

# **BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### *Schedule 2 – the Scottish Civil Enforcement Commission (Introduced by Section 50)*

154. [Schedule 2](#) makes detailed provision concerning the status, governance, remuneration and other terms of appointment of Commissioners, and the general and disciplinary powers of the Commission. It also makes detailed provision in relation to various matters of an administrative nature.
155. [Paragraph 1](#) makes it clear that the Commission is not to be regarded as a servant or agent of the Crown and that the Commission's property is not to be regarded as property of the Crown. This has legal implications in relation to immunities which are applied to servants or agents of the Crown and also in relation to particular statutory provisions which relate to Crown property.
156. [Paragraph 2](#) deals with the membership of the Commission. It must be made up of a judge, a sheriff principal or sheriff, a lawyer, a judicial officer, 3 lay persons and 2 *ex-officio* members (the Lord Lyon King of Arms and the Keeper of the Registers of Scotland).
157. [Paragraphs 3 to 14](#) deal with the tenure of each member and the procedure for filling vacancies in membership. By virtue of paragraph 3, serving MPs, MSPs and MEPs are ineligible for being appointed as members of the Commission. This rule also applies to those who have acted as such in the preceding 12 months. Paragraph 8 clarifies that a member of the Commission ceases to be a member if he or she becomes an MP, MSP or MEP.
158. [Paragraph 10](#) gives the Scottish Ministers power to remove a member of the Commission from office where that member is unable or unfit to discharge the functions of a member or has not complied with the terms and conditions of office as set down by Ministers. This power could be used where, for example, a member of the Commission falls seriously ill and needs to be replaced.
159. [Paragraphs 13 and 14](#) set out the procedure to be followed to fill vacancies in the Commission and paragraph 15 provides for a Commission chairperson to be selected from one of its members.
160. [Paragraph 16](#) places a duty on the Commission to appoint a disciplinary committee. That committee will perform the disciplinary functions set out in section 71 and will make decisions under sections 68 and 72. Paragraph 17 provides for the determination by the Scottish Ministers of the remuneration and allowances for expenses which must be paid to Commission members by the Commission.

161. Paragraphs 18 to 20 set out the general powers of the Commission. The Commission has a wide power to do anything which it considers necessary or expedient for the purpose of carrying out its functions or in relation to its functions. In paragraph 19, several powers which are included in this general power are set out.
162. Paragraph 21 provides for the Commission to determine its quorum and that of the disciplinary committee and any other committee or sub-committee. By virtue of paragraph 22, the Scottish Ministers may make regulations (subject to negative procedure under section 224(3)) about the structure and procedures of the Commission.
163. Paragraphs 23 to 28 give the Commission the necessary powers to appoint and pay a chief executive officer and such other employees as it sees fit. These powers can be exercised only with the approval of the Scottish Ministers because the Commission, as a non-departmental public body, will be funded by the Scottish Executive as provided for by paragraphs 30 to 32. Those provide for the payment of grants and loans by the Scottish Ministers to the Commission. Any grant paid or loan made will be subject to terms and conditions that may be varied by the Scottish Ministers.
164. Paragraph 29 provides that the location of the Commission's offices must be approved by the Scottish Ministers. The Commission must also comply with any direction of the Scottish Ministers in this matter. This means that the Scottish Ministers can opt to relocate the Commission should they so wish.
165. Paragraph 30 provides for the Scottish Ministers to provide finance to the Commission by means of grants and loans.
166. Paragraphs 33 to 35 set out the duties incumbent on the Commission in respect of accounts and audit and provide for the Commission's financial year to run from 31 March of each year. Under paragraph 34, the Scottish Ministers can direct the Commission in relation to certain aspects of the statement of accounts which is required under paragraph 33(b).

### ***Section 51 – Information and annual report***

167. This section obliges the Commission to provide information relating to the carrying out of its functions to the Scottish Ministers and to prepare an annual report on its activities. The report should be prepared as soon as practicable after the end of the financial year to which the report relates.
168. Subsection (3) states that the report has to include a statement of accounts prepared according to the audit and account requirements specified in paragraphs 33 and 34 of schedule 2. The report may also contain a statistical analysis of the performance of judicial officers during the reporting period or any other period. The statistical information can be on both official functions, such as enforcement of court decrees and documents of debt by diligence, and on any other activities, such as informal debt collection, which officers undertake.
169. In preparing the report, the Commission has the power to require a judicial officer to provide information it thinks necessary for the preparation of the report (subsection (4)). Failure to provide information is considered to be "misconduct" under section 67(9) and can be dealt with under the powers given to the disciplinary committee in section 72.
170. Subsections (5) and (6) provide that the Commission must publish and send a copy of each report to the Scottish Ministers, who must lay a copy before the Scottish Parliament. The report may be published electronically by virtue of section 78(a).

### ***Section 52 – Publication of guidance and other information***

171. Section 52 provides that the Commission may, for the purposes of informing and educating the public, prepare and publish information and other material on its functions, the functions and activities (subject to section 56(1) which already deals with

the publication of information and materials for the activity of informal debt collection) of judicial officers and the law of and procedures relating to diligence. Publishing can be by electronic means (section 78(a)). It can also carry out other such activities as it thinks fit with regard to informing and educating the public. Examples of such activities might include publicity campaigns, market research, school and college based activities and career promotion work.

### ***Section 53 – Published information not to enable identification***

172. **Section 53** provides that the information contained in an annual report under section 51(2) or published under sections 52(1) or 56(1) must not be in a form which will enable identification of individual judicial officers or any persons who have had diligence executed against them. This means that such published information must not contain personal information, for example an officer's or other person's name or address.

### ***Section 54 – Register of judicial officers***

173. **Section 54** provides that the Commission must keep a register of judicial officers. It may make rules as to the particulars and other information to be recorded in the register, regulate the procedure by which this will be provided by judicial officers and how changes in this information must be notified. The Commission must open the register to public inspection at reasonable times determined by the Commission.

### ***Section 55 – Code of practice***

174. **Section 55** provides that the Commission must prepare and publish a code of practice relating to the exercise of the functions of judicial officers. It also enables the Commission to prepare and publish a code in relation to the undertaking of activities by judicial officers. This power is subject to section 56(2)(a) which already provides a power to publish a code of practice for the activity of informal debt collection. A code published under this section may, from time to time, be revised in whole or in part and any revised code must be published. Publishing can be effected electronically (section 78(a)). The Commission will send a copy of each code of practice to the professional association for judicial officers (see section 63) and the Scottish Ministers, who must lay a copy of it before the Scottish Parliament.

### ***Section 56 – Publication of information relating to informal debt collection***

175. In section 56, "informal debt collection" (as defined in subsection (4)) is the collection of debts, including debts which have not been established by court action, by means other than by formal diligence. This type of debt collection covers activities such as debt collection by letters, phone calls or personal visits. Informal debt collection for consumer debts such as credit card debts is already regulated by the Office of Fair Trading for the UK Government's reserved interest under the Consumer Credit Act 1974. Section 56 therefore covers informal debt collection relating to matters such as commercial debt and public debt, for example arrears of council tax. It provides that the Commission may publish information and other materials promoting good practice and informing the public about informal debt collection.
176. This information may be published as a code of practice or as guidance for persons carrying out informal debt collection (which could include judicial officers if rules under section 61(4) permit informal debt collection to be undertaken by them). A code published under this section may, from time to time, be revised and any revised code must be published and sent to the Scottish Ministers who will lay it before the Scottish Parliament. By virtue of section 78(a), the information (including any code of practice) may be published electronically.

## **Judicial Officers**

### **Section 57 – Judicial Officers**

177. **Section 57(1)** creates the office of judicial officer and any person holding the office will have the functions (which include powers and duties) conferred on that office by the provisions of this Act (including any subordinate legislation made under powers contained in this Act) and by any other legislation.
178. A person may be granted a commission as a judicial officer by the Lord President only on the recommendation of the Commission provided the Commission is satisfied that the requirements set out in section 58(1) are met and that the person is a member of the professional association designated by the Scottish Ministers under section 63(1). The Commission must notify the applicant and the professional association where a commission is granted.
179. A judicial officer (unlike a sheriff officer) may carry out the functions of a judicial officer throughout Scotland (subsection (4)).
180. Subsection (5) provides that any person wishing to be a judicial officer must apply to the Commission unless the person is deemed to hold a commission as a judicial officer as a result of section 60(2). Under that section, messengers-at-arms and sheriff officers who hold a commission as such immediately before the day on which that section comes into force will automatically become judicial officers.
181. Subsection (6) provides for the process by which the Lord President may deprive an officer of his or her office. This will be done after the disciplinary committee of the Commission makes such a recommendation to the Lord President and once any time limit for appeal under section 74 has expired with no appeal having been made. The Lord President's decision is to be notified to the officer, the professional association, the Court of Session and every sheriff principal.

### **Section 58 – Appointment of judicial officer**

182. **Section 58(1)** provides that the Commission must make a recommendation to the Lord President to grant an application for a commission as judicial officer where it is satisfied as to the suitability of the person. In taking a decision to make such a recommendation it must also take into account the overall number of judicial officers and any other matters it considers relevant. The person must be a member of the professional association (see section 63(3)). A copy of the decision on an application must be sent to the applicant (subsection (2)). Refusals to recommend the granting of a commission are subject to appeal as set out in section 74(1).
183. The Commission must, following the granting of a commission by the Lord President, issue an official identity card to the judicial officer (subsection (3)). The officer must, when requested, show the identity card when carrying out official duties (subsection (4)).
184. Subsection (5) provides that the Commission may make rules for the procedure for applications to become a judicial officer, the qualifications such a person must hold, the examinations and training to be undertaken before a commission may be granted and any other matters considered to be relevant to applications.

### **Section 59 – Annual fee**

185. **Section 59(1)** provides that the Commission may make rules requiring every judicial officer to pay an annual fee to the Commission. These may include a specific date each year by which payment must be made, how the annual fee is to be paid and any other matters the Commission considers to be appropriate (subsection (2)).

186. Subsection (3) provides that rules under this section must be approved by the Scottish Ministers.

## **Abolition of offices of messenger-at-arms and sheriff officer**

### ***Section 60 – Abolition of offices of messenger-at-arms and sheriff officer***

187. **Section 60(1)** abolishes the offices of messenger-at-arms and sheriff officer. Messengers-at-arms are appointed by the Lord Lyon King of Arms on the recommendation of the Court of Session. Sheriff officers are commissioned on a territorial basis by the sheriff principal of each sheriffdom. Messengers-at-arms execute warrants issued by the Court of Session, the High Court of Justiciary and the Lyon Court. Messengers-at-arms have to be commissioned as sheriff officers before they can be appointed as messengers and are empowered to work across Scotland. Sheriff officers execute warrants of the sheriff court and are authorised to operate within the court area in which they have been granted a commission.
188. Subsection (2) provides that, from the day this section comes into force, those officers (provided they hold a commission as a messenger-at-arms or sheriff officer immediately before section 60(2) comes into force) will be deemed to hold a commission as a judicial officer granted under section 57(2).
189. Subsections (3) to (5) provide that it is competent for a judicial officer to carry out any function (which includes powers and duties) which was competent for a messenger-at-arms or sheriff officer to carry out (providing it does not conflict with any legislative provision about judicial officers) and references in any legislation to “messenger-at-arms”, “sheriff officer” and “officer of court” are to be treated as if they are references to a judicial officer.
190. There are certain provisions in Acts in which the references set out in subsection (5) (a) to (c) are not to be read as references to judicial officers (for example, because the Act refers to the term “officer of court” in a context other than Scottish sheriff officers or messengers-at-arms). Subsection (6) specifies those provisions which are excluded from the effect of subsection (5).

## **Regulation of judicial officers**

### ***Section 61 – Regulation of judicial officers***

191. **Section 61(1)** provides that the Scottish Ministers may, by regulations, confer functions on, or remove or modify the functions of, judicial officers. Again, functions in this context include powers and duties of judicial officers. Regulations made under this section are subject to negative resolution procedure before the Scottish Parliament as provided for by section 224(3).
192. Subsection (2) gives the Scottish Ministers further powers to make regulations. Those regulations may deal with the types of business association that officers may form (for example limited liability partnerships), provision about the ownership, membership, management and control of those associations, and conditions to be satisfied by those associations. Regulations made under this power are also subject to negative resolution procedure under section 224(3).
193. Subsection (2)(d) provides that the Scottish Ministers may make provision regulating the fees and charges that may be levied by judicial officers.
194. Subsection (3) requires the Scottish Ministers to consult the Commission before making regulations under subsection (1) or (2).
195. Subsection (4) gives the Commission the power to make rules regulating the conduct of judicial officers and prohibiting extra-official activities which are incompatible with their functions. Rules may permit extra-official activities which are not incompatible

with officers' functions but may impose conditions on the carrying out of such activities. This rule-making power could be used to prescribe the kinds of permitted and prohibited extra-official activities which sheriff officers and messengers-at-arms were permitted to carry out. Permitted activities might include informal debt collection and prohibited extra-official activities might include being a money lender or an auctioneer with his or her own auction room. The rules may include a requirement on judicial officers to keep and audit accounts, maintain records for inspection, provide a bond of caution and other matters that the Commission considers appropriate.

196. Subsections (5) to (7) provide that no judicial officers may undertake allowable extra-official activities for payment without the consent of the Commission and the Commission may attach conditions to its consent. Subsection (5) requires an officer to obtain permission from the Commission to undertake remunerated activities which are not connected with the officer's functions. In practice, an officer will only be able to obtain permission for activities which are not already prohibited by rules made under section 61(4)(b) and will only need to obtain permission for activities which are not already permitted by rules made under section 61(4)(c). Permission to undertake extra-official activities for remuneration will be permitted only if the activity is not incompatible with judicial officer functions.
197. Subsection (7) provides that the Commission can attach conditions to any permission it grants and can also revoke permission it had previously granted if, for instance, it is considered that the activity has become incompatible with the officer's functions.

### ***Section 62 – Duty to notify Commission of bankruptcy etc.***

198. **Section 62** provides that a judicial officer must notify the Commission in writing, within 28 days, of any one of the public acts of bankruptcy and related events listed in subsection (2). Most of the events listed apply to bankruptcies and insolvencies in Scotland. However, paragraph (e) (the making of a disqualification order under the Company Directors Disqualification Act 1986) applies on a UK-basis. Section 67(9)(d) provides that failure to notify is misconduct. Notification can be given electronically under section 78(b).

## **Judicial officers' professional association**

### ***Section 63 – Judicial officers' professional association***

199. **Section 63** gives the Scottish Ministers power to designate a professional association for judicial officers and to regulate the constitution and procedures of the professional association. Regulations under this section are subject to negative resolution procedure by virtue of section 224(3) and can be made only after consultation with the Commission, representatives of the professional association (or proposed association if one has yet to be designated) and any other body or person the Scottish Ministers consider has an interest. A commission as a judicial officer cannot be granted to anyone who is not a member of the professional association.

### ***Section 64 – Duty of professional association to forward complaints to Commission***

200. **Section 64** provides that where the professional association receives a complaint about a judicial officer or the services provided by an officer, it must send details of that complaint and any evidence which accompanies it, to the Commission. This duty could activate where, for example, a member of the public upon whom diligence has been effected by a judicial officer complains about the manner in which the officer has carried out his or her functions.

### ***Section 65 – Information from professional association***

201. **Section 65** provides that the Commission may require the professional association to provide any information to the Commission that it considers necessary to enable it to carry out its regulatory functions under sections 66, 67 and 71.

### **Investigation of judicial officers**

#### ***Section 66 – Inspection of judicial officer***

202. **Section 66** provides that the Commission can appoint a person to inspect the work or a particular aspect of the work of a judicial officer. The person must, if required by the Commission, inquire into any paid activities undertaken by the judicial officer. The person appointed is required to prepare a report on the inspection for the Commission and is entitled to charge the Commission a fee unless the person is a civil servant working in that capacity. Whether or not the person is a civil servant, the person is entitled to reimbursement by the Commission of expenses reasonably incurred in the inspection.

#### ***Section 67 – Investigation of alleged misconduct by judicial officer***

203. This section governs when the Commission can investigate allegations of misconduct by judicial officers. Subsection (1) provides that this section applies where—
- a person appointed under section 66 to carry out an inspection submits a report to the Commission disclosing that a judicial officer may have been guilty of misconduct;
  - a sheriff or judge, but not the Lord President (who carries out functions relating to misconduct by depriving judicial officers of office by virtue of section 57(6)), makes a report to the Commission alleging misconduct;
  - the professional association sends on details of a complaint under section 64;
  - any other person complains to the Commission alleging misconduct of an officer; or
  - the Commission otherwise has reason to believe that an officer may have been guilty of misconduct.
204. Subsection (2) provides that the Commission may disregard a complaint if it is considered that the complaint is frivolous or vexatious (i.e. is made simply to harass the judicial officer).
205. Subsections (3) and (4) provide that the Commission, after giving the officer an opportunity to admit, deny or give an explanation of the matter, may appoint a person to investigate the matter. Where a person was appointed under section 66 to inspect the work of the judicial officer, the Commission can appoint that person to carry out the investigation under this section (see subsection (8)). The Commission may not appoint a person if a judicial officer admits the misconduct in writing or gives a satisfactory explanation of the matter. An admission may be made by means of an electronic communication, as provided for in section 78(b).
206. Subsection (5) provides that the person appointed to investigate the alleged misconduct must provide a report to the Commission and may make a recommendation that the matter is referred to the disciplinary committee of the Commission where there is a probable case of misconduct with sufficient evidence to justify disciplinary proceedings.
207. Subsection (6) provides that the Commission must, where it receives such a recommendation, refer the matter to the disciplinary committee to be dealt with under section 71.

208. Subsection (7) provides that the Commission must pay the fees of the person conducting the investigation, except where the person is a civil servant acting in that capacity, and must pay the person's outlays (whether the person is a civil servant or not).
209. Subsection (9) defines "misconduct" as including bringing the office of judicial officer into disrepute, failure to provide information under section 51(4) and a failure to pay the annual fee to the Commission within 3 months of the due date. Failure to notify the Commission of public acts of bankruptcy and insolvent events as listed in section 62(2) is also misconduct which can be investigated by the Commission.

### ***Section 68 – Suspension of judicial officer pending outcome of disciplinary or criminal proceedings***

210. This section provides that the disciplinary committee may make an order suspending the officer from practice for a specific period where the Commission becomes aware of a complaint alleging misconduct on the part of a judicial officer, where the Commission becomes aware (under section 70) of a bankruptcy or related event involving the officer (or of other concerns surrounding such an event) or where a judicial officer has been charged with an offence.
211. The disciplinary committee may also extend the officer's suspension or revoke the order. Any decisions under this section are subject to appeal as set out in section 74(1).

### ***Section 69 – Commission's duty in relation to offences or misconduct by judicial officer***

212. Where the Commission becomes aware that a judicial officer has been convicted by a court of any offence or admits misconduct under section 67(4)(a), the Commission must refer the matter to the disciplinary committee to be dealt with under section 71.
213. Subsection (3) of section 69 specifies that "offence" means any offence which the judicial officer has been convicted of before or after being granted a commission as a judicial officer, other than any offence disclosed in his or her application for a commission. This is subject, however, to the Rehabilitation of Offenders Act 1974, so that a person applying for a commission as a judicial officer need not disclose spent convictions and a judicial officer cannot be suspended or deprived from office because of such spent convictions.

### ***Section 70 – Commission's power in relation to judicial officer's bankruptcy etc.***

214. **Section 70** allows the Commission to make a referral to the disciplinary committee (to be dealt with under section 71) when it becomes aware of the occurrence of a public act of bankruptcy or related event as listed in section 62(2). The Commission can make such a referral only if it considers that the circumstances of the event give rise to concerns about the officer that the disciplinary committee could not otherwise consider because the circumstances and concerns do not constitute misconduct or a criminal offence. A public act of bankruptcy or a related event could be classified as misconduct if it entails conduct tending to bring the office of judicial officer into disrepute.

## **Disciplinary proceedings**

### ***Section 71 – Referrals to the disciplinary committee***

215. Subsections (1) and (2) of section 71 provide that in dealing with any matter referred to the disciplinary committee, the committee must consider any report made to the Commission under section 67(5)(a) (report of investigation into alleged misconduct) and any other relevant information held by the Commission and may hold a hearing if it is considered appropriate. Where a judicial officer requests a hearing relating to a matter under consideration, the disciplinary committee must hold a hearing.



216. Subsections (3) and (4) provide that the disciplinary committee must, when holding a hearing, allow the judicial officer, the person who carried out any investigation under section 67 and any other person the committee thinks appropriate, to make a statement orally or in writing and to lead or produce evidence.
217. Subsections (5) and (7) provide that the disciplinary committee may award expenses in any hearing in favour of or against the judicial officer to whom the hearing relates. Expenses awarded in favour of the judicial officer will be paid by the Commission while expenses awarded against the officer will be paid to the Commission by the officer.
218. The Commission may (under subsection (8)) make rules as to the procedures, including the procedures to be followed during a hearing, of the disciplinary committee.
219. Subsection (9) provides that any rules made under subsection (8) must be approved by the Scottish Ministers.

### ***Section 72 – Disciplinary committee’s powers***

220. **Section 72** covers the situation where, after dealing with a matter referred to it, the disciplinary committee is satisfied that it is appropriate to take further action.
221. Where the judicial officer is guilty of misconduct (as defined in section 67(9)), the disciplinary committee can suspend the officer or recommend that the Lord President deprive the officer of office, it can censure the officer, it can restrict the officer’s functions or activities or it can impose a fine. If the officer is guilty of charging excessive fees, the committee can also require the officer to pay back the excessive amounts (with interest).
222. Where the matter reported to the disciplinary committee is one to which section 70 applies (concerns about an officer, falling short of misconduct and not constituting an offence, which arise from a public act of bankruptcy or related event as set out in section 62(2)), the committee may make an order to either suspend the officer from practice or recommend that the Lord President deprive the officer of office or it may make an order restricting the functions or activities of the officer.
223. Where the judicial officer is convicted of an offence (including an offence related to a public act of bankruptcy or related event as set out in section 62(2)), the committee may make an order either suspending the officer or recommending that the Lord President deprive the officer of office, an order censuring the officer or an order restricting the officer’s functions or activities.
224. Subsection (6) provides that where an officer fails to comply with an order imposing a fine, the disciplinary committee may suspend the officer from practice for a specified time or recommend that the Lord President deprive the officer of office.
225. Decisions under this section are subject to appeal as set out in section 74(1). A copy of any decision made by the disciplinary committee must be sent to the officer to whom it relates (see subsection (7)).

### ***Section 73 – Orders under sections 68 and 72: supplementary provision***

226. **Section 73** provides that an order imposing a fine is enforceable as if it were an extract decree arbitral bearing a warrant for execution issued by the sheriff. This means the Commission may recover any fine imposed by the order by means of diligence against the judicial officer. The Commission must also notify any order made by the disciplinary committee to the Court of Session, every sheriff principal and the professional association except for an order recommending that the Lord President deprives the officer of office.

## **Appeals**

### ***Section 74 – Appeals from decisions under sections 58, 68 and 72***

227. **Section 74** provides that appeals against decisions of the Commission and the disciplinary committee may be made to the Inner House of the Court of Session. The decisions which may be appealed are decisions of the Commission not to recommend that the Lord President grants a person a commission as a judicial officer (section 58(1)), orders of the disciplinary committee suspending the officer from practice pending the outcome of disciplinary or criminal proceedings or extending such a suspension (section 68) and orders made under section 72 suspending an officer, recommending an officer be deprived of office, censuring an officer, restricting an officer's functions or activities, imposing a fine on an officer or requiring an officer to repay fees and outlays. The decision of the Inner House on an appeal is final. Procedures relating to appeals are to be prescribed by Court of Session rules.

## **Miscellaneous**

### ***Section 75 – Judicial officer's actions void where officer has interest***

228. **Section 75** specifies the conditions under which a judicial officer who has a particular kind of interest may not exercise his or her functions. This covers individual interest as well as circumstances where a debt is owed to or by a business associate or family member of the judicial officer. Any action by the officer in relation to such cases is void which means that it is a nullity. The prohibition on acting covered by this section relates to "prescribed functions", which are the functions of judicial officers which the Scottish Ministers specify, by regulations, for the purposes of this section (see subsection (7)).
229. Subsection (4) (read with subsection (6)) defines, for the purposes of this section, who is a business associate of the judicial officer and what is meant by the officer having a "controlling interest" in a company or firm.
230. Subsection (5) sets out the list of family members to whom a debt might be due, or who might owe a debt, in relation to which any action by a judicial officer, which is a prescribed function, would be void under this provision. Family members, for the purposes of this section, include a co-habitee of an officer where they are living together as husband and wife and same sex co-habitees living together in a relationship akin to a relationship between husband and wife except that the officer and the person are of the same sex.

### ***Section 76 – Measure of damages payable by judicial officer for negligence or other fault***

231. This section replicates the provisions of section 85 of the 1987 Act, which is now repealed (see schedule 6). It makes it clear that no common law rule which determined the damages payable to a creditor by a messenger-at-arms or sheriff officer for negligent delay or failure to execute diligence by reference to the amount of debt being recovered is revived as a result of that repeal or the provisions in this Part. Nor is any such rule applied to a judicial officer. The effect of this is that the normal rules for quantifying damages for negligence or breach of contract apply.

### ***Section 77 – Effect of code of practice***

232. **Section 77(1)** provides that a judicial officer must exercise that officer's functions and undertake that officer's activities with regard to any code of practice published by the Commission under section 55 or 56.
233. Subsection (2) provides that failure to comply with a code of practice in itself will not cause a judicial officer to be prosecuted or liable to any civil proceedings.

*These notes relate to the Bankruptcy and Diligence etc. (Scotland)  
Act 2007 (asp 3) which received Royal Assent on 15 January 2007*

234. Subsections (3) and (4) provide that a code of practice will, however, be allowed as evidence in any criminal or civil proceedings. Where a court or tribunal conducting civil or criminal proceedings, or the disciplinary committee of the Commission holding a hearing, considers a code of practice to be relevant to any question arising in the proceedings, the code can be taken into account when determining that question.

***Section 78 – Electronic publications and communications***

235. **Section 78** clarifies that references to publishing and notification, admission or representation “in writing” includes doing all of these things by electronic means and by use of electronic communications (defined in section 221).