

2 ENFORCEMENT AND POLICY PRINCIPLES

Definition of Diligence

2.1 There is no precise definition of the term diligence, although writers on the subject who have considered the origins and purpose of diligence have variously sought to offer definitions.¹³ It has usually been used to describe the legal process for enforcing court decrees for payment of money or, more widely, for enforcing orders of the civil courts generally including for performance or prevention of an act. Recent public debate has been conducted in relation to the narrower construction of debt enforcement. In this paper, and in the review of this area of law which preceded it, the wider subject matter of enforcement of the civil obligations generally has been considered.

Policy Considerations Guiding Reform

2.2 **Purpose of the enforcement system.** Enforcement plays an important and integral role within the Scottish civil justice system. Without means to enforce them the orders of our civil courts would be but "as bees without stings"¹⁴ and the rule of law could not be upheld. If society is to function in a fair and orderly manner, everyone must be able to assert legal rights and those owing legal obligations must be held to account. Where such rights and obligations have been upheld by the courts, but they have not been fulfilled, wilfully or otherwise, compliance must be compelled. Without this, judicial decisions in civil, commercial, administrative or social matters would be rendered ineffective for business, individuals and the state, who all rely on confidence in an effective and efficient enforcement system. It is untenable, in such circumstances, for the fulfilment of civil obligations to be elective in the hands of those obliged to do so.

2.3 The means of compulsion, and their reform, should be framed or modernised as society develops and its values or expectations change. In addition, technological change and wider economic and social trends need to be taken into account. A number of fundamental reference points shaped the Executive's review of this subject and the reforms proposed in this paper are brought forward with the following considerations in mind.

2.4 Much of Scots law has unique historical and cultural roots, and this area is no exception. However, the terminology, which derives from historical traditional procedures, can give rise to difficulties in understanding outside legal circles which adds to the mystique and affects accessibility of the law and the system. A **pragmatic approach** has been adopted to this issue with changes proposed where genuine purposes of clarity, simplicity or effectiveness demand in aid of **easier access to justice**. A general difficulty with lack of uptake or awareness of the provisions of the 1987 Act has been identified, despite efforts to make explanatory material and forms intelligible for users. Accordingly, complementary measures to **disseminate information and raise awareness** are seen as playing an important role in ensuring that the purposes and procedures of enforcement may be understood as widely as possible.

2.5 An effective and efficient enforcement system must have a **comprehensive range of measures** available for all circumstances and against all types of property without flaws or loopholes. Since the relaxation or strengthening of one enforcement measure may cause

¹³ Stewart, p 1, Scot Law Com No 95, para 2.2; Walker, *Principles*, Vol IV, ch 9.1; *Stair Memorial Encyclopaedia*, Vol 8, *Diligence and Enforcement of Judgments*, para 101-102. No definition is offered in Maher & Cusine.

¹⁴ *Institutions of the Laws of Scotland*, (1832) Vol II, Book IV, 47.1.

another measure to be preferred or relinquished, the likely consequences of such potential adjustments must be weighed in the balance to avoid disproportionate, inappropriate or unacceptable use of particular measures. Enforcement of money obligations may have **consequences for the law on insolvency** and whether any reforms may cause insolvency measures to be preferred is a further important consideration.

2.6 Reform must be **relevant and proportionate**. It should seek, wherever possible, to **balance the interests** of those owed civil obligations against the legitimate interests of those on whom they are incumbent. At the same time, reform of the system should, as far as possible, be **fair, impartial, efficient and transparent**. It should be **informed by firm indicators, data or evidence** and based on **genuine democratic opinion**. Measures should be appropriate to tackle the **real root problems** which they seek to address. There should be proper recognition where a focus of disaffection on an obligation itself appears to produce transferred criticism of its enforcement.¹⁵ Where there may be a need for reform to improve a difficulty affecting a minority interest great care must be taken to ensure that proposals are appropriate, proportionate and measured in order to avoid undue conflict with the greater interest or key aims.

2.7 The **balancing of interests** is acutely relevant in this context because resolving an issue for one party usually tips the scales in favour of the other. Speedy, effective remedies are sought, on the one hand, and minimal, unintrusive measures, on the other. Third parties' interests may be affected or a wider impact on communities or business may have a bearing on where the balance should lie. The balancing exercise involves an assessment of fairness and equality of treatment since there should be no preferences where no credible justification for them exists. Above all, there must be borne in mind the need to ensure that enforceable obligations can be enforced in reality whilst ensuring that those against whom enforcement is sought have available appropriate support and safeguards against unfair and capricious action.

2.8 Existing arrangements and proposed changes have been assessed for their **human rights compatibility**. The enshrining of human rights within domestic law in the Human Rights Act 1998¹⁶ and their introduction as an integral part of the Scottish civil justice system in the Scotland Act 1998,¹⁷ make human rights compatibility a central issue for the Scottish system of enforcement of civil obligations. The requirements of the European Convention on Human Rights¹⁸ as developed by the European Court of Human Rights focuses not only on the rights of the person against whom enforcement activity is taken but also on the rights of the person who needs to seek recourse to enforcement action. For example, the Court has regarded enforcement of court decisions, in particular within a reasonable time, as an integral part of the right to a fair trial enshrined within article 6 of the Convention.¹⁹

2.9 Strenuous efforts have been made to find solutions which are evenly balanced although the competing nature of all aims and interests means that it may not always be possible to accommodate both in equal measure. The Executive acknowledges this reality and has endeavoured to devise reforms which meet the greatest and most pressing needs within the context of the prevailing social and economic climate and in the overall public interest.

¹⁵ Annex A, Part 3, Statements and Quotes, Historical Context.

¹⁶ c42.

¹⁷ c46.

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome, 4 November 1950.

¹⁹ *Hornsby v Greece*, (1997) 24 EHRR 250.