**Review of Diligence in Scotland**

**Diligence Working Group – Report of recommendations to modernise diligence**

**March 2021**

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# 1. Introduction

In August 2018, the Scottish Government brought together a number of stakeholders to form a working group to consider the diligence landscape in Scotland. The terms of reference of the Diligence Working Group (“the group”) are laid out later in this report, however, the main objective was to consider the current diligence landscape in Scotland and identify ways to improve it.

The group has now had the opportunity to meet and discuss each measure and this report seeks to outline recommendations to improve existing measures and next steps for the parts of the legislation that are not currently in force. Diligence legislation has not been amended significantly since 2007 and the Scottish Government has recognised the need for modernisation to ensure that debt recovery mechanisms are fair and effective for the 21st century.

# 2. Background

## 2.1 Diligence

Diligence is the term for various processes of debt enforcement in Scots law. A person or organisation that is owed money (the creditor) can use diligence if someone who owes them money (the debtor) has failed to pay a sum which is due. However, before the creditor can carry out diligence against the debtor, they must firstly obtain authority from the court or from another document entitling them to do so, for example, a Summary Warrant.

The court order gives the creditor authority to recover money due to them using any method of legal debt enforcement they choose. In most cases, the creditor must also serve a Charge for Payment and issue a Debt Advice and Information Package (DAIP) before carrying out diligence. The DAIP is a booklet providing key information to help people that owe money deal with their creditors – this includes the importance of seeking advice and sign-posting to appropriate organisations.

There are two types of Warrants used to pursue diligence, the Summary Warrant and the Non-Summary Warrant. A Summary Warrant is a means for certain creditors to pursue sums of money which they are owed. Used exclusively by local authorities, Her Majesty's Revenue and Customs (“HMRC”) and Revenue Scotland, the process involves an application being sent to court in respect of debts due by several different debtors. No hearing is held, as the legislation states that the warrant shall be granted by the sheriff if the application is presented in accordance with the provisions, however, debtors are advised of the consequences of non-payment and statutory notices are provided to the debtor prior to application. A Non-Summary Warrant debt is the term used for all executions of diligences that are not part of the Summary Warrant process. This encompasses all other types of debt, including business debts and consumer debt e.g. personal loans, credit card debt and personal guarantees.

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

## 2.2 Review of Diligence

Accountant in Bankruptcy (“AiB”), an agency of the Scottish Government, carried out a review of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (“the 2007 Act”) in 2016. This review sought to assess the impact of the diligence measures introduced by the 2007 Act, including those provisions which are not yet in force.

The diligence system aims to provide effective remedies for recovering debt from those who can but do not pay while providing adequate protections for those who cannot pay a debt. These offer an alternative to a creditor pursuing bankruptcy.

As part of the Diligence Review 2016, AiB carried out a consultation. This provided stakeholders with an opportunity to express their views on the diligence provisions which are currently available in Scotland. Feedback was invited on specific questions and those responses were analysed and used, along with a range of other available information and evidence, to determine if any further changes to diligence were necessary.

The response to this consultation was published by AiB on 20 December 2017 where AiB committed to reviewing each diligence measure to ensure the various processes of debt enforcement continue to be as effective as possible.

AiB also made a commitment to convene a working group to initially look at how Disclosure of Information could operate in Scotland. The aim of the group was to make recommendations to Ministers for a regulatory framework that could be taken forward through secondary legislation, allowing implementation of this new diligence. The group would also review all existing diligence measures with a view to modernising and improving them. The group convened in August 2018.

The group has now had the opportunity to consider each of the diligence measures below and this report sets out the group’s recommendations to Scottish Government on how these could be both modernised and improved:

* Exceptional Attachment
* Adjudication for Debt
* Inhibition
* Diligence on the Dependence
* Interim Attachment
* Money Attachment
* Diligence against Earnings
* Arrestment in Execution and Action of Furthcoming
* Landlord’s Hypothec
* Maills and Duties
* Admiralty Actions and Arrestment of Ships
* Actions for Removing from Heritable Property
* Land Attachment
* Disclosure of Information
* Residual Attachment

The group also considered Summary Warrants which, although not a form of diligence, it is used to authorise the recovery of a debt using diligence. The Charge for Payment is mentioned within this report and again this is not a form of diligence, but a necessary prerequisite to diligence.

# 3. Legislation

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

# 4. Diligence Working Group

The aim of the Diligence Working Group was to consider how diligence measures could be improved; act as a discussion forum to ensure that all member’s suggestions and views on the future of diligence were considered; and help develop recommendations to Ministers.

The key objectives of the group were to:

* consider how disclosure of information could operate in Scotland;
* provide recommendations to Ministers for a detailed regulatory framework that could be taken forward through secondary legislation, allowing implementation of the Disclosure of Information; and
* where appropriate, finalise proposals for other diligence measures, such as Land Attachment and Residual Attachment.

AiB Policy Development Team performed the secretariat function of the group and all minutes and papers have been published on the [Diligence Working Group section of the AiB website](https://www.aib.gov.uk/about-aib/stakeholder-working-groups/diligence-working-group). The first meeting of the group took place on 22 August 2018 and has since convened six further meetings. These discussions highlighted the complexity of existing diligence arrangements and brought together a broad range of opinion and constructive suggestions for future policy development.

The membership of the group is as follows:

| Name | Organisation |
| --- | --- |
| Carol Kirk | Policy Review Team Leader, AiB, Chair |
| Laura Sneddon | Policy Development Manager, AiB Secretariat |
| Pauline Carrigan | Policy Development Officer, AiB Secretariat |
| David Menzies | Institute of Chartered Accountants of Scotland |
| Alex Irvine | Society of Messenger-at-Arms and Sheriff Officers |
| Kevin McKay | Society of Messenger-at-Arms and Sheriff Officers |
| Nicola Anderson | Scottish Courts and Tribunals Service |
| David Smith | Scottish Courts and Tribunals Service |
| Andy Douglas | Her Majesty’s Revenue & Customs |
| Serena Weir | Shepherd & Wedderburn LLP |
| Pauline Allan | Citizens Advice Scotland |
| Sharon Bell | Stepchange Debt Charity |
| Yvonne MacDermid | Money Advice Scotland |
| David Hilferty | Money Advice Scotland |
| Andrew Crawley | Scottish Law Commission (until May 2019) |
| Professor Nicholas Grier | The Law Society of Scotland |
| Hannah Bruce | The Committee of Scottish Bankers (until Feb 2019) |
| Barbara Bell | The Committee of Scottish Bankers (from April 2019 - November 2020) |

# 5. Recommendations

The group has discussed each diligence measure and has made a number of recommendations in relation to each of these. Additionally, some recommendations are set out below that apply across all of the diligence legislation and not just to one individual measure.

## 5.1 Language and terminology

The language and terminology used in diligence legislation and publications are not generally understood by the public. Recommendation that the language is simplified and written in plain English wherever possible. For example, words like "arrestment" for freezing of a bank account or attachment of moveable assets are similar and confusing words.

**Recommendations:**

* Diligence language and terminology should be simplified wherever possible to make it easier to understand each of the diligence measures.

## 5.2 Debt Advice and Information Package

The Debt Advice and Information Package (DAIP) is a booklet providing important information for debtors to help them deal with their creditors. Where the debtor is an individual, a creditor is required by law to provide them with a DAIP prior to using most types of diligence. There is a set timescale for the issue of a DAIP within each of the processes in which it is required. Generally it must be issued no earlier than 12 weeks before diligence is carried out. The DAIP must also be issued before a creditor presents a petition for the debtor's bankruptcy, prior to the issue of a Certificate for Sequestration and before the granting of a trust deed.

The DAIP plays an important part in encouraging those who have an outstanding debt to seek advice. The current booklet contains a lot of information and there was a view that the main message is being lost. The group recommend that the DAIP should be streamlined, reduced in size, and the ways in which to access advice should be clearly visible at the outset of the document.

**Recommendations:**

* The DAIP should be reviewed and updated to ensure it is clear where to seek advice.

## 5.3 Guidance

The group recognised that many people pursue diligence believing they will recover the debt, however, that is not always possible. It was agreed that guidance needs to reflect this and all websites containing information about diligence should be updated accordingly.

Simple procedure is a common route used to start the debt recovery process and it is important that simple procedure guidance highlights that a successful simple procedure claim does not necessarily mean the debt will be recovered. This should be extended to all forms of debt recovery procedures, including summary cause.

**Recommendations:**

* All appropriate guidance should be updated to reflect that no diligence measure can guarantee that a creditor will get their money back. Websites containing information about debt recovery processes should highlight that diligence does not always result in the successful recovery of the debt.
* The Scottish Civil Justice Council should be asked to consider updating the Simple Procedure application forms.
* Organisations whose websites hold information about the Simple Procedure should be asked to reflect that Simple Procedure does not guarantee recovery of the debt.

## 5.4 Heritable Property

The group’s considered view is that changes cannot be made to diligence which affects heritable property without a broader review of how it is treated across all statutory debt solutions. It is a cross Government issue which impacts on different aspects of society, including housing, health and the community. This is reflected in greater detail at [Land Attachment at section 5.19](#_5.19_Land_Attachment).

**Recommendations:**

* An independent group should consider heritable property across all debt solutions and a review on the impacts on the wider aspects of society.

## 5.5 Consolidation of Diligence Legislation

The group recognised the complexity of diligence, not just for those who deal with diligence on an on-going basis, but also for members of the public who wish to take action to recover a debt, and for those who are subject to the action. Diligence legislation is contained in several parts of legislation and changes introduced through the current review would add to this. The group agreed there would be strong benefits to consolidating this legislation.

**Recommendations:**

* Following the introduction of current proposals, diligence legislation should be consolidated to help reduce the complexity around diligence.

## 5.6 Exceptional Attachment

Exceptional Attachment is a special procedure for the attachment of non-essential articles kept in a dwellinghouse. As the name suggests, this procedure can only be used in exceptional circumstances.

In the response to the AiB’s consultation, respondents suggested it was an expensive and time consuming process which was rarely used due to the low value of goods and long list of exemptions. The group agree that this diligence is controversial but acknowledge that it does appear to be working.

The group acknowledged that any reform in this measure should not see a reversion to the era of Poindings and Warrant Sales and that any amendments must not remove current debtor protections. The group agree that any amendments to the current process would need to be progressive and that debt advice should be at the centre of all diligence.

One of the key concerns highlighted through the consultation is the length of the current application process, particularly when a debtor does not attend court. The consultation suggested that in these circumstances a more streamlined process would be welcome. However, the group acknowledged there are a number of reasons why a debtor may not turn up to court and that streamlining this diligence without diluting debtor protections is difficult. They also acknowledged that the sheriff has the power to order a visit to the debtor by a money advisor or to make any other order they see fit before determining whether to make an exceptional attachment order. The group are therefore not recommending any streamlining to these processes.

The group considered the list of restricted articles and the consensus view was that this remained appropriate and comprehensive. There was a suggestion that the value of sentimental items, currently £150, should be increased as this value was considered to be low. A figure in the region of £300 to £500 would be more reasonable with a broad agreement that this be raised to £500.

The group also considered whether the current seven day timescale for the redemption of assets was sufficient. This redemption period is the timescale that a debtor has to avoid the attached items from being sold, by paying the appraised value. In most cases attached items are left in situ rather than being removed and put into storage, but it was acknowledged that any increase in the redemption period would increase storage costs where the items are removed.

It was agreed that where assets are attached and not removed from the premises the redemption period should be extended to 14 days which would bring the timescale in line with Attachment. However, where the items are attached and removed the redemption period should remain at seven days to help limit the costs associated with this diligence.

**Recommendations:**

* The value of sentimental articles should be increased from £150 to £500.
* Timescale for disposal of assets should be amended to seven days in the event articles are removed immediately and 14 days if they are left in situ.

## 5.7 Inhibition

**Inhibition** is a diligence which stops a debtor from dealing with their heritable property after the inhibition takes effect. Heritable property is land and other immoveable property (houses, commercial premises etc.) owned by the debtor.

Inhibition is a widely used diligence and there does not appear to be any significant issues with the process. It appears to be effective and the group did not see any requirement for it to be extended beyond five years.

One consideration arising from the consultation was the extension of Inhibition to Summary Warrant as this was potentially less onerous than bankruptcy as a means to recover debt and may reduce the volume of bankruptcies. The group agreed that Inhibition should be extended to Summary Warrants. The existing recall provision for Inhibition would also apply to Summary Warrants. Further information about the Summary Warrant process is covered in the [Summary Warrant section 5.13](#_5.13_Summary_Warrants)

The group discussed the terminology used in legislation and agreed that the public may not understand what the term Inhibition means or what its implications are. However, rather than considering any re-naming of the diligence, the group recommends that the opportunity is taken to simplify the language in legislation and supporting documents where possible, so the effect of it is more readily understood.

The group discussed the form used for Inhibition which requires to be registered with Registers of Scotland. There is currently no provision to change the wording to include “process server” in addition to “messenger at arms” or “sheriff officer” which means the forms are regularly rejected. This would require an administrative amendment which could be achieved in legislation and the group recommended this as an opportunity to improve existing processes.

The consensus of the group is that there should be an ability to renew an Inhibition online, although it is acknowledged that this would require further discussion with the Registers of Scotland. Where an online Inhibition service becomes available, the act of serving the Inhibition should be retained as this would ensure the debtor is aware the Inhibition remains in place. This is considered important as the current process of service the Inhibition encourages the debtor to work with the creditor to find a solution regarding the debt.

**Recommendations:**

* Administrative amendment should be made to the Inhibition form to amend wording to include “process server” in addition to “messenger at arms” or “sheriff officer”.
* The facility to renew an Inhibition online should be introduced.
* Inhibitions in execution should be extended to Summary Warrants which would incorporate the existing recall procedures and fees.

## 5.8 Diligence on the Dependence

**Diligence on the Dependence** is a provisional measure which can be used to secure funds, goods or property to prevent the debtor from disposing of them whilst a court action is ongoing. A creditor may, at any time while a court action is ongoing, apply to the court for authority to carry out Arrestment or Inhibition on the Dependence of the action.

The group thought that Diligence on the Dependence generally works well. There was general consensus that the automatic court hearing built into the process should be retained. Although it is unusual for the debtor to attend court, it offers protection for debtors.

It was agreed that although debtors will have been informed of the actions being taken against them, access to advice could be improved. Ensuring an amended DAIP is given to a debtor at the earliest stage could help to address this.

Further discussion regarding the DAIP resulted in an agreement that it would be sensible to align timescales for issuing a DAIP e.g. for a DAIP to be issued in all cases and to align the 12 weeks’ timescale with the four month timescale which applies in apparent insolvency.

**Recommendations:**

* Timescales for issuing the DAIP should be aligned across bankruptcy and diligence legislation.

## 5.9 Interim Attachment

**Interim Attachment** is a provisional diligence, similar to Diligence on the Dependence. Interim Attachment protects the interests of creditors whilst a court action progresses. It effectively restricts the debtor's ability to deal with attached moveable assets in their possession pending the outcome of the action, but does not allow the creditor to remove or sell the attached items. The court may, upon application any time after Interim Attachment, make provision for the security of attached articles.

The group recognised this diligence is rarely used, however, they also recognised it has a place within the diligence landscape. It is not designed to be used frequently because it is an interim diligence used to protect assets.

The group considered whether the legislation should be amended to allow automatic conversion from Interim Attachment to Attachment but agreed that there is a good reason why this is not currently set out in legislation. The key difference between both processes are in terms of assets. Interim Attachment is used to restrict the sale of assets pending the outcome of court action. Assets are valued twice, the first at the start of the Interim Attachment process and again prior to the sale of the assets. This is needed to reflect the length of time this diligence measure can be in place and the changes to the market during this timescale.

The general consensus of the group is that Interim Attachment should not be amended or removed from legislation.

**Recommendations:**

* Interim Attachment should not be amended or removed from legislation.

## 5.10 Money Attachment

Money Attachment allows a creditor to attach money (cash, including coins and banknotes in a foreign currency, postal orders, banking instruments etc.) which is held within the debtor's business premises. Money in a dwellinghouse cannot be attached and it is only competent to implement this diligence from Monday to Saturday within the hours of 8 am to 8 pm.

It was confirmed that although this diligence is not widely used, the businesses predominantly affected by this means of debt recovery are licensed premises. Issues identified included it being unclear how money attachment can work in a cashless society, and the simplicity in which proprietors can evade this diligence by not keeping a lot of cash in their tills.

The group considered the possibility of extending the hours for Money Attachment to mirror business hours. At present it is possible to execute Money Attachment out-with the stated times if granted by the court. It was agreed that removing the restrictions would reduce this burden on the court and therefore reduce the cost for the creditor.

The group also considered extending Money Attachment to include debit and credit counterfoils given the growth in “cashless” transactions. They recognised that without future proofing Money Attachment, this diligence is at risk of becoming ineffective.

The group identified the processes for card payments, highlighting the difficulty in determining when the funds can be attached. They also highlighted potentially high administration costs involved in identifying funds to attach, which could ultimately produce little or no return if accounts were overdrawn. The group sought to clarify how other countries are recovering debt as the use of cash reduces. The UK is the third most cashless society in the world, behind Canada and Sweden. The group recommend that further research is carried out to understand the mechanics behind transactions, and that Scotland work with the rest of the UK to establish if further steps can be made to help make this diligence more effective in an increasingly cashless society. It was also noted that the Covid-19 pandemic has further reduced the amount of cash transactions being undertaken.

**Recommendations:**

* Time restrictions for executing Money Attachment should be removed.
* Further research should be carried out on how other countries that are moving towards cashless societies are recovering debt.
* Work with the UK Government should be commissioned to establish what can be done to help make money attachment more effective.

## 5.11 Diligence against Earnings

Earnings Arrestment, Current Maintenance Arrestment and Conjoined Arrestment orders are ways for creditors to enforce the payment of debt. These arrestments, known collectively as Diligence Against Earnings, allow a creditor to instruct a debtor's employer to make a deduction from the debtor's earnings.

Key areas highlighted from the consultation included a desire to see a facility for batch and electronic transfer and a timeframe for notification of a successful arrestment (21 days); and the introduction of a minimum level of earnings recovered for Conjoined Arrestment Orders before employers are required to remit the earnings to the sheriff clerk.

The group considered these areas and agreed that employers should be required to notify if an arrestment is successful within 21 days.

The group also considered whether there should be a minimum amount of earnings recovered before employers are required to pay the sum recovered to the sheriff clerk, and whether there should be a facility for disbursement to creditors to be made quarterly rather than monthly. This could remove some of the burden on employers who will not have anticipated a member of their staff being subject to an Arrestment, and creditors particularly where the conjoined arrestment results in small monthly payments. There was general consensus that it could be possible to allow employers to hold the funds before sending these to the Court, however, further consideration needs to be given to the real benefits and potential risks associated with this. It was agreed it would not be possible for the Courts to hold on to funds and therefore not possible to pay creditors quarterly. This, however, should be revisited should AiB be appointed as the responsible body for dealing with conjoined Arrestments.

The group considered the processes involved for Conjoined Arrestment Orders and the courts involvement in collecting and then distributing funds to creditors. It was felt that it was more appropriate for this to fall to AiB rather than the courts.

**Recommendations:**

* The timescale for an employer to notify if an earnings arrestment was successful should be amended to 21 days to align it with the requirements of other arrestment orders.
* Responsibility for handling the receipt and distribution of conjoined arrestment funds should transfer to Accountant in Bankruptcy.
* The facility to make quarterly disbursements to creditors should be considered where FCA rules allow and it removes the administrative burden on creditors.
* Further consideration should be given on the merits and risks associated with enabling employers to forward funds recovered through an Arrestment quarterly, rather than monthly.

## 5.12 Arrestment in Execution and Action of Furthcoming

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

Feedback during the consultation suggested this is an effective diligence which could benefit from some small alterations to increase efficiency. The group agreed and suggested that the progression to service of bulk arrestments in an electronic format would be beneficial. This is another area where there is scope to simplify the language in legislation, supporting documentation and guidance. There is also scope to make some small alterations e.g. removing duplication on the service of documents.

The arrestee has a statutory duty to send the creditor, the debtor, and anyone else who has claimed ownership of the funds or goods, a form of disclosure within three weeks from the date the arrestment schedule was served. The form of disclosure details the nature and value, as far as it is known, of the items arrested. If funds held by a bank or any other financial institution are arrested, they are subject to a Protected Minimum Balance (PMB). Only the balance above this amount can be arrested. It has been highlighted that the monthly frequency of payment of benefits such as Universal Credit, coupled with the inclusion of housing costs, can mean that the funds at the credit of a person’s bank account are significantly in excess of the PMB. This presents the risk of arrestment as these payments lose their identity once deposited in a bank account.It was agreed that further work is needed to determine how Universal Credit (and other benefits) can be protected from arrestment.

The group considered it would be beneficial for all arrestees (those in whose hands an arrestment is served) to be required to notify where an arrestment is unsuccessful. Without this information the party pursuing the diligence could make assumptions about the debtor e.g. the debtor does not have a bank account with that bank, the funds held are under the PMB or there is no money in the account. If banks provide this information it would allow a creditor to make a more informed decision on whether to pursue further action. The group considered three weeks is not an unreasonable time period to find out the outcome of an action. It was recognised this additional action would have an impact on banks and it was agreed that it would be helpful to explore how this notification could be carried out with minimum impact on the banks. Further consideration is also needed to determine any additional costs associated with this and to establish who should bear this cost.

The group discussed an issue in respect of arresting funds in bank accounts that are not located in Scotland. There is also a need to consider the impact of open and on-line banking. The group agreed there is a need for a process which works for the whole of the UK.

The group also agreed the requirement to send a further Recorded Delivery copy of the arrestment schedule to the arrestee should be removed.

**Recommendations:**

* Electronic service of bulk arrestments should be introduced where appropriate.
* Further work needed to identify if there is any other circumstances when electronic service and personal service would be appropriate.
* Diligence language should be simplified and where appropriate, a clearer explanation of what the diligence achieves to be provided in legislation and/or supporting documentation.
* Banks and other arrestees should be required to notify sheriff officers where a diligence is unsuccessful, within 21 days. Further work should be carried out to determine how this can be done with minimum impact on banks, the costs associated with this change and who should bear this additional cost.
* Consider changes needed to allow bank arrestments to take place where a bank account is held outwith Scotland.
* Further work needed to determine how Universal Credit and other benefits can be protected from arrestment.
* The requirement to send a further Recorded Delivery copy of the arrestment schedule to the arrestee should be removed.

## 5.13 Summary Warrants

Summary Warrants allow local authorities and HMRC to execute diligence. Until April 2008 there was no requirement to serve a Charge for Payment prior to execution. However, the 2007 Act provides that a Charge for Payment should be served in all Summary Warrant actions before enforcement can take place.

The group considers that encouraging a debtor to take advice is key and this should be at the forefront of any action. With this in mind it would be helpful for a debtor to be issued with a DAIP before Summary Warrant action is taken.

The group also considered whether Summary Warrants could be extended to allow private sector creditors to use the procedure. There was agreement this should not be extended.

**Recommendations:**

* The DAIP should be issued before the Summary Warrant stage.
* Summary Warrants should not be extended to private sector creditors. Summary Warrants should be extended to Inhibitions in execution with the existing recall provision for Inhibition applying to Summary Warrants.

## 5.14 Admiralty Actions and Arrestment of Ships

**Admiralty Arrestment** is a type of diligence relating to the arrestment of ships and cargo on board ships for debt due. Generally, arrestment of a ship prevents it from sailing to its next destination until the Arrestment is recalled or the debtor provides alternative security. Admiralty Arrestments are relatively uncommon but can be utilised for claims of some considerable value.

The group considered whether an Arrestment of a ship should be allowed to take place on a Sunday. It was clarified that an Arrestment can currently take place on a Sunday with the court’s agreement. The issue is actually around the Arrestment to found jurisdiction which currently cannot take place on a Sunday. The group recommends that the legislation should be amended so that Arrestment to found jurisdiction can take place on a Sunday.

The group has considered the current requirement for a notice to be placed on the mast of a ship and whether this is still relevant as many ships do not have masts. It was clarified that current rules allow the notice to be placed elsewhere on the ship, where there is no mast. The group’s considered view is that no amendment is required in this respect.

**Recommendations:**

* Arrestment to found jurisdiction should be amended to allow Arrestment to take place on a Sunday.

## 5.15 Landlord’s Hypothec

**Landlord's Hypothec** arises automatically and gives a landlord a right in security over moveable property belonging to the tenant within let premises. It is available only in respect of unpaid rent and subsists as long as the rent remains unpaid.

The group notes the responses to AiB’s consultation suggesting that Landlord’s Hypothec should be extended to cover goods in commercial premises and consider this worthy of further consideration. It was also suggested that there should be recognition of the different types of landlords.

The group highlighted concerns around the effectiveness of this diligence, primarily around the ability to recover funds using it. Further measures would need to be put in place to make it more effective.

The group discussed whether Landlord’s Hypothec should be abolished due to the lack of volume, however, it is the group’s view that a wider discussion on Landlord’s Hypothec is required to determine the way forward as it is a complex area.

**Recommendations:**

* Further work should be carried out to determine how this diligence can be made more effective. This should be considered along with other diligences relating to heritable property.

## 5.16 Actions for Removing from Heritable Property

Actions for Removing From Heritable Property is an action where authority is granted to remove or eject a debtor from the pursuer’s property. Ejection is the term used where an owner of heritable property wishes to recover possession from someone who has no legal right or title to occupy the property e.g. where there are squatters in residence.

Before removal can take place, a charge for removing must be served on the debtor. The charge will usually provide 14 days’ notice before the removal can take place. The sheriff may dispense or alter the notice period if circumstances permit.

The service of Certificate of Execution of Decree is currently placed on the front door of the premises in a sealed envelope. This helps to ensure a debtor’s privacy and the group agree this should not change.

The majority of responses to the AiB’s consultation consider actions for removing from heritable property to be effective and the group concurs with this view. Where personal items are left in the property it is recommended that a statutory timescale for their uplift is provided for in legislation. Where contact is not made within the allotted time then assets may be sold with the funds being credited to the total debt. It was suggested that seven days’ notice is not adequate especially where vulnerable people are involved. The group considers that 14 days would be a more acceptable period to allow before the disposal of personal effects left in a property. Alternative arrangements may be agreed where creditor consent is received. In addition, determining who is responsible for protecting an abandoned animal left in a property requires guidance.

**Recommendations:**

* Introduce a prescribed statutory timescale for the removal of personal items of 14 days (unless otherwise agreed with the creditor).
* Guidance should be provided for officers attending an ejection to assist with any abandoned animals left in a property.

## 5.17 Maills and Duties

**Maills and Duties** is a diligence which is available to heritable creditors, where the property over which they have a security is let. It gives a heritable creditor the power to receive payments of rent due to be paid to the debtor, directly from the tenant who has leased the property.

The group acknowledged that this diligence is rarely, if ever, used and the intention back in 2007 was for this to be removed from statute. They agree there is no longer a need for it.

**Recommendations:**

* Maills and Duties should be removed from the statute.

## 5.18 Adjudication for Debt

**Adjudication for Debt** is a long established but rarely used diligence which is exclusively a Court of Session process. Adjudication for Debt gives creditors a right or security over heritable (and some other) property owned by the debtor. It can be used alone or as a follow-on process from Inhibition.

Given the timescales (a minimum of 10 years) involved and the costs for an exclusively Court of Session process, the group consider it is unlikely creditors will view this diligence as a viable way to recover debt. The group therefore considers this should be removed from statute. However, the group also believe there should be a mechanism in place to deal with heritable property but it needs to have the proper protections in place to prevent people from losing their homes for small debts and also to prevent its misuse.

The group recognise there are concerns over Land Attachment, which is considered at [section 5.19](#_5.19_Land_Attachment), but agree that further work is needed to help establish a replacement for Adjudication for Debt. The Group acknowledges that the Minister for Business, Fair Work and Skills has committed to a wider review of Scotland’s statutory debt solutions and recommend Land Attachment or alternative forms part of this wider review.

**Recommendations:**

* Adjudication for debt should be removed from statute, however, an independent group should consider how heritable property should be treated across all debt solutions and when recovering debt through diligence. Any recommendations should take account of the wider implications.

## 5.19 Land Attachment

Part 4, Chapter 2 of the 2007 Act introduced a new diligence over land owned by a debtor which is intended, together with Residual Attachment, to replace the existing diligence of Adjudication for Debt**. Land Attachment has not yet been commenced.**

The group, as well as respondents to the consultation, has concerns regarding Land Attachment. This legislation was intended to allow for an unsecured creditor to enforce a debt by taking action against a person’s land and property. Although provided for in 2007 Act, concerns about the lack of protection for a family home has meant it has never been enacted.

The group acknowledged that during 2007, Ministers committed to increased protection for those facing debt and bankruptcy, particularly where indebtedness may result in the loss of the family home. The First Minister at that time committed to an exemption on the main dwellinghouse from land attachment. This position has not changed. Furthermore, the Scottish Government announced in 2009 their commitment to early legislation to strengthen protection for homeowners at risk of repossession.

The Home Owner and Debtor Protection (Scotland) Act 2010 (HODPA) received Royal Ascent on 18 March 2010. It introduced pre-action measures for creditors to provide clear information about the terms of the standard security to debtors. In addition it endorsed the position that reasonable efforts must be made with debtors to agree proposals in respect of standard security repayments. Consequently, where the debtor is taking steps which are likely to result in the payment to the creditor within a reasonable time of any arrears, or the whole amount, due under the standard security, no application should be made as stated under section 24(1B), of the Conveyancing and Feudal Reform (Scotland) Act 1970 (“the 1970 Act”) to apply to the court for remedies on default. Where a second home exists, HODPA offers protections to entitled residents whose sole or main residence is the secured subject. The group recognised these additional protections.

It was widely acknowledged by those responding to the consultation that the family home needs to be protected if Land Attachment is to be enacted. It is recognised that although HODPA does provide some protection, it is not enough to alleviate concerns from the insolvency/debt advice sector. Indeed there is a view that people’s opinion on Land Attachment has not changed over the years and opposition is likely.

The group discussed whether Land Attachment could be introduced to allow a creditor to pursue second homes or business premises. The group recognised that HODPA offers protection to those entitled residents where a second home is their sole or main residence, and that business premises are mainly leased.

The group also acknowledged that most other advanced economies have a mechanism which forces the sale of “spare” heritable property i.e. property other than the debtor’s own home. In Scotland, alternatives are available to a creditor e.g. they can inhibit a debtor from selling their premises or they can sequestrate the debtor but these do not necessarily result in the creditor recovering their debt.

The group agrees a creditor should be able to take action against heritable property which may help avoid bankruptcy but that Land Attachment in its current form is not appropriate. They acknowledge that to some extent the treatment of a family home and heritable property is political and a steer from Scottish Ministers would be helpful. A wider review of how the family home and heritable property should then be conducted by an independent group. This should incorporate each diligence involving these assets, including Land Attachment. The Group acknowledges that the Minister for Business, Fair Work and Skills has committed to a wider review of Scotland’s statutory debt solutions and recommend Land Attachment or alternative forms part of this wider review.

**Recommendations:**

* The treatment of the family home, heritable property and Land Attachment should be considered by an independent group. This could form part of the wider review of Scotland’s statutory debt solutions.
* Further work and research is needed to develop an effective diligence against heritable property. This should consider the impact of wider issues such as housing.
* Any new diligence should replace Adjudication for Debt and allow Residual Attachment to be enacted.

## 5.20 Residual Attachment

Part 4, Chapter 3 of the 2007 Act introduced the new diligence of Residual Attachment which was intended, together with Land Attachment, to replace the existing diligence of Adjudication for Debt. **Residual Attachment has not yet been commenced.**

The group consider Residual Attachment to be a necessary diligence which could be used to capture assets not covered by any existing measures. The current legislation does not provide an exhaustive list of assets which may be attached but guidance identifying the type of assets which could be attached through Residual Attachment would be helpful e.g. digital assets, personal number plates, crypto currencies and intellectual property. Creditors may be able to ascertain the existence of assets through Information Disclosure Order’s, Land Register searches, general awareness of the debtor’s circumstances or by instructing a sheriff officer to gather further information.

**Recommendations:**

* Residual Attachment should be enacted when a suitable alternative to Adjudication for Debt and Land Attachment is identified and introduced.
* The introduction of a widely drafted provision with a caveat maintaining current protections will be necessary to ensure this diligence will cover a wide range of items. In addition, this must provide scope to exclude assets not to be attached such as milk quotas which was introduced in the EEC in 1984\*.
* Guidance should be provided identifying potential assets which could be attached through Residual Attachment.

\*See Community Regulations (EEC) 856/84 and 857/84 and Commission Regulation (EEC) 1371/84. See generally Caldwell, Milk Quotas (1996) for further information.

## 5.21 Disclosure of Information

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

The group discussed IDOs at length and a number of suggestions were put forward on how this diligence could work in practice. The group agree there is a legitimate role for IDOs in the diligence landscape in Scotland and it would add to the already effective suite of measures currently available. There is an appetite for IDOs with the right safeguards in place for effective operation.

### How Disclosure of Information could work in practice

The group proposed that a creditor must be in possession of a decree or document of debt as defined in Section 221 of the 2007 Act before an IDO can be considered. The debtor must also have been served a Charge for Payment, the days of the charge must have expired and they must have received a DAIP before an application can be made.

Before applying for an IDO the creditor must consider what information they have about the debtor. This means that if they already have the information they need to recover the debt, they should do so without applying for an IDO. To establish if an IDO is an appropriate measure, a creditor will be required to seek advice. The group recommends that advice should be sought from a professional, which includes a sheriff officer, a solicitor or an accountant, who will assess whether the application is appropriate.

If an IDO is appropriate, the creditor will be required to know the name and address of the debtor. The group considers this to be the minimum level of information required to apply for an IDO. Creditors will be encouraged to provide additional information to support their application if it is known e.g. a date of birth or National Insurance Number. The application form will provide space for this additional information. The group’s view is that a creditor will need to be specific about the information they are seeking and who they are seeking it from. Jurisdiction should be based on the debtor’s address and it was acknowledged IDOs would therefore not be appropriate for decrees granted in relation to a debtor out-with Scotland.

The group discussed who should be permitted to make an application and specifically if there should be a requirement for applications to be lodged by a sheriff officer, or if this could be done by the creditor directly to the court. Members agree that in the interests of fairness, and to prevent the misuse of information, applications should be accepted from a range of regulated professionals, including solicitors, accountants and sheriff officers and persons authorised by legislation to conduct proceedings. The application would be registered by the applicant in court, along with the relevant fee, which the group thought should be in the region of £60-£70. This fee would be for the IDO and the sheriff officer fee would be an additional cost. Any creditor pursuing a diligence as a result of information obtained through the IDO would also be liable for the costs involved for any future diligence. The jurisdiction of the application will be the debtor’s address.

It is the considered view of the group that the debtor should not be notified of the application as it may provide the debtor with an opportunity to hide or conceal assets before the application is granted. The group recommends that the DAIP is updated to include information about this new diligence along with the other measures available. The debtor will have multiple opportunities to engage with the creditor before it reaches the stage of an IDO, or diligence, and the DAIP should clearly set out what could happen next in plain English.

Due to the nature of the application, the group anticipates that a quick turnaround would be required by the court, however, it was decided not to recommend that a timescale be prescribed in legislation. Members agree that an application may be rejected for procedural issues, if the application has been completed incorrectly, or if information or proof of debt is not supplied.

Where an application is approved by the court, it is the group’s view that this should be communicated by way of a standard interlocutor issued to the professional who registered the application. This professional would then contact the creditor to advise of the outcome of the application within 14 days. If approved the creditor is free to instruct the sheriff officer to action the IDO. The group recommends that the sheriff officer should have three months in which to submit the request for information from the third party (the organisation(s) named in the IDO). If unsuccessful the creditor will need to consider how best to proceed. They would be able to submit a fresh application for an IDO in the future, providing they have additional information about the debtor.

An example of the type of information that could be requested through an IDO would include asking banks if the debtor has a bank account and the type of account(s) held. The group acknowledged that Government bodies will initially be exempt from having to provide this information and that further legislation would be needed to enable information to be sought from a Government body, likely to be via a Section 104 order.

The group recommends that the third party organisation should have 21 days to provide the information as requested in the IDO. This should include notifying the sheriff officer if they do not hold the information or if they cannot confirm someone’s identity.

The group agrees that information about the debtor should be sent to the sheriff officer who will be responsible for keeping the data secure. Members recommend that the data should be sent by secure email to ensure that the personal data is protected. The sheriff officer will liaise with the creditor about next steps but the creditor will not have sight of the personal information at this point. This is to ensure that access to the data is restricted and secure. The creditor will only have sight of the information after diligence has been executed (in line with other court processes/diligences). The data obtained through an IDO must only be retained in line with the sheriff officer’s retention and destruction policy. This must be in line with the General Data Protection Regulation (GDPR) and not kept for longer than is necessary.

**Recommendations:**

* Disclosure of Information should be introduced to help inform decisions on how best to recover debt. It is recommended it is adopted as set out above but is summarised as including the following measures being incorporated.
* A creditor must be in possession of decree or document of debt before they can apply for an IDO.
* The debtor must have been served with a charge for payment, the days of the charge must have expired and they must have received a DAIP before proceeding with an IDO application.
* Before applying for an IDO the creditor must consider the information they have about the debtor and whether the debt can be pursued without an IDO.
* A creditor must seek advice from a professional e.g. a sheriff officer, a solicitor or an accountant who will assist with the application.
* Investigations should continue to be carried out by a sheriff officer.
* The name and address of debtor will be the minimum level of information required to make an application for an IDO. The application will contain space for additional information where it is known e.g. date of birth.
* Applications should be accepted from a range of regulated professionals, including solicitors, accountants and sheriff officers and persons authorised by legislation to conduct proceedings. The application should be registered by the applicant in court.
* Where an application is approved by the court this should be communicated by way of a standard interlocutor issued to the professional who registered the application.
* The sheriff officer should have three months in which to submit the request for information from the third party (the organisation(s) named in the IDO).
* Fees involved to be set out in legislation - recommendation that the application should be in the region of £60/70 and the pursuing creditor should be liable for the cost.
* The debtor will not be notified of an IDO application being made against them to prevent concealment of assets.
* The Sheriff to grant an IDO by way of a standard court interlocutor.
* Initially public bodies will be exempt from IDOs. Consider further legislation to enable information to be sought from Government bodies.
* Data to be sent securely to ensure personal data is protected – this could be by secure email.
* Sheriff officers will be responsible for keeping personal data secure.
* Consideration to be given on whether to seek approval to extend the use of IDOs to include Government bodies.

# ****6. Conclusion****

The members of the Diligence Working Group are grateful for the opportunity to play an active role in this forum and being able to provide a considered view on how to modernise diligence measures in Scotland. The group would be more than happy to continue to engage with Scottish Government and remain as a resource to contribute as this work progresses.

The group acknowledges that the recommendations within this report will largely require primary legislation. This is likely to include the introduction of IDOs due to the recommendation that sheriff officers collect the information from third parties – current provisions are for the court to collect the information. Where there is an opportunity to take changes forward with secondary legislation this should be considered. It is the consensus of the group that the recommendations made within this report will seek to improve diligence measures in Scotland.

**Diligence Working Group**

**March 2021**