

Diligence Consultation 2016

The Report of the Summary of Responses and the Response from Accountant in Bankruptcy



An agency of
Buidheann Ie



Report on Public Consultation

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1. Background

Introduction

The Scottish Government recognises the responsibility it has to take action where it can to help the people of Scotland, by ensuring its debt management and debt relief solutions are fit for purpose: that is, they support the people of Scotland and help to strengthen Scotland's economy. As part of this, the Scottish Government also recognises it has a responsibility to ensure that creditors can use diligence to recover money due to them.

During 2016, Accountant in Bankruptcy (AiB), on behalf of Scottish Government, began a series of legislative reviews. This included a review of diligence legislation to assess, wherever possible, the impact of the diligence measures introduced by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (the 2007 Act), including those provisions of that Act which are not yet in force. As part of this review, AiB carried out a consultation and this report provides a summary of the responses.

Diligence

Diligence is the term for various processes of debt enforcement in Scots law. A person or organisation (the creditor) can use diligence if someone who owes them money (the debtor) has failed to pay a sum which is due. However, before the creditor can carry out diligence against the debtor they must firstly obtain a decree (court order) which is enforceable in Scotland, or a document of debt such as a summary warrant.

The court order gives the creditor authority to recover money due to them using any method of legal debt enforcement they choose. In most cases, the creditor must also serve a charge for payment and issue the Debt Advice and Information Pack (DAIP) before carrying out diligence.

There are two types of warrants used to pursue diligence - the summary warrant and the non-summary warrant. A summary warrant is a means for certain creditors to pursue sums of money which they are owed. Used mainly by local authorities and Her Majesty's Revenue and Customs (HMRC), the process involves an application being sent to court in respect of debts due by several different debtors. No hearing is held, although statutory notices are provided to the debtor prior to application. A non-summary warrant debt is the term used for all executions of diligences that are not part of the summary warrant process. This encompasses all other types of debt, including consumer debt, personal loans and credit card debt.

Most diligences require the creditor to firstly serve a charge for payment on the debtor. A charge for payment is a formal demand for payment of the amount owed to the creditor, including interest and associated costs, and generally gives the debtor 14 days in which to make payment. If the debtor does not satisfy the debt within the period specified, the creditor may then use diligence to recover what is owed.

Legislation

Diligence in Scotland is covered by the following legislation: the Debtors (Scotland) Act 1987 (the 1987 Act), the Debt Arrangement and Attachment (Scotland) Act 2002 (the 2002 Act) and the 2007 Act.

Response to Consultation

AiB is very grateful to those who took the time to respond to its consultation. There was broad agreement that most of the diligence measures are effective and that those diligence measures which have yet to be enacted should be brought into force. A number of suggestions for improvements were also put forward and these have been carefully considered. In doing so, the following key principles have been reflected upon:

- fair and just processes of debt advice, debt relief and debt management are available to those who need them
- those debtors who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses
- the best return for creditors is secured by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses

2. Table of abbreviations

AiB	Accountant in Bankruptcy
ABCUL	Association of British Credit Unions Limited
BBA	British Bankers Association
CAB	Citizens Advice Bureau
CAS	Citizens Advice Scotland
CCA	Credit Consumer Act
DAIP	Debt Advice and Information Pack
DAS	Debt Arrangement Scheme
DPP	Debt Payment Programme
EU	European Union
HMRC	Her Majesty's Revenue and Customs
ICAS	Institute of Chartered Accountants of Scotland
IP	Insolvency Practitioner
IVA	Individual Voluntary Arrangements
MAS	Money Advice Scotland
PMB	Protected Minimum Balance
PTD	Protected Trust Deed
SMASO	The Society of Messengers at Arms and Sheriff Officers
TD	Trust Deed

3. Summary of responses

The responses can be summarised into three main categories: (1) diligences the majority consider to be effective, (2) diligences the majority do not consider to be effective and (3) those that have not yet been enacted. They are summarised as follows:

(1) Diligence measures the majority of respondents consider to be effective

Inhibition

- respondents would like to see an improvement in the process where a debtor lives outwith Scotland
- the general consensus among respondents was that five years is an appropriate period for an inhibition

Diligence on the Dependence

- respondents were in agreement that it was an expensive diligence option with limited guarantees and there were questions around the need to have a hearing in each case
- over half of the respondents agreed it was unnecessary to send a copy of the arrestment schedule by recorded delivery as it was a duplication of the process which incurs an additional expense

Money Attachment

- the majority of respondents considered money attachment to be an effective diligence
- respondents would like to see the process adjusted to take account of modern IT payment methods and extend the time periods for execution

Diligence Against Earnings

- respondents would like to see a facility for batch and electronic transfer and a timeframe for notification of a successful arrestment (21 days)
- in relation to Conjoined Arrestment Orders, more than half of respondents believed there should be a minimum amount of earnings recovered before employers are required to pay the earnings collected to the sheriff clerk

Arrestment in Execution and Action of Furthcoming

- respondents would like to see a notification from the arrestee that an arrestment has been unsuccessful
- most respondents did not consider it necessary to send an additional copy of an arrestment schedule by recorded delivery when the arrestee is a bank or other financial institution

Admiralty Actions and Arrestment of Ships

- respondents considered that attaching the arrestment schedule to a “main mast” was outdated and that the Sunday limitation should be removed
- the process could be improved with the introduction of some form of information disclosure

Actions for Removing from Heritable Property

- respondents noted it was a costly and potentially length process and there needed to be some flexibility in serving the notice
- respondents would also like to see a formal process for the recording of items and their disposal, as well as a fixed timescale for doing so

Summary Warrants

- respondents highlighted that creditors are involuntary and have little knowledge of circumstances
- most respondents would like to see the introduction of some form of information disclosure

(2) Diligence measures that the majority of respondents *do not* consider to be effective

Exceptional Attachment

- respondents suggested it was an expensive and time consuming process which was rarely used due to the low value of goods and long list of exemptions
- respondents considered the power to execute should be included within the warrant for execution

Adjudication for Debt

- respondents suggested it was difficult to operate and was seldom used
- however, the majority of respondents were in favour of retaining the process unless a suitable alternative is introduced via land attachment

Interim Attachment

- respondents considered the process to be unnecessarily burdensome and costly and that the list of exempt goods should be reviewed
- respondents suggested there should be an automatic conversion from interim to attachment

Landlord's Hypotech

- respondents though it was difficult to enforce except in drastic circumstances, for example, sequestration
- respondents also considered it should cover goods in commercial premises

Mailles and Duties

- the majority of respondents agreed mailles and duties should be abolished as it was seldom used but some would like to see a similar process introduced first

(3) Diligence measures not currently in force

Land Attachment

- the majority of respondents believed land attachment or a similar process should be enacted to replace adjudication for debt. Before this can happen, respondents recognised there was a need for further consideration, particularly around the need for proper protection for the debtor's family home

Disclosure of Information

- the majority of respondents agreed there is a need for disclosure of information to facilitate diligence
- respondents suggested the disclosure of information should be granted after decree and after the days of a charge have expired
- there was general consensus that a minimum level of information should be available before disclosure can be requested. This should either be the name, address, date of birth and/or national insurance number, or the information contained within the court decree

Residual Attachment

- the majority of respondents concurred there was a need for residual attachment in its proposed form, as there was a necessity for universal attachability
- the majority of respondents also agreed there was no requirement for changes to be made prior to it being implemented

4. Summary of AiB Response

AiB will take a number of recommendations to Ministers for new legislation which seeks to improve the efficiency and effectiveness of diligence. It will aim to modernise diligences by making better use of technology where appropriate, remove duplication, streamline processes and improve the administration involved in diligence. In doing so, AiB will balance the rights of debtors and creditors.

AiB recognises that further work is needed to finalise some recommendations and will work with stakeholders to develop these.

The majority of the changes are expected to require primary legislation and AiB will establish when and how this can be taken forward. Where changes can be made through regulations, AiB will take these forward at the earliest opportunity.

These recommendations will include:

Exceptional Attachment

AiB will consider how it can simplify/streamline the processes to ensure this is a more efficient diligence. This will include considering the possibility of introducing the power to execute an exceptional attachment within the warrant for execution. It is anticipated the changes will require primary legislation.

Adjudication for Debt

AiB recognises the view that this diligence should be retained unless land attachment is enacted. As outlined later in this document, there are no plans to implement land attachment in its current form – but AiB will instead work with stakeholders to see if an amended version of land attachment can be brought forward. If this is not possible, AiB will then consider whether any changes can be made to adjudication for debt to improve the process without undermining the existing protection of the family home. Any change is likely to require primary legislation.

Inhibition

AiB will seek to take forward a recommendation to include the term "process server for service furth of Scotland" within the form of schedule of inhibition in order to address the situation where a debtor and/or heritable assets are not located in Scotland. This will require an amendment to secondary legislation.

Diligence on the Dependence

AiB will consider how it can make this diligence more efficient. This will include removing the requirement for an additional copy of an arrestment schedule to be sent by recorded delivery when the arrestee is a bank or financial institution. This will provide environmental and cost savings to those who use this diligence while also removing unnecessary duplication from the process. AiB will also consider the recommendation to remove the requirement for a hearing to be heard in all cases. It is anticipated this will amend the process so a hearing is only fixed after the debtor has been served with the relevant documentation and where interested parties have lodged answers. This will require an amendment to primary legislation.

Interim Attachment

AiB will consider how this diligence measure can be improved by reviewing the processes involved in interim attachment to establish if they can be streamlined. For example, whether there remains a need for two separate inventories and valuations, and the most appropriate time for any valuation to take place. AiB will also review the list of exempt assets to establish if any change is required. It is expected that any changes will require primary legislation.

Money Attachment

AiB accepts this diligence could be modernised and will take forward a recommendation to amend the timings for executing a money attachment. The current provision which states that money attachment can only be executed Monday to Saturday between 8am and 8pm will be removed to allow the diligence to be executed at any time within the trading hours of the business. AiB will also consider taking forward a recommendation for credit and debit card counterfoils to be included in the definition of “money”. AiB will investigate how this would work in practice. It is anticipated that this would make this diligence more effective. This will require primary legislation.

Diligence against Earnings

AiB will review the processes to determine if these can be streamlined and if greater use can be made of technology. For example, introducing a minimum amount of earnings collected before an employer is required to pay the earnings to the sheriff clerk, whether funds collected through payroll should be batched and sent electronically and whether a defined timescale of 21 days for an employer to advise whether an earnings arrestment has been successful can be introduced. AiB acknowledges that any changes introduced will impact on employers and will therefore seek to limit the burden on employers while improving the effectiveness and efficiency of this diligence. This will require primary legislation.

Arrestment in Execution

AiB will consider how it can remove duplication, such as removing the requirement to send an additional copy of an arrestment schedule by recorded delivery when the arrestee is a bank or financial institution. AiB will also take forward the recommendation for the requirement for arrestees to notify whether an arrestment has been unsuccessful. This will require primary legislation.

Landlord Hypothec

AiB recognises that many respondents said landlord hypothec is difficult to enforce and the desire for landlords to be able to enforce the hypothec against goods located in commercial properties. AiB will work with stakeholders to determine where improvements can be made. Any changes would require primary legislation.

Mails & Duties

AiB will take forward the recommendation to abolish mails and duties and consider a suitable alternative.

Admiralty Actions and Arrestment of Ships

AiB will take forward a recommendation to amend the location for attaching the arrestment schedule, currently to the ship's main mast. The recommendation will be that the arrestment schedule should be attached to the door of the ship's bridge or, where no door or ship's bridge exits, the ship's central access point. There will continue to be a requirement for a copy of the arrestment schedule and certificate to be delivered to the harbour master at the time of the arrestment. This change is intended to simplify the attachment to take account of different ships and where no mast exists. AiB will also take forward a recommendation to modernise this diligence by enabling admiralty actions and arrestment of ships to be carried out on a Sunday. This will require an amendment to primary legislation.

Actions for Removing Heritable Property

AiB will review the processes involved to determine if these can be improved and/or streamlined. For example, clarifying the treatment of assets abandoned by the debtor and the treatment of livestock. This will require primary legislation.

Summary Warrants

AiB notes that further improvements have been suggested, such as the request for a summary warrant to contain authority to execute an inhibition. However, AiB also notes concerns, primarily from the advice sector, about it being too early in the diligence process to incorporate inhibition into a summary warrant. AiB shares these concerns and will not seek to include authority to execute an inhibition within a summary warrant. AiB will take forward the recommendation that summary warrants should contain details of multiple summary warrants incurred by the same debtor. Any changes will require primary legislation.

Land Attachment

There is no intention to enact land attachment in its current form. AiB recognises the majority of respondents said that land attachment should be enacted, although the consultation confirmed there remains concern about the impact on debtors where this involves the family home. On behalf of Scottish Ministers, AiB will work with stakeholders to establish how land attachment can be implemented while still fully protecting the family home. For example, land attachment could initially be introduced only for second homes or business premises. Any potential changes will require primary legislation.

Disclosure of Information

AiB accepts there are circumstances where disclosure of information would be helpful. However, if implemented, AiB also wants to ensure there are sufficient measures in place to protect debtors (and other individuals with the same name and address) and to ensure the diligence is not abused. Current legislation provides a skeleton on how disclosure of information could work. AiB will work with stakeholders to establish how this can be fleshed out before putting forward proposals on how disclosure of information could be implemented. This would require secondary legislation.

Residual Attachment

AiB will take forward the recommendation to introduce residual attachment in its proposed form as there is a requirement for universal attachability. This will be considered in conjunction with land attachment.

Diligence Statistics

AiB welcomes the feedback on the format of the diligence statistics and will take forward the suggested improvements. The statistics are based on information provided by sheriff officers and there is currently no requirement for a sheriff officer to record the outcome of a diligence. AiB agrees this would be valuable information and will investigate whether this can be introduced.

Debt Advice and Information Package

AiB acknowledges there is a variety of views on when and how the DAIP should be issued. AiB agrees debtors should be encouraged to seek advice as early as possible and will therefore take forward the recommendation to issue the DAIP at the start of the process. AiB will also review the information contained in the DAIP and consider if other changes are required to encourage debtors to read and act on the DAIP.

5. Consultation Response Results

EXCEPTIONAL ATTACHMENT

Part 3 of the 2002 Act introduced exceptional attachment, which was subsequently updated by Part 7 of the 2007 Act. This provides a special procedure for the attachment of non-essential articles kept in a dwellinghouse and can only be used in exceptional circumstances.

An exceptional attachment order authorises the attachment, removal and auction of non-essential assets which belong to the debtor and are kept in a dwellinghouse. Before granting an order, the sheriff will take a number of matters into consideration, including the nature of the debt, whether the debtor resides in the dwellinghouse, whether the debtor has had money advice and whether there is, or has been, any agreement between the debtor and the creditor for payment of the debt.

The sheriff will satisfy himself that the creditor has taken reasonable steps to negotiate a settlement of the debt with the debtor. The sheriff will also check the creditor has already executed or attempted to execute an arrestment and earnings arrestment, and that there is a reasonable prospect that any sums recovered through exceptional attachment would produce the aggregate of chargeable expenses and £100.

Unlike an ordinary attachment, articles attached under authority of an exceptional attachment order are removed immediately from the dwellinghouse unless it is impractical to do so. Once removed, the attached articles may not be auctioned until seven days have elapsed from the date of removal. During this seven day period, the debtor may apply to the sheriff for an order to release an article which has been attached and allow for the return the attached articles if the sheriff considers this appropriate in the circumstances.

Question 1(a): Do you consider exceptional attachment to be an effective diligence?

	Total Responses
Yes	13
No	20
N/A	5
Total	38

Scott & Co (Scotland) LLP: "Although a rarely used diligence, from our experience the proceeds of auction in most cases are very low due to the poor value of second hand goods and tendency towards hi-spec electrical items being subject to finance agreements. However, the application process can be beneficial in engagement with the debtor and in the vast majority of applications made by our firm, the debtor has entered into and maintained a suitable payment plan with the creditor thereby negating the requirement to execute the order."

Question 1(b): If you answered no to Q1(a), why not?

Over half of all respondents did not consider exceptional attachment to be an effective diligence. Reasons for this vary, but include that debtors have no items of value, the process is too cumbersome and the list of exempt items is too long.

British Bankers Association: “No. This is very rarely used, particularly in the CCA regulated environment. It is an expensive and time consuming process and therefore rarely cost-effective even in cases where it is appropriate.”

Question 1(c): Have you identified any improvements that you consider are necessary to exceptional attachment?

	Total Responses
Yes	22
No	11
N/A	5
Total	38

Question 1(d): If you answered “Yes” to question 1(c), what improvements do you consider are needed?

There were numerous proposals for improvement to the exceptional attachment process. It was suggested that the power to execute an exceptional attachment should be contained within the warrant for execution.

FGJ Sheriff Officers: “The process is unnecessarily cumbersome for creditors and some thought should be given to including the power to execute an exceptional attachment within the standard warrant for execution.”

Other suggested improvements include a review of the value of exempted sentimental items, the ability for sheriff officers to legitimately enter an arrangement to reduce fees, and a redefining of essential assets.

Keith Morrison, Llewellyn & Co Sheriff Officers: “It is difficult to suggest an “improvement” as any change in favour of the creditor will be seen as an erosion of debtor’s rights.”

Question 1(e): Would you use exceptional attachment in its current form to recover debt?

	Total Responses
Yes	11
No	17
N/A	10
Total	38

British Bankers Association: “Yes, but very rarely as debtors don’t generally have easily identifiable non-essential articles of value.”

Question 1(f): If you answered “No” to question 1(e), why not?

The majority of respondents who answered “No” to question 1(e) did so as they felt the process takes too long.

Question 1(g): Do you consider the application process and timescales involved for exceptional attachment to be reasonable?

	Total Responses
Yes	11
No	21
N/A	6
Total	38

Question 1(h): If you answered “No” to question 1(g), why do you consider the application process and timescales involved unreasonable?

The majority of those who answered “No” to question 1 (g) commented that the process takes too long.

Alex Irvine, Scott & Co (Scotland) LLP: “The timescale and application process is unreasonable for several reasons, primarily because the diligence already proceeds on the basis of a decree or document of debt. The debtor is already suitably protected by the act given the provisions regarding entry and the articles which are exempt from attachment.”

It was also suggested that the timescale for auction should be extended and moved in line with other diligences.

Summary

- the majority of respondents do not believe that exceptional attachment is an effective diligence
- it is suggested that the power to execute an exceptional attachment should be contained within the warrant for execution

AiB Response

AiB acknowledges the concerns highlighted around the administration of exceptional attachment. It also recognises that this diligence has encouraged debtors to engage with sheriff officers. AiB will consider how it can simplify / streamline the processes to ensure this is a more efficient diligence, while still balancing the rights of debtors and creditors. This will include considering the possibility of introducing the power to execute an exceptional attachment within the warrant for execution. It is anticipated that the changes will require primary legislation.

ADJUDICATION FOR DEBT

Adjudication for debt is a rarely-used diligence against heritable property, which is exclusively a Court of Session process. Adjudication for debt gives creditors a right or security over heritable and some other property owned by the debtor. It can be used alone or following an inhibition. Before taking steps to use adjudication for debt, a creditor must be in possession of a decree (or relevant document of debt).

The creditor will normally, although not necessarily, register a notice of summons of adjudication in the Register of Inhibitions and Adjudications. This has the effect of inhibiting the debtor, limited to the property specified in the action, preventing the debtor from disposing of that property.

Once a decree of adjudication is granted, an extract of the decree can be registered in the Register of Sasines or Land Register. Upon registration, the adjudication effectively gives the creditor a judicial security over the adjudged property, but this does not permit the creditor to sell. It does, however, allow the creditor to raise an action to remove the debtor from the property. If the subjects are let then the creditor can, through the diligence of maills and duties (which is discussed later), collect rent from the tenants.

After the expiry of one year and a day, adjudication gives the adjudging creditor a preference over other creditors, apart from those holding prior or equal ranking securities. During the period between adjudication and the creation of the preference, it is possible for other creditors to raise a petition for the bankruptcy of the debtor and thus equalise their position with the adjudging creditor.

It is only if the debt remains unpaid after the expiry of at least 10 years from the granting of the decree of adjudication that the creditor can proceed to the second stage of the diligence and apply to the Court of Session for a declaratory of expiry of the legal. If the debtor does not settle the debt upon the raising of this action, decree will be granted and the creditor becomes the owner and can sell the property.

Part 4, Chapter 1 of the 2007 Act makes provision to abolish adjudication for debt. However as this has not been commenced, this diligence can still be used to recover debt.

Question 2(a): Do you agree that adjudication for debt should be abolished?

	Total Responses
Yes	15
No	17
N/A	6
Total	38

Capital Credit Union: "In its current form it is impossible to operate and recover debt."

Question 2(b): If you answered no to Q2(a), why not?

Of those who answered 'no' to Q2a, the majority believe that adjudication for debt should not be abolished unless land attachment was enacted.

ICAS: “Without reform in other areas (such as inhibitions and land attachment), adjudication for debt continues to provide a useful diligence process and provides creditors with an ultimate option to recover debt.”

Question 2(c): Would you use adjudication for debt in its current form to recover debt?

	Total Responses
Yes	7
No	18
N/A	13
Total	38

Question 2(d): If you answered “No” to question 2(c), why not?

Of those who answered ‘no’ to Q2(c), the majority did so as they believe that the process takes too long.

Sheilagh Scott, Scott & Co (Scotland) LLP: “The process is lengthy and cumbersome and in most cases other forms of diligence are more likely to yield a positive result.”

Summary

- respondents were not in agreement over whether adjudication for debt should be abolished. However, the majority of respondents were in favour of retaining the process unless a suitable alternative is introduced via land attachment
- Respondents suggested it is difficult to operate and is seldom used

AiB Response

AiB recognises the view that this diligence should be retained unless land attachment is enacted. As outlined later in this document, there are no plans to implement land attachment in its current form – but AiB will instead work with stakeholders to see if an amended version of land attachment can be brought forward in the near future. If this is not possible, AiB will then consider whether any changes can be made to adjudication for debt to improve the process without undermining the existing protection of the family home. Any change is likely to require primary legislation.

INHIBITION

Inhibition is a preventative diligence which stops a debtor from dealing with their heritable property until the debt is paid, or the obligation to the creditor is met. Heritable property is land and other immoveable property owned by the debtor, such as houses and commercial premises.

An inhibition stops the debtor from selling, transferring or disposing of their interest in property. It also prevents the debtor from securing any new loans against their property.

A creditor must have a decree (or relevant document of debt) before proceeding with an inhibition. A schedule of inhibition must be served on the debtor. In addition, where the debtor is an individual and the action is in respect of debt, the creditor must provide a DAIP. The court decree must be served on the debtor and notice of the inhibition registered in the Register of Inhibitions and Adjudication. This notice serves to protect potential purchasers of the property. Without registration, the inhibition is invalid.

Inhibition can also be used when an action for the payment of debt is under consideration by the court, but decree has not yet been granted. This action is used to secure the debtor's property pending the outcome of the court action and is a form of diligence on the dependence (which is discussed below).

Inhibition affects all heritable property owned by the debtor unless it is limited by the court 'on the dependence' of an action, or where decree is granted to allow a specific act, for example to transfer heritable property to someone else. An inhibition which is limited only applies to the property specified in the action.

The debtor is not allowed to enter into any dealings with inhibited property for a period of five years. After five years, the inhibition lapses and has no effect. However if the debt to which the inhibition relates is paid, the creditor is bound to record a discharge of the inhibition in the Register, indicating that the inhibition is no longer effective.

Question 3(a): Do you consider inhibition in its current form to be an effective diligence?

	Total Responses
Yes	32
No	1
N/A	5
Total	38

Citizens Advice Scotland: "Yes, inhibition is effective in bringing debtors to seek advice from the Scottish Citizens Advice service."

Question 3(b): If you answered no to Q3(a), why not?

The only respondent who answered 'no' to the previous question was ICAS who said:

“While inhibitions may be more effective than other forms of diligence, the correlation between the period of five years under which the inhibition is effective and the period when heritable property is transferred (a substantial number of people will stay in the same property for much longer than five years) is such that we consider that inhibitions are often ineffective.”

Question 3(c): Have you identified any improvements that you consider are necessary to inhibition?

	Total Responses
Yes	23
No	10
N/A	5
Total	38

Question 3(d): If you answered “Yes” to question 3(c), what improvements do you consider are necessary?

The majority of respondents who have answered ‘yes’ to the previous question are of the opinion that improvements are necessary for cases where the debtor lives outwith Scotland.

SMASO: “It would be helpful if the forms of schedule for inhibition were amended to include the term process server for service furth of Scotland.”

Question 3(e): Would you use inhibition in its current form to recover debt?

	Total Responses
Yes	29
No	0
N/A	9
Total	38

Question 3(f): If you answered “No” to question 3(e), why not?

There were zero ‘no’ responses to the previous question.

Question 3(g): An inhibition prevents the debtor from entering into any dealings with their heritable property for a period of five years, after which time, the inhibition has no effect. Do you agree that five years is an appropriate period for an inhibition?

	Total Responses
Yes	30
No	3
N/A	5
Total	38

Citizens Advice Scotland: “Yes, the inhibition should be renewed every five years to remind the debtor to do something about it and for the creditor to check whether the client's circumstances have changed and further payment is now possible.”

Question 3(h): If you answered “No” to question 3(g), how long should an inhibition have effect for?

It was suggested that the inhibition should last for 10 years, or that there should be no time limit - meaning the inhibition remains until payment or discharge.

Question 3(i): Should inhibition be a diligence option after securing a summary warrant?

	Total Responses
Yes	28
No	6
N/A	4
Total	38

Kevin MacKay, SMASO: “Similar to the concerns over Land Attachment, it should be introduced with some limitations – possibly in terms of the minimum balance it can be executed for?”

Question 3(j): If you answered “No” to question 3(i), why not?

The responses to why inhibition would not be considered appropriate were mixed, but included that it is too early in the debt recovery process, and that the amount of debt may not be accurate.

Citizens Advice Scotland: “Most of the clients seeking advice from the Scottish Citizens Advice Service about summary warrants relate to council tax arrears. Non-payers of council tax are just as likely to accrue inhibitions that they don't pay. More active means of recovery are better for local authorities and debtors to prompt them to get on top of their debts and not leave them until the situation is unsustainable and sequestration is the only option. It is also against natural justice that a government body should be allowed to impose an inhibition on property without the debtor having had an opportunity to challenge whether the debt is owed.”

Summary

- the vast majority of respondents believe inhibition to be an effective diligence, and would use inhibition in its current form
- over half of those who responded to the consultation identified improvements they consider necessary to inhibition. Of those, the most popular suggestion was improving the process where the debtor lives outwith Scotland
- more than 75% of respondents agree that five years remains an appropriate length of time for an inhibition to last
- most respondents think that inhibition should be a diligence option after securing a summary warrant

AiB Response

AiB recognises that inhibition is considered to be an effective diligence and acknowledges that further improvements can be made. This includes where the debtor has assets in Scotland but lives outwith Scotland. AiB will seek to take forward a recommendation to include the term "process server for service furth of Scotland" within the form of schedule of inhibition in order to address the situation where a debtor and/or heritable assets are not located in Scotland. This will require an amendment to secondary legislation. AiB does not propose to amend the current timescale which prevents a debtor from entering into any dealings with their heritable property. In addition, AiB does not intend to incorporate inhibition into a summary warrant as outlined in the summary warrant section later in this report.

DILIGENCE ON THE DEPENDENCE

Part 6 of the 2007 Act provides for diligence on the dependence. This is a provisional measure which can be used to secure funds, goods or property during a court action. At any time while the action is on-going, a creditor may apply to court for authority to carry out arrestment or inhibition on the dependence of the action. If successful, it will prevent the debtor from disposing of assets while the action is on-going.

A hearing date is fixed in all cases, providing the debtor and any other person having an interest the opportunity to make representations. In many instances, this hearing will be held prior to warrant for diligence on the dependence being granted. However, where it appears to the court that the creditor has a prima facie case in the main action, or that there is a real risk that the creditor could be prejudiced in some way prior to the action being decided, then a warrant can be granted prior to the hearing.

Question 4(a): Do you consider diligence on the dependence to be an effective diligence, in its current form?

	Total Responses
Yes	28
No	3
N/A	7
Total	38

Question 4(b): If you answered “No” to question 4(a), why not?

The most common response was that diligence on the dependence is used too infrequently to be effective.

The Moray Council: “We have no experience of this diligence as it does not appear to be used in this area.”

Question 4(c): Have you identified any improvements that you consider are necessary to diligence on the dependence?

	Total Responses
Yes	12
No	18
N/A	8
Total	38

Question 4(d): If you answered “Yes” to question 4(c), what improvements do you consider are necessary?

While the majority of respondents did not consider any improvements to be necessary to diligence on the dependence, there were a variety of suggestions from those who have identified improvements. These suggestions include: removing the automatic fixing of hearings in all cases, reducing the cost of the court procedure and greater clarity from sheriffs as to their reasoning.

Walker Love: "In general, diligence on the dependence works well from a sheriff officers perspective, with the exception of interim attachment. In its current format, interim attachment is unnecessarily complex on the basis that inventories and valuations require to be completed on two separate occasions. This make the process unnecessary expensive and impractical. The process should be retained but with improvements."

Question 4(e): Would you use diligence on the dependence in its current form to recover debt?

	Total Responses
Yes	28
No	0
N/A	10
Total	38

Question 4(f): If you answered "No" to question 4(e), why not?

There were zero 'no' responses to question 4(e).

Question 4(g): Do you agree that an additional copy of an arrestment schedule should be sent by recorded delivery when the arrestee is a bank or other financial institution?

	Total Responses
Yes	7
No	20
N/A	11
Total	38

John MacLeod: "Yes, in all cases, the arrestment schedule should be served on the arrestee and the debtor."

Question 4(h): If you answered "No" to question 4(f), why not?

The majority of responses to this question were that sending an additional copy of an arrestment schedule was an unnecessary duplication of process which incurs additional expense.

Walker Love: "The postal copy provides no useful or practical purpose. It is also an unnecessary burden with associated administrative cost to both the sheriff officer who is required to issue the additional copy and also the arrestee who is required to record receipt and then collate the paperwork. This is a significant overhead for Scotland's major clearing banks. NB: a postal copy is only required for sheriff court arrestments, therefore legislation should be adjusted to replicate the Court of Session rules."

Summary

- the vast majority of respondents consider diligence on the dependence to be effective in its current form, and would use it in its current form to recover debt
- the most common suggestion for the improvement of diligence on the dependence was to amend the process so that a hearing is not automatically fixed in all cases
- over half do not agree that an additional copy of an arrestment schedule should be sent by recorded delivery when the arrestee is a bank or other financial institution

AiB Response

AiB recognises the view that while this is an effective diligence, some improvements can be made to the processes and administration involved. AiB will therefore consider how it can make this diligence more efficient. This will include removing the requirement for an additional copy of an arrestment schedule to be sent by recorded delivery when the arrestee is a bank or financial institution. This will provide environmental and cost savings to those who use this diligence while also removing unnecessary duplication from the process.

AiB will also consider the recommendation to remove the requirement for a hearing to be heard in all cases. It is anticipated this will amend the process so a hearing is only fixed after the debtor has been served with the relevant documentation and where interested parties have lodged answers.

This will require an amendment to primary legislation.

INTERIM ATTACHMENT

Part 7 of the 2007 Act updated the interim attachment diligence, as covered in Part 1 of the 2002 Act. Interim attachment is a provisional diligence, similar to diligence on the dependence, which protects the interests of creditors while a court action progresses. It effectively restricts the debtor's ability to deal with attached movable assets in their possession pending the outcome of the action, but does not allow the creditor to remove or sell the attached items. The court may, upon application at any time after interim attachment is granted, make provision for the security of attached articles.

As with diligence on the dependence, a hearing will be fixed in most cases prior to a warrant for interim attachment being granted, with intimation on the debtor and any other person having an interest. This provides these parties with an opportunity to make representations. However, where the court is satisfied the creditor has a good case in the main action or there is a real risk the creditor could be prejudiced in some way prior to the action being decided, a warrant can be granted without a prior hearing.

This interim diligence does not allow the creditor to take steps to dispose of the attached items. When a decree is granted, a further valuation and attachment must be carried out before the creditor can proceed to sell attached goods.

Question 5(a): Do you consider interim attachment to be an effective diligence in its current form?

	Total Responses
Yes	6
No	25
N/A	7
Total	38

Question 5(b): If you answered "No" to question 5(a), why not?

The majority of respondents consider interim attachment to be unnecessarily burdensome and costly.

Scott & Co (Scotland) LLP: "We believe the under-utilisation of this diligence is due to the costs of application for the diligence and duplication of process when decree is granted. The creditor has to pay a fee for various hearings in addition to the attachment fee for the valuation of the goods attached and if unsuccessful in the action, the fee is not recoverable from the defender. The re-attachment of the same goods in execution on the granting of an extract decree should not be necessary and creates needless additional expense. Like an arrestment, the interim attachment should convert to an attachment in execution on the granting of decree."

Question 5(c): Have you identified any improvements that you consider are necessary to interim attachment?

	Total Responses
Yes	20
No	10
N/A	8
Total	38

Question 5(d): If you answered “Yes” to question 5(c), what improvements have you identified?

The most common suggestions for improving the process of interim attachment were to review the list of exempt goods, and that there should be an automatic conversion from interim attachment to attachment.

Question 5(e): Do you agree that there should be an automatic conversion from interim attachment, to attachment?

	Total Responses
Yes	22
No	8
N/A	8
Total	38

Stirling Park LLP: “There has to be a mechanism to revalue goods at the point of conversion and maybe it is a case that the goods are not valued at the interim attachment stage and will be valued after the decree is granted.”

Question 5(f): If you answered “No” to question 5(e), why not?

Of those who answered ‘no’ to question 5(e), the majority did so because they believe there should be an opportunity to revalue items and include additional items following the decree being granted.

It was also suggested that automatic conversion may disadvantage the debtor.

Citizens Advice & Rights Fife: “There should be clear stages for action and response or challenge otherwise ignorance to legislation or severity is likely to disadvantage the debtor further.”

Summary

- the vast majority of those who responded to the consultation do not consider interim attachment to be effective. The main reason for this is that it is unnecessarily burdensome and costly
- the most common suggestions to improve interim attachment were to review the list of exempt goods, and to introduce an automatic conversion from interim attachment to attachment

AiB Response

AiB acknowledges that many consider interim attachment to be burdensome and a costly diligence measure. AiB will therefore consider how this diligence measure can be made more efficient while still protecting debtors' rights. This will include a review of the processes involved in interim attachment to establish if they can be streamlined. For example, whether there is a need for two separate inventories and valuations and when a valuation should take place. AiB will also review the list of exempt assets to establish if any change is required. It is expected that any changes will require primary legislation.

MONEY ATTACHMENT

Part 8 of the 2007 Act introduced money attachment as a new form of diligence. Money attachment allows a creditor to attach money (cash, including coins and banknotes in a foreign currency, postal orders, banking instruments etc.) which is held on a debtor's premises. Money kept in a dwellinghouse cannot be attached, although this does not include a garage (even if it is built into a house), a garden shed or an outbuilding. A money attachment can only be executed Monday to Saturday between 8am and 8pm.

Question 6(a): Do you consider money attachment to be an effective diligence, in its current form?

	Total Responses
Yes	26
No	7
N/A	5
Total	38

British Banker's Association: "Due to the nature of some businesses (particularly high cash turnover businesses such as pubs and nightclubs), the time period for execution should be extended and the 'money' definition widened as suggested."

Question 6(b): If you have answered "No" to question 6(a), why not?

The majority of respondents did consider money attachment to be an effective diligence, although seven 'no' answers were submitted. The reasons given included that the current rules are too restrictive and that it was infrequently used.

HMRC: "HMRC's view is that money attachment in its current form is not cost effective, particularly in view of increased use of payment by debit or credit card."

Question 6(c): Have you identified any improvements that you consider are necessary to money attachment?

	Total Responses
Yes	25
No	9
N/A	4
Total	38

Question 6(d): If you answered "Yes" to question 6(c), what improvements have you identified?

There were three common suggestions for improvements to the money attachment process. These were: extending the times when money attachments can be executed, that the definition of 'money' should be extended to include credit and debit card counterfoils, and that there should be provision for sheriff officers to search persons present if it is suspected they have concealed attachable money on their person.

It was also suggested there should be a protection, similar to the Protected Minimum Balance, so the business is able to continue after the money attachment has taken place.

Money Advice Scotland: "Improvements identified included the introduction of a protected amount for attachment. The example was given of a money attachment being carried out to the detriment of staff working in a business. It was noted that it is not uncommon for staff working in the retail or hospitality sector to be paid out of the till at the end of a shift. If money attachment without a protected amount is carried out in these circumstances, staff may be affected. This in itself could ultimately lead to debt and financial difficulty for people (typically in low income employment) who bear no responsibility for the original debt. Members from across the sector – whether money advisers, IPs or sheriff officers – were all in agreement that the publication of additional data around money attachment would help better understand the efficacy of this option and whether any further improvements were necessary.

Question 6(e): Would you continue to use money attachment as a diligence in its current form?

	Total Responses
Yes	27
No	3
N/A	8
Total	38

Question 6(f): Do you agree that the timings for executing a money attachment diligence should be extended?

	Total Responses
Yes	29
No	4
Mixed	1
N/A	4
Total	38

Question 6(g): If you answered "Yes" to question 6(f), what timings do you consider are appropriate?

The most common suggestions for the extension of timings when a money attachment can be executed were: that the trading hours of the business should be used, that there should be no restrictions, and that the suggestion given in the consultation document of Saturday nights past 8pm, and through until 6am on Sunday mornings, was appropriate.

FGJ Sheriff Officers: "If a money attachment could be executed during a business's opening hours, this would enable full use of the diligence against many pubs, clubs etc."

Question 6(h): Would you use the money attachment diligence more if the timings for executing a money attachment were extended?

	Total Responses
Yes	26
No	1
N/A	9
Other	2
Total	38

Question 6(i): Do you agree that definition of “money” for the purposes of the money attachment diligence should be extended to include the attachment of debit and credit card counterfoils?

	Total Responses
Yes	26
No	6
N/A	6
Total	38

Question 6(j): If you answered “No” to question 6(i), why not?

Concerns were raised in respect of card machine providers and chargeback costs.

Citizens Advice Scotland: “Qualified answer: CAS is concerned that this option may cause difficulties unless it is researched and considered in more depth first. The business agreement with the merchant services provider (provider of the card machine) may not allow for the attachment of debit and credit counterfoils. If this option is to be looked at, it would presumably need to be with the permission of the merchant services providers, otherwise businesses affected may lose the benefit of the card machine due to breaking contractual terms. Losing such a facility would no doubt exacerbate any money difficulties the business already had, which is not in the creditor nor debtor's interests. It is also unclear if there was attachment of debit and credit card counterfoils who would assume liability if a customer proceeded with a request for a chargeback or a claim under section 75 of the Consumer Credit Act. Such consumers would need to be fully protected.”

Question 6(k): Would you use the money attachment diligence more if the definition of “money” was extended to include the attachment of debit and credit card counterfoils?

	Total Responses
Yes	25
No	2
N/A	10
Other	1
Total	38

The Highland Council: “Yes. Counterfoils are now almost obsolete, could the wording include “Transactions in IT systems, authorised but not yet paid out to the retailer”?”

Summary

- over three quarters of those who answered this question agree that money attachment is an effective diligence in its current form
- the main suggestion for improvement is to extend the timings when a money attachment can be executed
- there was no general consensus over what these times should be, although the most popular suggestions were that there should either be no restrictions, or that money attachments can be executed at any time within the trading hours of the business
- most respondents believe the definition of money should be extended to include credit and debit card counterfoils and that this extension would lead them to use the diligence more often

AiB Response

AiB accepts this diligence could be modernised and will take forward a recommendation to amend the timings for executing a money attachment. The current provision which states that money attachment can only be executed Monday to Saturday between 8am and 8pm will be removed to allow the diligence to be executed at any time within the trading hours of the business.

AiB will also consider taking forward a recommendation for credit and debit card counterfoils to be included in the definition of “money” and will investigate how this would work in practice. It is anticipated this would make this diligence more effective.

This will require primary legislation.

DILIGENCE AGAINST EARNINGS

Part 3 of the 1987 Act, as updated by Part 9 of the 2007 Act and successive Regulations, provides for three diligences, known as:

- **earnings arrestments** – to enforce the payment of any ordinary debt by making a deduction from a debtor’s earnings
- **current maintenance arrestments** – to enforce the payment of current maintenance by making a deduction from a debtor’s earnings
- **conjoined arrestment orders** – to enforce the payment of two or more debts owed to different creditors against the same earnings, by making a deduction from debtor’s earnings

A diligence against earnings is only permitted if a creditor is in possession of a decree (or relevant document of debt) and the creditor has issued the debtor with a charge for payment. The period of the charge for payment must have expired, before proceeding with diligence against earnings. However, where the debt is being pursued by a fines enforcement officer for an unpaid court fine, no charge for payment is required. Where the debtor is an individual, creditors, including fines enforcement officers, must also have provided a DAIP to the debtor.

The tables used to calculate what an employer must deduct when a debtor is subject to diligence against earnings are contained in Schedule 2 to the 1987 Act. Scottish Ministers have previously given an undertaking to review the deduction tables every three years. These tables were last reviewed in 2015.

The lower monthly threshold for diligence against earnings also determines the Protected Minimum Balance (“PMB”) in arrestment. The PMB was introduced to arrestment by the 2007 Act and provides an important protection for those subject to arrestment of their bank account, ensuring they are not left destitute by the arrestment. The PMB protects debtors by setting out a minimum amount of funds which are protected from the arrestment.

Question 7(a): Do you consider diligence against earnings to be an effective diligence, in its current form?

	Total Responses
Yes	34
No	0
N/A	4
Total	38

Citizens Advice Scotland: “This diligence is effective in bringing debtors in to bureaux to seek advice, and in some cases it is the best option for the debtors in terms of an affordable arrangement to repay their debts.”

Question 7(b): If you answered no to question 7(a), why not?

There were zero ‘no’ responses to the previous question.

Question 7(c): Have you experienced any issues with the process used to instruct an employer to make a deduction from the income of a debtor?

	Total Responses
Yes	13
No	20
N/A	5
Total	38

Question 7(d): If you answered yes to Question 7(c), what were these issues? How could the process be improved?

There were a number of suggestions given as to how the process could be improved. These included: providing more guidance for employers on their obligations, reviewing the way the deductible amount is calculated and making a change to the Time to Pay application form to include the debtor's full employment details.

Stirling Park LLP: "Some debtors have more than one job and their consolidated earnings would be within the threshold for an effective earnings arrestment. There should be a mechanism to obtain deductions from one of the employers. The arrestee should respond to the EA within three weeks and not when reasonably practical in line with arrestment."

Question 7(e): Would you continue to use diligence against earnings as a diligence in its current form?

	Total Responses
Yes	29
No	0
N/A	8
Other	1
Total	38

Question 7(f): In relation to conjoined arrestment orders, should there be a minimum amount of earnings recovered before employers are required to pay the earnings collected to the sheriff clerk? For example, where £4 is being arrested from an employee each week and a minimum threshold of £20 is in place, an employer would send payment to the sheriff clerk after five weekly collections.

	Total Responses
Yes	19
No	13
N/A	6
Total	38

British Bankers Association: "No. The use of electronic payment methods should ensure an efficient and cost effective process for employers to pay earnings collected to the sheriff clerk."

Question 7(g): If you answered "Yes" to question 7(f), what should the threshold be?

The most common amount suggested was £20.

Question 7(h): Do you agree that funds collected through payroll deduction should be batched and sent electronically?

	Total Responses
Yes	31
No	0
N/A	6
Other	1
Total	38

Question 7(i): Should there be a defined timeframe for an employer to advise if an earnings arrestment has been successful?

	Total Responses
Yes	33
No	0
N/A	5
Total	38

Question 7(j): If you answered "Yes" to question 7(i), what do you consider is an appropriate timescale?

Suggested timescales varied from seven days to one month. The most popular suggestion was 21 days.

Summary

- all respondents considered diligence against earnings to be an effective diligence in its current form
- the majority of respondents did not identify any improvements necessary to diligence against earnings and would continue to use the diligence in its current form
- in relation to conjoined arrestment orders, more than half of respondents believed there should be a minimum amount of earnings recovered before employers are required to pay the earnings collected to the sheriff clerk. £20 was the most common suggested minimum amount
- all respondents were in agreement that funds collected through payroll deduction should be batched and sent electronically
- they were also in agreement that there should be a defined timeframe for an employer to advise if an earnings arrestment has been successful. 21 days was the most popular suggestion

AiB Response

While diligence against earnings is an effective diligence measure, AiB acknowledges there are a number of improvements that would make it more efficient. AiB will therefore review the processes to determine if these can be streamlined and whether greater use of technology can be used. For example, introducing a minimum amount of earnings collected before an employer is required to pay the earnings to the sheriff clerk, whether funds collected through payroll should be batched and sent electronically, or if a defined timescale of 21 days for an employer to advise whether an earnings arrestment has been successful should be introduced. AiB acknowledges that any changes introduced will impact on employers and will therefore seek to limit the burden on employers while improving the effectiveness and efficiency of this diligence. This will require primary legislation.

ARRESTMENT IN EXECUTION AND ACTION OF FURTHCOMING

Part 10 of the 2007 Act introduced sections 73A - 73T into the 1987 Act from 22 April 2009, making changes to many aspects of arrestment, particularly in relation to the arrestment of funds. Section 73D, which specifies when a DAIP should be provided for arrestment, has not yet been brought into force. Aspects of arrestment not covered by the 2007 Act are still provided for by common law.

Arrestment allows a creditor to seize a debtor's moveable property, such as funds or goods held in storage, where that property is in the possession of a third party. For example, arrestment can be used against money held in a debtor's bank account(s).

A creditor must have a decree (or relevant document of debt) before proceeding with an arrestment. Unlike other diligences, for most creditors there is no requirement to serve a charge for payment prior to carrying out an arrestment. However, if the creditor is a public creditor, such as a local authority or HMRC, and it has pursued the debt through a special abbreviated court process in order to obtain a summary warrant, a charge must still be served.

The creditor must ask a sheriff officer to serve a schedule of arrestment on the third party (the arrestee) which prevents them from releasing funds and goods held for the debtor. Where funds are attached as a result of the arrestment, the amount arrested is limited to either the amount the arrestee holds for the debtor, or the total amount (including all charges, expenses and interest) due to the creditor, whichever is less. Where arrested funds are insufficient to cover the whole amount owed and the arrestee also holds goods belonging to the debtor, all of those goods are also arrested, regardless of value.

The arrestee has a statutory duty to send the creditor, the debtor and anyone else who has claimed ownership of the funds or goods a form of disclosure within three weeks from the date the arrestment schedule was served. The form of disclosure details the nature and value, as far as it is known, of the items arrested.

If funds held by a bank or any other financial institution are arrested, they are subject to a PMB. Only the balance above the PMB can be arrested.

Where funds are arrested, they are automatically released by the arrestee to the creditor 14 weeks after the date the arrestment is carried out. The debtor can also choose to give written authority (called a 'mandate') for the arrestee to give arrested funds or goods to the creditor sooner.

The automatic release of funds will not take place in cases where an objection has been lodged. The debtor, arrestee or any other interested party has the right to lodge a notice of objection by making an application to the sheriff, after which a hearing will be held. If the objection is upheld, the sheriff can order the arrestment to be restricted (in which case only part of the funds are given to the creditor) or recalled (where the funds are restored to their original position).

Where goods have been arrested and the debtor has not signed a mandate, the creditor must raise an action of furthcoming with the court. An action of furthcoming is an application to the court to authorise the release of funds or goods to the creditor.

Arrestment can also be used when an application for a decree is under consideration by the court but has not yet been decided. In these circumstances this can be used to secure funds or goods pending the outcome of the application and is a form of diligence on the dependence.

Question 8(a): Do you consider arrestments in execution and actions of furthcoming to be effective diligences, in their current form?

	Total Responses
Yes	32
No	0
N/A	6
Total	38

Citizens Advice Scotland: "Yes. Our members were of the view that the effectiveness of arrestment is that it prompts early intervention and encourages debtors to seek advice."

Question 8(b): If you answered "No" to question 8(a), why not?

There were zero 'no' responses to the previous question.

Question 8(c): Have you identified any improvements that you consider are necessary for arrestments in execution and actions of furthcoming?

	Total Responses
Yes	25
No	7
N/A	6
Total	38

Question 8(d): If you answered "Yes" to question 8(c), what improvements do you consider are necessary?

It was suggested that arrestees should be required to notify when an arrestment has been unsuccessful and, in the case of a bank or other financial institution, the reason for this, e.g. insufficient funds or no account held.

Another common suggestion was to remove the requirement in sheriff court rules to send a postal copy where the arrestment was not served personally on the arrestee.

The money advice community also noted their concerns regarding the Protected Minimum Balance on debtors who are solely in receipt of benefits and suggested that benefits should not be arrested where it is clear they are the sole source of income.

Question 8(e): Would you use the arrestment in execution and action of furthcoming to recover debt?

	Total Responses
Yes	28
No	0
N/A	10
Total	38

Question 8(f): If you answered “No” to question 8(e), why not?

There were zero ‘no’ answers to the previous question.

Question 8(g): Should an arrestee have to respond to the arrestment where no funds are attached?

	Total Responses
Yes	30
No	2
N/A	5
Other	1
Total	38

Question 8(h): If you answered “No” to question 8(g), why not?

Alan Munro: “We regularly have no information on the banking arrangements of debtors so cast our net as widely as possible with arrestments on various banks, in the hope the debtor holds an account with one of them. It is unduly onerous to expect a bank, which has no contractual relationship with the debtor, to respond to every arrestment where no funds are attached. This represents a considerable administrative cost for those banks.”

HMRC: “We do not see that this extra step is necessary.”

Question 8(i): Do you agree that an additional copy of an arrestment schedule should be sent by recorded delivery when the arrestee is a bank or other financial institution?

	Total Responses
Yes	9
No	21
N/A	7
Other	1
Total	38

John MacLeod: “Yes, arrestment schedules should be served on both debtor and arrestee in every case.”

Question 8(j): If you answered “No” to question 8(i), why not?

It was noted the postal copy is only required for sheriff court arrestments and legislation should be amended to follow the Court of Session rules. Concerns were also raised about unnecessary duplication and the environmental impact of the process.

Summary

- all respondents considered the diligence of arrestment in execution and action of furthcoming to be effective in its current form, and would use the diligence to recover debt
- the most common suggestion to improve the diligence was to require arrestees to notify when an arrestment has been unsuccessful
- most respondents did not believe it is necessary to send an additional copy of an arrestment schedule by recorded delivery when the arrestee is a bank or other financial institution

AiB Response

While arrestment is an effective diligence measure, AiB acknowledges there are a small number of improvements that would make it more efficient. AiB will therefore remove instances of duplication, such as the requirement to send an additional copy of an arrestment schedule by recorded delivery when the arrestee is a bank or financial institution. AiB will also take forward the recommendation which requires arrestees to notify whether an arrestment has been unsuccessful. This will require primary legislation.

LANDLORD'S HYPOTHEC

Part 11 of the 2007 Act modified the rules regarding the landlord's hypothec. The landlord's hypothec arises automatically and gives a landlord a right in security over movable property belonging to the tenant of let premises. It is available only in respect of unpaid rent and exists as long as the rent remains unpaid. It is not available over property which is kept in a dwellinghouse, on agricultural land, or on a croft. It is also not available over property which does not belong to the tenant, or property which has been acquired by a third party in good faith.

The hypothec operates in a similar way to a standard security, giving the landlord priority in any claim where there is ranking. If a tenant is subject to insolvency proceedings, such as bankruptcy or liquidation, the landlord has a priority over the other creditors regarding property secured by hypothec. If the tenant is not subject to an insolvency procedure, the landlord's methods of recovery are the same as for any other creditor.

Question 9(a): Do you consider landlord's hypothec to be effective in its current form?

	Total Responses
Yes	7
No	21
N/A	10
Total	38

Question 9(b): If you answered "No" to question 9(a), why not?

Most respondents who answered 'no' to the previous question did so as they don't believe there is a mechanism to enforce the landlord's rights other than by insolvency.

HMRC: "There is no way of enforcing the landlord's right except in the most drastic circumstances of insolvency or sequestration."

Question 9(c): Have you identified any improvements that you consider are necessary for landlord's hypothec?

	Total Responses
Yes	18
No	9
N/A	11
Total	38

Question 9(d): If you answered "Yes" to question 9(c), what improvements do you consider are necessary?

It was suggested that a process which operates in a similar way to sequestration for rent be reintroduced.

Stirling Park LLP: “We think that a landlord should have hypothec against the goods located within the premises with a diligence similar to sequestration for rent, which gives fast-track priority over other creditors before any insolvency process.”

Summary

- the majority of respondents did not consider landlord’s hypothec to be an effective diligence
- suggestions for improving this diligence included allowing the landlord to enforce the hypothec against goods located within commercial properties

AiB Response

AiB recognises that many respondents said landlord’s hypothec was difficult to enforce and the desire for landlords to be able to enforce the hypothec against goods located in commercial properties. AiB will work with stakeholders to determine where improvements can be made. Any changes would require primary legislation.

MAILLS AND DUTIES

Part 11 of the 2007 Act makes provision to abolish maills and duties. However, this has not been commenced and this diligence can still be used to recover debt.

Maills and duties is a diligence which is available to heritable creditors, where the property over which they have security is let. It gives a heritable creditor the power to receive payments of rent due to be paid to the debtor directly from the tenant who has leased the property. This diligence is not available to creditors holding a standard security and is rarely used.

Question 10(a): Do you agree that maills and duties should be abolished?

	Total Responses
Yes	26
No	4
N/A	8
Total	38

Citizens Advice Scotland: "CAS supports the abolition of this rarely used diligence."

Question 10(b): If you answered "No" to question 10(a), why not?

The majority of respondents to the previous question agreed that maills and duties should be abolished as it is a rarely used diligence. However, of those who answered no to question 10 (a), the majority were in agreement that maills and duties should not be abolished unless a similar process was introduced first which would provide the creditor with the same benefits.

Walker Love: "Maills and duties should not be abolished unless regulation is forthcoming to introduce residual attachment or similar process which would provide the creditor with the same benefits."

Summary

- the majority of respondents supported the abolishment of maills and duties as it is rarely used but some would like to see a similar process introduced first

AiB Response

AiB will take forward the recommendation to abolish maills and duties and consider a suitable alternative.

ADMIRALTY ACTIONS AND ARRESTMENT OF SHIPS

Part 14 and Schedule 4 of the 2007 Act updated the Administration of Justice Act 1956 to modernise the language and process of the diligence admiralty actions and arrestment of ships.

Admiralty arrestment is a type of diligence relating to the arrestment of ships and cargo on board ships for debt which is due. Generally, arrestment of a ship prevents it from sailing to its next destination until the arrestment is recalled or the debtor provides alternative security. Admiralty arrestments are relatively uncommon, but when used may involve claims of some considerable value.

While most admiralty actions in Scotland are raised in the Court of Session, sheriff courts also have authority within their own jurisdiction. There are three types of admiralty arrestment:

- **arrestment of the dependence** – used to secure a claim against the owner of a ship. Unlike other forms of arrestment on the dependence, the ship does not have to be in the hands of a third party in order to be arrested – it can be arrested in the hands of the owner
- **arrestment in rem** – an arrestment carried out to enforce a claim against the ship itself or against some other piece of maritime property
- **arrestment to found jurisdiction** – an action brought specifically to establish jurisdiction in Scotland but not having the effect of detaining the vessel. Unless followed by arrestment on the dependence, the vessel is free to sail

Before carrying out an admiralty arrestment, the creditor must obtain a warrant. The arrestment is carried out by an officer of the court who physically attends the vessel.

Feedback from messengers at arms and sheriff officers suggests admiralty actions and arrestment of ships is an effective diligence. However, it was felt this diligence should be extended to allow all types of arrestment of ships to take place on a Sunday.

Question 11(a): Do you consider admiralty actions and arrestment of ships to be an effective diligence, in its current form?

	Total Responses
Yes	26
No	0
N/A	12
Total	38

Question 11(b): If you answered “No” to question 11(a), why not?

The majority of respondents agreed that admiralty actions and arrestment of ships is an effective diligence.

There were zero “no responses” to question 11(a). However, the majority of respondents who answered N/A did so as this diligence is rarely used and therefore they were unable to comment.

British Bankers Association: “There are very rare cases of this diligence being used in the context of retail banking to be able to provide a meaningful response. However, it is believed that it is effective (for example to prevent cargo leaving a port until a debt has been paid).”

Question 11(c): Have you identified any improvements to admiralty actions and arrestment of ships?

	Total Responses
Yes	10
No	14
N/A	14
Total	38

Question 11(d): If you answered “Yes” to question 11(c), what improvements do you consider are necessary?

There was a mixed response to question 11(c) regarding whether any improvements could be made to admiralty actions and the arrestment of ships. There were three common themes in the responses:

- all types of admiralty actions should be extended to be executed on a Sunday
- the introduction of disclosure orders to make the process more efficient by allowing creditors to identify vessels owned by debtors
- removal of the reference to attaching the arrestment schedule to the “main mast”, as very few modern ships have a mast

Scott & Co (Scotland) LLP: “Remove the reference to attaching the arrestment schedule to the “main mast”. As very few modern ships have a mast, the attachment should be fixed to the door of the bridge or other part of the structure of the bridge. Historically, the arrestment schedule was attached to the main mast to show the ship had been arrested and no other process was effected at the time of arrestment. The current rule requires a copy of the arrestment schedule and certificate to be delivered to the harbour master at the time of arrestment and therefore the harbour master will not permit the ship to leave the harbour.”

Question 11(e): Would you use admiralty actions and arrestment of ships in its current form to recover debt?

	Total Responses
Yes	22
No	1
N/A	15
Total	38

Question 11(f): If you answered “No” to question 11(e), why not?

There were no comments from those who answered no to question 11(e), although there were comments made from those who responded “not applicable”.

Respondents said it was either not a process that they had used or that it would depend on the level of debt involved.

Question 11(g): Do you agree that admiralty actions and arrestment of ships diligence should be extended to enable all types of ship arrestments to take place on a Sunday?

	Total Responses
Yes	27
No	0
N/A	11
Total	38

Question 11(h): If you answered “No” to question 11(g), why not?

There were zero “no” responses to question 11(g).

Summary

- respondents agreed that admiralty actions and arrestments of ships were an effective diligence, albeit rarely used
- the process could be improved with the introduction of disclosure orders and removal of the reference to attach the arrestment schedule to the “main mast”, as very few modern ships have a mast
- the majority of respondents agreed that admiralty actions and arrestment of ships diligence should be extended to take place on a Sunday

AiB Response

AiB will take forward a recommendation to amend the location for attaching the arrestment schedule, currently to the ship’s main mast. The recommendation will be that the arrestment schedule should be attached to the door of the ship bridge or, where no door or ship bridge exists, the central access point. There will continue to be a requirement to deliver a copy of the arrestment schedule and certificate to the harbour master at the time of the arrestment. This change is intended to simplify the attachment to take account of different ships and where no mast exists. AiB will also take forward a recommendation to modernise this diligence by enabling admiralty actions and arrestment of ships to be carried out on a Sunday. This will require an amendment to primary legislation.

ACTIONS FOR REMOVING FROM HERITABLE PROPERTY

Part 15 of the 2007 Act sets out the rules for the diligence of actions for removing from heritable property. This is an action where authority is granted to remove or eject a defender from the pursuer's property. Ejection is the term used where an owner of heritable property wishes to recover possession from someone who has no legal right or title to occupy the property, such as where there are squatters in residence.

The 2007 Act introduced a consistent approach for all types of removing, regardless of the legislative basis under which a decree for removing is granted. It also changed the process of removing someone after a decree for removing is granted, by introducing the requirement for a charge for removing to be served upon the defender before the removal can take place. This charge will give the defender a period of (usually) 14 days' notice before the removal can take place, unless the sheriff dispenses with or varies the 14 day period in special circumstances.

Question 12(a): Do you consider actions for removing from heritable property to be an effective diligence, in its current form?

	Total Responses
Yes	28
No	1
N/A	9
Total	38

The majority of respondents considered actions for removing from heritable property to be an effective diligence.

Citizens Advice Scotland: "The pre-action requirements, court paperwork and charge for removing are all effective drivers for debtors to seek advice and for that reason are effective. However, there are still a number of debtors who do not seek advice despite the number of documents given and more work needs to be done to find ways to engage with these tenants and homeowners."

Question 12(b): If you answered "No" to question 12(a), why not?

There were limited responses from respondents who answered "no" or "not applicable". Responses included:

ICAS: "While ultimately the action may be effective, the process appears to be costly and lengthy to achieve a successful outcome."

Money Advice Scotland: "Advisers had limited experience of this type of diligence and were of the view that more information was required in terms of its prevalence."

Question 12(c): Have you identified any improvements that you consider are necessary to actions for removing from heritable property?

	Total Responses
Yes	11
No	16
N/A	11
Total	38

Question 12(d): If you answered “Yes” to question 12(c), what improvements do you consider are needed?

There was a mixed response to question 12(c). The majority of respondents were content with the current process or did not suggest any areas for improvement. However, the respondents who answered “yes” to the question, made the following suggestions:

- Form 7 should be placed in a transparent envelope and a prescribed fee for the service of the notice of removal should be introduced as this is not often served at the same time as the charge for removal
- a number of respondents thought it would be useful to have further instructions or protections in relation to possessions such as livestock or where, for example, items are of high value but in poor condition

The Highland Council: “It would be useful to note condition and impact on value – eg: disposal instructions could note where items of potentially high intrinsic value are in poor condition or unsanitary/hazardous/contaminated, and instruct accordingly. Officers have encountered evictions where pets have been left free to roam prior to an eviction and made a mess of expensive computer gear and furnishings.”

- the rule for service of a Form 4 to be changed to allow the officer to serve it by any legal mode at the alternative address of the defender

Keith Morrison, Llewellyn & Co Sheriff Officers: “An improvement in notice to occupants, as where notice is given to occupants by recorded delivery with no requirement for personal service when it fails is still leading to occupants who are tenants of a debtor being in situ at the time of ejection.”

Question 12(e): Do you agree that regulations should prescribe how effects left at a property after an ejection are to be disposed of?

	Total Responses
Yes	26
No	1
N/A	11
Total	38

Question 12(f): If you answered “Yes” to question 12(e), how do you think the effects should be disposed of?

A number of respondents who answered “yes” suggested effects that have been abandoned, or not claimed within a specified timescale, should be disposed of at the creditor’s discretion. A number of respondents proposed effects and/or livestock should be inventoried and retained for a short period to allow arrangements for disposal or collection.

Walker Love: “Effects and/or livestock left at the property should be inventoried, then retained for a short period to allow arrangements to be made for disposal. Thereafter, they should either be disposed of or sold by the creditor with any value being credited to the cost of the removal process with any balance offsetting arrears. The creditor may elect to leave the effects in the property or remove them for preservation. The notice of removal should be amended to include a statement covering disposal of abandoned effects or livestock. The court should also issue direction for disposal of effects or livestock in the event that they cannot be sold.”

A number of respondents also suggested that a notice should be displayed at the subject’s address giving a timescale of either seven or 14 days to contact the creditor/landlord/agent to remove the articles from the property.

Stirling Park LLP: “A notice should be displayed at the subject address giving a timescale (possibly 14 days) to contact the creditor/agent to remove articles and photos of all items should be recorded. Failing which, the creditor should dispose of the articles accordingly and keep a record of how these were disposed. There should be no recourse of a financial claim by a debtor for these goods outwith the prescribed timescale.”

Question 12(g): Do you agree that regulations should prescribe the timescale for the disposal of effects after an ejection?

	Total Responses
Yes	27
No	1
N/A	10
Total	38

Question 12(h): If you answered “Yes” to question 12(g), what do you consider to be a reasonable timescale for disposal of effects left in a property after an ejection?

Respondents unanimously agreed there should be a prescribed timescale for the disposal of effects after ejection, although the suggested timescales varied from 48 hours to 28 days. The most common timescale suggested by respondents was 14 days.

Alex Irvine, Scott & Co (Scotland) LLP: “14 days to remove or make an agreement with the creditor for their removal seems reasonable.”

Citizens Advice Scotland: "To provide clarity to all parties in the process. CAS would recommend no less than 28 days, to give debtors time to seek advice and support."

Summary

- the majority of respondents considered actions for removing from heritable property to be an effective diligence
- suggestions for improvement included a Form 7 being placed in a transparent envelope, a prescribed fee for notice of removal and the rule for service of a Form 4 to be changed to allow the officer to serve it by any legal mode at the alternative address of the defender
- effects that have been abandoned or not claimed within a specified timescale should be disposed of at the creditor's discretion or retained for period of time to allow arrangements for disposal or collection
- there should be a prescribed timescale for the disposal of effects after ejection, with 14 days being the most commonly suggested timescale

AiB Response

While actions for removing from heritable property is an effective diligence, AiB acknowledges there are a small number of improvements to processes that would make it more efficient. AiB will therefore review the processes involved to determine if these can be improved and/or streamlined. For example, clarifying the treatment of assets abandoned by the debtor and the treatment of livestock. This will require primary legislation.

SUMMARY WARRANTS (TIME TO PAY AND CHARGES TO PAY)

Summary warrants permit local authorities and other public creditors to proceed directly to execute diligence in a summary manner. Until April 2008, there was no requirement to serve a charge for payment prior to execution. However, the 2007 Act provided that a charge for payment should be served in all summary warrant actions before enforcement can take place.

It was considered that debtors who may ignore letters, or who may not understand the serious nature of letters requesting payment of debts, might respond to a court action. The service of a charge for payment gives the debtor one last chance to either pay the debt, or to seek advice about their financial situation.

Question 13(a): Do you consider the summary warrant process to be an effective diligence?

	Total Responses
Yes	30
No	1
N/A	6
Other	1
Total	38

The majority of respondents agreed the summary warrant process is an effective diligence.

HMRC: "Neither obtaining a summary warrant nor serving a charge for payment are diligences so the question is unclear. That said, HMRC's view is that a summary warrant and service of a charge are quick and effective methods of recovering debt."

Question 13(b): Have you identified any improvements that you consider necessary to the summary warrant process?

	Total Responses
Yes	10
No	20
N/A	8
Total	38

Question 13(c): If you answered "Yes" to question 13(b), what improvements do you consider are necessary?

A common theme raised by respondents who answered "yes" was that the introduction of some form of information disclosure would be useful to help identify arrestable sources and to ensure those who have the ability to repay their debts do so.

Walker Love: "Summary warrant creditors are involuntary creditors. As such, they generally have little or no prior knowledge of their debtors' circumstances and financial background. Typically, there will have been no opportunity to ingather practical information which might assist at the enforcement stage, such as banking

or employment information. Accordingly, to facilitate the identification of a potential arrestable sources or employment information, we recommend the early introduction of a form of information disclosure, which is now essential if we are to safeguard the creditor's position. This will significantly enhance the current summary warrant recovery process."

Clarification or clearer guidance for the recipient would also be helpful, as well as refining the review process prior to the executing of summary warrants.

Money Advice Scotland: "Concerns were raised over cases of maladministration from local authorities where summary warrants were executed in error. In that respect, members noted that the review process prior to executing summary warrants could be refined. One adviser cited the example of one client who had an inhibition placed on their property after the local authority had not followed the correct review process before proceeding with a summary warrant. The introduction of pre-action requirements was also considered a potential improvement, although to counter that point, some members were concerned that this would place an unmanageable burden on the courts."

Question 13(d): Do you agree that summary warrants should contain authority to execute an inhibition?

	Total Responses
Yes	27
No	5
N/A	6
Total	38

Capital Credit Union: "Inclusion of authority to execute an inhibition and charges to pay should contain details of multiple summary warrants by the same debtor."

Question 13(e): If you answered "No" to question 13(d), why not?

The respondents who answered "no" or "not applicable" to question 13(d) suggested it was either too harsh and early in the process for such a restrictive diligence, were concerned councils may not have the correct information at the time of securing the summary warrant or were not convinced that the case for it had been made.

Money Advice Scotland: "Our members were of the view that the case for summary warrants to contain authority to execute an inhibition had not been made. The consultation document outlines that feedback from messengers at arms and sheriff officers suggest that this would be an improvement, but the reasons that inform this view are not included."

Question 13(f): Do you agree that charges to pay should contain details of multiple summary warrants incurred by the same debtor?

	Total Responses
Yes	31
No	0
N/A	7
Total	38

Question 13(g): If you answered no to question 13(f), why not?

Respondents unanimously agreed charges to pay should contain details of multiple summary warrants incurred by the same debtor. There were no comments received from respondents.

Summary

- the majority of respondents agreed the summary process is effective and that summary warrants should contain authority to execute an inhibition
- a number of respondents would like to see some form of information disclosure introduced

AiB Response

AiB acknowledges the summary warrant procedure is an effective diligence. It is noted that further improvements have been suggested, for example, the request for a summary warrant to contain authority to execute an inhibition. However, AiB also notes concerns, primarily from the advice sector, about it being too early in the diligence process to incorporate inhibition into a summary warrant. AiB shares these concerns and will not seek to include authority to execute an inhibition within a summary warrant. AiB will take forward the recommendation that summary warrants should contain details of multiple summary warrants incurred by the same debtor. Respondents have also said the use of disclosure of information would support the effectiveness of this diligence and AiB's response on this diligence is covered later in this report. Any changes will require primary legislation.

LAND ATTACHMENT

Part 4, Chapter 2 of the 2007 Act introduced land attachment. Together with residual attachment, this diligence is intended to replace the existing diligence of adjudication for debt. Land attachment has not yet been commenced.

Land attachment is intended to provide a diligence which allows unsecured creditors to enforce debt by taking action against a debtor's land. In this context, land means land including buildings and other structures, land covered by water and long leases over land where the debtor is the tenant. Land attachment will give the creditor a subordinate real right over the attached land as security for the sum recoverable by the land attachment.

Land attachment will require the debt to be constituted by decree or document of debt and the service of a charge for payment upon the debtor. Where the debtor is an individual, the creditor will also be required to provide a DAIP no earlier than 12 weeks before registering a notice of land attachment.

Land attachment is designed as a two-stage process whereby the creditor can secure the amount owed by the attachment, but can only bring about the sale of land by securing a warrant for sale from the court. There are a number of protections incorporated into the legislation, intended to balance the interests of debtors and creditors, particularly where attached land includes a dwellinghouse which is the sole or main residence of the debtor.

While not procedurally difficult to implement, land attachment is nevertheless controversial, as it could result in the possible loss of the debtor's home (if the attached land comprises or contains the debtor's sole or main residence).

Question 14(a): Given that land attachment was intended to replace adjudication for debt, is there a need for something that operates like adjudication for debt?

	Total Responses
Yes	26
No	7
N/A	5
Total	38

Walker Love: "The early introduction of a process similar to land attachment for commercial premises, land and second homes, with suitably strict rules around debtor protection, would be preferable to utilising sequestration to recover debts. Sequestration being the only vehicle a creditor has to attach heritable property owned by a debtor. In the spirit of universal attachability, I believe that there is a place for a diligence against specific land or buildings, on the proviso that a sheriff will have significant discretion in respect of its application."

Question 14(b): If you answered "Yes" to question 14(a), what do you think is needed?

The majority of respondents agreed land attachment or a similar process should be enacted to replace adjudication of debt. Most respondents agreed this should only

be done if further protections could be introduced around protection of the family home. Other suggestions included the need for a review of how the family home is treated across all statutory debt solutions and diligence, excluding the family home from land attachment and using an updated adjudication for debt for the family home.

SMASO: “Yes it should be introduced with appropriate safeguards for the protection of debtors where it would not be appropriate.”

The main concerns of those respondents who answered “no” to question 14a were around the ability of creditors to force the sale of a debtor’s property for an unsecured debt.

Citizens Advice Scotland: “No, CAS opposed land attachment in the original Bankruptcy and Diligence etc (Scotland) Act 2007 and our position remains unchanged. No creditor should have the power to force the sale of a debtor’s property for an unsecured debt. Apart from removing the risk from the creditor to lend unsecured funds responsibly to property owners, it would also force creditors to act with less forbearance in order to be the first to secure their position. Neither of these outcomes are desirable or welcome.”

Money Advice Scotland also highlighted that land attachment remains a controversial issue and is considered to blur the line between secured and unsecured debts.

Money Advice Scotland: “As the consultation document notes, this is perhaps the most controversial point of the review. Former First Minister, Alex Salmond, previously raised concerns that creditors may use the threat of homelessness to force vulnerable debtors to pay. In our view, that threat remains unresolved. Land attachment was also considered to blur the line between secured and unsecured debts. One attendee noted that a potential exception may be cases where a debtor has a second home or even where there is substantial equity in an expensive sole residence. On the balance of views, however, it was considered that there is no need to commence land attachment or indeed something that operates like adjudication for debt.”

Summary

- most respondents said land attachment or a similar process should be enacted to replace adjudication of debt
- there should be further consideration of rules surrounding the protection of the debtor’s family home

AiB Response

There is no intention to enact land attachment in its current form. AiB recognises that while the majority of respondents said that land attachment should be enacted, the consultation confirmed there remain concerns about the impact on debtors where this involves the family home. On behalf of Scottish Ministers, AiB will work with stakeholders to establish how land attachment can be implemented while still fully protecting the family home. For example, land attachment could initially be introduced only for second homes or business premises. Any potential changes will require primary legislation.

DISCLOSURE OF INFORMATION

Part 16 of the 2007 Act makes provision for the disclosure of information. It provides a power which enables creditors to obtain information about debtors by making an application to the sheriff. This is to facilitate diligence to enforce payment of debts due by virtue of decrees and documents of debt. Disclosure of information has not been commenced.

The debtor cannot be ordered to disclose information. However, a bank which a debtor holds an account with, or an employer of the debtor, could be required to provide information. This regulation does not affect (and does not override) any existing legislation or common law about the power to disclose or use information, or to order its disclosure or use.

Question 15(a): Do you consider that there is a need for disclosure of information to facilitate diligence?

	Total Responses
Yes	29
No	2
N/A	7
Total	38

HMRC: "Yes. HMRC generally has access to a range of information about debtors but where there are gaps then the ability to obtain proportionate further details to enforce payment will be useful."

Question 15(b): If you answered "Yes" to question 15(a), when would you consider it appropriate for disclosure of information to be granted?

60% of respondents agreed disclosure of information should be granted after a decree has been issued and/or after the expiry of a charge for payment.

Sheilagh Scott, Scott & Co (Scotland) LLP: "The disclosure of information should be available to creditors in possession of a decree or document of debt who have served a charge for payment and only once the days of charge expire."

A number of respondents also suggested the disclosure of information should only be available on application to the sheriff for an information disclosure order. Concerns highlighted were about how the information would be used, eg: only in terms of debt. Two years' imprisonment for non-disclosure of information was felt to be extreme.

Question 15(c): What details do you think should be disclosed?

There was unanimous agreement among respondents that bank and employment details should be disclosed. Other suggestions included previous addresses, national insurance numbers and details of any assets, with the general consensus that the minimum information should be that which was contained within the court decree.

Question 15(d): To help ensure that any disclosed information is for the correct person, is there a minimum amount of information which should be known about a debtor before disclosure of information can be requested?

	Total Responses
Yes	29
No	1
N/A	8
Total	38

Question 15(e): If you answered “Yes” to question 15(d), what minimum information should be known about the debtor?

The majority of respondents agreed the name, address and date of birth and/or national insurance number should be the minimum information known about the debtor. Alternatively, the minimum information required should be the information contained within the court decree.

Summary

- respondents agreed there is a need for disclosure of information to facilitate diligence
- disclosure of information should be granted after decree and/or after the expiry of a charge for payment
- the minimum amount of information which should be known about the debtor before disclosure can be requested should either be the name, address and date of birth or, at the minimum, the information contained within the court decree

AiB Response

AiB accept there are circumstances where disclosure of information would be helpful. If implemented, however, AiB also wants to ensure there are sufficient measures in place to protect debtors (and individuals with the same name and address), and to ensure the diligence is not abused. Current legislation provides a skeleton on how disclosure of information could work. AiB will work with stakeholders to establish how this could work in practice before putting forward proposals on how disclosure of information could be implemented. This would require secondary legislation.

RESIDUAL ATTACHMENT

Part 4, Chapter 3 of the 2007 Act introduced the new diligence of residual attachment which is intended, together with land attachment, to replace the existing diligence of adjudication for debt. Residual attachment has not been commenced.

Residual attachment is intended to provide a mechanism for creditors who wish to enforce debt due to them by attaching property belonging to the debtor. This diligence applies to property which is transferable, but not capable of attachment by any other type of diligence. It applies to both heritable and moveable property.

The provisions of the 2007 Act allow the description or class of property attachable by residual attachment to be prescribed by regulations. Attachable property may, for example, include assets such as fishing rights or copyright.

Residual attachment will only be available once the creditor has been granted a residual attachment order by the court. In applying for a residual attachment order, the creditor will be required to show the debtor has been served with a charge for payment in respect of the debt and, where the debtor is an individual, the debtor has been provided with a DAIP no earlier than 12 weeks before the application for the order.

Question 16(a): Do you consider that there is a need for residual attachment, in its proposed form?

	Total Responses
Yes	23
No	7
N/A	8
Total	38

British Bankers Association: "If adjudication were to be abolished, there would be no means of attaching intangible property (such as copyright and fishing rights). Whilst the use of this remedy is likely to be rare, the potential implications of the holistic changes made under the consultation should be understood when deciding whether to commence residual attachment or not."

Question 16(b): If you answered "Yes" to question 16(a), why?

The overwhelming majority of respondents who answered "yes" to the question agreed there is a necessity for universal attachability and that residual attachment provides this. A number of respondents also emphasized this was also the aim of the 2007 Act.

SMASO: "The policy aim of the 2007 act was to create universal attachability. The addition of residual attachment would assist in achieving that aim."

Question 16(c): Do you consider that there is a need for changes to residual attachment before being implemented?

	Total Responses
Yes	2
No	26
N/A	10
Total	38

Question 16(d): If you answered “Yes” to question 16(c), what changes do you consider are necessary?

There were only two respondents who answered yes to this question and their responses have been noted below.

HMRC: “Difficult to say since, as Cowan on Debt Recovery (W. Green, 2011) mentions at 12-01 on page 198, “Significant detail will require the implementation of statutory instruments....”. The process as described at sections 129 – 145 of the 207 Act presents significant hurdles for the creditor (e.g. persuading the court that the diligence will be effective) and unless some of these barriers are removed it’s difficult to see many creditors making use of residual attachment.”

John MacLeod, School of Law: “Availability should turn on whether there are other rules applicable to the asset class rather than on provision by ministers. I.e. s 129(3) should determine the scope of availability. On a related point, I would strongly favour a single diligence code rather than the current piecemeal legislation. Such a code could provide common rules for shared procedures (such as provision of advice and information packs) and also a catalogue of exempt assets rather than having to pick through each diligence to see what is exempt from what.”

Summary

- the majority of respondents concurred there was a need for residual attachment in its proposed form as there remains a necessity for universal attachability
- the majority also agreed there was no requirement for changes to be made prior to it being implemented

AiB Response

AiB will take forward the recommendation to introduce residual attachment in its proposed form, as there is a requirement for universal attachability. This will be considered in conjunction with land attachment.

DILIGENCE STATISTICS

AiB publishes diligence statistics in accordance with Section 84 of the 1987 Act. This provides details about the diligences executed during the last financial year, including by warrant type and sheriffdom. A copy of the most recent statistics can be found at:

https://www.aib.gov.uk/sites/default/files/aib_scottish_diligence_statistics_2016-17_0.pdf

Question 17(a): Do you find the diligence statistics helpful in their current format?

	Total Responses
Yes	27
No	4
N/A	7
Total	38

Question 17(b): If you answered “No to question 17(a), what improvements do you consider would be helpful?”

The majority considered the diligence statistics helpful in their current format. The respondents who answered “no” thought that while the statistics were useful in checking what diligences creditors are using, it would be helpful to be able to differentiate between consumer and commercial debts. It was also suggested the lack of certain data made it difficult to comment fully on the effectiveness of each diligence.

The Moray Council: “It would be useful to have a percentage of successful outcomes from each diligence.”

Question 17(c): Is there anything that you would like to see incorporated into the diligence statistics?

	Total Responses
Yes	13
No	18
N/A	7
Total	38

Question 17(d): If you answered “Yes” to question 17(c), what would you like to see?

The majority of respondents said they would like to see further statistics collated which would allow them to understand the effectiveness of the various diligences. For example, Citizens Advice Scotland would like to see further information on how much was recovered from each diligence.

Citizens Advice Scotland: “CAS would welcome local authority level data on diligences, rather than the statistics relating to sheriffdoms which are too high level

and not easily compared. CAS would also welcome statistics on effectiveness of the diligences. If information was available about the sums recovered via the diligences, this would help inform how various diligences are being used by creditors and whether they appear to be effective.”

Another common suggestion was for the statistics to be broken down by petitioning type or by local authority data. Some said it would be useful to have details on the distribution of diligences both in relation to summary warrant and non-summary warrants.

ICAS: “It would be useful to have details on the distribution of diligences, both in relation to summary warrants (other than council tax) and non-summary warrants.”

Summary

- respondents were generally happy with the diligence statistics in their current format
- statistics could be improved by incorporating the outcomes or effectiveness of each diligence and by breaking the statistics down further
- incorporate statistics in relation to both summary warrants and non-summary warrants

AiB Response

AiB welcomes the feedback on the format of the diligence statistics and will identify any improvements for presenting the available information. The statistics are based on information provided by sheriff officers and there is no requirement for a sheriff officer to record the outcome of a diligence. AiB agrees this would be helpful and will investigate whether this is something that can be taken forward in the future.

DEBT ADVICE AND INFORMATION PACKAGE

The 2007 Act made it a requirement for a debtor to be issued with a DAIP before any petition for sequestration is presented. The DAIP is a booklet which provides important information for debtors to help them deal with their creditors. The booklet provides information about the importance of seeking early advice and provides contact details for organisations which can help the debtor find an advice provider in their local area. The booklet also contains information on common forms of enforcement, gives information about bankruptcy and trust deeds and provides details of other sources of debt advice.

Where the debtor is an individual, a creditor is required by law to arrange to provide a DAIP prior to using most types of diligence. There is a set timescale for the issue of a DAIP within each of the processes in which it is required. Generally it must be issued no earlier than 12 weeks before diligence is carried out. The DAIP must also be issued before a creditor presents a petition for the debtor's bankruptcy and prior to the issue of a certificate for sequestration.

Question 18(a): Do you consider the issuing of a DAIP to debtors to be effective?

	Total Responses
Yes	26
No	5
N/A	7
Total	38

Question 18(b): If you answered “No” to question 18(a), why not?

The majority of respondents agreed the issuing of a DAIP to debtors is effective, although those that answered “no” were not entirely convinced they were being read by debtors or that they were aware of its significance.

ICAS: “We are not aware of any evidence which suggests that the provision of a DAIP is directly leading to debtors taking appropriate advice.”

There was also a suggestion that it was not always clear the DAIP was being issued by creditors when it should be.

Question 18(c): Have you identified anything that would improve the process of issuing the DAIP, or have you identified anything that could be incorporated into the DAIP which would help debtors?

	Total Responses
Yes	13
No	19
N/A	6
Total	38

Question 18(d): If you answered “Yes” to question 18(c), what have you identified that would help?

There were a number of proposals for improvement to the process for issuing the DAIP. Introduction of electronic service was the most common suggestion as well as condensing the size of the booklet, with a focus on recommending the debtor should seek advice as soon as possible.

The Highland Council: “If outwith the 12 week period from the first service of the pack, allow electronic service for the second service.”

A number of respondents also suggested the DAIP should be issued at an earlier point in the process, such as the point of commencing the court action.

Walker Love: “The DAIP should be issued in hard copy at the commencement of the court process or at final notice stage prior to application for summary warrant. This would be the most useful time for a debtor to receive this information. Post decree diligence schedules could be adjusted to signpost debtors to electronic versions of a DAIP; the 12 week refresh practice of issuing a hard copy of the DAIP does not seem to serve any purpose. If there is a desire to retain the refresh of a hard copy of the DAIP then this should be aligned to the prescription of the charge for payment.”

Summary

- the majority of respondents agreed the process for issuing a DAIP is effective, but there is room for improvement
- suggestions included the introduction of electronic service, condensing the booklet and issuing at an earlier stage in the process

AiB Response

AiB acknowledges that there are a variety of views on when and how the DAIP should be issued. AiB agrees debtors’ should be encouraged to seek advice as early as possible and will therefore take forward the recommendation to issue the DAIP at the start of the process. AiB will also review the information contained in the DAIP and consider if other changes are required to encourage debtors’ to read and act on the DAIP.

ADDITIONAL COMMENTS

A number of respondents provided some additional comments which have been summarised below, where they have not already been covered elsewhere in this document :

- consider the introduction of inhibitions for local authority clients to allow them to recover arrears of council tax due under summary warrants
- remove the requirement to give notice to a debtor of the date of removal of attached assets before an auction. This enables debtors to hide attached assets
- review of sheriff officers' fees required
- there are concerns the Act of Sederunt which has introduced 'simple procedure' has introduced a new pre-diligence measure, the 'charge'. There are concerns this imposes a further barrier to business creditors to recover monies rightfully due to them
- each diligence should be reviewed on its own merit as it would depend on the total level of debt due. Some processes could be costly and time consuming in comparison to the debt due
- diligence against earnings is essential to credit unions and if it was restricted or removed, it would be devastating to them. Conjoined arrestments work in favour of local authority creditors who make a separate application for each additional year of unpaid council tax. This means the percentage paid to non-local authority creditors inevitably reduces with each year, while the local authority receives a greater amount of total repayment
- there are concerns that many credit union members, who are unable to pay, contact administrators to enter into a trust deed. There are concerns that administrator fees are unreasonable and can double the amount due. Concerns that bankruptcy fees are also too high
- some forms of diligence were unfamiliar to respondents, which suggests that further information or education is required for a wider audience
- where inhibition is introduced on summary warrant as a level of protection for the debtor, a charge for payment should be served and the days of the charge expired prior to the inhibition being lodged
- a call for the Scottish Government to carry out a full consultation on how a debtor's home should be dealt with in diligence and in insolvency situations
- there needs to be coherence between the diligence rules and the sequestration rules on residential properties
- there is a suggestion that the Bankruptcy and Diligence (Scotland) Act 2007 removed some of the force of inhibition by changing its ranking effect and this may be a reason why its use has declined in recent years
- in relation to inhibition, the process of registration and renewal should be moved online to reduce the administrative cost burden on Registers of Scotland, solicitors, trustees and creditors
- landlord's hypothec should be repealed. There are also questions about the rationale behind landlords having greater priority than virtually all other creditors
- a consolidation of diligence or a single diligence code which contains primary legislation should be introduced to make it more accessible and provide clarity for users

- all debtor's assets should be subject to an appropriate diligence
- further research should be conducted to establish the effectiveness of the DAIP and whether it has any impact on the outcome for debtors
- the definition of "effectiveness" could have been made clearer within the consultation document and a request for all individual responses to be published (where permission is given) alongside the summary of responses
- there is a proposed change to Rule 5.4(6) of the Ordinary Cause Rules which reads as follows: "Where service is executed under paragraphs (1)(b) or (3), the document and the citation or notice of intimation, as the case may be, must be placed in an envelope bearing the notice. This envelope contains a citation to or intimation from (insert name of sheriff court) and sealed by the sheriff officer." As the vast majority of documents served are charges for payment, it is not considered appropriate that these are returned to the sheriff court in the above instance as this causes confusion with the sheriff clerk offices and, in some cases, the returned envelopes are not forwarded to the sheriff officer. A suggested amendment to this rule would be allowing the return address to be the sheriff court in cases of citation or notice of intimation and creditor or creditor's agent in the case of diligence
- review sections 154 and 160 of the 2007 as they contain drafting problems

6. Next Steps

1. AiB is committed to ensuring that diligence measures are as effective as possible. Carrying out a review of diligence will help ensure the various processes of debt enforcement continue to be as effective as possible.
2. AiB will take forward the actions outlined earlier in this report, working with stakeholders to identify changes which will enhance the diligence measures while ensuring we balance the rights of debtors and creditors. It is recognised the majority of changes will require primary legislation and we will look to take this forward at the earliest opportunity, but this is not expected to be in the immediate future.
3. In the meantime, however, we intend to establish a working group which will initially look at how disclosure of information could operate in Scotland. Subsequently, recommendations will be made to Ministers for a detailed regulatory framework that could be taken forward through secondary legislation, allowing implementation of this new diligence. Where appropriate, we also propose to use the working group to finalise proposals for other diligence measures, such as land attachment and residual attachment.
4. AiB will keep stakeholders informed of progress, including full details of all of the proposed changes once finalised and will confirm the timing of the legislative changes.
5. Although this is not a formal consultation document, we would welcome comments on the overall approach outlined here. Your comments should be sent to:

AiB_Policy_Development_Enquiries@gov.scot

or to:

Carol Kirk, AIB, 1 Pennyburn Road, Kilwinning, Ayrshire, KA13 6SA

7. Annex A

Below is a list of all respondents to the consultation who have given permission for their names to be known.

No	Respondent Name
1	Mr Alan Munro
2	Adam Armstrong, Scott & Co (Scotland) LLP
3	Alexander Irvine, Scott & Co (Scotland) LLP
4	Keith Morrison
5	Kevin Mackay, SMASO
6	Louise Washington, Scott & Co (Scotland) LLP
7	Sheilagh Scott, Scott & Co (Scotland) LLP
8	John MacLeod
9	Ryan Edwards
10	Alisdair MacPherson
11	Gerry Maher
12	The Moray Council
13	The Highland Council
14	Association of British Credit Unions (Scotland)
15	British Banker's Association
16	Walker Love
17	Capital Credit Union
18	Citizens Advice Scotland
19	Money Advice Scotland
20	Her Majesty's Revenue & Customs
21	R3 Scottish Technical Committee
22	Institute of Chartered Accountants Scotland (ICAS)
23	Scott & Co (Scotland) LLP
24	Stirling Park LLP
25	Scottish Transport Credit Union Ltd