

3 STRUCTURE AND ORGANISATION OF THE ENFORCEMENT SYSTEM

3.1 The fundamental need for and purpose of the enforcement system has been addressed.²⁰ The way in which this operates and the structure within which it is set, including its regulation, have been assessed with a view to identifying any improvements which could increase the aim of a fair, impartial, efficient and transparent system.

3.2 Proposals for reform of the structure and organisation of the enforcement system are brought forward in this Part. In order to assess the nature and extent of appropriate reform, the general operation and functions of the enforcement system were considered, including the personnel involved in the process. Particular attention was paid to concerns raised in a number of contexts about the enforcement system. Upon examination many such concerns were found to relate to means of informal debt collection, rather than the formal enforcement system. It was, therefore, of some importance to consider the distinction between these two activities and their relationship. Also to examine the root problems underlying concerns about the current system. In the light of this review, a number of proposals for structural and other reforms are put forward.

General Operation and Functions

3.3 An obligation to do, or not do, something may be enforced where authority to do so has been granted by the civil courts²¹ and other means recognised by law. Decrees, or final orders, of the civil courts and court orders granted as provisional or protective measures contain a warrant for execution. That is, the court's authority to enforce. This is either in general terms, "for all lawful execution",²² or specific to the activity ordered by the court. A general warrant is usually applied in the case of orders for payment of money.²³ An example of a non-payment order might be for removal and delivery of a child in implement of a child custody order where the warrant would be for officers of court to search for, take into possession and deliver the child to a named person. Certain orders of the criminal courts, such as unpaid criminal fines or compensation orders, may also contain a warrant for enforcement by civil diligence.

3.4 Decisions which are classified as equivalent to a decree may be extracted or certified and enforced in the same manner. These principally include arbiters awards registered in the court books for execution, decisions given the same effect as arbiters' awards under statute and foreign court judgements registered in the court books. Certain documents, which contain civil obligations and the granter's consent to registration in the court books for execution, once registered may also be extracted and enforced,²⁴ such as dishonoured bills of exchange or promissory notes registered under statute.

3.5 An official copy of the authority to enforce which has been granted is necessary to provide sufficient evidence for enforcement action to be taken. Orders of court and other documents mentioned are formally extracted from the court books or other official records or a certified copy is produced. This is obtained by the person in whose favour the award is

²⁰ Part 2, para 2.2.

²¹ Including tribunals.

²² See for example, A.S. 1993/1956, rule 30.6 and form 1 and A.S. 1988/2013, rule 68(1) and form 62.

²³ Excepting in summary warrants for payment of taxes, duties and other levies where the diligences of arrestment and poinding and sale are specified.

²⁴ Known as summary diligence.

made who instructs officers who hold authority from the courts to carry out enforcement action.

3.6 The type of enforcement action which may be appropriate will depend on the nature of the order granted. The different methods of enforcement and proposals for their reform are considered in later Parts.

3.7 In Scotland enforcement of civil obligations is a purely private matter for which parties themselves have sole responsibility for taking any action and its funding. The state does not assist or intervene in the enforcement process except in terms of regulating enforcement officers' activities. Those who may be engaged to undertake enforcement action, although judicially commissioned and regulated, are self-employed private contractors providing a service within the free market. Whilst officers of court are not directly employed as public servants there is a substantial public dimension to their organisation. They might be regarded, roughly speaking, as the civil equivalent of police officers.

3.8 Enforcement officers are generally known as officers of court. They have responsibility for the exercise of a number of public functions related to the execution of necessary court business, such as witness citation or service of court notices and documents and enforce orders of the court. They certify their activities and owe a duty to the court in that regard and may be disciplined, including having their commission suspended or revoked, by the court. Their fees for carrying out these public functions are set by statutory instrument²⁵ and commissions are granted by the judiciary.

3.9 Before considering any issues and problems identified with existing arrangements concerning the current structure of the enforcement system, the background and reasons for its development are examined.

Structure of the Enforcement Officer Profession

3.10 Messengers-at-arms are responsible for the execution of warrants issued by the Court of Session, the High Court of Justiciary and the Court of the Lord Lyon and are empowered by their commissions to act in all parts of Scotland. A messenger-at-arms may not, in his capacity as messenger-at-arms, execute warrants granted by a sheriff or sheriff clerk. The Court of Session is responsible for investigating and disposing of complaints about the conduct of messengers-at-arms and for disciplining messengers.²⁶

3.11 By contrast, sheriff officers execute warrants of the sheriff court and the general rule is that officers are authorised by their commissions to act only within the sheriff court district or other area for which their commissions were granted.²⁷ "When a sheriff officer crosses the boundaries of the sheriffdom his commission, like that of the sheriff principal, ceases to have effect".²⁸ Not all sheriff officers are also commissioned as messengers-at-arms. It is understood that currently there are 183 serving officers and of these 124 are messengers-at-arms.²⁹ The general territorial role is relaxed in the case of a sheriff court district where there is no resident messenger-at-arms or in the islands of Scotland. In these

²⁵ SSI 2001/439, SSI 2001/440.

²⁶ See para 3.21.

²⁷ A.S. 1991/1397, rule 14(3).

²⁸ Malcolm Innes of Edingight, *Stair Memorial Encyclopaedia*, Vol 14, para 1508.

²⁹ As at November 2001. (Information obtained from the Court of the Lord Lyon and Society of Messengers-at-Arms and Sheriff Officers.)

circumstances, a sheriff officer, commissioned to operate in any part of the sheriffdom of which the district or island is part, has the power of a messenger-at-arms for performance of the duties of an officer of court, including execution of enforcement.³⁰ The sheriff principal from whom a sheriff officer holds a commission may deal with complaints about the conduct of that officer.³¹

Award of Commission

3.12 The award of a commission as a sheriff officer or messenger-at-arms is a matter within the discretion of the sheriff principal³² and Court of Session³³ respectively. Although the commission of a messenger-at-arms is granted formally by the Lord Lyon King of Arms, recommendation that an individual be granted a commission must be made by the Court of Session.

3.13 A necessary condition of the grant of a commission is that the Court of Session or sheriff principal be satisfied of the candidate's competence. Rules made under the 1987 Act provide that any applicant for a commission as an officer of court must submit, as part of the application process, a certificate from the Society of Messengers-at-Arms and Sheriff Officers to the effect that the applicant, "has passed such examinations as may be required by the committee of examiners".³⁴ The system of professional training and examination administered by the Society is considered below.

Training and Qualifications

3.14 Prior to the passing of the 1987 Act there was no formal system of training for applicants for, and holders of, commissions as officers of court. The 1987 Act gave the Court of Session power to regulate, by Act of Sederunt, the "training and the qualifications required to obtain a commission as messenger-at-arms or sheriff officer".³⁵ Currently, rules of court provide that an individual may not be an officer of court unless he is between the ages of 20 and 70, has satisfactorily completed a 3 year period of training with a qualified officer of court and has passed those examinations set by the committee of examiners appointed by the Society of Messengers-at-Arms and Sheriff Officers.³⁶

3.15 Setting examinations and determining the standard of attainment to be achieved by trainee officers of court is the responsibility of the committee of examiners, although they must consult the Society.³⁷ Officers of court are responsible for training any person whom they employ for the purpose of becoming an officer of court.³⁸

3.16 Following passing examination, an individual must practise for a further 2 years as a sheriff officer before he may be appointed as a messenger-at-arms.³⁹

³⁰ Execution of Diligence (Scotland) Act 1926, c16, s1.

³¹ See para 3.21.

³² *Stewart v Reid*, 1934, SC 69 and A.S. 1991/1397, rule 8.

³³ 1987 Act, s77(1) and A.S. 1991/1397, rule 7.

³⁴ A.S. 1991/1397 and rules 7(2)(c) and 8(2)(d).

³⁵ 1987 Act, s75(1)(b).

³⁶ A.S. 1991/1397, rule 3.

³⁷ *Ibid*, rule 6(3).

³⁸ *Ibid*, rule 5(1).

³⁹ *Ibid*, rule 4.

Professionalism

3.17 **Membership of a professional body.** Officers of court are not obliged to become or remain members of the Society of Messengers-at-Arms and Sheriff Officers. It is understood that 79% of commissioned officers are members of the Society.⁴⁰ Further, every applicant for a commission as an officer of court must obtain a certificate from the Society confirming that he has passed those examinations required by the "committee of examiners". The committee, which has responsibility for setting examination papers, standards of attainment and fees for examinations,⁴¹ is appointed by the Society and up to three of its five members may be members of the Society.

3.18 **Code of professional ethics.** The Society has a written constitution regulating its objects, membership and management. Bye-laws require members to abide by the Society's code of professional ethics⁴² and complaints against members are dealt with by the disciplinary and complaints committee which has power to expel or suspend members from the Society.⁴³

3.19 **Continuing professional development.** There is no statutory requirement for officers of court to engage in any post-qualifying training or education. However, the Society has a programme of Continuing Professional Development for members.

Regulation and Control

3.20 **Regulation.** Officers' of court appointment, organisation, qualification, training, conduct, inspection, investigation of misconduct, discipline, procedure, scope of official functions and non-official activity and keeping of accounts are regulated by the Act of Sederunt (Messengers-at-Arms & Sheriff Officers) Rules 1991.⁴⁴

3.21 **Misconduct.** The 1987 Act makes provision for formal investigation and disposal of complaints of misconduct against officers of court.⁴⁵ Complaints concerning messengers-at-arms are dealt with by a judge nominated by the Lord President of the Court of Session. Complaints concerning sheriff officers are dealt with by the sheriff principal from whom the officer holds his commission. Complaints could originate from a report of a sheriff, from a person appointed to inspect the work of an officer, where a judge of the Court of Session or a sheriff principal has reason to believe that the officer may have been guilty of misconduct, or where a complaint is made by a member of the public. An independent solicitor would be nominated to investigate the matter. Investigation of complaints includes misconduct not in the course of official duties. Misconduct includes conduct tending to bring the office of messenger-at-arms or sheriff officer into disrepute.

3.22 If found guilty of misconduct an officer could be deprived of office, suspended from practice, fined, censured or ordered to repay excessive fees. Appeal lies to the Inner House of the Court of Session.

⁴⁰ As at November 2001, of the 183 commissioned officers, 144 are members of the Society. (Information obtained from the Society of Messengers-at-Arms and Sheriff Officers.)

⁴¹ A.S. 1991/1397, rule 6(3).

⁴² Constitution of the Society of Messengers-at-Arms and Sheriff Officers, Bye-law 2(e).

⁴³ Constitution of the Society of Messengers-at-Arms and Sheriff Officers, Disciplinary & Complaints Committee.

⁴⁴ A.S. 1991/1397.

⁴⁵ ss 79-81.

3.23 Officers of court require to hold a bond of caution and professional indemnity insurance as they may be liable in damages for their actions.⁴⁶

3.24 **Advisory Council.** An Advisory Council on Messengers-at-Arms and Sheriff Officers was created by the 1987 Act.⁴⁷ This followed a recommendation by the Scottish Law Commission for establishment of a standing body to advise the Court of Session on the making of rules concerning the administration of diligence and to keep under review all matters relating to officers of court.⁴⁸ In terms of the 1987 Act, the Advisory Council is comprised of 9 members. These include one Court of Session judge, the Lord Lyon King of Arms, two sheriffs principal, two officers of court, two solicitors and one person appointed by the Scottish Ministers. Members hold office for a fixed period of 3 years but are eligible for reappointment. The Advisory Council is serviced by a secretary who is appointed by the Scottish Ministers. Although it has power “to regulate the summoning of its meetings and the procedure at such meetings,”⁴⁹ no formal procedural rules have been made. It has tended to meet once per year or as necessary.

3.25 **Production of information.** The Scottish Ministers have a wide power, under section 84 of the 1987 Act, to require officers of court to provide them with information. They must provide information, “in such form and at such times as the Scottish Ministers may specify, regarding the officer of court’s official functions”.⁵⁰ That information may be published in whatever form Ministers see fit, provided that the anonymity of individual officers of court and those against whom diligence has been done is preserved. Currently, in implement of this provision, the Justice Department asks each firm to submit a ‘section 84 return’ every quarter. This return seeks information concerning diligence executed and is published annually as part of the Civil Judicial Statistics. The return is also used to gather information concerning the number of officers of court in the firm and the number of commissions held by them.

3.26 Registers of officers of court are kept under Part VII of the 1991 Rules by the sheriff and Lyon clerks and officers are obliged to intimate any changes. These maintain details of all officers who hold commissions, their business details, any practising restrictions, any extra-official activities permitted and interests disclosed and arrangements for accounting and professional indemnity insurance policies.

3.27 **Business practices.** Officers of court are not permitted to engage in other business or professional activities outwith their office.⁵¹ Sheriff officers can perform the extra-official activity of collecting debts which are not constituted by court decree if specifically permitted by the sheriff principal.⁵²

⁴⁶ See paras 4.95.

⁴⁷ 1987 Act, s76.

⁴⁸ Scot Law Com No 95, para 8.33.

⁴⁹ 1987 Act, s76(9).

⁵⁰ 1987 Act, s84(1) as amended by the Transfer of Functions (Lord Advocate and Secretary of State) Order 1999, (SI 1999/678) and the 1998 Act, s53.

⁵¹ A.S. 1991/1397, rule 15.

⁵² *Ibid*, rule 16.

Formal Enforcement and Informal Debt Collection

Distinction between Pre-Decree Collection and Post Decree Enforcement

3.28 An important distinction exists, both conceptually and in terms of current regulation, between the informal collection of debts before a court decree ordering payment has been granted and the formal enforcement of debts which have been legally constituted by a decree or equivalent. The essence of this distinction lies in the nature of the two situations, the former being by voluntary agreement and the latter being by legal compulsion.

3.29 A debt which is accepted as payable may be paid, on a purely voluntary basis, according to terms agreed between debtor and creditor (usually pre-decree). The creditor may exercise his right to take formal action to have the sum held as legally due and payable, usually by raising court action and obtaining a decree containing a warrant for all lawful execution. Legal constitution of the debt by decree ordering payment to be made entitles the creditor to enforce payment by compulsory means (post-decree). Pre-decree voluntary arrangements for payment/collection are a matter between the parties. Post-decree compulsory enforcement procedures are governed by the law of diligence and overseen by the Scottish courts.

3.30 Informal pre-decree collection may be arranged between individuals but is often undertaken as a fee charging business service offered by collection agencies to creditors seeking to collect, often from multiple debtors. Informal debt collection can be undertaken at any stage of the process when creditors pursue obligations for payment of money, before and often after formal authority to enforce has been obtained or acted upon.

3.31 The current organisation and regulation of official post-decree enforcement is set out in preceding paragraphs. Debt collection is only partly regulated. Debt collectors can operate in the consumer credit field by obtaining licenses granted by the Office of Fair Trading. The Consumer Credit Act 1974⁵³ provides a system of licensing granted by the Office of Fair Trading⁵⁴ for consumer credit businesses, consumer hire businesses and ancillary credit businesses, under the 1974 Act. An ancillary credit business includes debt collecting⁵⁵ and is treated as a consumer credit business.⁵⁶ Debt collecting is covered under the Act in so far as it concerns debts due under consumer credit or hire agreements.⁵⁷ Regulations may be made under the 1974 Act regarding conduct of the business but none have been made for debt collecting.⁵⁸ The Office of Fair Trading has identified debt collecting as a sector where guidelines should be issued and recently issued guidelines for debt management companies. Voluntary codes of conduct are adopted by those who are members of consumer credit organisations. For example, one association⁵⁹ requires consumer credit debt collectors not to engage in specified activities which constitute harassment of a debtor. Similarly, another association⁶⁰ has a code of practice with guidelines for members about consumer credit debt collection procedures.

⁵³ c39.

⁵⁴ s21.

⁵⁵ ss 145 & 189.

⁵⁶ ss 145 & 147.

⁵⁷ ss 147(7) & 189.

⁵⁸ s26.

⁵⁹ Consumer Credit Association.

⁶⁰ Credit Services Association Ltd.

3.32 Debt collection practice outwith the consumer credit regime is not regulated. There are all sorts of debts which are collected by informal means which would not fall into the consumer credit/hire purchase category under the 1974 Act. Examples would include council tax, rent arrears, services provided by painters and decorators, roofing contractors, tree surgeons, plumbers, joiners, treatment given by vets and dentists and so on. Also, debts owing for goods received where payment is not made up front and no credit or hire purchase arrangement is entered into. Shops usually take a deposit for items which are delivered and the balance is paid once the goods have been received intact, for example white goods, furniture etc. In their aims, informal debt collection and formal enforcement are closely associated. There may be a case for regulating debt collecting activities in a similar manner to regulation which exists (plus future arrangements planned) for formal enforcement. Any necessary provision for the unlicensed arena should be made in parallel with proposals for adjusting the post-decree enforcement regime and consideration of this has, therefore, been included within this exercise.

Devolved and Reserved Competence

3.33 Formal enforcement falls within the remit of this exercise and is within devolved competence for which the Scottish Parliament may legislate. Informal debt collection, broadly speaking, is not reserved, although the subject matter of the 1974 Act is reserved as a matter of consumer protection by regulation of the credit industry. The 1974 Act was intended to establish, "for the protection of consumers",⁶¹ a new system of licensing and control of those engaged in the provision of credit. Informal debt collection, undertaken for monies due under arrangements which don't fall into the consumer credit area, is a matter within Scots private law as an obligation to make payment usually arising from a contract.

Concerns about the Current Enforcement System

3.34 Concerns about the current structure and organisation of the system of enforcement of civil obligations have been raised in a number of contexts. These are examined and include issues raised in the statutory complaints procedure against officers of court, SMASO's complaints procedure and local authority complaints procedures; Scottish Law Commission Reports; statements made in the parliamentary proceedings and public debate about abolition of poinding and warrant sale; the Report of the independent Working Group which recommended an alternative for poinding and warrant sale; advice sector Reports; the CRU research into the operation of the Debtors (Scotland) Act 1987; IRRV research plus the Report of the CoSLA and Executive Joint Working Group on Council Tax Collection.

Concerns Raised Within the Formal Complaints Procedures

Statutory Judicial Complaints Procedure

3.35 Despite the discontent expressed, the statutory judicial complaints procedure is little used and an extremely small number of complaints have been made over the years. Statistics are not published for complaints against officers of court. Nonetheless, information gathered from sheriffs principal and the Lord Lyon reveals the following:

⁶¹ 1974 Act, Long Title.

Table I Complaints about Officers of Court received by Sheriffdom

Year	Sheriffdom						Total
	Lothian & Borders	North Strathclyde	Tayside, Central & Fife	South Strathclyde, Dumfries & Galloway	Grampian, Highland & Islands	Glasgow & Strathkelvin	
1997	4	0	2	0	0	4	10
1998	2	2	2	3	3	1	13
1999	1	4	0	1	0	2	8
2000	5	2	1	2	3	3	16
2001*	0	2	3	3	2	1	11

Source: Sheriffs principal.

Notes: * To November/December 2001.

Table II Complaints about Messenger-at-Arms received by Lord Lyon

Year	Lord Lyon
1997	0
1998	0
1999	0
2000	0
2001	0

Source: Court of the Lord Lyon.

3.36 The nature of complaints received by sheriffs principal over the period from 1997 to date included concerns about the following types of matters:

- ♦ non-appearance of officer on specified date, difficulty contacting firm of sheriff officers
- ♦ misconduct in relation to arrestment procedures
- ♦ failure to respond to letter, incorrectly addressed correspondence
- ♦ breach of confidentiality
- ♦ diligence carried out unnecessarily
- ♦ earnings arrestment served on wrong employer
- ♦ unprofessional attitude and behaviour
- ♦ failure to provide proper identification

3.37 The information gathered from sheriffs principal discloses that nearly all complaints referred to them over this 5 year period were subsequently resolved without any form of disciplinary action being taken against the officer of court concerned. A substantial number appear to have been dealt with by means of investigation and exchange of correspondence between the relevant sheriff principal and the senior partner of the firm of sheriff officers concerned. Such correspondence has, typically, been copied to the complainer, with no further action then being taken. Other complaints were held to have been without foundation or did not proceed as a result of insufficient information having been provided. There were isolated instances of officers being reminded by the sheriff principal of the need to be courteous in their dealings with debtors, but no significant cases of misconduct appear to have been dealt with over the period concerned.

3.38 Information obtained from the Lyon Clerk confirms that, for the period from 1997 to November 2001, no complaints were received by the Lord Lyon concerning the actings of any messenger-at-arms, with none having been deprived of office or suspended for any other disciplinary matter in that period.

SMASO Complaints Procedure

3.39 SMASO's complaints procedure, which forms part of its own code of conduct and disciplinary framework, reveals that over a 5-year period, from 1997 to November 2001, the level of complaints received annually by SMASO, for which it has a locus to become involved, numbered between 5 and 7 each year. The nature of these complaints was varied, examples include: concerns over fees, accounting issues, tone of correspondence, failing to explain consequence of unsuccessful diligence. The majority of complaints were made by debtors, a small number by creditors and others being complaints by officers against fellow officers (relating to allegations of professional discourtesy). Nearly all complaints handled by SMASO over this period appear to have been resolved either by determining there to be no valid grounds of complaint, or by an exchange of correspondence with the parties involved. Over this 5-year period, the information provided by SMASO indicated that only one complaint was considered by its Disciplinary Committee, which was not upheld after investigation.

Complaints made Directly to Local Authorities

3.40 In order to get to the bottom of the disparity between complaints expressed publicly but not made under the statutory complaints procedure, the Executive conducted a survey of local authorities as part of the diligence review. Information was obtained about complaints made directly to them. Local authorities are substantial users of the enforcement system and it was possible that complaints were being directed to them instead of channelled through the statutory procedure. All local authorities were asked to provide details of the numbers and nature of complaints received by them, over the previous five year period, concerning officers of court and debt collectors who they had instructed and how they had dealt with them along with information about their complaints' policy.

3.41 The survey produced responses from 26 of the 32 local authorities. Of these, 14 reported no complaints having been received over the whole 5 year period covered. Of those who did report complaints, 11 authorities had received up to 4 complaints during the whole 5 year period, mostly against sheriff officers. One authority had received 16 complaints during the 5 year period all of which were against debt collectors. The nature of the complaints reported included, primarily, difficulties in negotiating payment terms by instalments and an inflexible or unhelpful attitude. Complaints were resolved following investigation by the authorities and exchange of correspondence with the complainer and the firm of officers of court or debt collectors concerned. No complaints were referred to the judiciary under the statutory complaints procedure. Most authorities reported that they operated a clearly defined complaints policy. Several also reported having entered into contracts for the provision of the sheriff officers' services employed by them which incorporated agreed codes of conduct.

Complaints about Debt Collectors

3.42 It is understood that complaints about licensed debt collectors should first be directed to Trading Standards Offices and, should those offices receive a number of complaints against the same individual or firm, they will be referred to the Office of Fair Trading for consideration of their licence. The Executive is advised that records of complaints about all consumer credit organisations are not broken down to distinguish those for debt collection.

3.43 Unlicensed debt collectors are not regulated and there is no complaints procedure.

Concerns Raised Informally

Parliament & Public Debate, SLC, Working Groups, Advice Sector, Research

3.44 During the parliamentary and public debates on the abolition of poinding and warrant sale some controversy arose about the enforcement system in relation to the role of sheriff officers in conducting that form of enforcement and about what could happen during the procedure. Interventions did not always reflect an accurate picture of the law or practice. A general flavour of comments made can be seen from excerpts produced in Annex A. The Scottish Law Commission endeavoured to clarify popular misconceptions in its evidence to the Parliamentary committee⁶² and their *Report on Poinding and Warrant Sales* without apparent success.

3.45 The role of officers of court was explored in the Report produced by the independent Working Group set up to identify a replacement for poinding and warrant sale.⁶³ The Working Group noted the importance of the officer of court function for the civil justice system and observed:

"We are aware of allegations about unprofessional conduct of sheriff officers made during the debate on the Abolition of Poindings and Warrant Sales Bill. Some of our "members" own knowledge suggested that there was an element of truth to the anecdotal evidence in this regard: but in other cases members had heard that debtors had found officers to be helpful and supportive. We note that there are a very low number of formal complaints made using the official complaints procedure; and we are well aware that people will tend to feel ill-disposed towards those charged with carrying out a procedure which is bound to be unwelcome. Whatever the factual position may be, the key point is that the significance of the onerous duties carried out by a court enforcement officer demands that all activities undertaken on the authority of the court must be conducted in a thoroughly professional, responsible and accountable manner. Past criticisms arising from the historical circumstances surrounding the poinding and sale procedure have brought the important role of court enforcement into question: we must not allow that state of affairs to persist."⁶⁴

3.46 The Working Group recommended that the Executive should:

"carry out an early and thorough review of this office [enforcement officers] and bring forward proposals for significant reform. This should include title, organisational structure and accountability as well as national standards, professional qualifications, training and continuing professional development. Careful consideration should also be given to whether the separate roles currently undertaken by sheriff officers, in relation to debt collection and enforcement of court decisions, are compatible and should be performed by the same people."⁶⁵

⁶² Justice and Home Affairs Committee (lead committee), Social Inclusion, Housing and Voluntary Sector Committee, Local Government Committee.

⁶³ *Striking the Balance*, 18 July 2001.

⁶⁴ *Ibid*, paras 56-57.

⁶⁵ *Ibid*, para 121.

3.47 The Executive consulted on the Working Group's proposals and this recommendation met with approval from most respondents. Many respondents offered comments on the organisation of the enforcement system and the role of enforcement officers. Relevant excerpts are reproduced in Annex A.

3.48 Some aspects of the enforcement system have been considered by the advice sector. A Report of the 2001 annual conference of Money Advice Scotland⁶⁶ recorded discussion during a money advisers' workshop session when delegates exchanged clients' experiences regarding sheriff officers when carrying out diligence. It was reported that sheriff officers proved supportive, providing useful information to people about benefits and where to go to obtain money advice. The root problem with clients' complaints lay with issues about the debt itself, often connected to an unco-ordinated approach taken by local authorities in collecting debts due to different departments.⁶⁷ Papers produced by Citizens Advice Scotland have touched on matters relating to the enforcement system by highlighting client's experiences, such as activities of debt collectors.⁶⁸

3.49 The Report of the interest group, Improving Debt Recovery Working Group,⁶⁹ recommended that the code of conduct for enforcement officers should be reviewed with SMASO and placed on a statutory footing if required. It suggested that the SMASO complaints system should be subject to further reference to the Legal Services Ombudsman and diligence forms should make reference to the complaints procedure.⁷⁰

3.50 Research into the Debtors (Scotland) Act 1987 considered how the Act was working in practice from the perspectives of all of its users and operators.⁷¹ The Scottish Office Central Research Unit had been commissioned in 1993 to conduct a thorough review of the implementation of the 1987 Act. The purpose of the research was to evaluate to what extent the new legislation was achieving the Commission's stated objectives of maintaining an effective system of debt recovery for creditors whilst protecting debtors from the harsher aspects of diligence. Seven separate research studies were conducted. Four studies were described as qualitative. They were not statistically based but were designed to evaluate the experiences and views of participants in the diligence system, namely: (1) commercial creditors; (2) individual creditors; (3) debtors and (4) facilitators (i.e. advice workers, solicitors, debt collectors, employers, sheriffs, court staff and enforcement officers). The remaining three studies were quantitative, that is to say they provided some statistical analysis of: (5) payment actions in the sheriff court, (6) the use of diligence generally and (7) the use of poinding and warrant sale specifically. From these seven studies, an overview of the operation of the 1987 Act was produced which attempted to draw together the results of the research.

3.51 The research team had encountered various difficulties throughout the project, including inaccuracies in statistical information provided by sheriff courts and problems securing the involvement of sufficient numbers of affected parties to ensure that sample groups were representative. There was considerable delay between the conduct of the research and the publication of the Reports in April 1999. The research represents the only formal study in this field and the types of difficulties then revealed may not have significantly

⁶⁶ 7-8 June 2001.

⁶⁷ *Money Advice Scotland Spring Journal, incorporating Conference 2001*, awaiting publication.

⁶⁸ *Would You Credit It? – creditor behaviour in Scotland*, December 2001.

⁶⁹ December 2000, an interest group comprising representatives of Scottish Socialist Party, Scottish National Party and certain religious, not for profit advice sector and poverty action organisations.

⁷⁰ See excerpt in Annex A.

⁷¹ *Evaluation of the Debtors (Scotland) Act 1987*, (1999).

changed. However, it should be borne in mind that it represented a small sample study and is now a number of years old.

3.52 Concerns about the enforcement system were raised by commercial creditors, individual creditors and debtors. Excerpts are reproduced in Annex A. The research revealed creditors' disappointment of results of enforcement and one creditor's view that the state should ensure that people pay their debts. Debtors expressed a need for wider availability of information about court and enforcement procedures. Debtors' reports of sheriff officers' conduct revealed disparities from discreet and sensitive to aggressive and insensitive. An increase in informal debt collection and a trend towards creditors referring debtors to advice agencies was noted. One debt collector observed that sheriff officers were regulated by the courts whereas debt collectors were not and suggested that problems were, therefore, more likely to arise with collectors than officers.

3.53 Local authorities are substantial users of the services of both informal debt collectors and formal enforcement officers. The Scottish enforcement system was considered as part of the research and recommendations made in respect of collection of council tax debt. There had been concerns about the relatively low levels of collection *per se* and in comparison with the rates of collection in England and Wales. A joint CoSLA and Scottish Office Working Group Report *It Pays to Pay*⁷² produced recommendations based on commissioned research of the Institute of Revenues, Rating and Valuation.⁷³ The Report did not make any recommendations about the structure or organisation of the enforcement system. It made some recommendations about specific aspects of how some forms of diligence operated. It also considered the issue about creditor access to information about debtors' circumstances. These issues are considered in subsequent parts of this paper. Many of its recommendations were directed at internal working practices within local authorities.

3.54 Recommendations were made in *It Pays to Pay* about the way in which local authorities should manage both informal pre-decree collection and formal post-decree enforcement, particularly in relation to their communication with and instruction of debt collectors and enforcement officers. It was recommended that local authorities entered into service level agreements or codes of practice with debt collectors and enforcement officers in order to set out their policies on collection and enforcement, as well as protocols to be carried out for matters such as arranging instalment repayments.⁷⁴ It was noted that sheriff officers were assisting in an advisory capacity with, for example, helping people to complete council tax benefit claim forms.⁷⁵ It was recommended that the local authorities do more to handle cases on an individual basis in order to consider the whole range of informal collection and formal enforcement options available which might be appropriate depending on the circumstances of individual cases.⁷⁶

Some Underlying Problems

3.55 Concerns raised about the current system for enforcement of civil obligations in Scotland relate almost exclusively to the role and conduct of the personnel involved in enforcing obligations for payment of money. Foregoing paragraphs summarised the way in

⁷² January 2000.

⁷³ IRRV.

⁷⁴ *It Pays to Pay*, paras 106-108.

⁷⁵ *Ibid*, para 104.

⁷⁶ *Ibid*, para 104 & Annex F, para 10.

which the enforcement system is currently structured and the organisation of the personnel who carry out the function.

3.56 The types of incidents related in research, official reports, anecdotal accounts in the public debate and elsewhere fall into a small number of categories. Whilst in some fora concerns were expressed in emotive and unspecific terms, upon examination there can nonetheless be identified certain root problems underlying them. Often this is attributable to a lack of knowledge or awareness but others fall into categories regarding accountability, creditors' instruction of enforcement, enforcement officers' attitude and informal debt collection.

Lack of Knowledge

3.57 A recurring and clear theme underlying a large proportion of the concerns raised is a lack of knowledge or understanding about the law and procedures involved in enforcement. This includes a lack of knowledge about the statutory arrangements for accountability of enforcement officers. There appears also to be a general lack of understanding about the sequence of events which may be followed when a creditor seeks to recover a debt and the difference between informal debt collection and formal enforcement. This has meant that debtors didn't know where exactly they stood or what strength of force could properly be used against them. Lack of awareness of debtor protection provided by existing law has resulted in safeguards not being taken up as widely as had been intended. Taken together, these different aspects of a knowledge deficit have unnecessarily generated worry and fear about what might happen to someone in debt.

3.58 Some concerns which, at first glance, appear to be about the conduct of enforcement officers, can be more accurately assessed as concerning a lack of knowledge about the way in which enforcement operates in law. This type of concern was raised only in the context of the poinding and warrant sale procedure, which is soon to be abolished and alternative arrangements brought forward, but it nonetheless raises an important issue about awareness of the law and procedures. The Scottish Law Commission explained the legal position about locksmiths opening locked doors⁷⁷ and any officer who kicked a door down ought to have been the subject of a complaint under the statutory procedure. It is likely that descriptive licence has been adopted and that it is a feeling of being invaded which is conveyed by this type of description. It is perhaps not surprising, therefore, that no complaints about any such activity were made formally. Similarly, references have been made to household items being capable of attachment but which were exempted from enforcement by law.⁷⁸ Yet such statements were made as if portraying the correct legal position in the parliamentary and public arenas and may have added to public fear and alarm. It would be dangerous to make assumptions about how such misstatements came to have been made and it must be assumed that they were unwitting. Irrespectively, it is important to have regard to the underlying problem demonstrated by them, that is a lack of knowledge about law and procedures.

Accountability

3.59 Concerns were raised in the parliamentary area and elsewhere about accountability of enforcement officers. Earlier paragraphs in this Part detailed the current regulatory arrangements for those engaged in conducting enforcement, including the primary and secondary legislation, their judicial appointments, supervision and discipline in conjunction

⁷⁷ See excerpt in Annex A.

⁷⁸ *Ibid.*

with the statutory complaints mechanism. Again, there appears to be a lack of knowledge that any regulatory framework exists and what the arrangements entail, rather than concerns being expressed about its nature and extent. This appears to be part of the wider lack of knowledge and understanding generally about the structure and legal framework of the enforcement system including the procedures, safeguards and controls.

3.60 The situation is exacerbated by the fact that informal debt collection activities appear often to be confused with formal enforcement. This is discussed separately along with other concerns about debt collection.

3.61 One suggestion for changing existing accountability arrangements was that the Society of Messengers-at-Arms and Sheriff Officers' own complaint system should be made subject to the Legal Services Ombudsman, although it appears that the existence of the statutory judicial procedure may not have been appreciated, and that the Society's own code of conduct should be reviewed and taken in to statutory arrangements for misconduct.⁷⁹

Creditors' Instruction of Enforcement

3.62 Some concerns, if taken at face value, would tend to suggest that there is a perception that enforcement officers pursue enforcement action of their own accord, rather than being instructed by creditors with legal authority to do so. Some might more accurately be assessed as a concern about the decisions which creditors take to pursue formal enforcement rather than seek agreement about the payment terms. Although the vessel of the instructing creditors, the focus of discontent has tended to be directed at the enforcement officer. The survey of local authorities and Report from the Money Advice Scotland conference tend to suggest that much of the grievance and distress arising from enforcement is more related to the fact the person's situation has reached the stage of enforcement action being taken rather than the way in which it is conducted.

3.63 It is, under present law, a matter for individual creditors to determine whether and when to pursue enforcement action if they have obtained the necessary legal authority to do so. A current trend towards encouraging the use of informal means of collecting monies owed rather than pursuing formal enforcement is discussed later.

3.64 An underlying concern about how creditors exercise their right to take enforcement action appears, in part, to be directed at local authorities. As large scale creditors they are inevitably heavy users of the formal enforcement system and also informal means of debt collection. In this context, the concern about the way creditors instruct action extends to co-ordination of multiple debts due to them. It is understood that it relates to increased costs and confusion for the debtor if separate agents are instructed to recover different years council tax debt or council tax plus rent arrears rather than co-ordinating these. However, it is particularly incumbent on local authorities to pursue recovery of debt without delay when payment is not forthcoming and services cannot be discontinued to prevent further debt accruing when arrears continue to mount. A cycle or layers of debt do then arise and again must be pursued. It seems that it may not be clear to which part of the total debt payments made are applied. Some sort of ongoing balance sheet covering all departments could show, at any given time, the total and component parts of the sum owing and which component parts may have been recovered by informal or formal means.

3.65 What might be at the root of the problem is perhaps less a question about enforcement and more a matter of management and liaison within local authorities.

⁷⁹ See para 3.49.

Remedies, where creditor use of the enforcement system has been inappropriate, are a matter considered in Part 4C of this paper.

Enforcement Officers' Behaviour

3.66 Concerns expressed about the behaviour of enforcement officers when carrying out formal enforcement included instances of aggression or inappropriate language which caused distress. This might be regarded as conduct tending to bring the office of messengers-at-arms or sheriff officers into disrepute which could constitute misconduct. Yet the level of formal complaints channelled through the statutory judicial complaints procedure is extremely low. However, there is also as much evidence of good behaviour as there is of bad behaviour which suggests that it should not be regarded as an endemic problem. There may, nonetheless, be reasons why people do not use the complaints procedure. Some accounts appear to have related to recollections from pre-1987 reform days, people may be unwilling to involve themselves further with the courts over such matters, may simply not be sufficiently motivated to do so, or may not be aware of the complaints procedure.

3.67 Many of the concerns raised which appear to have been about the attitude of enforcement officers are in fact complaints about creditors' decisions to instruct enforcement action or were made on the basis of misunderstandings about the law as already discussed.

3.68 The recent groundswell of adverse opinion concerning enforcement officers has also been attributed to a backlash from the non-payment campaign in the 1980s against the community charge or poll tax and the bitter resentment felt towards the 'messenger' as a consequence of councils enforcing it by poinding and warrant sale.⁸⁰ Thus, the officer instructed to enforce unpopular taxes is associated with its unpopularity.

Informal Debt Collection

3.69 It would appear that more creditors are attempting to resolve matters informally without recourse to formal enforcement.⁸¹ Some may do so in-house but the trend appears to be towards greater use of debt collection services or referrals to advice agencies. Different techniques are adopted by debt collectors with some actively advocating a heavy handed approach. For example, a firm of English-based debt collectors licensed for consumer credit purposes offer services in Scotland "by sending one of my teams of obnoxious and arrogant collectors to your debtor's business or home".⁸²

3.70 A good proportion of the anecdotal complaints as well as those recorded by local authorities which are said to be about enforcement officers are, from examination of the circumstances, about the conduct of informal debt collection rather than official enforcement. The context in which objectionable behaviour has been committed may be blurred because this difference in personnel is not appreciated. There are a great many firms of debt collectors who engage solely in that activity. However, enforcement officers may seek judicial permission to also undertake debt collection as an extra-official activity. When they do so, they wear a different hat and do not act in the capacity as an officer of court. It might be supposed that this arrangement has given rise to greater levels of discontent about the conduct of enforcement officers being assumed than actually exists, although a proportion of

⁸⁰ See Annex A, Part 3, Statements and Quotes, Historical Context.

⁸¹ The Report *It Pays to Pay* recommended that local authorities should review their practices to exploit fully the complete range of debt collection and recovery processes and facilities, both statutory and non-statutory, that are available. (Para 104 and Annex F, para10).

⁸² Crucial Input Ltd., advertising flyer, November 2000.

such concerns could have involved the same people regardless of which hat they might have been wearing.

Policy Issues and Proposals for Reform

3.71 The main questions are whether the current arrangements are satisfactory in terms of the policy aims for the Scottish system of enforcement of civil obligations and whether the system operates to the optimum level to achieve its purpose. A number of conclusions can be drawn from the issues arising from concerns highlighted in foregoing paragraphs which have helped inform consideration of appropriate reform. In addition to considering any defects which should be corrected it is necessary to assess also the broader issue of whether there is a need for reform in order to develop the system towards greater effectiveness, efficiency, fairness, or transparency. Do existing arrangements, within the private sector but subject to judicial scrutiny and control, operate to best effect or is there a case for greater public sector involvement or control? Could improvements be made to modernise the system whilst retaining the policy aims?

Structure of the Enforcement System

3.72 As noted earlier, enforcement in Scotland is a privately arranged and funded concern. Individuals, businesses and government can enforce dishonoured obligations, most often for payment of money, arising from arrangements freely entered into, judicial ruling or statutory requirement. Enforcement is not a function which itself is undertaken by the state, except to regulate its operation.

3.73 It has occasionally been suggested that there should be a change in the structure of the system from private to public provision of this service. Proponents of a private regime seek choice and competition of service providers within a free market and have a perception of public sector services being run in an inefficient and dilatory manner. Proponents of a public regime seek state provision of services as a matter of principle due to the nature of the function and for greater levels of accountability.

3.74 A comparative academic study suggests that the Scottish arrangements compare favourably with regulation of enforcement in many other European jurisdictions.⁸³ The study was intended to contribute to debate on the creation of a European judicial area, the aim being to improve compatibility towards approximation between the legal systems of European Union members states. The study emphasises that there are, at present, dramatic differences between the systems of civil enforcement in member states and identifies strengths and weaknesses in each. So far as Scotland is concerned, it is noted that the regulatory framework for enforcement officers compares very favourably with that in England and Wales resulting in “greater opportunity to resist bad practice”.⁸⁴

3.75 No significant difficulties have been identified with the system which might be resolved by a move from a private to public regime. Those issues raised in earlier paragraphs of this Part do not militate towards structural change as the solution for their improvement. For example, the mix of some poor and some good attitudes adopted by enforcement officers during the course of executing their duties could equally arise in a publicly run system. Structural change, by nationalising enforcement officers and bringing their role and employment wholly within the public sector, would be neither a logical nor

⁸³ *The Regulation of Civil Enforcement Agents in Europe*. See excerpt in Annex A.

⁸⁴ *Ibid*, p 182.

measured response to the level and nature of such concerns. The associated setting up, running and compensation costs to the public purse would be disproportionate when desired improvements for this and other issues could be achieved by alternative, more directly focused, means. These are discussed below.

Access to Information

3.76 Both those who favour a privately run system and publicly run system seek enquiry into and use of information about individual and business circumstances and assets. Access to information held by third parties including government is an extremely important issue for an effective and fair enforcement regime, particularly for enforcement of obligations to pay money. If creditors had access to a range of information about debtors' financial circumstances and assets they would be able to target and use appropriate and effective enforcement mechanisms and avoid procedures likely to be fruitless or excessive. There would be a saving of time, expense and upset for all. Both debtor and creditor interests have expressed a need for this. It was of particular concern in *It Pays to Pay* which recommended measures for local authority access to information as part of its package of proposals for improving council tax collection in Scotland.⁸⁵

3.77 It has to be borne in mind, however, that obtaining a decree for payment of money does not guarantee that the amount held by the court to be due or any part of it will be recoverable. Indications from the research and from the advice sector are that this often comes as a surprise for creditors who assume that the state will force their debtors to pay up. Enforcement against a debtor's assets may be unsuccessful or ultimately not possible. This is something which creditors should consider before proceeding to enforce or litigate to avoid throwing good money after bad. More information about a debtor's circumstances and his assets, accessible by creditors, will assist them to make an informed judgement on such matters. It is equally in the interests of debtors with few or no assets who will not be subject to fruitless enforcement.

3.78 The key issue is the extent to which this should be permitted and by whom it should be accessed having regard to the competing privacy interest and compatibility with existing data protection laws. Much of the information about debtors' assets and circumstances, which would be useful to enable appropriate enforcement means to be identified and fruitless blind attempts avoided, is held by government. Enforcement systems which are publicly run may naturally be able to access the information which other arms of government hold more readily. For example, in Sweden, the Enforcement Authority, in addition to receiving information supplied by the debtor, also has direct access to government registers and databases such as the Tax Register and National Car Register. The Authority may also access other existing registers such as private registers belonging to banks. Its own Enforcement Register, which contains details of all recovery and enforcement action taken and sums due, is open to the public. The significant factor in the Swedish model is, not so much that it's state run but, rather that there are in place appropriate permissions authorising access to information and the use of appropriate technology to do so easily and cost-effectively. Concluding remarks in the comparative European study, mentioned in paragraph 3.74, note limitations in the effectiveness of the Scottish system arising from a lack of good access to information and the fact that enforcement officers lack a controlling role in the enforcement of civil debts.

3.79 This was recognised in *Striking the Balance* by the independent Working Group who recommended that " the Executive continue to investigate, with the UK Government and

⁸⁵ Paras 60-64.

other interested parties, the scope for progress towards sharing information about debtors' financial circumstances." ⁸⁶ Much work on data sharing has been undertaken within government although until recently it has been piecemeal. The Cabinet Office Performance and Innovation Unit has recently been considering this issue in the Privacy and Data Sharing project.⁸⁷ This has considered the issues surrounding data sharing within government and public bodies only. The Executive inputted to the project for the Executive's enforcement interest and it is anticipated that a report will be published imminently.

3.80 As part of its review of enforcement, the Lord Chancellor's Department has put forward a proposal for the introduction of court based Data Disclosure Orders. In the first instance, before contacting a debtor, a regulated enforcement officer would have limited ability to confirm that debtor information, as provided by the creditor, is current. Secondly, the creditor would, after wilful non-compliance by a debtor, be able to ask the court for an order requiring information to be disclosed by third parties. The Executive considers such a model may prove costly for users, particularly debtors who bear the costs of enforcement. Given current statistics on the use of enforcement, it would weigh heavily on the courts' time and resources in a matter which in few cases would require judicial determination.

3.81 This is an area of concern in other European jurisdictions. For example, a private members bill submitted to the Chamber of Representatives of Belgium proposes statutory arrangements for access to information about debtors' assets.⁸⁸ This would be undertaken, on behalf of a creditor holding a judgement for debt, by members of a controlled and regulated profession of bailiffs. The aim is to strengthen the creditors position whilst doing so in compliance with human dignity and privacy and halt agencies already resorting to unorthodox methods.

3.82 Legislative rules for access to information will have to be formulated with regard to privacy, data protection and human rights issues and ensure that suitable safeguards and monitoring arrangements are built in. The Executive will continue to work with the UK government on this since a solution which sets uniform arrangements and criteria throughout the UK is desirable, not least for ease and compatibility in cross-border enforcement. This is something for which the Scottish Civil Enforcement Commission, which is discussed in the following paragraphs, should have responsibility once workable arrangements have been identified and taken forward.

Organisation of the Enforcement System

3.83 Among both those who use and provide the current enforcement system there is a will for change. Modernising unnecessary or outdated features and developing the system in line with present-day expectations is desirable to maintain confidence in the system and those who carry out its functions.

3.84 Despite the division in territorial competence and functions of enforcement officers, the distinction between sheriff officers and messengers-at-arms is not so great as might be imagined. Most significantly, the personnel involved are by and large the same: as a result of reforms implemented by the 1987 Act an individual must hold a commission as a sheriff officer before he can obtain a commission as a messenger-at-arms,⁸⁹ although not every

⁸⁶ *Striking the Balance*, para 97.

⁸⁷ www.piu.gov.uk

⁸⁸ *Proposition de Loi prévoyant un droit d'enquête d'information de l'huissier de justice dans le Code judiciaire*, Doc 50, 1388/001.

⁸⁹ 1987 Act, s77(1).

sheriff officer seeks this additional commission.⁹⁰ There are also a number of circumstances in which the boundary between the functions of sheriff officers and messengers-at-arms becomes blurred. There are, for example, statutory exceptions to the rule that a sheriff officer may only act within the area for which his commission was granted⁹¹ and a sheriff officer may exercise the duties and functions of a messenger-at-arms in situations where there is no resident, or reasonably available, practising messenger-at-arms.⁹²

3.85 Whether the two classes of officer of court should be merged into one was considered by the Scottish Law Commission. The Commission, in its 1985 Report, noted that fusion into just one class of officer, “would not necessarily mean that all officers would execute the decrees of all courts in Scotland...since it would be possible to have one service of court officers and yet impose limits on the territorial competence of individual officers”.⁹³ It took the view that: “The arguments for and against fusion turn largely on what new arrangements would be made on such matters as the appointment, training, discipline, control and territorial competence of officers in a fused service, and the level and mode of regulation of fees”.⁹⁴

3.86 At that time, of most importance to the Commission was the retention of separate jurisdictions for officers because “the Court of Session and the sheriffs principal should control the officers who execute the decrees of their respective courts, and it seems to us that the distinction between messengers-at-arms and sheriff officers provides a convenient method of achieving this”.⁹⁵ It also considered it necessary to retain the nation-wide territorial competence of messengers-at-arms and the more limited territorial jurisdiction of sheriff officers. It considered the fact that there was already a high level of fusion in practice to be supportive of retaining the existing system and that, in the absence of compelling arguments in favour of change, the history and tradition of the separate commissions should be respected.

3.87 Other than tradition, there do not appear to be any strong reasons for retaining the separate classes of enforcement officer. As the Commission noted, many officers already hold commissions in both capacities and it is debatable whether users of the enforcement system are, or should be, concerned about whether it is carried out by a messenger-at-arms or a sheriff officer. The system could be greatly simplified and avoid possible confusion amongst users if there was fusion of these offices resulting in only one type of enforcement officer.

3.88 This leads to the separate question of whether it is desirable or necessary to maintain separate territorial competencies for enforcement officers. This goes to the heart of the question of the organisation and control of enforcement officers. It is, firstly, necessary to consider whether it remains necessary and appropriate for the Court of Session and sheriffs principal to retain control over the award of commissions and regulation of the conduct of officers within their own jurisdiction. If it is, then some distinction in respect of territorial competence should be retained.

3.89 Enforcement is an essential arm of the civil justice system and this function, which is necessary for implementing the decisions of the civil courts, must by some means be

⁹⁰ See para 3.11 and fn 28.

⁹¹ 1987 Act, s91(2).

⁹² Execution of Diligence (Scotland) Act 1926, c16, ss 1-3.

⁹³ Scot Law Com No 95, para 8.14.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, para 8.15.

responsible to the courts for conducting the function in a manner compatible with the courts' authority. There is also a significant public interest. Under current arrangements the independence of the judiciary ensures that the process is fair and impartial. The Executive's policy for developing greater openness and transparency within judicial appointments in the civil justice system is in part relevant to the subsidiary arm of enforcement. The Executive is creating an independent Judicial Appointments Board to advise the First Minister on the appointment of Judges and Sheriffs. In keeping with this policy, the appointment and control of enforcement officers should be extended to involve lay input.

3.90 The purpose of the existing Advisory Council introduced by the 1987 Act was to advise the Court of Session on the rules for enforcement and for keeping all matters relating to enforcement officers under review. In practice, the Advisory Council has taken on a low key, rather than pro-active, approach towards assessing matters relating to enforcement officers and recommending alterations for improvement to the Court of Session. A body empowered to take a more active role in relation to all aspects of the enforcement system may be more appropriate. The functions and constitution of that body could be reorganised and responsibility for appointment and control of enforcement officers including complaints and discipline transferred to it. It could operate as the sole body where all matters relating to enforcement are determined and overseen. It could be made up of the judicial and professional interests already represented together with lay representation. Matters such as approving standards of practice, training and continuing professional development programmes currently set by the profession, including the arrangements set by the present committee of examiners, and setting fees would also come within its remit. So too the collection of information and statistics, monitoring trends of enforcement usage and publication of an annual report.

3.91 It would no longer be appropriate, given the range of functions involved, to consider this as an advisory body and these functions could be exercised by a new Scottish Civil Enforcement Commission. Such an arrangement would be in the public interest. It would improve and build upon current arrangements and have clear benefits of increasing public awareness and confidence about these matters. The Commission would require a greater commitment in terms of members time, administrative support and facilities than former arrangements and so would give rise to an additional cost to the public purse.

3.92 Since it is important that enforcement officers will be obliged to adhere to arrangements considered necessary for maintaining or enhancing standards of professionalism, consideration should also be given to whether membership of their professional organisation should be compulsory. It may be, however, that this would become the practical effect. Costs to the public purse would be minimised in a regime in which standards were approved by an accountable governing body and applied by the profession at its own cost. Compulsory membership of the professional organisation would enable training, education and ongoing improvement of the professional status to be financed by the profession itself.

3.93 The Scottish Law Commission considered whether membership of the Society should be compulsory for all officers of court and, although it initially suggested compulsory membership in its 1980 Consultative Memorandum,⁹⁶ it concluded in its 1985 Report that:

“On reconsideration we recommend that membership of the Society should not be compulsory. It is, we think, a fundamental principle that officers of court should be controlled by the courts. If membership of the Society were compulsory there would

⁹⁶ Scot Law Com CM No 51, para 6.18.

be inevitable conflicts between the Society and the disciplinary authorities over control of officers; compulsory membership of the Society is only compatible with a self-regulating service of officers of court.”⁹⁷

3.94 The main objection to compulsory membership at that time concerned the ability of the Society to expel its own members, and thereby deprive them of their commission, which should be a matter for the courts to control rather than the Society. At present the Society’s own disciplinary framework already duplicates the statutory arrangements for judicial discipline. This issue could be dealt with under the Society’s constitution by associating expulsion with determinations for deprivation of a commission by the Scottish Civil Enforcement Commission and doing away with its own disciplinary procedure.

3.95 Returning to the question of whether territorial competence of enforcement officers should be retained, this would initially appear to be unnecessary for organisational or operational purposes. It is, however, a matter of public interest that there should be nationwide access to sufficient enforcement services for courts’ and users’ requirements as well as choice.

3.96 At present it would appear that these factors are taken into account by the judiciary when deciding whether or not to recommend or grant the award of a commission. In its 1985 Report, the Commission stated that:

“In considering an application for appointment as a sheriff officer, the sheriff principal has regard to the interest of the applicant, to the interest of any objectors opposing the application and to the public interest, which is paramount. Important factors in determining the public interest are that there should be an adequate but not excessive number of sheriff officers for the relevant district; that a single officer or firm of officers should not have a monopoly of business so that a choice is available to creditors; that the officer should be a person of good character; and that the officer should preferably have knowledge of the local community. Where contested applications occur, it is usually because other sheriff officers holding appointments in the relevant district claim that there is already an adequate provision of officers in that district. The total volume of warrants for citation and diligence emanating from a particular sheriff court is finite, so that a surplus of officers could well result in existing officers’ businesses ceasing to be viable.”⁹⁸

3.97 This indirect regulation of the business of officers of court is a matter which has been discussed in only a few reported cases. In *Lewis, Petr.*⁹⁹ the sheriff considered objections made by existing sheriff officers in Ayr to the grant of a commission to two applicants. He gave some explanation of the factors which he considered relevant:

“It is improper in my opinion to have regard to what was described as, “healthy” competition, and to make fresh appointments without regard to the amount of work available, on the view that the most efficient sheriff officer will get the work and the others must just suffer. It is, in my view, clear that the total amount of work available at any time is a fixed quantity not to be increased by any efforts of the sheriff officers as a whole. In these circumstances an increase in the number of sheriff officers must obviously result in a reduction in the size of the “slice” available to each...I do not consider that it has been established that there is a present need for more sheriff

⁹⁷ Scot Law Com No 95, para 8.149.

⁹⁸ *Ibid*, para 8.50.

⁹⁹ *Lewis, Petitioner*, 1963 SLT (Sh Ct) 6.

officers in Ayr. In these circumstances, I do not consider it proper to appoint additional sheriff officers, who would be bound to take away business from those at present holding office.”¹⁰⁰

3.98 Almost thirty years later similar views were expressed in *Macpherson, Petr.*¹⁰¹

"A sheriff principal is not directly concerned with the way in which sheriff officers organise themselves to carry out their duties, or with their right to compete for business. His primary concern is to ensure that those to whom he grants commissions carry out the paramount duty which they owe to him as officers of court. He could not close his eyes to developments which could lead to any impairment of that duty. A concentration of all sheriff officer work in a few hands...could seriously damage the traditional loyalty owed by a sheriff officer to the sheriff principal who granted his commission...a general free for all should not be allowed to develop.”¹⁰²

3.99 More recently in *Moore, Petr.*¹⁰³ an application for a commission was opposed by other officers on grounds including that there was insufficient work in the particular sheriffdom for another officer and the applicant already held commissions in two other sheriffdoms so would not be able to properly discharge duties in all. The applicant's employers had won a major contract for work in the sheriffdom. Determining factors in the decision were that a reasonable service could not be provided under the contract without the services of a commissioned sheriff officer and there was a real possibility of existing local firms amalgamating resulting in a monopoly in the area, which would be undesirable. In granting the application the sheriff principal took the view that: "An important component of a satisfactory service from Sheriff Officers is that those who wish to instruct them should have a measure of choice as to whom they instruct." ¹⁰⁴

3.100 It is considered appropriate that these matters should continue to be taken into account. In order to do so it may be necessary for the Scottish Civil Enforcement Commission to determine the territorial competence of enforcement officers. Equally, where supply was not such to meet demand in remote or outlying areas, the Commission could have regard to arrangements which applicants proposed to accommodate this and could impose suitable conditions. This is, to some extent, already provided for by the arrangements mentioned in paragraph 3.11.

Extra-Official Activities and Debt Collection

3.101 The rather circular argument in paragraph 3.70, about the impact of inadvertent attribution of inappropriate conduct during debt collection to enforcement, simply underlines the fact that informal debt collection and formal enforcement activities are in practice closely related. They seek to achieve the same end, albeit by different means and with different legal legitimacy. The important distinction between them is that formal enforcement is authorised only after due process of law. This may be regarded as why they are subject to different standards of conduct required. Yet the question is whether there should be different standards of care between these activities. Arguably a greater standard of care should apply to informal debt recovery since techniques or procedures adopted are not governed by law.

¹⁰⁰ *Ibid*, pp 6-7.

¹⁰¹ *Macpherson*, Petitioner 1989 SLT (Sh Ct) 53.

¹⁰² *Ibid*, pp 54-55.

¹⁰³ *Moore*, Petitioner, 2001 SLT (Sh Ct) 111.

¹⁰⁴ *Ibid*, p 114.

3.102 It is notable that current opinion, of debtors, the advice sector and Working Groups which considered issues in this field, generally favours deploying mechanisms to assist or encourage resolution of debt obligations before decree is obtained and post-decree enforcement action undertaken with the aim of reducing costs and distress. At the same time, there are concerns about some techniques adopted by those engaged in informal debt collection, although there is no clear consensus about acceptable behaviour. This general approach towards greater informal means is implemented in the thrust of the recommendations made in the Report *Striking the Balance – a new approach to debt management*. Should these proposals be adopted, it is all the more important that those engaged by creditors for pre-decree collection should be required to do so to appropriate standards of care and conduct.

3.103 It has been suggested that the good office of enforcement officers could be better maintained if their role was to be restricted to official enforcement activities but not extra-official debt collection. There are two strands to this proposition. Firstly, that it would prevent any undesirable practices which would not then be rightly or wrongly attributed to enforcement officers. Curiously, the same argument has not been applied to solicitors who also engage in provision of pre-litigation debt collection services for clients. The proposition appears to further underline the need for appropriate standards to be applied to debt collection as the appropriate solution to get at the heart of the problem concerned.

3.104 Secondly, that enforcement officers should not gain commercial advantage when engaged in informal debt collection by virtue of their status otherwise from their role in enforcing court orders. Steps had been taken to legislate for this and there are restrictions presently in place to prevent any conflict of interest arising when enforcement officers engage in the extra-official activity of debt collection. The comparative European study referred to in paragraph 3.74 identifies the matter of debt collection as being particularly controversial in Scotland. It is noted that "There is a fear that sheriff officers may abuse their position if they also offer debt collection services - by misrepresenting the authority that they have in relation to the amicable collection of the debt, or by making use of information obtained in one context to put pressure on a debtor in another context".¹⁰⁵ This is contrasted with the situation in France, the Netherlands and Belgium where the worry about abuse of power does not predominate and which is considered to be an "interesting example of the different cultural responses to or traditional attitudes towards the enforcement agent".¹⁰⁶

3.105 It is not the nature of the two activities which it is said makes them incompatible, the opposite probably pertains. It is the opportunity presented to actively or impliedly make out that a debt collector acts in a different capacity with the authority of official enforcement behind him when he does not have authority to do so. This could be done equally by those who are or are not otherwise entitled to undertake official enforcement on other occasions. To get at the heart of the problem everyone must be prevented from doing so.

3.106 It would be possible to make the act of passing oneself off as an enforcement officer an offence. However, other measures such as practice regulation and codes of conduct, may be more appropriate and practically effective. For example, in the context of advertising by enforcement officers, the 1991 Rules provide that, "an officer of court who performs an extra-official activity...shall not state or imply that he is acting in his capacity as an officer of court".¹⁰⁷ This seeks to prohibit any advertisements which might blur the distinction between official and extra-official activities and which might imply that an officer of court is acting in

¹⁰⁵ *The Regulation of Civil Enforcement Agents in Europe*, p 86.

¹⁰⁶ *Ibid*, p 87.

¹⁰⁷ A.S. 1991/1397, rule 15(2).

his official capacity when collecting debts informally. Similarly, any such activity on the part of other informal debt collectors should be curbed by parallel means. Monitoring this, in relation to advertising as well as other forms of conduct, and issuing guidance would be another appropriate task for the Scottish Civil Enforcement Commission.

3.107 As detailed in paragraphs 3.31-3.32, debt collectors are only licensed for recovery of monies owing under consumer credit and hire arrangements and no code of conduct has yet been imposed. Unlicensed debt collectors are not subject to any statutory standards. The logical approach would be to ensure that the same mandatory code of conduct applied to relevant aspects of both informal debt collection and formal enforcement. This would be with a view to ensuring that standards of conduct in both activities came up equally to the highest common denominator. It would cover all currently unlicensed debt collection not arising from a consumer credit/hire arrangement. This is a matter for which the Scottish Civil Enforcement Commission should have responsibility.

Awareness about the Enforcement System

3.108 A very clear and recurring theme has emerged of a general and widespread lack of knowledge about all aspects of the enforcement system. This general lack of knowledge about this area of law, exacerbated by inaccurate statements made about it, has given rise to a culture of fear and distrust. This cannot be allowed to persist. The Commission could be charged with responsibility for determining and implementing an education and information strategy and programme.

3.109 There may be many means of delivering an education and information package to users generally and specifically targeting those in greatest need. Particularly sensitive areas, such as eviction and orders in relation to children, may need specialised coverage. Enforcement for payment of money may require more general means for reaching individual creditors and debtors plus their interest and advice groups. Coverage both prior to and during litigation would be desirable through wide-reaching channels and sources.

Summary of Proposals for Organisational Restructure and Related Reform

3.110 A Scottish Civil Enforcement Commission should operate as the sole body where all matters relating to enforcement are determined and overseen. Existing judicial responsibility including granting commission, investigation of complaints and discipline of enforcement officers together with existing functions of the Advisory Council of Messengers-at-Arms and Sheriff Officers should transfer to the Commission. Its membership should comprise the judicial and professional interests represented in the former Advisory Council together with lay representation. The Commission should also approve standards of practice, training and continuing professional development programmes, set the level of regulated fees and issue guidance on matters such as advertising practices. It should collect information and statistics, publish an annual report and have responsibility for education and information in this field.

3.111 The existing offices of messenger-at-arms and sheriff officers should be amalgamated into a single office of civil enforcement officers. The Commission should determine the territorial competence of enforcement officers having regard to sheriff court jurisdiction and may impose conditions with regard to remote or outlying areas. All commissioned enforcement officers should have competence to execute Court of Session enforcement within their territory.

- Q. 3.1** Should there be a **Scottish Civil Enforcement Commission** to carry out the enforcement functions specified?
- Q. 3.2** Should the Commission have responsibility for determining an education and information programme and what form should this take?
- Q. 3.3** Should the Commission carry out any other functions?
- Q. 3.4** Should the Commission comprise the membership specified?
- Q. 3.5** Should there be a single class of enforcement officers?

3.112 It is considered that informal debt collection activities should be regulated including mandatory codes for appropriate standards of care and conduct.

- Q. 3.6** Should informal debt collection activities be regulated in Scotland including mandatory codes for appropriate standards of care and conduct?

3.113 The Executive will take the issue of access to information held by third parties forward in partnership with the reserved interests concerned in order to achieve a solution in co-operation with those who hold such information, including reserved interests in the UK government and the finance institutions. Views from respondents to this consultation exercise about the extent to which this is required are sought.

- Q. 3.7** Would access to information held by third parties assist towards achieving more effective enforcement?
- Q. 3.8** If so, what type of information held by which third parties should be permitted?
- Q. 3.9** Should the same types and sources of information be uniformly accessible in the different UK jurisdictions?

