

4 DEBTOR PROTECTIONS

4.1 In this Part, existing debtor protections are examined and proposals for improvement brought forward together with proposals for introduction of a new debt management and debtor protection measure, a statutory debt arrangement scheme.

General Purpose

4.2 The importance of maintaining a system which enables efficient enforcement, particularly for recovery of debts by creditors, ought not be underestimated. It is certainly in the public interest that there should exist an efficient, speedy and cost-effective system of debt recovery. Commercial confidence and the success of day-to-day commercial and private transactions rely on compliance with legal obligations. Where this compliance breaks down, creditors should have access to appropriate legal remedies.

4.3 However, it is equally in the public interest that the debt recovery system properly protects the rights of the weaker party, usually the debtor. At the most basic level, any person who is the subject of legal action ought to receive appropriate procedural protections, such as fair notice of the action being taken against him, full information about it and the opportunity to participate in the proceedings. Furthermore, the system of enforcement itself should not lead to debtors suffering additional serious financial hardship or poverty. More widely, a diligence system which was perceived to alienate, confuse or oppress debtors, by subjecting them to unduly harsh treatment, would not command the necessary public confidence.

4.4 Debtor protection is a means of preserving a balance between debtor and creditor interests. It is not suggested that those in debt do not have responsibility for meeting their obligations. Everyone, in all circumstances, has a duty to pay their debts. Nor is it sought, in this exercise, to address or resolve the causes of debt, which is an issue to be addressed in a different context and which does not fall within a study of the enforcement system.

The Debtors (Scotland) Act 1987

4.5 The Debtors (Scotland) Act 1987 incorporated most of the recommendations made by the Scottish Law Commission in its 1985 *Report on Diligence and Debtor Protection*.¹⁰⁸ Focussing on small individual and consumer debts, the Commission had concluded that the diligence system, by and large, allowed creditors effectively to recover sums due to them. However it took the view that debtors who were willing, but unable, to pay their debts were not adequately protected against personal distress and undue economic hardship caused by the operation of diligence.

4.6 The 1987 Act, therefore, introduced various measures to improve debtor protection. These included mechanisms designed to stop diligence being used at all, time to pay directions and orders, and reform of the diligences used most often against individual debtors. The 1987 Act also changed the procedural rules relating to court expenses and representation in an attempt to make it easier for both creditors and debtors to operate within the diligence system. The 1987 Act did not implement one key recommendation of the Commission, the introduction of debt arrangement schemes. This is discussed in detail in Part 4 D.

¹⁰⁸ Scot Law Com No 95.

(A) TIME TO PAY ARRANGEMENTS

4.7 The Debtors (Scotland) Act 1987 introduced two mechanisms commonly described as ‘diligence stoppers’. The purpose of these diligence stoppers was to give additional time to debtors who were willing but unable to pay their debts and allow them to meet their obligations safe in the knowledge that they could not be subjected to diligence. The first diligence stopper is the **Time to Pay Direction (TTPD)**. The **Time to Pay Order (TTPO)** is the second of these diligence stoppers and is similar to the TTPD.

4.8 The Consumer Credit Act 1974 introduced a number of measures designed to protect individuals who entered into consumer contracts. These measures included giving debtors under such contracts the opportunity to apply for a **Time Order (TO)**. The time orders are very similar to the TTPD and TTPO available under the 1987 Act, allowing a debtor to repay an outstanding debt free from the threat of diligence. However, the rules of procedure governing applications for TO under the 1974 Act are slightly different to those which govern directions and orders under the 1987 Act and measures included in the 1987 Act are not available to applicants for TOs under the 1974 Act.

Summary of Current Law

Time to Pay Directions

4.9 The court may grant a TTPD on granting decree for payment. A debtor (defender) may apply for a TTPD after he receives a summons in an action for payment of money but before the court has pronounced decree in the case. The defender may offer to pay the debt to the creditor (pursuer), either by instalments (weekly, fortnightly or monthly payments) or by one single payment of the whole sum. Alternatively, the defender may indicate that he intends to appear in person, or be represented, at a hearing to consider his application for time to pay. The application form for a TTPD also provides the defender with the opportunity to give details about his financial position. If the defender wishes to obtain a TTPD he must admit that he owes the sum sued for and, if the defender’s application is successful, a decree for the whole sum will be granted in favour of the pursuer. The pursuer is not normally informed of the defender’s application for a TTPD. He must check with the sheriff court whether an application has been made, and must visit the court to examine any details of the defender’s financial position which have been provided. The pursuer may either accept or reject the defender’s offer.

4.10 If the pursuer accepts the offer, that is the end of the matter. The grant of a decree against the defender is normally a formality. Although the defender is not informed at this stage that his application has been accepted by the pursuer, the instalment arrangement which has been agreed is not effective until the pursuer intimates the decree to the defender.¹⁰⁹ If the pursuer rejects the defender’s offer of payment, a hearing takes place. The summons notifies the defender of the date on which a hearing will take place, in the event that his offer for a TTPD is rejected by the pursuer. However, because the defender is not informed that his application has in fact been rejected, he will not know that the hearing is to go ahead unless he contacts the court directly. The pursuer may wait until the day before the hearing is scheduled before deciding whether or not to accept the defender’s application. New summary case and small claim procedure rules will extend this to two days

¹⁰⁹ 1987 Act, s1(1).

prior to the hearing.¹¹⁰ The hearing takes place before a sheriff who must decide whether or not to grant the TTPD. The sheriff may grant the application even if the pursuer has objected to it. He will assess whether it is reasonable to do so in all the circumstances made known to him. The 1987 Act does not give any guidance as to which factors a sheriff should take into account in considering an application for time to pay.

4.11 Whilst a TTPD is in force, and provided that the defender complies with its terms, the pursuer may not enforce the decree by using diligence against the defender. However, should the defender default on the arrangements, the pursuer may proceed directly to diligence. In the case of instalment arrangements, 'default' means two payments missed and a third due.

4.12 After a TTPD has been granted, it is possible to have its terms varied by the court. An application for variation may be made by either the defender (e.g. where he feels the payments are too difficult to maintain) or by the pursuer (e.g. where he believes the defender's circumstances have improved sufficiently to justify increased payments).

Time to Pay Orders

4.13 By contrast to the TTPD, the TTPO is available only after decree has already been pronounced against the defender and the pursuer has initiated diligence. The defender may, at any time before diligence has been completed, apply for a TTPO. However, there are a number of circumstances in which a defender is not able to apply for a TTPO, the most significant of these being where a TTPD has already been in force in relation to the debt.¹¹¹ A TTPO is not available after a summary warrant has been granted but this is discussed further in Part 6.

4.14 Unlike TTPDs, the defender is not automatically informed by the court (or by the pursuer) of his right to apply for a TTPO, nor is he automatically provided with the appropriate form with which to make an application. If the pursuer does not object to the application by the defender, the TTPO is granted automatically. If the pursuer does object, a hearing is fixed and the sheriff determines whether the application ought to be granted.

4.15 The effect of a TTPO differs depending on the type of diligence which has been commenced by the pursuer and which the defender is seeking to halt. In general terms, however, a TTPO prevents completion of diligences which have started and makes fresh diligence incompetent. The TTPO remains in force so long as the defender maintains the payments required by the order.

4.16 Where the defender is in default in respect of the arrangements made under the TTPO, the TTPO lapses and the pursuer's right to do diligence is restored. Again, like TTPDs, default in relation to an instalment arrangement means two payments remaining unpaid and a third being due for payment.

Principal Research Findings

Research Results on TTPDs

4.17 **Use and Success of TTPDs.** The research evaluation concluded that TTPDs were not used to their full potential by debtors. As a result, "time to pay directions...have not been

¹¹⁰ A.S. 2002/132, A.S. 2002/133 which will come into force on 10 June 2001.

¹¹¹ 1987 Act, s5(4)(b).

wholly successful as they have not led to significant proportions of debtors paying their debts by instalments free from the threat of diligence.”¹¹² However, the research suggests that the lack of success of TTPDs is linked primarily, though not exclusively, to low levels of uptake by debtors rather than the responses of creditors and courts to applications for TTPDs

4.18 The *Survey of Payment Actions in the Sheriff Court* looked at a sample of payment actions and the response of debtors following service of a summons upon them. Significantly, in nearly 70% of all cases in the sample, the defender made no response to the summons.¹¹³ Thus, a very large number of debtors ‘opted-out’ of the protections of the 1987 Act at an early stage of the action against them. The proportion of all individual defenders who applied for a TTPD was estimated to be about 24%. This is a marginal increase on the 19% rate calculated by a 1980 study of the then existing instalment decree.

4.19 By contrast to this low application rate, the success rate of applications made by debtors was relatively high with around 74% of all applications for a TTPD being accepted by the creditor without the necessity of a hearing before a sheriff.¹¹⁴ Where an application for a TTPD was rejected and hearing subsequently held, around a third of these applications were granted by the sheriff. This gives an overall success rate for TTPD applications of over 80%.

4.20 **Reasons for low uptake.** It would seem from the research that the reasons why debtors fail to apply for TTPDs are varied. Where debtors did not seek advice some reported ignorance of the options available to them as being the reason for their failing to respond to the summons. Others felt that they were not financially able to make an offer, or that the offer they could make would not be accepted,¹¹⁵ and still others believed that making an offer would be futile because they believed the courts to favour creditors in debt recovery cases.

4.21 Whether debtors felt that they did not have access to, or were not provided with, adequate information about the availability of TTPDs is difficult to assess. Certainly, the research reported that those who did apply found the application forms (which are in most cases on the reverse of the summons) fairly easy to understand and straightforward to complete. It may be that the reaction of debtors themselves contributes to their inaction, many are understandably distressed when they receive the summons and may have difficulty understanding the options available to them.¹¹⁶

4.22 By contrast, the research evaluation revealed more complex patterns of behaviour where the debtor did seek advice from the creditor or an advice agency such as a Citizens Advice Bureau. The research reported that, “seeking advice had a positive impact on the outcome of respondents’ applications”¹¹⁷ for TTPDs. However, many debtors who sought advice did not go on to apply for a TTPD. Some had sought advice from the creditor and were either misadvised about the availability of TTPDs and/or came to an informal repayment arrangement with the creditor. In other cases, advice was sought from debt advice agencies and a number of factors influenced whether advisers would recommend an application for time to pay. Of the advisers interviewed, many were reluctant to advise clients to apply for a TTPD. The principal reason for this appeared to be the existence of

¹¹² *Overview*, p 18, para 7.

¹¹³ *Survey of Payment Actions in the Sheriff Court*, p 24, para 18.

¹¹⁴ *Ibid*, p 29, Table 23.

¹¹⁵ This view was often formed as a result of having unsuccessfully tried to make informal arrangements with the creditor prior to court action having been raised.

¹¹⁶ *Study of Debtors*, pp 27-28, paras 11-12.

¹¹⁷ *Ibid*, p 32, para 33.

multiple debt. Advisers were of the view that a negotiated agreement which involved all of a debtor's creditors was more flexible and of more benefit to a debtor than one isolated time to pay direction. Indeed, the research reported that debt advisers found it easier to secure informal repayment arrangements for their clients because creditors themselves preferred such arrangements.

4.23 A further reason for a negative view of TTPDs was linked to the rule that a TTPO cannot be granted where a TTPD has previously been in place. Some advisers were aware that if they had only one chance in relation to time to pay, they were more likely to hold the option of a TTPO in reserve.¹¹⁸ They appear to have viewed retaining the option of a TTPO as a safety net if informal negotiations for instalment payments broke down and the creditor resorted to proceeding to decree. Failure to apply for a TTPD may therefore be a deliberate step in a co-ordinated plan to reduce the debts of the defender.

4.24 **The Application Process.** The research reported some confusion on the part of both debtors and creditors in relation to the process of applying for a TTPD, although debtors did report general satisfaction with the format of the application form for a TTPD.¹¹⁹ Debtors may be unaware of the success or otherwise of their application for a TTPD because they do not know that they can only find out by contacting the court. Debtors also expressed cynicism about the application process as many believed that the creditor was the ultimate arbiter of the application. They did not know that a sheriff could, or trust that he would, grant a TTPD where the creditor had rejected the application. Many perceived sheriff clerks and sheriffs themselves to be pro-creditor, rather than independent and impartial.

4.25 Although not specifically addressed by the research, it has also been suggested that many debtors do not actually understand that the granting of a TTPD occurs as part of the process of decree being pronounced against them. This is thought to be particularly true in eviction actions involving rent arrears for which the research reported that: "it is clear from practice and experience that Defenders when they receive this form are totally unaware that by accepting the claim for the monetary payment and by making an application for a TTPD that they are accepting not only that payment is due, but also that they should be evicted".¹²⁰

4.26 Creditors also expressed confusion as to the level of offer which should be considered reasonable and should therefore be accepted by them. More generally, there was a lack of understanding by creditors of the distinction between obtaining decree and enforcement of that decree. Many creditors appeared to believe that having decree pronounced in the action raised by them would automatically result in payment of the debt.¹²¹ Many were under the false impression that the court itself was responsible for enforcement and expressed disappointment and regret that, having incurred the expense of obtaining a decree, they did not automatically obtain payment.

4.27 **The Hearing.** The research studies found that creditors and debtors had different attitudes towards the court hearing, depending upon whether or not they were represented or whether they appeared in person. The research found that whilst most creditors either appeared or were represented, usually by a solicitor, at the hearing, the opposite was true of debtors. Indeed most debtors were absent at the hearing, a factor which some sheriffs reported as being likely to lead to the application for TTPD being refused.¹²² Where parties

¹¹⁸ *Study of Facilitators*, p 17, para 20.

¹¹⁹ Save that many wished more space to provide additional details of their financial position.

¹²⁰ Scottish Association of Law Centres, *Manifesto for Change*, dated June 1999, para 4.4.

¹²¹ *Study of Individual Creditors*, p 23, para 9.

¹²² *Study of Facilitators*, p 76, para 23.

did decide to appear in person, many found the hearing difficult to cope with. This was particularly the experience of both debtors and individual, rather than corporate or commercial creditors. Sheriffs also indicated that party litigants had difficulties when they appeared in court. The difficulties were of two separate, but linked, kinds. In the first instance, parties often felt that they lacked the necessary knowledge and understanding of the 1987 Act, and of the court process, which would make their appearance meaningful. Secondly, and no doubt one consequence of lack of knowledge, parties tended to find the court experience intimidating and personally distressing.

4.28 In terms of how cases were dealt with at the hearing, both creditors and sheriffs alluded to one particular practice in relation to disposal of applications. Both categories of interviewee referred to a 'rule of thumb' which, although not universal, led sheriffs to decline applications for TTPDs where the offer made would not result in the debt being paid off within two years. Sheriffs also conceded that the fact that the creditor rejected the debtor's offer weighed heavily with them in deciding whether or not to grant a TTPD. Of the study sample, around 67% of TTPD applications made by debtors were rejected at the hearing stage.

4.29 **Implementing TTPDs.** There is no statistical information available as to the success of TTPDs. It is not, therefore, possible to provide objective evidence as to how many debtors maintain the payments required by the TTPD.

4.30 A specific criticism was expressed by creditors in relation to how quickly they were able to use diligence after the breakdown of a time to pay arrangement. As noted above,¹²³ diligence may be used where a debtor is in default in relation to a time to pay arrangement, that is where the debtor has failed to pay two instalments and a third is due. The actual timescale in which default can be established will, therefore, depend on the terms of the TTPD. Where weekly instalments are specified, default may be established in as little as three weeks while in the case of monthly instalments a creditor may have to wait three months before commencing diligence.

Research Results on TTPOs

4.31 Many of the issues which were raised by the evaluation in relation to TTPD were also relevant to TTPOs and do not bear detailed repetition.

4.32 Of particular note, however, was the finding that the uptake of TTPOs by debtors was found to be much poorer than the uptake of TTPDs. The analysis of the Civil Judicial Statistics for the years 1989-1993 estimated that on average only 250 applications for a TTPO were made in a year,¹²⁴ compared to an average of around 18 000 applications per year for TTPDs over the same period.¹²⁵ Again, like applications for TTPDs, where applications for TTPOs were made the majority of those applications were successful.¹²⁶

4.33 **Low take up of TTPOs.** The reasons for low uptake of TTPOs were, again, based on lack of knowledge although it would appear that ignorance of TTPOs is significantly worse than that which exists in relation to TTPDs. The *Study of Debtors* reported that of those debtors who were interviewed, "of the respondents who had not applied for time to pay

¹²³ Para 4.11.

¹²⁴ *Analysis of Diligence Statistics*, p 12. Although this represents the average number of applications per annum over the relevant period, the actual number of annual applications declined steadily between 1989 and 1993.

¹²⁵ *Ibid*, p 10, Table 2A.

¹²⁶ *Ibid*, p 12, Table 5.

orders, none were aware that they could make such an application to the court”.¹²⁷ In addition to lack of knowledge on the part of debtors, the research findings suggested lack of awareness on the part of creditors and advice workers. This lack of awareness appeared to both cause, and be a consequence of, the small numbers of applications which are made each year.

Time Orders under the Consumer Credit Act 1974

4.34 As noted in Part 3, the 1974 Act was intended to establish, “for the protection of consumers”,¹²⁸ a new system of licensing and control of those engaged in the provision of credit. A central element of the Act was provision for the judicial control of credit and hire agreements. Amongst the powers of the sheriff, in relation to regulated consumer credit or consumer hire agreements, is the power to make a TO in certain circumstances, e.g. where the debtor has defaulted in respect of his obligations under the agreement.¹²⁹

4.35 A TO is like a TTPD or TTPO inasmuch as it may provide for the payment by the debtor of any sum owed under the relevant credit agreement by instalments. A TO may also allow the debtor time to remedy non-monetary breaches of a consumer credit or consumer hire agreement.¹³⁰ While a TO is in place the creditor may not take certain types of action against the debtor, e.g. terminate the credit agreement, demand early repayment or recover possession of goods or land.¹³¹

4.36 Where a TTPD or TTPO has been made under the 1987 Act, a TO under the Consumer Credit Act 1974 cannot subsequently be made in respect of the same debt.¹³² Applications for TOs are extremely uncommon. It has been suggested, however, that there is increasing interest in the use of such orders as a result of the proactive approach of money advice and voluntary agencies advising debtors to pursue TOs. Numbers of applications for TOs are unknown as they are not recorded separately in the Civil Judicial Statistics.

4.37 Under the rules of procedure governing applications for TOs under the 1974 Act, such applications fall to be dealt with as summary applications.¹³³ As such, service or intimation of the application remains the responsibility of the pursuer.¹³⁴ Despite this rule, it has apparently become accepted practice in some courts that sheriff clerks would serve these applications but this is not, however, universally applied with some sheriff clerks having been known to refuse to serve applications as there is no procedural obligation to do so.

4.38 Unlike the 1987 Act, neither the 1974 Act nor the procedural rules governing summary applications provide for lay representation of debtors applying for TOs. The general rules of audience in the sheriff court therefore apply, namely that parties may represent themselves or be represented only by an advocate or solicitor. However again, although the correct legal position is that lay representation is not provided for in the case of applications for TOs, practice appears to have been inconsistent. Lay representatives report

¹²⁷ *Study of Debtors*, p 60, para 77.

¹²⁸ 1974 Act, Long Title.

¹²⁹ *Ibid*, s129.

¹³⁰ See para 3.31-3.33.

¹³¹ 1974 Act, s130.

¹³² 1974 Act, as amended by the 1987 Act, Sch 6.

¹³³ A.S. 1985/705.

¹³⁴ A.S. 1999/929.

having appeared in some cases for applicants for TOs but having been refused permission to appear in others.

Policy Issues and Proposals for Reform

4.39 Opportunities for debtors to extend or defer time to pay are a valuable means of debtor protection as well as a means of enabling creditors to obtain payment of debts albeit, at a later stage, which could otherwise not be payable immediately. Proposals for reform are set out which will improve application of the time to pay arrangements generally and particularly in relation to single debts. In the case of multiple debts, further improvement will also be achieved by the proposals which follow in relation to a debt arrangement scheme which it is anticipated will be the preferred course for those in multiple debt, as had been the Scottish Law Commission's original intention.

4.40 There are a number of possible improvements to the current system which would require changes to existing legislation. Others could be achieved administratively. The Executive's proposals for both such measures are outlined in the paragraphs which follow.

The TTPD Application Process

4.41 The research evaluation reported that creditors are sometimes unsure of what constitutes a reasonable offer by a debtor, partly as a consequence of not having full details of the debtor's financial circumstances. Currently, the financial information which a debtor volunteers as part of his application for a TTPD is available at the sheriff court where they may be inspected by the creditor. The Scottish Law Commission recommended that the clerk of court should automatically send the creditor a copy of the debtor's completed application form for a TTPD or TTPO.¹³⁵ Although it might reasonably be anticipated that existing instances when an application would be made might reduce, having regard to proposals which follow for a debt arrangement scheme, changing the procedure would place an additional burden on the courts. Accordingly, it is, instead, considered appropriate that creditors should be offered the option, on lodging their summons, of paying an additional nominal fee which would entitle them to receive, by post, details of any offer for payment made by the debtor and the debtor's financial circumstances.

4.42 The importance of access to information was discussed in Part 3. It is intended that the application forms for TTPDs should be revised to enable debtors to provide more detailed information about their financial position.

4.43 It was noted that debtors may not learn whether their application for a TTPD has been accepted until the day before the hearing. This timescale can impact upon a debtor's ability to prepare and attend the hearing and should ideally be reformed to give the debtor more notice of the hearing. This was reviewed recently by the Sheriff Court Rules Council as part of their general review of the rules of court. It was considered necessary to retain the seven day period, between the time when any offer should be made and the hearing before the court, for reasons of speed and consistency within the court processes. The question of whether the debtor should, in turn, be informed of the creditor's response was also considered. On balance, it was decided that it would be in the parties' interests to leave the onus on them to check the position of the other side.

¹³⁵ Scot Law Com No 177, para 5.33.

- Q. 4A. 1** Should creditors be offered the option, on lodging their summons, of paying an additional nominal fee to receive, by post, details of any TTPD offer for payment made by the debtor and the debtor's financial circumstances ?
- Q. 4A. 2** Should application forms for TTPDs be revised to enable debtors to provide more detailed information about their financial position?
- Q. 4A. 3** (a) Should the rules relating to TTPDs be revised to require acceptance to be notified several days prior to the hearing?
- (b) If so, what period would be appropriate?

Grant of TTPDs not Linked to Decree

4.44 As has been noted, the application for a TTPD takes place as part of the process for granting decree against the debtor. Sometimes debtors and their advisors are not aware of this, which can have adverse consequences in actions for eviction. It is proposed that this could be tackled in one of two ways. The rules relating specifically to actions for eviction could be amended to make clear that an application for time to pay in such an action relates solely to the repayment of rent arrears and not to the eviction itself. This would, however, heavily penalise creditors with a legitimate claim to evict who would be prevented from recovering possession of their property and may not receive current rent whilst the arrears were being paid off. It would open the potential for abuse. Alternatively, the concern could be tackled as part of an information and education strategy to raise awareness of the consequences amongst debtors and their advisers.

4.45 It was also considered whether, more generally, an application for a TTPD should not result in decree against the defender but, instead, a sist whilst a TTPD is in force. This would be burdensome on creditors who should be entitled to proceed speedily to enforce where the opportunity given to debtors for time to pay has not succeeded.

Guidance about Factors for Granting TTPDs and TTPOs

4.46 It seems clear from the research evaluation that the wide discretion which sheriffs possess in considering whether or not to grant an application for a TTPD is already constrained by practices which have developed since the introduction of the 1987 Act. In particular, creditors and sheriffs give particular weight to the length of time which would be taken to pay off the debt. By contrast, debtors may need guidance as to the factors which the court will consider relevant and upon which it will wish to be addressed. The Commission recommended the introduction of statutory guidance to assist sheriffs in deciding whether or not to grant a TTPD.¹³⁶ This guidance would make clear that the direction should be granted if it is reasonable in all the circumstances to do so. The guidance would also specify the factors which ought to be taken into consideration by the sheriff in disposing of TTPD applications. These factors would include the length of the proposed repayment period; the length of any original credit or loan agreement; the debtor's financial position and the reasonableness of the creditor in his rejection of the offer.

4.47 The new statutory test which it is proposed should govern whether or not a TTPD is granted should also apply to TTPOs.

¹³⁶ *Ibid*, para 5.42.

- Q. 4A. 4 (a) Should statutory guidance be introduced to specify the factors which ought to be taken into consideration by the sheriff in disposing of TTPD and TTPO applications?**
- (b) If so, should any other factors than those mentioned be taken into account?**

TTPO Information and Application Forms

4.48 There is no reason in principle why debtors should not automatically receive an application form and relevant literature informing of their rights in relation to TTPOs. Indeed, to make this information available automatically would be consistent with the practices which operate in relation to TTPDs. The Commission recommended that a charge for payment served on a debtor who is eligible to apply for a TTPO should be accompanied by a note explaining TTPOs and an application form for an order.¹³⁷ It also recommended that other documents served or intimated to the debtor during the course of diligence should contain a similar note and an application form.¹³⁸ It justified these recommendations on the ground that “where a debtor is given a right as a measure of debtor protection, the legal system should strive to make that right a meaningful one”.¹³⁹ It is intended to implement the Commission’s recommendation.

- Q. 4A. 5 Should a charge for payment served on a debtor who is eligible to apply for a TTPO, and other documents served or intimated to the debtor during the course of diligence, be accompanied by a note explaining TTPOs and an application form for an order?**

TTPO Available after TTPD

4.49 The rule which prohibits the granting of a TTPO in cases where a TTPD had already been granted was based on a specific Commission recommendation. It had been argued that such a provision was desirable, in fairness to creditors, and to encourage debtors to observe the terms of time to pay decrees and orders.¹⁴⁰ Indeed, in its 2000 Report,¹⁴¹ the Commission reaffirmed its view that TTPOs should not be available where a TTPD has already been granted.¹⁴² However, the rule cannot take account of the individual circumstances of debtors and, as has been noted, “somewhat unfairly perhaps a debtor who was granted a time to pay direction or order which was recalled when financial circumstances improved is unable to reapply if they deteriorate again”.¹⁴³ It is considered that the absolute rule against the granting of a TTPO to a debtor who has already enjoyed the protection of a TTPD may cause unnecessary hardship to some debtors whose circumstances change through no fault of their own and should be abolished. A new statutory test, governing whether TTPO should be granted, should allow a sheriff to

¹³⁷ *Ibid*, para 5.27.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*, para 5.26.

¹⁴⁰ Scot Law Com No 95, para 3.65.

¹⁴¹ Scot Law Com No 177.

¹⁴² *Ibid*, paras 5.19-5.22.

¹⁴³ Dr David Nichols, *The Debtors (Scotland) Act 1987*, (1987) (annotations), s5(4)(b).

consider, as one factor among many, whether a prior TTPD has been in force and the reasons why its terms have not been adhered to.

Q. 4A. 6 Should the absolute rule against the granting of a TTPO to a debtor who has already enjoyed the protection of a TTPD be retained?

4.50 There are also a number of possible changes to the current system which could be taken forward administratively. The Executive's principal proposals for improvement are outlined in the paragraphs which follow.

Information and Publicity

4.51 TTPDs can improve a debtor's situation by allowing him to repay his debt safe in the knowledge that diligence cannot be used against him. Debtors should, therefore, be encouraged to use TTPDs. Some improvements in uptake could be achieved by non-legislative means, by encouraging better use of existing provisions. It must, however, be accepted that, even with very good information and publicity, some debtors will choose to ignore a summons served upon them or decide not to apply for a TTPD. Indeed, it would seem that the decision not to apply for a TTPD may in some cases be part of an overall debt management strategy or a deliberate choice by debtors who wish to reserve their right to apply for a TTPO at a later stage. Nonetheless, the information which is available ought to explain clearly the options available to debtors and the consequences of each possible course of action.

4.52 The style of the summons which is currently served upon defenders was devised in consultation with advice agencies.¹⁴⁴ The Sheriff Court Rules Council has recently reviewed the forms of summons in summary cases and small claims and accompanying guidance leaflets in consultation with advice agencies. It should be clear to defenders from these that, an application for a TTPD involves accepting that decree will be pronounced against them.¹⁴⁵ The guidance also advises debtors that, although the TTPD will protect them from the use of diligence, the decree can have other collateral effects, such as credit black-listing. This could be reinforced within the general information and education programme already discussed.¹⁴⁶

4.53 It seems clear from the research evaluation that the availability of good advice and/or representation at a hearing contributed to the success of parties pursuing or defending actions for payment. It is important, therefore, that debtors be encouraged to appear or be represented at court.

4.54 Of particular interest in the context of debt recovery is the In-Court Advice Pilot Project which has operated at Edinburgh Sheriff Court since 1997. This project involves free access to advice and representation services to unrepresented parties by a legally qualified solicitor and lay advisers, who are based in the sheriff court but not employed by it, offering assistance. The advisers do not normally appear in court on behalf of a party but offer advice and support to those who wish to appear themselves. Advisers also liaise with other

¹⁴⁴ Citizens Advice Scotland, Money Advice Scotland, Trading Standards Central, In Court Advice Project, Scottish Consumer Council, Sheriff Court Users Group and the Scottish Association of Law Centres.

¹⁴⁵ Although see the proposal at para 4.44.

¹⁴⁶ See paras 3.108-3.109.

agencies, such as housing departments, where appropriate. The project is currently fully funded by the Executive.¹⁴⁷

4.55 A 1999 research Report, which assessed the project, found it to be successful in providing advice to large numbers of court users and to be welcomed by, amongst others, sheriffs and court staff.¹⁴⁸ Whilst making no formal recommendation concerning the project, the Scottish Law Commission stated that it was, “firmly of the opinion that the extension of this scheme would lead to an increase in the awareness of time to pay measures and in the number of measures granted”.¹⁴⁹ It is understood that further research will be published imminently. In the Report *Striking the Balance*,¹⁵⁰ it was recommended that the Executive should consider rolling out the in-court adviser service at Edinburgh sheriff court more widely across Scotland.

4.56 The Executive is currently considering the policy position to be taken regarding any extension of the pilot in the context of its work on development of a Community Legal Service in Scotland. The Working Group on Review of Legal Information and Advice Provision in Scotland made a number of recommendations in its Report, including further consideration of the role of non-lawyers in advice provision.¹⁵¹

Education Strategy

4.57 As with TTPDs, the perceived difficulties with the operation of TTPOs relate primarily to non-use of the provisions of the 1987 Act. As ignorance appeared to be the major reason for this non-use, steps should be taken to improve the use of the existing provisions of the 1987 Act in relation to TTPOs. Greater publicity for TTPOs, including publications aimed at advice agencies and guidance to sheriff clerks, who are obliged to assist debtors complete applications for TTPOs, should be undertaken. This should be a further role for the Scottish Civil Enforcement Commission.

Q. 4A. 7 Should further information and publicity about TTPDs and TTPOs, be included within the Scottish Civil Enforcement Commission's general information and education strategy?

TOs under the 1974 Act

4.58 The provisions of the 1987 Act governing service by the sheriff clerk of applications for time to pay and lay representation at hearings were instituted as part of a series of reforms designed to improve debtor protection. The lack of similar protection under the 1974 Act for applicants for TOs can be viewed merely as an accident of history since increased awareness of the need for procedural reforms to assist debtors did not result in general legislative reform until nearly a decade later.

4.59 Executive policy favours treating 1974 Act TOs and 1987 Act time to pay measures on an equal footing. The objective of all time to pay measures is debtor protection and, as noted by the Commission, “where a debtor is given a right as a measure of debtor

¹⁴⁷ Through Edinburgh Central Citizens Advice Bureau.

¹⁴⁸ *Supporting Court Users*.

¹⁴⁹ Scot Law Com No 177, para 5.28.

¹⁵⁰ Para 102.

¹⁵¹ *Review of Legal Information and Advice Provision in Scotland*, November 2001.

protection, the legal system should strive to make that right a meaningful one".¹⁵² The Executive and the Scottish Parliament recognised the similarity of orders under both Acts by raising the upper limit for time to pay applications under the 1987 Act to debts of £25 000¹⁵³ in line with the 1974 Act following a recommendation by the Commission.¹⁵⁴

4.60 It is one of the Executive's policy objectives that rules should be as consistent and coherent as possible. In respect of lay representation, it has been argued that the rules regarding representation in applications for time to pay arrangements under the 1987 and 1974 Acts should be the same. At present, an individual who could be accepted as a lay representative in a time to pay hearing under the 1987 Act, regarding a sum of as much as £25 000, could be refused permission to represent in a time order application under the 1974 Act for a sum as little as £250.¹⁵⁵

4.61 However as already noted, whilst the 1974 Act applies to Scotland, it is not thought that the Scottish Parliament has legislative competence to bring the procedures under the 1974 Act into line with those under the 1987 Act because the subject matter of the 1974 Act is reserved to the UK Parliament.¹⁵⁶ Legislation for reform should, therefore, be brought before the UK Parliament. The Executive has been advised by the Department of Trade and Industry that it plans to conduct a wide ranging review of the subject matter of the 1974 Act.

Q. 4A. 8 Should the rules regarding representation in applications for time to pay arrangements be the same under the 1987 and 1974 Acts?

Q. 4A. 9 Should similar protections in the 1987 Act, for service by the sheriff clerk of applications for time to pay and lay representation at hearings, be extended to the 1974 Act?

¹⁵² Scot Law Com No 177, para 5.26.

¹⁵³ The Debtors (Scotland) Act 1987 (Amendment) Regulations 2000, (SSI 2000/189), reg 2.

¹⁵⁴ Scot Law Com No 177, para 5.18.

¹⁵⁵ Sheriff Court Users Group, August 2000.

¹⁵⁶ 1998 Act, Sch 5, sC7.

(B) MEASURES TO ASSIST UNREPRESENTED PARTIES

4.62 The 1987 Act also included provisions which were intended to make it easier for both creditors and debtors to participate in the debt recovery process. Most attention was given to making procedures more straightforward for debtors, as it was felt that they had been most disadvantaged under the previous arrangements. In the recognition that most debt actions related to relatively small sums of money, it was also thought desirable that the process of debt recovery should be as simple, cheap and fast as possible.¹⁵⁷ These aims were achieved in the following ways.

Summary of Current Law

Financial Arrangements

4.63 **Fees and Expenses.** The Commission had recognised in its 1985 Report that debtors in particular were deterred from using the courts to defend claims against them, or to apply for protections such as an instalment decree, because of the cost of doing so. The Commission, therefore, made recommendations in relation to two separate types of cost which the debtor might incur. Firstly, in most court proceedings there are fees charged by the court itself in connection with various procedural steps such as applications made and documents lodged. Secondly, as a general rule in legal proceedings, the party against whom decree is made is required to pay the expenses of the successful party. The Commission recommended that this rule cease to apply in connection with applications made by the debtor under the 1987 Act. The purpose was that “a debtor making an application for say a time to pay order would not be faced with the possibility of having to meet the expenses of a legally represented creditor who successfully opposed it.”¹⁵⁸

4.64 The 1987 Act implemented the Commission’s recommendations and provides that no fees shall be payable by a debtor in connection with certain proceedings under the Act.¹⁵⁹ Broadly speaking, this means that the debtor will not pay a fee to the court for making an application for a time to pay direction or order, or for objecting to the application of another person, or in respect of a hearing held in connection with any such application or objection. The 1987 Act introduced a general rule that, as between debtor and creditor, neither would be liable to the other in respect of the expenses incurred in connection with time to pay proceedings under the Act.¹⁶⁰

4.65 **Legal Aid.** A solicitor may provide advice and assistance under the legal aid scheme on any matter of Scots Law if the client is eligible. However, the 1987 Act excluded proceedings under it from civil legal aid.¹⁶¹ It seems that the rationale was that the issues involved did not require the professional skills of lawyers and should be capable of being satisfactorily resolved by party litigant procedure. Also that the time to pay measures would slow down the progress of diligence but if they could be dispatched promptly the resultant

¹⁵⁷ See for example, Scot Law Com No 95, paras 2.134-2.139.

¹⁵⁸ *Ibid*, para 9.37.

¹⁵⁹ 1987 Act, s96(1).

¹⁶⁰ *Ibid*, s92(1).

¹⁶¹ Other than under ss 1(1) and 3(1) for applications regarding time to pay directions; Legal Aid (Scotland) Act 1986, c47, Sch 2, Pt II, para 4.

delay would not seriously endanger debt enforcement. There is no such bar to third parties affected by the 1987 Act obtaining civil legal aid, subject to the usual restrictions.¹⁶²

Representation and Assistance

4.66 **Lay Representation.** The 1987 Act made provision for parties to be represented in proceedings under the Act by persons who were neither solicitors nor advocates.¹⁶³ The intention was to encourage greater use of lay representation, such as debt counsellors and advice workers on behalf of debtors and credit control personnel on behalf of pursuers.

4.67 **Role of the Sheriff Clerk.** The 1987 Act imposed a number of duties on sheriff clerks in relation to assisting parties participating in the debt recovery process. In particular, a specific duty was imposed upon sheriff clerks requiring them, in response to a request for assistance by a debtor, to provide information as to the procedures available under the Act and to assist in the completion of forms required in connection with proceedings under the Act.¹⁶⁴ This general duty is amplified in relation to applications for TTPO, the sheriff clerk being obliged to assist the debtor to complete the form “in accordance with proposals for payment made by the debtor”.¹⁶⁵

4.68 **Forms and Documentation.** In its 1985 Report the Commission commented that “We envisage that the forms and procedures would be kept simple and that the procedure should be capable of being initiated and pursued with the help of the court by ordinary persons unfamiliar with court procedures, including persons of lower than average capacity in managing their affairs”.¹⁶⁶ In particular, the Commission recommended that the forms which would be served on or used by debtors should be in, “simple and intelligible language”¹⁶⁷ and that the forms served on debtors should inform them of their rights to apply for, for example, a time to pay direction.

Principal Research Findings

Financial Arrangements

4.69 The research into the operation of 1987 Act suggested that the measures introduced by the Act in relation to costs were not a significant factor affecting the behaviour of debtors. The evaluation acknowledged that no debtor interviewed as part of the research programme mentioned the measures as having encouraged them to use the protections available under the 1987 Act.¹⁶⁸ However, some debtors did feel that even the restricted categories of expenses which could be recovered under the Act had caused them financial hardship. No creditor interviewed as part of the study reported having been influenced by the rule against expenses in deciding whether or not to raise proceedings.

¹⁶² 1987 Act, s98.

¹⁶³ *Ibid*, s97.

¹⁶⁴ *Ibid*, s96(2).

¹⁶⁵ *Ibid*, s6(2).

¹⁶⁶ Scot Law Com No 95, para 2.136.

¹⁶⁷ *Ibid*, para 2.137.

¹⁶⁸ *Overview*, p 18, para 7.

Representation and Assistance

4.70 **Representation.** It has already been noted that the availability of advice to parties increased their chances of success when using the provisions of the 1987 Act. However, there is no necessary link made between the provision of advice and representation. The research found that overall “pursuers were more likely than defenders to employ legal representation and less likely than defenders to be absent from a hearing”.¹⁶⁹ Overall, of the sample of actions surveyed, 94% of pursuers were represented by a solicitor whilst only 56% of defenders had such representation. More than a third of all debtors were absent from the hearing of their action, whilst less than 0.5% of defenders obtained the services of a lay representative. Debtors themselves reported their reluctance to represent themselves and their view that without representation of some kind their chances of success were negligible. Creditors also appeared to value representation, as evidenced by the extremely frequent use of solicitors, but only two commercial creditors who were interviewed reported representing themselves.¹⁷⁰

4.71 **Role of sheriff clerks.** The research reported that only a handful of the debtors interviewed had used court staff as a source of advice or information. It noted that, although satisfaction with the particular member of staff used had varied from debtor to debtor, all “did view the court as being an important provider of information”.¹⁷¹ Of the individual, rather than commercial, creditors interviewed, most found court staff helpful and the information obtained from the court useful.¹⁷² The court staff interviewed as part of the research evaluation were not found to have experienced particular difficulties in respect of their duties under the 1987 Act, although they did report increased workload as a result of the Act. Partly because many staff then appeared to have no experience of enquiries under the 1987 Act, the research found that, “the knowledge and views [of court staff] were less comprehensive than expected”.¹⁷³

4.72 **Forms and documentation.** The research found that a majority of those debtors interviewed had experienced difficulty understanding the paperwork which was integral to the action against them. Debtors reported their failure to appreciate the significance of the summons and the importance of responding to it. However, those debtors who had applied for a time to pay direction were by and large satisfied with the format of the application. As already noted, there was a feeling that the forms ought to allow greater detail of a debtor’s financial position to be provided.¹⁷⁴

Policy Issues and Proposals for Reform

Financial Arrangements

4.73 The financial arrangements put in place by the 1987 Act to assist unrepresented parties do not appear to have given rise to any difficulty in their application.

¹⁶⁹ *Survey of Payment Actions in the Sheriff Court*, p 20, para 8.

¹⁷⁰ *Survey of Commercial Creditors*, p 86, para 17.

¹⁷¹ *Study of Debtors*, p 69, para 12.

¹⁷² *Study of Individual Creditors*, p 27, para 29.

¹⁷³ *Study of Facilitators*, p 85, para 4.

¹⁷⁴ Scot Law Com No 177, para 5.31.

4.74 It is considered that there is no reason in principle why a creditor should be entitled to recover expenses from a debtor in respect of a time to pay direction¹⁷⁵ but not in respect of an application for a time to pay order or other proceedings under the Act. It is proposed that the no expenses rule be extended to applications for time to pay directions.

Information and Education Strategy

4.75 It would appear that the main difficulties experienced by parties attempting to use the provisions of the 1987 Act relate to ignorance or lack of understanding of the various options available and, separately, a lack of confidence in their own ability to present their case to the court.

4.76 In line with proposals already made elsewhere, it is again proposed that the measures to assist unrepresented parties form part of an information and education programme, coupled with a review of the documentation currently in use. The Commission recently reported “virtually unanimous approval” for its proposal to improve the application forms by redesigning them after consultation with debt advice workers and others involved in debt recovery.¹⁷⁶ As before, whilst these forms were also originally designed in consultation with the advice sector, it would be worth reviewing their clients’ experiences of using them and it is intended to conduct this exercise again. Also, as part of a drive to encourage greater uptake of the mechanisms provided by the 1987 Act, further training could be made available for sheriff clerks to emphasise the importance of their role in these matters.

Representation and Assistance

4.77 It is clear that parties to actions for payment believe that representation is essential if, their case is to be given the attention it deserves. Parties should be encouraged to represent themselves and advice agencies to do so on behalf of their clients. This could be included in the general information and education programme.

4.78 As a matter of principle, it is considered appropriate that, in respect of their obligations to assist debtors, sheriff clerks ought to be equally obliged to assist creditors to use the provisions of the 1987 Act.

4.79 It has also been noted that the Executive is separately considering the In-Court Advice Pilot Project¹⁷⁷ and that the Department of Trade and Industry is to review the Consumer Credit Act 1974 which will include the question of lay representation at time order hearings.¹⁷⁸

Q. 4B. 1 Should the no expenses rule be extended to applications for time to pay orders or other proceedings under the Act in line with current application for time to pay directions?

Q. 4B. 2 Should measures to assist unrepresented parties and encouragement for party or lay representation form part of an information and education programme?

¹⁷⁵ 1987 Act, s92(3)(b)(i).

¹⁷⁶ Scot Law Com No 177, para 5.31.

¹⁷⁷ Para 4.54.

¹⁷⁸ Para 4.61.

- Q. 4B. 3** Should sheriff clerks be obliged to assist creditors to use the provisions of the 1987 Act in the same way as for debtors?
- Q. 4B. 4** Should further training be made available for sheriff clerks to emphasise the importance of their role in assisting parties?
- Q. 4B. 5** Should there be a review of the documentation currently in use?

(C) WRONGFUL DILIGENCE

4.80 The law of wrongful diligence governs situations where diligence has been carried out without proper authority to do so or where properly authorised diligence has been executed defectively. It can be regarded as a formal debtor protection, although it applies equally to anyone subjected to enforcement action, not just debtors.

4.81 Wrongful diligence is not a remedy which is often used. That may be because it is not required, not known about or not understood. Examination of discussion by writers on the subject may assist in considering why that might be and in assessing whether reform is necessary or desirable.

Summary of Current Law

4.82 The law relating to wrongful diligence is almost entirely common law, the majority of relevant cases having been decided in the 19th and early 20th centuries, since when there have been relatively few reported decisions on the subject. The law is fairly technical, with different rules applying to different types of diligence, but there are some general principles governing the law of wrongful diligence.

4.83 Two main types of act may be complained of as being wrongful (or wrongous¹⁷⁹) diligence. First, where a creditor uses diligence without the proper authority to do so and second, where the diligence itself is authorised but is executed "irregularly".

Diligence used Without Proper Authority.

4.84 Diligence may be wrongful for want of proper authority in a number of situations. Firstly, diligence may be done where there is no warrant at all to justify it. This may be because a warrant has never been obtained¹⁸⁰ or because the decree upon which the diligence proceeded has become inoperative, for example where payment of the sum due has been made.¹⁸¹ The latter example is given statutory foundation by the Debtors (Scotland) Act 1987 which provides that arrestments, earnings arrestments and poindings and sales will be terminated, "if the full amount recoverable thereby is paid to the creditor, an officer of court, or any other person who has authority to receive payment".¹⁸²

4.85 Secondly, a warrant to do a particular form of diligence may not be available as 'of right' and the court may have to be satisfied, on the basis of *ex parte* statements made by the pursuer, that the warrant should be granted. Use of the diligence will be wrongful if the statements made by the person seeking the warrant are inaccurate or incorrect, even where the inaccuracy is unintentional or made in good faith.

4.86 Thirdly, diligence may be wrongful where, although a valid warrant is available to the pursuer, diligence has been used "maliciously and without probable cause".¹⁸³ In this context, malice means spite or malevolence of such a degree required to rebut a defence of

¹⁷⁹ It has been noted that "'Wrongous' has been objected to as a barbarous word, but it is the traditional term," *Stair Memorial Encyclopaedia*, Vol 8, para 123, fn 1.

¹⁸⁰ *Wilson v Mackie*, (1875) 3 R 18.

¹⁸¹ *Stair Memorial Encyclopaedia*, Vol 8, para 123.

¹⁸² 1987 Act, s95.

¹⁸³ *Wolthecker v Northern Agricultural Co.*, (1862) 1 M 211.

qualified privilege in an action for defamation. Absence of probable cause means “absence of any just cause”.¹⁸⁴

Diligence Irregularly Executed

4.87 A person who has instructed diligence will not incur liability for wrongful diligence if he enforces a valid decree, provided that the diligence is executed properly. However, any material irregularity in execution of the diligence will give rise to an action without the need to establish want of probable cause and malice.¹⁸⁵ An example of such irregularity could be service of a charge, which incorrectly states the days of charge giving the debtor a shorter time to pay.¹⁸⁶

4.88 It is a matter of interpretation for the court whether, in all the circumstances, there has in fact been a material irregularity. There are areas of uncertainty. For example, it has been noted that there is authority for the view that a defect which is merely a clerical error is not actionable but it was held in a case concerning a charge for payment, where the date on which the charge was made was omitted, that both the charge and diligence following on from the charge were invalid.¹⁸⁷

Exercising the Remedy

4.89 Where a person has grounds to believe that diligence was wrongful, there are two types of action which he may raise. Firstly, and perhaps most immediately, he may attempt to prevent execution of the diligence commencing or continuing. Secondly, he may, in certain circumstances, be entitled to claim damages.

4.90 As noted above, diligence may be wrongful because there is no valid warrant for it. For example, because the decree upon which it proceeds is defective or because the diligence itself has been irregularly executed or is no longer appropriate. In the former case, action should be taken against the decree, for its suspension or recall. In the latter instance, an action for suspension, recall or interdict may be appropriate but directed against the diligence rather than the decree.

4.91 It has been commented that in the case of a summary warrant wrongfully obtained it is unclear how it should be challenged.¹⁸⁸ This suggests there may be difficulty in suspending or recalling a summary warrant itself but it has been held that diligence done on a summary warrant may be nullified where there is a defect on the face of the warrant.¹⁸⁹

4.92 Wrongful diligence may also constitute a delict and be used to found a claim for damages against the person who instructed it.¹⁹⁰ In most cases, before a court will be willing to award damages for wrongful diligence, it must be satisfied that there was ‘malice and want of probable cause’ on the part of those executing the diligence. This standard makes successful actions unusual¹⁹¹ because negligence will not, normally, give rise to a claim for damages in cases of wrongful diligence. For example, if a bank obtains decree and is then

¹⁸⁴ Maher & Cusine, para 12.01.

¹⁸⁵ *Ibid*, para 12.06.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Stair Memorial Encyclopaedia*, Vol 8, para 123.

¹⁸⁹ *Douglas v Fife Regional Council*, 1991 SLT (Sh Ct) 57.

¹⁹⁰ See generally Walker, *Delict*, Vol 2, pp 862-874.

¹⁹¹ *Stair Memorial Encyclopaedia*, Vol 8, para 124.

paid but by administrative error diligence is instructed, it would seem that there is no liability in reparation because the wrongful diligence would have arisen through negligence not malice.¹⁹²

4.93 There are a few situations where there may be said to be strict liability for wrongful diligence. All that must be proved is the wrongful use of the diligence to establish liability for damages. This would be the case where there was no warrant at all to justify the use of diligence.

Liability for Wrongful Diligence

4.94 Different parties involved in the carrying out of wrongful diligence may be responsible, and therefore liable to the person prejudiced, to varying degrees depending on the circumstances. The pursuer upon whose instructions diligence proceeds will be liable not only for his own fault but also for that of his solicitor and/or enforcement officer because in every case where the diligence is wrongful, an action will lie against the creditor.¹⁹³

4.95 Similarly, where the enforcement officer involved in the diligence knew or ought to have known that it was unlawful, he may be jointly and severally liable with the creditor in damages. The same is true of an instructing solicitor.¹⁹⁴ Although not strictly speaking wrongful diligence, an officer of court may be liable in damages to his instructing agent if he fails to carry out diligence in accordance with the instructions, provided they are proper, or fails to do diligence with all due speed.¹⁹⁵ In certain limited circumstances members of the judiciary and court staff may be liable for wrongful diligence.¹⁹⁶

4.96 Actions for wrongful diligence appear to be extremely rare. Although such actions are not recorded as part of the Civil Judicial Statistics, only two cases specifically concerned with wrongful diligence have been reported in the last 60 years.¹⁹⁷ Many others have, however, been considered in related matters, such as suspension of diligence or of a decree.¹⁹⁸ Most of the cases cited by writers as authorities in this area were reported in the 19th or even the 18th Century.

Policy Issues and Consideration of Reform

4.97 There are aspects of the law relating to wrongful diligence which could be perceived to be unfair and outmoded. The existing system of regulating wrongful diligence is almost entirely based on common law, where the courts have established circumstances in which it will require proof of malice and want of probable cause before making a finding of wrongful diligence and how that test is to be fulfilled. The courts have also developed different rules to govern different types of diligence. Whilst it is often desirable that the rules are developed on a case by case basis by the courts, there have been few cases in modern times. It may be appropriate to adapt the existing test and standards to reflect changes in society.

¹⁹² *Ibid*, citing *S P Davies & Co. v Brown and Lyell*, (1867) 5 M 842.

¹⁹³ Maher & Cusine, para 12.20, citing *Anderson v Ormiston and Lorain*, (1750) M 13949.

¹⁹⁴ *Stair Memorial Encyclopaedia*, Vol 8, para 124, citing Stewart, pp 763, 806.

¹⁹⁵ Maher & Cusine, para 12.22, citing Stewart, p 822 and, *inter alia*, *Troup v Hendry*, (1906) 22 (Sh Ct) 271.

¹⁹⁶ *Ibid*, paras 12.23-12.24.

¹⁹⁷ *Dramgate Ltd. v Tyne Dock Engineering Ltd.*, 1999 SLT 1392 (2000 SC 43); *Emerald Airways Ltd. v Nordic Oil Services Ltd.*, 1996 SLT 403.

¹⁹⁸ *Stair Memorial Encyclopaedia*, Vol 8, para 123, fns 6, 7.

4.98 For example, the standard to be met by a pursuer in an action for wrongful diligence, that he must prove malice and want of probable cause on the part of the person using diligence against him, may now be perceived as being unjustifiably high. It might also be fairer to innocent third parties affected by wrongful diligence if they could obtain damages where there is demonstrable negligence in the execution of the diligence. Similarly, it may be considered unnecessarily harsh that a creditor may be held liable for the irregular execution of diligence by enforcement officers (or his solicitor) which he has not condoned. It is also worth considering whether the uncertainty surrounding the means of challenging wrongfully obtained summary warrants should be addressed.

4.99 Although these issues have been raised by writers on the subject, they do not appear to have given rise to wide public concern. On the one hand, it is possible that there has simply been no need for recourse to the remedy. On the other hand, wrongful diligence may have been considered too difficult to establish. It is also possible that there is simply a lack of awareness, as noted for other aspects of this area of law. This issue is worthy of further exploration and the Executive would welcome consultees' views.

Q. 4C. 1 Why is the remedy of wrongful diligence little used?

Q. 4C. 2 Should an enforcement officer or instructing solicitor involved in diligence, which they knew or ought to have known was unlawful be:

(a) jointly and severally liable with the creditor in damages for wrongful diligence

(b) or wholly liable in place of the creditor?

Q. 4C. 3 Should the test to be met by a pursuer in an action for wrongful diligence, of malice and want of probable cause, be expanded to include negligence in the execution of the diligence?

Q. 4C. 4 Should the law be clarified to make it clear how a summary warrant wrongfully obtained should be challenged?

(D) DEBT ARRANGEMENT SCHEME

4.100 The historical recommendations for debt arrangement schemes, current need, benefits and difficulties of such an operation are examined and proposals for a current-day scheme are set out.

Nature and Purpose

4.101 The Scottish Law Commission first recommended debt arrangement schemes in its 1985 *Report on Diligence and Debtor Protection*.¹⁹⁹ The Commission intended that debt arrangement schemes would operate by debtors making regular single payments to a central place from where they would be distributed amongst multiple creditors as instalments towards payment of all their debts. It was to have assisted debtors who were not able to settle their debts as they fell due but had some surplus income, i.e. in excess of that required for minimum subsistence. Debtor applications, possibly prepared with the assistance of money advisers, would be submitted to the courts for judicial approval. All administration, including arrangements for payment and distribution, would be carried out by the clerk of court. The significant factor for the enforcement system was that, once schemes were approved and operating, enforcement action would not be competent. The purpose of the recommendation was intended to:

"fill a gap in the provision made by Scots law for helping ordinary consumer debtors and small traders to arrange for the orderly payment of debts".²⁰⁰

4.102 It was thought by the Commission to be similar in purpose, although not in make-up, to administration orders operating in England and Wales which were intended:

"for the introduction of a simple, accessible and inexpensive procedure for dealing with the ordinary consumer debtor ... who has no significant realisable assets, but who has a reasonable prospect of being able to discharge all or part of his liabilities out of the future earnings surplus to his essential requirements".²⁰¹

4.103 This remains a valid aim today. So why were the Scottish Law Commission's proposals for debt arrangement schemes made in 1985 not implemented with its other recommendations? The recommendation was not implemented for a number of reasons which the Commission summarised in its *Report on Pounding and Warrant Sale*.²⁰² These included the fact that existing arrangements for sequestration, voluntary trust deeds and voluntary repayment programmes were satisfactory. It was also felt that the proposals were too complicated, would not include pre-decree debts and might exclude subsequent creditors from the scheme whilst prohibiting them from enforcing. It had been noted that similar schemes abroad had experienced a high failure rate. Overall, the government of the time felt that the benefits would have been outweighed by the costs to the public purse. These concerns are addressed in following paragraphs.

4.104 The Commission's proposals for debt arrangement schemes had been made in conjunction with other recommendations aimed at debtor protection and orderly payment,

¹⁹⁹ Scot Law Com No 95, ch 4.

²⁰⁰ *Ibid*, para 4.33.

²⁰¹ *Ibid*, para 4.32, from the Cork Report, para 272.

²⁰² See excerpt in Annex A.

including time to pay directions and orders and conjoined arrestments. These recommendations were implemented and are currently in operation. Thus, for single debts for which an action has been raised, the court may grant the debtor time to pay, either by deferred lump sum or by instalments.

4.105 However, where individuals have multiple debts, they can find it difficult to organise and manage several separate time to pay arrangements. It may also be difficult for the court to set appropriate levels of payment in individual cases when they may not be informed of all relevant circumstances. Thus, individual time to pay arrangements ordered by the court, or made by informal agreement, can fail when repayments are not based on the complete debt picture and set at a level beyond surplus income available for all debts. Creditors may then have little option but to consider taking enforcement action to recover the debt. Time to pay arrangements granted in one case do not prevent enforcement action by another creditor under a different decree which can render the time to pay arrangement difficult to maintain.

4.106 The current time to pay arrangements depend on the debtor taking the initiative of making an application in cases which are before the courts. However, it is thought that many debtors are not taking up this opportunity, the reason for this appearing primarily to be due to lack of awareness.²⁰³ There may also be a reluctance because the time to pay arrangements also require the debtor to co-ordinate the payment arrangements awarded along with other subsisting debts and payments. It is understood that a large proportion of all small claims and summary cause actions for payment of money are undefended.²⁰⁴

4.107 Similarly, conjoined earnings arrestments were devised by the Scottish Law Commission to deal with multiple debts but, again, do not prevent other enforcement action by the same or other creditors being taken at the same time.

4.108 The Commission, when recommending time to pay and conjoined arrestment arrangements, had envisaged that they would mesh with debt arrangement schemes, thus avoiding these difficulties. It was not the intention that the time to pay arrangements should be a solution for multiple cases of debt and so it is perhaps not surprising that they have not been regarded as sufficient.

Support for National Statutory Provision for Debt Arrangement

4.109 Support for debt arrangement schemes has been renewed in recent times from many quarters.

4.110 The Scottish Law Commission, on consulting before issuing its 1985 Report, had then found that creditor interests supported debt arrangement schemes. At that time, the Scottish Association of Citizens Advice Bureaux, whilst accepting the principle expressed, serious doubts about their value.²⁰⁵ The Scottish Law Commission renewed its recommendation for debt arrangement schemes in its 2000 Report.²⁰⁶ The Commission reopened the issue in its preceding discussion paper in which it sought views on whether such

²⁰³ *Study of Debtors*, p 30.

²⁰⁴ No statistics are available to verify this.

²⁰⁵ Scot Law Com No 95, para 4.2.

²⁰⁶ Scot Law Com No 177, p 76, para 5.61.

schemes should be introduced.²⁰⁷ The Commission reported that the overwhelming majority of consultees supported the introduction of debt arrangement schemes.²⁰⁸

4.111 Current general perception is that the multiple debt problem has continued to increase over recent years. Reports from advice agencies and support groups about the effects of social changes appear to support this perception, particularly in relation to easier access to credit and other factors such as an increase in home ownership and wider availability of mortgage lending.

4.112 Citizens Advice Scotland now strongly supports introduction of a debt arrangement scheme. In evidence to the Scottish Parliament, it advised that: "Most clients have a strong desire to repay their debts, despite the almost impossible hurdles that can be faced doing so. Most clients, particularly young clients, do not want to face bankruptcy, with all of the financial and social consequences following them for the rest of their lives."²⁰⁹ A subsequent paper, offering views on the possible workings of such a scheme stated that: "Debt continues to be the largest, fastest growing and increasingly complex single problem that Bureaux dealt with in 1999/00...Most CABx debt clients are in multiple debt situations. For these clients, the lack of a formal debt arrangement scheme can create further problems."²¹⁰

4.113 A Report of a discussion group during the Money Advice Scotland Annual conference recorded that: "A principal concern was about the pressing need for a statutory debt arrangement scheme. It was a common problem that voluntary repayment schemes which advisers devised for clients could be made unworkable by a single uncooperative creditor. A statutory scheme could prevent this and could also overcome the difficulty faced by courts when assessing 'time to pay' arrangements in individual cases by enabling a client's whole situation to be considered. Delegates put forward suggestions about how such a scheme might work in practice."²¹¹

4.114 A paper contributed to a Report of the Improving Debt Recovery Working Group supported a debt arrangement scheme at an early stage.²¹² It was felt that time to pay arrangements often put in place instalments which had been offered before court action had been raised and a debt arrangement scheme would, therefore, save time and costs for debtors, creditors and the courts.

4.115 The independent Working Group set up to consider a replacement for poinding and warrant sale recommended a national statutory debt arrangement scheme in its 2001 Report *Striking The Balance- a new approach to debt management*.²¹³ The majority of respondents who addressed the issue, 90%, supported this recommendation. Excerpts are reproduced at Annex A. Many made comments about how they considered that such a scheme should work which proved very helpful to the Executive in its review and formulation of the proposals which follow.

²⁰⁷ Scot Law Com DP No 110, paras 7.53-7.65 and question 7.13.

²⁰⁸ Scot Law Com No 177, p 75, para 5.58.

²⁰⁹ Justice and Home Affairs Committee, Stage 1 Report on the Abolition of Poindings and Warrant Sales, Vol 2, p 132.

²¹⁰ *Debt Arrangement Scheme, A Proposal by Citizens Advice Scotland*, 23 August 2001.

²¹¹ *Money Advice Scotland Spring Journal, incorporating Conference 2001*, awaiting publication.

²¹² *Debt Enforcement in Scotland*, contributed by representatives of the Sheriff Court Users Group and the Scottish Consumer Council, December 2000.

²¹³ Published 18 July 2001.

4.116 Comments from respondents to *Striking the Balance* touched on a wide range of relevant issues. Many respondents felt that establishing a statutory debt arrangement scheme was vital to dealing with multiple debt, particularly those in the advice sector including local authority advice services. Some thought that it would be of benefit in offering an alternative solution for resolving multiple indebtedness to that of bankruptcy and trust deeds which remove the debtor's property from his control for realisation and distribution to creditors in satisfaction of their claims. One respondent felt that the absence of a debt arrangement scheme was a major contributing factor in the pre 1993 rise in sequestration and increasing post 1993 rise in use of protected trust deeds. Creditor interests mostly supported a debt arrangement scheme but some considered that it would only serve the same purpose as existing protected trust deeds. Local and central government creditors were concerned about how payments would be prioritised and apportioned between creditors.

4.117 Some respondents thought that there should be a maximum period over which the scheme should run whereas others thought that there should be no maximum period if that would mean that the full amount of the debt would be recovered. Respondents gave differing views about the stage at which the scheme could be entered, with some believing that greater benefits would be achieved if access could be as early as possible and others advising that this would inhibit or duplicate their own processes.

4.118 Concerns were raised by respondents about the scope of the scheme which it was felt should not extend to commercial debts, should not conflict with existing legislation for combating late payment in commercial debts and should not affect existing arrangements for deductions from benefits. Further concerns were expressed about the need for advisers to be accredited; including fee charging advisers; how the scheme would be funded; the need to ensure that debtors disclosed all sources of income and capital; the need for debtors to be aware that failure would result in further action; how disputes between debtor and creditor would be handled and whether lay representation would be permitted; how participants of the scheme would be listed; what would happen about omitted or subsequent creditors; and how debtors would be prevented from taking on further credit or debt.

4.119 The research into the operation of the Debtors (Scotland) Act 1987 suggests that many of the problems identified by different groups of respondents could be addressed by the introduction of debt arrangement schemes.²¹⁴ There was a general willingness by both debtors and creditors to agree settlement terms. However, in the absence of knowledge of the debtors' circumstances, creditors were suspicious of delaying tactics and debtors felt if only they could show creditors what their situation was they would agree to reasonable instalments. The intervention of advice seemed to produce positive results. Those who were supported by advisers succeeded in achieving settlement terms more readily. Where time to pay arrangements in court proceedings were used, they succeeded in about half of the study sample, with those who had received help (from a money adviser, trading standards officer or solicitor) being more likely to maintain the arrangement.

Voluntary Repayment Programmes

4.120 Voluntary repayment programmes have been operating for many years and continue to do so. A debt management plan is currently set up on a voluntary basis for instalment payment of multiple debts by mutual agreement between a debtor and his creditors. These arrangements are often brokered by money advice workers and debt counsellors. A gradual

²¹⁴ *Op. cit.* notably from the research *Study of Debtors*, *Study of Individual Creditors* and *Study of Commercial Creditors*.

increase of these services and, most significantly, technical advancements have enabled them to become more automated and less cumbersome to administer as well as more discreet and user friendly for debtors.

4.121 Typically, a voluntary repayment programme will be arranged, at no cost to the debtor, in the following manner. A debtor seeks advice about a particular debt or his overall indebtedness. He may have done so of his own volition but, increasingly, creditors, such as high street stores and financial institutions, actively encourage debtors to do so.²¹⁵ Some of them now often produce literature directing them to this facility. The CRU research noted that a third of their study sample of commercial creditors had at that time offered some sort of money advice to customers in difficulty.²¹⁶

4.122 Free money advice services, where voluntary repayment programmes can be arranged either in person or by telephone, are widely available from the not-for-profit sector and local authorities. The money adviser will obtain details of the debtor's income and liabilities, will seek to maximise income through available benefits and will work out a programme for payment in discussion with the debtor. This will be based on available surplus income after deduction of sums required for basic needs. It necessarily involves applying standard criteria, as well as a degree of value judgement on the part of the adviser, having regard to the individual and family circumstances, and common sense. For example, a modest sum for the upkeep of a companion pet cat might be considered a reasonable deduction but the stabling fees for a horse would not. Where possible a modest sum for future essential outlays, such as replacing a cooker or washing machine, and unexpected eventualities, such as illness or a death in the family, would be taken into account. The balance remaining would be allocated in a programmed schedule amongst all creditors. Some debts will be regarded as priorities to be paid first according to standard criteria. Agreement is sought from individual creditors and arrangements set up for payment and disbursement.

4.123 Voluntary repayment programmes are now commonly administered using electronic payment distribution systems for receiving debtors' payments and distributing them to creditors. Money advisers arrange a payment distribution mechanism suitable for the debtor's circumstances. Some money advice organisations run their own payment distribution mechanisms,²¹⁷ while others use externally provided systems.²¹⁸ These are now commonly set up on line or can be arranged by correspondence or telephone. Facilities for debtors to make payment currently include standing order or cheque where the debtor has a bank account. For those who do not have a bank account, postal order or cash deposits can be made at purpose-designed PayPoint²¹⁹ terminals accessible in local outlets such as grocery shops and garages. It is understood that expansion of methods of payment is being explored and that telephone and internet banking, direct debit and other places to pay, e.g. post offices, may also become available. Payments made by debtors are on a no-cost basis with the full amount of debtors' payments being allocated towards reduction of their debt.

4.124 Payment to the creditor is usually made by a single monthly electronic bank transfer incorporating various debtors' payments. Participating creditors fund the service by deduction of an administrative charge from payments distributed to them, ranging from 9% to

²¹⁵ *Study of Commercial Creditors*, ch 8, p 96, para 21.

²¹⁶ *Ibid*, ch 4, p 44, para 40.

²¹⁷ e.g. CCCS Scotland and their Scottish Debtline, www.cccs.co.uk, www.scottishdebtline.co.uk and Payplan www.payplan.com.

²¹⁸ e.g. Money Advice agencies and Citizens Advice Bureaux use the Paylink Trust, see *infra*.

²¹⁹ www.paypoint.co.uk, operating in association with the Paylink Trust, see *infra*, currently have over 8 400 outlets in UK.

15%. This pays for some money advice services, including preparation of debt management plans and ongoing case management, and the payment distribution system.

4.125 These arrangements do, of course, mean that creditors are accepting a reduction in the value of the full debt owed to them. Individual creditors will weigh up the costs and benefits of doing so for them. It is understood that the reasonable prospect of creditors receiving some payment on a regular basis weighs favourably in the balance against the uncertainty and cost of pursuing court and enforcement action in competition with other creditors. It is considered to be cost-effective and convenient, particularly for large creditor entities who receive payments from many debtors, as it can mean a reduction in their own administration costs for recovering bad debt. Large creditor entities tend to form the majority of creditors paid under voluntary arrangements and occasional small creditors may be included in the plan with no contribution being deducted.

4.126 These facilities have developed to satisfy an unmet need. They operate on the basis of many of the principles envisaged by the Scottish Law Commission applying up-to-date electronic technology on a streamlined basis. They are regarded by the advice sector as operating successfully, subject to the significant difficulties addressed in the following paragraphs.

4.127 Although limited, the statistical information which is available tends to support this. The charity, Consumer Credit Counselling Service Scotland, reports that, since opening in Scotland in 1996, it has given advice on debt problems to more than 12 000 people and has arranged more than 4000 voluntary debt management plans for Scottish clients totalling £25 million of debt.²²⁰ In 2000 throughout the UK, the Consumer Credit Counselling Service (CCCS) arranged over 6000 new plans bringing their total number of active plans to over 12 000.²²¹ CCCS reported that a survey by a major retail lender showed that 95% of CCCS plans were still working after six months, compared with 65% of plans arranged in house and 50% of plans offered by fee-charging companies.²²²

4.128 No statistics are collected of the numbers of plans set up or their success rate by Money Advice Scotland, for individual money advice agencies, or Citizens Advice Scotland, for individual citizens advice bureaux. Citizens Advice Scotland reported that during 2000 they dealt with 160 000 debt cases involving around £70 million of debt, which was a £10 million increase on the previous year.²²³ These figures are for all advice given, whether for single or multiple debt cases, and only a proportion of them would have involved setting up a voluntary repayment programme. These advice agencies tend to be consulted by those in poverty as well as those with disposable income.

4.129 So why can't current arrangements continue as they are without a statutory framework? The principal limitation to voluntary repayment programmes are that they do not prevent creditors, who hold court orders or other authority to enforce, from proceeding to do diligence. Neither do they prevent them from petitioning for sequestration, where conditions for apparent insolvency apply. A repayment programme can, thus, be rendered ineffective by a single creditor unwilling to participate when enforcement jeopardises the debtor's continued ability to keep making payments to other creditors. This affects the success and effectiveness of voluntary repayment programmes as a remedy for both debtors and

²²⁰ Press release, 24 July 2001.

²²¹ *Managing Debt, Review of the Year*, The Foundation for Credit Counselling, (2000).

²²² *Ibid.*

²²³ CAS response to DTI consultation *Tackling Loan Sharks and More*, September 2001.

creditors. The principal advantage of a statutory debt arrangement scheme is that it would ensure compliance by all creditors by stopping diligence whilst an arrangement is ongoing.

4.130 Another difficulty with voluntary arrangements is that they cannot regulate legal effects between the participating parties and third parties. For example in order to prevent a debt becoming unenforceable due to prescription, a creditor, although receiving voluntary payments, may wish to obtain decree to protect his position should instalments cease before the full amount is received. The need to do so incurs cost to creditor and debtor as well as using court time.

Policy Issues

4.131 A debt arrangement scheme should provide a positive opportunity and means of assisting debtors who do want to meet their liabilities and can do so given time to pay free from enforcement. It should not, however, be regarded as a replacement for enforcement or, indeed, sequestration when that is the appropriate and necessary course. For example, where the amount of debt or surplus income is such that payment could not be achieved over a reasonable period. There may be a greater prospect for creditors to recover more money due in the medium term under a DAS instead of being allocated a percentage in the pound under sequestration. All sums paid by debtors would go to creditors to reduce the debt. It would not be appropriate for debtors with no surplus income who would be unable to discharge their liabilities under the scheme.

4.132 The scheme should be available as a means of managed repayment of multiple debts both before and after court and enforcement action has been taken to secure recovery of sums agreed or judicially determined to be due. Where debts are disputed between debtor and creditor the appropriate remedy must remain with the usual channels of the legal system for resolution of such disputes.

4.133 The Scottish Law Commission's original proposal for debt arrangement schemes remains, in principle, valid. With the passage of some sixteen years since its proposals were recommended there have been significant social, organisational and technological developments. There may now be solutions which overcome some of the difficulties in process and implications for the public purse, which had been one of the factors which led to government at that time to decide not to implement it. Subsequent research and further evidence suggest that some of the arguments against implementation are now much less significant. In particular, the rate of uptake and success of voluntary arrangements now appear to have increased.

4.134 A debt arrangement scheme would be an appropriate solution for personal debtors who are insolvent but do have surplus income which could be applied to pay debts within a reasonable period. It would enable such debtors with assets such as heritable property to keep their home. Voluntary trust deeds, although previously thought would be more appropriate in many cases, are most useful where the debtor has substantial assets which can be made over to the trustee including any house which would have to be vacated and sold. Other ways of meeting liabilities without involving the loss of a home would be more in keeping with the Executive's current policy aims for tackling the increasing incidence of homelessness and providing means for people to keep their homes, such as by the current mortgage to rent initiative. The Scottish Office consulted in 1998 about improvements to protected trust deeds following concerns about their operation raised by the Accountant in Bankruptcy and the Executive intends to bring forward legislation for reform. It was thought that they may not be genuinely benefiting creditors and that the Accountant's supervisory and regulatory powers should be extended to them.

4.135 The money advice network has expanded and developed significantly in recent years. A national statutory debt arrangement scheme with a key role for the money advice sector is actively sought by that sector and others. As noted, to be successful a debt arrangement scheme should be accompanied by sufficient provision of high quality money advice. Provision within the money advice sector will be further expanded to accommodate such a role in response to the recommendations in *Striking the Balance - a new approach to debt management*. In addition to existing local money advice provision the Executive is investing a further £3 million per annum in money advice services across the country.²²⁴

4.136 Other issues continue to present challenges which the Executive has considered within its review and has sought to overcome in the proposals which follow. The Executive seeks to devise a means of implementing a modern, accessible debt arrangement scheme which meets the intended purpose and avoids unnecessary complications and costs. The following paragraphs examine how such a scheme might be formulated having regard to the need to take account of factors such as:

- ♦ wide-reaching availability
- ♦ simplicity and effectiveness
- ♦ debtor, creditor and third party rights and obligations
- ♦ the overarching general public interest
- ♦ the burden on the public purse

4.137 On assessment of all available information, the Executive considers that there is a current need for a debt arrangement scheme which would be in the public interest. All of the foregoing factors suggest that, where people are multiply over-indebted, a co-ordinated approach to time to pay for all debts in an environment where enforcement is restricted would offer wide-reaching benefits. Benefits for individual debtors and their creditors are immediately apparent, in terms of achieving payment of debt and reducing the need for recourse to formal enforcement. There could be a real impact for business and government who should reap the rewards of reduced bad debt and internal administration. The courts could see a reduction in actions for payment of money and petitions for sequestration. Local authorities should notice a reduction in their significant debt burden and, in turn, be able to pass on the benefits to their local community.

4.138 The research results, reports and comments mentioned, as well as helpful discussions with interested parties, have been taken into account and have helped to inform the proposals which follow.

Proposals for a National Statutory Debt Arrangement Scheme

Scope and Principal Features

4.139 The scope of a national statutory debt arrangement scheme (DAS) should include:

- ♦ access nation-wide
- ♦ available to all personal debtors (not business but including small traders)
- ♦ available pre and post decree

4.140 The principal features of a DAS should include:

²²⁴ PQ S1W-20607, Scottish Parliament, Written Answers Report, 19 December 2001, Jim Wallace, Minister for Justice.

- ♦ money advice and assistance with preparation of a debt repayment plan
- ♦ approval of plans for entry into the scheme or determination of disputes
- ♦ suspension of enforcement and sequestration during participation
- ♦ securing deductions from earnings
- ♦ payment and disbursement facilities

4.141 There currently exist successful arrangements which can contribute to a new DAS regime. Considerable money advice services at no cost to debtors are currently available and the Executive's current programme²²⁵ will increase this provision to ensure nation-wide provision for everyone who needs to access them. Voluntary repayment programmes arranged with the assistance of money advisers already operate well, as do mechanisms devised for payment distribution. Arrangements already exist for securing deductions from earnings.

Main Functions

4.142 The functions which should be undertaken fall into two main categories for the necessary operational and legal arrangements. The operational functions involve means for negotiation, preparation and management of plans including payments made under them. The legal functions involve the formal approval of plans, determination of disputes, prevention of enforcement/sequestration and regulation of the scheme.

4.143 Some **operational functions** already exist and could be incorporated into a statutory scheme without significant change, although further work may be required to achieve the necessary degree of integration. It would, however, be necessary to ensure that there is sufficient money advice provision and that appropriate standards are set and achieved. The Executive's current programme for increasing these services will satisfy the provision criterion. Similarly, the Executive is developing plans to enhance central support for money advice provision, which will satisfy the standards criterion. It is intended that such additional central support will result in a co-ordinated approach by having agreed standards for money advice, underpinned by training and development for money advisers, monitoring of money advice services and a collation of common statistical information on money advice across Scotland.

4.144 Potential applicants seeking entry to the DAS would be able to obtain advice about their eligibility and assistance with preparing and presenting a DAS application from accredited money advisers. They would make payments which would be issued to their creditors under an accredited payment distribution system.

4.145 The Scottish Law Commission model envisaged that the whole scheme would be operated by court officials. It is appropriate and necessary that there should be judicial supervision of a DAS, to the extent that approval of a DAS and determination of disputes will affect parties rights and obligations and how they are enforced. However, it is not necessary for the operational functions to be undertaken by court officials since such matters are more a matter of administration of finances than of administration of justice.

4.146 There are no pre-existing arrangements which could be drawn upon in respect of the **legal functions** and these would require to be devised. There should be a mechanism for formal approval of plans since entry into the scheme would impose legal duties and consequences on the parties. It would be necessary to maintain a register of participants in the scheme to enable the prohibition of enforcement and sequestration to be complied with.

²²⁵ See para 4.135.

4.147 Applications for inclusion in the scheme could be automatically approved administratively if they offered suitable payment terms, conformed to standardised requirements and were agreed. Applications not fully agreed in respect of proposed payment terms could also be determined administratively, subject to a right of appeal to the sheriff court. Applications disputed for reasons other than payment terms could be determined by the courts. For example, where it was considered that the circumstances merited proceeding with enforcement or sequestration, a creditor should have the opportunity to contest an application. Arrangements for discharging completed schemes and processing default cases would also form part of this function.

Relationship with Conjoined Arrestment Orders

4.148 The Scottish Law Commission's recommendations for conjoined arrestment orders, which were implemented by the 1987 Act, had been intended by it to operate alongside a DAS. Conjoined arrestment orders operate as a means of distributing a debtor's surplus income amongst several creditors. They are available where a debtor is in employment, and may be sought by creditors who have been granted a decree for a debt due by the court. The Commission had envisaged that the administrator of the scheme would attach a participating debtor's earnings at source as a means of ensuring compliance and reducing the likelihood of default. It would be contrary to the ethos of the current proposal for a DAS to permit entry only after court and enforcement action had been taken, by requiring creditors to proceed to decree and earnings arrestment. However, some means of securing deductions from earnings should be a feature of a DAS, in order to achieve a fair balance between debtor and creditor interests. It would go some way towards securing creditor support for such a scheme, which otherwise weighs heavily in favour of debtor interests, to the cost of creditors whose rights to enforce or sequester would be suspended. An application to enter the scheme could be accompanied by a mandate authorising the employer to make the necessary deductions to the selected payment distribution operator once certified and transmitted to the employer by the administrator.

4.149 Except in cases where a disputed application required judicial determination there would be no need for these matters to be dealt with by court officials. Extra-judicial functions would be more appropriately dealt with by central administration within the Executive or a body for which it is responsible. The role might be undertaken along with other enforcement functions by the Scottish Civil Enforcement Commission proposed in Part 3. An alternative existing location might be the Office of the Accountant in Bankruptcy, where advantage could be taken of existing expertise, technology and liaison with the courts. The enforcement and insolvency procedures are closely related and the Accountant in Bankruptcy is responsible for similar types of processes, such as his regulatory and supervisory role and maintenance of a public register. In a DAS which was not administered by the courts, there would be an argument in favour of transferring similar functions currently undertaken by sheriff clerks in connection with conjoined arrestment orders.

Alternative Models

4.150 Alternative models were considered but were not thought to be the most suitable, effective and efficient means of delivery. An alternative regime, advocated by Citizens Advice Scotland and participants of the Improving Debt Recovery Working Group, is for a court run system within a new debt tribunal. It would form a lower tier of the sheriff court and be presided over by lay persons similar to Justices of the Peace in the District Court in criminal matters, supported by clerks of court who together would determine applications according to new less formal rules of procedure. It is not considered that this would make best use of existing resources and would be a costly option which is unnecessary for this purpose.

Q. 4D. 1 Should a statutory debt arrangement scheme be introduced in Scotland?

Q. 4D. 2 In general, do the Executive's proposals offer a good approach for a modern, accessible DAS?

Conditions, Restrictions and Other Legal Effects

4.151 Although sixteen years have passed since the Scottish Law Commission's recommendations were first made and it is now considered appropriate to reflect developments since then in an alternative organisational structure, much of the Commission's work remains equally valid today. The Commission considered extremely important issues concerning the parameters of a scheme and the legal effects of participation in a DAS on the principal and third parties. Its aim was to balance equitably the interests of the debtor and his several creditors and also the interests of creditors as between themselves. Such issues, previously assessed in detail by the Commission in its 1985 Report, are drawn on heavily in these proposals.

4.152 **Limits of the Scheme.** There must be a genuinely achievable prospect of participation in the scheme resulting in payment of the total amount of indebtedness within a reasonable period. A restriction on incurring further debt would protect existing and new creditors whilst providing a degree of flexibility for debtors and avoid failure of the scheme due to unanticipated circumstances. In order to meet the policy aims of the scheme and to achieve a fair balance between competing interests admission to the scheme should apply within set limits.

4.153 Rules governing the limits of the scheme should be set out as follows:

- ♦ debtors should have title to apply to participate in a DAS (not creditors)²²⁶
- ♦ commercial or business debts should be excluded (small traders excepted)²²⁷
- ♦ plans approved in the scheme should run for a maximum period of 3 years with a provision for extension to no more than 5 years²²⁸
- ♦ an upper monetary limit of total debts (see figure discussed later)²²⁹ should apply (excluding those heritably secured)²³⁰
- ♦ a restriction on obtaining new credit or incurring new liabilities above a modest amount specified in the scheme for unanticipated necessities should apply²³¹

4.154 **Determination and Administration.** Appropriate provision should be made in order to ensure the efficient acceptance and determination of disputes, the smooth running of plans under the scheme and prevention of enforcement as follows:

- ♦ applications should be submitted on a standard form and should usually be compiled with the assistance of accredited money advisers

²²⁶ Scot Law Com No 95, paras 4.50-4.54.

²²⁷ *Ibid*, para 4.68.

²²⁸ *Ibid*, paras 4.36-4.41.

²²⁹ Para 4.166.

²³⁰ Scot Law Com No 95, paras 4.66-4.67, the Commission originally recommended an upper limit of £10 000.

²³¹ *Ibid*, paras 4.48-4.49.

- ♦ applications should be accompanied by details of a debt management plan including an accredited payment and disbursement system
- ♦ the Scottish Civil Enforcement Commission should have competence to approve applications
- ♦ the sheriff court having jurisdiction over the debtor's domicile should have jurisdiction to determine disputes²³²
- ♦ a register of subsisting approved plans under the DAS should be maintained

4.155 Types, Ranking and Priority of Debts. The Commission gave consideration to the types of debts which should be included in a DAS, how they should be ranked and whether any classes of debt should be given priority.²³³ There should be rules for the types of debt which should be included in the scheme. They should include those which, at the time of application, were:

- ♦ agreed or legally constituted as due and payable
- ♦ undisputed
- ♦ unsecured by contractual securities
- ♦ arrears (not current payments which would be outgoings).
- ♦ a right of relief acquired against the debtor by a co-obligant upon payment of a debt
- ♦ interest due at entry of the DAS (see below)
- ♦ court and enforcement expenses

4.156 Arrangements for ranking of creditors in sequestration and in voluntary repayment programmes are on the basis of rateable payments made to creditors according to the amounts of their respective debts (*pari passu*). It is intended that the same rule should apply in a DAS.

4.157 Interest accrued on debts to the date of the application is to be included. It has been suggested that interest should be 'frozen' and it is understood that the intention is that interest should cease to accrue. However, it is the purpose of the DAS only to make provision for orderly payment of debts due and it is not intended to intervene in their determination or calculation. It would be open to creditors to waive further interest by agreement.

4.158 Having regard to current practice in voluntary repayment programmes and comments about priority received from some respondents to the consultation on *Striking the Balance*, it is considered appropriate to reassess this issue in some detail. This is discussed further in paragraph 4.172.

4.159 Obligations and Effects on Participants and Third Parties. Appropriate provision should be made in order to enable parties to the scheme and third parties to comply with it. Arrangements should be in place to enable creditors to make an informed judgement on whether to consent to an application under the scheme and prevent participation being used as a tactic for delaying when payment can be afforded. A number of consequences of participation in the scheme, or of default, should apply to the parties to the scheme and to third parties as follows:

²³² *Ibid*, paras 4.58-4.60.

²³³ *Ibid*, paras 4.73-4.96.

- ♦ applications should be accompanied by full disclosure of the debtor's circumstances including all debts and creditors' certificates of consent²³⁴
- ♦ payment should be secured by deduction from earnings²³⁵ authorised by mandate
- ♦ enforcement should not be competent after a DAS application has been granted
- ♦ the penalty for breach of the terms of the DAS including false declaration or default in payment should be its revocation
- ♦ enforcement will become competent following failure or revocation of a DAS
- ♦ suspension of prescription during the currency of a DAS²³⁶

4.160 Preservation of Other Rights and Remedies. It will be necessary to make provision for preservation of creditors' other existing rights and remedies.²³⁷ The Commission made detailed proposals for addressing the relationship between these and a DAS which substantially remain appropriate and others may now apply. These might concern, for example:

- ♦ heritable and other securities and related matters
- ♦ liens or rights of retention
- ♦ set-off, HP and conditional sale agreements
- ♦ direct deductions from benefits (although those on benefits may not have surplus income for distribution in the scheme, but see paragraphs 4.169 - 4.170.
- ♦ student loans

4.161 Stopping and Ranking of Diligence.²³⁸ The Commission gave very detailed and careful consideration to appropriate rules for the stopping and ranking of diligence upon operation of a DAS. It is intended that the effects of the scheme on diligence should substantially follow the Commission's proposals, subject to adjustment in light of implementation of reforms proposed in this paper. However, with regard to payment of criminal fines, the Commission had recommended that civil diligence, where so ordered by the court, should still be competent despite the debtor's participation in a DAS. This could jeopardise a scheme and it is not intended that this recommendation should be implemented. Instead, criminal fines should be included as an essential outgoing for the purpose of calculating surplus income. The question of the way in which diligence should be halted is considered further in paragraph 4.177.

4.162 Relationship with Sequestration. It is important that a DAS should not be considered a replacement for sequestration when it would be the more appropriate course. The general circumstances in which each would be more appropriate were mentioned in paragraph 4.134. The following rules governing competence and priority in the relationship between a DAS and sequestration should apply:²³⁹

- ♦ a DAS application should not be competent where a petition for sequestration is ongoing or sequestration has been awarded and discharge not granted

²³⁴ *Ibid*, para 4.50.

²³⁵ *Ibid*, paras 4.30, 4.43 and 4.268-4.270.

²³⁶ *Ibid*, paras 4.214-4.216.

²³⁷ *Ibid*, paras 4.169-4.213.

²³⁸ *Ibid*, paras 4.99-4.155.

²³⁹ *Ibid*, paras 4.13-4.19 and 4.63-4.65.

- ♦ a DAS application should not be competent where there is a subsisting trust deed for creditors
- ♦ a petition for sequestration should not be competent after a DAS application has been granted
- ♦ it should not be competent to 'replace' sequestration with entry to the DAS
- ♦ creditors should be entitled to oppose a DAS application and petition for sequestration, subject to determination by the court
- ♦ a petition for sequestration should be competent following failure or revocation of a DAS
- ♦ failure or revocation of a DAS should have the effect of constituting apparent insolvency for the purpose of sequestration (where the DAS included post-decree debts)

4.163 **Miscellaneous.** The Commission also considered the question of civic disqualifications which apply to an undischarged bankrupt ²⁴⁰ and concluded that these should not be replicated for participants in the DAS. It is intended that this recommendation should be followed.

- Q. 4D. 3 Should title to apply to participate in a DAS be restricted to debtors and not to creditors?**
- Q. 4D. 4 Should access to the DAS be open to all personal debtors including small traders but not business debtors?**
- Q. 4D. 5 How should small traders be defined for this purpose?**
- Q. 4D. 6 What period should apply to approved schemes and should there be any provision for extension of that period?**
- Q. 4D. 7 Should there be a restriction on obtaining new credit or incurring new liabilities above a specified amount and, if so, should a maximum amount be set?**
- Q. 4D. 8 Should existing arrangements operating for voluntary repayment programmes be incorporated insofar as possible?**
- Q. 4D. 9 Should applicants have access to free money advice services for negotiation and preparation of DAS applications?**
- Q. 4D. 10 Should money advisers and payment distribution providers be accredited in order to maintain high levels of service provision?**
- Q. 4D. 11 Should the Scottish Civil Enforcement Commission be responsible for administrative approval of DAS applications?**
- Q. 4D. 12 Should DAS applications be approved administratively where:**
- (a) agreed and in accordance with specified standards**
- (b) agreed in principle subject to resolution of proposed payment terms?**

²⁴⁰ Scot Law Com No 95, para 4.312-4.314.

- Q. 4D. 13 Should disputed applications be considered by the sheriff court?**
- Q. 4D. 14 Should a register of subsisting approved plans under the DAS be maintained?**
- Q. 4D. 15 (a) Should all debts rank rateably?**
- (b) Should the types of debts specified be included?**
- Q. 4D. 16 Should an application to enter the scheme be accompanied by a mandate authorising the employer to make deductions from earnings?**
- Q. 4D. 17 Should enforcement be stopped once a DAS application has been granted?**
- Q. 4D. 18 Should prescription be suspended during the currency of a DAS?**
- Q. 4D. 19 Should the other rights and remedies specified be preserved?**
- Q. 4D. 20 Should the rules specified for governing competence and priority in relation to sequestration apply?**

Issues Still under Consideration

4.164 A number of issues require further careful consideration, particularly where there may be a need to find a solution as between competing interests or where alternative solutions may be possible. These are addressed in the following paragraphs and consultees' views on these matters would be particularly welcomed.

4.165 **Approval of an application** would be appropriate if it was agreed by all or the majority of creditors. However, the level of majority support could be determined by numbers of creditors or by proportion of the total amount of debt. In the latter case, a single large creditor would heavily influence the process. Leaving the matter for assessment in individual cases would be burdensome and would not offer guidance to potential participants.

4.166 Setting an **upper monetary limit** at the optimum level is important to the success of the DAS. If set too low many debtors who could benefit from the scheme would be excluded but, if too high or no limit at all, the scheme may not be capable of settling debts within a reasonable period. In 1985 the Commission proposed an upper limit of £10 000. It is difficult to assess accurately the appropriate figure since the available research about the current average levels of debt in Scotland has produced widely varying results.

4.167 The Consumer Credit Counselling Service found, as part of a regional comparison of their records, that "The highest debt levels in the CCCS population are in Scotland (median £14 993)".²⁴¹ Other parts of their study tend to suggest that home owners and buyers have higher average levels of debt. Their *Review of the Year, 2000* states that "A CCCS client on a repayment plan is typically mid-30s, married with children. The average debt is over £20,000."²⁴² Citizens Advice Scotland advise that "Our bureaux evidence shows many clients with debts in excess of £25,000, with figures of £85,000 and £100,000 fairly common.

²⁴¹ *When Credit Turns to Debt*, Analysis of CCCS clients between 1997 and 1999, May 2001, p 26.

²⁴² P 11.

Citizens Advice Scotland is in the process of conducting research into indebtedness along with our sister organisations..., sponsored by the OFT. Initial findings show that the average total debt from the sample of clients was £10,150, varying in the sample from a minimum of £142 to a maximum of £100,000.”²⁴³

4.168 However, it is understood that a proportion of these figures include secured debts such as mortgages, while others exclude them. Research conducted by Money Advice Scotland²⁴⁴ for all money advice providers in Scotland, including Citizens Advice Bureaux, reveals that, of those outlets which record mortgage statistics, nearly a third of all outlets count both arrears and mortgage balances and two thirds count arrears only. It further revealed that “The average debt for each individual/client who visits a money advice outlet is between £6,000-£10,000.” Accordingly, consultees' views are sought on an appropriate upper limit.

4.169 A **lower monetary limit**, in addition to the upper monetary limit, was also recommended by the Commission at the level of £600. Having no lower limit could conceivably open the DAS to abuse by debtors seeking to use it as a means for delaying payment or avoiding enforcement. However, people on very low incomes may have debts to pay but have little surplus income available. Creditors may be willing to participate in order to receive some payment even if relatively small sums paid over a long period were involved. Creditors would have the opportunity to withhold agreement or oppose a DAS. It is, therefore, not thought necessary to impose a lower monetary limit.

4.170 The rationale of a DAS depends upon there being sufficient surplus income available to pay towards settlement of debts. However, Citizens Advice Scotland suggested that there is a need to operate a system for clients with very little disposable income, such as £1 per week for all creditors. In order to provide for this they saw a role for Credit Unions. It was not suggested how this might work but it would be open to credit unions to seek accreditation to operate a payment disbursement arrangement. Whilst theoretically plausible, it may not have the facilities to do so. The returns to the creditors would be low but, where those concerned may have few assets against which to do diligence, creditors may be willing to receive some small payment rather than none at all.

4.171 **Discharge on less than full payment** was recommended by the Commission. Creditors and debtors would have been able to obtain ultimate discharge at the end of the scheme having paid a proportion of their debts' full value (composition). It considered this essential because a discharge in a sequestration would normally be obtained after three years no matter what level of composition is paid. However, this might cause creditors to believe that there may be little to choose between a DAS and sequestration and one of the aims of the scheme is to provide an alternative to sequestration. It is difficult to envisage how composition could offer adequate protection against abuse without stipulating a minimum percentage. It is not considered that a minimum percentage would be appropriate when applied to schemes of considerably different values. It would be undesirable to create an administratively or judicially sanctioned means of discounting the cost of goods and services. Accordingly, it is not intended to provide for composition.

4.172 **Priority** which could be given to certain types of debt was mentioned in paragraph 4.158. Necessary ongoing or current liabilities would be deducted from income as outgoings in the calculation of surplus income although arrears would be included in the DAS. It would not otherwise be intended that debts within the scheme should otherwise be

²⁴³ *Debt Arrangement Scheme, A Proposal by Citizens Advice Scotland, August 2001.*

²⁴⁴ *Money Advice Services in Scotland – A Time to Reflect, March 2000.*

given preferential status in attributing payment under the scheme in like manner to bankruptcy proceedings. This accords with the original Commission recommendations. It had been considered that creditors who might otherwise be considered preferential would not have strong grounds for objection in a scheme which provided for full payment rather than a percentage in the pound.

4.173 Future, Contingent, Subsequent and Omitted Debts.²⁴⁵ In fairness to other creditors and to aid simplicity in administering the scheme, the DAS should have rules about inclusion of debts arising subsequently or which were unintentionally omitted from the scheme. Other rules already mentioned concerning restriction of further credit or debt and debtor declaration of liabilities will go some way towards restricting these possibilities. The Commission proposed that debts should not be included in the scheme if they were subject to a contingency which had not occurred or where payment would become due at a future date which had not arrived. It would be of greater benefit to both debtor and creditor if such debts could be included in the scheme and it is intended that the scheme now proposed should include that possibility. In order to do so it would be necessary to determine the amount due and it is proposed that they should be included if the amount due has been agreed between the parties.

4.174 Another question arises as to the later inclusion of future or contingent debts once purified after commencement of the scheme. In fairness to those creditors already participating it should not be appropriate to do so, although it may be that the situation would arise only in few cases. Subsequent debts which arose due to the debtor undertaking commitments or obtaining credit in excess of the authorised level should not be included. Such debts could be enforceable after the scheme was discharged or revoked. This would act as an incentive for responsible lending so long as access to the DAS register, by user friendly means, was readily available. Subject to the following paragraph, the penalty for incurring subsequent debts in breach of the authorised level should normally be revocation of the scheme.

4.175 Realisation of Specific Assets. The Commission recommended that there should be provision for instructing the debtor to realise specific assets and pay the proceeds into the scheme. This was intended to make participation in a DAS more attractive to creditors who would otherwise petition for sequestration.²⁴⁶ Whilst this may only apply in a small number of cases it may enhance the scope of the DAS.

4.176 Variation of a DAS.²⁴⁷ Intervening circumstances affecting the debtor's surplus income level or necessitating incurring debts in excess of the authorised level may also arise. In such cases it may be considered equitable for the debtor to permit a variation of the scheme by agreement of the parties or on cause shown. It may also safeguard creditors' interests since the success of the scheme would otherwise be jeopardised. Strict and clear guidelines, on the types of changes in circumstances allowed, would be necessary to avoid potential abuse.

4.177 Provision for **stopping diligence** was recommended by the Commission as a two stage process. It proposed an interim sist of diligence during a notice period whilst discussions and arrangements took place ahead of the application being granted and final order on confirmation of the scheme. In support of this arrangement is that it might prevent a creditor from rushing to do diligence to the detriment of others. Its downside is that it

²⁴⁵ Scot Law Com No 95, paras 4.125-4.138.

²⁴⁶ *Ibid*, paras 4.45-4.47.

²⁴⁷ *Ibid*, paras 4.275-4.279.

would be burdensome and potentially open to abuse by debtors who might use it as a device means to delay and allow disposal of assets. Either way, potential difficulties could arise and, on balance, it is considered that a single step arrangement, for stopping diligence upon recording in the register, which would have the benefit of simplicity is to be preferred.

4.178 **Default or breach** of the terms of a DAS should give rise to its **revocation**.²⁴⁸ A breach may be due to circumstances which could be remedied, enabling the DAS to continue in the interests of both debtors and creditors. Yet too many 'chances' could render the system open to abuse. As noted in relation to existing time to pay arrangements, default occurs after two payments have been missed and the third is due.²⁴⁹ Experience from the operation of voluntary repayment programmes may also assist in suggesting appropriate periods for rules on default.

4.179 **Reports and Notices of default** could be produced from payment distribution systems to money advisers to enable them to monitor cases and assist further where there may be a change of circumstances requiring further assistance or application for variation. Other such mechanisms may also be useful tools.

4.180 **Access to Information in the Register** by existing and prospective creditors and enforcement officers would be necessary in order to confirm participants in order to join in or avoid attempting prohibited diligence. The practical reality is that there would have to be a public register.²⁵⁰ This forms part of the wider issue on access to information discussed in Part 3.

4.181 **Advertising** of applications in some form may similarly be necessary as a means of alerting all existing creditors and enabling them to participate.²⁵¹

Costs and Benefits

4.182 The current proposal involves continuation of the current self funding arrangements for operational functions including money advice and payment distribution in voluntary repayment programmes. That is with no cost to debtors and funding achieved from creditor contributions. Similarly to time to pay applications, it is not intended that disputed DAS applications which go before the courts should be eligible for legal aid.²⁵²

4.183 Some money advice services are centrally funded and, as indicated, funding for additional money advice services has been further committed by the Executive. Additional costs would be incurred by the public purse for administrative and legal functions including central administration in relation to approval, discharge of schemes and maintenance of the register. The additional court time for determining disputed cases may well be offset if the incidence of actions for payment of money and petitions for sequestration reduced. It would, however, be possible for the creditor contribution level or an application fee to contribute also towards the costs to the public purse.

4.184 There appear, therefore, to be three potential means of funding the scheme. Namely, fully self funding from creditor contributions, partially self funding and partially state subsidised or fully state funded.

²⁴⁸ *Ibid*, paras 4.280-4.285.

²⁴⁹ See para 4.11.

²⁵⁰ Scot Law Com No 95, paras 4.266-267.

²⁵¹ *Ibid*, paras 4.235-236.

²⁵² See para 4.65.

4.185 The anticipated benefits for individuals, business and society were discussed in paragraph 4.137 above. There may be potential benefits in the long run for business and government if the level of bad debt reduced and if debt was recovered without the cost of enforcement action and reduction of administration for debt recovery. Local authorities could benefit from a reduction in their debt burden which would be passed on to their local communities.

4.186 Consultees' views are sought on all of the foregoing issues and consultees' views are invited on the following questions:

- Q. 4D. 21 What level of creditor support should normally give rise to approval of a DAS application?**
- Q. 4D. 22 What upper monetary limit of total debt should be set?**
- Q. 4D. 23 What lower monetary limit, if any, should be set?**
- Q. 4D. 24 (a) Should access to the scheme be extended to debtors with very little disposable income?**
 - (b) If so, how could this work?**
 - (c) What role could credit unions play?**
- Q. 4D. 25 What outgoings should be regarded as essentials for the purpose of determining surplus income?**
- Q. 4D. 26 Should the proposed arrangements for future, contingent, subsequent and omitted debts apply?**
- Q. 4D. 27 Should there be provision for requiring the debtor to realise specific assets and pay the proceeds into the scheme?**
- Q. 4D. 28 Should a variation of the scheme be permitted if a debtor's circumstances change?**
- Q. 4D. 29 Should diligence be stopped by a single step procedure?**
- Q. 4D. 30 Should discharge of a DAS be permitted on less than full payment?**
- Q. 4D. 31 Should penalty for a breach of the terms of the DAS, including false declaration or default in payment, be revocation?**
- Q. 4D. 32 What extent of default should constitute breach of the DAS?**
- Q. 4D. 33 What reports or notices should be produced by payment distribution operators for applicants or their advisers?**
- Q. 4D. 34 What information should be recorded in a public DAS Register?**
- Q. 4D. 35 Should applications be advertised and in what form?**
- Q. 4D. 36 How should the DAS be funded?**

