

replacement
for poinding
& warrant
sales

debt &
poverty

early
intervention

social
security
system

debt
enforcement

small
businesses

debt
procedures

*the way
forward?*

Improving debt recovery in Scotland

**Report of
the Improving Debt
Recovery Working Group**

December 2000

Report of the Improving Debt Recovery Working Group

CONTENTS	<i>page</i>
1. Summary of recommendations	2
2. Foreword	6
3. Introduction	7
4. Membership and origin of the Improving Debt Recovery Working Group (IDRWG)	8
5. How debt and poverty occurs	10
6. Inadequacy of the social security system	14
7. Early intervention methods	19
8. Debt enforcement in Scotland	23
9. A replacement for poinding and warrant sales - the remedy of disclosure	27
10. Small businesses and poindings and warrant sales	34
11. Debt procedures after court	36

Appendices

- (a) Glossary**
- (b) Debt recovery procedure chart**
- (c) Trends in the use of debt enforcement procedures**
- (d) Debt questionnaire**
- (e) Contact information**

[1] Summary of recommendations

This report is the work of the *Improving Debt Recovery Working Group* (IDRWG). The IDRWG met monthly from 3 May 2000. The group wanted to show that debt recovery in Scotland could be more humane and would then be improved for debtor, creditor, the courts and society as a whole. It is an inclusive and open forum with an open membership bringing together advisers, community workers, lawyers, politicians, and those with a direct experience of poverty. The group had no independent funding or administrative resources.

- The basic principles of any changes should be to protect vulnerable groups, not reintroduce imprisonment for debt, and not undermine the continuation of widespread credit facilities.
- People in debt feel shame. They need an adequate income and more advice and information. They feel powerless to stop debts increasing no matter how hard they try to pay them off. They want creditors to actually communicate with them.
- Debt experienced by people on low incomes is the debt with the hardest sanctions. It occurs by a sudden disruption of income or a cumulative effect of an inadequate income.
- Scotland has among the worst poverty in the industrialised world.
- Means tested benefit levels are not calculated on a “basket of goods”. We inherited them. Benefit for a couple with 2 children under 11 falls £39p/w short of a low cost but acceptable budget.
- The social fund is wholly inadequate: it is cash limited, discretionary and the bulk of payments are loans.
- Our clients experience complex legal rules, restricted assistance with unpredictable costs and variable availability and quality of help.
- People who get advice report the access to knowledge, negotiation and representation make a huge difference.
- A disclosure order could give the creditor the right to relevant information to carry out further enforcement procedures.
- Our debt collection process takes no account of individual needs and does not address multi indebtedness.
- A debt adjudication scheme for undisputed debt with informal convenient, local hearings, operating in clear guidelines could supervise repayment of debts, saving expense for debtors, creditors, and the courts.

Disclaimer

The views expressed in this report are those held by particular individuals contributing to report chapters. The author(s) of individual chapters are footnoted. Authors include community activists with direct experience of debt, welfare rights and money advice professionals, solicitors and advisers working in the field of social welfare law, representatives of the small business community, representatives of churches, and politicians. Views expressed are not necessarily endorsed by the contributor's organisation.

Basic principles

Any system adopted must:

- Protect vulnerable groups. Our debt system must not put the debtor in destitution or below the bread line.
- Recognise that individuals and families have different needs, and that everything has a greater cost in relative terms for those who are disadvantaged.
- Not reintroduce civil imprisonment for failure to comply with any sanctions.
- Not undermine continuation of widespread credit facilities. People require credit to get by in their day-to-day lives.

The settled will of the parliament

It is the settled will of the Scottish Parliament that poindings and warrant sales must be abolished. Margaret Curran MSP stated, “We must make sure poindings and warrant sales will not be part of the alternatives that are put before us”.

The abolition of poindings and warrant sales

75% of all poindings proceed by way of a summary warrant – mostly for council tax and community charge arrears against people on low or modest incomes. A progressive and humane solution to the problem of debt recovery will never be found in a diligence against household goods. There is no need for such a system in Scotland.

Poverty and debt

Living on a low income increases the risk of debt. Debt occurs from a sudden disruption of income or through persistent low and inadequate income. The poverty trap of low wages means people live in debt and experience arrears. A “horrendous number” of people in Scotland suffer the damaging and debilitating effect of living in debt.

IDRWG report’s debt questionnaire

Debtors said: Being in debt gives feelings of “shame, guilt, inadequacy, powerlessness and failure”. Most common debts were housing costs, council tax, catalogues, phone bills, and loan companies (e.g. provident). They were in debt because wages and benefits are insufficient for a decent standard of living. Credit is too easily available and difficult to resist when there is not enough money to meet basic needs. Debts were too viciously pursued and no matter how hard you try the debt just gets “bigger and bigger”.

Debtors needs

Identified needs in the questionnaire were: “realistic and decent benefit levels”, “more wages”, “better housing” and more “communication”, “advice” and “information”.

Poverty in Scotland

Scotland has among the worst poverty in the industrialised world. Figures are shameful. 24% of Scots, 32% of children, 29% of pensioners live below half the average household income, the government’s measure of poverty. 26% of people lacked 2 or more essential items. 34% of children went without 1 and 18% without 2 essential items every day.

Inadequacy of the social security system

Families with children tend to have the highest arrears. Weekly benefit falls £39 short of a low cost but acceptable budget for a couple with 2 children under 11. Benefit levels are not calculated on a “basket of goods”. We inherited them. There has never been an assessment of their adequacy.

Social Fund

The social fund needs radical change: it is discretionary, the bulk of payments are loans with repayments taken from future benefit and the fund is cash limited, claimants have no way of knowing whether they will receive payment and refusal rates are very high.

Barriers to advice

The principle barriers to people seeking advice are: lack of knowledge of where to seek advice from when difficulties first begin through to enforcement action, and no strategic overview of the provision of advice and community legal services.

Early intervention methods

1 in 5 people have arrears of household expenses. The majority seek no advice at all even when the debt proceeds to court. Those that did get advice thought it made a “huge difference”. They welcomed access to knowledge, negotiation and representation. Advice provision creates a balance in the relationship between creditor and debtor.

Legal services in Scotland

Legal services in Scotland need reform. Our client’s experience unpredictable costs, restrictive legal aid rules, complex legal processes, variable availability and quality of services, lack of alternative dispute resolution options and services with persistent funding problems.

Disclosure order: a replacement for poindings and warrant sales

A post-decree disclosure procedure order is an example of how the debt recovery system can be vastly improved. Such a procedure could give the right of the creditor to obtain relevant information and proceed with an arrestment. This would facilitate the efficient use of enforcement methods and overcome the present difficulty of “the ignorance of the creditor”.

Local authorities debt collection

Local authorities must adopt a strategic approach to debt collection. There are huge inconsistencies between practices of local authorities and departments of local authorities. Local authorities may use different sheriff officers for different debts increasing costs, freeze bank accounts for council tax which means rent cannot get paid, or refuse to communicate between different departments of the same local authority.

Debt enforcement in Scotland and multiple debts

Debt enforcement procedures in Scotland take no account of the increasing problem of multiple debts. Each debt is dealt with on an individual basis. Debtors often have earning arrestments that are unmanageably high to meet other creditors.

Debt adjudication scheme

For accepted liability debts under £25,000 the establishment of a debt arrangement scheme with an adjudicator. This would relieve pressure on the sheriff court time for cases of genuine legal dispute and could supervise the repaying of all debts an individual has. It is another example of how the debt collection system in Scotland can be improved to the benefit of creditors and debtors. Hearings could take place in a room at the sheriff court or local building, at convenient times for working people, heard by an debt adjudicator in an informal manner within established published guidelines. The debt adjudicator would decide time to pay order and could supervise the repayment of multiple debts taking into account individual needs. Saving the resources of debtors, creditors and court and, therefore benefiting society as a whole.

Local authority direct benefit deductions

The operation of means tested benefit deductions by local authorities should be reformed to allow deductions from certain non-means tested benefits (e.g. Incapacity Benefit). This would be subject to existing safeguards and restrictions. This would require amendment of the Social Security Acts, outside the competence of the Scottish Parliament. As part of the overview of the debt recovery system in Scotland, however, the Scottish Executive should call upon the UK Government to effect this change.

Summary warrant procedure

The Scottish Executive should review summary warrant procedure generally. As an immediate *interim* measure, the right to ‘time to pay’ under the Debtors (Scotland) Act 1987 should be extended to summary warrant debts.

Bank arrestment

The Scottish Executive should support the forthcoming private member’s Bank Arrestment Bill. It aims to set limits on creditors’ powers to use arrestment on bank and building society accounts. It proposes protecting a minimum of £63 (in line with the figure protected for earnings arrestment) from arrestment; ensuring that exempt funds (particularly social security benefits) can quickly be released from arrestment; and providing quick, easy and free access to court control of the process.

**Improving Debt Recovery
Working Group
4 December 2000**

[2] Foreword by Lesley Riddoch

This document marks a turning point in the early history of the Scottish parliament. The first time an intractable social problem has been tackled by a cross party bunch of politicians, community activists and legal experts working informally to get a solution. Which they have done in record time.

There was almost no disagreement within the Scottish Parliament when Tommy Sheridan proposed that Warrant Sales should be abolished in April 2000. Indeed the Bill prompted one of the first backbench rebellions by Labour MSPs some of whom had been on parliament committees to hear evidence on the inhumanity of warrant sales as a debt recovery mechanism. The only serious objection lodged by the Scottish Executive was a procedural one - there is no workable alternative.

This report is that alternative - and the fact it has been produced in eight months is testimony to the “can do” culture developing within the parliament and beyond. The basic suggestion here is eminently sensible. For the “can pay, won’t pay” brigade, the report suggests that creditors be allowed to ask independent third parties like banks or the Inland Revenue for bank details so wages can be arrested. This power would of course be heavily subject to checks and usable only when existing court and other procedures had been exhausted.

For those on benefits the report suggests extending direct deductions for local authorities to non-means benefits, such as incapacity benefit. At the moment only those on income support and income-based jobseekers can be targeted. These are not easy or soft options for people living in poverty. And these final options for debt recovery may come as a surprise to those who expected a left wing cross party group of MSPs to pull their punches.

Making the existing systems work better and consistently is a fair solution everyone can back - and arriving at these conclusions consensually is a landmark for our growing sense of inclusive democracy.

Lesley Riddoch
28 November 2000
Glasgow

[3] Introduction

This report is unique. Never before has such a broad range of individuals and organisations in Scotland come together to look at ways to improve our debt recovery system.

In the space of only eight months and without any (paid) staff or resources, the *Improving Debt Recovery Working Group* (IDRWG) has developed a document with real substance. We offer real solutions, which if given the chance, could play a significant part in improving social justice for the many and not the few.

A remarkable consensus for change has emerged within the IDRWG. The solutions which this report offers for consideration are both fair to the debtor and creditor. A balance must be struck – but for too long poor people in this country have been made to feel guilty, and forgotten.

No-one should be made to feel second-class or worthless in the new Scotland. Where the debt recovery system does this – it must be challenged. Of course people have to pay their debts, but where the system traps people in a cycle of poverty – as this report clearly demonstrates - it is the system that must be pursued and not the human being.

This report would not be possible without the Scottish Parliament. The Parliament has created a new focus for change, and for the first time, a democratic access point for ordinary people in Scotland to influence the legislative process. The Scottish Parliament is not like Westminster. It is fundamentally much more inclusive in its structure and committee system.

Before this shift in culture if anyone in Scotland had wanted a report on debt they would probably have commissioned some boffins. But why not ask those in debt and poverty to participate? And why not ask those with personal experience of debt and poverty to help write the report. The IDRWG has done so. Debtors and people with direct experience of poverty are as much a part of the IDRWG as anyone else.

In editing this document I have been conscious of the time and effort that organisations and individuals have volunteered in the development of initiatives. There is much work even before a workable proposal is put to paper. Hopefully, that effort will be seen as an investment.

Members of the Scottish Parliament have said that poindings and warrant sales must not be part of any alternatives put before them. This report offers acceptable alternatives. It is up to the Scottish Executive and the Scottish Parliament to give the people of Scotland those alternatives – sooner rather than later.

Mike Dailly
Convener, IDRWG
Principal Solicitor
Govan Law Centre

4 December 2000

[4] Membership and origin of the Group¹

Membership of the *Improving Debt Recovery Working Group* (IDRWG) comprises of the following organisations and individuals:

- Alex Neil MSP (Scottish National Party)
- John McAllion MSP (Scottish Labour Party)
- Tommy Sheridan MSP (Scottish Socialist Party)
- Child Poverty Action Group in Scotland
- Citizens Advice Scotland
- Communities Against Poverty
- Easterhouse CABx
- Glasgow Anti-Poverty Project
- Govan Law Centre
- Lothian Anti-Poverty Alliance
- Money Advice Scotland
- Scottish Association of Law Centres
- Scottish Churches Parliamentary Office
- Scottish Consumer Council
- Scottish Federation of Small Businesses
- Scottish Human Rights Centre
- Sheriff Court Users Group
- The Poverty Alliance

The first meeting of the IDRWG took place in Edinburgh on 3 May 2000. The impetus of the Group was clear. Following a remarkable backbench rebellion at Stage 1 of the *Abolition of Pounding and Warrant Sales Bill* on 27 April 2000, the settled will of the Scottish Parliament was to send poundings and warrant sales to history's scrap heap.

Parliament recognised that alternative humane arrangements may have to be put in place following abolition. The difficulty was the Scottish Executive had never imagined it would be over-ruled, and little or no consideration had been given to what 'alternative arrangements' required to be put in place following abolition.

There was an urgent need to examine how debt recovery in Scotland could be improved following the abolition of poundings and warrant sales. The impetus being to improve debt recovery for both the debtor and creditor. An inclusive and open forum was required: a forum to represent not only the voice of legal experts and politicians, but community organisations with a direct experience of poverty and debt in Scotland's communities.

Even before April 27, the *Abolition of Poundings and Warrant Sales Bill* was acting as a catalyst in a shake-up of Scotland debt recovery system. On 2 February the first meeting

¹ The views expressed in this report are those held by particular individuals contributing to report chapters. The author(s) of individual chapters are footnoted. Views expressed are not necessarily endorsed by the individual's organisation.

of the Bank Arrestment Action Group took place at Govan Law Centre. Many of the members of the IDRWG were at that meeting.²

Over 101,000 bank arrestments take place in Scotland each year³ – over 90% carried out by local authorities to recover council tax or community charge debts. Very often banks cannot prevent creditors from arresting a debtor's entire account, even where a debtor's only income is social security payments. This can cause extreme hardship for those on welfare benefits.

The Bank Arrestment Action Group acted swiftly to develop a simple, yet practical solution to fill the void of protection for debtors subject to bank arrestment. Indeed, the Group had assisted in the development of MSP Alex Neil's *Bank Arrestment (Scotland) Bill* by 27 March 2000 (co-supported by John McAllion MSP and Tommy Sheridan MSP). The Bill's formal proposal is as follows:

“To provide safeguards for debtors with bank accounts by restricting the extent to which an arrestment attaches to monies in bank accounts; and by providing a new sheriff court procedure, to be known as an arrestment restriction order, whereby a debtor may apply to the sheriff for an order releasing monies from arrestment”⁴

The IDRWG was founded upon the successful inter-agency co-operation which emerged over the issue of bank arrestment – and a rejection of the 'major review' culture. Scotland should not have to wait five or ten years for a major review to (perhaps) improve its debt recovery system.

The Group accepts that major change can take time to implement, however, there are many changes, which can be made now with significant impact.

Time and effort are the only constraints to change – and where principled commitment exists, the constraint of time and effort becomes the investment and energy, which underpins a solution.

² Membership of the Bank Arrestment Action Group comprised of Govan Law Centre, Citizens Advice Scotland, the Child Poverty Action Group in Scotland, Money Advice Scotland, the Poverty Alliance, Glasgow Anti-Poverty Project, Lothian Anti-Poverty Alliance, the Sheriff Court Users Group, Alex Neil MSP, Tommy Sheridan MSP and John McAllion MSP.

³ See Appendix (c).

⁴ As at 4 December 2000, the Bill awaits its certificate of competency (from the Presiding Officer) before it can proceed further.

[5] How debt and poverty occurs⁵

Margo Kirkwood, member of Communities Against Poverty, has personal experience of debt. In this Chapter, Margo provides an insight into how debt and poverty can occur.

As a working class family, we have struggled with debt throughout our lives. The poverty trap of low wages means there is not enough money to meet the basic cost of living. In arrears for council tax as a consequence of the devastating effect of anti-social neighbours, I tried to negotiate affordable payments, but to no avail.

This seemed unjust and unreasonable to me, so I became a member of Communities Against Poverty to do something about it. I gave evidence to the Social Inclusion Committee of the Scottish Parliament in support of the abolition of poindings and warrant sales and was proud to play my part in persuading the Committee and the Parliament to support the Bill.

Meeting with CAP members from all over Scotland and hearing the horrendous statistics made me realise the scale of the debt problems that thousands of us face; struggling to survive the damaging and debilitating effects of living in debt.

This oppressive state of affairs **must** change, which is why I was glad to become part of this Improving Debt Recovery Working Group. My part has included working with the Poverty Alliance and Lothian Anti-Poverty Alliance to compile a debt questionnaire. The questionnaires were sent to CAP members asking people who had experience of debt to respond.

Here are the key findings of the debt questionnaire:

1. What are the reasons you got into debt?

Three categories were identified.

(a) *Unsustainable Incomes*

In almost every response, either inadequate benefit levels or low wages were cited as causes of debt. It is impossible to avoid debt on either benefits or low wages, as they are simply insufficient to afford people a proper and decent standard of living.

(b) *Credit too readily available*

Credit - from agents knocking doors offering “cash for Christmas”, to catalogue representatives stopping you in the street, to the flood of offers of credit from banks and finance companies. The current T.V. advertising campaigns for loans to consolidate debts are far too easily available and difficult to resist when there is not enough money to meet basic needs.

(c) *Changes in circumstances*

Debt also occurs through changes in circumstances, e.g. unemployment, illness, redundancy, divorce or separation. Another factor identified was poverty through employment.

⁵ This chapter is based upon a Group paper by Margo Kirkwood of Communities Against Poverty. See also the ‘Debt on our Doorstep – campaign briefing pack’ (2000), published by Church Action on Poverty Educational Trust, Parliamentary Office, 36 Causton Street, London, SW1P 4AU. Website: www.debt-on-our-doorstep.com

2. Who have you been in debt to?

Almost all questionnaires identified the following: rent, mortgage, council tax, gas, electricity, catalogues, phone bills, loan companies (e.g. Provident).

3. What could have helped you most to avoid getting into debt?

Responses received included:

- “Getting more wages, more help while on family credit”.
- “Having a decent amount of social security benefit to afford a proper standard of living”.
- “More information on managing my affairs when I became ill and spent a long time in a psychiatric hospital and care in the community”.
- “Less availability to loans – as a working couple it is only too easy to get loans”.
- “Interest rates explained better”.
- “More money”.
- “Better housing”.
- “We shouldn’t have given in to getting a loan”.
- “Realistic benefit levels”.
- “Financial advice at the time would have helped me”.
- “As the minimum wage is an insult to a working person, I would suggest that this is the first thing to be changed”.
- “Communication with people is very important as well as negotiation. Don’t threaten people, understand them”.
- “Having more help for people in debt. Not making it so easy for people to get into debt in the first place. More money for people on benefits. A fairer system for paying back any money due. Stop warrant sales as well.”

A response received from Carolann Ross illustrates how moving from welfare benefits to low paid employment can result in a ‘poverty-trap’:

“I am a single mother of 3 kids aged 16,15 and 19. I had my first child aged 16, missed exams etc., Through this I found it hard to find a job because of various things, such as no confidence or self-esteem, no qualifications, no childcare”.

“I decided to give myself and the kids a better chance by re-educating myself through various bodies: Community Education, One Plus, local school and colleges. In March this year I successfully gained a place on an ILM Play-work Course, The Waged Option, 6 months later I am about £1,500 (estimated) in the red - that is just between rent and council tax”.

“The reality hit home that having a job is not all that it seems. The adviser at the job centre worked out the difference on my weekly money regarding how much better off I’d be working. The sum was £60 per week. But what everyone forgot to include was the fact that the kids don’t get free school meals, and that they still need to eat as I do too, as well as travelling expenses adding up to between £50-£55 per week. Is it worth all the strain for an extra couple of pounds per week - you tell me because I am beginning to wonder”.

What could be done to make the debt recovery system better for debtors?

It was generally felt that debt collection is too viciously pursued, especially by sheriff officers in respect of council tax. Adding 10% charges to the existing debt compounds the debt and makes you feel like giving up, as no matter how hard you try the debt just keeps getting bigger and bigger. Additional sheriff officer charges for poindings and warrant sales simply compounds the problem further.

Being in debt is bad enough without harassment and intimidation from debt collectors making you feel even worse - we are still human beings, entitled to fair and just treatment. Attitudes among debt collectors should reflect this rather than feeling they have the right to belittle and humiliate people. This is particularly true in relation to council-tax and sheriffs officers, and is all the more difficult to accept as council-tax rates are imposed upon us.

Conclusion

It is abundantly clear from the responses to the questionnaire that people find themselves in debt due to circumstances out-with their control. Debt is not incurred through choice for frivolous reasons, but to provide the most basic needs - rent, food, clothing, fuel.

One respondent, who ticked every reason for getting into debt on the questionnaire, included the “other” category – “Overspending on family needs i.e. Christmas, birthday etc.” That single sentence eloquently expresses what living in inescapable debt does to your self-esteem.

We found ourselves in debt through circumstances over which we had no control and I felt it must somehow be my fault that we could not make ends meet. I felt guilty, ashamed, inadequate, a failure as a wife, a mother, a human being and absolutely powerless to do anything about it.

Depressed and agoraphobic because of this, I learned to cope with my permanent state of anxiety by worrying only during office hours. A strategy, which worked. Then I received abusive, intimidating phone calls from sheriffs officers in the evening and at weekends and it was the “last straw” and turning point for me.

Giving evidence to the Social Inclusion Committee in support for the abolition of warrant sales was a leap of faith for me. Was our Scottish Parliament really going to be what it claimed to be? The committee recommended support for the Bill and that leap of faith felt justified. When Parliament voted for the Bill, in such a spectacular style, my spirits soared and hope, for the first time in many years, crept into my heart.

It was short lived. The Justice Committee, ironically enough, has voted to support the Executive’s line that poindings and warrant sales should remain with us for a further two

years.⁶ Unless Parliament again votes with its conscience, thousands of vulnerable people will be condemned to the intimidation and humiliation of this **shameful** practice.

From my own point of view, if the Executive's party line is toed, my faith in, and hope for our Parliament will have come to nothing. All the rhetoric about social inclusion, equal rights and eradicating child poverty will be nothing but empty words. I believe this issue to be the single biggest test our politicians face. In the eyes of the majority of the Scottish People, the credibility of our Parliament stands or falls on how it acts now.

⁶ The Scottish Executive amended the Bill at Stage 2 (Justice & Home Affairs Committee, 19 September 2000) to come into force no later than 31 December 2002.

[6] Inadequacy of the social security system⁷

Debt in Scotland is still frequently regarded as a personal failure, which adds to the stress, anxiety and stigma, which accompany debt.

The link between poverty and debt

It is our experience that there is a strong link between the levels of debt and arrears and the level of poverty in Scotland. Only if there is a decrease in the levels of poverty in Scotland will there be a decrease in debt and arrears in Scotland. If individuals cannot take part in “normal life” because of low wages, inadequate benefits, with no access to grants or cheap loans to help with bulk expenditure then budgeting will continue to involve high interest loans, credit and unpaid liabilities, and therefore, the consequences of the debt collection process in Scotland.

The extensive experience of all organisations contributing to this document is that debt cannot be blamed on the individual action of borrowers. Individuals are led into borrowing by low wages or low benefit rates. They are forced into debt by structural factors like unemployment, ill health that are beyond the control of the individual and statistically more likely to effect those living in poverty. It is our experience that debt results from “a sudden disruption to income (unemployment, relationship breakdown or illness) where previous commitments are difficult to sustain or from a slower cumulative effect of a persistently low and inadequate income”.⁸

While the causes may not be individual the consequences certainly are, imprisonment, poindings and warrant sales, fuel disconnections, evictions, earnings and bank arrestment have all increased dramatically over recent years. A whole industry exists who have a vested interest in retaining the status quo of poverty, credit, debt and debt collection: debt collectors, tracers, credit controllers, solicitors and sheriff officers all of whom charge for their services.

It is these personal effects of debt and poverty that the organisations represented in this document deal with on a daily basis. The individual experience of debt magnifies and reinforces the experience of poverty i.e. the anxiety over money and the moving around of limited funds. Research has shown debt and arrears increase depression, sleeplessness, stress and stress on relationships and decrease the ability to cope.

Families with children are a group that tend to have the highest arrears. They are often under considerable stress trying to cope with juggling payments. Research Credit and Debt in Britain, PSI Report by Richard and Elaine Kempson gives three factors that would increase your likely hood of being in debt: old or young age, children and low income. Any two of these and you were more likely to be in debt.

Living on a low income increases the risk of debt. Research indicates that the type of debt generally incurred by people on low incomes is the debt with the hardest

⁷ This chapter is based upon a Group paper by Danny Phillips, Welfare Rights Officer, Child Poverty Action Group (CPAG) in Scotland.

⁸ Poverty the Facts CPAG p.73 (quoting Janet Ford, consuming credit: debt and poverty in the UK)

sanctions: rent arrears, mortgage arrears, council tax arrears, fuel debt payments.⁹ In 1980 20% of those on the lowest incomes used credit. By 1990 that had risen 69%. Aggressive pursuing of debts can also inhibit people making a successful transition from benefits into work. Creditors often pursue people, who move from benefits to work, much more vigorously.

Levels of poverty

The government adopted the commonly used Households Living Below Half the Average Household Income as its measure of poverty levels in UK. This is a measure of poverty but it not a measure of the adequacy of incomes. The government have not adopted an income adequacy standard. However, whatever measurement we adopt poverty in Scotland is at wholly unacceptable levels.

Scotland has among the worst poverty levels in Europe and other industrialised countries as measured by half the average household income.¹⁰ The Scottish Affairs Committee report "*Poverty in Scotland*", published 11 July 2000, took evidence from across Scotland. The report makes "shameful reading".¹¹ 1:4 adults, 2:3 lone parents, 29% of pensioners 1:3 children (350,000 children), to quote just a few figures, all live in poverty in Scotland.¹² There is for example, very clear evidence that child poverty has increased considerably in the last 20 years, and has increased more in Britain than in most other industrialised countries.¹³

On 11 September 2000 the Joseph Rowntree Foundation carried out research concerning deprivation amongst adults and children using researchers from 4 universities and statistics form the Office of National Statistics¹⁴. It is the most "comprehensive and rigorous survey of its type ever conducted"¹⁵. It set out a checklist of household items and activities that the majority of people considered to be necessities people should not have to do without. The research found that 26% of people lacked two or more essential items. This applied to 71% of unemployed people, 61% of long-term sick and disabled people and 62% of lone parents. 18% of children went without two or more essential items and 34% went without one essential item.

A larger percentage of the income of Scottish people comes from benefits and wages than it does in the UK as a whole.¹⁶ In 1997, 674,000 people were living on income support in Scotland.

The inadequacy of benefit levels

It is the experience of all organisations represented in this document and considerable independent evidence that benefit levels fall far short of an acceptable standard of living. The Family Budget Unit estimated in 1995 that Income Support currently falls £39 short of the 'low cost but acceptable' budget for a couple with two children under 11. Or that

⁹ The Scottish Affairs committee report "Poverty in Scotland" p86 - evidence from the Scottish poverty information unit

¹⁰ UNICEF report Bradbury, B and Jantti, M (1999) "Child poverty Across Industrialised Countries" Innocenti Occasional Papers, Economic and Social policy series No. 71 and Jonathon Bradshaw Poverty 104/15 "Comparing Child Poverty"

¹¹ The Herald July 31, 2000 "comment"

¹² Scottish Affairs Committee Report "Poverty in Scotland"

¹³ Jonathon Bradshaw Poverty 104/15 "Comparing Child Poverty"

¹⁴ "Poverty and social exclusion in Britain" by David Gordon et al. JFR, York publishing services

¹⁵ JRF Press release "Major new poverty survey finds two million children without necessities of life" 11.09.00

¹⁶ SPIUp.21 &18

income support only met 32% of an “adequate to moderate” family budget for a couple with two children under 11 or 27% for a lone parent in the same circumstances.

Many Income Support claimants are living below the basic benefit level because they have direct deductions for arrears of: rent, fuel, council tax mortgages and other accommodation charges. Housing benefit no longer covers the full amount of rent for all private tenants.¹⁷ Up to 25% of benefits can be deducted from the claimant for fuel, rent, water and mortgage interest without the permission of the claimant. The average deductions are £10.78 for electricity, £10.88 for gas, and £6.49 for water.

Means tested benefits have not been calculated on a “basket of goods”. They are largely based on the Beverage Report, which in turn was based on a Rowntree report in 1936. The amounts actually adopted were less than the recommendations by both Rowntree and Beverage reports. Adjustments have been made since but at no time, has there been an assessment of their actual adequacy.

There is still a lot of work to be done to explore modern family needs but many other countries such as Australia, Finland, Norway and the USA (to name a few) have adopted a minimum income standard and the European Union asked member states in 1992 to set minimum income standards “*considered sufficient to cover essential needs with regard to respect for human dignity*”. So far, the UK has not done so.

We need a minimum income standard sufficient to keep people out of poverty, which would establish a target for governments to set benefit rates. The Scottish Affairs Committee recommended:

“We consider it time for the UK to have a proper measurement of income adequacy and accordingly recommend that the government commissions an immediate study, utilising research already carried out by the Family Budget Unit at Kings College, London and the Scottish Poverty Information Unit, designed to develop a minimum incomes yardstick which is sensitive to local conditions. The introduction of such a measure would demonstrate both a sense of fairness and the Government’s commitment to overcoming poverty”[paragraph 152].

*The inadequacy of the Social Fund*¹⁸

The social fund was introduced in 1987/88 as part of the Social Security Act 1986. The system of single payments was replaced by the social fund. The regulated social fund provided grants for certain expenses if the qualifying conditions were met. Any other needs were to be met through the discretionary social fund, the budget for which was cash limited. In contrast to single payments, which did not need to be repaid, the majority of social fund payments are in the form of loans

The social fund is flawed in three main ways: payments are discretionary, the bulk of payments are loans and deductions are made from future weekly benefit and the fund operates within a budget and a cash limit. It is a wholly inadequate system and should be a priority for reform.

61% of claims to the social fund were concerned with meeting expenses for basic items such as clothing, household goods, bedding, cookers and food. In our view, it is not acceptable that claimants should be in a position where they are forced to live without

¹⁷ Poverty the facts CPAG “dimensions of poverty” p 75

¹⁸ see below for “what is the social fund”

beds, cooking and heating facilities, bedding and many other essentials that most people in our society at the end of the twentieth century take for granted. 362,000 applications for budgeting loans were refused in the year 1999-2000¹⁹. This is an extraordinary increase on the previous years, which were 4,865 applications refused in 1997-98 and 11,102 in the year 1998-99.

Other problems with the Social Fund

Claimants have no way of knowing whether they will receive a payment, which is a deterrent to take up. There is a very high refusal rate for grants only 1 in 5 succeed. And of the grants that are paid a very high proportion are paid to those who are coming out of institutional care. For example, families who need help for basic furniture and household equipment are often refused.

Where payments are refused, six months after the refusal, 40% of applicants were still trying to find the money to meet the need. From 1988 to 1992 the numbers refused loans on the basis of the inability to repay increased by 203%. In August 1998, just under 600,000 income support claimants had a deduction for a social fund repayment. The average deduction was £8.58 p/w. 54% of claimants with social fund deductions were lone parents, 30% are disabled people.

Research commissioned by the DSS²⁰ and carried out by York University showed that people who were repaying loans suffered considerable hardship. 70% said it left them with insufficient money to live on, over third said that they had to cut back on food, clothing or paying bills, a fifth borrowed money had to live on reduced incomes

A new system of grants for bulk payments

What we need:

- Furniture and household equipment grant to be paid when a family is allocated housing or moves home;
- A pregnancy grant paid to the mother to meet additional dietary requirements and maternity clothing costs during pregnancy;
- A household safety grant paid every 6 months to help with replacing electrical and gas equipment; and
- Child development grants, these could be paid when the child reaches 1yr, 3 yrs, and 11yrs and when they start or change schools.

These should be seen as part of a necessary cash safety net and paid on top of benefits. They should be easy to administer, should be paid by right through regulations to people who fit certain conditions and have a proper right of appeal against unfavourable decisions.

There is a lot of support for reforming the social fund. CPAG, anecdotally understand, that the DSS may be carrying out an initial review of the social fund at present. The recent Scottish Affairs Committee report "Poverty in Scotland" published in 19 July 2000 recommended "*It is clear that an in-depth review of the working of the Social Fund and its impact on some of the most vulnerable sections of the community is long overdue. We therefore recommend that the Government undertakes such action now.*" [Paragraph 103]

¹⁹ The Guardian & The Herald, 15.8.00

²⁰ M. Huby and G. Dix "Evaluating the social fund" and R. Walker, G. Dix and M. Huby, "Working with the social fund", HMSO 1992.

This would be consistent with the Family Budget Units Report (mentioned above) and the conclusions of other reports e.g. the Independent Inquiry into Inequalities and Health by Sir Donald Acheson (1998).

The Herald stated, “*Reform of social fund is long overdue*” and went on describe it as a “...generally discredited hangover from the last conservative government, ... which often had the effect of forcing the really poor into the arms of the loan sharks”²¹ (31.7.00 Opinion).

²¹ The Herald, *Opinion*, 31 July 2000.

[7] Early intervention methods²²

In 1977 the National Consumer Council produced the Fourth Right of Citizenship: a review of local advice services in which it argued that the right to information and advice was as much an irrevocable right of citizenship as was the right to education. In the start of the twenty-first century, this right is as fundamental and crucial as ever before.

The Need for Advice

Debt is a feature of our society. In the mid 1970s under half of all households had a current account, yet in 1999 this had increased to eight in every ten households with various extra options such as debit, credit and ATM cards, and telephone or Internet banking facilities²³. In 1970 one quarter of households had credit facilities (mainly HP or mail order) compared with seven in every ten now (Kempson & Whyte, August 1998). Research has shown that most consumers know little about financial issues, and even those who believe they do know about them do not fully understand them (Evolution Project PIA Board, 1998).

In 1992²⁴, research showed that many households were in debt: -

1 in 5 households had been in arrears in the course of the previous year with payments on either a regular household expense, like rent, mortgage or gas bill or a consumer credit commitment – many reported that they had been in arrears with more than one item. One in 8 households had one or more problem debts.

Moreover, the experience of organisations contributing to this document is that many of the most vulnerable groups in our society, the most socially excluded groups (i.e. households dependent on benefits) are forced into debt because of inadequate benefit levels. The need for everyday items such as clothing can only be met by incurring debt.

In addition, the 1992 research revealed:

- Six out of 10 people with problem debts had sought no help or advice, not even from family or friends.
- Only one third of those with problem debts had consulted a formal adviser, most often an independent advice agency or bank manager.
- Only one in every five debtors had made contact with the creditor

Recently published research into the workings of the Debtors (Scotland) Act 1987²⁵ shows that even when debt proceeds to the court stages, still the majority of debtors do not seek advice. Debtors provided the following reasons why: -

- Cost – this was seen as a barrier to representation by a solicitor, but some were unaware that free advice services were available.
- Rural areas – the cost of having to travel to an adviser was a barrier to seeking representation.

²² This chapter is based upon a Group paper by Susan McPhee, Head of Public Relations and Policy, Citizens Advice Scotland.

²³ Consumer concerns 1999: consumer's views of advice and information on financial services

²⁴ Credit and Debt the PSI Report 1992 Richard Berthoud and Elaine Kempson

²⁵ Evaluation of the Debtors (Scotland) Act 1987 Study of Debtors David Whyte published Scottish Office CRU 1999

- Rural areas – the debtor knew local advisors personally and was worried about being seen to enter a advice agency.
- Some did not know where to get advice.
- Many felt that nothing could be done about it.
- Some preferred to sort things out themselves.
- Debtors wanted to maintain privacy over their own affairs.

There was some concern about the amount of time wasted before seeing anybody. Of those that did seek advice, the debtors themselves felt the benefits.

- Clients thought that access to advice had made a huge difference – there was an access to knowledge, which debtors did not have.
- In dealing with creditors and others, money advisers could negotiate an agreement where the client had failed.
- By using an adviser to negotiation, a welcome barrier was placed between the debtor/creditor.
- Representation at court was also welcome.

Similarly, research has shown that accessing money advice services can be extremely beneficial²⁶: -

- Rent arrears of tenants who did not seek advice increased on average by over 100% over 18 months compared to an average 25% increase in arrears of those who sought advice.
- Debt counsellors can help their clients avoid eviction or repossession of their home – this has savings to local authorities which have a duty to rehouse certain categories of homeless people.
- The detailed picture of a client's financial position provided by money advisers enables creditors to be in a better position to pursue the most cost effective means of recovering a debt.
- Debtors receiving money advice do not repay less than other defaulters, nor do they create additional administration costs for creditors.
- Money advice can considerably improve client's financial, social and psychological well being, especially for the first few months.

Barriers to seeking advice

There are a number of barriers to seeking advice. Debtors themselves have identified some of the difficulties that can arise when seeking advice. It should also be recognised that poverty, particularly long term poverty is in itself a barrier for many of the most excluded households. The ongoing stress and hardship suffered by those living in poverty imposes their priorities based on the crisis of a particular day. Realistically, this will mean that for some households, early intervention will not be possible. We will require local advice agencies to be equipped and skilled to meet the high level of support and assistance required to address these complex problems.

That said, there are two principal barriers to seeking advice. The lack of knowledge of the debtor to seek advice at all levels of the debt process, from when difficulties first begin to arise, right through to enforcement action. The second problem is that there is no strategic overview in the provision of advice, which could make access to advice services easier.

²⁶ JR Foundation Benefits of Money Advice Services November 1990

Strategic Overview - Local authorities

As long ago as 1993, Citizens Advice Scotland campaigned for a new clause to be inserted into the Local Government (Scotland) Act 1994. The aim of the clause was to ensure that a local authority would have a statutory duty to prepare and implement a strategy for their area regarding the provision of advice and information concerning an individual's rights and obligations. The clause was rejected, however the need remains.

In 1988, a report by the Scottish Consumer Council on advice services in Scotland²⁷ concluded that there was no evidence of any common policy or attitude shared by government departments concerned with funding advice and information. Additionally there was a lack of any common approach by local authorities on what constitutes a proper role for information and advice services, both statutory and voluntary. In March 2000, in its research Money Advice Scotland called for appropriate funding to be made available to fund advice services provision.

The needs of every area are different as communities and client types vary. Some areas may suffer multiple deprivation problems requiring advice services that offer in-depth case work and formal representation. Rural areas may require advisers who will carry out home visits. Different methods are needed for different local needs. While telephone advice may be suitable for some areas and some client groups it will not meet the needs of the most excluded groups who will require a far greater level of assistance to address the range and complexity of the problems that arise from long term poverty i.e. eviction, fuel disconnection, multiple debt, benefits etc. A formulated plan allows local authorities to plan effectively and respond to local needs.

Consumer choice is also an important element in the provision of independent advice. The mixed economy of the statutory and voluntary sectors provides this. A local strategy can ensure effective links and referrals ensuring a more efficient and cost effective service.

Recommendation

The Scottish Parliament introduces legislation to impose a statutory obligation on local authorities to provide a strategy for dealing with problems faced by individuals based on local need.

A strategic approach to debt collection can still be practised by local authorities in the absence of legislation. In the first instance, inconsistency within local authority departments as well as different practices operated by different local authorities can make it difficult for the advice sector to utilise existing resources effectively.

Furthermore, problems with council tax collection as outlined in a recent CAS evidence report²⁸ has highlighted the difficulties when debts are collected in isolation from a client's overall indebtedness. Some of the problems found were: -

- Different firms of sheriff officers pursuing different years of debts in respect of community charge and council tax. When this is done in isolation, clients will repay the most pressing debt, leaving them no money to pay the current year's liability.

²⁷ Scottish Consumer Council "Following Our Advice – A Review of Advice Services in Scotland" October 1988

²⁸ *Can't Pay Won't Pay - The Real Cost Scotland's Council Tax Debt*, Citizens Advice Scotland, 2000

- The use of some methods of debt enforcement practices pushing client's into further debt i.e. clients whose bank accounts are frozen in respect of council tax debt leaving the clients with no funds to pay their local authority rent.
- Problems with communication between different departments, such as housing benefit and council tax benefit.
- Problems with communications with outside government agencies, such as Benefits Agency.

Some local authorities such as Glasgow City Council are actively adopting a corporate debt strategy as a way of tackling this, and other local authorities such as Borders Council do not have the same range of problems as others, as a result of the practices they are operating.

Recommendation

The Scottish Parliament issues good practice guidance to local authorities in terms of corporate debt strategies and communications, to ensure consistency.

Community Legal Services

The second strand to a strategic overview is the need for community legal services to be developed in Scotland. The Scottish Executive is already taking some action on this, by setting up a working party to develop a blueprint for Scotland²⁹.

The Advice Sector has also worked to progress this policy. In September 2000, ASLAN, the *Association of Scottish Legal Advice Networks* launched their manifesto setting out the need for a community legal service.³⁰ The manifesto set out the problems with existing legal services: -

- The high or unpredictable cost of obtaining advice and representation from private solicitors.
- The restrictiveness of legal aid rules .
- The complexity of the legal process combined with lack of funding for representation at employment and benefit tribunals and small claims proceedings.
- The shortage of specialist expertise in certain subjects e.g. race discrimination.
- The non availability of specialist advice and/or representation in certain geographical areas.
- Variable quality of advice both within the legal profession and in advice agencies.
- Lack of alternative dispute resolution options.
- Lack of integration of current provision.
- Persistent funding problems for voluntary organisations.

The advantages of a Scottish community legal service set out by the manifesto are: -

- A genuinely independent service which can deliver the best service possible.
- An accessible public resource.
- A service of the highest quality working to agreed national, quality standards applied rigorously across the board as never before.
- A co-ordinated and integrated national network of approved service providers.
- Integrated specialist and generalist services to ensure for example, quality of diagnosis at intake-referral stage.

²⁹ Jim Wallace SLAB 50th anniversary speech 10 October 2000

³⁰ ASLAN Manifesto June 2000

- A means of providing an effective resolution of legal problems through the provision of legal information, advice, assistance, representation, advocacy and/or some other form of dispute resolution.
- A service which benefits from the advantages of having non legally qualified people working collaboratively with legally qualified people.
- Free access to advice on a broad range of legal matters and referral as required.

It is encouraging to see the first steps now being taken to develop a Scottish system, however there are already some lessons that can be learned from the English experience. Some of the problems with its development have arisen due to the lack of co-operation from some local authorities, which are seen as crucial funders of the voluntary sector. Accordingly the development of a community legal service in Scotland should proceed in conjunction with an obligation on local authorities to fund and plan for advice provision. For example, in Scotland 94% of outlets which took part in Money Advice Scotland's research were funded by local authorities during the period April 1999-March 2000.

Recommendation

The Scottish Executive proceeds with the planning and development of a community legal service in co-operation and consultation with the proposed service providers and funders, including the voluntary sector and local authorities.

[8] Debt enforcement in Scotland³¹

Multiple indebtedness is an escalating problem. It is a situation that the Debtors (Scotland) Act does not address. The existing system is geared towards both payment of and enforcement on individual debts.³² This is a particular problem for debtors who are subject to earnings arrestment and find that deductions are unmanageably high in light of commitments to other creditors. This will continue to be the case unless each creditor instructs an arrestment to create a conjoined order.

Even debtors who have been successful in obtaining time to pay on one or more debts have problems when the remaining creditors demand payments the debtor can ill afford. There are many examples of these creditors taking out court action, which results in them being paid the same sum under a time to pay direction or order that they were offered informally. Thus, these actions do not benefit the creditor, the debtor, the court, or indeed society as a whole.

Under a debt arrangement scheme the court could supervise repayment proposals to all creditors rather than just the one that has pursued court action.

This agreement would be in the best interests of both debtor and creditor who would know exactly where they stood. Creditors would receive repayments in a more systematic fashion than at present, and would all be treated fairly, rather than the current system where those who shout loudest get the largest share. It would also save court time, as it would prevent a large amount of unnecessary actions, and ease the burden on debtors and money advisers of constantly having to renegotiate with certain creditors.

There is clearly a need to create an effective system for dealing with multiple debts and a more effective arena to resolve repayment difficulties than the intimidating and adversarial sheriff court proceedings in place at present. A fair system must take into account the debtor's individual circumstances and where appropriate those of the family unit.

The establishment of the debt arrangement scheme with an adjudicator to oversee formal proceedings would relieve the pressure on sheriff court time for cases of genuine legal dispute and allow a more effective use of judicial resources.

The proposal for a debt arrangement scheme, suggested by the Scottish Law Commission in 1985 should be implemented as part of the establishment of debt adjudication hearings. The operation of which is outlined below.

Remit and operation of the Debt Adjudicator

The Debt Adjudicator will oversee all time to pay applications made under the Debtors (Scotland) Act and arrange payments to all creditors in a multiple debt situation where a Debt Arrangement Scheme has been applied for by the debtor.

Each sheriff court jurisdiction shall appoint a number of Debt Adjudicators (dependent on size of local area/demand on service). Only one adjudicator would sit at each hearing.

³¹ This chapter is based upon a Group paper by Neil McLeod, Policy and Development Officer, Sheriff Court Users Group and Sarah O'Neill, Legal Officer, Scottish Consumer Council.

³² See Appendix (b), for an illustration of current debt procedures in Scotland.

These individuals could be legally qualified or from a social work/welfare rights background.

Every action for payment summons issued by the sheriff court (excluding eviction and reparation) served on an individual debtor for a sum up to £25,000 will, in addition to the current time to pay application, state that any other debts can be included in a debt arrangement scheme application.

There will be no limit to the total debt dealt with under the procedure, but no individual debt shall be over £25,000.³³

If the liability or the amount of the debt is in dispute, the debtor will return the summons to the court indicating intention to lodge a defence and the case will call before a sheriff. If the sheriff finds in favour of the creditor at this hearing the debtor shall subsequently have recourse to the debt adjudicator to apply for time to pay on this and any other debts they may have.

Debt arrangement hearings may take place in a room at the sheriff court, or in another venue in that jurisdiction e.g. church hall, conference facilities. Proceedings will be conducted in an informal manner that will be clearly established by published guidelines. Hearings will take place via an appointment system, possibly including evenings and weekends.

Debt arrangement schemes

Where the amount is not in dispute the debtor can apply for a time to pay direction (or post-decree for a time to pay order). In addition, if there are multiple debts, the debtor can apply to have a repayment schedule set up to all creditors under a debt arrangement scheme. The Debt Adjudicator will oversee all such applications.

The time to pay or debt arrangement application will be returned to the sheriff clerks' office at the court and passed to the Debt Adjudicator. If the adjudicator has any queries the debtor and/or their representative can be asked to attend a hearing at that point. If there are no preliminary problems copies of the proposal will be sent to all creditors.

All creditors will be given 28 days to object to the sum offered. If no objections are received prior to that date the debt arrangement scheme will be formally enacted. If the adjudicator receives objections from any creditor/s a hearing will take place.

The granting of time to pay directions or a debt arrangement scheme by the adjudicator will have the effect of sisting any court action taken by creditors and barring any further action from commencing for the duration of the direction/scheme. The time to pay direction will not therefore involve the granting of a decree as at present.

The commencement date of the time to pay agreement or debt arrangement scheme will be sent in writing to debtor and creditor with clear details of their rights and responsibilities.

If two monthly payments or four weekly are missed to the creditor who took out the initial summons, they can recall the action to the court and open decree can be sought. No further formal opportunity is available for time to pay on that debt.

³³ In line with the limits set for time to pay applications in the Debtors (Scotland) Act Amendment Regulations 2000.

If 2 monthly payments or 4 weekly are missed to any other creditor, that creditor can then apply to court to issue a summons and no further opportunity will be available for time to pay on that debt.

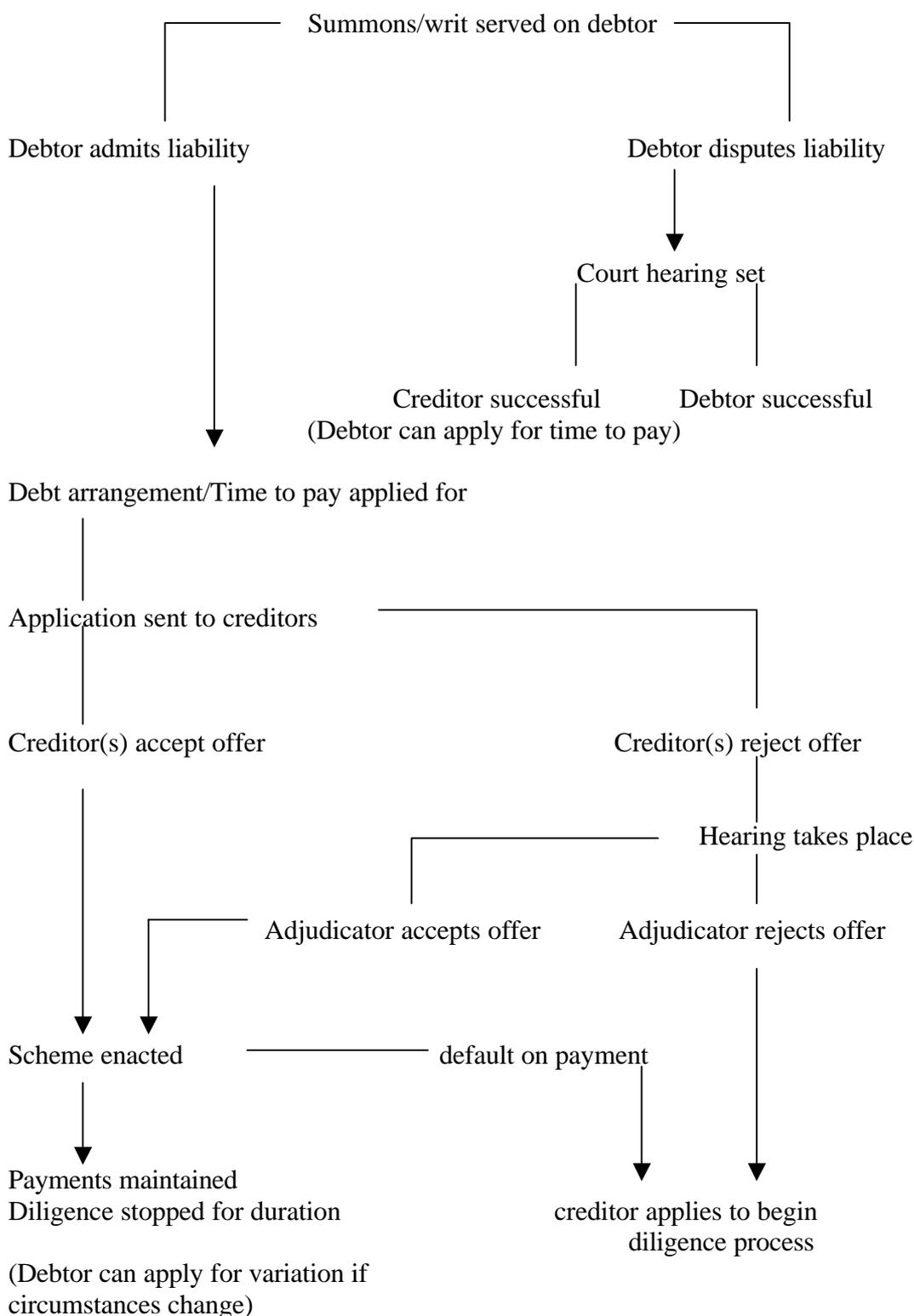
The debtor will however have the right to apply for a variation on the debt arrangement scheme should their financial circumstances change. It will be for the debt adjudicator to decide whether a revised offer to creditors is necessary or acceptable.

It remains for discussion what role the Debt Adjudicator should take in relation to the post decree diligence process, and in other possible new protections for debtors such as those that could be provided under the Bank Arrestment Bill.

The debt arrangement scheme could distribute the repayments from one lump sum (similar to an administration order in England), or the debtor themselves could be solely responsible for each payment. These options are to be discussed on the basis of resources available and financial implications to both the courts and the debtor.

A flow chart summary of the procedure is outlined on the proceeding page.

Summary of procedure



[9] A replacement for poindings and warrant sales – the remedy of disclosure³⁴

Is there a need for a general diligence against household moveable property in Scotland? Perceived need arises from the inability of creditors to use existing forms of diligence against debtors. For example, a creditor will be unable to use bank or earnings arrestment where the identity of a debtor's employer or bank cannot be ascertained.³⁵

The Scottish Executive – and indeed others including the Scottish Law Commission – has maintained that the immediate consequence of abolition of poinding and warrant sales would be to create an incentive for debtors to invest in moveable property and therefore escape liability.³⁶ A general diligence against household and domestic possessions, it is argued, is therefore necessary.

However, such assertions are without empirical evidence and disregard the uncontroversial fact that some 75% of all poindings proceed by way of summary warrant – mostly for council and poll tax against debtors on modest or low incomes.

How can families with no or little disposable income convert something which they do not possess into moveable property? **A progressive and humane solution to this problem will never be found in a diligence against household goods.** A new diligence against domestic possessions would be a poinding and warrant sale by any other name.

In the experience of advice agencies in Scotland many clients threatened with poinding and warrant sale are in receipt of income support and other means tested benefits. While such persons are entitled to full council tax rebates, they are still required to pay water and sewerage charges. In Glasgow, the typical figure can be around £118 – representing almost £130 when the statutory surcharge is applied (10%).³⁷

This issue is still ignored or misunderstood. For example, in launching Glasgow City Council's 'Pay Up for Glasgow Campaign', the Council stated that 'poverty was a cause of non-payment up to a point, although the council insists that this should not be a factor given the availability of council tax benefit'.³⁸ Such thinking also ignores the practical and legal difficulties that citizen's experience in attempting to obtain backdated council tax benefit.

In terms of practical mass problem-solving, the key priority following the abolition of poindings and warrant sales must be to devise a system which facilitates debtors on low or modest incomes contributing to their debt. Before considering how can this be achieved, it is important to examine the "settled-will" of the Scottish Parliament when it agreed to abolish poindings and warrant sales.

³⁴ This chapter is based upon a Group paper by Mike Dailly, Principal Solicitor, Govan Law Centre.

³⁵ Local authorities are currently entitled to force debtors to disclose employer details etc., with respect to the payment of council tax: *Council Tax (Administration and Enforcement) Regulations 1992*. This route can be a blunt tool, given that the failure to disclose may result in the imposition of a fine – in other words the statutory instrument does not entitle the local authority to force a third party to disclose relevant information – it only targets the debtor.

³⁶ Paragraph 18, *Memorandum by the Scottish Executive to the Justice and Home Affairs Committee*, 4 November 1999.

³⁷ This is a typical figure for water and sewerage charges being pursued in Glasgow. Such debts are also being pursued from the early 1990's, often in some of the most deprived areas of the City.

³⁸ Councillor Robertson, *The Herald*, 12 May 2000.

The Scottish Executive has repeatedly opposed the *Abolition of POUNDINGS and Warrant Sales Bill*.

Before the Bill was published, they released a press statement advising they would abolish poundings and warrant sales at an undisclosed future date, and accordingly, could not support the Bill.

They instructed the Scottish Law Commission (SLC) to separately consult and report on abolition, despite the fact three committees of the Scottish Parliament were taking written and oral evidence on the Bill. The SLC report did not support the Bill. It did not recommend abolition.³⁹

On the 27 April 2000, the Scottish Executive tabled an amendment, which, if passed, would have killed the *Abolition of POUNDINGS and Warrant Sales Bill* at Stage 1. Backbench Labour MSPs were not prepared to vote in favour of retaining poundings and warrant sales.

Labour MSP Johann Lamont (Glasgow Pollok) made the position of her backbench colleagues clear to the Scottish Executive during Stage 1 of the Bill:

“I am happy that the position of the Executive has changed from what seemed to be direct opposition to proposing an amendment that outlines its commitment to abolishing poundings and warrant sales and makes helpful suggestions about the way forward. As a Labour back bencher, and I believe representing the views of many of my colleagues, I urge the minister, even at this late stage, to withdraw the amendment, to make it clear that this Parliament wants warrant sales and poundings to go”.

“I further say, in all seriousness, that if the minister does not withdraw the amendment, I believe that I and many of my colleagues will vote to ensure that they go. We must agree to the principles so that we can get on with the job of developing a system of debt collection that does not have at its heart such deep injustice.”⁴⁰

Another then Labour backbencher, Margaret Curran MSP, (Glasgow Baillieston, and now Deputy Minister for Social Justice) fully endorsed the commitment of MSPs to abolish warrant sales:

“I have argued for support of the bill since it was introduced. I will support it today because we must ensure that poundings and warrant sales will not be part of the alternatives that are put before us”.⁴¹

Again and again, these sentiments were supported by the vast majority of MSPs. Labour MSP Karen Whitefield (Airdrie and Shotts) – originally against the Bill until she had the opportunity to weigh-up the evidence - said:

“The evidence that was given to the Social Inclusion, Housing and Voluntary Sector Committee made it clear to me that there is no place

³⁹ Report on POUNDING and Warrant Sale (Scot Law Com No.177) April 2000. The Scottish Law Commission recommended that “the diligence of pOUNDING and warrant sale should be radically reformed and made less easily available, but that it should not be completely abolished”.

⁴⁰ Scottish Parliamentary Official Report, Volume 6, Number 2 (27 April 2000).

⁴¹ Ibid.

*in a just and fair modern Scotland for poindings or warrant sales. That is not to say that the enactment of the bill will not create additional problems. All societies must ensure that there are sufficient means to enforce the payment of debt”.*⁴²

In a closing speech on the Bill, Labour backbench MSP John McAllion (Dundee East) put the issue into sharp and uncompromising focus:

*“The Scottish Law Commission is on record as saying that after long and exhaustive study it believes that there is no alternative to poindings and warrant sales. It has argued for reform of the system, to humanise it and make it less harsh, but it is impossible to humanise a system that is, by its nature, dehumanising”.*⁴³

The Scottish Executive’s amendment was, of course, withdrawn and Parliament agreed to abolish poindings and warrant sales.⁴⁴ **No one can doubt that the Scottish Parliament does not wish to see the introduction of poindings and warrant sales by any other name.**

Introducing a form of diligence that involves the forcible entry into a debtor’s home to attach debt to moveable property would frustrate Parliament’s will. Accordingly, a humane alternative solution must be found.

Where a debtor is in work, the inability of creditors to use bank or earnings arrestment is due to a lack of knowledge about that person’s financial circumstances.

With respect to debtors in receipt of benefit it is possible for local authorities to apply to the Secretary of State for Social Security for a benefit deduction (around £2.60 per week) against certain means tested benefits. However, local authority benefit deductions cannot be effected against non-means tested benefits.

A two-fold solution to these problems could be considered as follows. Firstly, creating a limited system of “disclosure” by third parties to creditors in certain circumstances would overcome the inability of creditors to utilise bank and earnings arrestment. A proposed procedure is set out below – and would require third parties to disclose certain information about debtors to creditors in prescribed circumstances.

Secondly, there is no reason, in principle, why local authorities should not be entitled to apply to the Secretary of State for Social Security for a maximum benefit deduction of

⁴² Ibid.

⁴³ Ibid. There has been widespread support for abolition. For example, Brian Wilson MP, now a Labour minister in the UK Government, said over 10 years ago that “we should acknowledge unanimously that the warrant sale is a peculiarly Scottish evil. It is a dreadful system. It has no redeeming feature.”— [Official Report, House of Commons, 9 February 1990; c 1189.] Indeed, the Independent Labour Party committed itself to abolishing warrant sales in 1893; the abolition of poindings and warrant sales being in Keir Hardie’s manifesto.

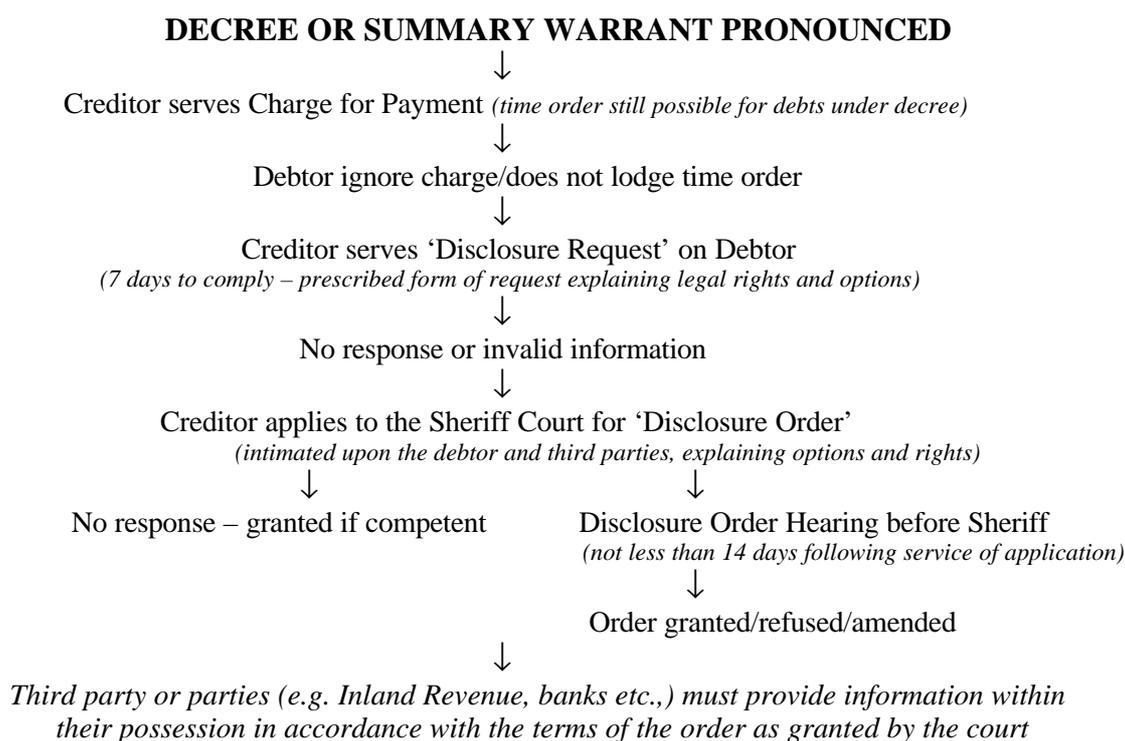
⁴⁴ The Abolition of Poinding and Warrant Sales Bill completed its Stage 2 on 19 September 2000 (albeit amended by the Scottish Executive to “come into force on 31st December 2002 or such earlier date as the Scottish Ministers may, by order made by statutory instrument, appoint”). On 28 November, the Executive lodged a Stage 3 amendment, reversing its position on transitional and savings provisions. These will now be on the face of the Bill (a concession to the Sponsoring Member’s position as argued at Stage 2) – “Despite section 1(3) of this Act, the provisions of the Debtors (Scotland) Act 1987 (c.18) mentioned in that section shall continue to have effect in relation to a debt in respect of which a warrant sale has been completed before the date on which that section comes into force”. The Bill (and amendments) await a final Stage 3 debate and decision on 6 December 2000.

£2.60 per week – against non-means tested benefits (excluding certain benefits such as DLA and child benefit). This would require primary legislation at Westminster.

The system of benefit deductions already works well in the collection of local authority rent arrears and could be improved to facilitate realistic contributions to debts.

A proposed, controlled, system of disclosure is set out below.

Disclosure Order – suggested court procedure



The present system of earnings and bank account arrestment could work better if it was improved. The main obstacle to this, from the creditor's point of view, lies where the creditor does not know the identity of the debtor's employer or bank or building society.

A post-decree disclosure procedure (in other words where a debt had been legally established before a sheriff) would empowered the court to grant an order in favour of the creditor to enable the creditor to obtain relevant information and proceed with an arrestment.

The creditor would require to know the identity of the party who had the information. This party would require to be given the opportunity to make representations when the application for the order was made.

The most obvious party with relevant information would be the Inland Revenue. There is already a precedent where the Child Support Agency can obtain information from the Inland Revenue pertaining to the income of an absent parent. Paragraph (1) to schedule 2 of the Child Support Act 1991 provides as follows:

1-(1) This paragraph applies where the Secretary of State or the Department of Health and Social Services for Northern Ireland requires information for the purposes of tracing-

- (a) the current address of the absent parent; or*
- (b) the current employer of the absent parent.*

(2) In such a case, no obligation as to secrecy imposed by statute or otherwise on a person employed in relation to the Inland Revenue shall prevent any information obtained or held in connection with the assessment or collection of income tax from being disclosed to-

- (a) the Secretary of State;*
- (b) the Department of Health and Social Services for Northern Ireland; or*
- (c) an officer of either of them authorised to receive such information in connection with the operation of this Act or any corresponding Northern Ireland legislation.*

[...]

This proposal overcomes the only major obstacle to debt enforcement – the ignorance of the creditor. This proposal would also facilitate the efficient use of other enforcement methods such as earnings and bank arrestment. There is presently a common law ‘public interest’ defence when documentation is sought from the Inland Revenue. This would have to be specifically excluded by legislation. This proposal would not require UK legislation.⁴⁵

The remedy of disclosure would require to be compliant with the Human Rights Act 1998.⁴⁶ Article 8 of schedule 1 to the 1998 Act provides as follows:

- 1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Disclosure of private information will not breach Article 8 where it is (a) in accordance with the law; and (b) necessary for the protection of the rights and freedom of others.⁴⁷

The law must be sufficiently clear in its terms to give its citizens an adequate indication as to the circumstances in which, and the conditions on which, the courts are empowered to interfere with the right to respect for private life. Any interference must be proportionate to the legitimate aim being pursued.⁴⁸

The proposed disclosure procedure would only be available to creditors as a last resort. No human rights issue would arise, as the procedure could never be relied upon until a legal liability to pay a debt had been determined by the court. Moreover, once liability had been admitted or conceded, disclosure could not arise unless the debtor had (a)

⁴⁵ As this proposal would require reforming a particular aspect of Scots common law by way of statute. Diligence is, of course, a devolved matter in terms of Schedule 5 of the Scotland Act 1998.

⁴⁶ In terms of the Scotland Act 1998 all legislation of the Scottish Parliament must comply with the ECHR (European Convention on Human Rights).

⁴⁷ *Klass –v- Germany* (1979-80) 2 EHRR 214; *Malone –v- United Kingdom* (1984) 7 EHRR 14.

⁴⁸ *Beldjoudi –v- France* (1992) 14 EHRR 801.

refused or ignored a charge to pay a legally determined debt; and (b) had ignored or refused a request for disclosure. It would still be open at these stages for the debtor to apply for a time to pay order under the Debtors (Scotland) Act 1987 (and therefore freeze any further diligence – including a disclosure application).

Only after the exhaustion of these stages would the creditor be in a position to request the court to grant a disclosure order. The debtor would have the right to object to such an order on cause shown, as would a third party. A defence of “not reasonable to disclose” could be considered at the court hearing stage. This could be akin to the Child Support Agency protection against disclosing the name of a father, and would provide a further layer of protection in appropriate circumstances.

At this late stage in the proceedings, and with the necessary safeguards, disclosure would represent a proportionate remedy where the right to enforce a legally determined debt would otherwise be impossible.⁴⁹

⁴⁹ Such impossibility could, of course, render the creditor’s right and the court process as meaningless.

[11] Small businesses and poindings and warrant sales⁵⁰

The Federation of Small Businesses recently stated in evidence to the Justice & Home Affairs Committee's inquiry into poinding and warrant sales, that the members of the small business community in general find poinding and warrant sales distasteful. Small businesses are part of the social community in Scotland and share the concerns of the community.

The current system has proved financial ineffective – 46% of business warrant sales make no contribution to the debt and only partly meet the expenses of the case. Only 8% result in all of the debt being repaid.

It is also widely accepted that business or domestic goods are given values that do not reflect the importance of such items to the debtor - values that are a pittance of the replacement cost – and such valuations are a primary cause of the distress inflicted on the debtor.

Particularly from a small business perspective, it is also possible that there may be an urban/rural divide with regard to poinding and warrant sales – urban based businesses might consider this method of debt recover because they lack a close personal relationship with their debtor. In rural or remote areas – the majority of Scotland in fact – a sterling way to lose your customers and destroy your reputation is to pursue this path.

The Federation also has major concerns with the summary warrant procedure, regarded by businesses as a fast track procedure, used significantly by the Inland Revenue, Customs & Excise and the local authorities. There has been an increase in calls made to the Federation regarding summary warrant enactment by the Inland Revenue and Customs & Excise. In fact, the Federation has 100,000 callers annually to our UK legal helpline.

Businesses express the view that the Revenue and Customs & Excise may use this approach without taking into account the overall financial situation of the business that they are pursuing for tax debts. This is certainly the case with Customs & Excise who seem to regularly instigate civil recovery procedures for VAT debt without any proper cognisance being taken of the reason for the debt nor the ability of the business to pay off the debt within a reasonable timescale.

Small businesses would like to see the Inland Revenue, Customs & Excise and local authorities genuinely negotiating settlement with debtors and we would also like to see the removal of any government pressure to use summary warrants. The current system of Government agency debt recovery seems to put pressure on debt management officers to pass cases to sheriff officers as this reduces the overall debt assigned to each debt management officer which in turn makes the officer seem to be carrying out duties more effective.

There is a culture within Customs & Excise that it is wholly unacceptable to have a VAT debt on a trader's file for more than a few months. This narrow-minded outlook does not reflect cash flow crisis in the harsh 'real world' business environment. When in contact

⁵⁰ This chapter is based upon a Group paper by Jim Hughes of the Federation of Small Businesses.

with VAT debt management officers it is very worrying to hear them continually use the same phrases such as : “Customs & Excise are not in the business of giving cheap loans” - “Your client is a cash trader therefore he has had the money to pay his VAT” or “Your client knows that his VAT is due every quarter therefore there is no excuse for him not having the funds available to do so”.

The Federation of Small Businesses considers that debts should not be passed to Sheriff Officers without exhaustive other means being negotiated with businesses. All relevant factors should be taken into account, not just simply that a tax debt exists. Everyone, with the exception of Sheriff Officers, loses out financially otherwise.

It is often the case that a financially viable business has had its tax debt referred to Sheriff Officers when, if allowed a reasonable time to pay period, the debt could have been paid off and the business would have continued trading. Sensible and balanced negotiation between government agencies and their debtors would often result in sheriff officers not having to be involved, and the tax due eventually being paid to the Treasury.

Recent figures from Dun & Bradshaw remind us that Scotland recorded 4,554 business failures during 1999 – an increase of 13.9% on 1998. Liquidations increased by 19% to 1,311 and bankruptcies, at 3,243, were up 11.9%. Many businesses on the receiving end of summary warrants are – just like many domestic debtors – experiencing circumstances which have disrupted their usual cash flow, for example, divorce, dissolution of partnerships, changes in the market place etc.

In an era when the debate about business birth rate is increasingly being seen as shadowing the necessary debate on business death rate, we cannot afford a mechanism that may force some viable but temporarily fragile small businesses out of business.

[11] Debt procedures after court⁵¹

Following decree, there are a range of options open to a creditor after the expiry of a charge for payment (or acting upon summary warrant). Diligence offers creditors access to debtors' wages, assets and funds. While this may be required in the case of reluctant payers, it needs to be controlled in order to protect those who are most vulnerable.

Bank arrestment

The remedy of arrestment at common law (as opposed to earnings arrestment) allows a creditor to attach property belonging to a debtor but held by a third party. It is most commonly used in connection with bank and building society accounts. Any funds caught by an arrestment are "frozen" and cannot be accessed by a debtor. A mandate signed by the debtor or a court action of furthcoming is used to transfer the attached funds to the creditor.

There is a serious anomaly in this process. Arrestment was not modified by the terms of the Debtors (Scotland) Act 1987, which sought to humanise the debt recovery process in Scotland. The process of arrestment fails to have regard to the need to safeguard the basic living expenses of the debtor and his or her family. Certain classes of money are, in theory, exempt from any sort of arrestment (e.g. state benefits; alimentary payments), but there is no quick or affordable way of enforcing this.

In addition to being unable to access their funds, a debtor may incur bank charges as direct debits etc. cannot be met, and other credit commitments often fall into arrears, causing yet further problems.

The Bank Arrestment Bill, promoted by Alex Neil MSP, aims to set limits on creditors' powers to use arrestment on bank and building society accounts. It proposes protecting a minimum of £63 (in line with the figure protected for earnings arrestment) from arrestment; ensuring that exempt funds (particularly social security benefits) can quickly be released from arrestment; and providing quick, easy and free access to court control of the process.

The Scottish Executive has accepted that this anomaly needs to be addressed, and the only stated opposition to providing the safeguards proposed by the Bank Arrestment Bill is that this represents a piecemeal approach whereas they advocate a joined-up response. Such a response must address the issues set out in this report, i.e. the need for a process which takes into account the full financial position of the debtor and which provides the debtor with genuine access to all available options.

At present, no notice is required to be given to the debtor of an arrestment, and debtors will only find out through a letter from the bank. Notices required under the Debtors (Scotland) Act 1987 include a statement of the debtor's rights and sources of information and advice.

⁵¹ This chapter is based upon a Group paper by Iain Nisbet, Solicitor, Govan Law Centre and Graham Blount, Scottish Churches Parliamentary Officer. For a comparative study of European debt collection practices see: "Debt Collection Practices Across Europe", CDN Collection Watch Project (February 1999), c/o Money Matters, SS., Sheriff Leas, Springfield Road, Blakelaw, Newcastle Upon Tyne, NE5 3DS.

Recommendation

- *The Bank Arrestment Bill should be enacted and given effect to, as soon as possible. Debtors should be fully informed of their rights and options as part of the arrestment process, by way of statutory notice to the debtor.*

Poundings and warrant sales

Almost universally unpopular, these are to be abolished by the coming into force of the Abolition of Poundings and Warrant Sales Act 2000. The urgency of giving effect to abolition was made clear in the testimonies given to the Social Inclusion Committee during the earlier stages of the Bill. The proposals contained in the Group's report should "plug" any perceived loophole for individual debtors.

Recommendation

- *Introduce a right, to be enforced by the court making orders against third parties (for example, Inland Revenue) to require disclosure by a debtor of details of their employer.*

Summary warrant procedure

Summary warrant is fast-track legal procedure that local authorities and certain public bodies, such as the Inland Revenue and HM Customs & Excise, can use. In a non-commercial context, they are typically used for council tax and community charge arrears by councils.

Where a debtor is in arrears of council tax and has been sent a warning notice, the local authority can apply a 10% surcharge (in other words add 10% of the sum due onto the debt) and pass the debt to the Sheriff Court (usually *en masse* with other debtors' cases) for a summary warrant to be issued.

The matter does not call in court and the debtor will simply be informed that a warrant has been granted. The warrant can then be passed to sheriff officers to enforce. The summary warrant is powerful and allows creditors to do diligence automatically – without having to obtain the permission of the court (which ordinary creditors have to do). Debtors have no 'time to pay' rights with respect to summary warrant debts.

The absence of protection for debtors under summary warrant procedure has been universally criticised. For example, the Scottish Law Commission has recommended that: "Time to pay directions and orders should be available in relation to central and local government tax debts and time to pay orders made available in summary warrant procedure".⁵²

Recommendation

The Scottish Executive should review summary warrant procedure generally. As an immediate interim measure, the right to 'time to pay' under the Debtors (Scotland) Act 1987 should be extended to summary warrant debts.

Earnings arrestment

An earnings arrestment allow a creditor access to a proportion of a debtor's wages, following service of a schedule on his or her employers. The Debtors (Scotland) Act

⁵² Report on Pounding and Warrant Sale, (Scot Law Com No, 177), April 2000 at page xi.

1987 provides the levels of protected income on a sliding scale contained in a schedule to the Act.

Research carried out for the Scottish Office into the working of the Debtors (Scotland) Act found that, “*despite the sliding scale of deductions, debtors subject to earnings arrestments ... found it difficult to cope with the reduction in income. However, this was often because their situation was compounded by other financial commitments, including the payment of other debts. In such circumstances debtors did not generally use the opportunity to apply for a time to pay order*”.⁵³

Although earnings arrestments are generally a good model of the debt recovery process, their effect can often be magnified by the lack of knowledge of rights available. This emphasises the need for further free advice provision. In theory at least, the interests of the creditor are well balanced with the rights of the debtor. The debtor has a source of income, to which the creditor is allowed only restricted access, regulated by the courts.

However, the levels of protected income have not been up-rated in recent years. Also, the legislation provides for arrestment in excess of the prescribed rate where there is a regular arrestment and a current maintenance arrestment in force at the same time. There is also the danger of “double diligence” where a debtor's wages are arrested at source and then again by an arrestment of a bank account.

Recommendation

- *The provisions which provide for the separate treatment of current maintenance arrestments and earnings arrestments should be reviewed. These should be subject to an increased minimum income standard (currently £5 per day). Levels of protected income should be up-rated with immediate effect and then year on year in line with cost of living rises. The position on double diligence should be clarified by enacting a provision that wages caught by an earnings arrestment cannot subsequently be arrested in a bank account.*

Direct deductions from benefits

At present direct deductions from income based benefits (Income Support; Income Based Jobseekers Allowance) can be made by arrangement with the Department of Social Security for recovery of certain “public” debts e.g. rent arrears, council tax, fuel, child support, benefits overpayments etc. These are subject to individual and global *maxima*. Housing benefit overpayments can be deducted from current housing benefit at any rate.

In many cases, the debtor has an opportunity to object to the deduction being made, where there is good reason for that objection (e.g. where rent arrears have accrued due to a withholding of rent).

Direct deductions of benefits are often welcomed by debtors, as they provide in many instances a respite from the ever present threat of further action (including disconnection or eviction) being taken. It is anomalous that these deductions are only available in respect of means tested benefits (by definition paid to the poorest in society).

Recommendation

- *The operation of such deductions should be extended to allow deductions from other non-means tested benefits (e.g. Incapacity Benefit etc.). This would be*

⁵³ The Scottish Office Central Research Unit Papers on Evaluation of the Debtors (Scotland) Act 1987 (1999) Edinburgh.

subject to the same maxima as above. This would require amendment of the Social Security Acts, outside the competence of the Scottish Parliament. As part of the overview of the debt recovery system in Scotland, however, the Scottish Parliament should call upon the UK Government to effect this change.

Eviction/ejection

In certain types of debt (rent arrears, mortgage arrears, or arrears on a secured loan) the creditor is empowered to seek a decree of eviction or removing, which means that the debtor will lose his or her home as a result of the debt. In most cases all or much of the debt still remains due. This is the most extreme form of diligence.

In the case of rent arrears for a secure tenancy (generally, local authority lets), the court can only grant a decree for eviction if it appears “*reasonable to grant the order*”. In the case of rent arrears for an assured tenancy (generally, housing association or private lets), and the arrears are less than three months’ worth, the court cannot grant a decree for eviction “*unless [the sheriff] considers it reasonable to do so*”.

In all other cases, the court must make an order putting the debtor out of their home where the debt is proved to be owing. This is regardless of the size of the arrears, or of any offer the debtor has made to repay the arrears.

In Scotland, where a home-owner falls into mortgage arrears, and the lender calls-up that mortgage, there is no defence to an action for ejection (other than paying off the entire mortgage). In England and Wales, the courts have the power to suspend the operation of a repossession order to allow the home-owner time to pay. This allows the debtor an opportunity to repay mortgage arrears without losing his or her home.

Recommendation

- *The relevant provisions of the Family Homes and Homelessness (Scotland) Bill and the Mortgage Rights (Scotland) Bill should be enacted and brought into force as soon as possible.*

Sheriff Officers & Messengers at Arms

The Society of Sheriff Officers and Messengers at Arms has a code of conduct and complaints procedure. However, this is not well known by debtors and few complaints are made. In the evidence taken by the committees for the Poindings and Warrant Sales Bill it became clear that many had grievances about the conduct of sheriff officers.

Recommendation

- *The code of conduct and complaints procedure should be reviewed in consultation with the Society to ensure that it complies with the requirements of the Human Rights Act and with a humane and fair debt recovery system, placing it on a statutory footing, if required. The operation of this self-regulated system of complaints should be made subject to further reference to the Legal Services Ombudsman. If a serious breach was found, the Ombudsman would have powers to make the debt unenforceable in law. The creditor's remedy would then be against the sheriff officer. The forms in the Debtors (Scotland) Act 1987 used for charges for payment- intimation of earnings arrestment etc. should be amended to include information about the complaints procedure.*

Bankruptcy

Bankruptcy provides for the rehabilitation of debtors and aims to secure equity among creditors. It represents some "give" in the system recognising that there are situations in which debts are, simply not going to be paid, and offers the possibility of a fresh start to people trapped in a cycle of debt from which there seems no escape.

Ten years ago, personal bankruptcies were spiralling, and the law was changed - not to address the underlying problem, but to make access to bankruptcy more difficult. Ironically, there has been some pressure recently for reform of bankruptcy law along American lines, in the direction of encouraging entrepreneurial risk-taking by making business bankruptcies easier (but not personal bankruptcies).

Avoiding fraud and abuse of the system are important, but if it is accepted that different rules might apply to personal and commercial bankruptcies, there may be opportunity to think further about access to bankruptcy. However, the Scottish Executive have stated that, despite changes being made in England, there is no likelihood of change during the four-year term of this Parliament.

The bankruptcy process has drawbacks for everyone. Although over 60% of bankruptcies originate in petitions from the debtor, the process is one which places severe constraints (as well as a significant stigma) on the debtor, not all of which end on discharge. Although it seeks to secure fairness among creditors, it secures, on average, less of a return for creditors than is spent on the expenses of administration (expenses use up 50% of gross receipts, while creditors get 46%): this is mainly the result of the decision in the 1993 Act to remove the underwriting of the costs of insolvency practitioners appointed by permanent trustees in bankruptcy (saving the Exchequer the £27m it cost in the last year of the previous legislation). Ordinary creditors often receive no dividend at all; on average creditors receive around 25p in the pound.

The Bankruptcy (Scotland) Act 1993 was intended to encourage the use of Protected Trust Deeds, and this is gradually happening. These seem to offer fewer penalties for the debtor than bankruptcy while holding out the prospect of light at the end of the tunnel. While sequestrations (bankruptcies) have remained relatively stable in number since 1995, protected trust deeds have increased from 424 to 2,353 in the same period and seem likely to overtake sequestrations soon (already they outnumber debtor initiated petitions for bankruptcy). This seems a welcome trend, and one to be encouraged.

Recommendation

- *The continued use of protected trust deeds should be encouraged. Bankruptcy should be made more accessible, especially to small debtors. In short, the whole system of diligence in Scotland requires to be looked at again, in order to ensure that debtors' rights are properly balanced against creditors' interests. Where, due to financial circumstances, there is no realistic prospect of repayment, the debtor should not be subject to continuing threats and invasive diligences. These simply add to the expenses due from the debtor, and to his or her distress.*

Appendix (a)

Glossary

Bank arrestment – *this is a procedure carried out by a creditor to recover funds from a debtor following on court action, and is a form of diligence. It involves freezing funds in a debtor’s bank account, forcing the debtor to repay their debts or negotiate a settlement before they can regain access to their funds. If the debtor does not agree to release the arrested funds (for example, by way of written permission) the creditor requires to raise a separate court action to obtain the funds (known as an action of forthcoming).*

Diligence – *this is a generic name for any procedure used for enforcing a court order. Common procedures used include bank arrestment, earnings arrestment, poindings and warrant sales.*

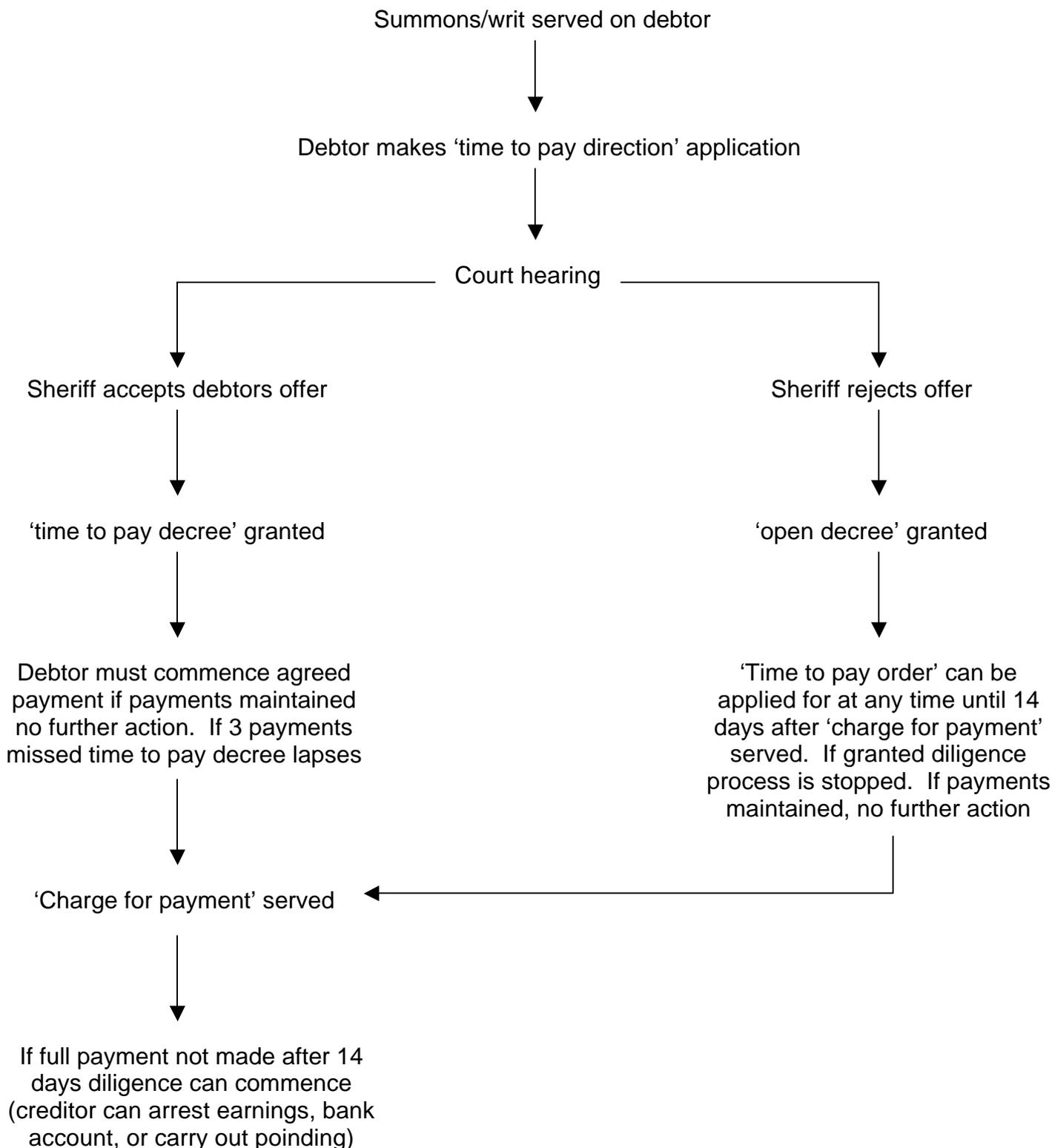
Earning arrestment – *this is a procedure taken by a creditor to recover funds from a debtor following on court action, and is a form of diligence. It involves seizing the debtor’s salary or wages directly from their employer. The employee must be left with enough to live on and the law sets out minimum figures. This form of arrestment is regulated by the Debtors (Scotland) Act 1987.*

Poindings and Warrant Sale – *this is a form of diligence against items of moveable property within a debtor’s home. A poinding results in sheriff officer physically entering a debtor’s home to place a value on certain goods. Once poinded, it is a criminal offence to remove the goods. A poinding remains in force for 1 year and if the debtor does not negotiate repayment of debts during this period, the creditor can proceed with a warrant sale – the public auction of household goods in order to realise cash. This procedure is currently regulated by the Debtors (Scotland) Act 1987.*

Summary warrant – *this a fast-track legal procedure that local authorities and certain public bodies can use. It is typically used for council tax and community charge arrears. Where a debtor is in arrears of council tax and has been sent a warning notice, the local authority can apply a 10% surcharge (in other words add 10% of the sum due onto the debt) and pass the debt to the Sheriff Court (usually en masse with other debtors’ cases) in order for a summary warrant to be issued. The matter does not call in court and the debtor will simply be informed that a warrant has been granted. The summary warrant is powerful and allows creditors to do diligence automatically – without having to obtain the permission of the court (which ordinary creditors have to do).*

Appendix (b)

Current debt recovery procedures



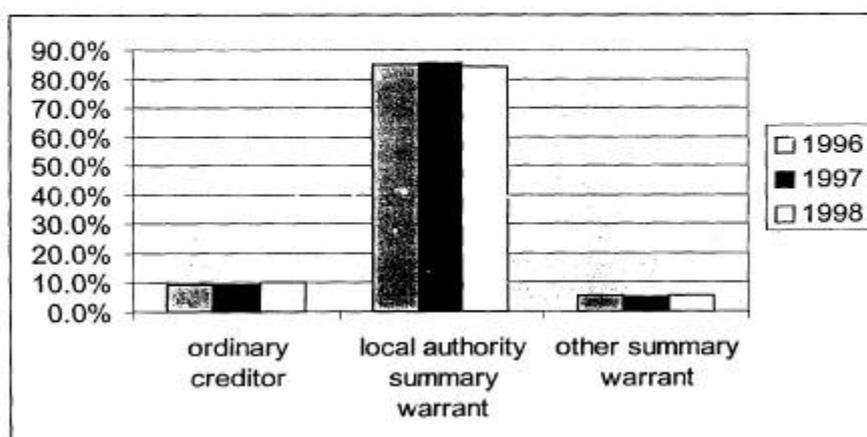
Note: This chart applies only to those cases where the debt is admitted by the debtor, and where the debt is not paid in full before the court hearing

Appendix (c)

Trends in the use of diligence procedures in Scotland

Based on statistics from the *Civil Judicial Statistics Scotland 1996 – 1998*, tables 5.2, 5.4 and 5.5.

Trends in the use of diligence procedures, by creditor



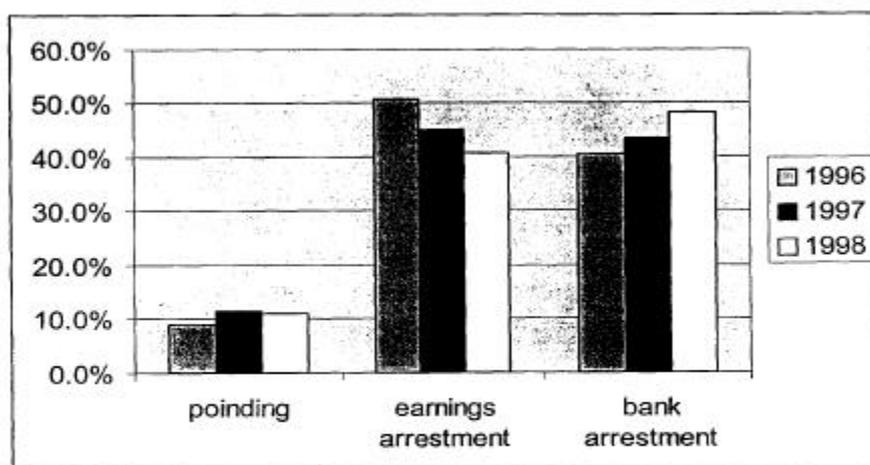
Notes:

'ordinary' = diligence other than in summary warrant

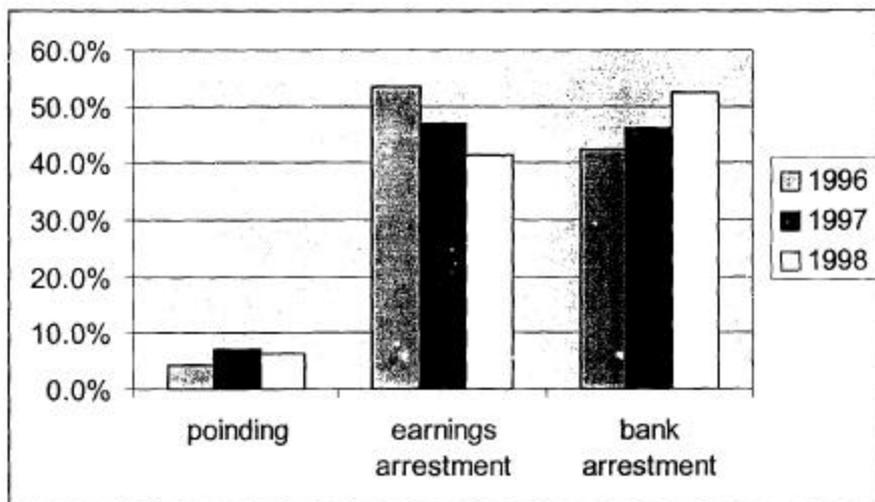
'local authority summary warrant' = summary warrant for recovery of council tax and community charge

'other summary warrant' = summary warrant for the recovery of local authority non-domestic rates arrears or central government taxes etc. arrears.

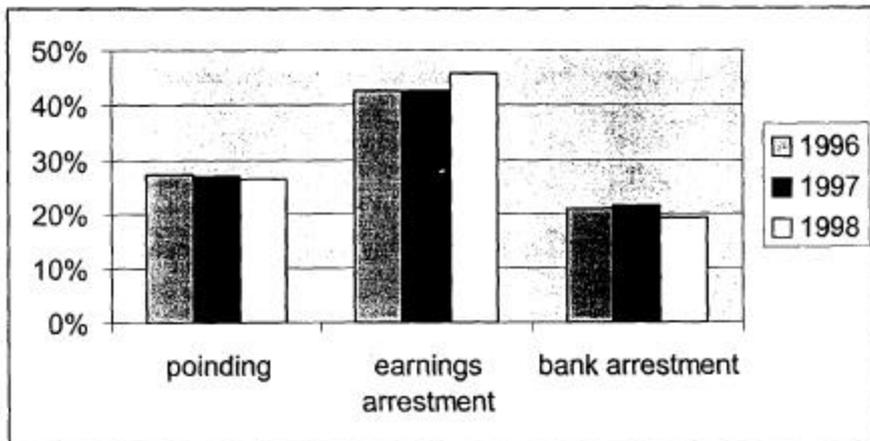
Overall trends in use of diligence procedures (all creditors)



Trends in local authorities' use of summary warrant diligence procedures



Trends in 'ordinary' creditors' use of diligence procedures



Appendix (d)

4. What could be done to make the debt recovery system better for debtors?

What should the Scottish Parliament and Executive do about debt?

Please return this questionnaire to:
The Poverty Alliance, 162 Buchanan St, Glasgow G1 2LL (you can use the freepost envelope).

Closing date: 18 September

Members of the Debt Recovery Working Group are: Alex Neil MSP, John McAllion MSP, Tommy Sheridan MSP, Citizens Advice Scotland, CPAG, Money Advice Scotland, Glasgow Anti-Poverty Project, Communities Against Poverty Network, The Poverty Alliance, Scottish Churches Parliamentary Office, Lothian Anti-Poverty Alliance, Scottish Consumer Council, Scottish Sherrif Court Users Group, Govan Law Centre, Federation of Small Businesses

The Debt Recovery Working Group is made up of organisations and MSPs who would like to improve the situation faced by people in debt and help people avoid debt. We are writing a report which we will use to try to get changes in the law.

We would like to get the views of people who have been in debt. If you are interested, please fill in this questionnaire, or photocopy it and pass it on to other people.

1. What are the reasons you got into debt?
(Please tick one or more)

Lack of money due to benefit levels

Lack of money due to low wages

Illness

Redundancy

Divorce/Separation

Disability

Mistake by creditor

Reduction in Wages

Other (What?):

2. Who have you been in debt to?

3. What could have helped you most to avoid getting into debt?

Appendix (e)

Contact information

Alex Neil MSP, The Scottish Parliament, George 1V Bridge, Edinburgh, EH99 1SP. Telephone 0131-348 5000 (switchboard).

Child Poverty Action Group in Scotland, Unit 425, Pentagon Centre, Washington Street, Glasgow G3 8AZ. Telephone 0141 204 1069. Fax:0141 204 0307 E-mail: dannyp@cpagscotland.demon.co.uk

Citizens Advice Scotland, 26 George Square, Edinburgh EH8 9LD. Telephone 0131-667 0156. Fax 0131-668 4359.

Communities Against Poverty, Flat 1/2, 14 Todholm Road, Paisley, PA2 7JL.

Easterhouse CABx, 46 Shandwick House, Easterhouse, G34, Telephone 0141- 771 2328.

Federation of Small Businesses Ltd, 74 Berkeley Street, Glasgow G3.

Glasgow Anti-poverty Project (CABx), 48 Albion Street, Glasgow.

Govan Law Centre, 47 Burleigh Street,, Govan, Glasgow, G51 3LB. Telephone 0141-440 1687. Fax 0141-401 8430. E-mail: mail@govanlc.com Website: www.govanlc.com

John McAllion MSP, The Scottish Parliament, George 1V Bridge, Edinburgh, EH99 1SP. Telephone 0131-348 5000 (switchboard).

Lothian Anti-Poverty Alliance, c/o 4th Floor, 200 Cowgate, Edinburgh, EH1 1NQ.

Money Advice Scotland, Suite 306, Pentagon Centre, 36 Washington Street, Glasgow G3 8AZ.

Scottish Association of Law Centres, c/o Castlemilk Law Centre, 32 Dougrie Drive, Castlemilk, Glasgow, G45 9AG. Telephone 0141-643 0312.

Scottish Centre for Human Rights, 146 Holland Street, Glasgow, G2 4NG.

Scottish Consumer Council, Royal Exchange House, 100 Queens Street, Glasgow, G1 3DN.

Scottish Parliamentary Churches Office, 14 Johnson Terrace, Edinburgh.

Sheriff Court Users Group, c/o SCC, Royal Exchange House, 100 Queen Street, Glasgow G1 3DN.

The Law Society of Scotland, 26 Drumsheugh Gardens, Edinburgh, EH3 7YR.

The Poverty Alliance, 142 Buchanan Street, Glasgow G1 2LL.

Tommy Sheridan MSP, The Scottish Parliament, George 1V Bridge, Edinburgh, EH99 1SP. Telephone 0131-348 5000 (switchboard).