Cathy Jamieson MSP

I wonder if you have seen an article in the September issue of The Law Society of Scotland Journal regarding Sheriff Officers and Messengers-at-Arms. I must say I have some sympathy regarding the points put forward which seem to relate to (a) the title of the new Officer which ought to retain some historic connection and (b) the independent status of Officers.

I think these are points which should be taken on board and I would appreciate an idea of your current thinking on this matter.

Robert Gordon MSP

A Messenger's Message: Abolishing Officers of Court Would Deforce Core Principles of Law

A lost message
by Roderick Macpherson

Writer's view that the Scottish Executive's proposal to abolish the existing officers of court and constitute them as "court enforcement officers" would deforce core principles of law

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Until 30 September, the Scottish Executive will welcome your views on any or all of the consultation points raised in its report and draft bill, "Modernising Bankruptcy and Diligence in Scotland" (July 2004). In an earlier consultation paper, "Enforcement of Civil Obligations in Scotland" (April 2002), Jim Wallace, then Minister for Justice, proposed that “The existing offices of messenger-at-arms and sheriff officers [sic] should be amalgamated into a single office of civil enforcement officers.” The robust defence that the officers of court profession made, against a needless “amalgamation” and a resented title of “civil enforcement officer”, clearly has had some effect in developing the Minister’s thinking. Instead of the offices being “amalgamated”, the Minister for Enterprise and Lifelong Learning, as Mr Wallace now is, prefers the word “abolished”. The title of the new category of officer is changed, from a “civil” to “court” enforcement officer. If a deforcement – literally, a taking of strength from our law – is not to occur, the Minister’s new words must not be the last on the subject.

The Rt Hon Jim Wallace, QC, MSP, Deputy First Minister, evidently has a delicate appreciation of the nuances of meaning in all the expressions connected with sheriff officers. It was Mr Wallace who delivered one of the Scottish Executive’s most subtle pronouncements: of Tommy Sheridan’s Abolition of Poindings and Warrant Sales Bill (a single issue bill, doing only what it said in its title), the Minister said the Executive, “while agreeing to the principle of abolition of the poindings and warrant sales system, does not agree to the general principles of the Abolition of Poindings and Warrant Sales Bill”. The arguments made against this next abolition – of the messengers-at-arms and sheriff officers – can hardly have been misunderstood by the Minister, who keeps a grip on diligence even after having let go of Justice. It is the sign of a sophisticated Scottish
politician, to tell the difference between poindings and attachments, warrant sales and auctions.

Executive ownership

The modernisation that the Executive promises includes its taking "ownership" (a word that seems to be replacing "responsibility") for the "core principles of court officers". It is proposed that the Scottish Ministers, through the creation of a new statutory public body, known as the Scottish Civil Enforcement Commission, consisting of persons appointed by the Ministers, will take over the powers and duties of the Court of Session, the Lord Lyon and the sheriffs principal in relation to the appointment of what the Executive seems set on making "enforcement officers". In the so-called "unification", the offices of messenger-at-arms and sheriff officer are abolished; but the dispossessed holders of these appointments are to be immediately consoled by their being re-commissioned under a new title.

My criticism of the Executive needs to be proportionate, and balanced with praise. Much that is proposed in the report would strengthen the core principles of the officer’s professionalism and independence. There has been great concern about recent developments, in which debt collection companies have been seen to be able to acquire ownership of sheriff officers’ businesses. The Executive proposes to introduce a reform that would require each partner in an officer firm, or limited liability partnership, to be a court officer (see section 11.51) – an important point, that should have been addressed long ago. In proposing a new system of administration and regulation, through the Scottish Civil Enforcement Commission, the Minister deserves support. That the country’s judges, at the height of the political unrest against poinding – with all of the unsubstantiated and refutable criticisms of officers in the public domain – should have allowed this most practical aspect of court procedure, and the officers of court profession itself, to fall into disrepute, proves that the existing system has suffered from communication problems.

But abolishing the historic, independent character of messengers-at-arms and sheriff officers as representatives of the Crown and courts is truly rotten to the core principles of this profession. The Scottish Law Commission Memorandum no 51 (1980) warned: “there may be constitutional arguments against a transfer of control of enforcement from the courts to the government... [The] Scottish courts have in the past regarded control of sheriff officers by central or local government as a dangerous encroachment on the independence of the courts”. The Commission’s report no 95 (1985) made this comment: "Transfer of control of diligence to central government would be open to objection on the ground that the enforcement of court orders would be liable to be affected, or appear to be affected, by political considerations, and would thus infringe the constitutional principle of the independence of the courts.” These words of caution were drawn to the Executive’s attention in the 2002 consultation. But such concerns are not properly addressed in the present consultation paper. Section 20 to Annex C, referring to the Executive having “recognised the need to retain a judicial involvement”, is inadequate; the aim must be to keep a corps of proper judicial officers.

How is the new Scottish Civil Enforcement Commission’s perceived independence from the Executive to be guaranteed? What status are the new officers to have as representatives of public authority? Should the draft bill’s clause 35(5) – “References in any enactment to – (a) a ‘messenger-at-arms’; (b) a ‘sheriff officer’; and (c) an ‘officer of court’, shall be construed as references to a court enforcement officer” – be accepted as a completely safe transition, without further thought? (The statutes dealing with the officers of arms, for example, could not be applied correctly to the new enforcement officers.) If the equivalents of messengers-at-arms and sheriff officers are to become creatures of a new statute, the bill needs more detail.

But details are not enough. It was no mere debating point I made, in answer to the 2002 consultation, when I told the Executive, from my experience, that “In the midst of the poll tax troubles that were visited upon this profession by the government, at least we
could say that we were independent officers of the courts, bound to uphold the law. It
would not have helped our position... if we had been dependent as officers upon the
powers of appointment, regulation and discipline, vested in a Minister of Justice, or his
delegates. The perception might have been that we were the officers of the executive,
not of the courts.” The basis of an officer's authority to act should have nothing to do
with the Scottish Ministers; they might, for all we know, some day have power to devise
new taxes, which many Scots may try to pay with a smile, instead of cash.

**Appointment by judges**

These difficulties about the projected legislation can be overcome easily. The answer is to
withdraw clauses 35 and 36 of the draft bill. The Scottish Civil Enforcement Commission's
membership is to include the Lord Lyon King of Arms and one sheriff principal, at least. They, and
the other sheriffs principal, should continue to commission their officers. The new system could be
that applications for office are directed to and disposed of by the Commission, which would
recommend appointments to the appropriate sheriffs principal and Lyon. Administrative and
disciplinary matters would also be dealt with in the Commission. But the appointment of officers of
court should be a matter for judges, not quangos. If not, given the abolition of their ancient
offices, the executors of court warrants in Scotland are made into a vaguely constituted corps of
enforcing-only operatives. The UIHJ in Paris (the international union of judicial officers) is drafting
a charter, recording the core principles of this international profession. Messengers-at-arms and
sheriff officers clearly do have the primary characteristic of judicial officers: “sous l’autorité et le
contrôle des autorités judiciaires, qui doivent assurer et garantir la défense et l’honneur de la
fonction”. Scots law should never be made any less clear on this important point of principle.

It has been suggested, of course, that just as the very sound of the word “poinding”, and
the whisper of warrant sale, was enough to prompt parliamentary rant and rumpus, so
too might the titles of the officers offend the same sensibilities. The Minister wants to
keep “officers”, but prefixed by “enforcement”. Surely he does not think “sheriff” a
disreputable title? In any case, I doubt that there has ever been an image problem with
“messenger-at-arms”. It is an internationally known and respected term of address.
(Messengers-at-arms are designated by the UK as transmitting and receiving agencies,
under article 2 of Council Regulation (EC) 1348/2000 on the service in the Member
States of judicial and extrajudicial documents.) Nor does one hear, closer to home, the
echoes of anti-poll tax days when the expression “officers of court” is used. Already
many of the prescribed diligence forms describe the executor – both of Court of Session
and sheriff court warrants – as “officer of court”. This is what should continue.

**English-style “enforcers”**

A change should not be made unless it is of clearly practical benefit. Why does the
Executive, in spite of the implacable opposition to the title “enforcement officer” from the
officer of court profession, continue to fix on that name? As a job description, it is
inadequate: sometimes we are citation officers. The “enforcer” title would be no more
popular, on either side of the debtor's doorstep, than “bailiff”. It is curious that the Irish
Republic in 1922, when seeking a politically acceptable word to use instead of bailiff,
opted for the Scottish term messenger; yet our own Scottish Ministers propose the
abolition of something which is part of the honourable traditions of Scots law. Frankly, it
is dispiriting to think that “court enforcement officer” is probably just a secondhand tag
from (what used to be called) the Lord Chancellor’s Department. Since April 2004, the
sheriffs’ officers of England and Wales have been translated as “high court enforcement
officers”. (High Court enforcement is at least what they do – they do not have the
Scottish officers’ responsibilities for citation.)

We do not need to be englished. Neither do we need wrangles over whether the Scottish
Parliament has, in fact, the legislative competence to abolish the office of messenger-at-
arms. It is a Crown appointment, of which its holders are proud. In 2002 I wrote to the
Scottish Executive: “The very existence of a category of Her Majesty’s officers of arms in
Scotland, as the messengers are, I suppose to be an issue that touches upon the Royal
Prerogative, and therefore falls outwith the competence of the parliament.” It would be
as well to settle this point about the parliament’s proper powers. If I was wrong, am I not entitled to be corrected, not dismissed? The issue plainly is not addressed by “Modernising Bankruptcy and Diligence in Scotland”.

The consultation period ends this month. The questions in the report, designed to prompt helpful responses, ignore the points of which I have complained in this article. Can my concerns about the Scottish Ministers’ ownership of the core principles of those who are entrusted with the tasks of giving effect to the decisions of all the Scottish civil courts be so simply disposed of, as the Minister for Lifelong Learning seems to suppose?

Roderick Macpherson, Messenger-at-Arms, Rutherford & Macpherson