

<b>Title:</b> Enforcement of Family Financial Orders <b>IA No:</b> LAWCOM0058  <b>RPC Reference No:</b> <b>Lead department or agency:</b> Law Commission <b>Other departments or agencies:</b> <b>Ministry of Justice</b>	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 14 December 2016			
	<b>Stage:</b> Final Report			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Primary legislation			
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<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> RPC Opinion Status
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
N/Q	£m	£m	Not in scope	Qualifying provision

**What is the problem under consideration? Why is government intervention necessary?**

Family financial orders are made on the breakdown of personal relationships, between spouses, civil partners or parents. The orders require the transfer of property or the payment of money, sometimes on an ongoing basis. Non-payment can cause significant hardship. The current law governing the enforcement of family financial orders is ineffective: significant assets are beyond reach; there are insufficient means of obtaining information about the debtor's finances; and there are a lack of options for applying pressure to debtors who are choosing not to comply. Government intervention is required to establish a more effective, efficient and accessible system.

**What are the policy objectives and the intended effects?**

The objectives are:

- To simplify the law and procedure, making it accessible and minimising inefficiency.
- To provide a wider range of options for enforcement and minimise the opportunities for non-compliance.
- To ensure greater information about the debtors' finances for courts and creditors.
- To protect those debtors who are unable, rather than unwilling, to meet their obligations under a family financial order

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 0 'baseline': Make no changes to the current system.

Option 1 – reform focussed on expanding existing methods of enforcement, minimising inefficiencies in procedure, and making the system more accessible.

Option 2 – reform focussed on expanding existing methods of enforcement, minimising inefficiencies in procedure, and making the system more accessible and introducing new methods of enforcement.

Our preference is for Option 2. New methods of enforcement are needed to maximise the range of assets that may be enforced against and to provide new options for applying pressure to debtors who are choosing not to pay.

<b>Will the policy be reviewed?</b> It will/will not be reviewed. <b>If applicable, set review date:</b> Month/Year					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope?		<b>Micro</b> Yes/No	<b>Small</b> Yes/No	<b>Medium</b> Yes/No	<b>Large</b> Yes/No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b>		<b>Non-traded:</b>

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Reform focussed on expanding existing methods of enforcement, minimising inefficiencies in procedure, and making the system more accessible.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2015/16	PV Base Year 2015/16	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/Q	N/Q	N/Q

Description and scale of key monetised costs by 'main affected groups'

### Other key non-monetised costs by 'main affected groups'

Transitional costs: Amendment to Family Procedure Rules, New Guidance documents and new forms and amendment to primary and secondary legislation – Ministry of Justice; Negligible training costs; Required new information sharing system with a number of information providers – some systems already established, estimate given for one provider for new system of £10,000 - £15,000 – HMCTS.  
On-going costs: Maintenance of new information sharing system, increased court time – HMCTS; Some loss of financial autonomy – Debtors; Operating periodic third party debt orders - individuals and businesses.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	Optional	Optional
High	0	Optional	Optional
Best Estimate	0	N/Q	N/Q

Description and scale of key monetised benefits by 'main affected groups'

### Other key non-monetised benefits by 'main affected groups'

Ongoing benefits: Increased confidence in the justice system – Ministry of Justice; Saving court time – HMCTS; Welfare savings – DWP; Increased debt recovery – creditors; Less court time – creditors and debtors.

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate (%)</b>	3.5
<ol style="list-style-type: none"> <li>The costs to information providers generated by our recommendations for information requests and orders are recoverable, either directly from assets held by the information provider or by payment from HMCTS.</li> <li>DWP will be able to process information requests using a system similar to that established between HMRC and HMCTS.</li> </ol>		

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

# Summary: Analysis & Evidence

# Policy Option 2

**Description:** Reform focussed on expanding existing methods of enforcement, minimising inefficiencies in procedure, and making the system more accessible and introducing new methods of enforcement.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2015/16	PV Base Year 2015/16	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

### Other key non-monetised costs by 'main affected groups'

In addition to those outlined for Option 1:

Transitional costs: new primary legislation – MOJ.

Ongoing costs: processing disqualification from driving orders – DVLA; processing disqualification from travel orders – HMPO.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	Optional	Optional
High	0	Optional	Optional
Best Estimate	0		

### Description and scale of key monetised benefits by 'main affected groups'

None identified

### Other key non-monetised benefits by 'main affected groups'

In addition to those outlined in Option 1:

Ongoing benefits: greater recover of debt – creditors; greater welfare savings – DWP.

Key assumptions/sensitivities/risks

Discount rate (%) **3.5**

In addition to the key assumptions made in respect of option 1.

- Orders for disqualification from driving can be processed by DVLA using the same system which is used for DVLA to process disqualification orders made under the Child Support Act 1991.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

# Evidence Base

## BACKGROUND

### Origins of the project

- 1.1 This Impact Assessment accompanies the Law Commission Report on the enforcement of family financial orders. The project was taken on by the Law Commission, as part of its 11<sup>th</sup> Programme of Law Reform, following a submission by the Family Law Bar Association, which described the law in this area as “hopelessly complex and procedurally tortuous” and argued that the current system is ineffective.
- 1.2 Between the Family Law Bar Association proposing the project and work being started, there were two developments that changed the shape of the project. One was the changes to the provision of legal aid,<sup>1</sup> the other was the introduction of the Family Court.
- 1.3 The changes to legal aid have resulted in a greater number of litigants in person using the family courts. In 2015 at least one party was unrepresented in 79% of private family law cases (that is financial cases, applications for domestic violence injunctions and disputes about children between family members, not where the Local Authority has initiated proceedings); in 35% of cases neither party had legal representation.<sup>2</sup> This is an important backdrop to considering reform in this area – the law needs to be accessible and easy to navigate for litigants in person.
- 1.4 The introduction of the Family Court brought about some improvement to the procedural difficulties in enforcing family financial orders; it removed the need to issue proceedings in different courts and follow different procedures. However, there is still little confidence in the existing system, which was described in consultation (which took place after these reforms had been introduced and had time to bed down) as, among other things, “cumbersome”, “far too complex”, “impenetrable”, and in need of a “rebalancing” of the interests of the parties”.

### Consultation

- 1.5 We published our Consultation Paper in March 2015. Publication marked the start of the consultation period, which ended on 31 July 2015.<sup>3</sup> We received consultation responses from the major stakeholders in this area, including Resolution,<sup>4</sup> the Family Law Bar Association, the Family Justice Council, the Law Society, High Court judges of the Family Division, the Justices’ Clerks Society and the Magistrates Association. We also received responses from individual practitioners, individual members of the judiciary, specialist law firms, the Association of Pension Lawyers and the Money Advice Trust.
- 1.6 During the consultation period we held consultation events in Cardiff, Manchester and London. All three were well attended by practitioners and members of the judiciary and provided an insight into how enforcement of family financial orders is operating in different parts of England and Wales.

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<sup>1</sup> Changes were introduced under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Since April 2013, legal aid has only been available for private law family cases if there is evidence of domestic violence.

<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/556715/family-court-statistics-quarterly-apr-june-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556715/family-court-statistics-quarterly-apr-june-2016.pdf)

<sup>3</sup> A slightly longer period of consultation than usual to take account of the restrictions that apply during purdah.

<sup>4</sup> An organisation representing over 6,500 legal and other professionals working in family justice.

- 1.7 We established an advisory group to discuss issues that arose during the consultation and to consider the details of the recommendations we now make. Representatives from Her Majesty's Courts and Tribunals Services ("HMCTS") and Ministry Of Justice ("MOJ") were members of the group.
- 1.8 Following the consultation period we have continued to consult with stakeholders, especially those who would be directly affected by our proposals, including the Family Procedure Rules Committee ("FPRC"), Her Majesty's Revenue and Customs ("HMRC"), Her Majesty's Passport Office ("HMPO"), the Driver Vehicle and Licensing Agency ("DVLA"), and banks and building societies.

### **The scale of enforcement of family financial orders**

1.9 Many people will come into contact with the family justice system. Their reasons for doing so and their experiences will vary, but the application of family law is widespread. In 2015 there were 18.7 million families<sup>5</sup> in the UK. Family financial orders usually result from the breakdown of family relationships. They can arise on the ending of a marriage<sup>6</sup> or civil partnership<sup>7</sup> or they may be orders between unmarried parents made for the benefit of a child.<sup>8</sup> The terms of reference for this protect do not extend to the enforcement of child maintenance that is assessed by the Child Maintenance Service.

1.10 For the purposes of this project family financial orders comprise:

- 1) Financial orders made to redistribute assets between the parties following an application for a financial remedy on a divorce or dissolution of a civil partnership, including interim orders made for maintenance or for the payment of legal services. We call these "financial remedy orders".
- 2) Orders made for the benefit of a child under Schedule 1 to the Children Act 1989. The orders may direct payment or the transfer of property between parents regardless of whether they are married, in a civil partnership or neither married nor in a civil partnership. We call these orders "Schedule 1 orders".
- 3) Orders for costs made on a petition for divorce or an application for the dissolution of a civil partnership, or orders for costs made on a financial remedy order or a Schedule 1 order.

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<sup>5</sup>The Office for National Statistics defines a family as "...a married, civil partnered or cohabiting couple with or without children, or a lone parent with at least one child who lives at the same address. Children may be dependent or non-dependent". See

<http://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2015-11-05> - pages 2 - 3 [last visited 12th October 2016]

<sup>6</sup> Under the Matrimonial Causes Act 1973.

<sup>7</sup> Under the Civil Partnership Act 2004.

<sup>8</sup> Under the Children Act 1989.

## Number of family financial orders

- 1.11 In 2015 there were 115,266 matrimonial applications<sup>9</sup> and 102,827 decree absolutes, which is the order that ends a marriage.<sup>10</sup> Many decree absolutes will result in an order for costs.
- 1.12 In the same year there were 38,834 final orders made in financial remedy claims.<sup>11</sup> The final order concludes the financial remedy claim and will be made up of one or more individual orders, for example an order for the transfer of a property, an order for a lump sum and an order for periodical payments.
- 1.13 Each individual family financial order may require enforcement, and may require a different approach to enforcement. For example: a creditor may need the court to execute documents to transfer property; a third party debt order may be needed to enforce the lump sum order; and an attachment of earnings order may be required to recover what is due under the periodical payments order. The whole order will be part of a carefully worked out distribution of assets and each part needs to be enforced to ensure the creditor receives what they are due, and very often what they need.
- 1.14 The following table shows, by type, the number of individual family financial orders made in the year 2015.

Table 1: Number and Type of Family Financial Orders, 2013 to 2015<sup>12</sup>

	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>Average</b>
<b>Order type</b>				
Periodical payments	11,308	10,160	9,761	10,410
Lump sum	24,599	23,985	22,856	23,813
Property adjustment	24,803	23,192	21,223	23,073
Pension sharing	9,538	9,037	8,186	8,920
Pension attachment	2,888	2,855	2,993	2,912
Secure provision	4,907	4,335	4,383	4,542
Maintenance pending suit	2,397	2,303	2,463	2,388
<b>Total</b>	<b>80,440</b>	<b>75,867</b>	<b>71,865</b>	<b>76,057</b>

<sup>9</sup> Matrimonial applications are petitions for divorce, for judicial separation or for a declaration of nullity; over 99% of matrimonial applications are petitions for divorce. All of which may lead to financial remedy orders being made. We have not included applications for the dissolution of civil partnerships as the numbers involved are relatively small.

<sup>10</sup> Family Court statistics quarterly: January to March 2016 tables, Table 7. See <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2016> [last visited 28th October 2016].

<sup>11</sup> <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2016> (table 10)

<sup>12</sup> Family Court statistics quarterly: January to March 2016 tables, Table 11. See <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2016> [last visited 28th October 2016].

1.15 In addition, over the same period of 2013 to 2015 there were, on average, 451 final orders made on Schedule 1 applications each year. As with final orders in financial remedy proceedings, final orders on a Schedule 1 application will contain at least one individual family financial order.<sup>13</sup>

1.16 In the section below we consider how many family financial orders that are made require enforcement action. In making that assessment we consider the number of final orders that require some enforcement action rather than calculating the number of individual family financial orders that need to be enforced. At the conclusion of family financial proceedings a final order, which may consist of a number of individual family financial orders (for example, such a package might include periodical payments, a property adjustment order and a lump sum).

#### Number of enforcement actions<sup>14</sup>

1.17 There are no statistics routinely collected to record enforcement action taken specifically in family proceedings. From looking at available data relating to civil proceedings generally we know that, in 2013, the number of judgments made in the county courts totalled 667,168 and the number of applications for enforcement was 131,147, which is 19.7% of the total number of judgments.<sup>15</sup> After 2013 the data collected in the civil courts changed so that there is no longer any data on enforcement applications in the County Court.

1.18 Data that we have obtained from the Central Family Court (“CFC”)<sup>16</sup> suggests that the rate of enforcement in family proceedings may be less than that in general civil proceedings as indicated by the 2013 data. In the period August 2015 to August 2016, 1,550 financial remedy applications were made to the CFC. Over the same period there were 146 new enforcement cases started. Although the enforcement cases may not be to enforce orders made over the same period, if we assume that the number of applications for both are fairly consistent then the data suggests that 9.4% of financial remedy cases may lead to enforcement action.

1.19 Applying a rate of 9.4% as the rate of final family financial orders<sup>17</sup> that require enforcement, gives the following number of cases requiring enforcement action every year:

- 1) 3,650 final orders in financial remedy proceedings; and
- 2) 42 Schedule 1 orders.<sup>18</sup>

1.20 We do not think the same enforcement percentage can be applied to costs orders made on matrimonial orders (that is orders ending a marriage or civil partnership, as distinct from financial remedy orders) as we understand from anecdotal evidence that they give rise to fewer issues of non-compliance. We assume that 50% of the matrimonial orders made include an order for costs and that 1% of those costs orders require enforcement action, which results in 514 additional enforcement cases.

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<sup>13</sup> Though not all types of family financial order that are available on a financial remedy application are available on a Schedule 1 application, for example orders against pensions.

<sup>14</sup> By enforcement action we mean the creditor making an application to court to recover the money or other property that is due.

<sup>15</sup> [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment\\_data%2Ffile%2F507773%2Fcivil-stats-tables-october-december-2015.xls](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F507773%2Fcivil-stats-tables-october-december-2015.xls)

<sup>16</sup> The Central Family Court is a court in London that only handles family cases; the judiciary who sit there include district judges and circuit judges specialising in family matters.

<sup>17</sup> 38,834 in 2015.

<sup>18</sup> i.e 9.4% of 451 final orders. There is no reason to assume that a different rate of enforcement applies to orders for maintenance pending suit or Schedule 1 orders.

- 1.21 In total, therefore, we assume that family financial orders give rise to, on average, around 4,200 enforcement cases per year. Within each case, the creditor may seek to enforce more than one unpaid family financial order.
- 1.22 In addition, we assume that there are a number of creditors who are owed money under a family financial order who take no enforcement action. A creditor's lack of action may be for many different reasons, for example, not being aware of the available enforcement options, thinking they require unaffordable representation or being intimidated by the non-paying debtor. For illustrative purposes, if 1% of creditors who have a family financial order fall into the category of creditors who take no enforcement action, that is 1,421 creditors.<sup>19</sup>

### **The impact of non-payment and the need for an effective enforcement system**

- 1.23 Family financial orders are generally made to provide financial support for the creditor and any dependent children of the family. More often than not the orders are essential to enable creditors to meet their basic needs.<sup>20</sup> For example, an order for a lump sum to enable the purchase of a home, and an order for periodical payments to meet mortgage payments and day-to-day living expenses. As a result, any non-payment by the debtor has the potential to cause very significant hardship.
- 1.24 The impact of non-payment was noted by a number of consultees in their responses to the Law Commission's Consultation Paper.<sup>21</sup> Resolution said that "non-payment of a sum due under a family financial order can be catastrophic especially in average cases where people are living in ordinary circumstances without significant resources". Pennington Manches<sup>22</sup> said that non-payment can have a "devastating impact on creditors and their dependants". The response mentioned a recent case where the debtor's non-payment of mortgage arrears and payments left the creditor and children facing repossession of the family home.
- 1.25 Non-payment does not just effect the parties involved. An ineffective enforcement system has wide adverse consequences.
- It was noted by the Law Society and Resolution that non-recovery of what is owed can result in increased claims for welfare benefits and tax credits by creditors left unable to meet their financial needs.
  - There is a risk that confidence in the family justice system will be lost if orders are not effectively enforced. The Law Society said that the complexity of the current law may deter creditors from taking enforcement action, which conceivably "has an impact on the reputation of the family justice system, and the public's perception of its effectiveness and fairness". Similarly, the Family Law Bar Association said that the "whole financial remedies jurisdiction" is undermined if the orders that are made are unlikely to be enforced.

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<sup>19</sup> We assume that the level of non-compliance is higher than 9.4% given the significantly higher level of non-compliance in other civil proceedings. We think that the reasons that we list for a family creditor's lack of action are not so applicable to non-family creditors, many of whom will not be individuals, and may go some way to explaining the difference between 9.4% and the 19.7% of civil (other than family orders) that require enforcement action.

<sup>20</sup> Need is not the rationale for costs orders, but is the basis of the majority of financial remedy and Schedule 1 orders.

<sup>21</sup> The Enforcement of Family Financial Orders (2015) Law Commission Consultation Paper No 219.

<sup>22</sup> A law firm with a specialist family law team.



- An inaccessible and overly-complicated system risks incorrect or misguided applications and wasted hearings resulting in delays and inefficiency. This is even more the case as a result of the reduction in legal aid and the increase in litigants in person, following the changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The current law is very difficult for litigants in person to understand and put into practice.

1.26 Ineffective enforcement procedures can, therefore, have an impact on and a cost to individuals, the welfare system, family justice and the court system as a whole.

1.27 There is an important distinction between debtors who can comply with the family financial order that has been made against them but are choosing not to do so, and debtors who, for whatever reason, cannot comply.

### **The current law governing the enforcement of family financial orders**

1.28 The law contains a range of methods to enforce orders for the payment of money or transfer of property. Generally speaking, the same methods of enforcement are available for family financial orders as they are for the enforcement of orders in other civil cases.<sup>23</sup> However, there are some important differences.

1.29 The rules governing enforcement are found in statute<sup>24</sup> and in procedural rules of court. The Family Procedure Rules 2010 (“FPR”) apply to proceedings for the enforcement of family financial orders, but to a large extent they apply, with modifications, the enforcement provisions in the Civil Procedure Rules 1998 (“CPR”).

1.30 A creditor who seeks to enforce a family financial order will make an application for enforcement to the Family Court. The application may be for a specific method of enforcement or may be an application for the court to make the enforcement order it considers appropriate. We call the latter type of order a “general enforcement application”. The option to make a general enforcement application is not available to other civil creditors.

1.31 Most methods of enforcement are “direct” in that they target assets belonging to the debtor and realise those assets for the creditor’s benefit; some methods are “indirect” in that they put pressure on the debtor so that he or she chooses to pay what is owed.

1.32 The procedure is different depending on the enforcement method for which the creditor has applied. On a general enforcement application, debtors are asked to provide information about their finances to the court so that the court may determine whether enforcement action is appropriate and if so what kind. On other enforcement applications, the debtor is not required to provide such information as the application will already be targeting a specific asset.

1.33 Enforcement action does not re-open the original financial order. However, some family financial orders can be varied on an application by either party, and a debtor may respond to enforcement action with an application to vary.

### **The need for reform**

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<sup>23</sup>The notable difference in the available methods of enforcement is the judgment summons procedure, which is available for the enforcement of most family financial orders whereas it is available for the enforcement of only very few other civil debts.

<sup>24</sup> The primary statutes governing the enforcement of family financial orders Charging Orders Act 1979, Attachment of Earnings Act 1971 and the Debtor’s Act 1869.

1.34 We have identified 6 problems with the current law

Problem 1: A lack of information about the debtor

1.35 Information about the debtor's financial circumstances is vital to effective enforcement. Information is needed to determine whether there is any merit in taking enforcement action and to assess the viability of different enforcement methods.

1.36 At present, there is no standard form of disclosure required from the debtor on a general enforcement application to enable the court to have an overview of the debtor's financial circumstances in order to determine whether enforcement is appropriate and, if so, how it should best be targeted. It is important for the court to be able to distinguish between the debtor who cannot pay because he or she lacks the means to do so, and the debtor who will not pay while having the means to do so. The lack of a standard form has led to different courts applying different practices, causing confusion and inconsistency.

1.37 Further, the Family Court has limited powers to obtain relevant information from third parties. Such information can be key in assessing whether the debtor is a "can't pay" or "won't pay" debtor and in unlocking possible routes to enforcement.

Problem 2: An inability to access some of the debtor's assets

1.38 There are three significant types of asset which are currently beyond the reach of the Family Courts' enforcement powers:

- funds in a pension that is not in payment;
- funds held in a joint account; and
- money that becomes owing to the debtor after the enforcement application is made.

Problem 3: A lack of options for indirect enforcement

1.39 There are generally two types of enforcement method:

- direct enforcement, which provides a means of bypassing the debtor and directly targeting his or her assets, for example an attachment of earnings order; and
- indirect enforcement, which involves putting pressure on the debtor to encourage compliance with the order.

1.40 Direct enforcement is often the most efficient route for the creditor to receive what he or she is owed. Sometimes, however, direct enforcement is not available or is not effective: for example, because the majority of the debtor's assets are overseas. In such cases indirect action can be effective in ensuring payment. Currently, the family courts have very few options for indirect enforcement, either committal under a judgment summons application or sequestration. The judgment summons procedure can be very difficult for litigants in person to navigate and imprisonment of the debtor is not always a desirable outcome. Sequestration is an ancient, expensive and complicated method of enforcement, which is very rarely used.

#### Problem 4: An inaccessible system

- 1.41 The rules governing the enforcement of family financial orders are spread across various statutes, the FPR and the CPR. The FPR contain the procedural rules for all family proceedings and the CPR the procedural rules (generally) for all other civil proceedings. However, on a number of enforcement applications, the FPR simply applies, with modifications, the relevant rules from the CPR. This need to cross-refer between the two sets of rules makes the law on enforcement of family financial orders difficult to follow. This is particularly true for litigants in person, but also for lawyers and judges, many of whom are not experienced in practising in this area.
- 1.42 The problem is exacerbated due to the lack of any central authoritative guidance and there is little by way of explanation in the FPR to assist. It is often not clear to litigants what the enforcement options are or how to go about making an effective application.

#### Problem 5: An inefficient system

- 1.43 We have identified a number of inefficiencies in the current system which result in wasted resources and court time. We set out the three main inefficiencies here.
- 1.44 First, under the current procedure, the first hearing on a general enforcement application is nearly always used for making standard directions that could be easily encapsulated in the procedural rules. Further, the procedural rules which cross-refer to parts of the CPR are confusing and lead to inconsistencies in practice.
- 1.45 Secondly, the current procedure for making a final charging order in family proceedings requires a hearing on every application. A charging order secures a debt against an asset held by the debtor, often land. A hearing is unnecessary in circumstances where there is no objection to the order being made. The procedure to make a charging order in other civil proceedings has recently been reformed so that a hearing does not have to take place unless needed. In family proceedings, we understand that often the debtor does not attend the hearing, and, even when the debtor does attend, he or she often has no objection to the order.
- 1.46 Thirdly, the allocation of enforcement proceedings could be more efficiently managed. There is no guidance at present beyond the rule that enforcement applications must be heard by a judge of the same or higher level than the judge who made the original order. That rule itself places an unnecessary burden on certain levels of the judiciary and restricts listing options. In some cases a judge of a lower level would be capable of hearing enforcement applications. Further, there is no recognition of the benefits of judicial continuity between the making of the financial order and any subsequent enforcement proceedings. These benefits include the parties having increased confidence in the system and the judge hearing enforcement proceedings having a prior knowledge of the case.

#### Problem 6: An unfair system

- 1.47 An effective system of enforcement needs to be fair to both parties.
- 1.48 The current law on enforcement fails, in some respects, to strike the appropriate balance between the interests of the debtor and the creditor. There are two areas we have identified as not supporting creditors:
- the rule requiring the court's permission to enforce arrears that have accrued more than 12 months' prior to the enforcement application; and
  - the current rules on costs.

#### *Permission to enforce arrears*

1.49 At present, any arrears that have accrued more than twelve months before the creditor takes enforcement action can only be recovered with the court's permission. Twelve months is considered too short a period for a number of reasons, including that it may not be cost efficient for the creditor to take action within that period and because there may be other good reasons for the creditor failing to take action within that time (for example, because the debtor is out of work).

### Costs

1.50 Unlike in civil enforcement proceedings there is no general rule in family enforcement proceedings that the successful party will recover his or her costs. Creditors may be deterred from taking enforcement action due to not knowing who is likely to have to bear the costs. Further, the current costs rules do not signal that the court expects its orders to be complied with and that non-compliance may result in penalties, i.e. an award of costs to the creditor.

1.51 On the other hand, the current law fails to address the debtor's interests in some areas. For example, a debtor who has suffered a period of being unable to pay what is owing under a family financial order is unable to ask the court to remit those arrears without having to issue an application to vary the ongoing order. An application to vary can be costly and slow and is not necessary where the issue has been a temporary inability to meet the order, for example, a period of unemployment.

### Rationale for intervention

1.52 The conventional economic approach to government intervention is based on efficiency or equity arguments. In particular, the Government may consider intervening if there are failures in existing government interventions (e.g. waste generated by misdirected rules). Any proposed intervention should itself avoid creating a further set of disproportionate costs and distortions.

1.53 Incomplete information leads to under-utilisation by creditors unable to navigate effectively through the system. When faced with the challenge of negotiating the existing procedure creditors may choose instead to rely on a relatively more accessible benefits system, effectively shifting the burden of payment from the private sphere to public funding.

1.54 The potential for wastage is indicated through an inaccessible and overly-complicated system, risking incorrect or misguided applications and wasted hearings resulting in delays and inefficiency. This is even more the case as a result of the reduction in legal aid and the increase in litigants in person, following the changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The current law is very difficult for litigants in person to understand and put into practice.

1.55 When considering the need for intervention, it is important to bear in mind that an ineffective enforcement system has adverse consequences that go beyond the impact on the individual parties involved and that there may be wider societal spill-over effects. Adverse societal effects are indicated at several levels.

- It was noted by the Law Society and Resolution that non-recovery of what is owed can result in increased claims for welfare benefits and tax credits by creditors left unable to meet their financial needs.

- There is a risk that confidence in the family justice system will be lost if orders are not effectively enforced. The Law Society said that the complexity of the current law may deter creditors from taking enforcement action, which conceivably “has an impact on the reputation of the family justice system, and the public’s perception of its effectiveness and fairness”. Similarly, the Family Law Bar Association said that the “whole financial remedies jurisdiction” is undermined if the orders that are made are unlikely to be enforced.

## Policy objectives

1.56 Our recommendations are intended to create an effective, efficient and fair system for the enforcement of family financial orders. Our aim is to equip creditors and the courts with the information and powers necessary to enable enforcement against those debtors who have the means to pay but are choosing not to do so, while at the same time ensuring that debtors who cannot pay are not punished for involuntary non-compliance. The reforms aim to ensure that neither party nor any of their dependants suffer undue hardship as a result of the inefficiency of the enforcement system.

## Affected Stakeholder Groups, Organisations and Sectors

1.57 The main stakeholders for this project are:

- Families involved in financial disputes following a divorce or dissolution of a civil partnership or court proceedings regarding financial provision for children. Many will be litigants in person.
- Her Majesty’s Courts and Tribunals Service
- Her Majesty’s Passport Office
- Her Majesty’s Revenue and Customs
- Driver and Vehicle Licensing Agency
- The legal community: family law practitioners and organisations such as Resolution, the Family Law Bar Association, the Law Society, the Bar Council and the Family Justice Council.
- Department for Work and Pensions – benefits arm
- Financial institutions such as banks, building societies and pension providers.

## Description of options considered

1.58 In assessing methods to deliver the key objectives stated above, the following options have been considered:

### Option 0: Do nothing

1.59 The table below provides a summary of the key features and the identified problems with option 0.

Table 1- Option 0, Key features and associated problems

Current law	Associated problems
•No standard form of financial disclosure required of debtors on enforcement	• Inadequate information about the debtor.

<p>applications.</p> <ul style="list-style-type: none"> <li>• No specific powers to obtain information from third parties for the purposes of enforcement.</li> </ul>	<ul style="list-style-type: none"> <li>• Different practices applied in different courts, causing confusion and inconsistency.</li> </ul>
<ul style="list-style-type: none"> <li>• Three types of assets currently excluded from Family Court financial enforcement powers.</li> </ul>	<ul style="list-style-type: none"> <li>• Current methods of enforcement cannot access: <ul style="list-style-type: none"> <li>- funds which the debtor has in a pension arrangement;</li> <li>- monies in a joint account; and</li> <li>- monies which become owing to the debtor after the enforcement application is made.</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• Limited options for indirect enforcement.</li> </ul>	<ul style="list-style-type: none"> <li>• Difficult to enforce against debtors who have the means to pay but have organised their finances to avoid direct enforcement.</li> </ul>
<ul style="list-style-type: none"> <li>• The need to cross-refer between two sets of procedure rules.</li> <li>• Lack of available authoritative guidance.</li> <li>• Lack of experience of some members of the judiciary and practitioners.</li> </ul>	<ul style="list-style-type: none"> <li>• Makes the law inaccessible and its application inconsistent.</li> <li>• Difficult for litigants in person to know and understand the different enforcement options and navigate proceedings. Leading to mistakes, inefficient use of court time, and unrecovered debt.</li> <li>• Inefficient enforcement system.</li> </ul>
<ul style="list-style-type: none"> <li>• No requirement for the debtor to provide disclosure in advance of the first hearing on a general enforcement application.</li> <li>• The making of a final charging order always requires a hearing.</li> <li>• The rules on allocation require enforcement proceedings to be listed before a judge of at least the same level as the judge who made the financial order. Beyond this requirement the rules provide no guidance for efficient listing.</li> </ul>	<ul style="list-style-type: none"> <li>• The first hearing on a general enforcement application is used for directing disclosure and cannot be used more constructively, wasting court time.</li> <li>• Hearings are listed where there is no objection to the order being made, making them an unnecessary use of court time and causing unnecessary delay.</li> <li>• Listing applications before lay justices is not possible for the vast majority of cases, thus limiting listing options and not allowing flexibility to</li> </ul>

<ul style="list-style-type: none"> <li>• A lack of pro-activity about enforcement at the time of making the final order.</li> </ul>	<p>most appropriately allocate cases. Further, the rules do not promote judicial continuity which can result in greater efficiency.</p> <ul style="list-style-type: none"> <li>• Non-compliance is not dealt with as early and efficiently as it could be.</li> </ul>
<ul style="list-style-type: none"> <li>• Failing to draw the right balance between the interests of the creditor and debtor.</li> </ul>	<ul style="list-style-type: none"> <li>• Creditors must seek permission to enforce arrears after 12 months.</li> <li>• Costs rules do not reflect practice and do not signal the importance of complying with a court order.</li> <li>• Debtors are unable to issue a free-standing application to remit arrears.</li> </ul>

**Option 1: reform to existing methods of enforcement, procedural reform and reform to make the system more accessible.**

1.60 The following areas of reform are of sufficient individual importance – in terms of their costs and/or benefits – to warrant a detailed exposition in this Impact Assessment. We have already explained the problems in each of these areas and we turn now to address how Option 1 would operate in respect of them.

1.61 Option 1 does not contain any recommendations to solve Problem 3 (a lack of options for indirect enforcement).

Recommendations to resolve Problem 1 (a lack of information about the debtor):

1.62 Four main recommendations impacting on costs/benefits:

*Recommendation 1(a): an enforcement financial statement*

1.63 A new financial statement that would capture all the information necessary to enable the creditor and the court to consider which, if any, enforcement method would be most appropriate.

*Recommendation 1(b): information requests and information orders*

1.64 New powers for the court to obtain relevant financial information about the debtor from certain government departments and other third parties.

*Recommendation 1(c): tracking of the debtor’s employment in relation to an attachment of earnings order*

1.65 The recommendation to “track” the debtor’s employment would enable the court to obtain information about the debtor’s employment direct from HMRC for the purposes of re-directing an attachment of earnings order.

*Recommendation 1(d): amendments to Forms to capture parties’ NI numbers*

1.66 Amendment to Forms E, E1, E2 and D81 so that the parties’ NI numbers are available to facilitate any necessary enforcement.

### Recommendations to resolve problem 2 (inability to access some of the debtor's assets)

1.67 Two main recommendations impacting on costs/benefits:

*Recommendation 2(a): expanding the scope of third party debt orders so that they may be made against joint accounts*

1.68 We recommend that third party debt orders should be available against funds in bank or building society accounts that the debtor holds with one or more other account holders.

*Recommendation 2(b): expanding the scope of third party debt orders so that they may operate periodically*

1.69 We recommend enabling third party debt orders to operate periodically in two ways:

- a) to enable enforcement against debts that periodically fall due to the debtor from the same third party; and
- b) to enable ongoing enforcement of debts that periodically fall due to the creditor.

### Recommendations to resolve problem 4 (inaccessibility of the enforcement system):

1.70 Five main recommendations impacting on costs/benefits:

*Recommendation 4(a): a consolidation of the enforcement procedure rules into the FPR 2010*

1.71 Consolidation would result in a comprehensive set of procedural rules governing the enforcement of family financial orders in the FPR.

*Recommendation 4(b): an enforcement practice direction*

1.72 A new narrative practice direction on enforcement be included in the FPR to direct the court and parties through enforcement proceedings.

*Recommendation 4(c): guidance for litigants*

1.73 We recommend that a summary of enforcement information should be provided on the back of family financial orders and that a comprehensive step-by-step guide be produced and be available both in hard-copy and digitally.

*Recommendation 4(d): enforcement liaison judges*

1.74 We recommend the adoption of the role of enforcement liaison judge across all designated family judge areas. The enforcement liaison judge would be responsible for the following:

- Keeping up-to-date with enforcement cases, practice and procedure and “cascading” information.
- Enforcement training for other judges (all levels) and HMCTS staff in their area.
- Liaising with lay justices/justices’ clerks/the gatekeeping team on issues of allocation.
- Being a point of contact for other judges with enforcement questions/queries.
- Hearing particularly difficult enforcement cases (where possible).
- Keeping an overview of the enforcement applications made in his or her area to build a picture of family enforcement (in the absence of available statistics).



*Recommendation 4(e): raise awareness about enforcement by the court*

1.75 Include reference to the option of enforcement by the court in the information and advice about enforcement that we recommend be produced for litigants. Further, it is an option that should be discussed in the enforcement practice direction that we recommend be included in the FPR – it is important that the court has the option in mind when making the original financial order as that order may be structured so as to enable enforcement by the court as an option from the beginning.

Recommendations to resolve problem 5 (an inefficient enforcement system):

1.76 Five main recommendations impacting on costs/benefits:

*Recommendation 5(a): a revised procedure for the “general enforcement application”*

1.77 Our recommended reforms provide for the creditor and the court to have the necessary information in advance of the first hearing so that enforcement options can be fully considered at that stage. We recommend changes to the application form and notice of hearing to ensure the parties are aware of the nature of the application, their respective duties, the powers of the court and the consequences of any non-compliance. The rules would be contained solely within the FPR.

*Recommendation 5(b): an increase in the enforcement powers of lay justices and reforms to the rules on allocation*

1.78 We recommend:

- 1) A change to the allocation rule requiring that enforcement must be dealt with by a judge of at least the same level as the judge who made the original order.
- 2) Extending the powers of lay justices so that they may make charging orders, third party debt orders and issue warrants of control and delivery.
- 3) In certain circumstances, enforcement applications should return to the judge who made the original financial order, so long as this does not cause delay in the listing.

*Recommendation 5(c): streamlining of the procedure for a charging order*

1.79 A hearing will take place on an application for a charging order only when necessary (not on every application), for example where the debtor objects, or a third party claims an interest in the property. The reform would bring the procedure for charging orders in family proceedings into line with charging orders in civil proceedings.

*Recommendation 5(d): recommendation to extend the scope of the court’s powers to make an order for sale under section 24A of the Matrimonial Causes Act 1973*

1.80 We recommend that the court’s power to make an order for sale should be available upon or subsequent to the making of any family financial order.

*Recommendation 5(e): recommendations to encourage more pro-active thinking about enforcement:*

1.81 We recommend a new direction to judges to consider enforcement when settling a final order.

1.82 We recommend that judges are directed to consider whether a record of findings may be helpful to any judge hearing a subsequent enforcement application, and if so to make a note for the file of the findings on which they based their final order.

1.83 We recommend making explicit in the enforcement practice direction the court's power to list a mention hearing after the conclusion of proceedings, which the court may choose to exercise if the court anticipates default on the part of the debtor.

Recommendations to resolve problem 6 (redressing the balance between the creditor and the debtor):

1.84 Three main recommendations impacting on costs/benefits:

*Recommendation 6(a): changing the requirements that govern when a creditor must seek permission from the court to enforce certain arrears (by amending section 32 of the Matrimonial Causes Act 1973)*

1.85 We recommend:

- 1) extending the period of time that may elapse before the creditor requires the court's permission to enforce arrears from 12 to 24 months; and
- 2) clarifying the test that the court must apply to applications for permission by amending the statute to provide that the court should grant permission where satisfied that there are "good reasons" for the creditor not having recovered the arrears within the 24 month period.

*Recommendation 6(b): amendments to the costs rules and the introduction of a general rule that the creditor recovers his or her costs on a successful enforcement application*

1.86 We recommend amending the FPR to introduce a general rule that a successful creditor recovers his or her costs.

*Recommendation 6(c): enabling the debtor to make a free-standing application to remit arrears*

1.87 We recommend introducing a free-standing application that may be made by a debtor to remit arrears. The application would have its own streamlined procedure.

**Option 2: reform to existing methods of enforcement, procedural reform, reform to make the system more accessible and introducing new methods of enforcement**

1.88 In addition to the recommendations outlined in Option 1 above, we make recommendations to solve Problem 3, and an additional recommendation to further address Problem 2.

Recommendations to resolve problem 3 (lack of indirect enforcement methods):

1.89 Two main recommendations impacting on costs/benefits:

*Recommendation 3(a): introduction of the power to disqualify a debtor from driving*

1.90 A new power to disqualify from driving a debtor whom the court is satisfied has the means to pay but is choosing not to do so. The power would include the power to make a suspended order in the first instance and the disqualification would be lifted on payment of what the debtor owes, and could be reviewed on part-payment.

*Recommendation 3(b): introduction of the power to prohibit a debtor from travelling out of the jurisdiction*

1.91 A new power to disqualify from travelling out of the United Kingdom a debtor whom the court is satisfied has the means to pay but is choosing not to do so. The power would include the power to make a suspended order in the first instance and the disqualification would be lifted on payment of what the debtor owes, and could be reviewed on part-payment.

Further recommendation to resolve problem 2 (inability to access some of the debtor's assets):

1.92 One main recommendation impacting on costs/benefits:

*Recommendation 2(c): enabling enforcement against pensions*

1.93 Enforcement against pensions would be by way of pension sharing orders and pension attachment orders. Both orders, in different ways, transfer some of the benefit of the pension from one party to the other.

## **COST BENEFIT ANALYSIS**

This impact assessment identifies both monetised and non-monetised impacts of intervention, with the aim of understanding the overall impact on society and the wider environment. The costs and benefits of each option are measured against the “do nothing” option. Impact assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised. These might include how the proposals impact differently on particular groups of society or changes in equity and fairness, either positive or negative.

The impact assessment process requires that we make an assessment of the quantifiable costs and benefits even when there is insufficient material on which to base those calculations. Where possible we have obtained relevant statistics and spoken to practitioners to inform our view of the likely aspects to be affected by the changes and have used these as the bases for our calculations. Where it has not been possible to obtain a rough indication of numbers in this way we have had to make a realistic estimate. In such cases we have taken a conservative approach and have tended to use figures that we considered likely to under-estimate benefits and over-estimate costs.

When calculating the net present value (“NPV”) for the Impact Assessment we have used a time frame of ten years, with the present 2016, being year 0. We have assumed that the transitional costs and benefits occur in years 0, and ongoing costs and benefits accrue in years 1 to 10. We have used a discount rate of 3.5%, in accordance with HM Treasury Guidance.

### **Option 0 – Do nothing**

Because the “do-nothing” option is compared against itself its costs and benefits are necessarily zero, as is its NPV. However the problems identified above will continue.

### **Option 1 – Amendments to existing methods of enforcement and procedural reform**

#### **Transitional costs**

*MoJ*

#### Amendment to Family Procedure Rules

1.94 A number of our recommendations will require amendment to the FPR. We anticipate that the cost of these amendments will be negligible, as the FPR would be periodically amended notwithstanding our recommendations.<sup>25</sup>

#### New guidance documents and court forms

1.95 A number of guidance documents will have to be produced for litigants, banks, pension providers and credit reference agencies. New court forms will have to be created and some existing forms will need minor amendment.

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<sup>25</sup> At present, a number of procedural rules governing the enforcement of family financial orders are found in the Civil Procedure Rules 1998 and applied to family proceedings by the FPR. We recommend that those rules are brought within the FPR (Recommendation 4(a)), but if that recommendation were not to be implemented then we consider that amendments that we recommend in respect of those rules could still be implemented in the FPR as the FPR applies the rules specifically to family proceedings.

## Amendment to primary legislation; new secondary legislation

- 1.96 New secondary legislation will have to be created to:
- a) implement the relevant provisions of the Tribunal, Courts and Enforcement Act 2007 and provide the detail of how information requests and information orders and tracking would operate;
  - b) increase the enforcement powers of lay justices; and
  - c) amend the rules on allocation.
- 1.97 Amendments to primary legislation will be required to:
- a) change the rules on when a creditor must seek the court's permission to enforce arrears and the test the court will apply on such an application; and
  - b) extend the court's power to make an order for sale following the making of a family financial order.

## *HMCTS*

### Training

- 1.98 Recommended reform will require some training for lay justices and judges on new requirements. As the judiciary must in any event remain up-to-date with procedural developments in the law, we expect this cost to be negligible.
- 1.99 Some training will also be required for court staff. Similarly, as court staff must in any event remain up-to-date with procedural developments in the law, we expect this cost to be negligible.<sup>26</sup>

### Creation of new role

- 1.100 The newly created role of enforcement liaison judge is expected to have minimal cost implications as suitable appointments would be made from existing judges. We anticipate negligible cost because (1) it does not require the appointment of new judges and (2) a suitable framework for appointment of similar judges already exists within the Family Court.

### New information sharing system

- 1.101 New information sharing systems with each information provider must be established.<sup>27</sup> We understand that a similar platform provides for the sharing of information by HMRC with HMCTS and think that could be utilised. We have been informed by a leading credit reference agency that the set-up cost would be between £10,000 - £15,000, with training fees of approximately £1,200 per day.

### *Private bodies as information providers*

### New response system

- 1.102 Private bodies will have to create new processes to respond to information orders.

### *Banks*

### New considerations for the operation of third party debt orders

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<sup>26</sup> The exception is the training that will be required for some members of court/HMCTS staff to operate information requests and information orders. That cost we have included in the costs of establishing new information sharing systems below.

<sup>27</sup> Obtaining information from HMRC for tracking could be achieved by the same system and so this recommendation creates no extra cost.

- 1.103 Banks will have to create new processes for third party debt orders to operate the protected minimum balance. However, this should be relatively straightforward and banks that have Scottish branches will already be operating such a process in Scotland.
- 1.104 As a result of expanding third party debt orders to operate against joint accounts, although the administration of the order will remain the same as for sole accounts, new standard form letters to be sent to joint account holders will have to be created.
- 1.105 Employees of the banks will also have to receive basic training. As periodic training will happen in any event, we expect the cost to be negligible.

## **On-going costs**

### *HMCTS*

#### Maintenance of/operating new information sharing systems

- 1.106 The new information sharing systems with information providers will require maintenance. For example, HMCTS pay HMRC £25,000 per annum, and a leading credit reference agency have informed us they would charge approximately £10 per data enquiry. We estimate that between 500 – 1,000 enquiries would be made each year to a credit reference agency. The information obtained pursuant to information orders and information requests must also be processed.
- 1.107 An increased awareness of the option of enforcement by the court could result in more applications for that enforcement method and, as a result, more court officers being required to take enforcement action.

#### Increased court time

- 1.108 Reforms to third party debt orders may result in applications requiring more court time. More time may be needed to determine the details of periodic third party debt orders and the ownership of funds in joint accounts. More applications may be made as a result of extending third party debt orders to joint accounts. Increased awareness of enforcement options and highlighting the court's power to list a mention hearing after making a final order may also result in the listing of further hearings.

### *Debtors*

#### Documentation and loss of financial autonomy

- 1.109 We identify three potential areas of concern:
- a) The debtor will be required to provide disclosure by completing an enforcement financial statement and producing certain documents; to do so will take time.
  - b) The provision of information concerning the debtor's finances by third parties may result in the debtor feeling that his or her privacy has been invaded.
  - c) The introduction of periodic orders may give rise to a loss of financial freedom if the joint account is frozen beyond the final order.

#### Increased legal fees

- 1.110 Enforcement against joint accounts may result in increased legal fees for the debtor where there is a dispute over the ownership of funds in the account.<sup>28</sup>

#### Fewer arrears remitted

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<sup>28</sup> Innocent holders of joint accounts may incur legal fees if there is a dispute about the ownership of the funds in a joint account and may feel a sense of injustice as the account is frozen.

1.111 Allowing more arrears to be enforceable without the need for the court's permission may lead to fewer arrears being remitted.

#### *Non-bank third party debtors (businesses and individuals)*

##### Operation of periodic third party debt orders

1.112 Non-bank third party debtors may have to operate periodic third party debt orders by making payments (of money that the third party owes to the debtor) to both the creditor as well as the debtor. In any given period, once a minimum amount has been paid to the debtor, payments will have to be diverted to the creditor, up to a maximum amount. This will require the third party to keep a record of payments made to both parties. We expect the costs of this to be negligible. Businesses are required to maintain accounting records and this can be done on an automated basis. The diversion of funds to the creditor will involve setting up a payment to a new bank account, which should be straightforward for any business. For individuals, automated record keeping may not be possible but we still consider that the cost will be negligible because it would be unusual for any individual to be subject to more than one order.

1.113 We note that the obligations that our recommendations may give rise to are very similar to those that already exist on the making of an attachment of earnings order, which can be directed at the third party that employs the debtor.

#### **On-going benefits**

##### *MoJ*

##### Increased confidence in justice system

1.114 Generally our recommendations will improve accessibility to and the effectiveness and efficiency of the enforcement system, in turn increasing confidence in the wider justice system.

##### *HMCTS*

##### Saving in court time

1.115 Making the system more accessible and more efficient will result in a saving of court time. In addition, there are two specific savings of court time, which it is possible to calculate:

- a) around 870 hours p/a as a result of requiring standard disclosure from the debtor in advance of the first hearing on a general enforcement application. Standard disclosure in advance means that the first hearing can be used productively to progress the application rather than making directions for disclosure; and
- b) around 90 hours p/a as a result of streamlining applications for charging orders.<sup>29</sup>

1.116 The ability to allocate more than 90%<sup>30</sup> of cases to a lower level of the judiciary will give rise to greater flexibility of listing. Judicial time can then be allocated more appropriately.

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<sup>29</sup> For our workings see Appendix B.

<sup>30</sup> As a result of our recommendation for greater judicial continuity, cases that have been concluded at a final hearing should return to the judge who heard the final hearing, meaning that there is no flexibility in listing those cases. From April to June 2016 10% of financial remedy cases were contested to a final hearing, leaving 90% that do not fall within our recommendation for greater judicial continuity. The percentage of enforcement cases that could be allocated to a lower level of judge is actually higher than 90% as the costs orders arising from divorce petitions and applications to dissolve civil partnerships that require enforcement will not fall within our recommendations for judicial continuity.

## Welfare savings

1.117 Generally our recommendations to improve the enforcement system will lead to a greater recovery by creditors of what is owed to them. Greater recovery will result in welfare savings as it will reduce the number of creditors who end up relying on state support when they do not receive what they need under the family financial order.<sup>31</sup> At present, such creditors require state support when either: a) their enforcement action is unsuccessful; or b) they are not receiving what they are owed but do not start enforcement proceedings.

### *Creditors*

#### More successful enforcement action

1.118 In general our recommendations will result in more successful enforcement applications<sup>32</sup> and in more creditors taking action to recover what they are owed, most notably, our recommendations for:

- a) introducing information requests and information orders;
- b) extending the scope of third party debt orders; and
- c) consolidating the procedural rules and the production of guidance.

1.119 We assume every year, as a result of unsuccessful enforcement applications, that there is unrecovered debt of between around £16.9m and £21.7m.<sup>33</sup> Some of that debt will be because debtors cannot comply with the family financial order, but given the order will have been made after assessing the debtor's ability to comply we assume, for illustrative purposes, that in 90% to 95% of cases the debtor is able to comply but is choosing not to do so. Taking the high estimate for the amount of unrecovered debt, means that around £19.5m to around £20.6m is potentially recoverable. Taking the lower estimate means the range of potentially recoverable debt is around £15.2m to £16.1m.

1.120 If our recommendations were to result in 50%<sup>34</sup> of those currently unsuccessful enforcement actions being successful, that would mean creditors would receive additional funds of between £7.6m<sup>35</sup> and £10.3m.<sup>36</sup> These figures do not account for the additional funds that would be received by creditors who would, as a result of our recommendations, take enforcement action but who take no such action under the current law.

1.13 Confirmation that a successful creditor should (unless, for example, the creditor has behaved unreasonably) recover costs will remove significant financial risks in commencing enforcement action and therefore incentivise creditors to take appropriate enforcement action.

### *Debtors*

#### Immediate access to funds for day-to-day expenses

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<sup>31</sup> We assume that 25% of enforcement actions are unsuccessful. Considering the type of family financial orders that if not complied with would leave a creditor in need, unsuccessful enforcement could leave about 900 creditors per year looking to the state for financial support.

<sup>32</sup> Assuming that our recommendations can halve the number of unsuccessful applications would produce a benefit of between about £15.5m and £12.2m.

<sup>33</sup> For our working, see Appendix A.

<sup>34</sup> We think 50% is a reasonable assumption given that our recommendations, in addition to making the system easier to navigate and thus resulting in less erroneous applications, will also specifically enable easier enforcement against the income of self-employed debtors (and in 2015 14% of the UK population were self-employed: <http://www.parliament.uk/business/publications/research/key-issues-parliament-2015/work/self-employment/>) and enable enforcement against joint accounts (DWP exercise showed 30% of debtors had joint accounts that could be enforced against).

<sup>35</sup> Assuming the lower estimate for potentially recoverable debt and that in 90% of cases the debtor has the means to comply.

<sup>36</sup> Assuming the higher estimate for potentially recoverable debt and that in 95% of cases the debtor has the means to comply.

1.12 The introduction of a protected minimum balance on interim third party debt orders will ensure that the debtor is able to access funds immediately in order to meet day-to-day and necessary expenses. This in turn will reduce the need to make an application for a hardship payment order.

### *Creditors and debtors*

#### Understanding and accessibility

1.121 Consolidating the procedural rules, introducing an enforcement practice direction and providing guidance for litigants will ensure that both parties have a better understanding of the system and the options available. This will deter unmeritorious applications and ensure the system is accessible, particularly for litigants in person. Changes to costs rules will provide clarity as to the costs orders available to the court.

#### Less court time

1.122 Both parties will have to spend less time in court. Revising the procedure for the general enforcement application will make the application more efficient. Streamlining the application for charging orders will ensure that there is no need to attend court unless a debtor or a third party raises an objection to the order. The introduction of enforcement liaison judges will ensure that the judiciary is better prepared to deal with enforcement applications, and highlighting the court's power to list a mention hearing after making a final order will give rise to quicker resolution of any enforcement issues.

1.123 Completion of the enforcement financial statement will allow the debtor an opportunity to set out his or her financial position at an early stage in the enforcement proceedings. This will be of particular benefit to debtors who "can't pay", as opposed to those who "won't pay"; pointless enforcement applications will be avoided.

1.124 Placing greater focus on judicial continuity will ensure that neither party feels as if they are having to "start again" when in front of different judges. Further, recommending a practice of judges noting material findings about assets will provide for greater continuity between original proceedings and enforcement proceedings.

1.125 The introduction of a free-standing power to remit arrears will allow the debtor to make an application to remit arrears, without having to make an application to vary the underlying order, which can take a long time and can be costly.

### **Option 2 – Amendments to existing methods of enforcement, procedural reform and introducing new methods of enforcement**

In addition to the above costs and benefits of Option 1, Option 2 has the following additional costs and benefits.

#### **Transitional costs**

*MoJ*

#### New primary and secondary legislation

1.126 Our recommendations will require the drafting and introduction of new primary legislation, to:  
a) enable enforcement against pensions; and  
b) introduce the powers to disqualify a debtor from driving and to prohibit a debtor from travelling out of the jurisdiction.

1.127 New secondary legislation will be required to create a new fee to cover the transaction of a previously disqualified debtor renewing his or her licence.

*HMCTS*



## Training

1.128 The same recommendations will also require training of the judiciary and HMCTS staff on the new powers. As the judiciary and court staff would be trained on procedural developments in any event, we expect this cost to be negligible.

*DVLA and HMPO*

## New system to administer disqualification orders

1.129 The introduction of orders to disqualify a debtor from driving will require the implementation of a system to record disqualification orders, cancel licences and notify the debtor of the need to apply for a new licence at the end of the disqualification period. The DVLA website and literature will also need updating. It is envisaged that the cost will be small as the disqualification orders can fit within the existing system for disqualification orders made under the Child Support Act 1991. Staff will also be required to process the orders; as the number of orders is expected to be small, process of the orders is unlikely to be done on an automated basis.

1.130 The introduction of orders to disqualify a debtor from travelling out of the UK will require the implementation of a system to record disqualification orders and the fact that the debtor should not be issued with a new passport but could utilise the existing “stop file” system operated by the Passport Office.

## **On-going costs**

*HMCTS*

## Increased court time

1.131 Enabling enforcement against pensions and the introduction of disqualification orders may require more court time by increasing the number of enforcement applications where otherwise the creditor would not have taken enforcement action.

*DVLA and HMPO*

## Execution of disqualification orders

1.132 Orders to disqualify a debtor from driving and from travelling outside the UK will need to be executed.

*Pension providers*

## Execution of pension orders

1.133 Enabling enforcement against pensions and introducing a new ground of jurisdiction to enable English courts to make orders against pensions following a foreign divorce where one of the parties has a pension in this jurisdiction will require a greater number of pension orders to be executed.

## **On-going benefits**

*DWP*

## Welfare savings

1.134 Enabling enforcement against pension assets and introducing disqualification orders will result in welfare savings by ensuring a greater recovery of what is due under family financial orders reducing the risk that unpaid creditors will resort to state support.

## *Creditors and debtors*

### Execution of foreign orders

1.135 The introduction of a new ground of jurisdiction for the English court to make an order in respect of a pension in this jurisdiction following a foreign divorce will enable the English court to give effect to a foreign order, and therefore give effect to what has previously been ordered or (and could have been agreed between the parties).

## *Creditors*

### Increased recovery

1.136 The introduction of disqualification orders will increase the likelihood that the creditor will recover what is owed from the debtor. Enabling enforcement against pensions creates new assets against which to enforce.

1.137 Applying the same working as at paras 1.119 to 1.120 above, but, for illustrative purposes, assuming that our recommendations under Option 2 would result in 75%<sup>37</sup> of currently unsuccessful enforcement applications being successful would result in additional funds being recovered by creditors every year of between £11.4m and £15.5m.

## **SPECIFIC IMPACT ASSESSMENTS**

### **Statutory equality duties**

1.138 There are no equality implications associated with the proposals.

### **Economic impacts**

#### *Competition*

1.139 No significant competition impacts associated with the proposals have been identified.

#### *Small firms*

1.140 It may be that small firms are impacted by the execution of periodic third party debt orders more significantly than larger firms. The administrative burden on businesses of directing funds to the creditor may be less for larger sized firms.

1.141 However, this impact is countered by two factors:

- a) Successful enforcement action will result in quicker resolution of proceedings which will cause less disruption to the debtor/employee.
- b) The risk that unpaid creditors will default on payments due to businesses is likely to be more damaging to the cash flow of smaller rather than larger firms.

### **Environmental impacts**

1.142 There are no environmental implications associated with the proposals.

### **Social impacts**

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<sup>37</sup> We assume 75% as in addition to the recommendations under Option 1 that we assume would result in 50% of currently unsuccessful enforcement applications being successful, Option 2 will enable enforcement against debtor's pension assets and will enable indirect enforcement against debtors who have put their assets beyond the reach of the court.

### *Health and well-being*

1.143 Our recommendations are likely to improve the well-being of both parties to the enforcement proceedings:

- a) The creditor will benefit from receiving payment of money that is owed. This is particularly significant for lower income creditors, who otherwise may have to resort to state support.
- b) Both parties will benefit from the provision of guidance and general improvements to the efficiency of enforcement proceedings. Our recommendations will reduce the distress and inconvenience of ongoing and complicated court proceedings.

### *Human rights*

1.144 Although our recommendations to introduce new disqualification orders and the extension of third party debt orders to joint accounts may have human rights implications, our proposals are designed to strike an appropriate balance between the rights of the debtor and the right of the creditor to obtain payment of the money owed to him or her.

### **Rural proofing**

1.145 There are no rural proofing implications associated with the proposals.

### **Sustainable Development**

1.146 There are no sustainable development implications associated with the proposals.