

1 INTRODUCTION

1.1 This consultation paper follows a review by the Executive of the system of enforcement of civil obligations in Scotland. It seeks views on proposals for reform of the law of diligence and organisation of the enforcement system.

Origins and Scope of the Review

1.2 A review of the law of diligence had been planned for some while by the Scottish Office. The principal current legislation, the Debtors (Scotland) Act 1987,¹ which implemented a majority of recommendations made by the Scottish Law Commission in its 1985 *Report on Diligence and Debtor Protection*,² was the first significant reform in this area for about 100 years. The Commission produced further work on diligence over the years.

1.3 The Minister for Justice, Jim Wallace, set out the Executive's proposals for a review of the law of diligence in a statement to the Scottish Parliament on 8 June 2000.³ He said that it would be thorough, wide-ranging and coherent, and that it was intended to introduce legislation to implement reforms within the lifetime of this Parliament. Following this consultation exercise the Executive intends to legislate as soon as possible to implement those reforms which, having regard to the views expressed, command broad support.

1.4 Reports of the Scottish Law Commission's work, or the parts of them, which had not previously been considered have been addressed in the review.⁴ This consultation paper indicates whether and how the Executive intends to take these forward. Research, commissioned in order to evaluate how the 1987 Act was operating in practice, has also been considered.⁵ A range of related issues which impinge on the enforcement system, or which the Executive has been asked to address by organisations and individuals in this context, have been addressed. A new international convention in relation to admiralty arrestments is also discussed.⁶ Progressive developments in the legal, social, economic and technological spheres relevant to the enforcement system have been taken into consideration.

1.5 Renewed calls for a national statutory debt arrangement scheme have arisen from further work by the Scottish Law Commission first recommended in its 1985 Report, as well as a gathering momentum of other studies. These have been assessed within the review. A fundamental element of such a scheme is that it would halt enforcement action whilst debt repayment programmes are operating. It is therefore considered appropriate to put forward proposals within the framework of this review. The successful operation of an effective statutory debt arrangement scheme could potentially reduce enforcement action or render it unnecessary. This may contribute significantly to the improved operation of the enforcement system as a whole. Whilst increasing prevalence of debt, particularly multiple over-indebtedness in recent years, may give rise to greater use of the enforcement system, this consultation paper does not otherwise consider issues concerning debt or seek to address their structural causes. Many other studies and proposals for reform in that field are being conducted elsewhere and these are mentioned where relevant. Nor does it address

¹ 1987 c18.

² Scot Law Com No 95.

³ Official Report 8 June 2000, col 105.

⁴ Scot Law Com No 95, No 133, No 164 and No 183.

⁵ SOCRU, seven research studies and overview on the *Evaluation of the Debtors (Scotland) Act 1987* (1999).

⁶ See Part 5B.

insolvency law although the paper does consider the potential impact which possible reforms might have for insolvency law.

1.6 In order to ensure that the system for enforcement of civil obligations remains relevant and appropriate in a modern Scotland, it is important also to examine broader issues. Because, in some quarters, the reputation of and respect for the diligence system appears to have fallen, it was felt necessary to re-examine the continuing need for an enforcement system, the principles upon which it is based, and the organisational structure within which it should operate.

1.7 The review did not examine the policy leading to abolition of the diligence of poinding and warrant sale⁷ or the alternative proposals recommended to the Executive by the independent Working Group in its Report *Striking the Balance - a new approach to debt management*,⁸ which are being taken forward separately. That Report having received very widespread support on consultation, the Executive advised that it intends to implement the Working Group's recommendations.⁹ The abolition of that diligence has consequential effects on other parts of the system of enforcement of civil obligations, and these were taken into account in the review. Recommendations for review of other matters made by that Working Group are also addressed in following parts of this consultation paper.

1.8 The private international law aspects of enforcement were not examined directly in the review. However, the Executive has borne in mind the policy aims of the European Union and participates in meetings of the Council of the European Union in this field. There are arrangements in place in Scotland for recognition and enforcement of foreign civil court judgements.¹⁰ The Council of the European Union considered the need for enhanced mutual recognition of judicial decisions to facilitate judicial co-operation and judicial protection of individual rights at the Tampere Summit in October 1999. Conclusions from the Summit included proposals for the European Commission to adopt a programme of measures to implement the principle of mutual recognition, including work on a European enforcement order. The purpose of this order is to create a single document for the enforcement of orders of the courts across the European Union. It is likely that this initiative will be taken forward under the Spanish Presidency of the European Union during the first six months of 2002.

Acknowledgements

1.9 Many papers, studies and debates which aided the review process and proved useful information sources are acknowledged throughout this paper. As indicated, the review has been greatly assisted by the works of the Scottish Law Commission. Assistance was also particularly appreciated from Christine O'Neill¹¹ and Duncan MacLean¹² solicitors. Grateful thanks go to those who responded to the Minister for Justice's invitation to share their views and experiences. Also to those who gave of their time and expertise to take part in direct discussions with the Executive.

⁷ Abolition of Poindings and Warrant Sales Act 2001, asp1.

⁸ Presented to Jim Wallace, Minister for Justice on 6 July 2001 and published for consultation by him on 18 July 2001.

⁹ PQ S1W-20607, Scottish Parliament, Written Answers Report, 19 December 2001, Jim Wallace, Minister for Justice.

¹⁰ Civil Jurisdiction and Judgements Act 1982, c27.

¹¹ Temporarily seconded from Messrs Brodies to the Scottish Executive Justice Department.

¹² Messrs Henderson Boyd Jackson, consultant on admiralty law.