

EVALUATION OF THE DEBTORS (SCOTLAND) ACT 1987:

OVERVIEW

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Executive summary

1. This report draws together the findings of a programme of research to provide an evaluation of the Debtors (Scotland) Act 1987. The programme of research was commissioned by Scottish Courts Administration on behalf of the Lord Advocate and consisted of 7 separate studies: 4 qualitative studies which focused on the experiences and views of debtors, commercial creditors, individual creditors and facilitators (solicitors, advice workers, sheriffs, court staff etc.) and 3 quantitative studies examining the characteristics of payment actions, the characteristics of poindings and warrant sales and trends in the use of various measures introduced by the Act. These studies each provided a wealth of information on the operation of the Act and this overview draws on that information to provide an overall assessment of the impact of the Act and the extent to which it has met its objective of achieving an equitable balance between its 2 main aims of ensuring effective machinery by which creditors can recover their debts and protecting debtors from undue economic hardship and personal distress.

2. Chapter 1 presents background information relating to the introduction of the Act and the evaluation. The Act was introduced following a period of investigation by the Scottish Law Commission (SLC) which culminated in the publication of their *Report on Diligence and Debtor Protection* in 1985. Based on extensive research and consultation the SLC concluded that the then system of diligence provided effective machinery for creditors but failed to provide the necessary protections for debtors. As such they recommended reforms to deal with the identified deficiencies.

3. The SLC's recommendations were largely enacted in the Debtors (Scotland) Act 1987. The main reforms introduced by the Act were: time to pay directions and orders, allowing debtors to pay their debts over time, free from the threat of diligence; 3 new diligences against earnings - the earnings arrestment, the conjoined arrestment order and the current maintenance order - all of which were continuous in nature and involved a sliding scale of deductions; and reforms to the diligence of poinding and warrant sale including the introduction of rights to allow debtors to protect themselves from the harsher aspects of the diligence.

4. Chapter 1 also outlines the research programme and its aims and draws attention to the importance of taking account of the context in which the Act operates (eg, the changing credit and debt environment, other legislative changes within the debt recovery field) in any evaluation.

5. Chapter 2 examines time to pay directions and orders, the so called 'diligence stoppers'. It reports that neither measure - but particularly time to pay orders - are used to their full potential. Debtors do not apply for time to pay directions for a variety of reasons (eg, because they do not think their offer will be accepted, because they do not have sufficient disposable income to make an offer); the main obstacle to applying for a time to pay order was lack of awareness. However, those debtors who made use of the time to pay arrangements found the forms easy to understand and complete and three-quarters had their offers accepted. And, although there was a significant level of default on such arrangements, a proportion of debtors were nevertheless enabled to pay their debts free from the threat of diligence.

6. The research found that creditors were generally happy with receiving money through time to pay directions and orders (although less so with the latter measure). There were, however, some criticisms about the size of instalments set under such arrangements. The role of sheriffs in adjudicating on time to pay applications was also investigated by the research. Sheriffs took a range of factors into account in considering applications but the length of time it would take to pay off the debt appeared to be particularly crucial, with a maximum of one or 2 years being commonly mentioned, and few sheriffs appeared to carry out a full investigation of a debtor's circumstances. Sheriffs disallowed the majority of applications which came before them. Thus the evaluation concludes that these measures can help debtors pay their debts protected from the threat of diligence but that the apparent non use by debtors and the practices of sheriffs inhibited further success.

7. Earnings arrestments and conjoined arrestment orders are examined in Chapter 3. The research found that earnings arrestments were well used and were the preferred diligence of most creditors. They were seen as an efficient means of debt recovery and most were satisfied with the level of instalments received. Creditors were also happy with the principle of conjoined arrestment orders but were often critical of the amounts received through such measures.

8. Despite the sliding scale of deductions, debtors subject to earnings arrestments or conjoined arrestment orders found it difficult to cope with the reduction in income. However, this was often because their situation was compounded by other financial commitments, including the payment of other debts. In such circumstances debtors did not generally use the opportunity to apply for a time to pay order.

9. As the groups required to implement earnings arrestments and conjoined arrestment orders, the views of employers and court staff were also consulted and their views sought. Neither group had any significant complaints about their role in operating the diligences.

10. These new diligences would therefore appear to meet the needs of creditors but do not protect debtors from economic hardship because of factors relating to the financial circumstances of debtors and the non take up of other measures, particularly time to pay orders.

11. Chapter 4 covers poindings and warrant sales. Statistics show that the use of this diligence has decreased markedly since the introduction of the Act and creditors and their agents reported that they were reluctant to use it, either because they considered it unacceptable for moral reasons or because they regarded it as ineffective. Those of the latter view thought that the Act had introduced too much debtor protection, rendering it no longer effective. They were especially critical of the revised list of exempt goods, which they said meant that the diligence could only be used in certain situations, particularly against commercial debtors or where the debtor had significant poindable assets. Nevertheless the diligence continued to be used with some success as a threat to encourage payment and thus, from the perspective of creditors, still operated as an effective final sanction in the diligence process.

12. Despite the claims of creditors, debtors subject to this diligence still reported that they continued to suffer personal distress and, to a lesser extent, financial hardship. The research reported that debtors found the experience of a poinding frightening and traumatic. Debtors appeared to be poorly informed of their rights and statistics show that they made little use of

the protections available to them through the Act. However, on the positive side, the reduction in use of the procedure means that fewer debtors are now subject to the diligence, and changes to the rules mean that, those that are, no longer have sales carried out in their homes (a major cause of distress under the previous system).

13. The evaluation concludes that elements of the reforms (and especially the revised list of exempt goods) have resulted in many debtors in poor circumstances being protected from the diligence but that non use of the rights provided by the Act mean that where the diligence does proceed debtors are not always protected from its harsher aspects. Although creditors regarded the drop in use of the diligence as a reflection of its ineffectiveness, it can rather be seen as a justifiable consequence of the need to protect debtors in poor circumstances, and its continued use as a threat indicates that it still forms an effective part of the machinery available to creditors in enforcing debts.

14. Measures designed to assist debtors (and unrepresented parties in general) make use of the Act are examined in Chapter 5. A number of specific measures were investigated by the research and the findings were as follows:

- the forms used in relation to procedures of the Act were found to be relatively easy to use but not always effective in providing information on procedures or rights;
- limited use only was made of lay representatives, with debtors choosing not to appear at court hearings or finding the experience difficult when they did;
- sheriff clerks - charged with new responsibilities regarding the provision of advice to unrepresented parties - appeared to be an underused resources;
- in relation to the 'no expenses' rule, other cost factors appeared to have a greater impact on the decision to make or oppose an application for both debtors and creditors.

In general, as reported in the context of specific aspects of the reforms, levels of knowledge and understanding amongst debtors were found to be low, leading to problems of low use of debtors' rights. The chapter concludes that the measures introduced to assist debtors have not always been sufficient, but that the response of individuals to their situation has also been a contributory factor here.

15. Chapter 6 draws together the material presented in relation to individual aspects of the reforms of the Act to provide an overall evaluation of the Act. The report concludes that the Act has by and large ensured the continued provision of effective machinery for creditors wishing to enforce their debts but that, although the experiences of debtors have undoubtedly been improved by the new and reformed procedures, the protections have not been wholly effective in protecting debtors from undue economic hardship and personal distress. Importantly, despite the reforms of the Act the research found that debtors who are willing but unable to pay their debts outright continue to be vulnerable to diligence.

16. Various factors are identified as contributing to this situation. The problem of non use was found to cut across many aspects of the Act's operation, despite the measures introduced to make the Act's provisions accessible to all. Thus, to a great extent it appears that appropriate protections are available, but that debtors are unable to take advantage of them. Other factors affecting the operation of the Act are the increases in credit and debt, the

incidence of multiple indebtedness, the limited availability of advice services, and the attitudes and practices of creditors and sheriffs. The report concludes that attention could be paid to improving access for debtors (for example, through improved targeting of user friendly information) but that overall the Act must be viewed within its wider environment and its successes and failures judged within that context.

Two annexes to the report are also included.

Chapter 1: Introduction to the evaluation

Introduction

1. This Overview provides an overall evaluation of the Debtors (Scotland) Act 1987. It is based on a programme of research consisting of 7 separate studies. The research studies carried out were limited in the information they provided on the operation of the Act, ie because they examined the Act from a particular perspective (eg that of debtors or creditors) or examined a particular aspect of its operation (eg court process or warrant sales). Thus, while providing valuable information, the reports cannot on their own provide an evaluation of the legislation as a whole. It is the purpose of this Overview to draw on the findings of the individual studies to address the fundamental question of whether the Act has met its objectives of providing effective machinery for creditors to recover their debts while at the same time protecting debtors from undue hardship and personal distress.

Background

2. The Debtors (Scotland) Act 1987 (the 1987 Act) represented the first major reform to the diligence system in Scotland for 150 years (Debtors (Scotland) Act 1838). It dealt largely with 3 main areas: time to pay arrangements, poidings and warrant sales, and earnings arrestments. In addition, the Act also dealt with the recovery of rates and taxes under summary warrant procedure and the regulation of the activities of officers of court (sheriff officers and messengers-at-arms). The Act was the culmination of an extensive programme of work undertaken by the Scottish Law Commission (SLC) which resulted in the publication in 1985 of their *Report on Diligence and Debtor Protection* (referred to as ‘the SLC Report’) setting out their recommendations for reform, and including a draft Bill. The Bill submitted to Parliament and the subsequent Act were based closely on the recommendations of the SLC (with the exception that the proposal for a ‘debt arrangement scheme’ was not taken forward (see paragraphs 19 to 21)).

Outline of the Debtors (Scotland) Act 1987

3. The 1987 Act was intended to deal largely with the problems of consumer debts and thus the reforms focused on the diligences most frequently used against private individuals (as opposed to businesses) and measures which would assist this group in paying their debts. The 3 main areas dealt with were: time to pay arrangements, poidings and warrant sales, and earnings arrestments. Brief details of the reforms introduced in each area were as follows:

The introduction of time to pay directions and time to pay orders

4. Debtors were given the right to pay off a debt in instalments over a period of time, or by way of a deferred lump sum, through the introduction of 2 new measures. Time to pay directions, which replaced the old summary cause instalment decree, can be applied for before the awarding of a decree with the result that, if granted, the decree would be in terms of instalments or a deferred lump sum payable by the debtor. Time to pay orders, on the other hand, can be applied for after the awarding of a decree and the onset of diligence. On condition that the arrangement is adhered to by the debtor, such court orders protect the debtor from further enforcement action (see Chapter 2 for a more detailed description of the procedures).

Diligence against earnings

5. In place of the old procedures for arrestment of earnings, the Act introduced 3 new diligences against earnings: the earnings arrestment, the current maintenance arrestment, and the conjoined arrestment order. In contrast to the repeated arrestments previously required, the new earnings arrestment is a continuous diligence in that, once served, it stays in place until the debt is paid off. In addition the debtor benefits from a revised scale of protected earnings. The conjoined arrestment order allows more than one creditor to benefit from the proceeds of an arrestment, while still allowing the debtor to benefit from the same scale of protected earnings as applies in the case of a single earnings arrestment. The current maintenance arrestment operates in the same way as an earnings arrestment but has a slightly different focus in that it allows maintenance creditors who have experienced default in payments to protect themselves from possible future arrears (see Chapter 3 for further detail of the procedures).

Poidings and warrant sales

6. The diligence of poiding and warrant sale (the valuation and public sale of a debtor's goods in satisfaction of a debt) was retained in a broadly unchanged form, but important reforms were introduced with a view to reducing the potential for undue economic hardship and personal distress. The new protections included extending the range of goods in a debtor's possession which could not be poided, together with the introduction of new opportunities for goods to be released from a poiding and new rights to apply for the recall of a poiding and to oppose an application for a warrant to sell. In addition, the 1987 Act removed some of the most resented aspects of the previous system; the naming of the debtor in publicity for the sale, and the use of the debtor's home for the sale (other than with the written consent of the debtor and any other occupants of the home). (See Chapter 4 for a more detailed description of the reforms to the procedures.)

Assisting debtors

7. There was a general aim to make the procedures and related documentation simple enough for people to understand and to use without legal representation. The 1987 Act and its enabling legislation, Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988 (the Act of Sederunt), included a package of measures to assist debtors in obtaining the protection of the court.

Other areas dealt with by the 1987 Act

8. As well as dealing with the main issues of protection for debtors and effectiveness for creditors in relation to 'ordinary' debts, the 1987 Act also dealt with procedures for the recovery of rates and taxes under summary warrant procedure and the regulation of the activities of officers of court (sheriff officers and messengers-at-arms). These reforms, however, were not subject of the current evaluation and are thus not dealt with in any detail here¹.

¹ The main focus of the 1987 Act (and of the evaluation) was debt enforcement procedures in relation to consumer debts, ie the main area of concern giving rise to the perceived need for reform. In order to maintain this focus, other areas dealt with by the Act are not covered by the evaluation. Thus, as well as procedures relating to summary warrant debts and the activities of sheriff officers, the operation of current maintenance arrestments and dealing with maintenance debts are not covered in the research.

General aims of the legislation

9. The SLC saw the objectives of the diligence system as follows:

First, it should seek to provide effective machinery, in which creditors have confidence, whereby creditors can obtain payment of their debts. Second, within the constraints imposed by the need to maintain an effective system of enforcing debts, it should make available procedures which are designed to have proper regard to protecting those debtors who are subjected to diligence from undue economic hardship and personal distress. (SLC, 1985, p.22)

10. The SLC also believed that ‘people who are able to pay their legally binding debts should be required to do so’. Such statements are important as they provide a framework for the subsequently introduced reforms and allow fuller understanding of the SLC’s intentions. There are a number of important points to note. The interests of creditors are seen as being important. Any protections for debtors were to be provided ‘within the constraints imposed by the need to maintain an effective system for enforcing debts’ and debtors were to be protected from ‘*undue* economic hardship and personal distress’ (see above) rather than *all* hardship and personal distress. Thus, the SLC noted the importance of achieving a ‘proper balance’ between the interests of creditors and the interests of debtors, bearing in mind their differing needs for effective enforcement machinery and adequate protections, respectively.

11. However, research carried out for the SLC to assist them in their consideration of the law of diligence suggested that the previous system was generally providing effective machinery for creditors, but that there were inadequate protections for debtors subject to enforcement procedures (see SLC: 33). The balance could therefore be said to have been tipped in favour of the creditor at the expense of the debtor. The recommendations of the SLC were aimed at correcting this imbalance. Thus, the focus of the SLC’s recommendations was on new protections for debtors, but the retention of an effective system for creditors was also taken into account.

The reform of the law of diligence

12. The SLC’s work and the subsequent Debtors (Scotland) Act were prompted by public concerns about the then current system of debt enforcement in Scotland. The procedure of poinding and warrant sale in particular had attracted much criticism and had been the subject of several unsuccessful private member’s bills seeking the abolition of this form of diligence. The SLC’s review was wide ranging in nature going beyond a technical consideration of ‘black letter’ law to encompass a programme of social research designed to examine the implications of current procedures for those who used them and those who were subject to them. This research programme resulted in 8 reports, all providing valuable information to assist the SLC with their considerations². Public consultation was also an important part of

² The programme of research included the following projects: Doig (1980) *The Nature and Scale of Diligence*, Edinburgh: SOCRU; Connor (1980) *Characteristics of Warrant Sales*, Edinburgh: SOCRU; Doig (1980) *Debt Recovery through the Scottish Sheriff Courts*, Edinburgh: SOCRU; Connor (1980) *Arrestments of Wages and Salaries: A Review of Employers’ Involvement*, Edinburgh: SOCRU; Adler and Wozniak, (1981) *The Origins and Consequences of Default: An Examination of the Impact of Diligence*; Edinburgh: University of Edinburgh; Gregory and Monk, (1981) *Survey of Defenders in Debt Actions in Scotland*, Office of Population Censuses and Surveys (OPCS); Millar, (1981) *Debt Counselling: An Assessment of the Services and Facilities Available to Consumer Debtors in Scotland*, Edinburgh:

the SLC's deliberations, with 5 Consultative Memoranda being issued on different aspects of the diligence system. The findings of the research and the comments received in response to the various Consultative Memoranda each played an important part in shaping the recommendations put forward by the SLC.

13. The SLC Report broadly concluded that, while the system then in place provided effective means for creditors to recover their debts, debtors were given inadequate protections against the harsher aspects of debt enforcement. Based on the research carried out, the SLC reported that most debtors fell into debt through a change in circumstances (unemployment, illness, a breakdown of a relationship) rather than through irresponsibility, and that most wanted to pay their debts but were unable to do so outright. The research also found that debtors suffered considerable economic hardship and personal distress as a result of the enforcement action taken against them. Economic hardship was experienced, in particular, as a consequence of an arrestment of earnings, as the amount of protected earnings was found to be inadequate for the purposes of subsistence. Personal distress, on the other hand, was particularly associated with poindings and warrant sales. Here, the list of items exempt from a poinding was found to be too limited, while both the practice of holding the warrant sale in the debtor's home, and the related publicity for the sale, were seen as humiliating and degrading.

14. In the light of these research findings and the responses to public consultation, the SLC recommended the introduction of important protections for debtors subject to these diligences. However, the diligences themselves were still intended to be an efficient and effective means of enforcement for creditors who required to use them. In fact, some of the reforms were beneficial to creditors as well as debtors, for example the recommendation that a continuous diligence against earnings be introduced (see above). In response to the finding that most debtors were simply unable - rather than unwilling - to pay their debts 2 new measures were recommended which gave debtors the opportunity to pay their debts over an agreed period of time free from the threat of diligence. In addition, in order to deal with the problem of debtors having multiple debts (which although not found to be widespread, was seen to cause significant problems where it did arise), the SLC also recommended a debt arrangement scheme.

15. The distinction drawn between the 'can't pays' and the 'won't pays' was important to the aims of the SLC. Thus, the reforms were designed to allow those who could not pay their debts outright an opportunity to do so over time but still to enable effective enforcement in the cases of those who would not pay their debts, albeit with the introduction of important protections against the harsher aspects of diligence. It is important to note that the SLC recommended a system based on 'the discretionary control of diligence by ordinary courts of law on voluntary application by the debtor' (SLC: 48). Although more interventionist systems were considered, involving such features as compulsory means enquiries, these were rejected by the SLC as inefficient, resource intensive and detrimental to the interests of creditors. Instead the system recommended retained the basic framework of the previous system and relied on debtors taking the initiative in seeking the protection of the court through the measures contained in the 1987 Act.

The passage of the Bill through parliament

SOCRU; Doig and Millar, (1981) *Debt Recovery: A Review of the Creditors' Practices and Policies*, Edinburgh: SOCRU.

16. The Bill that went forward to Parliament included most of the SLC's recommendations, with the exception of the debt arrangement scheme. The Bill was generally welcomed by all parties as a major step forward in an area where reform was seen to be overdue. However, reservations were expressed by opposition members who felt that the reforms were not radical enough - particularly with respect to the diligence of poinding and sale - and were concerned that the recommendation for a debt arrangement scheme had not been accepted by the then Conservative government³.

17. The reforms to the diligence of poinding and sale left the procedure broadly unchanged but introduced a number of opportunities whereby debtors could apply to the court to seek to have individual items released from the poinding or to have the diligence halted altogether. The reforms also made important changes to the practices for holding and advertising sales. The reforms largely followed the recommendations of the SLC who had opted to retain the diligence, despite calls, on humanitarian grounds, from a number of quarters for abolition or a restriction on the circumstances in which it could be used (eg, the restriction to commercial situations). The SLC had rejected such arguments in their Report. They believed that the existence of the diligence was crucial to the operation of the 'filter effect' of the debt recovery process, whereby the number of cases under pursuit decreases at each stage of the recovery process because of settlement or abandonment. The SLC believed that the final sanction of the warrant sale ensured the efficient operation of earlier stages in the recovery process. They were of the view that means had to be available by which creditors could enforce debts when necessary and that, in the absence of a feasible alternative, poindings and warrant sales would continue to have a role.

18. Although the SLC rejected the arguments for abolition, they were nevertheless firmly of the view that the diligence required 'substantial reform' and hoped that their proposals would 'allay the concern of many who have argued for its abolition' (SLC Report, 1985, p.60). However, the SLC's optimism was not borne out; much of the debate in the Houses of Parliament centred around this area of the Bill. Opposition amendments sought the abolition of the diligence in respect of domestic debt, the exemption of all household goods from a poinding, and fine tuning of the list of exempt goods (see Hansard debates). However, none of the significant amendments was adopted, and the diligence remained as a means of enforcing debts, both domestic and commercial.

19. The debt arrangement scheme proposed by the SLC was excluded from the Bill presented to Parliament and was the only significant part of the SLC's recommendations not to be accepted by the government. The scheme was intended to deal with the problem of multiple indebtedness. Research carried out for the SLC⁴ had shown that the problems encountered as a result of debt enforcement were often compounded when a debtor had more than one debt and that such situations could also cause problems for creditors trying to recover their debts. The SLC noted that debtors had no way of taking the initiative to resolve this situation and proposed the debt arrangement scheme as a solution to this situation, a procedure which they noted already existed in many other jurisdictions⁵.

20. Under the proposed scheme a debtor with multiple debts would have been able to apply to the court for time to pay towards his or her debts over a set period of time, after

³ See relevant Hansard debates, January to April 1987.

⁴ See Adler and Wozniak (1981); Doig and Millar (1981).

⁵ The SLC cited initiatives in England and Wales and Northern Ireland, as well as New Zealand, USA, Canada and Australia (SLC Report, 1985, p.133).

which the debtor would be discharged from his or her debts. The scheme would have been voluntary and, as long as the arrangement agreed with the court was complied with, the debtor would have been protected from further enforcement action. The government rejected the proposal for a number of reasons:

- they were not persuaded that the scale of the problem (which the SLC admitted was probably less than originally thought) merited such a scheme;
- a debt arrangement scheme was thought to be unfair to future creditors who would be barred from doing diligence;
- informal arrangements between creditors and debtors were seen as adequate alternatives, as were voluntary trust deeds;
- the scheme as proposed was seen as too complex;
- the relatively high level of default on similar schemes elsewhere;
- the resource implications of such a scheme;
- a general view that the problem of multiple indebtedness would be better dealt with at an earlier stage in the debt recovery process (eg through debt counselling).

21. The exclusion of the scheme from the Bill gave rise to significant parliamentary debate. Lord Morton of Shuna, in proposing an amendment which would have had the effect of reinstating the relevant clauses from the SLC's draft Bill, stated that the scheme was 'an essential part of the Law Commission's proposals for reform' and noted also that the other reforms proposed were designed to deal with one debt only. Tom Clarke MP stated that the problem of multiple indebtedness was a 'major and growing problem in Scotland, to which a debt arrangement scheme would offer a workable solution'. Members of the opposition concurred with the SLC in their view that the debt arrangement scheme would have been a useful measure in dealing with a significant problem. However, amendments in this area were unsuccessful and the resulting Act came into force without any specific measures for dealing with the problems of multiple indebtedness.

22. With some minor amendments having been incorporated, the Bill was enacted in May 1987 and came into force on 30 November 1988. Despite persisting reservations with regard to poindings and warrant sales and the absence of a debt arrangement scheme from opposition members, the Debtors (Scotland) Act 1987 was generally welcomed, being seen as 'a substantial improvement on the present system' (Gregor MacKenzie MP) and a 'progressive measure' (Tom Clarke MP).

The evaluation of the reforms

23. Debt enforcement is a complex area but also one which has an impact on ordinary people in a very fundamental way. As has been noted, the introduction of the 1987 Act was preceded by considerable research and consultation. It was also important to find out whether the reforms were working as intended, and if not, why not. Thus, in 1993 Scottish Courts Administration commissioned The Scottish Office Central Research Unit to carry out an evaluation of the legislation. The overall aims of the research programme were:

- (i) to evaluate how the 1987 Act is working in practice and the extent to which it is meeting its 2 main objectives (of providing effective machinery for creditors and adequate protections for debtors) and achieving an equitable balance between them;
- (ii) to identify for further study any aspects of the reforms where further work or changes may be necessary or desirable so that the main objectives of the reforms can be met;
- (iii) to assess the extent to which the new and reformed procedures are being used by the various groups involved in debt enforcement; and
- (iv) to find out the level of knowledge about the reformed procedures and the sources of information used, and to find out how information might be better directed in order to achieve maximum understanding and use of the procedures.

24. In order to address the wide ranging aims set for the research, a broad programme of work was designed involving 7 separate studies as follows: 4 qualitative studies examining the views and experiences of debtors (Whyte, 1999), commercial creditors (Platts, 1999), private individual creditors (Headrick and Platts, 1999), and facilitators (solicitors, advice workers, sheriffs, court staff, sheriff officers and debt collectors) (Fleming, 1999a); 3 quantitative studies examining the characteristics of payment actions (Fleming and Platts, 1999b) and the characteristics of poindings and warrant sales (Fleming, 1999b), and the available national statistics on debt enforcement procedures (Fleming and Platts, 1999a). Such a broad programme allowed the impact of the Act to be assessed from the differing perspectives of the various groups involved in its operation, who either use or are subject to measures provided for by the 1987 Act. The research was based in 5 sheriff courts, selected to provide examples of a range of different types of court area throughout Scotland.

25. Each of the individual studies had their own specific objectives, but all provided information to feed into the overall assessment of the Act. This evaluation, then, involves analysis of the views of debtors, creditors and facilitators along with the available statistical information in order to address the above research questions.

The context of the evaluation

26. The prime aims of the evaluation were to find out how the 1987 Act was operating in practice and to assess the extent to which the policy aims of debtor protection and efficiency for creditors were being met. However, it is important to appreciate that factors external to the legislation can have an impact on its success. Failure - or indeed success - may have as much to do with changes in the outside world as with the provisions of the 1987 Act itself. A number of significant trends or occurrences can be identified as interacting with the new procedures of the Act since its introduction: the rise of credit and debt in society as a whole; the shift towards a consumer orientated, rights based society and the increased awareness of citizens' rights; the introduction of the community charge and the subsequent non-payment campaigns; the introduction of the Bankruptcy (Scotland) Acts 1985 and 1993; the introduction of small claims procedure. This list is not exhaustive but illustrates the complexities of understanding how the legislation is working and why it is working as it is.

Some of the factors were considered before the introduction of the 1987 Act (either by the SLC, by consultees or by MPs in debate), others have come to light since that time. Each is briefly addressed below.

The increase in credit and debt in society

27. Trends in credit and debt were frequently referred to during the passage of the Debtors (Scotland) Bill through parliament. The easy availability of credit and the correct responsibilities of lenders were of particular concern. There were various calls for such issues to be dealt with as a way of preventing debt arising, or for creditors to be held liable for irresponsible lending. The government maintained that such regulation was beyond the scope of the Bill, but the high level of concern on this issue, and its role in the debt recovery process, was registered.

28. The increase in the availability and use of credit in recent years is well documented by various commentators. For example, in their work on credit and debt, Berthoud and Kempson quote Central Statistical Office figures showing an increase in the total amount of money owed by consumers from £21 billion in 1981 to £48 billion in 1989 (Berthoud and Kempson, 1992). Trends in indebtedness are harder to track because information is not collected centrally. However, some indicators are available. Figures published by the Council of Mortgage Lenders show the number of mortgages 6 months or more in arrears to have increased from 12,000 in 1979 to over 200,000 in 1991 (cited in Berthoud and Kempson, 1992). In addition, increased enquiries relating to financial problems as recorded by Citizens Advice Scotland rising from 13,000 in 1983-84 to a peak of 94,000 in 1992-93 (see Citizens' Advice Scotland Annual Reports, various years) suggest that indebtedness had increased. Such changes mean that the Debtors (Scotland) Act is not operating within the same credit and debt environment as existed at the time of the SLC's considerations, and what is appropriate for one environment may not be so appropriate for another.

The introduction of small claims procedure

29. Small claims procedure came into force in Scotland at the same time as the Debtors (Scotland) Act 1987. As with the Debtors (Scotland) Act, small claims procedures aimed to be simple enough for people to use without recourse to a lawyer. Between 43% and 49% of all sheriff court actions are raised under small claims procedure⁶ and, in the case of small claims payment actions, previous research has shown that most of these actions are straightforward debt actions where no defence is presented (Jones *et al.*, 1991). As such, large numbers of debtors now come into the formal enforcement system via the small claims procedure. This could impact on debtors in a number of ways. For example, the restrictions placed on expenses and the non-availability of legal aid to pursue small claims cases could mean that fewer people benefit from legal advice at the litigation stage of debt recovery; alternatively the simplified forms and procedures of small claims could have a positive impact on the experience of debtors at this point. Either way, experiences at this stage could have an impact on the longer term experience of the recovery process.

The introduction of the community charge

⁶ Derived from figures in *Civil Judicial Statistics*, 1989 to 1996.

30. The community charge replaced domestic rates as the system of local government taxation in Scotland in 1989. As a consequence every adult over the age of 18 became liable to pay the charge, or a proportion thereof. Previously, rates had been levied on a household basis with the owner of the property held liable for payment. Full rebates had been available for those on low incomes and many tenants paid only indirectly through their rent, having no personal liability to pay. There was much opposition to this new tax resulting in a high profile campaign for non payment. Many more people had the potential to incur debt and, whether as part of the non payment campaign or not, many did not pay. Large numbers of people came into contact with the debt enforcement system for the first time and local authority efforts to recover money owed by defaulters received much publicity, notably adverse publicity through the media. As a result public knowledge and experience of debt enforcement increased. The public debate around the issues of non payment and enforcement is likely to have had some impact on the views and conduct of those involved in debt enforcement whether as debtors, creditors or facilitators.

The Bankruptcy (Scotland) Acts 1985 and 1993

31. Following the introduction of the Bankruptcy (Scotland) Act 1985 there was a dramatic increase in the number of sequestrations in Scotland (from under 300 to almost 12,000 between 1985 and 1992)⁷. As noted by McBryde (1993), the majority of these cases were 'small asset' cases, where a debtor's assets were unlikely to pay a dividend. Public funds were available to meet the costs of trustees' fees and outlays for cases pursued through the 'trust deed route', the route which accounted for the majority of cases. To a great extent this trend was debtor (or adviser) led, with sequestration being used as a type of debt arrangement scheme, comparable to that proposed by the SLC but not implemented in the 1987 Act. The use made of this option by debtors may suggest that the stigma of being in debt was not as strong as previously perceived by the SLC and may indicate a more general shift in public attitudes towards indebtedness.

32. In response to this situation, and in particular the increase in public expenditure, Scotland's bankruptcy laws were reformed in the 1993 Bankruptcy (Scotland) Act which introduced more stringent criteria for petitioning for bankruptcy as well as a greater role for the Accountant in Bankruptcy. The number of sequestrations has fallen to about 2,500 annually from 1995 onwards. Thus the new Bankruptcy Act could be seen as closing off a possible route out of the debt enforcement system, albeit a fairly drastic route, by making it more difficult for debtors to arrange their own sequestration, so leaving more people open to the possibility of having diligence done against them. However, one of the criteria for petitioning for bankruptcy introduced by the 1993 Act was that of 'apparent insolvency' which could be established by continued non payment of a debt after the initiation of diligence proceedings. Under such circumstances it is possible that creditors would choose not to instruct diligence rather than open up the possibility of the debtor petitioning for bankruptcy. Thus there are a number of possible ways that this legislation could affect the use made of the provisions of the Debtors (Scotland) Act 1987.

The consumer society

33. Ordinary members of the public are increasingly aware of their rights and wish to exercise them. In Scotland, as in other jurisdictions, the introduction of small claims

⁷ Figures drawn from Annual Report of the Accountant in Bankruptcy (various years).

procedures can be seen as a product of the consumer movement (see Jones *et al.*, 1991) and a response to the increasingly recognised problem of access to justice. The government's initiative of the Citizens' Charter and subsequent specific Charters such as the Justice Charter for Scotland have emphasised the rights of members of the public to seek redress through the courts⁸. It is possible that such initiatives could lead to a more litigious society and thus open up the possibility of increased debt enforcement activity. In addition, debtors could become more aware of their rights and more likely to make use of protections provided. Again, such developments could have an impact on the use of the 1987 Act.

The use of informal debt recovery

34. Creditors have a number of options available to them in pursuing their debts, both at the pre and post decree stages of the recovery process. Creditors can choose to take no action, they can use the procedures available to them through the courts and diligence systems or they can use informal recovery methods such as letters and phone calls or door-to-door collection. Figures are not available on this sort of informal activity. However, it is clear that use of the courts for pursuing debts has not risen in line with the increase in credit extended and default debt incurred, suggesting that creditors may be choosing other methods of recovery⁹. And, indeed, Platts' (1999) *Study of Commercial Creditors* identified a reluctance to raise court action and an increase in the efforts put into informal recovery, either in-house or through the use of debt collection agencies. It is thus possible that any use or non use of the new or reformed procedures may reflect creditors' preferences for other methods of recovery (for whatever reasons) rather than reflect on the efficiency or otherwise of the provisions of the 1987 Act.

35. In addition, Adler and McMillan (1994) suggest that the consumer credit industry increasingly has adopted an approach termed 'systemic rationalisation' making recourse to the courts less likely. This approach involves such developments as:

- the introduction of more flexible payment methods, such as credit cards;
- concentration of business within a small number of large finance companies, able to finance the rescheduling of debts;
- increased use of direct debit and standing order for the payment of bills;
- increased availability of overdraft facilities;
- increased use of budget payment schemes (eg for 'utilities' bills).

Such developments act to prevent debts arising or to shift debt from suppliers of goods and services to financial institutions. Debts with banks or credit card companies can be pre-arranged or can be regularised, with the customer paying for this facility through interest payments etc. Assuming any conditions are adhered to, such debts would not be viewed as 'problem debts'. Thus Adler and McMillan argue that there has been 'a move away from a public form of debt enforcement through the courts to private forms of debt enforcement through charging high rates of interest on outstanding loans and, in some cases, refusing further credit'. They also note that such developments will have been to the benefit of higher

⁸ *The Citizens' Charter: Raising the Standard* (CM 1599), 1991, London: HMSO; *The Justice Charter*, 1991, Edinburgh: The Scottish Office, Crown Office, Scottish Courts Administration.

⁹ For example, figures in SOCRU *Analysis of Statistics* show the number of all actions initiated and the number of monetary decrees granted in the sheriff courts have fallen over the period 1991 to 1995, while Berthoud and Kempson (1992) report this as being a period of rapid growth in both credit and debt.

income consumers, with those on lower incomes less likely to have access to bank accounts, credit cards etc., and thus remaining vulnerable to court action.

36. Awareness of factors such as those outlined above means that the 1987 Act cannot be evaluated in isolation but that account must be taken of this wider context. This appreciation of the wider context in which the Debtors (Scotland) Act 1987 operates gave rise to the wide ranging research programme that was carried out. A programme such as this was thought best suited to identify and take account of external factors impacting on the operation of the Act. Such factors are covered, where appropriate, in the individual research reports.

The Overview

37 This Overview offers an evaluation of the Debtors (Scotland) Act 1987. In the following chapters, each of the main areas of reform (time to pay arrangements, poindings and warrant sales, arrestment of earnings, measures to assist debtors) are evaluated separately, while the final chapter offers an overview of the success of this complex piece of legislation. Attention is paid not only to the letter of the Act but to the intentions of the SLC in making their recommendations. In this way it is possible to get a fuller understanding of how it was anticipated that the Act would work in practice and, where appropriate, why this has or has not turned out to be the case.

38. In carrying out the programme of research, a number of themes have emerged which cut across the various aspects of the legislation:

- the interdependence of different aspects of the Act;
- the extent to which the Act has differentiated between those that can't pay and those that won't pay their debts;
- multiple indebtedness;
- the role of the sheriff;
- the role of advice and information;
- the response of debtors to the situation in which they find themselves.

These themes are highlighted in respect of the various individual procedures and are considered more generally in the final assessment of whether an equitable balance has been achieved between the interests of creditors and debtors.

39. The main body of this Overview takes a broad approach to examining the success of the main reforms of the Act. In an overview of this type it is not possible to consider in depth detailed aspects of the procedures. These are covered fully in the individual reports and Annex 1 outlines specific comments and suggestions made by research participants in respect of time to pay directions and orders, earnings arrestments and conjoined arrestment orders, and poindings and warrant sales.

Chapter 2: Time to pay directions and orders

Background to the reforms

1. Research carried out for the Scottish Law Commission found that ‘most debtors who are subjected to diligence are unable rather than unwilling to pay their debt outright’ (SLC Report, 1985). Time to pay directions and time to pay orders were introduced by the 1987 Act in response to this situation, with the aim of giving debtors the opportunity to pay their debts in instalments or by way of a deferred lump sum free from the threat of diligence.

2. The 2 measures are competent at different stages in the debt recovery process. A time to pay direction can be applied for in response to the initial summons document, before degree is granted. It allows the debtor to admit the debt and make an offer to pay in instalments (or in one deferred lump sum). The offer is first considered by the creditor; if the creditor rejects the offer, the application is then heard by a sheriff who may grant the application in the terms offered, reject the application and award an open decree or set an alternative arrangement. If a time to pay direction is granted, the debtor is protected from diligence as long as the arrangement is maintained. In the case of an instalment arrangement, default is defined as 2 instalments having been missed and a third one being due. A time to pay order gives a debtor a second opportunity to apply for time to pay their debt once the creditor has initiated enforcement action. A time to pay order operates on the same principles as a time to pay direction (described above) and can be applied for at any point following the service of a charge (but prior to the granting of a warrant of sale) or after the service of an ordinary arrestment. A time to pay order is, however, not competent if a time to pay direction, or another time to pay order, has already been made. A number of restrictions apply to both time to pay directions and orders, broadly as follows: the debtor must be an individual; the debt must be below £10,000; the debt must not relate to maintenance or capital sum payments on divorce or to debts relating to central or local government taxes.

3. The evaluation sought to gather information about the operation of these new measures and to assess whether they had been successful in providing debtors with a way to pay off their debts, thus protecting them from diligence. The success of the measures can be gauged by examining a number of factors: the uptake of the opportunity; adherence to arrangements by debtors; awareness of the opportunity amongst debtors; understanding of the procedures. All these factors are considered here in this chapter.

4. The 2 measures were introduced as part of the reforms to improve debtor protection. However, the SLC also stated that the first objective of a good debt enforcement system was to provide an effective means of recovering debt. It was therefore also valid to look at time to pay directions and orders from the perspective of creditors to assess whether such payment arrangements were compatible with efficient and effective debt recovery.

Use of time to pay orders and time to pay directions

5. Fleming and Platts (1999b) estimated in their *Survey of Payment Actions in the Sheriff Courts* that time to pay directions are applied for in 24% of eligible cases. The majority of such applications (about three quarters) are accepted by the creditor and, of those applications initially rejected and then heard by a sheriff, a third are subsequently granted, although not necessarily in the terms of the original application. Use of the provision can be compared with the use of the previously available summary cause instalment decree. Based on figures in

Doig's 1980 research, it is estimated that offers to pay by instalments were made in 19% of cases studied (see Fleming and Platts, 1999b). Based on this figure of 19%, the SLC stated that 'only a restricted use is made of the right to apply for a summary cause instalment decree' (see SLC Report, 1985). It is assumed, therefore, that one of the objectives of the new measures was to increase uptake of the opportunity to pay by instalments. However, even allowing for the fact that instalment decrees were only competent in summary cause actions, it appears that, despite the reforms of the 1987 Act, the proportion of debtors who now take advantage of the opportunity to make an offer to pay their debts in instalments has not increased significantly.

6. Because no comparable provision was available prior to 1988 it is not possible to carry out a similar analysis for time to pay orders. However, some comment can be made on the number of applications made following the introduction of the Act. Figures from *Civil Judicial Statistics* for 1989 to 1993 show approximately 250 applications per year across Scotland¹⁰. Given the number of incidences of diligence in each of these years (with earnings arrestments alone ranging from 9400 to over 70,000 cases) uptake certainly appears low.

7. Statistics therefore suggest that time to pay directions and orders have not been wholly successful as they have not led to significant proportions of debtors paying their debts by instalments free from the threat of diligence. In such circumstances, there are a number of important issues requiring further investigation:

- the reasons for the apparently low uptake;
- the outcome of those applications which are made;
- the success of those applications which are granted.

Each of these issues can be examined using information gathered in the surveys of debtors, creditors and facilitators.

Reasons for the low uptake of time to pay directions and time to pay orders

8. The surveys of debtors and facilitators both give an insight into the reasons for the low uptake of time to pay directions and orders. The experiences of debtors, as the group which the measures were intended to assist, are clearly important in investigating this issue, but the views of their advisers (advice workers and solicitors) and those who administer and adjudicate on applications are also very relevant. From the various surveys, the following reasons can be identified for the low usage of time to pay arrangements: lack of awareness; lack of understanding; insufficient disposable income; impact of the 1987 Act on informal negotiations; perceptions about creditors' attitudes; unsuitability for multiple debt situations. Each of these is discussed in turn below.

¹⁰ Statistics for 1994 onwards do show an increase in the number of applications. However the increase is largely accounted for by a small number of courts which may have erroneously included time to pay directions in their returns, figures for which were not collected after 1993. Discounting these courts, the number of time to pay order applications made annually would appear to continue at about the 250 mark.

Lack of awareness

9. Although no interviewee in the survey of debtors stated they had been unaware of the opportunity to apply for a time to pay direction, a number of solicitors and advice workers in the survey of facilitators believed that, based on their experience, awareness amongst debtors of time to pay directions was low. Perhaps more significantly, the survey found that not all advice workers themselves were aware of the existence of time to pay directions.

10. Debtors receive notification of the opportunity to apply for a time to pay direction along with the summons document at the outset of an action. This, however, is not the case with time to pay orders and, perhaps not surprisingly, levels of awareness were lower amongst debtors regarding this latter measure. Those that had used them had found out about them when seeking advice about possible courses of action following the onset of diligence or, in a small number of cases, had been informed about the option by a sheriff officer carrying out enforcement of the decree. Even amongst commercial creditors there were interviewees who suggested that the opportunity to apply for time to pay at this later stage in the debt enforcement process needed to be brought to people's attention through some means of direct notification.

Lack of understanding

11. Whyte's (1999) *Study of Debtors* revealed a general lack of understanding about responding to the summons document, with some not understanding how to respond and some not understanding a response was required, and it is possible that both of these situations could result in people missing the opportunity to apply for a time to pay direction. In particular, there were a number of instances of interviewees complaining that they could not understand the language used on the summons. Certainly, solicitors and advice workers felt the procedure to be too complex for debtors to understand and use competently without advice. In particular, such advisers felt that too much was expected of debtors in completing the application form. They considered debtors to be unable to assess realistically their income and outgoings and arrive at an affordable offer. In this context, they thought that the application form did not help debtors in this process as there was not sufficient guidance or space to ensure that all relevant items were included. However, the majority of debtors who had made an application for a time to pay direction were positive about the forms used and appeared to have understood them.

12. As important as any poor understanding of the mechanics of making a time to pay direction application was a more fundamental misunderstanding, or misconception, about how the provision operated. A number of debtors believed that the outcome of their application depended solely on the creditor and so did not make an application as previous experience of dealing with the creditor suggested that it would not be accepted. It should be noted that, conversely, a number of debtors thought that their application would be considered in the first instance by the sheriff and that making an application was a way of obtaining a payment arrangement previously offered to and rejected by the creditor. Although this encouraged, rather than discouraged, people in making applications, the misunderstanding is still worthy of note.

Insufficient disposable income

13. The survey of debtors reported a small number of respondents who had not made applications for time to pay directions because they felt they simply could not afford to make payments towards their debt in this way. This theme was taken up by advice workers who said that time to pay directions were of little relevance when dealing with clients who could only afford very low instalments. In such situations, advisers did not use the opportunity. Advisers also reported 'filtering out' offers suggested by clients which they saw as unlikely to be accepted, based on an assessment of the offer in relation to the size of the debt. Thus, unless the debtor could make an improved offer which the adviser thought more likely to be accepted, the application would not be proceeded with.

Impact of the Act on informal negotiations

14. Advisers reported that, in responding to a summons, they often negotiated directly with the creditor with the aim of reaching an acceptable arrangement informally and preventing a decree being granted against their client. In general, they thought that they were more likely to reach an agreement if they negotiated informally. Even where a decree was granted, an informal payment arrangement at this stage was seen as having the advantage of retaining the possibility of applying for a time to pay order at a later date should the arrangement break down and the creditor initiate diligence proceedings. This would not be possible if the debtor had been making payments under a time to pay direction as the 1987 Act allows only 'one bite at the cherry', ie, a person who has already had a time to pay direction is excluded from applying for a time to pay order.

Unsuitability for multiple debt situations

15. Informal negotiations were seen as being particularly valuable in relation to clients with multiple debts. Advisers reported that in such situations it was important to deal with all creditors together and that establishing a payment plan acceptable to all creditors and realistic for the debtor took a great deal of careful, personal negotiation. Applying for a time to pay direction or order meant dealing exclusively with one creditor on an impersonal basis and this was not seen as appropriate in such situations.

Perceived attitudes of creditors

16. A number of debtors reported that they had not applied for a time to pay direction because they did not think the creditor would accept the offer. Advice workers and solicitors also reported that their own perceptions about the attitudes of creditors were often such that they chose not use time to pay directions. They believed that creditors preferred informal negotiations, and that by using such an approach they were more likely to reach an agreed arrangement and creditors were more likely to accept an offer lower than would have otherwise been the case. There was some evidence in support of this view from the survey of commercial creditors. Although most of the commercial creditors interviewed were happy with the principle of time to pay directions, some dissented from this view, stating a preference for the flexibility of an open decree and an informal payment arrangement.

The significance of non use

17. Amongst debtors themselves the consequence of non use of time to pay directions was that no response was made when an action was raised against them, leaving creditors free to seek an open decree and proceed to enforcement. Figures from Fleming and Platts' (1999b)

Survey of Payment Actions in the Sheriff Courts showed that in almost half the actions raised against private individuals a decree was awarded after the defender had failed to make any response to the summons. Amongst advice workers and solicitors the non use of time to pay directions was coupled with a preference for informal negotiations with creditors. Amongst advice workers in particular there was a strong preference for such an approach so they did not make much use of time to pay directions in their work on behalf of debtors. They found that informal negotiations were easier, less resource intensive and more likely to be successful. This preference was also found to some extent amongst the solicitors interviewed. Advisers are presumably content that they have negotiated an arrangement which is realistic for the debtor and that the creditor will honour. Even where an open decree is also granted, they have made the agreement in the knowledge that creditors are often reluctant to pursue diligence and that a time to pay order is still an option at a later stage. The research did not suggest that such reasoning was part of the decision-making process for debtors and so, by not responding to the summons, they left themselves open to the possibility of enforcement action, or at least the threat of it.

18. Advisers also noted that they believed that the willingness of creditors to enter into negotiations had increased since the introduction of the 1987 Act. They put this down to creditors wishing to avoid the debtor protections introduced by the Act, which they found cumbersome and which they felt rendered debt recovery less effective than had previously been the case. Thus creditors were more willing to accept informal payment arrangements in the hope that this would avoid the need for further formal action in which they were reluctant to get involved. So, paradoxically, although advisers said they made little use of the 1987 Act in their negotiations, it was only the existence of the legislation which allowed them to do this.

The outcome of applications for time to pay directions and orders

19. Civil Judicial Statistics for 1989 to 1993 (the last year that figures were collected) show that around three quarters of all applications for time to pay directions are granted each year. This figure includes a small proportion granted after being heard by a sheriff. Fleming and Platts (1999b) reported that 29% of applications were initially rejected by the creditor and subsequently called in court. One quarter of the applications which went to a hearing resulted in a time to pay direction, although not necessarily in the terms of the original offer. A similar proportion of time to pay order applications are also granted each year. Thus, despite the misgivings expressed by some of those who did not make an application, it can be seen that the majority of those who did apply were successful in securing time to pay their debt.

Factors taken into account in considering applications

20. Information is available from the research about the factors which influenced whether or not an application for a time to pay direction was accepted. Analysis carried out as part of the SOCRU *Survey of Payment Actions in the Sheriff Courts* (Fleming and Platts, 1999b) showed that the size of the debt, the length of time it would take to pay off the debt and the type of pursuer (public sector organisations, catalogues and particularly the ‘utilities’ accepted a high proportion of offers made to them) were all factors in whether an application was accepted. Creditors and their agents also spoke of their criteria for accepting or rejecting applications. The factors which were mentioned included the following:

- the length of time it would take to pay off the debt
- the belief that the debtor could afford a higher offer

the basis of the original debt
the payment history of the debtor
the circumstances of the debtor
a preference for informal arrangements
the frequency of proposed instalments

21. A significant proportion of creditors, however, said that they accepted all offers made. Some did so because they felt it was not cost effective (in terms of administrative and legal costs) to do otherwise, while others said that they did not feel in a position to challenge the offer with the minimal information available to them. As was the case with debtors, there were also a number of misconceptions about the operation of time to pay arrangements with some creditors believing that the court had already considered the offer and so it must be regarded as acceptable, and some not realising that they could reject an offer.

22. A number of the factors taken into account by creditors and their agents in their decision-making processes are worthy of further comment.

23. Creditors regularly stated that the length of time it would take to pay off a debt under the terms of the offer made was a significant consideration for them. Interviewees often said that they looked for the debt to be paid off within one or 2 years. In this context, a number of interviewees referred to the practice of the sheriffs at their local court of rejecting offers involving longer time periods, suggesting that they were guided by this in their own decision making. Analysis of applications considered by sheriffs (see Fleming and Platts, 1999b) suggests that such a policy (or 'rule of thumb') is in operation, with the one year threshold appearing particularly significant. Sheriffs themselves confirmed this practice, although the extent to which it was adhered to did vary. (The practices of sheriffs are covered more fully below.)

24. Consideration of the circumstances of the debtor and the belief that the debtor could afford a higher offer are linked since the latter is presumably based on some knowledge of the former. However, whatever information creditors have about a debtor's circumstances is likely to be partial. Creditors were unlikely, even, to have the basic information provided on the application form as this is not routinely sent to creditors or their agents (unless the pursuer was a party litigant), and few appeared to consult the available documentation at court. In particular, they are unlikely to know the detail of a debtor's financial commitments, including other debt repayments, to judge whether a debtor could afford more. In response to this difficulty, a number of creditors said that they would have liked to have more information available to help them in considering applications. This view was also supported by solicitors and debt collectors acting on behalf of creditors. A specific suggestion was that a copy of the debtor's application be sent to the agent along with details of the offer.

25. Confirming the views of advice workers and solicitors acting for debtors, a number of creditors and their agents said that they rejected applications for time to pay directions because they preferred informal arrangements. An open decree and an agreed payment arrangement were seen as having the benefit of flexibility as the creditor did not have to adhere to statutory rules in varying the arrangement (although it should be noted that the possibility of seeking a variation to a time to pay arrangement was not widely known about) or moving to enforcement. This 'flexibility' is of course the very thing from which the SLC sought to protect debtors in introducing time to pay directions and orders.

26. There was a general preference amongst creditors and their agents for weekly rather than monthly instalments, with a number of interviewees stating that this could be a reason for rejecting an offer from a debtor. Monthly arrangements were unpopular because the terms governing default (ie, 2 payments missed and a third one due) meant that 2 months had to elapse, following the first missed payment, before enforcement action could be taken. This compares with 2 weeks in the case of a weekly arrangement. Because of this there were suggestions for monthly arrangements to be allowed only in exceptional circumstances or only where the debtor was paid monthly, or for the conditions for default to be revised in the case of such arrangements (eg, for default to be defined as one payment missed and a second one due).

The role of the sheriff in adjudicating on applications

27. Once a creditor has rejected a debtor's request for time to pay, the application automatically calls in court before a sheriff. The sheriff then adjudicates on the application, with both parties able to make representations in support of their position. Fleming and Platts (1999b) showed that, of the 170 applications for time to pay directions which went to a hearing, one quarter were subsequently granted, although not necessarily in the same terms as the original offer. The survey also suggested that, as for creditors, the projected payment period and the size of the debt were important factors in whether or not a time to pay direction was granted by the sheriff.

28. Sheriffs discussed their decision making at some length in their interviews. The 1987 Act itself gives no guidance or direction as to the basis for accepting or rejecting an application for time to pay. As already noted, all the sheriffs interviewed considered the length of time it would take to pay off the debt in deciding upon an application. To a greater or lesser extent sheriffs also took into account the following: size of the debt, nature of the original debt and the circumstances of the debtor. Giving consideration to the circumstances of the debtor did, however, cause sheriffs some problems. A common comment was that information was often not available to allow them to do this properly, giving them little choice, as they saw it, but to fall back on considerations such as the repayment period. In this respect, sheriffs said that they found the more detailed income and expenditure assessments provided by money advisers to be very useful (compared to relying on the information on the court application form), and they found it particularly helpful when a debtor appeared in court to support an application. Through either of these means, sheriffs thought they got the additional information required to make an informed decision. In the light of this it is, however, interesting to note that Fleming and Platts (1999b) found that representation at the hearing was not a factor in whether or not a time to pay direction was awarded.

29. This wish for further information tied in with another point raised by sheriffs. They felt that, as the creditor had already rejected any offer which came before them (with the exception of those where the debtor had elected to make their application in person), there had to be very good justification for them subsequently to allow an application. They felt that the interest of the creditor had to be given due consideration. Knowledge of the debtor's circumstances could give them the required justification to override the wishes of the creditor.

30. Sheriffs were acting with regard to the interests of creditors in considering the period of repayment. It was thought unjust to impose a very lengthy repayment period on a creditor, particularly when a debtor's circumstances could subsequently change. There was a belief that beyond a certain point, allowing time to pay was no longer appropriate and the parties

should be free to pursue other options such as diligence or sequestration. Nevertheless, in awarding an open decree in such circumstances sheriffs expressed the hope that an informal arrangement - and possibly the writing off of the debt - would be reached between the 2 parties.

31. Sheriffs thus appeared to have developed a framework - albeit with variations in emphasis between individual sheriffs - within which to consider applications for time to pay directions (and orders, which they said were considered in a similar way), with reference to the interests of both creditors and debtors. This framework has in turn influenced the practices of creditors and their agents who reported accepting or rejecting offers on the basis of how they thought the local sheriff would react to the application, and of debtors' advisers who reported filtering out offers which they thought the court would not accept. In this way the practice of sheriffs is critical to the whole operation of the 2 time to pay measures in the 1987 Act. In considering disputed applications there appears to be an implicit assumption in favour of the creditor, with the onus on the debtor to justify his or her application. This is perhaps inevitable in a system where the onus is on the debtor to make the initial application but it does not take full account of the difficulties such individuals may have in completing forms or their reluctance to appear in court.

The success of applications granted

32. As noted previously, the majority of applications for both time to pay directions and orders are granted. However, statistical data are not available on the extent to which these arrangements are adhered to, or on what happens when default occurs. Information was, though, available from the surveys of different groups involved in their operation.

33. In the survey of debtors it was reported that about half of those who had been awarded a time to pay direction had managed to maintain payments and there was some evidence to suggest that those who had sought advice in making their offer were more successful in maintaining payments than those who had not. It was also reported that those who had had applications refused or had been awarded a time to pay direction different from that offered on their application form struggled to meet their commitments. So, it appears that time to pay directions allowed some debtors successfully to pay their debts in instalments free from the threat of diligence, as intended by the legislation.

34. The extent of default reported in the survey of debtors was, however, significantly lower than that reported elsewhere in the research. Creditors and their agents claimed that they experienced high levels of default. Commercial creditors reported mixed experiences in receiving money through time to pay directions, with one interviewee reporting levels of default of 90%. Debt collectors were probably the most vociferous in their claims that a high proportion of time to pay directions were subject to default. Amongst this group, there was a belief that most arrangements would in fact fail, often with no payments being made. There were 2 reasons put forward for this expected high failure rate. Firstly, one interviewee explained that informal arrangements would have already been tried unsuccessfully before a court action was raised so the prospects for recovery through a formal arrangement were probably not good. Secondly, another interviewee suggested that default was in fact encouraged by not sending reminders to those who did miss payments with the express intention of increasing the likelihood of the time to pay direction or order lapsing and the decree becoming open and thus enforceable. Amongst debt collectors there was a generally

negative attitude towards time to pay directions with interviewees regarding them as unnecessary, ineffective and as a delaying tactic used by debtors.

35. Although creditors reported that they often suffered high levels of default, their overall approach to time to pay arrangements was more positive than that of debt collectors. With just a small number of exceptions they were happy with the principle of time to pay arrangements and were happy to get some money rather than none (this was a view held by both commercial and individual creditors). Confirming this general attitude, most creditors expressed a willingness to reactivate payments on default rather than move straight to enforcement.

36. None of the debtors in the research who had defaulted on their time to pay arrangements had made use of the option to seek a variation to the direction or order. Some of those who had defaulted were subsequently subject to diligence. It is of course not possible to say whether or not applications for variations would have been granted in these cases but the opportunity for seeking further protection was not taken. Statistics are not collected on the use of this provision but other groups included in the research reported little or no experience of applications for variation to payment arrangements, and, given the significant levels of default reported, it appears that this aspect of the legislation is being under-used with the consequence that some debtors may be opening themselves up to the threat of diligence unnecessarily.

Overall assessment of time to pay directions and orders

37. Time to pay directions and orders were introduced with the aim of giving debtors who were willing but unable to pay their debts the opportunity to do so by way of instalments or a deferred lump sum, free from the threat of diligence. The fact that so few debtors appear to apply for these measures means that their success can, at best, be said to be partial. Although debtors have been given the right to make such applications, they are not exercising this right in great numbers. The reasons for non use as identified in the research are varied. Important issues such as lack of awareness and poor levels of understanding amongst debtors need to be addressed if the measures are to become more successful in terms of take up.

38. The statistics show that the majority of applicants are successful in obtaining either a time to pay direction or order. Those offers that are rejected by the creditor are adjudicated on by a sheriff. Although the measures were introduced to protect debtors, sheriffs were found to have kept regard for the interests of creditors in considering applications and factors such as the length of time it would take to pay off the debt featured prominently in the decision-making process. The approach adopted by most sheriffs very much relied on the debtor justifying why time to pay should be allowed. Sheriffs were unwilling to make a direction or order unless they had clear evidence of the need for it, with a general preference for the debtor to support his or her case in person. However, such an approach does not take account of the difficulties individual debtors have in dealing with official documentation or their reluctance to attend court. These would need to be tackled for debtors to be treated justly with regard to such an approach. Nevertheless, the request for more information on which to base decisions (made by both sheriffs and creditors and their agents) is worthy of consideration as it is unfortunate if the current level of information requested on application forms is preventing debtors obtaining the protection they seek.

39. The practice of sheriffs in imposing a maximum repayment period on time to pay directions and orders is particularly significant. The 1987 Act gives no criteria against which an application should be judged, but this has emerged as a key factor in the decision-making process of sheriffs. The maximum period deemed acceptable by any sheriff in the survey was 3 years and, while in extreme cases options such as sequestration may be more appropriate, applying this time period excludes from the court's protection, without any legislative basis, debtors who would like to meet their commitments in instalments but who require more than 3 years (or in the case of other sheriffs, one year or 2 years) to do so.

40. The wider impact of shrieval practices in this area is also important. Both creditors and their agents and debtors' advisers reported that they responded to the application of this 'rule'. Creditors took account of the likelihood of the court's reaction in deciding whether or not to accept an offer, while advisers filtered out offers that they regarded as unacceptable to the court on the same basis. Thus, these maximum repayment periods have become an almost integral part of the system without any statutory intervention. It is particularly interesting to note that sheriffs believed they were following the lead of creditors in pursuing such a practice, while creditors (and other groups) saw sheriffs as setting the parameters.

41. It is perhaps inevitable that creditors will pursue their own interests and in doing so will reject time to pay directions for their own reasons. Sheriffs, on the other hand, should have regard for the aims of the legislation in relation to time to pay directions; that is, the aim of providing debtors who wish to pay their debts but are unable to do so with the facility to pay over time with the protection of the court. Under the current legislation, sheriffs do not, though, carry out a full investigation and assessment of a debtor's ability to make payments. This would involve giving consideration to a debtor's complete circumstances (including the payment of other debts, either formally or informally). Such an approach is not stipulated by the Act (and, indeed, the SLC rejected the idea of 'means testing' in relation to their proposed reforms as a whole, see Chapter 1) but the extent to which time to pay arrangements can be successful in protecting debtors while applications are considered in relative isolation is perhaps open to question. Of course, this also has to be done within the context of one of the 1987 Act's overall objectives; that of providing creditors with efficient and effective machinery to recover their debts. Clearly, the interests of creditors are not to be ignored, but consideration has to be given as to whether the current practices followed by sheriffs give enough prominence to the interests of debtors, albeit that inadequate information may contribute to this approach. However, the question remains as to how sheriffs are to obtain the information required for a full consideration of a debtor's circumstances under the present system.

42. For those applications that are granted, either through creditor agreement or shrieval decision, the research suggested that durability was variable. Because the court has no formal role during the course of a direction, other than if a variation is sought, no official data are available on this issue. Interviews, however, provided some relevant information showing there to be a mixed picture with regard to adherence to arrangements, and suggesting that the assistance of an advice worker and the instalments set relative to those offered by the debtor were both factors in the success of arrangements. In the case of those which were successful, the time to pay direction or order can be said to have allowed the debtor to pay their debt when presumably they were unable to do so prior to court action or in response to the summons, and in so doing prevented diligence from being a possibility. Providing debtors otherwise unable to do so with a means of paying their debts was, of course, a main aim of the 1987 Act and, looking Whyte's (1999) *Study of Debtors* only, where 21 people had had time

to pay directions granted, this had been achieved in approximately half of the cases. In other cases the time to pay arrangement merely served to delay the possibility of diligence.

43. Time to pay directions and orders can, then, help debtors to meet their commitments to creditors without recourse to the threat of diligence. However, greater success is perhaps inhibited by non use of the measures by debtors and their advisers for a variety of reasons and by the decisions of sheriffs in rejecting the majority of applications which come before them. Both these issues need to be considered further if these measures are to become more successful.

44. Thus, the research has highlighted the limited extent to which the policy objectives of time to pay directions and orders have been achieved. While this is fundamental to the evaluation as a whole, the research also identified a number of detailed points regarding the operation of these measures which gave rise to comment from interviewees. These are listed in Annex 1.

Chapter 3: Arrestment of earnings

Background to the reforms

1. Prior to the introduction of the Debtors (Scotland) Act 1987, a debtor's earnings could be arrested by way of a one-off arrestment followed by an action of furthcoming which had the effect of releasing the arrested funds to the creditor. In this way the procedure was the same as that used for the arrestment of other funds and moveables. There was, however, an element of protection for the debtor in that the first £4 paid and 50% of any sum paid above this level were exempt from the arrestment.

2. The SLC identified 2 major problems with the diligence as it operated prior to 1987. First, it was often necessary to repeat the diligence a number of times in order to pay off the whole debt. This was inefficient for the creditor and costly for the debtor who was liable for any expenses incurred in carrying out the diligence. Second, the proportion of a debtor's earnings which was arrested could leave the debtor with insufficient money for subsistence purposes. The reforms introduced by the 1987 Act aimed to deal with both these problems. In its Report on Diligence and Debtor Protection, the SLC stated:

Our proposed reforms seek to improve the efficiency of arrestments of earnings from the creditor's point of view while at the same time ensuring so far as practicable that the amount to be deducted from the debtor's earnings is not such as to impose undue hardship on him. (SLC Report, 1995)

The reforms introduced, therefore, had regard to the interests of both creditor and debtor.

3. The 1987 Act introduced 3 new diligences against earnings: the earnings arrestment, the current maintenance arrestment and the conjoined arrestment order. For debts apart from maintenance debts the earnings arrestment replaced the use of ordinary arrestments against earnings. The conjoined arrestment order was introduced to deal with situations where 2 or more creditors sought to arrest the earnings of a single debtor. The current maintenance arrestment was introduced as a solution to the particular problems associated with maintenance arrears and its operation was not included within the remit of this research.

4. The earnings arrestment aimed to meet the objectives of efficiency for creditors and protection for debtors in 2 basic ways. First, the new diligence was continuous in that it remained in force until the debt was paid off. Second, deductions were to be made according to a sliding scale, designed to ensure that the debtor was left with enough money on which to subsist. The continuous nature of the diligence was introduced with the intention of providing an efficient means of recovery for creditors, while the new sliding scale of deductions aimed to protect debtors from undue hardship.

5. The conjoined arrestment order allowed, for the first time, more than one creditor to benefit from an arrestment. The level of deductions remain the same as for an earnings arrestment, with the deductions being sent to the sheriff clerk for disbursement between the conjoined creditors on a pro rata basis, proportionate to the size of the original debt. Debtor protection is preserved by maintaining the level of deductions at that used for a single earnings arrestment, while efficiency for the creditor is promoted by obviating the possibility of unsuccessful arrestments and delays before being able to obtain payment.

6. As well as having regard for the interests of both creditors and debtors, the new diligences against earnings were also intended to be simple for employers to administer. For example, although formula based, the actual deductions to be made in any particular case are provided along with the schedule of arrestment served on the employer. And, in relation to conjoined arrestment orders, the employer simply sends a single deduction to the sheriff clerk who is responsible for apportioning the money correctly between the creditors and forwarding it on.

7. The evaluation thus sought to assess whether the new diligences had met their objectives of being an efficient means of debt recovery for creditors, providing adequate protection from hardship for debtors and being simple for employers to administer. Each of these criteria for success will be examined in turn in relation to both earnings arrestment and conjoined arrestment orders.

Earnings arrestments

8. One indicator useful in judging whether the new diligences against earnings have proved to be an efficient means of debt recovery for creditors is the actual use made of them. Figures available from the 'section 84 returns'¹¹ submitted by sheriff officers show that the total number of earnings arrestments carried out increased markedly in the period 1989 to 1996. In 1989 there were under 10,000 arrestments while in 1995 and 1996 respectively there were 83,000 and 108,000¹². Although not in itself proof that creditors find the diligence efficient and effective, some conclusions can be drawn based on use relative to the use made of other diligences. Over the same period the number of poindings instructed fell from over 30,000 to 19,000 (as with the previously quoted figures for earnings arrestments these figures relate to all poindings, including those executed under summary warrant proceedings¹³). So, it can be seen that use of earnings arrestments not only rose, but rose during a period when the use of poindings and warrant sales fell, suggesting that, for whatever reason, creditors were demonstrating a preference for the former diligence. The SLC noted a long tradition in Scotland of the use of arrestment of earnings - in preference to a poinding - which they saw as 'beneficial' (SLC: 331) and were keen to preserve through reforms which made the diligence attractive to creditors. The figures suggest that this may have been achieved.

Efficiency for creditors

9. The apparent preference for earnings arrestments suggested by the available statistics was in fact confirmed by the interview surveys. The majority of commercial creditors and their agents (solicitors, debt collectors and sheriff officers) stated that an earnings arrestment was their first choice of diligence when considering enforcement of a debt and was always used if a debtor's employment details were available. The general view was that earnings arrestments were an efficient and effective means of debt recovery resulting in regular, guaranteed payments towards a debt. In particular, a number of interviewees specifically noted that they believed the diligence to be a great improvement on the previous procedures

¹¹ Section 84 of the Debtors (Scotland) Act 1987 places a statutory requirement on officers of court to provide statistical information to the Lord Advocate.

¹² This increase is likely to be attributable, at least in part, to the use of this diligence in enforcing summary warrants granted in respect of community charge debts (see Fleming and Platts, 1999a)

¹³ Separate figures for summary warrant and non-summary warrant arrestments were collected for the first time in 1996, showing less than 10% of earnings arrestments to apply to non-summary warrant debts (see *Civil Judicial Statistics*, 1996).

for arresting a debtor's earnings so the positive views expressed appear to be directly related to the reforms of the 1987 Act. Most of the creditors and their agents were happy with the level of deductions, although a minority, most significantly amongst the debt collectors, thought them too low.

10. Because interviewees were generally content with earnings arrestments, there was little incentive to accept alternative informal payment arrangements with the associated risk of default. Such an arrangement was only likely to be accepted under specific circumstances; for example, if the debtor offered substantial payments, if the payments were to be made by bankers' order, or if the creditor believed that the debtor was at risk of losing his or her job because of the arrestment. However, in most cases the creditors preferred the reliability of an earnings arrestment.

11. Only a minority of interviewees did not favour the use of this diligence. The main reason for this was the length of time it could take to pay off a debt - particularly a large debt - under the terms of the scale of deductions. This was contrasted with the immediate lump sum return which they believed could be achieved using a poinding and sale. Although this was the view of a small number of creditors, the length of time taken to conclude poinding and sale procedures will depend on a variety of factors such as any response made by the debtor, and any 'return' would depend on the extent of saleable assets identified. In addition, a number who said that the earnings arrestment was generally their preferred option said that they would opt for a poinding if the debtor had obvious saleable assets of sufficient value to cover the debt.

12. Despite the generally positive attitudes expressed towards earnings arrestments, there were several areas where creditors and their agents had experienced some problems in using the diligence (see Annex 1). Sheriff officers, who are responsible for actually carrying out the diligence, reported more difficulties than other groups, probably because of their closer involvement with its operation. On the whole, though, the points raised represented minor complaints from people who were generally satisfied with the procedures available to them and who found the diligence an efficient and effective means of recovering their debts. The new earnings arrestment would therefore seem to have met the needs of creditors.

Protection for debtors

13. The 1987 Act sought to protect debtors from undue economic hardship by introducing a sliding scale of deductions to be applied against a debtor's earnings. Under this system debtors with higher incomes had proportionately more deducted from their earnings than those with lower incomes. For example, the statutory deduction made from a debtor earning £40 a week represented 2.5% of their income, for those earning £150 a week the deduction represented 15% and for those earning £300 the deduction represented 27%¹⁴.

14. In the survey of debtors, the majority of interviewees who had been subject to an earnings arrestment, regardless of their income level, thought that the deductions were too high. There were various reports of people struggling to subsist on the remaining income and in some instances incurring further debts in the process. The level of deductions payable under an earnings arrestment are based on the assumption that only one debt is involved. However, this is often not the case when account is taken of debts being recovered on an

¹⁴ These figures are based on the scale of deductions included in Schedule 2 of the 1987 Act. This was in fact revised in 1995 (SI 1995/2878).

informal basis, either pre or post decree. Thus, a factor contributing to the difficulties experienced by debtors in the study was that they often had multiple debts and were involved in other informal payment arrangements outwith the purview of the court.

15. Those who acted as advisers to debtors (namely solicitors and advice workers) also noted concerns about the level of deductions. They felt they were too high, and disproportionately so at the top end of the scale. They linked their criticism to the fact that deductions were purely income based and took no account of the circumstances of an individual debtor. In its considerations prior to the introduction of the 1987 Act, the SLC specifically rejected a means based system of arrestments opting instead for the simplicity and low expense (for creditors, debtors, employers and the courts) of a fixed scale of deductions. While recognising the disadvantages of such a system in terms of the different impact on debtors with different circumstances, they saw the possibility of applying for a time to pay order, where the full circumstances of the debtor could be considered in setting an appropriate payment arrangement, as a way round this disadvantage for those adversely affected. However, *Civil Judicial Statistics* shows that little use is made of this provision (only about 250 time to pay orders are applied for in a year) with lack of awareness amongst debtors identified as contributing towards this low level of usage. The small number of debtors in the research who had applied for a time to pay order in this situation had done so after seeking advice; debtors who had not sought advice were under the impression that there was nothing they could do. Further, the basis for considering time to pay order applications, as identified by the research (see Chapter 2), would not necessarily have assisted debtors in getting the protection envisaged by the SLC.

16. The problems of high deductions were felt to be particularly acute because of the reluctance of creditors to enter into alternative arrangements once an arrestment was in place. This situation was confirmed by creditors, and, as previously reported, creditors often wanted compensation for accepting the risk of an informal arrangement by way of higher payments. This clearly would not be of benefit to debtors unable to cope with the deductions under the arrestment. There was some limited use of time to pay orders as a way of circumventing earnings arrestments reported by the solicitor interviewees. However, one of the main reasons for making such an application was to prevent potential problems between employee and employer. But, because the debtor often only learned of the arrestment at the same time as the employer (ie when the schedule was served), or not until the first deduction was made, such action was too late to stop the employer finding out about the arrestment and the employee's apparent financial problems.

17. One of the criticisms levied at earnings arrestments is that the diligence involves a third party, namely the debtor's employer, and that this can cause friction and, in extreme cases, job loss. Such a situation could cause hardship to the debtor and it would inhibit the efficient recovery of debts by creditors if this was a widespread consequence of earnings arrestments. The SLC gave this criticism due consideration but rejected it as a reason for not introducing a continuous diligence for 2 main reasons: first, the available evidence did not suggest that dismissal was a common occurrence under the old arrestment of earnings procedures; and second, the SLC were not persuaded that the situation would worsen with the introduction of a continuous diligence. Evidence from this research suggests that this prediction was probably correct.

18. With one exception, none of those in the survey of debtors who had been subject to an earnings arrestment reported that this had caused any problems with their employer. The one

interviewee who had experienced problems reported that his employer had (erroneously) adopted the practice of deducting all overtime payments as part of the arrestment (overtime payments should be treated in the same way as other payments in calculating the deduction to be made). This had left him unwilling to work overtime which had been a cause of friction between him and his employer. In general, though, earnings arrestments did not appear to have caused problems, with one debtor suggesting that this was at least partly because the large number of arrestments carried out (as shown in the statistics) particularly in respect of community charge debts, had led to this being accepted as 'normal'. Thus, circumstances may have had a part to play in the attitudes of employers to employees subject to arrestments. However, although debtors did not report serious problems as a result of their arrestment, the fact that their employer or colleagues at work knew about their financial problems was nevertheless a source of embarrassment. And advice workers and solicitors both reported that clients were often concerned about their employer learning of their debt problems in general and, because they were fearful of the consequences, sought to stop arrestments for this reason.

19. The survey of debtors included 24 individuals who had been subject to an earnings arrestment and, although none of them reported significant problems as a result of their arrestment, a slightly different picture emerged from interviews with other groups included in the research. A small number of commercial creditors and their agents reported incidences of people losing their jobs or, at least, ceasing to be employed after an arrestment had been served, or referred to this potential problem in a general way, and a number cited the risk of this as a reason for accepting an informal payment arrangement in place of an arrestment. Further, this had happened in a number of cases in the survey of individual creditors. Interviewees were not generally aware of the circumstances which had led to this situation (eg, whether the debtor had been dismissed or had left of their own accord); they only knew that the arrestment had stopped as the debtor had ceased to be employed.

20. Those facilitators representing debtors also had concerns about this issue. Some advice workers believed dismissal to be a problem, although none had direct knowledge of this happening to a client. In addition, solicitors working on behalf of debtors said that they were aware of employees sometime being put under pressure to pay off a debt and so end the arrestment, or of arrestments being treated as a disciplinary matter by employers. Employers themselves were asked about their policies towards employees against whom arrestments were instructed. Most reported that no action was taken - although in a few instances the fact of an arrestment would be recorded on an employee's file - and concern was most commonly voiced in relation to staff who handled money as part of their duties. Overall, therefore, the research suggests that while the occasional incident of this type arose, the problem did not appear to be widespread. Thus, termination of employment as a direct result of an earnings arrestment did not appear to be a significant cause of hardship for debtors, although the involvement of their employer in their personal affairs did cause anxiety for some.

21. Particular aspects of the procedures governing earnings arrestments contributed to the hardship which some debtors experienced. First, debtors were generally given little notice that their earnings were to be arrested, and some appeared to have never received any notification. The legislation states only that a copy of the schedule of arrestment should be served on the debtor if 'reasonable practicable' (Section 70 of the 1987 Act) to do so. There is, therefore, no statutory obligation to ensure that the debtor receives a copy of the schedule, but not receiving a copy did appear to cause debtors some difficulties as they were unable to prepare themselves for a reduced income. The same difficulty applied to those who received

notification of the arrestment at the same time as the first deduction was made. Those that did not receive a copy of the schedule were also unable to check if the correct deductions were being made. Because the earnings arrestment is entirely income based, deductions vary if income varies from one pay period to another. This fluctuation was another feature of the procedure with which debtors said they found difficulty coping.

22. On the positive side, however, the majority of debtors did receive a copy of the schedule of arrestment - even if this was along with the first deduction - and most were able to understand the documentation and check the amounts being deducted. Most reported that they found the schedule helpful and informative.

23. In sum, the research found that debtors who were subject to earnings arrestments had difficulty coping with the level of deductions made from their earnings and, as a result, suffered some hardship. However, according to debtors and their advisers, there were 2 important contributory factors operating alongside the level of deductions themselves: the individual circumstances of the debtor, and informal payments to other creditors. The rules governing arrestments do not allow such factors to be taken into account and, unfortunately, the option of applying for a time to pay order has not proved to be a solution to this situation, as had been anticipated by the SLC for reasons discussed here and in Chapter 2. Providing adequate protection for debtors while using a wholly income related system of arrestments relies heavily on also providing suitable access to a 'safety valve' such as the time to pay order. As time to pay orders have not operated as anticipated, debtors have been denied protection where their own circumstances have combined with the prescribed deductions to result in hardship.

Ease of use for employers

24. Employers are under a statutory obligation to implement an arrestment if a schedule of arrestment is served on them. The SLC were mindful of the possible inconvenience and expense borne by employers because of their role in the operation of a continuous earnings arrestment, noting in their *Report on Diligence and Debtor Protection* (SLC, 1985) that 'we have been particularly careful in following our recommendations to try to impose the minimum of additional burdens on them. The SLC believed that 'to some extent the additional burdens on employers [resulting from continuous arrestments] would be offset by the elimination of repeat arrestments' and also noted that employers who responded during the consultation exercise did not object to the idea of a continuous diligence against earnings.

25. The research suggested that the reforms had not caused any great problems for employers, with few complaints reported about their role in the implementation of earnings arrestment (see Fleming, 1999a). The experiences of employers reported in Fleming's report contrasted favourably with the experiences reported by Connor (1980a) who, in her 1980 research, found that employers were critical of various administrative and operational aspects of arrestments (eg there was criticism of the information contained on the schedule in terms of identifying the debtor and calculating the deductions, and problems encountered because of the advance notice required to make the necessary amendments to computerised systems), and appeared to adopt a variety of different practices in calculating deductions. In contrast, none of the employers interviewed for Fleming's *Study of Facilitators* reported any problems in dealing with the schedule of arrestment, in following the instructions provided, or in making the actual deductions. For larger organisations, however, difficulties were sometimes still encountered in identifying the correct person against whom the arrestment was to be operated

and it was suggested that more information on the schedule would be helpful in this respect. Many employers had automated systems which could deal with arrestments and so, beyond initial instruction, there was little work for the employer apart from actually dispatching the cheque to the creditor (or to the court in the case of a conjoined arrestment order). Thus, the increased use and sophistication of computer systems may have contributed to the relative ease with which employers dealt with the new diligences.

26. Section 71 of the 1987 Act permitted an employer to charge a debtor the fee (set at 50 pence) each time a payment is made to a creditor under an earnings arrestment. Although the general view amongst employers was that earnings arrestments did not cause them many problems or much work, there was also a common opinion that the 50 pence deduction to which they were entitled was insufficient to compensate them for any expense incurred in the process. (The likelihood of this was conceded by the SLC and full recompense was not intended.) Despite this view, a number of employers chose not to deduct anything, either because they did not wish to add to the debtor's financial difficulties or because it was just not worth their while to do so.

27. In general, therefore, earnings arrestments did not appear to be a cause of concern to employers who reported few problems in their implementation. The introduction of a continuous diligence against earnings would seem to have been achieved without much adverse effect on employers - a desirable outcome, even if not foremost in the considerations of the SLC.

Overall assessment of earnings arrestments

28. Having presented the views and experiences of the various actors involved with earnings arrestments it is possible to consider the extent to which the prime aims of efficiency for creditors and protection for debtors have been met. The views of creditors and their agents leave little doubt that the new continuous arrestment introduced by the Debtors (Scotland) Act 1987 has proved to be an efficient and effective diligence much used by creditors in recovering debts. There were several detailed areas which attracted some adverse comment (see Annex 1), where presumably creditors would wish to see change, but the negative views expressed were not enough to detract from the conclusion that the earnings arrestment has successfully achieved its aim of providing effective machinery for creditors recovering debts.

29. The question of whether the aim of providing protection for debtors had been successfully achieved is somewhat more complex. Debtors and their advisers reported that financial hardship was common following an arrestment. The principle of promoting debtor protection through a scale of deductions set to ensure that sufficient income remains for the arrestee to subsist without undue hardship is laudable. However, it assumes that all debtors have the same subsistence needs and does not take account of multiple debt situations where a debtor is paying off one or more debts, possibly on an informal basis, at the same time as being subject to an earnings arrestment. This research found that the personal circumstances of the debtor or existing commitments to pay other debts were often cited by debtors or their advisers as contributory factors in the hardship experienced. The simple system of a set income based scale made for a straightforward, efficient diligence for creditors and employers but was not flexible enough to meet the needs of debtors on an individual basis. The use of time to pay orders as a way of circumventing earnings arrestments for those whose particular circumstances meant that deductions were difficult to cope with has not come about as

envisaged by the SLC and, even if it had, practice in relation to such applications (and in particular the factors taken into account by sheriffs in their consideration) suggests they may not have proved to be the solution anticipated (see Chapter 2 for further discussion).

30. Thus, debtors subject to earnings arrestments could suffer hardship, not necessarily because the deductions were too high, but because the arrestment was only one part of a complex financial situation in which the debtors found themselves and into which an earnings arrestment - with all its assumptions - did not easily fit. The debt arrangement scheme proposed by the SLC but not incorporated into the 1987 Act may have provided a way of dealing with such situations (see Chapter 1).

Conjoined arrestment orders

31. The conjoined arrestment order was introduced to allow 2 or more creditors to benefit from the proceeds of an earnings arrestment. In her work for the SLC, Connor (1980a) did not find competition between 2 or more creditors seeking to arrest a debtor's wages to be a significant problem. However, the SLC anticipated that the introduction of a continuous diligence against earnings would increase the risk of subsequent creditors being 'shut out' of an arrestment. In recognition of this potential problem, the conjoined arrestment order was introduced as a means of sharing the proceeds of an arrestment between 2 or more creditors.

32. To apply for a conjoined arrestment order, a creditor who is aware that an earnings arrestment is already in place (most likely as a result of having instructed an unsuccessful earnings arrestment) lodges an application with the sheriff clerk who then serves a copy of the order on the employer. The order has the effect of recalling any existing arrestment and requiring the employer to pay sums deductible under the scale of deductions to the sheriff clerk for disbursement amongst the creditors (see Section 60 of the 1987 Act).

Use of conjoined arrestments

33. Despite the anticipated need for such a measure, the use of conjoined arrestment orders has in fact been limited, although numbers have increased, with only a very small proportion of arrestments becoming conjoined. From 1989 to 1993, the number of new conjoined arrestment orders in a year increased from 195 to 915 but, because of the rise in the number of earnings arrestments over the same period, this has continued to represent less than 2% of all earnings arrestments.

Efficiency for creditors

34. The intended beneficiaries of the new order were creditors, so their views and the views of their agents on the operation of the measure are of key importance to an assessment of their success. As might be expected from the small numbers of orders made each year, there was only limited experience of conjoined arrestment orders amongst interviewees included in the research, and particularly amongst the creditors themselves. However, of those with experience, the research found that neither creditors nor their agents wholeheartedly endorsed the new orders. Most interviewees accepted the principle of sharing the proceeds of an arrestment and stated a willingness to enter into such an arrangement, but there was a general view that the amounts received through a conjoined arrestment order were very low (compared to the general acceptance of the amounts received through a single arrestment). The money received through a conjoined arrestment order was often regarded as

'better than nothing', and a suggestion made by a number of interviewees was that the total amount deducted from earnings should be increased as the number of conjoined creditors increased. While creditors wished to see an increase in the amounts they received, this suggestion was also motivated by the belief that debtors should be 'punished' for having more than one debt. Such an approach, of course, would not be compatible with the objective of providing protection for debtors, with the level of deductions for a single arrestment (and thus also a conjoined arrestment order) already set on the basis of preventing undue economic hardship.

35. Thus, the main complaint amongst creditors and their agents related to the size of payments received. However, several more detailed comments were made and these are contained in Annex 1.

The protection of debtors

36. For debtors themselves the transformation of an earnings arrestment into a conjoined arrestment order makes little impact in practical terms as the level of deductions remains unchanged. However, it is important to note that some of the debtors in the research were unaware that more than one creditor was benefiting (or had benefited) from the arrestment to which they had been subject, and did not appear to have received a copy of the relevant applications or orders.

37. The experiences of debtors subject to earning arrestments, along with the relatively small number of applications for conjoined arrestment orders, also suggests that the introduction of the order has not been entirely successful in avoiding the problem of those creditors 'shut out' by an existing earnings arrestment choosing to use other diligences or informal methods of recovery in collecting their debts rather than enter into a conjoined arrestment. This was seen as a possible consequence of the introduction of a continuous diligence against earnings because a creditor could be 'shut out' for a considerable period of time while an existing arrestment ran its course. Because of this, the conjoined arrestment order was introduced to provide a way for more than one creditor to recover their money through an earnings arrestment at the same time. However, as previously noted, it was common for debtors to report that they were paying towards other informal arrangements at the same time as being subject to an earnings arrestment. Although not all such arrangements would have been in respect of debts where a decree had been granted, where this was the case it is possible that creditors were choosing to collect their money through informal means, rather than join into an existing arrestment with the low returns that that implied.

Ease of administration for court staff

38. Administering conjoined arrestment orders was a new function for the sheriff clerk and his or her staff. How they carry out this function, and the ease with which it is carried out, could have an impact on the achievement of efficiency for creditors and protection for debtors.

39. Although the research reported that creditors had encountered a number of difficulties in applying for a conjoined arrestment order (see Annex 1), court staff themselves reported few problems beyond initial 'teething' problems. The only significant issue reported by Fleming (1999a) in his *Study of Facilitators* was that of reconciling variations in the amount of debt outstanding as calculated by creditors and the staff themselves; such discrepancies

usually resulted from calculations being made at different time points. Other than a plea for computerisation to assist with the workload, staff reported no other difficulties in administering these orders and there were no obvious implications for their effectiveness.

Overall assessment of conjoined arrestment orders

40. Conjoined arrestment orders, therefore, have had mixed success. Creditors were happy with the principle of such a measure and, other than in respect of a small number of specific points (see Annex 1), the provision would appear to work efficiently as a means of recovering money. However, there were high levels of dissatisfaction with the amounts of money received and consequently the length of time it took to repay a debt. Interviewees said that this did not generally deter them from joining into an existing arrestment, but the small number of orders a year (representing less than 2% of all arrestments), coupled with the high incidence of multiple debt reported by debtors and their advisers, suggests that conjoined arrestment orders may not be being used to their full potential. In this respect, debtors may not be benefiting from the protection afforded by the measure if creditors instead are opting for other means of recovery through other diligences, or as appears more common, through informal payment arrangements, possibly without having sought a decree. This may not, however, be a reflection of any particular failing of conjoined arrestment orders per se, but could rather be a function of general creditor behaviour (ie, a general preference for informal recovery). Nevertheless, success in achieving the policy aims of conjoined arrestment orders - that is, the aims of providing efficiency for creditors by providing a means of joining into an existing arrestment, while at the same time continuing to protect debtors from undue economic hardship through the scale of deductions - appears to have been inhibited by this factor.

Overall assessment of new diligences against earnings

41. The new continuous diligences against earnings were intended to be efficient for creditors (by removing the need for repeated arrestments and actions of furthcoming and the problem of being 'shut out of an arrestment'). They were also intended to protect debtors by introducing a revised scale of deductions aimed at ensuring that those subject to the diligence had enough money on which to subsist. The research evidence suggests that the earnings arrestment has proved to be an efficient and effective procedure for creditors who have made significant use of the new diligence. Although there was less satisfaction with the amounts of money received, conjoined arrestment orders too would appear to operate successfully with creditors being generally happy to join into an existing arrestment. The benefits accruing to creditors as a result of the new diligences had not been gained at the expense of employers who reported few problems in implementing arrestments.

42. The issue of the achievement of debtor protection is less clear cut. The same scale of deductions is in operation for both earnings arrestments and conjoined arrestment orders so the level of protection offered is also the same, albeit that under the latter the debtor will be subject to deductions for a longer period of time. Both measures can thus be considered together here. The research found that debtors subject to these diligences could suffer economic hardship but often this was because their circumstances were worsened by commitments to other creditors in addition to those receiving money through the assessment. It is therefore not possible to say that the scale of deductions has failed to protect debtors adequately. It does appear, though, that the protections of the diligence do not cater for the situation of debtors with multiple debts.

43. It could be argued that the scale of deductions was not intended to deal with multiple debt situations. In such circumstances, debtors can apply for a time to pay order and, in their original recommendations, the SLC envisaged that debtors with multiple debts would also be catered for through the proposed, but not implemented, debt arrangement scheme. However, the research has shown that time to pay orders are not used to any great extent so debtors with multiple debts are, in practice, subject to earnings arrestments and find it difficult to cope with the deductions.

44. In simple terms, some debtors subject to earnings arrestments do suffer economic hardship, despite the aims of the legislation. It is the varied circumstances of debtors, combined with their low usage of other provisions such as time to pay directions and orders, which leads to this situation, rather than an inappropriate scale of deductions. Addressing these issues of non use and the treatment of time to pay applications by the court could therefore help relieve this problem.

Chapter 4: The diligence of poinding and warrant sale

Background to the reforms

1. The diligence of poinding and warrant sale is the process by which a debtor's goods are valued (or poinded) and then sold at public auction in order to raise money to satisfy a debt which remains unpaid following the expiry of a charge. In their 1985 Report, the SLC concluded that this diligence was an effective method of debt recovery for creditors, primarily because it acted as 'a sanction inducing payment arrangements', but that debtors subject to the diligence were not given adequate protection from undue economic hardship and, in particular, from personal distress. This view led the SLC to propose that the diligence itself be retained but that it be reformed to provide the necessary protections for debtors.

2. The conclusions of the SLC with regard to poindings and warrant sales and their recommended reforms were based on extensive research and on responses received following the publication of their consultative memoranda (see SLC Report: Chapter 2; Chapter 5). Research carried out by Edinburgh University (Adler and Wozniak, 1981) reported that debtors found the diligence to be harsh and distressing. Although the diligence was found to be not necessarily economically harsh (because it was often not concluded), it was nevertheless found to be stressful for the individual involved, with the main effects being 'social and psychological'. However, research into creditors' policies and practices (Doig and Millar, *ibid*) found few complaints with the diligence. During consultation, a number of respondents argued for the abolition of the diligence, and the SLC noted that 'in recent years, the diligence of poinding and warrant sale has become probably the most unpopular diligence in Scotland, as well as being the most frequently used'. Nevertheless, the SLC saw it as important to keep poinding and sale as the final sanction in the debt enforcement process in the absence of a plausible alternative, but they recommended the diligence be reformed to deal with the problems faced by debtors as identified by the research. Overall the SLC's strategy was 'to reform the diligence so that its impact on debtors is made as humane as possible, consistent with the need to retain the effectiveness of the diligence as a method of eliciting payment from debtors who can, but will not, pay their debts'.

3. In making their recommendations, the SLC 'sought to strike a proper balance between the interests of debtors and creditors'. To protect the interests of creditors the diligence was firstly, and importantly, retained and would continue in broadly the same form as had been the case prior to the 1987 Act with the 4 basic stages of charge, poinding, application for warrant of sale and the sale itself. It was anticipated that the retention of the 4 stages would mean the diligences would continue to be an important feature of the debt enforcement 'filter', thus encouraging debtors who could pay to do so at earlier stages, while still being effective in actually realising assets in the cases where it was used. To protect the interests of debtors, the SLC recommended the inclusion of a number of measures at key stages in the diligence based primarily on allowing the debtor to seek the protection of the court. Here, the SLC anticipated that the measures introduced would mean fewer people reaching the end point of the diligence (ie, the warrant sale itself) and that those who did reach that stage would be protected from the harsher aspects of the system prior to the Act.

4. The main recommendations of the SLC as enacted in the Debtors (Scotland) Act 1987 were as follows:

- 4.1 the extension and codification of the list of goods exempt from poinding;

4.2 the introduction of the right to apply for the release of poinded items on the grounds of undue hardship as well as on the existing grounds of exemption¹⁵;

4.3 the replacement of the ‘offer back’ provision (in terms of which the officer, at the end of the poinding, offered the goods back to the debtor at their appraised values) by an entitlement to redeem all or any of the goods at their appraised values within 14 days of the execution of the poinding, and the introduction of a second opportunity to redeem goods following an application for a warrant of sale.

4.4 the introduction of the right to apply for the recall of a poinding on one of 3 grounds: undue harshness; the anticipated proceeds of the sale being unlikely to cover the expenses incurred in the application for the warrant of sale and any steps required to be taken under the Act in execution of such a warrant (section 24); and that the aggregate of the value of poinded goods would be ‘substantially’ below the aggregate of the proceeds they were likely to fetch on the open market.

4.5 the introduction of the right to be informed of the application for warrant of sale, and the right to oppose the granting of such a warrant (on the same grounds as are applicable to recalling a poinding as well as on the grounds that the poinding is invalid or has ceased to have effect (section 30));

4.6 the prohibition of the use of the debtor’s home for the warrant sale, unless agreed by the debtor and any other occupants, and the ending of the practice of naming the debtor in advertising the sale;

4.7 the extension of the duration of a poinding to one year (from 6 months).

5. By and large the specific reforms can be seen as having the aim of protecting debtors. However, reforms such as the extension to the duration of a poinding can also be seen to enhance the efficiency of the diligence for creditors by providing improved security while receiving payments from the debtor, should an arrangement to clear the debt be reached at any stage following the poinding.

6. In order to understand fully the context of the reforms, it is important to note that, in retaining the diligence of poinding and warrant sale, the SLC based their recommendation on the premise that the measure was generally only used as a last resort in cases where the debtor was able to pay the debt but refused to do so (ie, cases involving the so called ‘won’t pays’, as opposed to the ‘can’t pays’), and the acceptance of the view (against which few would argue) that in such cases a creditor has the right to enforce the debt and that the state should provide the framework for doing so. Here, the SLC saw the reforms introduced elsewhere in the 1987 Act as just as important as the specific reforms introduced to poinding and warrant sale procedure in providing the means by which the ‘can’t pay’ debtors could repay their debts. They saw the introduction of time to pay directions and orders as a means of allowing those debtors the opportunity to meet their obligations free from the threat of diligence. Further, the new diligences against earnings were intended to make this form of enforcement more appealing to creditors who might otherwise opt for a poinding. Thus, in addition to the reforms to earnings arrestments and the introduction of the new ‘diligence stoppers’, new

¹⁵ The 1987 Act also introduced the right to apply for the release of poinded goods on the grounds of third party ownership. This measure was designed to protect the interests of such parties rather than debtors themselves.

protections were introduced to the poinding and warrant sale procedure to provide a further safety net for those who slipped through the protections introduced at earlier stages in the system.

Trends in the use of poinding and sale

7. It is important to set the views and experiences of relevant groups in some context by reviewing the use made of the diligence since the introduction of the Debtors (Scotland) Act 1987. Figures from *Civil Judicial Statistics* show that the use of the diligence throughout Scotland has fallen quite significantly since the introduction of the 1987 Act. The number of poindings has fallen steadily over the period (with the exception of 1993), from over 11,000 in 1989 (the first full year of the operation of the Act) to less than 6000 in 1996, representing a decrease of almost a half. This downward trend followed a drop of one quarter in the number of poindings from 1988 to 1989. When viewed as a composite diligence, it is clear that decreasing numbers of creditors are choosing this option as a means of enforcing their debts.

8. Although the number of poindings has dropped considerably since the introduction of the 1987 Act, the same trends are not apparent for the later stages of the diligence. For both applications for warrants of sale and actual sales, numbers fell significantly between 1988 and 1989 (by 38 and 48% respectively) but thereafter numbers of applications for warrants held fairly steady until a drop of almost one quarter was recorded between 1993 and 1994) and numbers of reports of sale have fluctuated between 334 in 1992 and 640 in 1990 (the most recently reported figure was 513 in 1996). This means that, once started, the diligence is as likely, if not more so, to progress to the later stages compared to when the Act was first introduced.

9. However, statistics also show that the majority of those subject to a warrant sale no longer have to suffer the distress of a sale taking place in their own home. This practice and the associated publicity for the sale were a major cause of resentment under the old procedures but the Fleming's (1999b) *Survey of Poinding and Warrant Sales* identified no instances of warrants being granted for the debtor's home, suggesting that this is now a very rare occurrence. Interviews with sheriff officers also suggested this to be an uncommon practice¹⁶.

10. Against this backdrop of a decrease in the use of the diligence of poinding and warrant sale, the remainder of this chapter examines, based on the empirical research carried out, whether debtors are now provided with adequate protections and whether the diligence continues to be effective as a means of debt enforcement for creditors.

Effective machinery for creditors

11. It is not a simple task to evaluate the extent to which the reformed diligence has continued to provide effective machinery for creditors recovering their debts because of the dual way in which the procedure operates. Firstly, and most obviously, the procedures can be followed with a view to realising the assets of a debtor in order to recover the money owed. Secondly, the very existence of the diligence as a final sanction which can be used against a debtor can be said to encourage payment at earlier stages of the enforcement process thus

¹⁶ Although figures from *Civil Judicial Statistics* show a higher level of incidence, certain features of the data for individual courts suggest that overall figures may be somewhat overstated, and the data from other research sources is likely to be a better reflection of the situation.

enhancing the efficiency of the system as a whole. Even where the diligence itself is commenced, with a charge and poinding, the threat of a sale may encourage payment or the establishment of a payment arrangement rendering the final step unnecessary.

12. Examining the outcome of warrant sales which do proceed can provide some useful information. Fleming's (1999b) *Survey of Poinding and Warrant Sales* reported on a sample of poindings carried out in 1991 and 1992, some of which proceeded to a warrant sale. The survey found that, where a warrant sale took place, in only a very small proportion of cases did the proceeds of the sale pay off the debt and any expenses due (and in no case where the debtor was a private individual did this occur), and in the majority of cases (particularly where the debtor was a private individual) the sale paid off less than half of the sum owed.

13. Statistics, then, suggest that the diligence does not always prove to be an efficient means of debt recovery for creditors, with a significant shortfall often remaining following the conclusion of the diligence. However, statistics also show that only a small proportion of poindings proceed to a warrant sale (between 3 and 9% in each of the years from 1989 to 1996; the proportion has in fact increased each year since 1992 (see Fleming and Platts, 1999a)). Cases could drop out of the process for a variety of reasons (eg, because the debt is paid off, because a payment arrangement is reached or because the creditor decides not to proceed because of the poor prospects for recovery) some of which would reflect a successful outcome as a result of using the diligence. Such information is not readily available from statistics and it is therefore necessary to look beyond the figures at the views and experiences of creditors and their agents.

Creditors' use of poinding and warrant sale

14. The programme of research involved 2 studies of creditors looking separately at businesses and private individuals. Fleming's (1999b) *Survey of Poinding and Warrant Sales* found that the vast majority of creditors who instructed poindings were businesses and so their views and experiences are of particular importance in assessing the effectiveness of the diligence. Because of the way that business creditors operate, often with little detailed involvement in the decision making in individual debt cases, the views of their agents (solicitors, debt collectors and sheriff officers) are also very important.

The use of poinding and warrant sales in the debt recovery process

15. The survey of creditors found that the diligence of poinding and sale, and particularly the warrant sale itself, was not a popular option for enforcing a debt against a private individual (commercial debts were regarded somewhat differently as described in paragraph 18 below). About half of the commercial creditors surveyed used the diligence, although some said they would not go beyond a poinding and others stressed that, while they did use the diligence, it was a very rare occurrence. Amongst both creditors and their agents only a small proportion of interviewees stated that this was their preferred form of diligence. This was confirmed by statistics showing that in 1993 approximately 10 earnings arrestments were lodged for every one poinding carried out.

16. It was clear that, where it was used, the diligence was generally used with the intention of encouraging payment from the debtor rather than with the intention of having a sale carried out. As one creditor said 'the worst poindings of all are the ones where they are actually able to carry it out'. The threat of the diligence, and the poinding itself, were often used in this

way. In line with this strategic use of the diligence, most creditors were willing to enter into payment arrangements at this stage and found such arrangements generally successful because of the threat of the sale. Despite this apparent amenability to payment arrangements, creditors often said that they insisted on some sort of reassurance of the sincerity of an offer such as the reliability of a standing order or a significant payment up front. And the likelihood of an instalment arrangement, as opposed to full payment, being accepted decreased as the diligence progressed. This attitude was confirmed by those acting on behalf of creditors. However, where the threat of the diligence failed to elicit payment or a payment arrangement, creditors said that they often took no further action because it was not worthwhile to do so. In other words, their strategy of using the diligence as a threat had failed and there was no interest in using the procedure to realise assets.

17. There were other ways in which the diligence was used. Some interviewees reported using the procedure selectively in the hope that adopting a tough stance in a small number of cases would serve to deter other potential debtors, and others said that the diligence was used in order to meet the conditions of bad debt insurance. In general, though, the diligence was said to be used rarely, where no alternative was available, and was most commonly used to encourage payment with a general unwillingness to proceed to a warrant sale itself.

Views on the effectiveness of the diligence

18. The reasons why creditors chose not to use the diligence are instructive in assessing its effectiveness. Two broad types of reason were put forward: those relating to 'morality' and those relating to effectiveness. A number of creditors said they did not use the diligence (or in some cases restricted its use to the stage of a poinding) or only used it in particular circumstances because they objected to its use on principle, seeing it as 'immoral' or 'uncivilised'. However, creditors made a distinction between domestic and commercial situations, and between the 'average' household and the household with luxury goods, where in both instances creditors were willing to use the diligence in the latter situation because the same issues of morality were not seen to arise. Those that criticised the effectiveness of the diligence attributed this to the provisions of the 1987 Act, and, in particular, the list of exempt goods introduced by the legislation. In this respect, a number of creditors believed that debtors now had 'too much protection'. In practical terms, creditors found that the diligence was expensive - in time as well as money - with little return. It was common for creditors to state that the diligence was only really effective in particular circumstances; ie, against commercial debtors or against personal debtors who had valuable, luxury goods to poind (interestingly, the same circumstances where those who cited moral reasons for not using the diligence thought that its use was acceptable). In these circumstances the lists of exempt goods was not seen as restrictive as other items of significant values with good sale prospects could be poinded.

19. The views of creditors on the effectiveness of the diligence were largely echoed in the views of their agents (solicitors, sheriff officers and debt collectors), although few comments on the 'morality' of the diligence were recorded amongst this group. In general, interviewees were critical of the effectiveness of the diligence in domestic situations, and, with the exception of those cases where obvious poindable assets were available, only opted for this method of recovery where no alternative was available.

20. Sheriff officers and debt collectors, the groups 'at the coalface' in terms of debt recovery, were most vocal in their views on the ineffectiveness of the poinding and warrant

sale in domestic situations. Debtors were seen as having been given too much protection by the Act, and particularly by the list of exempt goods. Interviewees noted that the items which could be poinded were now very limited and that the number of goods covered by hire purchase or rental agreements (which are not poindable) exacerbated the situation.

21. Not surprisingly, given their unique role in the operation of the diligence system, sheriff officers were also keen to comment on the detailed workings of the reforms of the 1987 Act and their contribution to rendering the diligence, at best, unattractive and, at worst, ineffective. Arriving at appropriate valuations for poindable items was seen as particularly problematic. Sheriff officers are charged with the responsibility of setting a 'market value' for each item but a number of factors were suggested as making this a difficult task. First, the officer did not know when the sale would take place, and this could have a greater or lesser effect on the price raised, dependent on the item involved (eg, the money raised through the sale of seasonal goods such as Christmas decorations or fashion clothing would be affected by the timing of a sale). Second, it was noted that prospective buyers came to auction houses in search of bargains and this was likely to depress the price realised. Third, other rules introduced by the 1987 Act were seen as putting sheriff officers in an invidious position in setting a value. The Act states that, following a sale, a creditor is credited with either the poinded value or the price achieved at the sale, whichever is the greater. It is thus to the disadvantage of creditors if sheriff officers are liberal in setting their value, and officers feared that they could be held liable for any shortfall if the appraised value was not reached. On the other hand, if sheriff officers were conservative in their valuations, there was a risk that the debtor would apply to the court for a recall of poinding on the grounds that the total valuation was significantly below market value (despite the concerns of sheriff officers it should be noted that *Civil Judicial Statistics* show this to be a little used provision). Sheriff officers thus perceived themselves as performing a fine balancing act with regard to what was fundamentally an inexact science.

22. Although the overall view offered by creditors of the reforms of the 1987 Act was undoubtedly negative in terms of the impact on the effectiveness of the diligence, there were, though, a number of newly introduced provisions which were seen as positive. The introduction of 'section 18' notices (warning those debtors not at home when a sheriff officer calls to carry out a poinding that the officer would return in 4 days' time, after which time the officer may seek to force entry) was generally seen as positive by creditors as well as their agents. This notice - intended to protect the interests of debtors rather than promote the recovery of money for creditors (see SLC: 262-264) - was regarded as very effective in eliciting payment from debtors without the need for the poinding to proceed. Similarly, the presumption in favour of using an auction house for the warrant sale was seen as generally beneficial, despite the potential for greater expenses to be incurred, because sales in auction houses tended to attract greater numbers of potential buyers and thus led to higher prices being achieved. Such points did not, however, affect the overall critical view of the reforms.

23. Despite criticisms of the diligence as above, most creditors continued to instruct the use of this method of recovery. They and their agents remained of the view that its effectiveness lay in its use as a 'threat' which encouraged debtors to pay their debts. The diligence was seen as most useful when used in this way, rather than with the intention of proceeding to a sale and realising the poinded assets. As such the diligence was seen as a necessary part of the debt recovery system and there was support for the idea that, with no alternative available, the diligence needed to continue to exist as a 'final sanction'.

Factors influencing the effectiveness of the diligence

24. However, although there was general agreement that the diligence continued to be effective by encouraging payment, there was a view that the extent to which it was effective in this way had declined since the introduction of the 1987 Act. Here a complex set of factors were seen to be at play. Importantly, interviewees noted that to be effective in encouraging payment, debtors had to perceive the possibility of a warrant sale as being a 'real' threat. For various reasons creditors and their agents believed that this was no longer always the case. First, they thought that the Act had introduced too many protections and that debtors were now much more knowledgeable about their rights than had previously been the case - and here the impact of the non payment campaign in relation to the community charge was particularly mentioned as having increased awareness. Exercising these new rights, for example in making applications to the court for the release of goods from a poinding, purely as a delaying tactic, was cited as a problem by some interviewees but the low usage of such applications (see *Civil Judicial Statistics*) suggests this is not a major problem. Second, creditors believed that the very fact that debtors had so few poindable assets (and their awareness of this position) meant that they were often safe in the knowledge that the diligence would not be pursued beyond a poinding because it was not worthwhile to do so. This position was in fact confirmed by advice workers who reported that where the prospects for a sale were poor they often adopted a strategy of doing nothing in response to a poinding in the belief that the creditor would also take no further action. Third, it was felt that in an era of widely available credit and increased indebtedness, and a general culture of non payment and open defiance to payment in some specific areas (ie, in relation to the community charge) there was no longer the same stigma attached to debt enforcement, and the diligence of poinding and warrant sale in particular, and thus its deterrent effect was reduced. Importantly, the points above were very much the perceptions of creditors and their agents; information from other parts of the research programme did not suggest that debtors were generally knowledgeable and actively involved in using the protections of the Act or did not care about being in debt (see, for example, Whyte, 1999).

25. But, although the ineffectiveness of the diligence was to a great extent attributed to the reforms of the 1987 Act, those close to its operation also identified a number of external factors which had had an impact. These factors included the following:

Reduced demand for second-hand consumer and household goods: the relative reduction in the price of new electrical goods and, ironically, the general availability of credit meant that people were able to buy new goods more easily.

Developments in consumer protection law: some sheriff officers were of the view that regulations governing liability for the safety of electrical goods meant that items had to be checked by an electrician before they could be sold at auction and that this additional expense affected the viability of a sale. Similarly, regulations governing flammable materials in soft furnishings affected the saleability of household furniture.

The increase in consumer debts: the average debt to be enforced was seen to have increased, thus exacerbating the perceived ineffectiveness of the diligence.

The poor circumstances of debtors: it was acknowledged by some that debtors needed some reasonable protections as embodied by the list of exempt goods and that, having taken account of exempt items, many debtors simply had nothing left to poind.

26. Such factors are obviously independent of the reforms of the 1987 Act but, nevertheless, have an impact on the success of achieving its objectives, ie that the diligence continue to be an effective means of debt enforcement for creditors. They must, therefore, be taken account of in an evaluation of the legislation.

Overall views of creditors on the diligence of poinding and warrant sale

27. Overall, creditors and their agents were generally dissatisfied with the diligence of poinding and sale. While interviewees generally recognised that the system had to provide some protections for debtors, most were of the view that in relation to this diligence - and in particular with regard to the list of exempt goods - the 1987 Act had introduced too many protections. Interviewees were often reluctant to use the diligence believing it was rarely worthwhile to do so.

Assessment of the views of creditors

28. Taken at face value, the views of creditors and their agents suggest that the reforms of the 1987 Act, albeit to some extent in conjunction with other external factors, have resulted in the diligence of poinding and sale no longer constituting 'effective machinery for the recovery of debts'. However, closer assessment of the situation with regard to the general principles supported by the SLC shows a somewhat different picture.

29. The SLC intended the diligence to remain effective in situations where debtors 'can, but will not, pay their debts'. The experience of creditors and their agents suggests that in many instances they were attempting to use the diligence against debtors who, in the terms of the SLC, would be classed as 'can't pay', rather than 'won't pay'. Interviewees believed the diligence to be no longer effective in the majority of domestic situations because, having taken account of the list of exempt goods, either at the stage of the charge or the poinding itself, it was considered not worthwhile, given the available assets, to proceed with the diligence, and interviewees were critical of this. However, this is surely what the SLC intended; that a warrant sale should only be an available option in situations where the debtor had adequate saleable property beyond that prescribed by the list of exempt goods. And the fact that creditors bemoan the ineffectiveness of the poinding and sale in the domestic situation can be seen as a measure of the success of the SLC in protecting the 'can't pay' from the diligence. Particularly telling were the claims (or complaints) that the diligence was now only effective in relation to commercial debtors or in relation to domestic situations where the debtor had obvious poindable items. These would appear to be the very situations in which the SLC intended the diligence to remain effective. In such situations the resulting hardship and personal distress are likely to be minimal and the availability of poindable goods suggest that the debtor is able to pay their debts, albeit through realising non essential assets.

30. In addition, the vocal criticism of interviewees with regard to the effectiveness of the diligence in ordinary domestic situations has to be assessed in the context of the aim of the SLC to 'strike a proper balance between the interests of debtors and creditors'. Thus, the 'ineffectiveness' of the diligence can be justified because of the need (generally accepted by all parties) to protect debtors in poor circumstances, unable to pay their debts. At the same time, though, creditors and their agents viewed the diligence as effective when used as a threat to encourage payment in most domestic situations and when used with a view to realising assets in commercial situations and domestic situations where items of value were available for

poinding. So, despite the protestations of interviewees, the diligence would appear to continue to be effective in recovering debts by realising assets in the circumstances deemed appropriate by the SLC, and when viewed as a 'final sanction' encouraging payment at earlier stages in the process.

The protection of debtors

31. As noted above, the main criticisms of the diligence prior to the Debtors (Scotland) Act 1987 related to its impact - and particularly the social and psychological impact - on the debtor. Consequently, the main thrust of the reforms contained in the 1987 Act was the introduction of adequate protections for debtors. The SLC sought to protect those debtors who did become subject to the diligence by making the procedure less harsh and more humane in its operation. However, it is also important to stress that the SLC anticipated that other reforms also introduced (the introduction of time to pay directions and, in particular, time to pay orders, and the newly introduced diligences against earnings) would result in few poindings and warrant sales being instructed against individual debtors. So, although important measures were introduced into the procedures for the actual diligence, these other reforms were considered just as important to the idea of debtor protection.

32. The statistics show that there has been a downward trend in the use of poindings and warrant sales since the introduction of the 1987 Act (see paragraph 8), and the research suggests that the proportion of warrant sales instructed against private individuals - as opposed to businesses - has also fallen. Connor (1980b) found that in 1978 over three-quarters of warrant sales and over-four fifths of poindings involved private individuals; Flemings (1999b) reported that these figures had fallen to one-third (31%) and two-thirds (64%) in 1991-1992. Such figures certainly suggest that private individuals are being protected from the harsher aspects of the diligence by the very fact that the extent to which it - and particularly the latter stage of the procedure - is used against such debtors has decreased. This decrease in use has taken place in a period when the use of diligence overall has increased but creditors have opted to use other enforcement procedures, particularly earnings arrestments, rather than poindings and sales (see Fleming and Platts, 1999a).

33. Although this drop in use is important and indicates that the SLC's aims have been met to some extent, a full evaluation involves an examination of the experiences of the small number of personal debtors who are still subject to the diligence. The SLC recognised that, for a variety of reasons, some debtors would still be in this position (for example, because they failed to take advantage of the opportunities to apply for time to pay their debt) and that it was necessary to provide further protections once the procedure had started to lessen the impact of the diligence on these people. Interviews with debtors and with professionals working on their behalf (advice workers and solicitors) provide an insight into their experience to judge the success of these reforms.

Experience of the diligence

34. The research found that the general experience of those debtors against whom poindings (and in some cases warrant sales) were instructed was - probably inevitably - negative. As previously found by Adler and Wozniak (1981), the research carried out as part of this evaluation also reported that the impact on debtors was largely social and emotional rather than financial. Interviewees in Whyte's (1999) *Study of Debtors* described the experience of the poindings variously as frightening, stressful, intrusive, embarrassing and

humiliating. The experience of the uplift of goods itself was most commonly referred to as 'traumatic'. However, interviewees did also report how, in some instances, the diligence had a financial impact on them. First, the sheriff officers' fees incurred increased the total debt they owed; second, replacing the items included in a warrant sale meant incurring further expense, and possibly debt; and third, the poinding and possible subsequent sale of 'tools of the trade' was seen as restricting the ability of the debtor to earn a living and thus pay off their debts¹⁷.

35. There were mixed reports on the conduct of the sheriff officers themselves, with some debtors reporting them to have been discreet and sensitive while others had found them to be aggressive and intimidating. The majority of interviewees said that sheriff officers had informed them that basic household items were exempt from the poinding but had not gone on to inform them in any detail of their rights to apply for the release of goods etc. The following specific practices were also reported:

- the adoption of a broad interpretation of the list of exempt goods whereby, in situations of doubt, sheriff officers poinded goods, leaving the initiative with the debtor to seek their release;
- the poinding of items after it was explained they did not belong to the debtor;
- misinformation, whereby debtors were informed that it was only possible to redeem all items by paying the full poinded value, as opposed to being able to redeem individual items;
- the same items being given different valuations by different sheriff officers when more than one poinding had taken place in the same premises.

Practices such as the above all added to the unpleasantness of the experience for debtors. However, it should be noted that there were also positive reports of sheriff officers being helpful and informative and an important source of information to debtors in an isolated position.

Perceptions of the role of the diligence in the debt enforcement process

36. Although only a minority of debtors interviewed for the research had been subject to a poinding or warrant sale, many others reported that they had been threatened with the diligence. The diligence was generally seen as a way of trying to force payment out of debtors. Those who had had poindings instructed against them thought the action had been taken to 'punish' them or to 'teach them a lesson' and they believed that creditors took the action in the knowledge that it would not be effective as a means of recovering money. In addition there was a view that creditors did not put enough effort into establishing payment arrangements before resorting to a poinding. Related to this, there were several reports of people receiving little or no warning before a poinding went ahead (although at the very least a charge would have been required) and other reports of poindings proceeding while negotiations with a view to establishing a payment arrangement were still underway.

¹⁷ Section 16(1)(b) of the Act exempted 'implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any member of his household in the practice of the debtor's or such member's profession, trade or business, not exceeding in aggregate value £500 . . .'. While no clear evidence is available, it is assumed that debtors were referring to the poinding of items outwith this exemption.

37. The general view amongst debtors was that the diligence was unsuccessful in encouraging payment because people simply did not have the money, and certainly the research uncovered no debtors who claimed to have paid their debt in order to avoid the possibility of a poinding or warrant sale. Where the diligence was used, interviewees claimed that creditors had not exhausted all other options before pursuing this option, and in the 5 cases where a sale had gone ahead, the outcome in terms of recovering the money owed was only known in one instance, in which the sale had not cleared the debt. Thus, debtors were generally frustrated by creditors' use - or threatened use - of the diligence seeing it as hasty, vindictive or just not worthwhile.

Making use of the protections provided by the 1987 Act

38. Many of the protections introduced by the 1987 Act operate on the basis of an application to the court being made by the debtor. In other words, the system can be said to be 'rights based', with the initiative resting with the debtor to invoke the protections provided by the Act. If the debtor does not act at the appropriate time they will not benefit from the protections to which they are entitled.

39. Only one of the debtors who had been subject to a poinding had made use of any of the protections relating specifically to the diligence provided by the 1987 Act. This is perhaps not surprising in a small sample of debtors, when *Civil Judicial Statistics* shows very low usage on a national scale (for example, in 1993 there were just 96 applications for the release of goods from a poinding and 56 applications for the recall of a poinding and, although the actual numbers of applications vary from year to year, the general picture of low usage remains unchanged). Low usage itself is not necessarily an indicator of the failure of measures to protect debtors; another possible interpretation would be that creditors and their agents are operating in such a way that debtors do not need to make use of these rights more frequently. However, given that debtors interviewed for the research felt that their goods had been undervalued, and that they reported instances where goods belonging to a third party or exempt goods had been poinded, and sheriff officers, by their own admission, adopted a policy of 'if in doubt, poind it' (see Fleming, 1999a), it is important to consider why people did not make use of the rights contained in the Act.

40. Whyte's (1999) *Study of Debtors* suggests that ignorance of the system may prevent some people from taking action. Under the terms of the 1987 Act, sheriff officers are obliged to inform people of their rights at the time of a poinding. However, the experiences reported by debtors suggest that either this does not always happen or, alternatively, that sheriff officers do provide the required information but that debtors do not understand it because it is too complicated or they simply do not take it in because of the emotionally charged situation in which they find themselves.

41. Most, although not all, debtor interviewees reported that sheriff officers had informed them that they could only poind 'luxury' items but beyond that there were mixed reports regarding what other information they had been given. Some interviewees appeared to have been given no further information about their rights, while for others the sheriff officer had clearly been an important source of information. Thus, it appears that the information provided to debtors was not always in a form appropriate to their needs, or that information was just not provided. Either way, in practical terms, debtors are left uninformed and unable to exercise their rights.

42. Information, and the ability to act upon that information, is crucial to a 'rights based' system such as that embodied by the 1987 Act, where the onus is on the debtor to make use of the protections available to them. There does, however, appear to be a failure of effective information provision, leaving debtors unable to protect themselves. It is perhaps significant that the only reported incidence of a debtor applying for the release of goods was done with the involvement of a money advice worker.

43. Despite the one reported case of a money advice worker being involved in an application for the release of goods, such professionals themselves reported minimal experience of assisting debtors who found themselves subject to the diligence. One possible explanation for this is that those debtors who seek advice do so at a relatively early stage in the enforcement process and so, with the help of their adviser, are able to make use of other options such as time to pay directions and orders or are able to reach a negotiated settlement with the creditor, and thus do not come into contact with poinding and sale procedure. Those advisers who did have experience of the diligence generally preferred to negotiate informally with creditors or their agents (as was the case in other areas of their work) about the release of goods etc. And, as stated previously, they would often choose to take no action in the belief that the diligence would not proceed on the grounds that it would not be worthwhile. Although these informal and laissez-faire strategies suggest that the protections of the 1987 Act are not being used, advice workers noted that they could only operate successfully in this way because of the Act's existence, and the reforms introduced were seen as having a generally beneficial effect on debt enforcement practices and thus on the experiences of debtors.

44. Most solicitors working on behalf of debtors also had very limited experience of dealing with poindings and sales. However, one solicitor took a particularly proactive stance in such situations, attempting to have individual items released from the poinding on the grounds of exemption or undue hardship with the intention of reaching the point where the proceeds of the sale would no longer cover the expenses likely to be incurred, thus giving grounds to have the poinding itself recalled. This interviewee reported a good success rate as a result of pursuing this strategy and was of the view that adequate protections were provided for debtors, but that they were not used to their full potential.

45. This perspective is important as it allows some credence to be attached to the view that the problem is one of information and initiative, rather than a lack of protections per se. Nonetheless poor uptake of the provisions has to be seen as a very real problem in a system relying on the initiative of those affected to at least seek help if they are not able to act on their own behalf. The attitudes of sheriffs - who have the role of hearing applications made by debtors - are somewhat indicative of the problems relating to the situation. A number of sheriffs interviewed expressed concern about the low numbers of applications coming before them, which was generally put down to debtor apathy. However, other sheriffs also noted an unwillingness amongst colleagues to use what discretion they had to intervene on behalf of debtors where they thought this necessary. Only in hearing applications for warrants of sale, when it was necessary to assess whether the likely proceeds of the sale would exceed the expenses incurred in proceeding, did sheriffs appear to play an active part in reaching a decision. Even here, this was not reported by all sheriffs. So, other than where the 1987 Act places a direct responsibility on the sheriff to consider an issue, there is a reluctance to intervene, leaving the onus very much on the debtor to draw matters to the attention of the court. Other sheriffs, on the other hand, thought that the lack of applications may reflect the

success of the 1987 Act in rendering such action unnecessary. Indeed, some sheriffs stated that the Act had made them less likely to act on their own initiative because of the very fact that protections were there for the debtor to use if necessary.

46. The attitudes of sheriffs highlight 2 problems of a rights based system. First, even where there is concern that the system is not being used to its full potential there may be little scope for intervention by sheriffs because of the onus the rules place on debtors to act on their own behalf. Second, the existence of rights can be seen as a solution in itself, with little thought given to the possibility that those with rights may not be able to use them effectively.

The success of the reforms in protecting debtors

47. As with other aspects of the 1987 Act the reforms relating to the diligence of pointing and sale are to a great extent dependent on the success of reforms in other areas of the Act. Only limited numbers of people take advantage of the protection provided by time to pay directions and orders, and those that apply are not always granted the instalment arrangement they request (see Chapter 2). Ironically, the approach adopted by creditors and sheriffs in refusing applications which involve lengthy repayment periods means that the very people whom the SLC sought to protect from the diligence, ie, the most extreme cases of ‘can’t pay’, are those that are left vulnerable to its operation because those offering the lowest instalments are also likely to be unemployed, thus ruling out the option of an earnings arrestment.

48. In terms of the numbers of people who are subject to pointings, and in some cases warrant sales, the 1987 Act would appear to have achieved some success in that statistics show a clear decrease in the use of the diligence (see paragraphs 7 and 8). However, the general experience of those who are subject to the diligence remains largely unchanged, with debtors describing it as stressful and traumatic. It is probably inevitable that a pointing will continue to be an unpleasant experience and, significantly, the SLC aimed to relieve ‘*undue* economic hardship and personal distress, not *all* hardship and personal distress. The research does suggest that although adequate protections are included in the 1987 Act, debtors do not or cannot make use of these without assistance. This is particularly important because of the limited impact of other aspects of the Act in providing debtors with the means to pay their debts. Thus, the fact that the initiative lies very much with the debtor to invoke the protections available to them has meant that the aims of the legislation have not been fully met.

Overall assessment of the reforms to pointing and sale procedure¹⁸

49. The SLC clearly had a difficult task in attempting to balance the interests of debtors and creditors in reforming this diligence. The research evidence suggests, however, that they have been at least partly successful in doing so. Although creditors and their agents were undoubtedly unhappy with the reformed diligence, a close examination of the evidence suggests that the ‘ineffectiveness’ claimed by interviewees can be seen as a reflection of the necessary protections for debtors introduced by the 1987 Act. Introducing such protections was necessarily going to impact on the effectiveness of the diligence in particular circumstances and it is surely justifiable, in the SLC’s terms, that the diligence is only effective in realising assets in commercial situations or where a private individual has obvious pointable

¹⁸ See Annex 1 for comments and suggestions on the more detailed reformed procedures for pointing and warrant sales.

assets. The truth of the matter would appear to be that most debtors do not have significant possessions once account is taken of the list of exempt goods, and as such it is within the spirit of the 1987 Act that they be protected from this diligence, even if that be at the expense of creditors attempting to recover their money.

50. Significantly, as far as creditors and their agents are concerned, the diligence continues to be a credible option against commercial debtors and personal debtors with poindable goods of value. And, importantly, it also continues to be used with some success - explicitly or implicitly - as a threat to encourage payment. Specific aspects of the reforms were criticised by interviewees as having hindered the efficiency of the diligence (see Annex 1), but generally these reforms played an important role in providing protections for debtors and can be justified as such. And, on the other hand, other reforms such as the introduction of 'section 18' notices (see paragraph 22) were actually said to have enhanced the likelihood of recovering money.

51. Ironically, despite creditors believing the effectiveness of the diligence to have been reduced because of the introduction of too much debtor protection, debtors themselves were also dissatisfied with the situation. Despite important reforms such as the introduction of a codified list of exempt goods and the ending of the practice of carrying out sales in the debtor's home and naming the debtor in any publicity, the general experience of the diligence remains largely unchanged for those subject to it. The trauma would appear to be linked directly to the deed at the very heart of the diligence; ie, a stranger entering a person's home and putting a value on personal possessions with a view to their forcible sale. No amount of protections or reforms can realistically remove this aspect of the diligence and thus the emotional stress associated with it.

52. It also should be noted that the threat of the diligence continues to be a cause of stress for debtors because of the limited impact of other reforms of the 1987 Act, namely the time to pay directions and orders which were intended to allow debtors unable to pay the debts outright an opportunity to do so free from the threat of diligence.

53. While the emotional impact of the diligence has been little affected by the reforms, there is a more mixed picture when examining the success of reforms designed to minimise hardship, as opposed to personal distress, once the procedure is actually commenced. The research found that creditors and their agents were less likely to instruct the diligence against personal debtors and this can be seen as a success of the reforms. Further, the list of exempt goods, in particular, has had the effect of removing many people from the scope of the diligence (as reported by creditors), and, even where a poinding has taken place, the few items generally available for inclusion mean that it is often found to be not worthwhile to proceed to a sale.

54. However, statistical evidence and evidence provided by debtors and their advisers suggests that those subject to the diligence are continuing to suffer, in some cases because the rights provided by the 1987 Act for use by those subject to the diligence are not used to their full potential. Significantly, the success of the list of exempt goods in protecting debtors relies much less on the initiative of the debtor, but instead can be seen to have impacted on the practices of creditors, reducing the use of the diligence and thus providing protection for debtors of poor circumstances. Research in the civil law area has consistently found that private individuals have problems in accessing and operating the systems available to them because of a lack of knowledge, resources and expertise (see, for example, Chapman, 1995;

Whelan, 1990). Whyte's (1999) *Study of Debtors* - and other studies in this programme - has shown debtors as a group to have low levels of knowledge and understanding at various stages of the debt recovery process and, crucially, to also have a tendency to ignore the situation in which they find themselves. Such characteristics are likely to have an impact on the success of a system where the initiative lies with the debtor, and this appears to have been the case here. The basis for accessing the available protections in relation to poinding and warrant sale procedure will have to be addressed if the success of the system is to be further improved.

Chapter 5: Using the procedures of the Debtors (Scotland) Act 1987

Background to the reforms

1. One of the aims of the Debtors (Scotland) Act 1987 was that the procedures contained therein should be accessible to those that needed to make use of them. Research carried out for the SLC in the 1980s highlighted the difficulties which groups like debtors have in accessing their legal rights. Adler and Wozniak (1981) found that debtors subject to enforcement procedures often struggled to understand what had happened, had difficulty comprehending and, where appropriate, responding to documents served upon them, and often did not seek assistance. It was for these reasons that the SLC recommended including in the legislation a package of measures to assist debtors to take advantage of their new protections. However, it should be noted that this is not a problem associated only with those involved in debt actions. Other research has shown that problems of access to justice are encountered by individuals who come into contact with the legal system for a wide range of reasons (see, for example, Chapman, 1995). The particular intention with regard to the 1987 Act was to allow debtors to make use of the new protections introduced by the legislation. Under the heading 'Assisting debtors to obtain the protection of the court' the SLC noted the following:

We have already observed that the new justice to be administered by the courts must be accessible justice and appear as such to those for whom it is designed. The formulation of procedural rules and other measures which would put the new safeguards within reach of debtors presents difficulties which must be solved if reform is to be successful. (SLC Report: 56)

2. Thus, there was clear recognition that access to the law was an issue that had to be dealt with in the context of any subsequent legislation and that not to do so would hinder the success of the legislation in respect of its overall aims. This theme was indeed taken forward by policy makers with the inclusion in the 1987 Act of a package of measures to assist debtors.

3. An important aspect of the evaluation of the legislation is therefore an assessment of whether the measures introduced have allowed debtors access to the protection as intended. This is a theme which has been addressed to some extent in Chapters 2 to 4, but this chapter allows the relevant material to be drawn together and assessed in its entirety, as a fundamental element of the reforms.

4. The measures introduced by the 1987 Act and related Act of Sederunt in order to 'assist debtors to obtain the protection of the court' included the following, as recommended by the SLC:

- (i) a 'no expenses' rule was introduced, whereby, as a general rule, in relation to an application under the 1987 Act, neither party is liable for the expenses of the other, regardless of the application's outcome;
- (ii) new statutory duties were given to the sheriff clerk of providing procedural information to debtors and assisting with the completion of forms;

- (iii) sheriff clerk responsibility for the service of forms in relation to applications made under the Act;
- (iv) tenabling of the court to make rules permitting lay representation, and such representation is now permitted before the sheriff;
- (v) forms prescribed by the rules intended to be in simple and intelligible language;
- (vi) notification of the debtor's rights are contained on forms served at various points in the diligence process;
- (vii) sheriff has jurisdiction over enforcement of decrees, even in the case of decrees awarded in the Court of Session.

5. This chapter examines, in turn, 5 of the measures recommended by the SLC and assesses their impact on the accessibility of the protections contained in the 1987 Act. In terms of the experiences reported by debtors in the research interviews some of the measures had greater relevance to them than others, and this is reflected in the discussion below. No information relevant to the issue of accessibility on the sheriff clerk's role in serving documents (iii above) or the sheriff court's jurisdiction for the enforcement of decrees (vii) emerged from the research and these measures are excluded from the following discussion. Further, the measures introduced by the Act have also had an impact on other groups (ie creditors and the various facilitators) involved in its operation and their views and experiences are also covered where applicable.

Prescribed forms

6. The SLC noted that the research undertaken by the University of Edinburgh (Adler and Wozniak, 1981) and by OPCS (Gregory and Monk, 1981) had found that debtors had difficulty understanding legal and court documents, and they recommended that this problem be dealt with by introducing prescribed forms for use at different stages in the procedures which would use 'simple and intelligible language'. Following this recommendation, a series of prescribed forms (64 in all) was introduced via the Act of Sederunt. The various forms cover such eventualities as applying for time to pay directions and orders, applying for the recall of a poinding and the release of individual items from a poinding, applying for and objecting to the granting of a warrant of sale, reporting a poinding or a warrant sale and seeking to establish a conjoined arrestment order. All the forms are either to be used by debtors in making applications or are served on debtors when action is taken by the creditor. Either way, it is important that the forms are easily understood and used.

Forms used in applying for a time to pay direction

7. The forms most commonly used by debtors are those used in making an application for a time to pay direction. Statistics show that in 1993, 16,000 such applications were made; this compares with the handful of applications made for the release of goods from a poinding, for the recall of a poinding or for a time to pay order (see Chapter 2). In addition, even where an application for a time to pay direction is not subsequently made, all debtors will encounter the application form as it is issued along with the summons document (in the case of small claims, the application form is an integral part of the summons). Whyte's (1999) *Study of Debtors*

sought information on whether interviewees had applied for a time to pay direction. Those that had were asked about their experience of doing so; those that had not were asked why they had not done so. Both groups were able to provide information relevant to an assessment of the forms.

8. The majority of interviewees who had applied for a time to pay direction were positive about the forms. Although there were some who noted that the language had caused them some difficulties, few reported problems in actually completing the form. From this group of debtors there was one significant proposal for improving the forms; that of providing more room for details of income and expenditure and more direction as to what should be included in this part of the application.

9. However, although interviewees did not generally criticise the forms, not everyone who applied for a time to pay direction appeared to fully understand the procedure. For example, a number of people did not know who made a decision on the application (ie the creditor or the court) and people were often unaware that they could attend court in support of their application. So, although the forms would seem to be simple enough for people to complete, they were not necessarily effective in conveying information about the operation of the procedure.

10. The information relating to those who did not use the procedure was just as instructive in appraising the forms. A number of advice workers reported low awareness of time to pay directions amongst debtors, and a number of debtors said that they had not applied because they thought the offer would be rejected by the creditor and did not realise that the court had a role in adjudicating on such claims. Again, it would appear that the forms are not always providing an effective vehicle for conveying information about the existence of the option and the operation of the procedure.

11. The problems of those who did not apply for time to pay were taken up by advisers (both advice workers and solicitors). They believed that there was only limited awareness of time to pay directions, in spite of inclusion of the forms with summons documents, and that the forms were too complicated for people to understand and complete unassisted. For those that did use the procedure, advisers suggested that more information needed to be provided about what happened after an application was made (and certainly the experience of the debtors themselves suggested that this was a problem) and that more space should be provided for details of income and expenditure.

Other forms encountered in the debt enforcement process

12. Once enforcement action has started debtors are likely to encounter a variety of documents and forms. The first form encountered in most cases would be the charge. Although the form of charge is not governed by the 1987 Act per se but is regulated by The Act of Sederunt (Form of charge for payment) 1988, it is an integral part of the diligence process and it is therefore crucial that it is understood by debtors. It is thus worth noting that the implications of the charge were not fully understood by all debtors interviewed for the research.

13. Other forms encountered by the sample of debtors were in relation to time to pay orders and earnings arrestments. As with time to pay directions, those who had applied for a time to pay order had generally found the forms understandable and easy to use. Forms

relating to earnings arrestments, such as the schedule of arrestment, were also generally well received, with debtors saying that they were able to understand the schedule and had found the table of deductions helpful and informative. In relation to earnings arrestments and conjoined arrestment orders (where the debtor should also receive a copy of the schedule) the only reported problem was that a small number of interviewees did not appear to have received a copy and felt disadvantaged by this. In relation to earnings arrestments it is also important to note that employers also found the forms easy to understand and implement.

Assessment of the forms

14. Overall, while the research suggests that those who used the various forms available had few problems in doing so, there do seem to be 2 rather paradoxical problems relating to providing information through the forms; firstly, that insufficient information is provided, and secondly that the information that is provided is not always fully understood. For example, with regard to time to pay directions debtors are not informed that they must contact the court to find out the outcome of their application and the research found that some debtors were unaware that their application had been rejected until a charge was served on them; on the other hand misunderstandings about the procedure (eg the belief that the court had sole power to decide on the application, or that the creditor had sole power, without appreciating the two-stage process) show that what information is included on the forms is not necessarily comprehended.

15. Of course, there is a limit to the amount of information which the forms can include and it should be noted that additional information is available in the SCA booklet on debt enforcement procedures (SCA, 1988a) or, in the case of time to pay directions in connection with small claims actions, in the small claims booklet and guide (SCA 1988a, 1988b). Such sources could be useful for those who are able to comprehend the information provided. However, the research found that such literature was not routinely provided by court staff in response to queries (in fact most court staff were either unaware of the literature or reported that the court did not have any in stock). In addition, advice workers and solicitors were not generally familiar with or did not use the SCA literature. None of the debtors interviewed had come across the SCA leaflet, and the one debtor in the study who reported using an information leaflet used one prepared by a local money advice centre. Although some agencies did produce their own leaflets, there was a general belief amongst advisers that the role for written information in providing advice was a limited one, and that verbal advice was preferable because of the low levels of understanding and the reaction of panic amongst debtors.

16. A number of debtors talked about their feeling of panic when they received the summons from the court. Another common reaction was to ignore official documentation in the hope that the problem would 'go away'. Such responses were familiar to advice workers who dealt with debtors who were in a state of anxiety or who had only sought help once their situation could no longer be ignored; that is, once enforcement action had commenced. Given these typical responses to court action it is perhaps not surprising that information linked to the summons or other court documents does not always get through to debtors.

17. Thus, the research suggests that the aim of providing simple and intelligible forms has had mixed success. Those that have used the forms have found them easy to complete; the problem has been in conveying sufficient, comprehensible information to debtors about the procedures involved. Others have not understood sufficiently to make an application. This is

something which is not easily resolved. The nature of the target population and their typical reactions to their situations are inhibiting factors which may help explain the apparent failings of the measure. Nevertheless the possibility of improving the forms is one that needs to be examined fully.

Notifying debtors of their rights

18. The SLC recommended that forms served on debtors should be used to inform them of their rights under the 1987 Act. To this end, forms such as the schedule of pointing include details of the right to apply for the release of pointed items, to recall the pointing or to redeem items by payment of the appraised value. The application for warrant of sale, as served on the debtor, includes details of the right to object to the application. The inclusion of such information on forms which were required to be served on the debtor as part of the diligence process was intended to ensure that the protections available under the 1987 Act were drawn to the attention of those who may require to use them at the appropriate time. In this way, finding out about their rights does not rely on the debtor taking the initiative and actively seeking information about possible options.

19. The research suggests that giving effect to this recommendation has not had a significant impact on debtors' access to the protections of the 1987 Act. The study of debtors found that there were low levels of awareness of the options available to them amongst those against whom diligence was instructed. Assuming that people received the required documentation it is necessary to conclude that they either did not read the forms or did not understand the information contained therein, with the end result that people remained ill informed about their rights.

20. As previously noted, all the evidence of the current research suggests that debtors as a group are not well disposed to responding to information contained in official documentation. This situation was reported in previous research (Adler and Wozniak, 1981), and, in addition to giving debtors details of their rights, the need for assistance was recognised by the inclusion of a statement on all forms advising debtors to seek advice. Again the research suggests that few people respond to this, with only a minority of debtors reporting that they sought advice at these critical points. Those that did seek advice, though, were able to access their rights by either applying for a time to pay order or applying for the release of goods from a pointing (although it is not clear whether they sought advice as a result of the notice on the forms).

21. In terms of bringing rights to the notice of debtors it is important to note that no mention is made of time to pay orders on any of the forms served on the debtor. This would seem to be something of an omission, given that the SLC set great store by the new 'diligence stoppers', seeing them as key to the successful operation of the reforms by providing debtors with the means to stop the 'steamroller' of diligence (Nichols, 1987). The research found low usage and low levels of awareness of this option with those debtors who had made applications generally doing so after seeking advice about the situation in which they found themselves and only then being informed of the option. It is clear from the research that providing written information on forms is not the whole solution to the problem of informing debtors of their rights. Nevertheless, not including reference to time to pay orders on any forms rather precludes the possibility of anyone finding out about their existence unless they seek advice, and seems to be rather contrary to the spirit of the SLC's recommendation.

22. In sum, the information provided on the various forms about the protections of the 1987 Act does not appear to have significantly empowered debtors. A number of possible factors appear to contribute to this: poor understanding of the information provided; inability to respond to information at what is a difficult time for individuals; general reluctance to respond to official documentation; a reluctance to seek advice. This last point is important as the research suggests that the protections of the Act were most likely to be used - and used successfully - if personal, rather than written, advice and information was utilised. For example, time to pay directions and orders were most likely to be maintained if advice was sought and the only application for the release of a poinded item was made with the involvement of an advice worker.

23. Advisers and court staff were keen to stress the importance of verbal advice in dealing with debtors, seeing written information as a secondary, back-up resource. Obtaining personal advice from these sources, however, relies on the debtor taking the initiative in seeking advice, something that debtors as a group did not generally do. It is, therefore, worth noting that for some debtors the sheriff officer proved to be a useful source of information (in particular, one debtor reported that it was the sheriff officer who informed him of the possibility of applying for a time to pay order). And, as the only person likely to initiate contact with the debtor during the enforcement process, sheriff officer responsibilities in this area could perhaps be further examined. That is not to say that there is not a role for written information in the enforcement process but, in its present form, it is not easily accessible to debtors or may not be sufficient for the needs of all.

24. Thus, the written information provided needs to further examined. If rights are to be provided - as in the case of the Debtors (Scotland) Act - it is equally important that people are made aware of their rights in an effective way. Further simplification of information provided or the preparation of stage-specific information leaflets sent directly to all debtors affected could both be considered¹⁹, as could putting further emphasis on available advice sources in the literature provided. Such steps could all help improve debtors' awareness of their rights and thus their use of these rights.

Lay representation

25. The 1987 Act enabled the making of rules permitting lay representation. This provision recognised that debtors in particular may need some assistance in pursuing applications made under the Act, although legal representation was not thought to be necessary (see SLC Report: 57). In connection with this assumption (that applications could be pursued without legal representation) civil legal aid is not generally available in connection with proceedings under the 1987 Act.

26. Only 2 interviewees in the study of debtors reported that they had made use of this provision, one in connection with a time to pay direction and one in connection with an application for release of an item from a poinding. Most hearings in which debtors were involved were in connection with time to pay directions and in all such cases the debtors represented themselves. It is thus important to look at the experiences of those who chose not to use lay representation, all of whom had found attending court in support of their application a difficult experience, typically describing it as frightening and terrifying, but despite this all the interviewees were glad that they had attended as they believed it had been

¹⁹ Research in the area of welfare benefits has suggested that targeted and focused information is most successful in increasing awareness and uptake (see, for example, Craig, 1991).

beneficial, or at least had given them the opportunity to state their case. One interviewee, in particular, reported how the Sheriff had assisted her by explaining procedure and had looked after her interests by giving her an opportunity to lower the instalments offered.

The use of lay representation

27. *Civil Judicial Statistics* show that lay representation is not common. Figures for 1993 (the last year for which data are available) show that less than 2000 appearances were recorded throughout Scotland. Meanwhile, Fleming and Platts' (1999a) found that, in relation to hearings to adjudicate on time to pay directions, one-third of defenders appeared without representation, while two-thirds of defenders did not appear at all in support of their case. Given these statistics, it is not surprising that use of lay representation was not common amongst the interviewees in Whyte's (1999) *Study of Debtors*.

28. This situation was reflected in the experiences of sheriffs and court staff and advisers themselves, as reported by Fleming (1999a). Sheriffs and court staff noted little experience of lay representatives, although where such representatives had appeared in court, they were regarded positively. None of the advisers interviewed had personally represented a client in connection with an application under the 1987 Act, although most had done representation work in connection with other types of hearings (eg in connection with heritable actions, or small claims full hearings). One reason cited for not getting involved in this type of activity was that of limited resources, with representation work being seen as expensive in terms of time. More generally, though, the emphasis which advice workers put on informal negotiation and their reported success in this area, means that the cases in which advisers are involved are less likely to result in a court hearing.

29. The provision would therefore appear to have been of limited assistance to debtors wishing to take advantage of their rights under the 1987 Act. This is, however, largely symptomatic of the way that debtors behave (ie often not seeking advice or not responding correctly to court documents, for example by not appearing in court as required) and the way that advice workers operate in assisting debtors who do seek their help.

30. Lay representation was introduced to assist debtors in presenting their case at court, given that legal representation would be unlikely to be an option as legal aid was not generally available. And, although lay representation was not used to any great extent, the experience of debtors suggests that the need for some type of assistance in this area has not gone away. The experience of those debtors who did appear in court unrepresented suggests that they would have appreciated some sort of assistance. The views of those who did not attend and were not represented in any way also suggest that a problem does, nevertheless, exist.

31. Debtors put forward a variety of reasons for not attending their court hearing:

- a fear of the hearing being formal and difficult to understand and being unable to cope with the situation;
- being unable to afford a solicitor but being unwilling to attend court without representation; being unaware that the option to attend court was available;
- a belief that there was nothing to be gained by attending; simply being frightened of the idea of attending court.

Along with the difficulties encountered by those who represented themselves at court, these are the very problems which the provision allowing lay representation sought to address. The fact that they still exist is therefore an issue of concern and it is necessary to examine why significant proportions of debtors either appear unrepresented or are not represented in any way when this option is open to them.

Non use of lay representation

32. A number of factors conspire against debtors making use of this provision. Firstly, and perhaps rather obviously, in order for lay representation to be a possibility, debtors must seek assistance. However, as Whyte (1999) has shown, debtors do not always do this. This research found that less than a third of interviewees had sought any sort of advice (excluding those who had sought information from the sheriff clerk or a sheriff officer) in connection with their debt. This proportion included those who had sought advice from a solicitor and is likely to over represent the situation in the population as a whole as the research had used referrals from advice agencies as one means of obtaining a sample of interviewees. The majority of interviewees, therefore, had not sought advice and gave a variety of reasons for this, as follows:

- (i) the cost of engaging a solicitor (with no consideration given to other sources of advice)
- (ii) ignorance of the existence of free advice services
- (iii) the costs involved with seeing an advice worker (travel expenses and time)
- (iv) a belief that there was nothing to be gained by seeking advice
- (v) not knowing where to go to seek advice
- (vi) a wish to maintain privacy over their own affairs
- (vii) a belief that responsibility for resolving the problem lay with the individual
- (viii) a lack of confidence in the service provided by advice agencies.

33. Some of the more ‘personal’ reasons listed (such as (vi) and (vii)) are perhaps beyond the realm of policy makers, but others, while external to the Debtors (Scotland) Act 1987, obviously have an impact on its operation, and need to be given some consideration. The basic issues are ones of knowledge of and access to appropriate advice sources. The 1987 Act allows for what appears to be a suitable solution to the problems experienced by debtors with regard to court appearances but if people cannot access the advice sector they cannot access the possibility of lay representation.

34. However, easier access to the advice sector may not necessarily increase lay representation. Firstly, a number of advice workers interviewed in the research suggested that they either could not cope with greater numbers of clients or were reluctant to get involved in representation activity because it was so resource intensive (similar findings were reported by Jones *et al.* (1991) in earlier research looking at the small claims procedure). Secondly, and

paradoxically, even if greater numbers of debtors received assistance from advice workers, it is not clear to what extent lay representation would increase because of the general preference amongst advisers to negotiate informally with creditors wherever possible, rather than use the provisions of the 1987 Act. Thirdly, the tendency of debtors to ignore official correspondence or fail to understand its serious implications rather militates against those most in need actually seeking advice.

35. There is a general point to be made, though, regarding the role of advice services in the debt enforcement process. Those that sought assistance from an advice agency found it to be of great benefit, both in practical terms in helping them deal with their predicament (eg negotiating with creditors, assisting with time to pay applications) and in emotional terms in relieving the stress of the situation in which they found themselves. Debtors reported that advisers had helped them in situations where they could not have coped alone. In other words, the assistance they received allowed them to deal with the different stages of litigation and debt enforcement in general and, where appropriate, the provisions of the 1987 Act.

The impact of lay representation

36. The potential benefits of lay representation in relation to court hearings should not be underestimated, but the research evidence suggests that increased advice input at other stages of the debt enforcement system would probably have a greater impact on the experience of debtors. This issue is, though, outwith the scope of the 1987 Act and the remit of the Scottish Courts Administration.

Advice from the sheriff clerk

37. The Debtors (Scotland) Act gave the sheriff clerk a role in providing assistance to debtors. The role was defined in Section 96(2) of the Act as follows:

The sheriff clerk shall, if requested by the debtor:

- (a) provide him with information as to the procedures available to him under this Act; and
- (b) without prejudice to subsection (2) of section 6 of this Act, assist with the completion of any form required in connection with any proceedings under this Act,

but the sheriff clerk shall not be liable for any error or omission by him in performing the duties imposed on him by this subsection or that subsection.

The summons form and other forms used in proceedings under the Act list the sheriff clerk as a possible source for those that need advice. Despite this, Whyte (1999) found that only a small number of debtors sought advice at the sheriff court. There were mixed views from those who had, but most regarded the court as an important source of information.

38. Court staff themselves were asked about their role in providing assistance to debtors. In line with the small number of debtors who reported seeking advice at the court, the staff interviewed said that they received few enquiries from the public, either pre or post decree, and that more enquiries were received from creditors than debtors. Those enquiries that were

received, however, were seen as time consuming, particularly where people did not understand the procedural complexities of the 1987 Act. Court staff themselves regarded the Act as a complex piece of legislation and stressed the importance of thorough training.

39. The type of information which court staff could provide was an issue for the interviewees who were conscious of the distinction between procedural information and advice. They were aware that their role restricted them to providing factual information on the procedures of the Act but that people often wanted advice about what course of action they should take, and staff found themselves in a difficult position. Nevertheless, some court staff were reluctant to refer people on to advice agencies for assistance because the area of debt enforcement was seen as very complicated and the staff regarded themselves as more knowledgeable than advice workers and thus more able to help. However, this attitude rather ignores the different roles of the court and advice agencies; the former is restricted to providing information and limited assistance (eg with form completion), while the latter can provide advice as to what action should be taken and can effectively work on behalf of the party seeking assistance, and also tackle the wider financial problems of the debtor.

40. In general the research suggests that the provisions allowing the sheriff clerk to assist debtors would appear to have had only a limited impact on their experience with few people making use of this opportunity. However, the views of court staff themselves suggest that court staff who, by the very nature of their job are knowledgeable about the provisions of the 1987 Act, could be a valuable resource for debtors with their poor knowledge of this system. Once again, though, there is a problem in getting debtors to make use of all the resources available to them.

The ‘no expenses’ rule

41. A ‘no expenses’ rule was introduced by the 1987 Act meaning that (with the exception of ‘frivolous’ applications) each party bore their own costs, regardless of the outcome of an application. As such, the intention was to ensure that debtors were not deterred from making appropriate applications by the fear of having to pay the other party’s costs should the application fail. The research does not provide a great deal of information to allow the success of this measure to be assessed. No debtor made direct reference to the ‘no expenses’ position as having influenced their behaviour and encouraged them to use the protections available to them. Cost was a factor for some people who did not use the procedures, but it was in terms of their own costs, eg the costs of instructing a solicitor, the costs of seeking advice, the costs of attending court.

42. It is, however, also possible to look at the ‘no expenses’ rule from the alternative perspective of creditors and their agents. While there was some criticism of the rule from these groups, most interviewees were content with the provision and, furthermore, no interviewee was deterred from taking action they thought necessary because of its existence.

43. The research suggests that other cost factors played a bigger part in the experience of debtors than the no expenses rule, and issues discussed elsewhere in this chapter - and throughout the report - suggest that there are other important obstacles to access to the law which mean that the possibility of being liable for the other party’s expenses is not generally a major consideration. The low usage of most measures (with the exception of time to pay

directions where liability for litigation expenses rather clouds the issue²⁰) means it is difficult to assess the importance of the no expenses rule. The research does, however, suggest that the rule does not deny access to creditors so, although clearly designed to assist debtors to protect themselves, this does not appear to have been to the disadvantage of creditors.

Knowledge and understanding of the system

44. As well as examining the individual aspects of the package of measures specifically introduced to assist debtors, it is also useful to take a broader view of the knowledge and understanding such people have of the debt recovery system as a whole (ie, including both the court and diligence stages).

45. Whyte (1999) found that there was a generally poor level of knowledge and understanding amongst interviewees. However, this was not confined to the diligence stages but was apparent at the early stages of litigation as well. In interviews debtors were often unclear about what had happened in their case, and why it had happened. The report highlighted a number of significant gaps in the knowledge and understanding of debtors at various stages in the debt recovery process, as follows:

- Debtors did not always understand the summons document served on them when litigation was initiated. The language used was noted as a problem and as a result the summons was often ignored.
- Some debtors did not appreciate that they could attend court to defend the action or to put their case in applying for a time to pay direction.
- There was little knowledge about enforcement procedures.
- Debtors did not understand the implications of the charge, ie that no payment within 14 days would open up the possibility of diligence.
- Other than where people had sought advice at an appropriate point in the procedures, there was low awareness of time to pay orders.
- There was a general lack of awareness of poinding and warrant sale procedure and the rights of debtors subject to the diligence.

46. With regard to the 1987 Act, the knowledge gaps noted above relate to areas where measures had been taken to provide debtors with necessary information. For example, application forms for time to pay directions were designed to be simple to understand and use, documents served during the enforcement process include information detailing the debtor's rights.

47. While the language used in court and diligence documentation was noted as a factor contributing to the low levels of knowledge and understanding amongst debtors, the general response of debtors to their situation is also likely to have an impact. The research reported

²⁰ Applications for time to pay directions are considered at the pre decree stage of debt enforcement. Thus, although parties would not be liable for expenses resulting solely from the application, expenses would be awardable in relation to the principal claim itself. The court decision regarding the claim, any expenses and any time to pay direction would generally be made known as a package.

that a common response amongst debtors to their financial problems in general was to ignore the situation, and a common response to the onset of litigation or diligence was either to continue to ignore the situation or to panic, with the point in the process at which people panicked varying from one individual to the next. Such responses are understandable in the face of what is clearly a stressful situation but are not conducive to taking in and understanding new and inevitably somewhat complicated information (whatever efforts are made to simplify it).

48. This picture was confirmed by advice workers and solicitors working on behalf of debtors. There was a common view that levels of knowledge and understanding were low amongst debtors. In this respect interviewees noted both the forms and other documentation as being difficult for debtors to understand, as were the procedures in general. Amongst both advice workers and solicitors there was a belief that debtors did not want advice and information but wanted to be able to hand their problems over to somebody else to sort out for them. Advisers reported making little use of written information when advising clients because it was felt that debtors did not understand it. The state of panic reported by debtors themselves was also recognised by advisers who saw this as an obstacle to debtors assimilating and responding to information.

49. This then provides some insight into the context in which the steps introduced by the 1987 Act to assist debtors must operate. It is clearly too simplistic to assume that the steps taken would guarantee access to and successful utilisation of the protections provided by the Act. As has been noted elsewhere (see, for example Chapter 4, paragraphs 37 to 45; Chapter 5, paragraph 28) a significant obstacle to the 1987 Act achieving its aims of providing effective debtor protection is the extent to which the system relies on the debtor acting on his or her own initiative, even if that only involves taking action to seek appropriate advice. However, the common response of the debtor, in either ignoring the situation or panicking, and their problems in understanding or absorbing information provided, rather calls into question this underlying assumption of the 1987 Act.

Overall assessment of the measures designed to assist debtors to obtain the protection of the court

50. The recommendations put forward by the SLC - all of which were subsequently enacted in the Debtors (Scotland) Act 1987 or the related Act of Sederunt - were reasonable responses to the problems debtors encountered as reported in research carried out by Adler and Wozniak (1981) and Gregory and Monk (1981). However, the recent research, and particularly that by Whyte (1999) shows that the same problems continue to exist, ie debtors do not use or do not find it easy to use the rights available to them. The SLC believed that 'the reluctance of debtors to approach the courts for protection could to a great extent be overcome' but the research suggests that the measures introduced by the Act and its enabling legislation have not allowed this to be achieved and the research has merely reinforced the previous findings of research.

51. The research suggested that the measures introduced are helpful - and have proved to be successful in a number of important aspects (eg those debtors who completed forms found them simple to use; most who did so appreciated the opportunity to present their case in court) - but are not on their own sufficient to ensure that all debtors are able to obtain the protection of the courts. The package of measures is probably of most assistance to the debtor who has the competency to take some initial steps to protect themselves, even if that

just involves seeking advice. What these measures cannot do though is deal with the situations of debtor apathy, of debtors ignoring their situation in the hope it will go away, or of debtors not seeking assistance. Responses such as these to court action or enforcement action are significant obstacles to debtors being able to protect themselves.

52. To a great extent the success of the Debtors (Scotland) Act 1987, based as it was on a system of 'discretionary control of diligence ... on voluntary application by (the) debtor', in providing debtor protection depended on the assumption that debtor 'reluctance' (to approach the courts) could be overcome. The Act provided rights which could be invoked on the debtor's initiative. However, the research has shown that, despite the inclusion of measures intended to address the problems of debtors, debtors do not use the rights available to them. This prevailing behaviour amongst debtors means that a 'rights based' system cannot easily meet its objectives, but nevertheless there is likely to be some scope for improving the information provided to debtors, increasing the levels of knowledge and awareness, and allowing greater numbers to protect themselves, as intended by the Act.

Chapter 6: Conclusion

1. The preceding chapters in this report have provided an evaluation of each of the major areas of reform dealt with by the Debtors (Scotland) Act 1987. This chapter attempts to draw together all the available material and provide an evaluation of the 1987 Act as a whole and specifically to address the overall aims of the research programme. In other words, this chapter will assess whether the Act has been successful in achieving its policy objectives, the reasons why it has and has not been successful in different areas and the steps which could be taken to improve the situation where required. Each of the research aims is addressed in turn, before turning to a more general discussion of the Act and its operation.

Addressing the aims of the research

Aim 1: To evaluate how the Act is working in practice and the extent to which it is meeting its 2 main objectives and achieving an equitable balance between them.

2. The programme of research uncovered a great deal of information about how the 1987 Act is working in practice. The detail of this is contained in the individual research reports relating to different aspects of the programme and in the preceding chapters of this Overview. It is, however, worthwhile recapping on some of the key features of how the Act is operating before moving on to discussion of the policy objectives.

3. It is, first of all, important to note that, despite discontent with the system, creditors continue to make use of the 2 main diligences available for use in consumer debt cases, ie poinding and warrant sale and arrestment of earnings. The reforms of the 1987 Act have, however, resulted in the earnings arrestment becoming the most commonly used diligence in such cases, while the use of poindings and warrant sales has decreased significantly. Because of the need to protect debtors, the circumstances in which poinding and warrant sale can be used effectively have been reduced and this is reflected in use of the diligence. It was, though, generally felt that the existence of the diligence as a 'final sanction' in the debt enforcement system still represented an effective lever in obtaining payment from debtors.

4. In relation to time to pay directions and orders, creditors were generally happy with the principle of receiving payment of debts through such arrangements, although there were some reservations about the amounts received.

5. Debtors, though, do not appear to make full use of the measures provided in the Act which allow them time to pay their debts free from the threat of diligence or allow them to protect themselves following the onset of diligence. The low usage of time to pay directions is particularly significant because this measure could potentially remove large numbers of people from the enforcement process.

6. Advisers working on behalf of debtors (both advice workers and solicitors) made only limited use of the protections of the 1987 Act, preferring instead to use informal negotiations with creditors, often because they found this approach more appropriate in the cases of clients with multiple debts. Agents working on behalf of creditors also noted instances where they chose to side-step the provisions of the 1987 Act by employing such strategies as door-to-door collection of debts as an alternative to formal enforcement. In both cases, however, these practices appear to be influenced by the introduction of the Act. Advisers felt that their position was strengthened because of the perceived desire of creditors to avoid formal

procedures; creditors and their agents were indeed inclined to opt for informal recovery as they saw their options limited in terms of formal procedures (eg, because of the perceived ineffectiveness of poindings and warrant sales). Much in the same way as parties can be said to be ‘bargaining in the shadow of the law’ following a dispute (see Genn, 1987), creditors and debtors (or more likely their advisers) can be said to be negotiating in the shadow of the law as it is the existence of the 1987 Act which gives rise to the behaviour patterns identified in the research. Thus, beyond the actual use of the provisions of the 1987 Act, there are subtleties to the way it has operated, by influencing the attitudes and behaviour of those involved in the debt recovery system.

7. While the use of time to pay directions and orders does appear to be limited, it is nevertheless important to note that those debtors who did make applications found it relatively easy to do so and most applications were granted. As such, therefore, the provisions allowed some debtors to pay their debts free from the threat of diligence.

8. Although very broad, the above points provide a brief summary of how the Debtors (Scotland) Act 1987 is operating. The operation of the Act has implications for the realisation of the policy objectives of the legislation. And, reviewing the operation of the Act as a whole, it is possible to conclude that the Act has been more successful in some areas than others. In general, the 1987 Act has provided effective machinery for creditors to enforce their debts, an important objective for the SLC. The new earnings arrestments have proved to be particularly successful, while poindings and sales are still used effectively as a threat to encourage payment, and as a way of realising assets in those cases where the debtor has sufficient goods once account has been taken of those items exempt from the diligence. Creditors were often critical of what they saw as its reduced effectiveness, but the curtailment of their use of the diligence is a reflection of the need to protect debtors, and has to be seen in that light. The 1987 Act, though, has been less successful in protecting debtors. Although significant protections were included in the legislation, there is a continuing problem of non use which has contributed significantly to the limited success of the Act. Debtors do not make full use of the measures contained in the Act and so remain vulnerable to undue harshness and personal distress.

9. The SLC envisaged a situation where the majority of those who were unable rather than unwilling to pay their debts would take advantage of the opportunity to apply for a time to pay direction at the decree stage and thus protect themselves from the threat of diligence. Those that failed to apply at this stage would still have a second opportunity to do so by applying for a time to pay order after the onset of diligence. Thus, debtors would be able to stop subsequent steps in the composite diligence of poinding and warrant sale. And, in the case of an earnings arrestment could seek to establish a time to pay order with lower payments which took account of their individual circumstances. The expected minority of debtors who would remain at risk of diligence would be those unwilling but able to pay their debts, against whom diligence is justified, and those who had unfortunately missed opportunities to apply for time to pay or had defaulted on such an arrangement. Acknowledging that diligence would be inevitable in some cases, the SLC provided further protections, some statutory like the list of exempt goods, and some for which the debtor had a right to apply to the court. Thus it was envisaged that even once diligence commenced, debtors would be able to take steps to prevent undue harshness or personal distress.

10. Under such a system there was, in theory, little reason why anyone willing to pay their debts should become subject to diligence. However, Whyte (1999) has shown that this

continues to be the case. It is, though, possible to identify a number of factors which have led to this situation. The factors are often related and reflect the inter-dependence of different aspects of the legislation.

11. The interdependence of different aspects of the 1987 Act is crucial to the way it operates, as success or failure in one area has an impact on other aspects of the legislation. The operation of time to pay directions and orders is particularly important here. These measures were intended to prevent debtors from becoming subject to diligence but, as the research has shown, they have not been used to the extent that was anticipated, or applications have not been granted, with the consequence that debtors who are willing but unable to pay their debts have been left vulnerable to diligence. Once diligence has started the very limited use of time to pay orders is particularly crucial. For example, although the SLC opted for a simple sliding scale of deductions for earnings arrestments which took no account of individual circumstances - and in so doing achieved the aim of ease of implementation for employers - they recognised that this would not be appropriate in all situations and saw the time to pay order as the route for having any such circumstances taken into account. But, because debtors have not made use of time to pay orders, those with multiple debts or with other financial commitments have found the deductions under an earnings arrestment hard to cope with.

12. The fact that debtors do not make use of the protections available to them is, of course, fundamental to the issue of the success of the 1987 Act. This is apparent at all stages of the debt recovery process. However, based on the evidence of other schemes (the SLC cited the then recently introduced simplified divorce proceedings, the Dundee small claims experiment and the experience in certain courts of the security of tenure provisions of the Tenants Rights etc. (Scotland) Act 1980) the SLC believed that the package of measures designed to assist debtors would be sufficient to make the procedures accessible to those that needed to make use of them. This, though, has not always proved to be the case. Although, it is true that those that did use the procedures themselves were often positive about their experience, many others did not reach this point, remaining ignorant of their rights completely or not understanding sufficiently to allow them to progress. Thus while the measures designed to assist debtors themselves may be helpful in many instances, they themselves first have to be accessed. The varied responses of debtors to their situation is a factor here. Panic, defeatism or ignoring the situation in the hope that it would go away were all commonly reported reactions to debt problems and could all be seen as preventing the debtor from being receptive to important information, however well presented and targeted. The appropriateness of the information and literature provided to debtors nevertheless needs to be considered as it is possible that change in this area could be of positive benefit to debtors.

13. Debtors were also reluctant to seek advice. Only a minority did so, although those that did appeared to benefit greatly from the advice they received. Although it was intended that the procedures would be easy enough for people to use themselves without any legal assistance, it is clear that the SLC envisaged a role for advice agencies. Allowing lay representation at hearings indicates an assumption that advisers would be involved in cases on behalf of debtors, and certainly during the Bill's passage through Parliament much was made of the valuable work undertaken by CABx and other advice agencies by both the Government and the Opposition. Yet previous research had suggested that few debtors sought such assistance (Gregory and Monk, 1981) and, in the consultation exercise preceding the issuing of the SLC Report, the Scottish Association of Citizens' Advice Bureaux noted that getting debtors to come forward was a major problem. The current research has shown that this

previously identified situation persists, with only a minority of debtors seeking assistance, despite the various forms advising people to do so.

14. Consideration of unsuccessful applications for time to pay directions or orders is also particularly instructive. Such applications are adjudicated on by the courts and the research found that offers involving low instalments over long periods of time were more likely to be rejected. Although sheriffs often reasoned that it was in nobody's interests to tie both parties to what would have been very lengthy arrangements, this stance could, nevertheless, leave those most in need (ie those that could afford only the lowest instalments) open to the possibility of diligence. These people are willing to pay their debts but unable to do so outright, but are nevertheless being denied the opportunity to make use of the measures aimed at this group. In this way debtors who cannot pay their debts rather than will not pay their debts remain in the system, despite making use of the options available to them.

15. The case of judicially determined time to pay applications highlights the role of sheriffs in the system. Little direction is provided in the 1987 Act as to how their duties should be carried out. In relation to time to pay applications no guidance is given as to what constitutes a reasonable offer, or the factors to be taken into account in considering such offers. At other points in the legislation, particularly in respect of poinding and warrant sale procedure, sheriffs have some discretion to intervene in the progress of the diligence. However, the general picture was one of sheriffs regarding the onus as being very much on the debtor to persuade the court of the need for intervention on their behalf. But, as has been demonstrated elsewhere, the typical debtor is not well placed to act on his or her own initiative.

16. The incidence of multiple indebtedness also persists. Without the debt arrangement scheme originally proposed by the SLC (see Chapter 1), the 1987 Act did not specifically address the special problem of multiple indebtedness. However, the existence of other debts, not necessarily at the enforcement stage, or even the decree stage, was mentioned by a number of debtors who struggled to cope with deductions made as part of an earnings arrestment or with instalments under a time to pay direction. And dealing with multiple debt situations was a common experience for advice workers. The procedures for time to pay directions and orders do not preclude taking account of other debts, but neither are the procedures geared to this situation. It is unlikely that creditors would make much allowance for debts other than those owing to themselves, and sheriffs do not always consider such wider circumstances in their deliberations. Having said that, it is not clear that the debt arrangement scheme as proposed by the SLC would have been wholly successful in dealing with multiple indebtedness given that it very much depended on debtors taking the initiative in bringing their situation to the attention of the court, even if this was through an advice worker. Nevertheless, at least the SLC scheme acknowledged the existence of the problem and the need to deal with this in a structured way rather than leaving it to the discretion of amenable creditors, interventionist sheriffs and the efforts of individual advice workers.

17. As a result of the interplay of all these features, too many people who simply cannot pay their debts can end up unprotected and in danger of being subject to diligence. The SLC were firm in their distinction between the 2 groups of 'can't pay' and 'won't pay' debtors and their belief that they should be treated differently. Yet it seems that those remaining in the diligence system, at whatever point, are often willing to pay their debts.

18. Although there are undoubtedly problems in the way the 1987 Act is operating, it is also clear that the situation has significantly improved for those subject to diligence.

Crucially, debtors no longer complained of the humiliation of having a warrant sale in their home because this is no longer a common occurrence. The frustrations of creditors, along with the experiences of advice workers, attest to the fact that the diligence of poinding and sale is no longer used - or at least is not concluded - in some situations where previously it would have been pursued; time to pay orders have assisted some who would previously been unable to stop the diligence process. In general, advice workers have found that negotiating in the shadow of the Act has strengthened their hand in dealing with creditors.

19. However, when the SLC made their recommendations in the belief that their proposals would result in the attainment of a 'proper balance' between the interests of creditors and the interests of debtors, they presumably based this on an expectation that the protections provided would be used to their full potential. Because this has not come about, the 'proper balance' for which they aimed has not been fully achieved. It is true to say that the Act has provided many important safeguards for debtors but the SLC were clear that this in itself was insufficient to ensure that debtors actually benefited from the protections to which they were entitled. The steps taken to assist debtors to access their rights have not, in themselves, proved to be sufficient and if the success of the 1987 Act is to be increased attention will have to be given to how this can be improved.

Aim 2: To identify for further study any aspects of the reforms where further work or changes may be necessary or desirable so that the main objectives of the reforms can be met.

20. As is often the case with research, this programme of work has given rise to as many questions as answers. The current research has identified some areas where the reforms are not working as intended but further investigation may be required to explain in more detail why things are operating as they are, and to identify how things might be improved.

21. A major problem inhibiting the realisation of the objectives of the Debtors (Scotland) Act 1987 is non use amongst debtors. The SLC recognised that ensuring debtors used the protections provided was essential to the success of the 1987 Act and introduced specific measures to assist debtors to access the protections. The package of measures has, however, proved to be insufficient as many debtors still fail to take advantage of the means to repay their debts over time free from the threat of diligence, and of the safeguards available to them once diligence has started.

22. Ignorance of the available procedures is as big a problem as lack of understanding. Changes may thus be necessary to the way in which information is brought to the attention of debtors, to the language and coverage of any information provided and to the procedures that debtors subsequently need to follow in order to access their rights under the 1987 Act. This is a difficult issue to address, but is fundamental to the successful operation of the Act. This research has identified a major problem, but has not found an easy solution. More information, revised forms and improved targeting of literature is likely to help some debtors, but the problem of non use may be more entrenched than could be dealt with by such measures alone (see Aim 4 below).

Tackling the crucial issue of non use is dealt with more fully under Aim 4 below. However, in relation to other necessary, or desirable changes, it is possible to identify a number of detailed aspects of the legislation where more minor amendments could be introduced to the benefit of either creditors or debtors. These are listed at Annex 1.

Aim 3: To assess the extent to which the new and reformed procedures are being used by the various groups.

23. Statistical information from *Civil Judicial Statistics* gives valuable information about the use of the procedures of the Debtors (Scotland) Act 1987. However, such information gives only a partial picture and it is necessary to look beyond the figures to investigate issues such as possible non use. The use made by creditors and debtors of the various provisions is discussed below.

Creditors

24. Statistics show that creditors' use of arrestments of earnings rose quite significantly following the introduction of the 1987 Act (from 10,000 in 1989 to 108,000 in 1996) while the use of poinding and warrant sale procedure fell over the same period (from 30,000 in 1989 to 19,000 in 1996) (figures related to summary warrant and non-summary warrant diligences). Significantly the balance of the use of the 2 diligences has reversed compared to the situation prior to the Act. Doig (1980) estimated that in 1978 there were approximately 3 poindings for every arrestment instructed (including the arrestment of assets other than earnings); in 1996, in contrast, there was one poinding for every 5 earnings arrestment instructed. The views of creditors and facilitators indicates that this shift represents an endorsement of the new diligence against earnings, with the reforms being well received by interviewees and most saying that this was their preferred form of diligence when the option was available. Creditors explained that it was often not worthwhile to use a poinding and warrant sale because debtors generally had so few non-exempt goods, and thus they made little use of the diligence. Creditors were critical of this situation, seeing it as too favourable to debtors, but in terms of the SLC's intentions, the reduced use can be justified in terms of protecting those in poor circumstances from the diligence. Some creditors chose not to use the diligence on principle or because they were wary of public opinion on the matter. However, although the number of poindings and warrant sales is low most creditors continued to use the diligence as a threat to encourage payment.

Debtors

25. Statistics show only limited use of the various protections provided for debtors by the 1987 Act. The 'diligence stoppers' which were so crucial to the reforms proposed by the SLC would appear to be significantly underused. The 24% of defenders who apply for time to pay directions is little different from the 19% who applied for summary cause instalment decrees prior to the Act, while only a very small proportion of those who have diligence instructed against them applied for a time to pay order. However, interview data from the Whyte's (1999) *Study of Debtors* suggested that, without exception, those interviewed were unable rather than unwilling to pay their debts - thus representing the very people meant to benefit from these measures - and yet the majority did not apply for time to pay.

26. The protections introduced to the poinding and warrant sale procedure were also infrequently used (eg there were just 152 applications for the recall of a poinding or release of poinded items in 1993 compared to 7809 poindings). The reports of debtors subject to the procedure who expressed grievances about their experiences and the views of advisers working on the behalf of debtors suggest that the protections are not being used in all situations where they might be.

27. Statistics are also available on lay representation at hearings to deal with applications under the 1987 Act. Here again numbers are low with less than 2000 such appearances being recorded across Scotland in 1993, while at the same time two-thirds of defenders fail to appear at all at hearings to deal with time to pay directions, suggesting a need for such assistance.

28. In general, then, the statistics coupled with other available research evidence suggest that debtors are not using the new and reformed procedures to their full extent. Non use would thus appear to be a significant problem amongst those whom it was intended would benefit from the new protections.

29. The evidence suggests that creditors are generally making good use of the new and reformed diligences available to them. Earnings arrestments were well used and although poindings and sales were less frequently used, this was generally because of the poor circumstances of debtors or because of other pressures (eg, the wish to avoid publicity), rather than the efficiency or otherwise of the diligence per se.

30. It is perhaps ironic that in many of the situations where the creditor's preferred diligence of an earnings arrestment is not an option it is because the debtor is unemployed, but that debtors dependent on benefits are also less likely to have sufficient poindable assets to make the diligence of poinding and warrant sale worthwhile. In other words, in the very situations where a poinding and warrant sale could be a feasible course of action, creditors have another preferred option available to them, and conversely, where there is no other option the diligence is often not feasible. This situation creates the impression of a diligence that is not effective, because its use is most often considered in cases where it rightly turns out to be not worthwhile. Further, the diligence of poinding and warrant sale continues to be used effectively in circumstances involving commercial debtors or better off individual debtors, and continues to be used with some level of success as a threat in other cases. Thus any non use in terms of creditors not using the diligence when they could have done so appears to result from creditors preferring to use an earnings arrestment or because of personal or policy decisions about the use of the diligence rather than because of any inherent ineffectiveness of the diligence itself.

Aim 4: To find out the level of knowledge about the reformed procedures and the sources of information used, and to find out how information might be better directed in order to achieve maximum understanding and use of the procedures.

31. The research found that levels of knowledge and understanding amongst debtors were low and that this was a major obstacle to them using the available procedures. Debtors themselves indicated the low levels of awareness and the difficulties they had with various aspects of the procedures, and advisers working on their behalf believed awareness and levels of understanding to be low. The findings of the research suggest that non use did not generally result from debtors making an informed choice not to use the procedures for whatever reason; rather debtors did not know that options such as time to pay orders existed or elected not to use the procedures having misunderstood how they worked (eg not applying for time to pay directions because they did not think the creditor would accept their offer).

32. Such findings are crucial as a system of protections initiated by debtor application cannot be used to its full potential if debtors do not know about or do not understand the procedures available to them. However, the debtor's own knowledge and understanding

would not be so crucial if advisers (either advice workers or solicitors) were consulted. This is not generally the case, though, with the research finding that, for a variety of reasons, only a minority of debtors sought advice from any source. So, not only are debtors themselves often unable to access the system unassisted, they do not make use of the various sources of advice and assistance available to them in the community.

33. Those debtors who did seek assistance used a variety of sources: advice workers, solicitors, and court staff. And, although not actively sought out, sheriff officers were also cited as a source of information and advice. By all accounts, those that sought advice were generally better able to negotiate the system of protections available to them as a result of receiving essential information, practical assistance and emotional support.

34. Little use was made by debtors of written information, with only one interviewee reporting using a money advice centre leaflet and no one reporting using, or even being aware of, the leaflets produced by SCA. Certainly those who provided advice to debtors did not generally provide written information; specifically, court staff did not generally provide the SCA leaflet, either because the court had none in stock or because they were unaware of its existence. However, advice workers themselves were of the view that written information was of limited use only, and that the situation called for personal assistance. Nevertheless, some debtors said they would have liked to have had access to information leaflets and it is likely that some debtors would have benefited from such an information source.

35. The information provided on the forms with which debtors come into contact also appeared to be of limited use only. For example, knowledge and understanding of time to pay directions was low, despite all debtors receiving information along with the original summons forms. Debtors' rights in relation to poindings and sales were also not widely known, despite information being included on various forms served during the diligence process.

36. Given that the information currently provided for debtors is not getting through to those who need it, thought needs to be given to how this situation might be improved. Clearly debtors are to a great extent ignorant of the protections available to them. However, the written information that is provided on forms and schedules appears to help a minority of debtors only. Although providing more written information and making sure it is easily available to debtors (in the case of leaflets, these could be sent directly to all debtors, as suggested by one interviewee) may be of assistance to some, it is unlikely to be enough to help all debtors. Personal advice was seen by debtors to be very beneficial and would therefore seem to be a potentially more successful route for getting information through to debtors. However, even here there are difficulties - beyond that of the obvious resource implications of using such a medium - in that debtors as a group appeared to be resistant to seeking assistance from any of the outlets available to them so again only a minority of those in need would be likely to benefit from information and advice (perhaps relating to their financial situation in general) provided in this way.

37. For a significant proportion of debtors there appear to be 2 problems. Firstly they are unable to act on the basis of information with which they are provided because of poor understanding, panic, or a tendency to ignore the situation; they do not want information per se, but instead want somebody to deal with the situation on their behalf, hence the very positive reports of the assistance provided by money advice workers. Secondly, only a minority of debtors seek the assistance they so obviously require. These factors obviously

have an impact on the operation of a system relying on debtor initiative to use the protections available.

38. Based on the nature of the problem, it may be necessary to consider more radical solutions based not just on rights but also on responsibilities, that is, responsibilities on appropriate agencies to ensure that debtors are aware of and can use the rights with which they have been provided. Comparisons with other areas of social policy are of interest here showing that problems of take-up of rights are not restricted to the area of debt enforcement and demonstrating the type of steps which can be used to combat this. In the area of welfare benefits, means tested benefits have consistently lower take up rates than universal benefits. That is, those benefits which involve the claimant in negotiating more hurdles to obtain them reach fewer of those who are entitled to them.

39. Research in the welfare benefits area has led to the development of a number of models of the claiming process involving the identification of factors which affect take up. Such models suggest that take up can be increased by dealing with one or more of the factors, dependent on how they are seen to interact. The factors identified in Kerr's threshold model (cited in Craig, 1991) included perceived need, basic knowledge, perceived eligibility, perceived utility, beliefs and feeling, and perceived stability of circumstances. These factors are not readily transferable to the area of debtors' rights but the research programme does suggest a number of possible factors which may interact to determine the use of those rights: basic knowledge, perceived utility, beliefs and feelings, availability of advice. More sophisticated work would be required to investigate the existence of other factors, the relative importance of these factors and how they interact. Nevertheless it is possible to see how dealing with these factors might lead to an increase in the use of debtor protections.

40. In the welfare rights area problems are often tackled at a local level by welfare rights workers, social workers and community education officers encouraging people to apply through publicity campaigns, carrying out 'benefit checks', providing information when contact is originally sought in relation to another issue and by providing practical assistance for those making claims. The Benefits Agency itself runs publicity campaigns and produces a range of targeted leaflets. Thus the need for active intervention to ensure that people are aware of their rights and are able to access those rights is recognised²¹. Here, there are important lessons to be learnt from the experiences of those debtors who were assisted by advice workers. Such debtors benefited greatly from the assistance they received, both practically and emotionally, and this appeared to be a significant factor in whether people were able to access their rights.

41. Clearly far more people come into contact with the social security system than the debt enforcement system and as such it could be argued that such efforts are justified because of the numbers who can benefit. However, the comparison is still useful because it demonstrates that acknowledging the difficulties that people can encounter in accessing their rights and acting to alleviate their problems can be successful, but it may involve a significant input from one agency or another.

42. In the context of debt enforcement, the first steps may be to improve the content and targeting of information provided to debtors to ensure that more people are aware of their rights and how to use them. Simple, self contained, user-friendly forms focusing on specific

²¹ See Craig, P, (1991) for a review of research in the area of take up of welfare benefits.

stages of the debt enforcement process could be sent to debtors by appropriate parties (eg creditors, the courts, sheriff officers). Including details of local advice agencies could also be helpful here in making it easier for people to seek further advice and assistance if required, although the availability of advice agencies in the community - an issue outwith the scope of SCA - may continue to have an impact on the success of the Act with regard to debtor protection. Initiatives such as in-court advisers (currently being piloted at Edinburgh Sheriff Court) may provide another way of channelling advice and assistance to those in need (although this may only be of benefit to those who attend court in the first place).

43. An alternative, more radical approach would be one where the ‘system’ takes a more proactive role in ensuring that debtors are aware of their rights, assisting them in making use of those rights, where appropriate. This could imply personal delivery of documents or personal contact triggered by particular behaviour (eg non response to a document). Another approach would be to place the initiative with the creditor. Under such a system the creditor would have to seek the approval of the court to proceed with any steps of diligence, demonstrating that the debtor would not suffer undue hardship or personal distress. Of course, systems incorporating features such as these would be extremely resource intensive and thus expensive, raising the question of who would meet such additional costs. They are also, to an extent, inefficient as such steps are not required in all cases. As such, there may be a conflict with the requirement for a debt enforcement system to be efficient for creditors and to operate at a reasonable cost to society as a whole. It should also be noted that systems of this type were considered and rejected by the SLC for a variety of reasons. Full consideration of the information provided to debtors would thus appear to be a useful starting point in tackling the issue of non use. Such an approach may not solve the problem completely but would demonstrate that reasonable and appropriate steps were being taken to ensure that people were informed of their rights.

Evaluating the legislation

44. In addressing the 4 main research questions, the evidence suggests that the balance between the interests of creditors and debtors has shifted towards the latter, as intended by the SLC, but that the balance may not yet be as ‘equitable’ as desired as the protections of the Act do not appear to be fully used. It thus appears that on a practical level the aims of the SLC have not been fully achieved. Nevertheless there is much that is positive about the Act.

45. Technically, the Act has much to commend it. The legislation attempted, with the exception of the issue of multiple indebtedness, to tackle in a comprehensive way the area of the enforcement of consumer debts. The interests of both creditors and debtors were considered and debtors were provided with measures to assist them in paying their debts as well as measures to protect themselves in the event of diligence being instructed. Interviewees from various points of the spectrum (eg, finance house managers and solicitors working on behalf of debtors) were positive about the Act, believing it provided the necessary provisions for both creditors and debtors.

46. The limited number of detailed comments on operational aspects of the Act (see Annex 1) can also be seen to indicate that the legislation works on a technical level. The comments made were generally minor and were often voiced by just one or 2 interviewees.

47. On a broader level the Act appears to have had an impact on the wider debt recovery system. The Act appears to have created a climate which encourages creditors to reach

informal settlements with debtors and has given advisers (although not necessarily unrepresented debtors) additional means to negotiate on behalf of their clients. With the involvement of such advisers this can be to the benefit of debtors, although the danger of shifting debt recovery out of the public domain and into a private, less regulated sphere must also be noted.

48. The Act would thus appear to have the potential to deliver efficiency for creditors and protection for debtors but the evidence suggests that in the latter case this is not being fully achieved on the ground.

49. In evaluating the Act it is also important to recognise that this legislation only attempts to deal with specific aspects of the debt recovery process, ie those relating to diligence and diligence stoppers. Many of the negative experiences reported by debtors and creditors related to other aspects of debt recovery, eg earlier negotiations regarding the non payment of debts or litigating through the courts. Although part of this wider environment, the Debtors (Scotland) Act did not attempt to affect change in these areas. Thus the poor experiences of some - as reported in the research - do not necessarily reflect shortcomings of the Act.

Conclusion

50. It is not possible to do justice to the evaluation of the Act in a brief concluding section. The preceding chapter has, however, presented a general overview of the Act in terms of the objectives of the legislation. The Act sought to provide protections for debtors while still maintaining effective machinery for creditors. Given that the previous system was found to be meeting the needs of creditors but providing inadequate protections for debtors, the main thrust of the reforms was concerned with debtor protection, with the aim of creating a balance between the interests of the 2 groups. One message which emerges from the research is that the Act has delivered improvements to debtors in the diligence system. In fulfilling this objective the needs of creditors have not been unduly jeopardised. However, it was an SLC aim that debtors willing to pay their debts would no longer be subject to either the threat of diligence or actual enforcement and that those who are subject to diligence would not suffer undue economic hardship or personal distress. This has not been fully achieved since some debtors have not been able to access those protections which the Act sought to introduce.

51. A fundamental issue relates to debtors not making full use of the protections available to them. As a key to trying to understand this issue, it is possible to identify specific areas of the 1987 Act where the reforms did not depend on the debtor taking action (eg the revised list of exempt goods, the presumption of holding the warrant sale outwith the debtor's home) and where greater measures of success in terms of debtor protection have been achieved. However, because most of the protections of the Act are 'rights' based, dependent on the debtor using the rights available to them, the issue of non use is one that cuts across all aspects of its operation to some extent. This must be addressed if the Debtors (Scotland) Act is to become more successful.

52. Of course, non use, while important, was not the only obstacle to the Act fulfilling its aims in the area of debtor protection. The attitudes of creditors and their agents in responding to applications for time to pay, the willingness of sheriffs to intervene in the procedures for poindings and warrant sales, and the extent to which sheriff officers were effective in informing debtors of their rights during the poinding process all had an impact on the successful operation of the Act. In the wider environment, the incidence of multiple

indebtedness and the limited availability of advice agencies can both be seen to contribute to how the Act has operated in practice.

53. Thus, the Act must be seen in this broad context, within which some of reforms introduced have proved more effective than others. The research found that creditors, by and large, still have effective machinery for the recovery of debts and that the newly introduced or reformed protections for debtors have improved the situation for those subject to debt recovery, although not necessarily to the full extent anticipated. Importantly those that have been able to access their rights have benefited from the new protections, showing that the reforms of the Act can be used successfully. Tackling the obstacles to greater success in the area of debtor protection may not be easy and may be beyond the remit of SCA in some respects, but their existence needs to be recognised if the impact of the Act is to be further extended.

Annex 1: Detailed proposals for revising the provisions of the Debtors (Scotland) Act 1987

1. This Annex provides information on the more detailed comments and proposals made by individual research in respect of the various provisions of the Debtors (Scotland) Act 1987. The points listed are specific in nature, and generally relate to operational aspects of the various diligences and diligence stoppers. Individually, they are not central to an overall consideration of the success of the Act in achieving its aim of an equitable balance between providing effective machinery for creditors and adequate protections for debtors. They represent the views of different research participants and are reported here without qualification and should be seen in that context. Nevertheless they are worth noting as detailed changes to procedures can still improve a system to the benefit of its users.

2. It should be emphasised that the knowledge levels and articulacy of the different groups involved is likely to have influenced the extent to which they offered detailed comments on the workings of the Act. Thus lack of comments or suggestions does not necessarily indicate satisfaction with current arrangements.

3. Some of the comments and suggestions listed below are also contained in the main body of the report as they contribute to the general views and experiences of the different groups involved.

Time to pay directions and orders

Making an application

- Debtors encountered problems in understanding the language contained on the application form which could inhibit the likelihood of them applying for a time to pay direction. Despite information contained on the form, debtors displayed a number of misconceptions about the procedures.
- Solicitors and advice workers thought that the procedures were too complex for debtors to understand and use competently without advice. They thought that the application forms did not provide sufficient guidance or space to ensure that all relevant items of expenditure were included.
- Debtors and their advisers wished the application forms to be revised to allow more detailed information about income and expenditure to be provided. Advisers felt that more procedural information should be provided on the forms.

Responding to an application

- Commercial creditors, solicitors acting for creditors, and debt collectors all wanted more information made available to them on which to base their decisions about applications for time to pay. A specific suggestion was that a copy of the debtor's application be sent to the agent along with details of the offer. (At present, although the papers are available for inspection at the court, the legislation does not provide for the sheriff clerk to send this to the pursuer.)

The role of the sheriff

- Sheriffs wanted more information on which to base their decisions, either submitted in writing with the application or presented by the debtor personally at the hearing.
- Commercial creditors perceived sheriffs to be ‘pro-debtor’ and wanted more account to be taken of the circumstances of the debt and the payment history of the debtor in awarding time to pay directions and orders. In contrast, debtors and their advisers perceived sheriffs to be ‘pro-creditor’.
- Advisers wanted sheriffs to adopt a more flexible approach to considering applications, and in particular wanted to see less reliance on the repayment period in determining whether an application should be granted.

Intimation

- Debtors were often unaware of the outcome of their application because they did not know they had to contact the court to find this out.
- There was a suggestion from a number of creditors that intimation by the court, rather than the creditor, of the extract decree containing details of a time to pay direction would carry more weight and encourage payment by the debtor.
- Commercial creditors suggested that interest should be recoverable along with the principal sum and expenses without the need for separate intimation to the debtor.

Eligibility for time to pay

- A suggestion from the solicitor interviewees was for time to pay arrangements to be competent in respect of debts incurred through non payment of taxation.
- Although the majority of creditors and their agents were happy with the current financial limit of £10,000, a small number favoured either raising or lowering the limit. Raising the limit was proposed on the following grounds: that those with higher debts had greater need of time to pay; that the level was rather arbitrary; and that the limit may effectively exclude some debts, particularly business related debts. Lowering the limit was proposed on the grounds that debts at the top end of the current range would be better dealt with through other means such as sequestration or diligence as repayments would be too lengthy.

The nature of arrangements

- Commercial creditors favoured a limit on the period in which a debt should be paid off.

Default and enforcement

- Commercial creditors and their agents were unhappy with monthly time to pay arrangements because of the time lapse between default first occurring and the decree becoming enforceable. Suggestions for dealing with this situation included restricting the use of monthly arrangements to particular situations (eg, where the debtor was paid

monthly) and revising the definition of default with regard to such arrangements so that enforcement could proceed after one missed payment.

- Sheriff officers raised the issue of liability on enforcement as they had to rely on the creditor's word that the extract decree had been served and that the direction or order had lapsed. Should this prove not to be the case, it was felt that there was uncertainty about the liability for wrongful diligence.

Awareness

- Interviewees as diverse as debtors and commercial creditors suggested the need for greater publicity for time to pay orders, in particular.

Earnings arrestments

Serving an arrestment

- Use of the diligence relied on information being available about the debtor's employment and this was not always easy to obtain.
- There was a view that the service of a charge should not be required before an arrestment was served. This was seen as an unnecessary step in the process, and one not required under the previous system of arrestment of wages²².
- The short period of notice, or absence of notice, that an arrestment was to be implemented did not allow debtors to prepare themselves for the reduction in income. Debtors thus argued for a statutory period of warning before an arrestment was implemented. Some debtors did not receive a copy of the schedule of arrestment.

Implementation of arrestments

- The definition of 'earnings' could cause problems for employers. For example there was some confusion about whether payments such as bonuses should be included.
- Debtors thought that overtime payments should not be included in the calculation of deductions.
- There were reports of small firms being slow to implement arrestments.
- Some interviewees had experience of employers being unco-operative in implementing an arrestment.
- Employers wanted more information on the schedule of arrestment to help them identify correctly the employee against whom the arrestment was to be implemented.
- One creditor wanted to see more obligation on the employer to provide information on the debtor's earnings, as there was no way to check that the correct deductions were being made.

²² Although some expressed this view in relation to the earnings arrestment process, the service of the charge was more frequently seen as a positive step in the diligence process as a whole.

The level of deductions

- Debtors and their advisers thought that deductions were too high, noting particularly that no account was taken of the debtor's circumstances. Debtors reported difficulties in coping with variable deductions in situations where their earnings fluctuated from one pay period to another.
- A number of interviewees were critical of the level of deductions made under an arrestment. Deductions were criticised for being too low, with the result that debts took a long time to pay off. Interestingly, in contrast, a small number of creditors thought that the deductions may be too high for those on low incomes or thought that account should be taken of the debtor's circumstances in setting deductions.

Limitations to the diligence

- Difficulties in implementing arrestments against particular types of employees were reported. Such problems related to employment sectors which did not follow standard working and payment patterns. Examples cited were the fishing industry and the taxi trade.
- It was noted that the current system did not take account of situations where a debtor had 2 or more low paid jobs, none of which individually reached the lower threshold for deductions to be made, but, if taken together, the total earnings would have been deductible.

Conjoined arrestment orders

Applying for a conjoined arrestment order

- The forms used for applying for a conjoined arrestment order were criticised for being too complicated.
- One interviewee had experienced problems identifying correctly the court with jurisdiction over an application for a conjoined arrestment order. The interviewee felt that clarification was required to assist the creditor as to whether jurisdiction lay with the court where the debtor lived, where the debtor worked, or where decree of the first or subsequent creditor was granted.
- There was some criticism of the length of time it took from making an application for a conjoined arrestment order to implementation of the order.

Amounts received

- Creditors and their agents were critical of the amounts received through conjoined arrestment orders. There was a view that deductions made from earnings should increase as the number of conjoined creditors increased.
- One creditor suggested that the basis for calculating each creditor's share of an arrestment should be the outstanding balance on the debt rather than the original amount of the debt.

Receiving the money

- One interviewee suggested that the employer should be responsible for sending out the cheques directly to the creditors.
- One interviewee complained about the administrative inefficiency of dealing with cheques for very small sums of money and suggested that deductions could be allowed to accumulate and then be sent out as a lump sum periodically.
- There was a complaint that the 1987 Act did not clearly define the responsibilities of the different parties involved in a conjoined arrestment order in ensuring compliance. For example, if the court, with no vested interest in receiving the money from the arrestment, chose to adopt a relaxed approach to late deductions, the creditors themselves appeared to have no right to intervene with the employer on their own behalf.

Awareness amongst debtors

- Not all debtors received copies of the appropriate orders and were unaware of the creditors who were benefiting from the arrestment.

Poundings and warrant sales

The charge

- Debtors did not appear to understand the implications of the charge for payment served prior to the instruction of a pouncing (this also applied to situations involving an earnings arrestment).

The list of exempt goods

- Creditors and their agents were often critical of the revised list of exempt goods, believing that this provided too much protection for the debtor and restricted the effectiveness of the diligence.
- The extent to which the list of exempt goods was open to interpretation was an issue of concern for creditors and their agents as well as debtors.

Carrying out the diligence

- Sheriff officers found it problematic to comply with the requirement to place a 'market value' on pounded goods. This was because of uncertainty about when a sale would take place, and the low sale prices generally achieved at auction.
- Possible liability for overvaluing items and the risk of debtors applying for the recall of a pouncing because of under valuation increased the pressures on sheriff officers in valuing pounded goods.
- Both creditors and debtors were critical of the values sheriff officers placed on goods.

- In response to problems experienced with debtors removing poided items, one creditor wanted the introduction of the immediate uplift of goods.
- Some creditors and sheriff officers felt that the codification of the stages of the diligence meant that it now took too long to conclude.

Informing debtors of their rights

- Debtors reported that they were not always adequately informed by sheriff officers of their rights to apply for the release of goods etc.

Use of debtor protections

- Some creditors thought that debtors should have to provide details of the basis for their challenge when making application for the release of goods etc.
- Some solicitors proposed that sheriffs should have greater powers to intervene in the poiding process on behalf of debtors who failed to make use of the protections available to them.

Annex 2: Background: the Debtors (Scotland) Act 1987 and the programme of research

1. This report draws on a wider programme of work, commissioned by Scottish Courts Administration (SCA) on behalf of the Lord Advocate, to evaluate the Debtors (Scotland) Act 1987. The focus of the programme of research was to evaluate the reforms made to the procedures for enforcing debts which were introduced by the Act. Not included in the scope of the evaluation are the reforms made to summary warrant procedure or the legislation governing the conduct of sheriff officers. The programme of research is made up of a number of individual research projects which either consider the reforms introduced by the 1987 Act from the view point of different actors in the system or look at different aspects of debt enforcement. The programme includes the following projects: Study of Commercial Creditors, Study of Individual Creditors, Study of Debtors, Study of Facilitators and statistical surveys looking at the characteristics of poindings and warrant sales and the characteristics of payment actions as well as a report providing trend analysis of relevant national statistics. Findings from each of these studies, together with this Overview, have been published by The Scottish Office Central Research Unit (see Bibliography).

Background

2. The Debtors (Scotland) Act 1987 (the 1987 Act) came into force on 30 November 1988. This Act was the first major reform to the law of diligence in Scotland for over 150 years and was the culmination of a review of the law of diligence carried out by the Scottish Law Commission (SLC). In addition to an investigation into the legal efficacy of the law of diligence, the SLC review drew on a wide ranging social research programme looking at the nature, scale and social aspects of diligence²³ carried out by The Scottish Office Central Research Unit. The outcome of this review was published in the *SLC Report on Diligence and Debtor Protection* (SLC, 1985) and gave rise to the Debtors (Scotland) Act 1987.

3. The SLC report defined the general objectives of a good system of enforcing debts by diligence as follows:

First, it should seek to provide effective machinery, in which creditors have confidence, whereby creditors can obtain payment of their debts. Second, within the constraints imposed by the need to maintain an effective system of enforcing debts, it should make available procedures which are designed to have proper regard to protecting those debtors who are subject to diligence from undue economic hardship and personal distress. (SLC, 1995, p.22)

The report used these 2 objectives to assess the then system of debt enforcement by diligence and, where inadequacies were found, to make recommendations for reform.

Effective machinery for the recovery of debts

4. The SLC found that the then system of debt enforcement by diligence largely fulfilled its first objective of effective enforcement and was generally regarded by creditors as satisfactory. The report rejected criticism that poinding and warrant sale was an ineffective

²³ The programme of research included the following projects, all listed in full in the Bibliography: Doig, 1980; Connor, 1980a, 1980b; Adler and Wozniak, 1981; Gregory and Monk, 1981; Millar, 1980; Doig and Millar, 1981.

mode of debt collection, believing that the effectiveness of the diligence should not be judged solely in terms of the relatively few number of occasions where poided goods are realised at a warrant sale but rather in terms of the far greater number of occasions where debtors pay the debt to avoid a warrant sale being carried out.

5. On the other hand, the report found that diligence against earnings did not always provide an effective means of enforcement for creditors. The arrestment of wages involved a one off arrestment to capture the wages followed by an action of furthcoming to release the money to the creditor. The two-stage procedure was cumbersome for creditors since the wages arrestment only attached the pay due for the period it was served and as a result it was often necessary to repeat the diligence on a number of occasions in order to pay off the debt. The potentially onerous procedures for repaying a debt meant that it was also expensive for the debtors.

6. Overall then the view of the SLC was that poiding and warrant sale continued to be an effective mechanism for the recovery of debts, if in need of reform and modernisation. The view of the procedures for the arrestment of wages was that they could be improved by the introduction of a system of continuous diligence against earnings.

Adequate protection for the debtor

7. The SLC report also considered whether the then system of debt enforcement by diligence fulfilled its second objective of providing adequate protection for debtors who are subject to diligence from undue economic hardship and personal distress, and found the system lacking in this regard. The report singled out a number of areas where the system failed to provide adequate protection to debtors. These were as follows:

- the goods exempt from a poiding were not found to cover all items which most people would regard as necessary for domestic life;
- the public advertisement of the sale identifying the debtor to the community was seen to be humiliating to the debtor;
- in a wages arrestment, the amount which could be deducted from a debtor's wages was felt to leave the debtor below subsistence level;
- the repetitive nature of the diligence against earnings resulted in high recovery costs for which the debtor was liable;
- the system did not provide the flexibility to allow debtors who wished to pay their debt but did not have the resources to pay it outright (the 'can't pays') to 'stop the steamroller of diligence' and pay off the debt by instalments.

The reforms

8. The SLC found that, with the exception of the diligence against earnings, the debt enforcement system remained effective in enforcing debts. However, in terms of protecting debtors, the system did not satisfactorily meet this objective. The SLC proposed a range of reforms to address the above mentioned deficiencies of the debt enforcement system. The 1987 Act implemented most of these proposals, the principal components being:

- i) the introduction of time to pay directions and orders;
- ii) reforms to the diligence of poiding and warrant sale; and
- iii) the introduction of new diligences against earnings.

9. One proposal outlined in the SLC report which was not brought forward in the legislation was that of a debt arrangement scheme. This scheme was intended to deal with the situation of multiple indebtedness and would have allowed a debtor to make regular repayment of debts to several creditors under a court supervised arrangement. At the end of a set period, assuming the arrangement had been adhered to, the debtor would be discharged from his/her debts. The proposed debt arrangement scheme was not included in the Act for a number of reasons to do with the potential complexity of such a scheme and the perception that such a scheme would not be cost effective (see Nichols, 1987).

Time to pay directions and orders

10. One of the key findings about the diligence system reported by the SLC was that most debtors subject to diligence were unable rather than unwilling to pay their debts outright, ie they were 'can't pays' rather than 'won't pays'. In response to this situation, the Act introduced procedures to allow the so called 'can't pays' time to pay their debt off in a more flexible way, eg by instalments, free from the threat of diligence. Two court orders, competent at different stages of a court action, were introduced called time to pay directions and time to pay orders.

Time to pay directions

11. Time to pay directions provide debtors who are individuals an opportunity to pay off their debts either by instalments or by a deferred lump sum. The court (the Court of Session or the sheriff court), on an application by an individual debtor, may allow some or all of the sums due in terms of the decree to be paid off by specified regular instalments or in a lump sum at the end of a specified period, by attaching a time to pay direction to the decree. The application, made in response to the summons or initial writ, is first considered by the creditor and, if accepted, the court will grant the order. If the application is rejected by the creditor, the application will call in court. The parties will then have the opportunity to present their case before the sheriff who will decide the outcome of the application. The provision applies only to debts not exceeding £10,000 and the application must be made before the court grants decree. Debts relating to the non payment of taxes such as council tax, rates and income tax (ie those debts enforceable under summary warrant procedure) are excluded from the provision.

Time to pay orders

12. Time to pay orders, like time to pay directions in decrees, are discretionary remedies allowing debtors who are individuals either to pay their debts by specified instalments or in a lump sum at the end of a specified period. A time to pay order can be applied for only after the creditor has taken steps to enforce the debt (for example, after the service of a charge). Again there is a £10,000 limit and debts enforceable under summary warrant procedures are excluded. The process of applying for a time to pay order is broadly the same as for a time to pay direction in that the creditor first considers any application and, if it is rejected, the application calls in court. It is not competent for the sheriff to make a time to pay order where a time to pay direction or time to pay order has previously been made.

Reforms to poinding and warrant sale

13. The basic structure of the diligence of poinding and warrant sale remained unaltered following the introduction of the 1987 Act. The principal changes were intended to provide greater protection to individual debtors subject to the diligence against undue hardship while retaining its effectiveness as a means of enforcing payment of debts. The main changes are outlined below.

i) The Act extended the range of goods, particularly household goods, exempt from a poinding to cover most items reasonably required by debtors and their households.

ii) The Act restricted the rights of officers of court to gain entry to either an empty house or one in which only children under the age of 16 are present for the purposes of executing a poinding. The reform required at least 4 day's notice of the intention to return to be given before an officer would have the power to force entry to carry out a poinding. This restriction can be waived where prior authority to force entry has been granted by the sheriff. This reform largely brought legislation in line with existing sheriff officer practice.

iii) The Act introduced the rights of debtors to intervene in the poinding process either to apply for the release of poinded goods or to recall the entire poinding on set grounds.

iv) The Act replaced the 'offer back' provision (where the sheriff officer, at the end of a poinding, offered the goods back to the debtor on payment of the appraised value) with an entitlement to redeem all or any of the goods at their appraised values within 14 days of the execution of the poinding, and introduced a second opportunity to do so following the application for a warrant sale.

v) The Act introduced a debtor's right to be informed that an application for warrant of sale had been made and the right to oppose the granting of such a warrant on certain specified grounds.

vi) The Act prohibited the use of the public advertisement of a warrant sale giving the name and address of the debtor. It also ended the use of the debtor's home as a venue for the warrant sale, unless the debtor and all occupants of the home give their written consent.

vii) The Act made provision to encourage the repayment of debts by informal arrangements by allowing creditors to extend the security offered by the poinding and warrant sale process. Thus the period during which a poinding remains valid was extended from 6 months to one year, with an opportunity to apply to the sheriff for an extension²⁴ to this period. In addition to this provision the creditor can postpone the sale twice for the purposes of giving the debtor time to pay the debt.

Reforms to diligence against earnings

14. The SLC identified problems with the previous diligence against earnings both in terms of its efficacy as a diligence and its fairness to debtors. As a result the 1987 Act abolished the diligence of arrestment and furthcoming of wages and brought into force 3 new diligences against earnings. These were the earnings arrestment, the conjoined arrestment order, and the current maintenance arrestment. The earnings arrestment is a continuous diligence which remains in force until a debt is paid off. It requires that deductions are made from earnings

²⁴ The length of the period of extension depends on a wide range of factors, as set out in section 27 of the Debtors (Scotland) Act 1987.

according to a sliding scale which ensures that debtors are left with sufficient money to subsist. The current maintenance arrestment was introduced to deal with the recovery of arrears of maintenance²⁵ and the final diligence against earnings, the conjoined arrestment order, allows more than one creditor to benefit from an arrestment.

Assisting debtors seeking the protection of the court

15. The 1987 Act and its enabling legislation also introduced a package of measures to assist unrepresented debtors to make use of the protections provided. These measures included:

- i) a 'no expenses' rule, whereby, in relation to court applications under the Act, neither party is liable for the expenses of the other, regardless of the outcome of the application;
- ii) new statutory duties given to the sheriff clerk to provide procedural information to debtors and assist with the completion of forms;
- iii) sheriff clerk responsibility for the service of forms in relation to applications under the Act;
- iv) the enabling of the making of court rules permitting lay representation. Such representation is now permitted before the sheriff;
- v) forms prescribed by the rules intended to be in a simple and intelligible language;
- vi) information about the debtor's rights contained on forms served at various points in the diligence process; and
- vii) sheriff court jurisdiction over enforcement of decrees, even in the case of decrees awarded by the Court of Session.

Objectives of the reforms

16. In their *Report on Diligence and Debtor Protection* (SLC, 1985) the SLC identified the twin objectives of a good system of enforcing debts by diligence. These were the provision of effective enforcement machinery for creditors and the provision of adequate protection for debtors. Through the measures discussed above, the 1987 Act sought to provide an equitable balance between the competing objectives identified by the SLC.

Evaluation of the reforms

17. Scottish Courts Administration commissioned The Scottish Office Central Research Unit to carry out research to evaluate how the new Act was working in practice and the extent to which it was meeting its main objectives (of providing effective machinery for creditors while at the same time providing protection for debtors) and achieving an equitable balance between them.

19. The programme of research consisted of 7 separate studies and an overview evaluation report. Four qualitative studies sought information on the views and experiences of commercial creditors, individual creditors, debtors and facilitators (solicitors, advisers, sheriffs, sheriff officers) and 3 quantitative studies provided information on the characteristics of payment actions, the characteristics of poindings and warrant sales, and trends in the use of the measures introduced by the 1987 Act. The research focused on 5 sheriff courts chosen to

²⁵ With its focus on protecting the creditor rather than the debtor, the current maintenance arrestment does not fall within the remit of this evaluation.

reflect a range of different geographic and demographic features (eg, high/low population, urban/rural). Fieldwork was largely carried out in 1994. Findings from each of the studies, together with an Overview, have been published by The Scottish Office Central Research Unit (see Bibliography).

Glossary

Absolvitor (decree of)	A final judgement of the court in a civil action which absolves or decides in favour of the defender.
Appraised value	The value which an officer of court or specialist valuer assesses pointed goods will raise if sold on the open market.
Arrestment	A form of diligence which attaches or freezes a debtor's moveable property which is in the hands of a third party. It prevents the third party from giving up possession of the property and the creditor may obtain it by raising an action of furthcoming.
Charge	Generally, an order to obey a decree of the court. In civil diligence, a charge is a necessary precursor to diligence. It is a formal request in writing served on the debtor which demands payment by him/her of sums due within a specified time and warns that specified diligence may be initiated if payment is not made.
Conjoined arrestment order	A form of diligence which enables more than one debt to be enforced against the earnings of a debtor.
Current maintenance arrestment	A form of diligence against the earnings of a debtor to enforce the payment of current maintenance.
Decree	A final judgement of the court in a civil action.
Decree and expenses	A final judgement of the court which includes an award of expenses.
Defender	The person against whom an action is raised.
Diligence	The legal process by which a debtor's lands, personal or moveable property are attached for the recovery of the debt.
Dismissal	An order of the court bringing the proceedings in a claim to an end.
Earnings arrestment	A forms of diligence by which a debt is enforced against the earnings of a debtor.
Expenses	The costs of an action, including legal fees, outlays etc.
Extract decree	A formal certified copy of a decree, extracted from court records, which is used to enforce the decree.
First calling	The first hearing in a summary cause action.

(Full) hearing	The second stage of a small claim, when a hearing is conducted if a case is not concluded at or prior to the preliminary hearing; at which the pursuer and defender may give evidence or bring along witnesses or documents to support their case.
Furthcoming (action of)	An action which is taken by a creditor who has arrested property against a third party (also known as the arrestee) in order to obtain the arrested property.
Inhibition	A writ prohibiting a debtor from burdening or selling his/her heritable property without repaying the inhibiting creditor. A warrant to do so must be obtained from the Court of Session and the inhibition only becomes effective when it is registered in the Register of Inhibitions and Adjudications.
Initial writ	The document which initiates an ordinary action.
Lay representative	A non-legally qualified representative, eg advice worker.
Messenger-at-arms	An officer of both the sheriff court and Court of Session whose principal functions are connected with doing diligence.
Notice of intention to defend (NITD)	A formal notice to the court that a defender wishes to state a defence or challenge the jurisdiction of the court. The effect of such a notice is to make the action a defended action.
Open decree	A judgement of the court which leaves the pursuer free to pursue whatever type of enforcement he/she wants.
Ordinary cause	A civil court action raised in the sheriff court which is not a summary cause or small claim. In the case of an ordinary action for payment of money, the sum sought must not exceed £1500.
Party litigant	A person acting for him/herself in a court action without representation.
Poinding (pronounced 'pinding')	A form of diligence enabling the attachment of a debtor's moveable property by the creditor
Poinding schedule	A document which an officer of court requires to complete giving specified information about a poinding and which contains information to the debtor about his/her rights.
Preliminary hearing	The first time a small claim is heard in court.

Proof	The court hearing in a summary or ordinary cause action at which evidence is led on the facts of the case and legal arguments stated, after which a decision is made by the sheriff
Pursuer	The person bringing a civil action in court.
Recall of decree/ Reponing	A procedure for rescinding the decision of the court in a claim when either the pursuer or the defender in the claim failed to attend court.
Report of execution of poinding	A report giving information on the execution of a poinding which an officer of court is required to make to the sheriff.
Report of warrant sale	A report giving information on the execution of a warrant sale which an officer of court is required to make to the sheriff.
Section 18 notice	A notice served on a debtor by an officer of court indicating that he/she will return to the debtor's dwelling house in not less than 4 days' time to carry out the poinding and, if necessary, force entry. (The Debtors (Scotland) Act 1987, Section 18.)
Service	Sending or making available court documents by one party in a court action to other parties.
Sheriff	The judge who hears and decides cases in the sheriff court.
Sheriff clerk	The clerk of the sheriff court.
Sheriff officer	An officer of the sheriff court whose main functions concern the carrying out of diligence within the sheriffdom.
Sist	The suspension of a civil court case for an indefinite period or until the occurrence of a particular event, eg to enable the parties to settle a case or to enable a party to apply for legal aid.
Small claims	The civil court procedure used for actions involving disputes over payment, delivery or implementation of an obligation in which there is a financial claim of £750 or less.
Summary cause	A simplified civil procedure applicable to a fairly wide range of actions and where a financial sum is involved with a value of between £750 and £1500.
Summary warrant	A simplified court process which can be used to enforce certain types of monies levied by central or local government, eg income tax, VAT, vehicle excise duty, community charge and council tax.
Summons	The court document by which initiates small claims and summary cause actions in the sheriff court.

- Time to pay direction** An order of the court which a debtor can apply for before the awarding of decree. If the order is granted the debtor can repay their debt by instalments or deferred lump sum.
- Time to pay order** An order of the court similar to the time to pay direction except that it can only be applied for after the awarding of decree and the onset of diligence.
- Warrant sale** A form of diligence by which a debtor's moveable property is sold to repay the debt. The warrant sale can only commence after pointing procedure has been carried out by an officer of court.

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