123] Regulation 6.03 para 2.
[124] See Part 4, para 4.13.
[125] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 347(1).
[126] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 354; cf: the Scottish provisions of s 23 and sch 5 para 7 of the 1987 Act regarding the release of poinded articles on grounds of undue harshness.

of trade, plant and equipment, professional instruments and reference books to an upper limit of $500 in aggregate value.[127]

79 Vague exemptions are available in the Northern Territory. The Local Court Act (NT) provides that a warrant of seizure and sale authorises the person to whom it is directed to take and sell any property belonging to the debtor.[128] The Local Court Rules supplement this provision by providing exemption for "all personal property necessary for adequate living and continuation of work".[129]

80 Tasmanian legislation appears similarly narrow. The Civil Process Act 1839 (Tas) provides exemptions for "any implement of trade or any deed or writing not being in fact in its nature saleable or convertible into money".[130]

81 In Western Australia the Local Courts Act 1904 (WA) regulates the seizure under a warrant of execution by a bailiff. It provides that the following goods will be exempt from seizure:

> "wearing apparel of [the debtor] to the value $100 and of his wife to the value $100 and of his family to the value $50 for each member thereof dependent on him; household furniture and effects to a value not exceeding in the aggregate $300; implements of trade to the value of $100; all beds and bedding; family photographs and portraits".

It should be noted however that a report by the Law Reform Commission of Western Australia in 1995, which has not yet been implemented, proposed that exemptions ought to be "along the lines of that applying in respect of clothing and household property in the case of sequestration under the Commonwealth Bankruptcy Act 1966".[131] This reflects a general trend in Australian law towards increasing the exemptions as an alternative to abolition of executions. In 1987 the Law Reform Commission of Australia pointed out the 'disparities' between the exemptions allowed in State and Territory provisions and the exemptions allowed in bankruptcy under the Commonwealth law.[132] This point was reiterated in a report in 1988 where it was stated that this "inconsistency is… undesirable".[133] It was suggested in that report that States and Territories could provide for property exempt under the Bankruptcy Act to be exempt under the local laws on execution.[134] Whilst this suggestion was not framed as a recommendation it has been followed by two states.[135]

EXAMINATION OF DEBTOR AS TO HIS MEANS

82 In most (if not all[136]) states and territories of Australia there is some provision regarding the examination of the debtor as to his means. This is designed to give the creditor a better idea of the financial position of the debtor and information as to the debtor's moveable possessions prior to seizure.

83 In the Australian Capital Territory the registrar may issue a notice, on application by the creditor, calling on the debtor to "furnish the judgment creditor with answers to the questions contained in the notice".[137] These questions relate to the financial position and property of the judgment debtor and he is given 21 days to reply.

84 Alternatively, an examination summons may be issued in several states.[138] In Australian Capital Territory, Victoria and New South Wales the oral examination may be conducted by the creditor or may, usually on the creditor's request, be carried out by the registrar.[139] At the examination the debtor will be asked about his property and other means of satisfying the judgment debt and generally as to his financial circumstances.[140]

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[127] Local Courts (Civil Claims) Act 1970 (NSW), s 59 and District Court Act 1973 (NSW), s 109.
[128] Local Court Act (NT, REPL011), s 22(2).
[129] Local Court Rules (NT, REPL015), rule 29.09.
[130] Civil Process Act 1839 (Tas), s 1.
[131] Law Reform Commission of Western Australia, *Report on Enforcement of Judgments of Local Courts*, No 16 pt II (1995), at p 95, para 7.10.
[132] Law Reform Commission (Australia), *Debt Recovery and Insolvency*, No 36 (1987), p 142, para 213
[133] Law Reform Commission (Australia), *General Insolvency Inquiry*, No 45 vol 1 (1988), p 348, para 866.
[134] *Ibid*.
[135] Ie Queensland and South Australia.
[136] Unfortunately no information could be gathered regarding Tasmania.
[137] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 294.
[138] Ie in the Australian Capital Territory, New South Wales, Victoria, the Northern Territory and South Australia, where a registrar (or Court in the Northern Territory and South Australia) may summon a debtor before him to be orally examined; see Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), ss 295 to 298; District Court Act 1973 (NSW), s 91(2); Local Court Act (REPL011) (NT), s 26; Enforcement of Judgements Act 1991 (SA), s 4; Magistrates Court Civil Procedure Rules 1999 (Vic), rule 27.12.1.
[139] Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 298(1); District Court Act 1973 (NSW), s 91(3).
[140] District Court Act 1973 (NSW), s 91(3); Magistrates Court (Civil Jurisdiction) Act 1982 (ACT), s 298; Local Court Act (REPL011) (NT), s 26(2); Magistrates Court Civil Procedure Rules 1999 (Vic), rule 27.12.1.

In many states the debtor may be required to produce evidence or documentation as to his financial position.[141] Failure to attend such an examination may result in arrest of the debtor.[142]

85 In Queensland a debtor may be examined both as to his property and financial position[143] and as to any debts which are owed to him.[144] Examination is made on an *ex parte* application to the judge. Failure to appear before the court can result in arrest and the debtor may be required to produce documentary evidence.[145] Similarly, Western Australia has a system whereby the debtor can be examined as to debts owing to him as well as his property and financial position.[146] The information gathered in such an examination is often used to decide whether the court would be justified in making an order for the payment by instalments.[147]

NEW ZEALAND

86 Under the District Courts Act 1947 (as amended) a warrant of distress issued by the court authorises a bailiff to levy the amount of the debt and the costs of execution by seizure and sale of the goods of the debtor. There are a number of exemptions from seizure by a bailiff.[148]

87 Any goods seized under a warrant of distress must be sold by public auction unless a court otherwise orders.[149] However the sale may not take place until at least five days after the goods have been seized, unless they are either of a perishable nature or the debtor requests a quick sale in writing.[150]

SOUTH AFRICA

88 If a court gives a judgment for the payment of a sum of money, or if it orders the payment of money in instalments, that court may order execution against the debtor's moveable property in the event of default. Execution is carried out by the sheriff, who is an officer of the court.

89 Before a sheriff can seize the debtor's goods he must first serve a formal demand for payment. If payment is not made he may proceed with the seizure. Certain property is exempt from seizure in terms of the Magistrates' Courts Act 1944.[151] These categories are:

(a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family;
(b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the sum of *R*2000;
(c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of *R*2000;
(d) the supply of food and drink in the house sufficient for the needs of the debtor and his family for a period of one month;
(e) tools and implements of trade in so far as they do not exceed in value the sum of *R*2000;
(f) professional books, documents or instruments necessarily used by the debtor in his profession in so far as they do not exceed in value the sum of *R*2000;
(g) such arms and ammunition as the debtor is required by law, regulation or disciplinary orders to have in his possession as part of his equipment.

A magistrate's court is, however, given a discretion in exceptional circumstances to increase the sums mentioned in the above paragraphs.

90 In the process of the seizure the sheriff may also take any money, bank-notes, cheques, bills of exchange, promissory notes or bonds.[152] The sheriff must request the debtor to point out such moveable property as will satisfy the debt. If the debtor cannot or does not wish to the sheriff must make an inventory of as much

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[141] Ie in New South Wales, Victoria, South Australia and the Northern Territory; see District Court Act 1973 (NSW), s 91(2)(c); Local Court Act (REPL011) (NT), s.26(2); Enforcement of Judgments Act 1991 (SA), s 4(2); Magistrates Court Civil Procedure Rules 1999 (Vic), rule 27.12.1(4).
[142] District Court Act 1973 (NSW), s 92; Local Court Act (REPL011) (NT), s 26(3)(b); Enforcement of Judgments Act 1991 (SA), s 4(4).
[143] District Court Rules 1968 (Qld) (as amended), s 305.
[144] District Court Rules 1968 (Qld) (as amended), s 305; and Rules of the Supreme Court of Queensland, s 33.
[145] District Court Rules 1968 (Qld) (as amended), s 305.
[146] Local Courts Act 1904 (WA), s 144; Local Court Rules 1961 (WA), rule 27.13.
[147] Law Reform Commission of Western Australia, *Report on Enforcement of Judgments of Local Courts*, No 16 pt II, p 22, paras 2.28 and 2.29.
[148] These are discussed in Part 4, para 4.12, above.
[149] *Ibid*., s. 89.
[150] *Ibid*., s. 88.
[151] See Joubert (ed.), *The Law of South Africa*, (1st Re-issue), Vol. 3(2), (1997), at para. 246. Henceforth referred to as 'Joubert'.
[152] Joubert, para. 252.

of the debtors property as he can find up to the value of the debt.[153] In doing so the sheriff may open any door on the premises or any piece of furniture. If entry or opening is refused, or if the debtor is not present, the sheriff may use what force is necessary for this purpose. The original warrant of execution must be served on the debtor during the process, or if the debtor is not present it must be left in the premises. The sheriff values the property as he makes his inventory.

91 All goods must be sold at public auction, by an auctioneer, to the highest bidder. If the value of the goods attached exceeds *R*500, the sheriff must publicly advertise the sale in a local newspaper or circular not less than ten days prior to sale.[154] If the value of the goods falls below this, a notice on the notice board of the courthouse or other public building will suffice.

92 Sale may not take place less than 15 days after the attachment, however the courts may reduce this period with the debtor's consent or if the goods are perishable in nature.[155] The sale must be discontinued as soon as enough has been raised to cover the debt and the costs of execution. Any surplus must be given back to the debtor.

[153] Joubert, para. 253.
[154] Joubert, para. 254.
[155] Joubert, para. 254.