

## **7 MISCELLANEOUS ENFORCEMENT AND OTHER PROCEDURAL ISSUES**

### **(A) WARRANT, INTIMATION AND CHARGE**

7.1 Examination of the means of enforcement would not be complete without consideration of the authority, or warrant, to enforce, its intimation on the party who is required to comply and other pre-enforcement requirements.

#### **Warrant to Enforce**

7.2 In earlier parts of this paper, the authority necessary, and procedures applicable to obtain that authority, prior to each method of enforcement was discussed. These arrangements vary depending on the starting point and whether the authority is conferred by a court or is conveyed by the agreement of the parties, as in summary diligence. In order to simplify matters and for the purposes of clarity, transparency and simplicity, the Executive considers that it would be appropriate to unify the law and procedure with regard to the authority conferred by a warrant to enforce and the form of any such warrant. At present, the law in this regard is contained in sections 87 and 88 of the Debtors (Scotland) Act 1987 and also in the Writs Execution (Scotland) Act 1877, section 3 as amended by section 87 of the 1987 Act.<sup>576</sup>

7.3 The Executive's view in this regard is reinforced by work which is under consideration within the European Union to create a European enforcement order for uncontested liquid pecuniary claims.<sup>577</sup> Should this work be concluded then the effect of a regulation would be that, where a judgement (decree) for payment of an ascertainable sum of money was given without being contested, then judgement would itself be authority for enforcement in all of the relevant member states. The form of that authority would also be uniform within the European Union. It seems clear that it would be desirable to have a single form of Scottish warrant to link into this, in addition to the reasons given above, which would convey a unified authority for enforcement activity.

7.4 The Executive considers that it is appropriate to unify the law in this regard. Accordingly, it would be appropriate to devise and introduce a single warrant and to unify the authority conferred by that warrant for enforcement within the context of diligence reform.

#### **Intimation of Orders, Decrees and Enforceable Documents**

7.5 There is no general provision regulating the intimation of court orders to the parties to the action.<sup>578</sup> There is an exception in the case of time to pay arrangements under the Debtors (Scotland) Act 1987 in which instalment payments must commence, or deferred payment made, upon such date after intimation of the court's order has been made by the creditor.<sup>579</sup> Whilst it has been considered that the onus should be on the parties to check the progress of their case, this may no longer be a satisfactory approach. In view of the serious consequences which may ensue if a person fails to appreciate that a court order has been granted against him, it seems only fair and reasonable to have formal arrangements for intimation.

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<sup>576</sup> c40.

<sup>577</sup> See Part 1, para 1.8.

<sup>578</sup> Although details of decrees granted in certain types of family actions are published in the rolls of the Court of Session.

<sup>579</sup> s1(1).

7.6 The various sources and classes of decree and equivalent which can authorise enforcement action were discussed in paragraph 3.3-3.5. The practice for issue of an extract decree or similar document upon which enforcement action may be undertaken can vary with the type of procedure concerned. For example, Court of Session decrees for payment of money will be extracted following a request from the parties made by note to the Extractor's office upon payment of a fee. However, in family actions, an extract is issued automatically free of charge to the successful party and an unauthenticated copy sent by post to the unsuccessful party. The sheriff court rules of procedure for different types of action provide for time limits and form of extracts but there is no uniform procedure regarding intimation of extract decrees. Some Sheriff Courts will issue extracts automatically to the parties, whereas others will only do so upon request.

7.7 It is desirable that there should be uniform arrangements for intimation and the manner in which it is effected. In the context of enforcement, prompt intimation of the terms of the decree or equivalent to the person against whom it is granted would enable that person to act before enforcement is undertaken. Whilst in some instances it may be necessary to serve a charge before proceeding with enforcement, if standard provision was made for formal intimation it may be thought that this would reduce the need for a charge to be served in many instances.

7.8 For the purpose of the proposed European enforcement order, it is intended that a judgement made in a member state could only be converted into a European enforcement order if it had first been served on the debtor. Accordingly, standard arrangements for intimation would be desirable for this purpose also.

7.9 It is intended for these reasons, and for the purposes of clarity, consistency and transparency, to standardise arrangements for intimation of decrees and their equivalent. The successful party would be under a duty, upon its receipt by him, to intimate it on any person required to comply with its terms.

### **Service of Charge for Payment or Other Action**

7.10 The general proposition for intimation would sit well alongside the proposal for service of a notice in summary warrant cases mentioned in Part 6. If arrangements for intimation were strengthened, the case for service of a charge on a summary warrant is lessened.

7.11 Consideration of both intimation and charge should be taken together. There may be some occasions where, despite intimation of the decree or equivalent, it may still be appropriate to retain a requirement for personal service of a charge prior to enforcement action being competent. This may be relevant in cases where the greatest impact and potential for hardship would be experienced when the method of enforcement takes effect. The most clear example may be in cases where it is intended to proceed with enforcement of a warrant for ejection.

7.12 In the event that a general rule for intimation was introduced, including the proposal for notice of a summary warrant, consultees' further views are sought on the continued need for personal service of a charge prior to proceeding with enforcement action.

### **Q. 7A. 1 (a) Should there be a unified approach to the authority conferred by a warrant for enforcement, and**

- (b) if so, should the form of the warrant be prescribed by rules of court subject to amendment or prescription in regulations made by the Scottish Ministers?
- Q. 7A. 2 (a) Should there be standard arrangements for intimation of a decree or equivalent, and
- (b) if so, should the onus be placed upon the successful party to do so upon his receipt of the extract or certified copy?
- Q. 7A. 3 In the event that a general rule for intimation of a decree or equivalent was introduced, for which methods of enforcement should additional personal service of a charge remain necessary?
- Q. 7A. 4 In cases other than those where personal service would be appropriate, what methods of intimation would be appropriate (for example existing methods of service of judicial documents or some other standard)?

## **(B) INFORMATION AND ADVICE**

7.13 The crucial role of adequate information and advice about the enforcement system has been highlighted in a number of places throughout this paper. It applies equally to those who seek to use the enforcement system, to ensure that civil obligations in which they have an interest are complied with; to those against whom enforcement procedures are undertaken; and to third parties.

7.14 Many enforcement procedures require careful application and penalties for failure to comply, breach or wrongful diligence may arise. Access to clear guidance on the duties placed on all persons engaged in the system is essential to its operation in an efficient, effective and fair manner.

7.15 The aim of many of the reforms and measures proposed in this paper, notably a debt arrangement scheme, is to reduce the need for recourse to the enforcement system at all. A similar ethos was applied to the Report *Striking the Balance – a new approach to debt management*. This will be supported by the increased provision of money advice which the Executive is currently putting in place. Such measures will assist in helping people to address and resolve debt problems before the enforcement system becomes an issue.

7.16 Nonetheless, individuals and businesses which do need to apply, or are affected by, the enforcement system need to know what can be done and whether the rules have been complied with. They need to know where to obtain information and advice. They need to know who to contact when things go wrong. The Executive's proposal for a Scottish Civil Enforcement Commission, to oversee all aspects of the enforcement system and, indeed, informal means of debt collection undertaken outside the formal enforcement system, would enable practical arrangements to meet these needs to be put in place. It would be able to tackle the problem of lack of knowledge which generates fear and to be a focal point of contact for anyone with concerns.

7.17 One of the aims of the 1987 Act was to provide information and advice where required, particularly for unrepresented parties, and further proposals are made in this paper in order to strengthen these aims. Proposals are made where additional needs have been identified. However, the Executive would welcome views from consultees about where the greatest need lies, what types of information and advice are required and the means by which they could be delivered.

### **Q. 7B. 1 For provision of information and advice about the enforcement system:**

- (a) where are the greatest areas of need**
- (b) what types of information and advice should be made available, and**
- (c) by what means should they be delivered?**

## **(C) FORMS AND FEES**

7.18 Issues concerning existing forms have been mentioned throughout this paper. The Executive intends to address the language and style of forms by developing modern, easily understood and user-friendly forms to be prescribed in the rules of court. Current forms were devised, for the most part, in consultation with advice agencies, although previously unforeseen difficulties for users appear to have arisen. This suggests a need for further revision.

7.19 The updating of forms generally should be considered in the round and not in a fragmented way. Additional forms will be necessary where new or reformed procedures are proposed. The intention is to incorporate brief, but useful, information as an integral part of the forms. Particularly in relation to time to pay arrangements and the provision of sources of money and other advice. It is intended that this exercise should be conducted for all diligence forms and that consultation with relevant interests and user groups would assist the court in updating them.

7.20 It will also be necessary to undertake the review of the fees applicable to enforcement. This could be kept under regular review by a Scottish Civil Enforcement Commission should it be introduced.

7.21 The Executive welcomes any views which consultees may have regarding revision of forms.

**Q. 7C. 1 Consultees are invited to comment on the proposal to further develop modern, easily understood and user-friendly forms.**

**Q. 7C. 2 In particular, consultees are invited to identify any forms where it is considered that improvements could be made and indicate the nature of any difficulties experienced or improvements proposed.**

## **(D) INFORMATION GATHERING AND MONITORING**

7.22 It has been noted on a number of occasions throughout this paper that, whilst a substantial amount of statistical information is gathered and published regarding the use of some forms of diligence, the collation of such information is not comprehensive or consistent. It should be a necessary part of ongoing evaluation of enforcement procedures to have regard to such information. It is intended to review the manner in which such information is gathered and its coverage across the enforcement system. It has been noted that, should a Scottish Civil Enforcement Commission be introduced, it would form part of its functions to gather and publish such information. It would also have regard to this when monitoring and assessing the success of enforcement procedures and making any future proposals for reform.

