

# DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) ACT 2002

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## EXPLANATORY NOTES

### THE ACT

3. The Act is intended to implement the central recommendations of a broadly based Working Group which was set up, in response to the request of the Justice and Home Affairs Committee of the Scottish Parliament in the Committee's Stage 1 Report on the Abolition of Poindings and Warrant Sales Bill (SP Paper 82, paragraph 48), to consider an alternative for pointing and warrant sale. The Working Group's recommendations were published in its report *Striking the Balance – a new approach to debt management* on 6 July 2001.
4. The Act is in five parts:

**Part 1 (THE DEBT ARRANGEMENT SCHEME)** creates a national debt arrangement scheme to enable multiple debts to be assessed with the support of money advisers and paid in accordance with a debt payment programme over a period of time. During participation in the debt arrangement scheme enforcement action against and sequestration of the debtor will be prohibited. Regulation making powers are included within the Act to enable the scheme to be introduced without the need for additional primary legislation, so allowing for early implementation. Matters of detail to be contained within the regulations will be informed by the responses to the consultation document *Enforcement of Civil Obligations in Scotland*, published on 22 April 2002. The first regulations to be made under the Act which make further provision in relation to debt payment programmes under the scheme will be subject to affirmative procedure.

**Part 2 (ATTACHMENT)** provides for attachment of corporeal moveable property.

**Part 3 (ATTACHMENT OF ARTICLES KEPT IN DWELLINGHOUSES: SPECIAL PROCEDURE)** provides for attachment, on an exceptional basis, of articles kept in dwellinghouses. This is competent only where a sheriff grants an exceptional attachment order and where assets exist which are not essential. An exceptional attachment order will be granted only after there has been a judicial enquiry in each individual case. This will take into account such matters as whether money advice has been given to the debtor, any previous time to pay arrangement, the nature of the debt and any information produced that relates to the debtor's financial circumstances. Factors to be taken into account by the sheriff in deciding whether there are exceptional circumstances include whether the creditor has taken reasonable steps to negotiate a settlement, whether an earnings or ordinary arrestment has been attempted and whether there is a reasonable prospect that a sum (currently £100) plus expenses will be recovered. The sheriff does, however, have an overriding discretion, after considering all the matters before him, to decide whether or not to grant an exceptional attachment order on the basis that it would be reasonable or not in the circumstances to do so.

*These notes relate to the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) which received Royal Assent on 17 December 2002*

**Part 4 (ABOLITION OF POINDINGS AND WARRANT SALES)** makes provision for the abolition of poinding and warrant sales. It also contains saving provisions in respect of warrant sales already completed before 30 December 2002 and for poindings where a warrant sale has not been completed before that date where the poinding was executed in premises that are not a dwellinghouse and provided that the warrant sale is completed on or before 31 March 2003.

**Part 5 (MISCELLANEOUS AND GENERAL)** makes provision for the short title, regulations and orders, commencement of the Act and other miscellaneous matters.

**The SCHEDULES** contain details of the expenses of attachment chargeable against the debtor, non-essential assets and minor and consequential amendments and repeals.

## **Part 1 – the Debt Arrangement Scheme**

5. **Part 1** provides the framework within which the debt arrangement scheme will operate. Further detailed provision will be made following Ministerial consideration of the analysed responses to the consultation about proposals for the operational arrangements and legal effect of the scheme.

### ***Section 1 – Debt arrangement scheme***

6. **Section 1** creates a scheme, named the “debt arrangement scheme”, to enable individuals to arrange for their debts to be paid under debt payment programmes.

### ***Section 2 – Debt payment programmes***

7. **Section 2** defines what a debt payment programme under the scheme is and specifies how an application for approval of a debt payment programme may be made.
8. **Section 2(1)** defines a debt payment programme as a programme which provides for the payment of money owed by a debtor.
9. The Scottish Ministers are given the power in section 2(2) to approve a debt payment programme upon submission of an application by a debtor. It is intended that this approval function of the Scottish Ministers will be delegated by them to another body by virtue of the power contained in section 8.
10. Details of what must be included in an application are set out in section 2(3). The programme is to specify arrangements proposed for payment of debts giving details of the amounts, periods and manner in which debts are to be paid, these details to be specified by the debtor according to the debtor's knowledge and belief.
11. **Section 2(4)** provides that the application form is to incorporate the consent of all the debtor's creditors.
12. The debt payment programme will specify the person (the “payments distributor”) to whom the debtor proposes to make instalment payments for distribution amongst creditors. Section 2(5) provides that a person appointed to carry out the payment distribution function has to be approved for that purpose by the Scottish Ministers.

### ***Section 3 – Money advice***

13. **Section 3** requires the debtor to take certain steps before submitting an application for approval, or variation, of a debt payment programme.
14. **Section 3(1)** requires the debtor to seek the assistance of a money adviser before applying for approval of a debt payment programme, or its variation. Section 3(2)

provides that the debtors' application to enter into a debt payment programme must contain a signed declaration by the money adviser that money advice has been given.

#### ***Section 4 – Effect of debt payment programmes***

15. **Section 4** details the effects of an approved debt payment programme under the scheme.
16. **Section 4(2)** and **(3)** prohibit all creditors from executing any form of diligence against or seeking to sequester a person who has debts which are being paid by way of an approved debt payment programme under the scheme.
17. **Section 4(4)** provides that any period during which a debtor's debts were subject to an approved debt payment programme under the scheme is to be disregarded for the purpose of creditors' rights and remedies for enforcing a debt. The effect of this provision is, in particular, to suspend prescription during the relevant period. Thus debts for which creditors had not obtained decree which are included in a debt payment programme which ceases before payment is made in full, will not prescribe during the period of the programme.
18. **Section 4(5)** provides that the prohibition on creditors from executing diligence or seeking to sequester a debtor whilst their debts are being paid under an approved debt payment programme is restricted to not only those debts owed that are included in the debt payment programme but also to any other debts owed to creditors who have been given notice of the approval of the debt payment programme.

#### ***Section 5 – Variation of debt payment programmes***

19. **Section 5** deals with the variation of an existing debt payment programme and any conditions attached. It is anticipated that, once a programme is approved, variation will be infrequent. Circumstances in which variation should be allowed have been consulted upon and will be provided for in regulations to be made under section 7(1) (see section 7(2)(k) in particular).
20. **Section 5(1)** allows both creditors and debtors to apply for a variation of a debt payment programme. **Section 5(2)** provides that a copy of the application is to be provided by the party applying for the variation to all other participants in the programme. **Section 5(4)** specifies that an application for variation will be made in a standard form which will be prescribed.

#### ***Section 6 – Deduction from earnings***

21. **Section 6** provides for deduction from earnings under the terms of a debt payment programme. It is anticipated that, subject to consultation, the regular payments to be made for distribution amongst creditors could be made by deduction from a debtor's earnings.
22. **Section 6(1)** and **(2)** require the debtor to instruct an employer to make the approved payments to the person distributing the payments to the creditors and for the employer to comply with the instruction.

#### ***Section 7 – Debt payment programmes: power to make further provision***

23. **Section 7** gives the Scottish Ministers further powers to regulate the content, operation and effect of debt payment programmes approved under the scheme. This will enable the detail to reflect views expressed in the consultation.
24. **Section 7(1)** gives the Scottish Ministers a general power to make further provision in this respect by way of regulations. It enables regulations to be made concerning applications for the approval, or variation, of debt payment programmes, the manner in which they are to operate, the conditions to be complied with and the effects which they will have.

25. **Section 7(2)** sets out particular matters in respect of which the general power in section 7(1) may be exercised. It lists many of the arrangements for which it will be necessary to make provision in order to enable the scheme to operate and which have been anticipated in the consultation. For example, section 7(2)(n) provides for regulation of the period over which a debt payment programme may run. This is intended to enable settlement of the debts within a reasonable period (to be determined from the outcome of the consultation).
26. **Section 7(3)** allows the regulations to make different provisions and Section 7(4) allows legislation, which may have to be modified as a consequence of the scheme in order to make it operate effectively, to be modified by the regulations. For example, it may be necessary to modify existing legislation concerning diligence and sequestration to ensure that their operation is suspended during participation in the scheme in accordance with provisions of the Act in section 4 and the regulations which can be made under section 7(1)(c) and (2).

### ***Section 8 – Functions of the Scottish Ministers***

27. The Scottish Ministers may wish to nominate a body or bodies outwith the Scottish Executive to perform functions in relation to the debt arrangement scheme currently provided for in Part 1 of the Act as a function of the Scottish Ministers. Section 8 gives them the power to do so by order.

### ***Section 9 – Interpretation of Part***

28. **Section 9** defines terms used in Part 1. Money advisers, for the purposes of the scheme, will be approved by the Scottish Ministers to give advice to a debtor who applies for approval or variation of a debt payment programme. Debtors, for the purposes of the scheme, must be natural persons (i.e. companies, partnerships, associations etc. may not apply).

## **Part 2 – Attachment**

### **Attachment**

29. This part of the Act introduces a new method of enforcement, or diligence, for the attachment of corporeal moveable property. The law of diligence provides procedures by which legal obligations, usually imposed by an order of the civil courts, can be enforced. Different procedures for the enforcement of obligations concerning legally constituted debt apply to different types of property. Corporeal moveable property is property which is tangible (corporeal), is not fixed like land or buildings and can be handled and moved (moveable).
30. Rules of court will make supplementary provision for the manner in which the procedural requirements under this Part of the Act are to be undertaken within the court process – for example, regarding intimation of documents and steps in procedure, the conduct of hearings and the manner in which applications to the sheriff or appeals against decisions may be made (including provision of forms to be used). The Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002, which came into force on 30 December 2002, makes provision for the rules to be applied under the Act.

### ***Section 10 – Attachment***

31. This section creates a new diligence over corporeal moveable property for recovery of legally constituted debt, to be known as attachment.
32. **Section 10(3)** and (4) provide that attachment is only competent where the debtor has been charged to pay the sum owed together with interest accrued and the creditor has provided the debtor with a debt advice and information package. In the absence of a

charge to pay in summary warrant cases, the creditor must provide the debtor with a debt advice and information package before taking any steps to carry out an attachment.

33. [Section 10\(5\)](#) defines terms used in this section. It specifies that the debt advice and information package is to contain such information as may be determined by the Scottish Ministers. It also specifies the meaning of decree and document of debt.

### ***Section 11 – Articles exempt from attachment***

34. This section specifies property which is to be exempt from attachment.
35. [Section 11\(1\)](#) provides that it will not be competent to attach articles which are reasonably required for the debtor's profession, trade or business, and which do not exceed an aggregate value of £1,000. In particular, tools of trade, books other equipment may not be attached. This will enable valuable property to be attached whilst permitting the debtor to retain items which will allow him to continue his business and generate income. This is in line with recommendations 7 and 11 of the Scottish Law Commission in its *Report on Pounding and Warrant Sale* (Scot Law Com No177). Specific provision is also made to exempt a vehicle reasonably required by the debtor and not exceeding £1000, and a mobile home which is the debtor's only or principal residence. Gardening equipment necessary for keeping a debtor's garden or yard adjacent to where the debtor lives is also exempted.
36. [Section 11\(2\)](#) allows the Scottish Ministers to add or remove and vary the items exempted by regulations. This will provide flexibility in order to meet changing circumstances or where it is considered that further debtor protection may be needed.

### ***Section 12 – Times when articles may not be attached***

37. [Section 12](#) specifies days on which attachment may not take place, namely on a Sunday, a day which is a public holiday in the area in which the attachment is to be executed or any other day prescribed by rules of court. It also specifies times during which attachment may not take place, restricting it to between 8am and 8pm unless prior authority has been obtained from the sheriff.

### ***Section 13 – Presumption of ownership***

38. [Section 13](#) provides a presumption that articles in the possession of a debtor are owned by the debtor, either solely or in common with a third party.

### **Attachment of articles kept outwith dwellinghouses**

#### ***Section 14 – Procedure for attachment of articles kept outwith dwellinghouses etc.***

39. [Section 14](#) provides that sections 15 to 19 apply only to the attachment of articles which are kept outwith a dwellinghouse and that they do not apply to a mobile home which is the debtor's only or principal residence.

#### ***Section 15 – Power of entry and valuation***

40. [Section 15\(1\)](#) provides for entry into premises which are not a home (dwellinghouse) for the purpose of executing an attachment and permits locked premises to be opened if necessary. Sections 15(2) and (3) provide that the valuation of an article is to be based on the amount the article would be likely to fetch if sold on the open market, and is to be carried out, where appropriate, by a professional valuer or other suitably skilled person. This will be applicable in cases where, for example, the article concerned is antique or unusual.

### ***Section 16 – Attachment of mobile homes***

41. This permits a caravan, houseboat or other moveable structure used as a dwellinghouse, which is the only or principal residence of a third party, to be released from an attachment. The third party must be given notice of the attachment. The debtor or the third party may then, within 14 days of the attachment, apply to the sheriff for its release. If, however, there is good reason for the application being made late the sheriff can consider an application made after that period but before the mobile home is auctioned.

### ***Section 17 – Report of attachment***

42. This section provides for judicial supervision of the attachment by requiring that a report of the attachment be made to the sheriff within 14 days of its execution. The sheriff may allow a longer period on cause shown. If there is some irregularity in the format of, or procedure by which the report was made, the sheriff may refuse to accept the report and the attachment will cease to have effect.
43. [Section 17\(2\)](#) provides that the report must be in the form prescribed in rules of court and that it must be signed by the officer. [Section 17\(3\)](#) stipulates what the report should specify. Under [section 17\(4\)](#) the report need not specify articles which have been sold following specific orders made by the court regarding the sale of perishables nor a vehicle that has been sold.

### ***Section 18 – Redemption***

44. [Section 18](#) enables attached articles to be redeemed by the debtor within 14 days of the date on which the article was attached. This provides for circumstances where an article has been attached but the debtor wants to buy it back before auction.
45. [Section 18\(2\)](#) specifies that the article must be redeemed at the attached value. [Section 18\(3\)](#) and (4) provide for a receipt to be given when payment is made upon which the attachment will cease to have effect. The receipt will be in a form prescribed by rules of court.
46. [Section 18\(5\)](#) provides for a supplementary report to be made as soon as reasonably practicable to the sheriff in respect of a redemption made after the original report of attachment has been made.

### ***Section 19 – Removal and auction of attached articles***

47. [Section 19](#) requires arrangements for the auction of attached articles to be made and, after notice of the date on which the auction is to take place has been given, permits the removal of articles from the place where they are kept to the place where the auction is to take place. [Section 19\(4\)](#) and (5) permit only sufficient articles as would, if sold at their attached values cover the debt due, to be removed for auction. Any remaining attached articles will cease to be subject to attachment.

### ***Section 20 – Order for security of articles or sale of articles which are perishable etc.***

48. [Section 20](#) allows the sheriff to make an order for the security of attached articles and for the immediate sale of perishable articles so that they will not deteriorate and lose value. The proceeds of sale are then consigned in court.
49. [Section 20\(2\)](#) provides that an application for such an order must be intimated to the debtor or creditor and the officer depending on which party makes the application.
50. [Section 20\(4\)](#) provides that where an attachment ceases to have effect before an auction takes place the sum consigned in court will be paid to the creditor to meet the debt and any surplus will be paid to the debtor.

### ***Section 21 – Unlawful acts after attachment***

51. This section prohibits the removal, sale, gifting or other disposal of attached articles and their wilful destruction or damage. To do so will be in breach of the attachment and may be dealt with as a contempt of court.
52. [Section 21\(7\)](#) requires the debtor to give notification to the creditor and officer if an attached article is stolen and of any insurance claim which the debtor intends to make. [Section 21\(10\)](#) provides that, where attached articles have been damaged, destroyed or stolen, the sheriff may order that others be attached. Damaged articles may, on the authority of the sheriff, be revalued.
53. [Section 21\(11\) to \(15\)](#) makes provision for a sum of money to be consigned in court in circumstances where an article is made unavailable by the debtor or any third party who knows the article is attached. These include where the debtor or third party moves an attached article and it is subsequently damaged, destroyed, lost or stolen or is acquired by another person who is unaware of the attachment, and where the debtor or third party wilfully damages or destroys the article. The sum to be consigned will be equal to the difference between the value of the article when attached and the value of the damaged article or, in any other case, a sum equal to the attached value. Where the attachment of a damaged article ceases to have effect before its auction, any sum which has been consigned in court will be paid to the creditor to the extent necessary to meet the debt with any surplus left over being paid to the debtor.

### ***Section 22 – Release of vehicle from attachment***

54. This section provides for the protection of vehicles where auction would be unduly harsh in the circumstances, for example, vehicles used for travel to work or for regular medical treatment in a rural area not serviced by public transport. Circumstances which would constitute undue harshness are not specified, thus allowing the sheriff to make a decision based on the debtor's individual circumstances. This section implements recommendation 11 of the Scottish Law Commission in Scot Law Com No 177.
55. [Section 22\(1\)](#) entitles the sheriff, on an application by the debtor, to make an order for release of the vehicle. [Section 22\(2\)](#) restricts the release to vehicles whose value does not exceed £1,000. This monetary limit may be varied by the Scottish Ministers in regulations. [Section 22\(3\)](#) provides that, where the value of the vehicle is over £1,000, the sheriff may order the sale of the vehicle and for the proceeds of sale up to £1,000 to be paid to the debtor to enable a replacement vehicle to be obtained and for any surplus to remain in court. [Section 22\(5\)](#) provides that if the vehicle cannot be sold within 14 days of the date of the order the attachment will cease to have effect.

### ***Section 23 - Appeals against valuation***

56. [Section 23](#) provides that, where a sheriff is satisfied that the aggregate value of the attached articles is substantially below market value, the sheriff may, up until the date of their auction, order the attachment to cease.. [Section 23\(2\)](#) provides that this can be done either on the sheriff's own accord or on an application by the debtor. [Section 23\(3\)](#) ensures that such an order cannot be made without the debtor and creditor having been given an opportunity to make representations and, if they so wish, be heard.

### ***Section 24 – Duration of attachment***

57. This section provides that an attachment will cease to have effect if no further action is taken within six months of the attachment or 28 days of the removal of the attached article from the place at which it was attached, whichever is the earlier. An extension of the period may be permitted only by order of the sheriff in circumstances where the debtor is likely to comply with an agreement with the creditor to pay the debt due by instalments or where the auction cannot take place before the date on which the attachment ceases through no fault of the creditor and that will prejudice the creditor.

### ***Section 25 – Second attachment at same place***

58. Section 25 provides that a second attachment may not be undertaken at the same premises to enforce the same debt unless other articles were brought onto the premises after the first attachment took place.

### ***Section 26 – Invalidity and cessation of attachment***

59. Section 26 provides that, at any time before the auction of attached articles, the sheriff may, on his own initiative or on an application by the debtor, make an order declaring the attachment to be invalid or having ceased to have effect. The sheriff may also make such other order as is considered necessary in the circumstances. This enables enforcement action to be halted in the event of an irregularity in procedure or if an attachment should have ceased to have had effect.
60. Section 26(4) gives the debtor and the creditor an opportunity to make representations and, if either so wishes, to be heard. Section 26(5) provides for any articles removed to be returned in the event of an order being made. Section 26(6) provides for the sheriff to give reasons for a refusal to grant such an order.

### **Auction of attached articles**

#### ***Section 27 – Notice of public auction.***

61. Section 27 provides that an auction of attached articles must be held by public auction in an auction room unless it is impractical to do so in which event the auction may be held in an alternative location that the officer considers appropriate other than in a debtor's dwellinghouse. Section 27(3) allows other articles, attached along with those which it is impractical to auction in an auction house, to also be auctioned at the alternative location in order to prevent the cost of having two auctions.
62. Intimation of the date and place of the auction, and the date of removal of attached articles kept outside dwellinghouses, must be given to the debtor and to any third party in possession of the attached articles, and details advertised by public notice.

#### ***Section 28 – Alteration of arrangements for removal or auction***

63. Section 28(1) prohibits the date of auction or removal from being varied, unless due to circumstances beyond the creditor's or officer's control. Any new date must be intimated to the debtor and to any other person in possession of the attached articles. Section 28(3) requires the new date to be at least seven days after intimation.

#### ***Section 29– Cancellation of auctions***

64. This section allows an auction to be cancelled to enable the debtor to repay the debt in the event of an agreement having been reached with the creditor but restricts the cancellation to no more than two occasions. Section 29(4) allows for any necessary subsequent resumption of the auction should the debtor default on an agreement made with the creditor, provided that the sheriff, on an application by the creditor, is satisfied that the debtor has defaulted. Section 29(5) makes provision for the debtor to be given an opportunity to respond to an allegation that he/she has breached the agreement, including a right to be heard, before the sheriff makes an order allowing the resumption of the auction.

#### ***Section 30 – Auction***

65. Section 30(1) to (3) provides for the auction to be attended by the officer and a witness and for a record to be made of the articles sold specifying the amount which each achieved.

66. **Section 30(4)** permits any article to be bought by any creditor or by a third party who owns the article in common with the debtor.

### ***Section 31 – Disposal of proceeds of auction***

67. **Section 31(1)** provides for the proceeds of the auction to be applied firstly to meet the expenses of the procedure and then to the creditor to meet the debt with any surplus payable to the debtor. **Section 31(2)** provides that, where the sum due is not realised, ownership of any unsold articles will pass to the creditor, in which case their value will be credited against the debt due.
68. **Section 31(6)** specifies that the proceeds of auction are to include any sum consigned in court and any sum received from a third party for purchase of the debtor's share in joint property.

### ***Section 32 – Report of auction***

69. **Section 32(1)** requires a report to be made to the sheriff within 14 days of the date of auction.
70. **Section 32(2)** specifies the content of the report of auction, including details of articles sold and remaining unsold, price achieved, expenses, any surplus paid to the debtor and any balance due to or by the debtor.
71. **Section 32(3)** provides for the sheriff to order that the chargeable expenses, in whole or in part, be charged against the officer responsible for the report in the event of the report being made late without reasonable excuse or the officer's refusal or delay in making the report. **Section 31(4)** allows the sheriff to treat any such failure as misconduct.

### ***Section 33 – Audit of report of auction***

72. **Section 33** requires the sheriff to remit the report of the auction to the auditor of court for him to tax the expenses charged, certify the balance due to or by the debtor and make a report to the sheriff.
73. **Section 33(4)** requires the sheriff to make an order declaring what sum remains due to or by the debtor. In the event of an irregularity in the procedure, the sheriff may declare the auction void and make any other provision considered necessary as a result. However, any such order will not affect a purchaser's title to property bought in good faith.

## **General and miscellaneous provisions**

### ***Section 34– Articles belonging to a third party***

74. **Section 34(1)** enables articles, prior to auction, to be released from attachment where a third party claims ownership and either the officer is satisfied as to the validity of the claim or the sheriff grants an order.
75. **Section 34(3)** provides for other articles owned by the debtor and kept at the same place as where the original attachment took place to be attached instead of the released articles.

### ***Section 35 – Articles in common ownership***

76. **Section 35(1)** allows articles commonly owned by a debtor and a third party to be attached and sold in satisfaction of the debtor's debt.
77. **Section 35(2)** allows the common owner to redeem such articles on payment of an amount equal to the debtor's interest in the article.
78. **Section 35(3)** enables the sheriff to order that the article be released from attachment where its sale would be unduly harsh to the common owner.

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79. **Section 35(4)** provides for other articles owned by the debtor to be attached in replacement.

***Section 36 – Procedure where articles in common ownership are sold at auction.***

80. **Section 36** covers circumstances where assets in common ownership are sold at auction. Section 36(1) and (2) entitles the third party to a proportion of the proceeds of sale corresponding to his/her interest in them.

***Section 37 – Attachment terminated by payment or tender of full amount owing***

81. **Section 37** provides that an attachment will cease to be effective where the full amount owing to the creditor is paid.

***Section 38 – Assistance to debtor***

82. **Section 38** allows the sheriff clerk to provide debtors with assistance in explaining the procedure involved or completing any forms which may be necessary in connection with any of the procedures in the Act.

***Section 39 – Expenses chargeable in relation to attachment etc.***

83. This section makes provision for determining liability as between debtor and creditor for the expenses of the procedures in the Act.

***Section 40 – Recovery from debtor of expenses of attachment***

84. This section specifies when the expenses of an attachment chargeable against the debtor may be recovered otherwise than from the proceeds of auction.

***Section 41 – Ascription of sums recovered by attachment or while attachment is in effect***

85. This section provides for the order in which amounts recovered by attachment are to be applied, namely towards the cost of attachment, then to interest payable which had accrued by the date of the attachment, then to the debt due including expenses.

***Section 42 – Restriction on fees payable by debtor***

86. This section prohibits the charging of fees to the debtor for any application made by the debtor under the Act, any objections made by the debtor to an application made by another party or in relation to any hearing.

***Section 43 – Power to provide for lay representation***

87. This section confers power to make provision in rules of court for lay representation to be permitted in proceedings concerning attachment.

***Section 44 – Legal aid***

88. This section provides that legal aid is not available for proceedings under Parts 2 and 3 of the Act. Third parties are not prevented from obtaining legal aid in connection with those proceedings.

***Section 45 – Interpretation of this Part and Parts 3 and 4***

89. This section defines terms used in Parts 2, 3 and 4 of the Act.

### **Part 3 – Attachment of Articles Kept in Dwellinghouses: Special Procedure**

90. This Part of the Act provides for special procedures that are to be followed when attaching property kept in dwellinghouses. These procedures follow recommendation 6 of the Working Group.
91. The Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002 which came into force on 30 December 2002 makes provision for the Rules of Court to be applied under the Act.
92. A specific application must be made to the court for an exceptional attachment order in all cases where a creditor wishes to pursue the attachment of property in a dwellinghouse. Each case will be considered individually on its own merits by judicial enquiry. The sheriff will have regard to specified criteria when considering whether to grant an exceptional attachment order. Any order granted will be restricted to articles which are not essential.

#### ***Section 46 – Restriction on attachment of articles kept in dwellinghouses***

93. This section prohibits the attachment of articles kept in a dwellinghouse except in accordance with the provisions of Part 3 where an exceptional attachment order is being pursued.

#### ***Section 47 – Exceptional attachment order***

94. **Section 47** provides for the granting of an order of court authorising the attachment of non-essential assets, on an exceptional basis, within dwellinghouses. Attachment of articles in dwellinghouses will be competent only where the court is satisfied that exceptional circumstances exist.
95. **Section 47(2)** provides that, where it is considered that exceptional circumstances exist justifying the granting of an order, assets which are not essential may be auctioned. The procedure for auction will follow that in Part 2.
96. **Section 47(3)** requires that, when considering whether to make an exceptional attachment order, the sheriff must take account of specified factors. This ensures that an appropriate assessment of individual circumstances is made.
97. **Section 47(4)** specifies the factors to be taken into account by the court. These include whether money advice has been given to the debtor, whether there is any agreement for settlement of the debt and whether there has been any previous time to pay arrangement. The court must also have regard to the nature of the debt, particularly where it relates to any trade, business or unpaid tax. To assist the court, the debtor will have the opportunity to make a voluntary declaration about his financial circumstances, his ability to pay and any non-essential assets held (and, where they are held, their aggregate value).
98. In taking account of whether the debtor has received money advice the sheriff may, where appropriate, make that opportunity available, if necessary by intervention of a domestic visit for the purposes of providing money advice.

#### ***Section 48 – Exceptional circumstances***

99. **Section 48** specifies matters about which the sheriff must be satisfied when deciding whether to grant an exceptional attachment order. The creditor must have attempted to obtain settlement by negotiation and must have attempted earnings or ordinary arrestment if appropriate in the individual circumstances of the case. The sheriff must be satisfied that an auction of the non-essential assets which the debtor has would not only meet the creditor's expenses recoverable from the auction, but also reduce the outstanding debt itself by £100.

100. Section 48(1)(d) requires sheriffs to make an overriding decision on whether it is reasonable in the circumstances to grant an exceptional attachment order.
101. Section 48(2) provides that where a creditor has not attempted other diligence first because there was not a reasonable prospect of successfully recovering the expenses and minimum sum, that creditor will be treated as having made a reasonable attempt to do so.

### ***Section 49 – Power of entry***

102. This section provides that it will not be competent to enter a dwellinghouse unless there is a person present who is over 16 years of age and is able to understand the proceedings, or the debtor has been given 4 days' notice of the intended entry. The sheriff may dispense with the requirement to give notice on application if cause can be shown.

### ***Section 50 – Unlawful acts before attachment***

103. Section 50(1) and (2) provide that the removal, sale, gifting or relinquishment of non-essential assets known to be subject to an exceptional attachment order or their wilful destruction or damage by anyone will amount to breach of the order.
104. Section 50(3) requires the debtor to give notification if an asset is stolen and of any insurance claim which it is intended to make. Section 50(5) and (6) make provision for a sum of money to be consigned in court by the debtor in circumstances where an asset is made unavailable before attachment has taken place in the knowledge of an exceptional attachment order's existence. The sum to be consigned will be the best estimate of the amount which the asset would have achieved at auction under section 50(7). Where an attachment ceases to have effect, any sum which has been consigned in court will be paid to the creditor to the extent necessary to meet the debt with any surplus left over being paid to the debtor under section 50(8).

### ***Section 51 - Valuation***

105. Section 51 provides that assets being attached under an exceptional attachment order should be valued by the officer at the price which they would be likely to fetch on the open market.

### ***Section 52 – Articles with sentimental value***

106. Section 52 prohibits the attachment of assets of sentimental value to the debtor not exceeding an aggregate value of £150, according to the values attributed by the officer under Section 51. This provision will implement recommendation 9 of the Law Commission in Scot Law Com No 177.

### ***Section 53 – Removal of articles attached in dwellinghouse***

107. Section 53(1) provides for immediate removal of non-essential assets in execution of an exceptional attachment order once an attachment schedule has been completed unless the officer considers it impractical to do so, for example where specialist handling is required. Section 53(2) provides that if an article is not immediately uplifted, the officer must inform the debtor or any person in possession of the article when it will be removed. Section 53(3) permits only those assets likely to realise the sum due to be removed, according to the values attributed by the officer under Section 51.

### ***Section 54 - Professional valuation***

108. This section provides that the officer, if he considers it appropriate, can arrange for an article, attached under an exceptional attachment order, to be valued by a professional valuer or other suitable skilled person. It also provides for the debtor to be notified of

*These notes relate to the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) which received Royal Assent on 17 December 2002*

the new value where the valuer values the attached article at a different amount than the officer did at attachment.

### ***Section 55 - Release of articles from attachment***

109. This section allows a period of 7 days from the removal of non-essential assets during which the debtor may apply to the sheriff for the return of an asset on the grounds that attachment was incompetent, that auction would be unduly harsh. It also provides for the right of the debtor to apply within 7 days for release of assets of sentimental value not exceeding an aggregate value of £150.

### ***Section 56 – Redemption***

110. **Section 56** provides for the redemption of non-essential assets within 7 days of the date on which they were attached. Redemption will be at an amount which the asset is likely to fetch if sold on the open market, according to the values attributed by the officer under Section 51 or by the specialist valuer under Section 54(1).

### ***Section 57 – Appeals***

111. **Section 57** provides for an appeal against any decision in relation to proceedings concerning an exceptional attachment order to be made to the sheriff principal with the leave of the sheriff and on a point of law only. Section 57(2) provides that the decision of the sheriff principal will be final.

## **Part 4 – Abolition of Poindings and Warrant Sale**

### ***Section 58 – Abolition of poindings and warrant sales***

112. This section makes provision for the abolition of poindings and warrant sales and repeals various provisions of the Debtors (Scotland) Act 1987.

### ***Section 59 – Savings***

113. **Section 59(1)** makes saving provisions in respect of warrant sales already completed before the date on which their abolition comes into force. Section 59(2) enables a poinding and warrant sale, already commenced before the provisions of the Act came into force, to be completed for poindings outwith dwellinghouses only up until 31 March 2003. Section 59(4) provides that summary warrants which authorised a poinding and warrant sale before the Act came into force are to be treated as authorising an attachment after that date. These savings apply to references to poindings and warrant sales in the Bankruptcy (Scotland) Act 1985, the Debtors (Scotland) Act 1987, and the Proceeds of Crime Act 2002.

## **Part 5 – Miscellaneous and General**

### ***Section 60 – Application of this Act to sequestration for rent and arrestment***

114. This section provides that certain provisions of the Act apply to other methods of enforcement namely some types of arrestment and a landlord's right of hypothec and its enforcement by a sequestration for rent. In particular the articles exempt from attachment under Section 11(1) or Schedule 1 are similarly exempt under these other methods of enforcement.

### ***Section 61 – Minor and consequential amendments and repeals***

115. This section makes provision for Schedule 3, which provides for necessary minor and consequential amendments to and repeals of existing legislation, to have effect.

### ***Section 62 – Regulations and orders***

116. This section provides that, where the Act gives the Scottish Ministers power to make an order or regulations, such power will be exercisable by statutory instrument subject to negative resolution procedure apart from those specified in Section 62(3). This provides that the first regulations made in relation to debt payment programmes under section 7 of the Act will be subject to an affirmative resolution, as will any order made under Sections 47,60 or 64 of the Act.

### ***Section 63 – Crown application***

117. This section provides for application of the Act to the Crown acting in its capacity as a creditor or employer.

### ***Section 64 – Short title and commencement***

118. This section provides for commencement of the Act on 30 December 2002, with the exception of sections 43 and 62. Powers conferred by the Act to make rules of court will be come into force upon Royal Assent to enable them to be in place in advance of the commencement of the rest of the Act. Sections 1 to 9, regarding the debt arrangement scheme, will be brought into force on a day to be appointed by the Scottish Ministers.

### ***Schedule 1 – Expenses of attachment Etc***

119. This schedule is introduced by Section 39. It sets out a list of expenses of attachment etc which are recoverable from the debtor regardless of whether an attachment takes place within or outwith a dwellinghouse. Schedule 1(1)(k) also provides that the costs of storing valuable non-essential assets, as a consequence of an exceptional attachment order, are recoverable against the debtor.

### ***Schedule 2 – Non-essential assets***

120. This schedule is introduced by Section 45 and gives details of articles in a dwellinghouse which cannot be considered non-essential assets for the purpose of an exceptional attachment order. Paragraph 5 gives the Scottish Ministers the power to amend this list by way of regulations.

### ***Schedule 3 – Minor and consequential amendments and repeals***

121. This schedule is introduced by Section 61 and makes necessary minor and consequential amendments and repeals to existing legislation. For example, section 33(1)(a) of the Bankruptcy (Scotland) Act 1985 provides exemptions to property vesting in the trustee for bankruptcy and this schedule amends that provision to incorporate property exempt from attachment in the Act. Provision is also made at Schedule 3(15)(2) to allow a debtor's apparent insolvency to be constituted under Section 7(1)(c) of the Bankruptcy (Scotland) Act 1985 upon a "nil" schedule of attachment being returned with a report of attachment.