

ENFORCEMENT OF FAMILY FINANCIAL ORDERS ANALYSIS OF RESPONSES

INTRODUCTION

- 1.1 This Analysis of Responses accompanies our report which sets out our recommendations for reform of the law and procedure governing the enforcement of family financial orders.
- 1.2 The report was published on 15 December 2016. This followed the publication of the consultation paper on 11 March 2015, and the extended consultation period which ran from the publication of the consultation paper until 31 July 2015.¹ During the consultation period we held consultation events in Cardiff, London and Manchester. We also engaged continuously with stakeholders, including those who did not make a formal response to the consultation, from the beginning of the project to the time of the publication of the report.
- 1.3 We received 31 consultation responses. Consultees comprised members of the public, individual lawyers or law firms, justices' clerks, professional associations of lawyers (including Resolution)² and those who work in the family justice system, an academic, individual members and representatives of the judiciary and lay justices, the Family Justice Council and the Land Registry. For a list of consultees, other than members of the public or those who wished their response to remain confidential, please see Appendix A of the report.
- 1.4 This Analysis serves two main purposes. First, it records consultees' responses to the questions raised in our Consultation Paper, alongside additional comments made by consultees in their responses. Secondly, we use the Analysis to provide brief responses to points made by consultees that are not addressed in our Report.³ The Analysis is not, however, intended to be a comprehensive record of all points that were raised with us during the consultation. For example, we have not included some issues raised by consultees that fell beyond the scope of the project.

¹ The consultation period ran for longer than usual because it coincided with the period of purdah around the 2015 General Election. Purdah is the period leading up to an election when there is a restriction on certain activities of the civil service, including arms-length bodies such as the Law Commission.

² Formerly known as the Solicitors Family Law Association, Resolution is an organisation of 6,500 family lawyers and other professionals in England and Wales.

³ Regarding orders to obtain information (see para 1.171) and the execution of documents by the court (see para 1.609).

ALTERNATIVE DISPUTE RESOLUTION

Do consultees think that the Family Court should be able to adjourn enforcement proceedings without the parties' consent for the purpose of the parties attempting to reach agreement using alternative dispute resolution methods?

- 1.5 Sixteen consultees answered this question. Eight answered "no";⁴ six answered "yes";⁵ and two supported the use of alternative dispute resolution ("ADR") but did not address the specific issue of the need for the parties' consent to adjourn proceedings for that purpose.⁶

Negative responses

- 1.6 There were three recurring reasons running through the responses of those that answered no. Those were:
- (1) that ADR is not generally appropriate at the stage of enforcement;
 - (2) for ADR to be successful it generally requires both parties to be willing to engage in the process; and
 - (3) there is a risk that a power to order an adjournment for ADR without both parties' consent may be abused as a delaying tactic by a debtor who is unwilling to pay what is due.
- 1.7 Of the eight consultees who answered "no", three stressed their support for the use of ADR generally in family proceedings.

ADR NOT APPROPRIATE AT THE STAGE OF ENFORCEMENT

- 1.8 Birmingham Law Society said that "whilst ADR is generally welcomed at any stage in litigation, ADR won't be appropriate for the "won't pay" debtors; and it is perhaps more appropriate for the "can't pay" debtors to receive a determination by a Judge to progress matters." As a result it said ADR was "felt not to be appropriate necessarily in the enforcement process."
- 1.9 Clarion Solicitors made a similar point: "whilst we are supportive of parties being encouraged to use dispute resolution processes prior to final orders being made, we think it unlikely that dispute resolution models will be appropriate in an enforcement situation."
- 1.10 The Family Justice Council did not support the adjournment of enforcement proceedings for the purposes of ADR on the basis that "the court has made an order or approved a consent order and it should be complied with".

⁴ Birmingham Law Society; Clarion Solicitors; District Judge Robinson; Family Justice Council; Family Law Bar Association ("FLBA"); The Law Society; Penningtons Manches; Resolution.

⁵ International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices' Clerks' Society; A member of the public; Tony Roe.

⁶ National Family Mediation; Stone King.

- 1.11 The Law Society was of the view that enforcement “does not lend itself as well to ADR as other parts of the family law process.”
- 1.12 Penningtons Manches said that it was “difficult to conceive of any situation where alternative dispute resolution would be appropriate in enforcement proceedings.”
- 1.13 Resolution said that it found it difficult to “envisage any circumstances where this proposal might help or change the position.” In its view, if there had been a change of circumstances or a misunderstanding about the order that should have become evident at an earlier stage and, in the context of non-compliance by a debtor who may want delay or to pay less than ordered, the exercise of a power to adjourn without the parties’ consent would “have no real purpose and would cause delay.” Resolution said that it would “not be fair to or understood by the vast majority of creditors applying for enforcement.”

SUCCESSFUL ADR REQUIRES BOTH PARTIES TO BE WILLING TO ENGAGE IN THE PROCESS

- 1.14 Clarion Solicitors said that a “certain level of cooperation is required” for alternative dispute resolution to be successful and that would “be lacking in a situation such as this.”
- 1.15 The Family Law Bar Association noted that there was scope for the parties to use mediation where there is a live variation application, or in any event, a significant change of circumstances since the making of the final order, but it did not think a court should have the power to adjourn for the purpose of alternative dispute resolution “unless both parties agree.”

RISK OF ADR BEING USED AS A DELAYING TACTIC

- 1.16 District Judge Robinson said that ADR must never “be allowed to become an additional tool for the time waster.” He noted that he had recently referred a case to meditation where it was apparent that the husband’s income had dropped substantially and so it was necessary to reconsider the level of maintenance and both parties were willing to do so. He suggested that judges already have the power to refer cases to mediation and arbitration in the right cases.
- 1.17 The FLBA expressed a concern that ADR may be used as a delaying tactic by a debtor. In answer to the question it said: “We do not believe this would be helpful. In a case where enforcement issues arise the creditor may see little value in ADR and the debtor may attempt to use this as a way of delaying enforcement.”
- 1.18 The Law Society said that the court should only adjourn for the purposes of ADR if both parties request the opportunity to try it, otherwise there was “a risk that the request to adjourn from one party may be a delaying tactic.” It went on to say that a party should not be penalised if he or she does not want to pursue ADR.
- 1.19 Penningtons Manches suggested that “compulsory adjournment to alternative dispute resolution would be a gift to non-payers, offering the opportunity for yet more delay and obfuscation.”

Positive responses

- 1.20 Amongst the six consultees who answered positively, there was a degree of caution from two of them, International Family Law Group and Janet Bazley QC, and an acknowledgement from the Judges of the Family Division that the power would only be rarely used though they remained supportive of its introduction.
- 1.21 International Family Law Group explained their general favourable view of the use of ADR in family proceedings: “We hugely support ADR, in its various manifestations, to resolve family law finance disputes. One primary reason is that the research, albeit relatively limited, seems consistently to show that a settlement reached through ADR is more likely to be upheld and implemented than one imposed by a court”. They said that there are risks associated with adjourning enforcement proceedings for the purpose of ADR without the parties’ consent as creditors “would be forced to wait for a period before they could get their enforcement proceedings off the ground”. In addition they suggested that ADR is “only ever effective if both parties enter into it freely and willingly”. However, they said the court should have the power (to adjourn without the parties’ consent) but it should be “exercised carefully”.
- 1.22 Janet Bazley QC offered cautious support for the introduction of the power, she said “it should be used only exceptionally where there is real evidence that ADR is likely to be effective and, probably, only where both parties agree. Otherwise, this is likely to lead to delay and greater difficulty enforcing the order.”
- 1.23 The Judges of the Family Division, noted that it will only be in rare enforcement cases where there is scope for ADR and that, in general, for it to be successful it is necessary for both parties to be prepared to engaged. However, they said that a judge should have the power to adjourn for ADR even without the consent of both parties.
- 1.24 The Justices’ Clerks’ Society said that a change to the rules to enable an adjournment for the purposes of ADR without the parties consent would be “helpful”. It suggested that once the creditor “appreciates the difficulties faced by [the] debtor, they may be willing to agree terms for payment.” The Society also said that greater use of ADR would create “greater understanding and cooperation between parties” and be “less stressful and expensive.”
- 1.25 A member of the public, who has previously had obligations under a family financial order, answered “yes” to this question and said that the creditor “needs to understand that a financial reconstruction is much better for them than a bankruptcy.” He suggested that the court should be able to impose a “moratorium” so that a debtor could explore the possibility of an IVA (that is an individual voluntary arrangement); he expressed a concern that due to the emotional nature of the dispute and the creditor not being an experienced creditor the wrong decisions may be taken.

Responses favourable to the use of ADR but not addressing the issue of a power to adjourn without the parties' consent

- 1.26 National Family Mediation considered that the underlying presumption in the Consultation Paper that mediation at the stage of enforcement is largely inappropriate is a flawed presumption. It said that it “strongly believe[s] that mediation should be actively considered by the courts during the lifetime of the proceedings.” It said that if this were the case then it is confident that there would be less need for enforcement proceedings as more would have been agreed and carried out by consent. It did not comment on the question of dispensing with the parties' consent to adjourn enforcement proceedings for the purposes of ADR.
- 1.27 Stone King suggested that ADR, and in particular mediation, should be considered “as an entry point for enforcement of family financial orders.” They did not comment on the question of dispensing with the parties' consent to adjourn enforcement proceedings for the purposes of ADR.

Responses from consultation events

- 1.28 This question was discussed at the consultation events in London and Manchester.
- 1.29 Two district judges gave their views at the Manchester event. One judge was opposed to greater use of ADR; he said that at the enforcement stage “the court has made an order or approved a consent order and it should be complied with.” The other judge said she had experience of an enforcement case where mediation was tried and no progress was made as at the first session the debtor would only discuss the parties' children, then at the second did not bring any disclosure, and at the third would not negotiate. She said it would be better to emphasise the costs consequences of a failure to engage in ADR rather than push people towards it. Another attendee felt that a court based mediation service might provide a forum for discussing options if circumstances had changed since the time the original order was made.
- 1.30 At the London event, one attendee queried whether ADR was a realistic option on enforcement as people will only reach agreement if they are willing to attend, fully participate and be reasonable. Another attendee said that she was “perturbed” by the idea of ADR in enforcement proceedings as it seems to send a message that the debt is negotiable.

CONSOLIDATION

Do consultees find that the need to refer both to the Family Procedure Rules and the Civil Procedure Rules gives rise to problems?

- 1.31 Thirteen consultees responded to this question. Eleven consultees¹ were in favour of consolidation, one member of the public was opposed and Resolution thought that, whilst reform would add convenience, it would prefer to see priority given to other issues, especially the introduction of legislation to allow no fault divorce.

Responses in favour of consolidation

- 1.32 Clarion Solicitors felt that it would be “helpful for all relevant provisions to be housed within the same set of rules” notwithstanding the fact that the Family Procedure Rules were updated recently. The Law Society noted that “in an ideal world, all the rules would be in one place.”
- 1.33 District Judge Robinson thought the use of two sets of rules was a problem as they were “very difficult to follow for judges and lawyers, impossible for litigants in person.” He thought that combining these rules, even if it meant duplicating the Civil Procedure Rules in places, would be a “major advance in the creation of the Family Court, and would help all court users.” The Judges of the Family Division agreed it would be “far better for all rules to be incorporated into the [Family Procedure Rules] so that there is no need to refer to the [Civil Procedure Rules] at all.”
- 1.34 The Family Justice Council said that the need to consult two sets of rules is “difficult for litigants”. The Council considered that if reforms are made following the Law Commission’s work in this area, it would be an ideal time to create a “truly comprehensive set of Family Procedure Rules.”
- 1.35 The FLBA noted the current rules were “complex and confusing”. It added that it did not see any danger of a divergence between civil and family enforcement developing (as a result of having two separate sets of rules) but if any divergence were to occur it, “could readily be justified on the basis of the different nature of the respective proceedings.” The Justices’ Clerks’ Society agreed that divergence in the development of the law on enforcement is not an issue as “maintenance debt differs in a number of aspects from other civil debt as indicated previously.” Janet Bazley QC thought similarly about the risk of divergence.
- 1.36 International Family Law Group thought the proposals were necessary given the increasing number of litigants in person. It also considered that consolidation would make enforcement easier for family practitioners to understand and, therefore, make legal advice on enforcement cheaper for litigants.

¹ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Law Society; Penningtons Manches; Tony Roe.

- 1.37 Penningtons Manches commented that “the current enforcement methods are scattered across multiple statutes, a situation made worse by the need to refer to multiple sources for the procedure.” It supported a “single reference point” for enforcement in the Family Procedure Rules in respect of all methods available for enforcement of family financial orders.

Responses against consolidation

- 1.38 One member of the public thought that there was a risk in creating a “special family statute”, as “the more family and civil law diverges, the more complex the distinction between family law creditors and civil law creditors, the harder it is to lend to individuals as family law enforcement may take priority over civil law.”

Responses from consultation events

- 1.39 At the consultation event in London, on behalf of the FLBA, it was said that there is a need for all of the rules to be in one place. Even experienced lawyers find it hard to know the rules and it is important to have one set of rules. It was also said that there is a need for a specialist judiciary. If enforcement goes before an inexperienced judge he or she will usually delay the matter because he or she is not confident to deal with it. It would be helpful for the judge who made the order to retain case management responsibility or to have specialist judges who deal with enforcement cases. In addition, a Family Enforcement Act was proposed.
- 1.40 At the consultation event in Manchester, one attendee offered the view that consolidation would provide a lot of clarity. It would result in duplication, but it is often difficult to work out whether one of the exceptions to the Civil Procedure Rules applies in family cases or not. Litigants in person could also be pointed in the right direction if all the rules were in the Family Procedure Rules. This was supported by another attendee who said the Family Procedure Rules were meant to be comprehensive, but clearly were not. There was, from one attendee, a desire for a fresh start with a new statute or code of all civil and family enforcement provisions; this idea was met with general consensus.

GUIDANCE FOR LITIGANTS IN PERSON

- 1.41 We made two provisional proposals in relation to guidance for litigants in person. We consider the responses to each in turn.

We provisionally propose that Government:

- (1) **consolidate and increase the information and support available to litigants in person and the public in respect of proceedings to enforce family financial orders, with information being published in both electronic and paper formats; and**
- (2) **consider the scope for funding lawyers to provide free advice in person to litigants in person that goes beyond information and support but which is not based on a lawyer-client relationship.**

Do consultees agree?

Provisional proposal (1) – publishing information

Introduction

- 1.42 In total, sixteen consultees² responded to this question. The responses were universally positive with all consultees agreeing that we needed to consolidate and increase the information and support available to litigants in person and the public in relation to enforcement of family financial orders.

Reasons for reform

Complexity of the enforcement process

- 1.43 District Judge Robinson stated that he “did not know how any lawyer, let alone litigant in person, can fully understand the details of the Enforcement Procedural Jungle.” He commented that “as an enforcement judge, and after lecturing to the Judicial College on the subject, I certainly do not.”

Inadequacy of the current information

- 1.44 Resolution explained that “little information is currently available, with any reported cases tending to relate to big money and/or international cases rather than those involving parties with more average means and assets.” The Family Justice Council stated that the leaflets presently available to litigants are “inadequate”.
- 1.45 National Family Mediation commented that “information for litigants in person needs to be made available urgently, and note this has been outstanding for at least 2 years.”
- 1.46 The Justices’ Clerks’ Society noted that “the information that HMCTS staff are able to provide is limited. They are unable to provide legal advice in any particular case.”

Encourage the debtor’s compliance

- 1.47 The International Family Law group considered that “in many circumstances the debtor refuses to pay because they think the creditor will be unable to afford the financial and emotional cost of bringing enforcement proceedings.” It believed, therefore, that “if there was clear guidance and/or publicly funded legal information as to the enforcement methods available and the necessary procedure, this might deter some debtors from defaulting and better enable creditors to enforce arrears.”

² Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Law for Life/AdviceNow; Law Society; National Family Mediation; Penningtons Manches; Resolution; Rhys Taylor; One member of the public; Tony Roe.

Expense of the enforcement process

- 1.48 The Justices' Clerks' Society noted that "parties will not be granted Legal Aid to bring or defend enforcement proceedings." Further, "since there can be no guarantee of costs being ordered or paid by the creditor, virtually all parties to enforcement proceedings are litigants in person." The International Family Law Group said that "very often those considering issuing enforcement proceedings cannot afford legal advice and representation."
- 1.49 The Justices' Clerks' Society also noted that "as the legislation now requires a creditor to bring proceedings on their own behalf rather than relying on the court, the provision of clear, unambiguous, accessible guidance is essential."

How should the information be presented?

- 1.50 Law for Life/AdviceNow (a charitable organisation providing legal information) said that the information should be "clearly and simply set out." It said that the information should be "well designed and use a variety of presentation techniques to get its message across", and it should "be aimed at the sections of the intended audience with the least level of knowledge and experience of the issue". This is important as it is then "less likely to lose the most vulnerable sections of the readership, and the more capable ones will not mind having things spelled out."
- 1.51 The International Family Law Group said it would welcome the "production of a single, easy to read, guide to enforcement proceedings." The Justices' Clerks' Society said that "more visual information may be of assistance eg flow charts." It argued this "makes understanding of the process more accessible." The Law Society referred to the use of "video guides" on the court process, and Clarion Solicitors commented that the information "should be provided in electronic and paper format."
- 1.52 National Family Mediation supported the "recommendation for literature to be clearly understandable to laypeople, using Plain English." It noted this is "especially pressing since recent legislation, for example the Children and Families Act 2014, has generated new paperwork requirement. The C100 court order application form is now 28 pages long."
- 1.53 Resolution commented that "it is also important for information to be designed to assist and be reasonably understood by all litigants. Presentation of materials for litigants in person only suggests special treatment for them."
- 1.54 District Judge Robinson considered that there must be a better way of setting out the procedure rules and suggested looking at the "Child Arrangements Programme ([Family Procedure Rules] PD12B)" by way of analogy. He commented that the Programme "was a brave attempt at explanation", although noted that it was "let down by over complicated forms". He continued that whilst it would be a "major project", it would be "immensely worthwhile."

What information should be provided?

- 1.55 Law for Life/AdviceNow referred to a report it had produced in 2014: *Meeting the information needs of litigants in person*.³ Building on the report, it emphasised the need for any guide to enforcement “to clearly and simply set out what litigants in person need to know as well as how to deal with any barriers they may face.” It thought a guide to enforcement “could and should incorporate a step by step approach and links to the necessary court forms.” It stated that “this is the approach we adopt in all our guides to court processes”
- 1.56 Clarion Solicitors said that the “guidance needs to explain the options available in simple terms ... and cover all aspects of enforcement.” The Law Society noted that “it would be useful if the information available included video guides on the court process and how to fill in forms.”
- 1.57 Resolution suggested that information is necessary “about the nature and effect of the court process and any order, whether by consent or not, and the consequences of non-compliance.” Further, “more could also be done in warning notices on court forms and court information materials to emphasise, from the outset of the court process, the potential consequences of breaching an order.”
- 1.58 The Family Justice Council said that “Advice Now and Resolution provide excellent information” and the Council would support “consolidating the information and making it available through Advice Now”.

Where should the information be located?

- 1.59 The International Family Law Group said that the “single, easy to read, guide to enforcement proceedings” should be “available electronically on the internet and in hard copy format in places such as family courts, Citizen Advice Bureaux and local libraries.” Clarion Solicitors stated that the guidance needs to be “centrally available.” The Law Society commented that “for litigants in person, these guidance notes would be the main source of information on family financial orders, so they should be easy to find.”
- 1.60 As well as sending out a copy at the time of the relevant order, Law for Life/AdviceNow suggested that the “guide should also be available to the public electronically.”
- 1.61 The Family Justice Council said that information should be made available through AdviceNow. Further, it stated that “HMCTS and the MoJ should provide better information signposting litigants to Advice Now and Resolution.”

³ Available at <http://www.lawforlife.org/wp-content/uploads/Meeting-the-information-needs-of-litigants-in-person.pdf>.

When should litigants receive the information?

When the relevant order is made

- 1.62 Clarion Solicitors said it seems “self-evident that information about enforcement, remission of arrears and variation should be provided to parties at the point that any relevant order is made...”. They argued that the parties should “receive this along with the sealed consent order preferably with notification of the possibility that details about employment, address and financial circumstances may be disclosed at a later date in the event of default.”
- 1.63 International Family Law Group supported the “policy of automatically sending a copy of the leaflet to both parties at the conclusion of relevant family proceedings.” Law for Life/Advice Now suggested that “a guide to enforcement is written and sent out to the parties at the time a final financial order is made.”
- 1.64 Rhys Taylor said that he “can see the attraction of having a factsheet on enforcement with further links either on the reverse, footer or supplemental page to substantive orders.”

At the start of enforcement proceedings

- 1.65 The Law Society argued that “at the time the creditor makes an application for enforcement, they should receive brochures providing them with information on the process”.
- 1.66 The Family Justice Council stated that “litigants should be made aware of the sources of information in the guidance notes when they are completing the forms to start proceedings.”

Additional points

- 1.67 The Family Justice Council noted that “if the system is improved so that enforcement is fully contained in the Family Procedure Rules, the procedure will be easier for litigants and lawyers to use.”
- 1.68 Land Registry stated that it could not comment on the proposals but, with reference to paragraph 5.28 of the Consultation Paper, noted the following practice guides:
- (1) Land Registry Practice Guide 76, available from Land Registry’s Gov.UK website,⁴ gives information about protecting charging orders affecting a registered title.

⁴ See <https://www.gov.uk/government/publications/charging-orders/practice-guide-76-charging-orders>.

- (2) Where title to a property is unregistered, protection may be by way of land charge registration in the register of writs and orders affecting land; registration is made against the name of the affected estate owner pursuant to the Land Charges Act 1972 and Land Charges Rules 1974 – see Land Registry Practice Guide 63.⁵

Responses from consultation events

- 1.69 At the consultation event in Cardiff, it was suggested that the first step for any enforcement project is to make sure that litigants in person do bring issues of non-compliance back to court; otherwise any other reforms will be useless. Attendees suggested that information about enforcement might go in the standard financial orders; this could be as part of the order, as a footer or just a website link of somewhere to look for information.
- 1.70 At the consultation event in London, the proposal of having all information in one place was supported. It was felt that it must be possible to undertake the same exercise for domestic enforcement, maybe even getting all the information on one page, and this would be really useful.
- 1.71 At the consultation event in London, one attendee said, on behalf of Resolution, that few disagree that change is needed in this area. Resolution is very conscious of the rise in the number of litigants in person who will have no advice on, or experience of, drafting orders. This is likely to lead to even more problems and it would be helpful if statistics were collected to monitor this.
- 1.72 At the consultation event in Manchester, one attendee commented that many creditors cannot afford to use a solicitor for enforcement and so even improvement to the forms (to make them easier for litigants in person) is likely to be a big help.

Provisional proposal (2) – free advice

Introduction

- 1.73 In total, twelve consultees responded to this question. Ten consultees⁶ were in favour of reform although the extent of their enthusiasm varied; for some consultees, the financial considerations of such a reform were more of a pressing issue than others. Of these ten, three⁷ were more cautious towards reform. Two consultees⁸ were opposed to reform in this area.

⁵ See <https://www.gov.uk/government/publications/land-charges-applications-for-registration-official-search-office-copy-and-cancellation/practice-guide-63-land-charges-applications-for-registration-official-search-office-copy-and-cancellation>.

⁶ Clarion Solicitors; District Robinson; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices' Clerks' Society; Law Society; Resolution; One member of the public; Tony Roe.

⁷ Janet Bazley QC; Law Society; Resolution.

⁸ FLBA; Penningtons Manches.

Why is reform necessary?

Litigants' lack of resources and the increased number of litigants in person

- 1.74 Clarion Solicitors commented that “all too often the financially weaker receiving party is simply unable to fund legal advice or to comprehend the existing rules, meaning that they simply give up.” It said that “given the rise in the number of litigants in person, the provision of ‘family law facilitators is, in our view, necessary.”
- 1.75 International Family Law Group noted that “creditors considering enforcement proceedings very often cannot afford to pay for legal advice and/or representation.” Further, the “cost-benefit analysis often doesn’t favour personal representation.”
- 1.76 District Judge Robinson said that “free advice would be one step to allowing the many people who run out of money to understand enforcement.”

Encourage compliance from the debtor

- 1.77 International Family Law Group commented that the creditor’s lack of financial resources can act “as an incentive to the debtor to not comply with financial orders because they are aware that the creditor may feel like there is little or nothing they can do to enforce compliance.” It noted its experience of an increase in compliance as a result of a debtor “receiving a letter from a solicitor setting out the options available to the creditor and threatening enforcement proceedings unless there is at least partial compliance with an order within a specified period.”

Meritorious applications

- 1.78 International Family Law Group argued that “information as to the most appropriate method(s) of enforcement to a particular scenario and the procedure involved would result in significantly more meritorious enforcement applications being properly brought”.

Reasons against reform

Financial considerations/ Need for advice in all areas of family law

- 1.79 Even though Clarion Solicitors were generally in favour of this reform, they cautioned that “without funding, this suggestion has no strength.” Resolution commented that “any type of free service” would of course have “significant costs implications.” It noted that its own “Family Matters” scheme which provides a free service to help low income separating couples who were previously eligible for legal aid has “required financial investment and involved experienced lawyers”.
- 1.80 The FLBA stated that “the question of funding lawyers within court centres (or otherwise) to provide free advice raises much wider policy and resource issues.” It was opposed to reform solely in family enforcement; it stated it was not sure “that it is possible to look at enforcement as a discrete issue without a wider consideration of other, equally pressing, areas where publicly funded legal advice is no longer available.” It commented that “there is a great need for advice to be available to parties in a wide range of disputes such as substantive financial remedies applications and private law Children Act cases where legal aid was formerly available but now is not.”

- 1.81 Janet Bazley QC thought similarly that reform “might be appropriate” but it was “difficult to say that this should be prioritized over other areas in which funded advice or representation is no longer available following the changes introduced by LASPO.”

Ethical considerations

- 1.82 Penningtons Manches stated that they have “concerns about the ethical and compliance implications” of support and advice which is not based on a lawyer-client relationship.

How would the reform work?

Need for training and a funded and regulated system

Clarion Solicitors stated that “facilitators will only be as good as the training they receive.” Further, it said “there is, in our view, little point in having facilitators unless the following can be assured:

- (1) structured initial and ongoing training;
- (2) regular monitoring of the advice being dispensed; and
- (3) adequate funding.”

Formal duty solicitor scheme

- 1.83 The Judges of the Family Division thought that “a formal duty scheme in all Family Court Hearing Centres has much to recommend it.” Although, they were “unable to comment on the financial implications of such a recommendation.”

Limited specialist advice

- 1.84 International Family Law Group appeared to agree with our proposal, as they “urge consideration to be given to extending the scope to allow limited specialist advice to creditors contemplating enforcement.”

Californian system

- 1.85 In paragraph 5.40 of the Consultation Paper, we discussed the Californian system of self-help centres and family law facilitators. In its response, the Justices’ Clerks’ Society stated that it agreed with paragraph 5.40.

Within a lawyer/client relationship

- 1.86 Whilst the Law Society would “welcome greater free advice available to litigants in person”, the Society is not clear “how this could be made easier if it were outside the lawyer-client relationship.” It referenced the previous guidance it has provided on “unbundling”⁹ which “in principle, enables solicitors to provide advice on parts of a case without assuming responsibility for the entire case.” However, the Law Society doubted “whether it would be right for the relationship to be diluted further.” It concluded by saying that “we think that, in principle, lawyers in this situation should continue to owe all their professional duties to the client and should be liable for poor or inaccurate advice.”

Free/Fixed fee/Unbundled services by local solicitors

- 1.87 Resolution were concerned that “unless tailored and proper advice is available ... any scheme, whilst well intentioned, will be somewhat artificial and contrived and not provide people with the help they need/fill the policy gap.” For this reason, it proposed that “people would be better referred by the courts to free, fixed fee or unbundled services provided by local solicitors.”

Debt counselling help

- 1.88 One member of the public argued that “debt counselling help is needed, whether from the courts or other bodies.” He noted that “some people are not paying because they can’t cope with their financial problems.”

Additional points

- 1.89 District Judge Robinson commented that the “Citizen’s Advice provides some assistance, but the procedure is so complex that they cannot help sufficiently.”

INFORMATION AND TRAINING

We welcome consultees’ views on what more, if anything, could be done by practitioners and the courts, in the area of training and professional development, to help improve enforcement.

Introduction

- 1.90 In total, ten consultees¹⁰ responded to this question. All suggested reform to improve training and professional development in the context of enforcement.

Reform proposals

Training

- 1.91 Clarion Solicitors felt strongly that “there should be basic training and an ongoing CPD requirement in relation to this topic for all family lawyers and judges who deal with finances.”

⁹ See <http://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling/>.

¹⁰ Clarion Solicitors; District Judge Robinson; FLBA; International Family Law Group; Janet Bazley QC; Justices’ Clerks’ Society; Law Society; Penningtons Manches; Resolution; Tony Roe.

- 1.92 District Judge Robinson noted how “poorly prepared judges are to deal with enforcement work.” During a lecture to the judicial college he had asked for suggestions on the Law Commission Executive Summary; he commented that “the lack of feedback owed much to the general lack of knowledge and experience.” Further, he noted that “a few practitioners know their way around [the enforcement rules], but they are in the very small minority.” He questioned how “efficacious” training will be until the “procedures are simplified.”
- 1.93 International Family Law Group commented that “greater specialisation and expertise of family lawyers in finance work should lead to better orders anticipating potential future problems such as enforcement issues.”
- 1.94 The Justices’ Clerks’ Society argued that “it would be of assistance if there was a national training programme for all those involved in the enforcement of maintenance to ensure the powers and limitations of powers are fully understood by all.” In terms of who should receive training, it commented that “joint training of lay justices, legal advisers and judges may be appropriate under the principle of a unified family court.”
- 1.95 Penningtons Manches considered the “development of the skills of support staff should go hand in hand with the reform to the processes recommended.”
- 1.96 Resolution was “mindful of the need to train practitioners and address future risks and enforcement within the original proceedings, and to carefully look at the final order with this in mind, whichever party they act for.” Further, “standard financial remedy orders, and the proposed Resolution companion editions with footnotes and guidance, will need to fully address planning ahead for enforcement difficulties. Judicial training should also include planning ahead for this.”

Creation of an accreditation

- 1.97 Resolution said it was “considering whether a Specialist Accreditation Subject could be developed in this area. This would identify the relevant knowledge and performance competencies, from which further training and good practice would flow on both the current law and any future changes in this area.”
- 1.98 Tony Roe commented that “[enforcement] could feature more in [Resolution’s] accreditation schemes too.”

Specialist judge

- 1.99 In its “package” of proposals, the FLBA recommended “a specialist judge within each court centre (with a deputy available to cover holidays/illness) who would have responsibility for the training and the professional development of other judges and court staff on enforcement issues.”
- 1.100 In addition to consolidation of the rules, Janet Bazley QC noted that “either specialist judges or allocation to judges with sufficient experience and expertise would be very helpful.”

- 1.101 As well as the better drafting of orders, the Law Society proposed that it “would be worth exploring the idea that each court should have a specialist district judge for dealing with enforcement proceedings. These district judges would be given detailed training on Family Procedure Rules, Civil Procedure Rules and enforcement.” Although, the Law Society recognised the risk that “having only specialist judges hear these types of cases may delay listing,” it argued that “well-drafted orders should make it quicker to make future decisions related to the enforcement of an order.”
- 1.102 Penningtons Manches supported “the proposal that each court appoints an enforcement liaison judge who has received specific training in relation to enforcement law and practice.”
- 1.103 Tony Roe referred to a “designated judge” as a “very good idea”.

Specialist HMCTS staff

- 1.104 In addition to a specialist judge, the FLBA commented that “it would be helpful if a specialist member of HMCTS staff could be available at each court centre to manage the applications and ensure that sufficient evidence has been produced to enable a judicial decision to be made on each enforcement application”.

Cultural shift

- 1.105 Clarion Solicitors agreed that “a cultural shift is need to ensure that the existing options, which ultimately save costs, are used more often.” They then referenced the fact that “at judicial level, we have found significant reluctance to the possibility of securing periodical payments.” They felt that “defaulting to secured periodical payments (where circumstances allow) would be a helpful shift which would assist in limiting the number of later enforcement applications.”

Better drafting

- 1.106 As well as recommending a specialist judiciary, the Law Society commented that “many problems could be avoided through better drafting of orders, and that may require a better understanding of the enforcement options that are available.”

Provision of information

- 1.107 Resolution noted that “the provision of accurate and informative government information as proposed would be helpful for all and would most likely be cross referenced and built upon in information for family justice professionals.”
- 1.108 Tony Roe suggested that “Resolution’s Good Practice Guide should cover enforcement.”

Consolidation of existing enforcement provisions

- 1.109 A few consultees saw consolidation as a necessary corollary to any training of lawyers and the judiciary. The FLBA suggested the “codification of all methods within one statutory provision.” Further, it proposed that “consolidation of the rules within the [Family Procedure Rules] would make it much easier for practitioners, the judiciary and litigants in person to apply the rules with greater confidence.” Finally, The FLBA noted that “other suggestions we have received include a bespoke section on enforcement within the Family Court Practice (“the Red Book”) and a detailed practice direction specifically on enforcement.”
- 1.110 Janet Bazley QC thought that “a single statutory scheme for enforcement with consolidation of the procedural rules with the [Family Procedure Rules] would ... greatly improve matters.”

Consultation event responses

- 1.111 At the consultation event in London, it was pointed out that a lot of family lawyers are not sufficiently familiar with enforcement. As with Child Support Act 1991 issues, these technical areas of law tend to cause difficulties.
- 1.112 In Manchester, a district judge said that although there are section 9 money judges, there is no specialisation in the judiciary for family financial work let alone enforcement. Family financial work is not ticketed or specialised and falls within the civil jurisdiction. There are 18 judges in Manchester who can all deal with such matters. This also includes deputy district judges.
- 1.113 He explained that the process of centralisation, with work then being dispatched to hearing centres, raises issues around access to justice, but that it might also offer more opportunity for specialisation by the judiciary.

Additional points

- 1.114 Resolution has begun work on a suite of precedent enforcement orders with accompanying information for practitioners, which it will develop depending on the progress of the standard orders project.¹¹

ALLOCATION

- 1.115 This was generally addressed in the responses in relation to case management powers,¹² but we have extracted the relevant parts of the responses and deal with them here since this follows the structure of the policy paper.

¹¹ Undertaken by the Financial Remedies Working Group.

¹² See section at the end of the document.

Allocation of enforcement proceedings

- 1.116 The Consultation Paper took the provisional view that it was too early to reconsider this issue since the Family Court (Composition and Distribution of Business) Rules 2014¹³ were very recent but invited the views of consultees. The majority of consultees who responded disagreed and suggested that changes to the allocation procedures may improve enforcement. There was, however, no consensus as to the most appropriate way to deal with allocation.

Designated enforcement judges

- 1.117 Feedback on the possibility of designated enforcement judges in courts or court areas was generally positive from the consultees that addressed this possibility either in response to this specific question or when commenting on training (see above), although there was not always a clear distinction between support for specialist enforcement judges to hear cases and support for an enforcement liaison judge. Of the eleven written responses that addressed this issue in some way, nine appeared to support this approach, one objected and one was favourable but with some reservations.
- 1.118 District Judge Robinson said the enforcement liaison judge role had been “helpful” and there was value in encouraging this on a wider scale. He suggested the judge would need to be supported by a nominated legal advisor and experienced enforcement staff. International Family Law Group have found that the system in place in the Central Family Court “is working well. We have been impressed”.
- 1.119 The FLBA said that “each court centre should have a specialist enforcement judge of at least District Judge level (with a deputy to cover holidays / illness) both to hear enforcement cases and to provide information and guidance to other local judiciary on enforcement issues.” The Family Justice Council also thought “in courts of sufficient size ... a specialist enforcement judge would improve the system”, adding that “the nominated judge would also be able to oversee training for court staff”.
- 1.120 Clarion Solicitors were concerned that reserving enforcement matters to designated judges would cause further delay and that “it would be preferable for all family judges to have the necessary training”.¹⁴

¹³ SI 2001 No 840

¹⁴ This was also mentioned by the Law Society in relation to the issue of training and specialist judges.

Judicial continuity

- 1.121 Three consultees agreed with the suggestion that judicial continuity would be helpful in enforcement cases.¹⁵ Resolution and National Family Mediation both responded favourably to the idea of returning the enforcement application to the same judge that made the original order. FLBA stated that “judicial continuity should be retained where appropriate. There is a real sense of a creditor having to ‘start again’ when it comes to ... enforcement”.
- 1.122 The FLBA thought there should be a change to enable a judge presiding over an FDR who approves a consent order to later be able to “hear any contentious issue that subsequently arises on enforcement”. District Judge Robinson addressed negotiated orders more generally, commenting in his response that “the vast majority of orders are reached by consent either in negotiation or after an FDR, so the value of referring to the judge who made the order is illusory in most cases, though sometimes useful”.
- 1.123 District Judge Robinson indicated that, when allocating enforcement proceedings, he would not allocate these to the original judge if the judge was part time, as “the process needs consistency above all”.

Level of judge

- 1.124 It was generally agreed that enforcement is a technical area and allocation to the correct level of judge is very important. Particular observations were that “there is a tendency amongst [Deputy District Judges] to be less robust”,¹⁶ and that consideration could be given to “allocation of enforcement to District Judges and above who have particular experience of the issues which arise in enforcement applications”.¹⁷ The FLBA also emphasised the importance of the judge having “sufficient expertise to be confident in resolving the enforcement issues”.
- 1.125 A different view was expressed by District Judge Robinson, who proposed greater use of lay justices “saving Judges for cases with clearly defined legal issues”. Lay justices benefit from the experience of legal advisers in dealing with enforcement proceedings, and their skills generally. In contrast, “district judges are handicapped by the lack of any administrative support or in many cases any person to present the application”. Whilst the allocation of cases to legal advisers is particularly relevant to REMO cases, which are outside the scope of this project, District Judge Robinson wanted greater flexibility in the Allocation Guidance for Magistrates.
- 1.126 Penningtons Manches and the FLBA noted that the judge hearing enforcement proceedings should be able to grant “all of the remedies which may be appropriate” and “the widest possible array of methods available” respectively. Resolution raised the importance of the judge having the necessary powers particularly in relation to the allocation of general enforcement applications.

¹⁵ This includes the FLBA who also responded positively in relation to designated enforcement judges.

¹⁶ Clarion Solicitors.

¹⁷ Janet Bazley QC.

ENFORCEMENT BY THE COURT

We invite consultees' views on the enforcement of family financial orders by the court.¹⁸ Could the system be improved or extended?

- 1.127 Eleven consultees responded specifically to this question.¹⁹ However, general comments were also made within the consultation responses that can be applied, at least in part, to issues that are relevant to enforcement by the court. Those comments are addressed in more detail in other Chapters, but a number of themes arise which show why improving and extending enforcement by the court under rule 32.33 of the Family Procedure Rules could be useful and we touch on those in this section.

Reasons to extend or improve enforcement by the court officer

- 1.128 A recurring theme was that the enforcement system should be more accessible to litigants in person. Consultees noted that creditors make mistakes in their applications that cause delay and additional cost, or simply give up on the enforcement process as it is too difficult.²⁰ This would be avoided if the court officer had responsibility for conducting the enforcement proceedings following the initial application.
- 1.129 Another recurring theme was that creditors may not have the funds to bring repeated enforcement proceedings or to take legal advice to ensure these are conducted correctly.²¹ So if the creditor can only afford "one shot", then arguably it is better to entrust the management of this to the court, which should avoid wasted costs and make enforcement more cost-effective.
- 1.130 The emotional, as well as the financial toll on the creditor, was also raised, for example by International Family Law Group and the Justices' Clerks' Society. It was suggested that a more active role for the court would help to alleviate the "emotional strain" and may encourage more creditors, particularly "vulnerable litigants"²² to pursue enforcement. International Family Law Group also commented that the debtor may be influenced by the knowledge that the court is monitoring compliance with the order on an ongoing basis with authorisation to take action automatically if he or she fails to pay.

¹⁸ By "enforcement by the court" we mean enforcement action taken by a court officer pursuant to rule 32.33 of the Family Procedure Rules at the request and on behalf of a creditor who is in receipt of periodical payments that are made via the court.

¹⁹ Birmingham Law Society, Charles Russell Speechlys; District Judge Robinson; FLBA; International Family Law Group; Janet Bazley QC; Law Society; Penningtons Manches; Resolution; One member of the public; Tony Roe.

²⁰ For example Charles Russell Speechlys and Janet Bazley QC.

²¹ International Family Law Group; Janet Bazley QC; Justices' Clerks' Society.

²² This term was used by Penningtons Manches to describe those who cannot effectively enforce their order by themselves and it is assumed, in this context, to refer in particular to emotional vulnerabilities.

- 1.131 There were also many examples in the responses where consultees favoured the possibility of the creditor making one enforcement application that would then enable investigation of different methods of enforcement and also deal with changes in circumstances; a “seamless” process in the words of the FLBA. The Justices’ Clerks’ Society, the Magistrates’ Association and Malcolm Dodds provided further explanation of the previous procedure in the magistrates’ court and praised its simplicity; the creditor would give the court authority to deal with enforcement, the debtor would be summoned to attend, the court would conduct a means enquiry and then make an order for enforcement. It was felt that this offered many advantages to the creditor. The general enforcement application is an important step in that direction, but it lacks the continuing nature of the old procedure for registration and enforcement.

Extension of jurisdiction

- 1.132 Four consultees specifically supported the extension of the court’s jurisdiction under rule 32.33 of the Family Procedure Rules to receive (and to enforce in the case of default) lump sums, although some of those responses limited this to lump sums paid by instalments.²³ Tony Roe supported the idea that the court’s powers should be “extended” but without commenting on the precise scope of any such extension.

Awareness of the remedy

- 1.133 Four consultees commented specifically on how infrequently enforcement by the court is used. The FLBA, Penningtons Manches and Janet Bazley QC all thought this was a rare or little used remedy and Tony Roe commented that “since the creation of the single family court ... [it] seems to have disappeared from the mindset of a lot of practitioners”. Other responses raised concerns about how widely the remedy is known to be available.²⁴
- 1.134 There was general consensus that this method of enforcement can only be effective (even in appropriate cases) if the creditor knows it is available and that greater awareness and understanding is required. The main suggestions for achieving this was advertising, publicity and guidance, as suggested by International Family Law Group and Tony Roe.
- 1.135 Penningtons Manches also suggested integrating the remedy into the general enforcement application as ways to improve the uptake of this method of enforcement. Resolution also mentioned the general enforcement application and proposed adopting that procedure as necessary.

²³ Birmingham Law Society; International Family Law Group, Law Society, Resolution. Birmingham Law Society also specifically mentioned the enforcement of monies paid on account of costs.

²⁴ The Justices’ Clerks’ Society commented that successful enforcement by the court was dependent on the creditor being aware that he or she should provide authority for this and Tony Roe explained how his own investigations had shown the lack of any public guidance referencing or explaining the procedure as an enforcement option.

Obstacles to reform of this method

- 1.136 There were concerns raised about extending enforcement by the court. A principal cause of concern was the resource implications. District Judge Robinson noted that “the efficiency of this system has not been high in the past” and that, following the introduction of the Family Court in 2014, there were various administrative issues to resolve. One consultee commented that it had taken 14 months for the Central Family Court to take action on an old registered order. Birmingham Law Society expressed its concern about the court’s resources to administer these payments more generally.
- 1.137 District Judge Robinson thought that it would be helpful for Maintenance Enforcement Units to have greater scope to appear before the court or instruct a solicitor, although additional funds would obviously be needed for the latter. He also suggested that enforcement by the court should be allocated to a legal adviser with the power to attend a hearing and present the case and the discretion to choose the appropriate level of judge.
- 1.138 The FLBA considered that the court’s powers under rule 32.33 need not be extended since they are likely to be useful only in “simple low value cases”. It said that anything more complex is likely to need more input from the creditor. Janet Bazley QC agreed that enforcement by the court was particularly of use in “straightforward cases”, but saw more scope for the method provided that it was supported by a power to obtain the disclosure needed for it to be effective.

Responses from consultation events

- 1.139 An alternative, but related, proposal was made at the consultation event in Manchester; this was that the best solution would be for payments under family orders to be collected by HMRC.

STATISTICS

We provisionally propose that HMCTS should begin collecting and publishing data on the use of the different enforcement methods in the Family Court.

Do consultees agree?

- 1.140 Twelve consultees answered this question. Eleven²⁵ answered “yes” and one²⁶ answered “no”. Of the “yes” responses, two were cautious; they raised concerns about the difficulty of gathering certain statistics and balancing the need for statistics in the context of limited HMCTS resources.

In favour of reform

- 1.141 Of the eleven “yes” responses, the following reasons for provision of enforcement statistics were the most common:

²⁵ District Judge Robinson; Family Justice Council; FLBA; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Law Society; Penningtons Manches; Resolution; One member of the public; Tony Roe.

²⁶ International Family Law Group.

- (1) to improve performance of the courts by providing information which would help determine which method to use; and
 - (2) to know which methods of enforcement are the most effective/successful.
- 1.142 One member of the public was very supportive of the proposal and believed the collection of data should predate any other reform in the area of enforcement: “Yes. This is essential. No changes should be made until this information is obtained”.
- 1.143 The Law Society thought the information could be used to improve the performance of the courts. The Family Justice Council emphasised the role of statistics in determining the effectiveness of enforcement methods so that necessary improvements can be made. Janet Bazley QC echoed the usefulness of knowing which methods are the most effective: “I support this proposal as a suitable means of establishing an evidence base on the efficacy of each method of enforcement.” The FLBA also noted that the collection of statistics would help to create an understanding of “how the process operates in practice.”
- 1.144 The Justices’ Clerks’ Society supported the need to know the success rates of particular enforcement methods: “At the moment, it is unclear to the court how successful a particular method of enforcement is in collecting a debt. The JCS would welcome the provision of statistical data which would assist the court in determining which enforcement methods are appropriate.” The Society also drew attention to the need to know the cost effectiveness of each enforcement method.

Cautiously in favour of reform

- 1.145 Of the eleven “Yes” responses, two consultees expressed a degree of reservation in their responses
- 1.146 The Judges of the Family Division were unsure of the ability of the court to provide information on the success of a particular method: “We suspect it will prove very difficult to provide information as to how successful any particular method proved to be, although this information would be particularly useful.”
- 1.147 Resolution was cautious about whether there would be sufficient resources for such a proposal given limited HMCTS resources generally: “More needs to be known about the use of the existing raft of enforcement measures. But in the context of limited HMCTS resources we understand the need to balance this need alongside the need for other statistics and indeed to improve the core services provided by the family courts.”

Not in favour of reform

- 1.148 International Family Law Group expressed the same concerns as Resolution; namely, whether the resources needed to fund this proposal were an appropriate use of administrative time and money. It queried whether the money would be better invested in another one of our proposals: “We consider that time and funds would be better invested in producing a consolidated guide as to the enforcement methods available and the procedure involved.”

- 1.149 IFLG also questioned the premise of providing general statistics from fact-specific cases: "... each case is fact specific and we question how useful general statistics will be in assisting creditors and/or their legal advisors in determining which method of enforcement is most appropriate."

GENERAL ENFORCEMENT APPLICATION

Do consultees think that orders to obtain information, and the general enforcement application, work well? How could they be improved?

Responses to the question about the general enforcement application

- 1.150 Twelve consultees answered this question. Eleven consultees²⁷ considered that the general enforcement application required reform; one consultee²⁸ considered that the current system worked well.

General comments

- 1.151 District Judge Robinson said "the D50K procedure [had] been very popular with applicants, so much so that applications for oral examinations²⁹ have virtually disappeared", which he did not consider to be a bad thing. Clarion Solicitors said the general enforcement application was a good idea "in principle." The FLBA said that it supports "the continuation of the 'general enforcement' application as this gives the court the widest powers once the issue of enforcement has been raised." Janet Bazley QC noted that the general enforcement application "gives the court the most options (and the broadest powers) and should be retained." Penningtons Manches described the application as "a welcome simplification of the enforcement procedure", and commented that the application should "form the basis for further reforms of the enforcement system."

The need to cross-refer between the Family Procedure Rules and the Civil Procedure Rules

- 1.152 The most commonly cited concern was the difficulty caused by the need to cross-refer between the Family Procedure Rules and the Civil Procedure Rules. The FLBA said "the current need to cross-refer ... is confusing and time consuming and adds unnecessary complexity to the process. We are of the view that the complete enforcement process ought to be expressly set out in the [Family Procedure Rules]." Janet Bazley QC echoed that view: "... complexity is added as a result of some of the procedural rules being contained in the [Civil Procedure Rules] and others in the [Family Procedure Rules]. My view is that a comprehensive set of rules within the [Family Procedure Rules] would greatly improve matters." Pennington Manches also referred to the need to cross-refer as "confusing and unnecessary" and advocated that a "single set of rules specific to family financial orders should apply."

²⁷ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; Gwyn Evans; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Law Society; Penningtons Manches; Resolution.

²⁸ Tony Roe.

²⁹ Applications for "oral examinations" are applications for orders to obtain information pursuant to Part 71 of the Civil Procedure Rules.

A procedural gap

- 1.153 District Judge Robinson referred to a procedural gap that exists between the Family Procedure Rules and the Civil Procedure Rules: “There is a gap between the existence of this power and the detailed provisions of the [Civil Procedure Rules].” He said that “... the consequences of the Family Procedure Rules Order 33(1)(b) were not fully thought through when it was introduced.” District Judge Robinson said there is a need for “streamlined joined up thinking in drafting the rules...”.

Other procedural problems

- 1.154 A number of other specific procedural problems were cited by consultees.

LACK OF CLARITY AS TO REQUIREMENTS FOR APPLICATION

- 1.155 Gwyn Evans said that the rules are not clear as to whether a creditor needs to issue separate specific applications if he or she wants to obtain a third party debt order or a charging order on a general enforcement application. He queried whether it is right that, if separate applications are required, the creditor should incur the extra court fees and he noted that the cost of issuing a D50K as a general enforcement application is only half the cost of each of the specific applications required for a third party debt order and a charging order.

INADEQUATE NOTICE OF HEARING

- 1.156 Penningtons Manches raised a concern about the notice of hearing that is issued on an application for general enforcement: “As a specific observation, in our experience the notice of hearing issued by the court is inadequate. The notice issued by the Court in response to an application for general enforcement does not clearly set out the procedure (unlike, for example, the Notice of First Appointment, or Judgment Summons). The court currently lists a 30 minute hearing “for directions or disposal” without reference to what the parties should expect at the hearing. It should be made clear that failure to attend hearings or provide information will be a contempt of court and that the full range of coercive measures will be available to the Court.”

LACK OF FINANCIAL DISCLOSURE BEFORE THE HEARING

- 1.157 A concern raised by a number of consultees was that there is a lack of information about the debtor’s financial circumstances before the hearing, which is when questioning of the debtor is supposed to take place. The FLBA said “... the lack of detailed and reliable information about the financial circumstances of the debtor in advance of any court hearing, and the differing powers between different levels of judiciary, mean that the process can be slow and expensive, involving numerous hearings and considerable delay.” Janet Bazley QC commented that “the process is often impeded by a lack of reliable information about the debtor’s assets and means ...”.

- 1.158 Resolution suggested that disclosure should take place before the hearing: “We suggest that an option for the court to direct the filing of a short standard form for initial disclosure would be of assistance in general enforcement applications.” International Family Law Group made a similar recommendation in respect of the process for orders to obtain information which they said could also apply on a general enforcement application: “We would suggest that the current procedure could be improved if the debtor was given reasonable opportunity to provide answers and any documents sought to the creditor, say, seven days before the hearing; the creditor can then consider whether the debtor has provided everything sought and, if so, vacate the hearing.”³⁰
- 1.159 The Justices’ Clerks’ Society approached the problem in a different way and recommended that the application form for the general enforcement application “could encourage the creditor to provide more information at an early stage about what is known about the debtor.” The Society acknowledged that the creditor may not have up to date information about the debtor but “the creditor will at least know what the debtor’s circumstances were when the order [w]as made.”

PROBLEM OF DELAY AND INCONSISTENCIES BETWEEN COURTS

- 1.160 The Family Justice Council noted: “Some courts list the general enforcement application (the D50K) for directions initially and other courts are slow in issuing applications, largely as a result of staff shortages, which adds to delay for the creditor.

Judicial powers/ judicial experience

- 1.161 Three consultees referred to the fact that different levels of judiciary have different powers, meaning that an application may end up before a judge who does not have the power to make the most appropriate order. Janet Bazley QC said that the process is often impeded by, among other factors, “the fact that some of the court’s range of powers are not available to every level of judiciary.” The FLBA recognised this variation in judicial powers as one of the causes of the process being “slow and expensive, involving numerous hearings and considerable delay.”
- 1.162 Resolution recommended that “whatever level of judge in the single family court a general application for enforcement comes before at first instance, they should have the power to make the appropriate order.” It provided the example that at present, “magistrates have no power to make a charging order requiring transfer to a District Judge.”
- 1.163 The Law Society suggested there was a lack of experience among the judiciary in dealing with these applications: “Not all judges and court officers have experience of dealing with general enforcement applications. General enforcement applications operate well when the relevant questioning is carried out by a judge or court officer who is familiar with these types of orders.”

³⁰ The creditor may, of course, still want the hearing to go ahead if the creditor has made a general enforcement application and wishes the court to make an enforcement order. If the creditor had made only an application for an order to obtain information then the creditor may decide to vacate the hearing on the debtor providing the required information.

Remedies available on the application

- 1.164 The Judges of the Family Division said that the “one major difficulty” with the general enforcement application arises when a creditor makes a general enforcement application but is seeking a judgment summons. The judges said: “It is common for a creditor to make the general application in the expectation that the committal to prison of the debtor will be immediately available to the judge hearing the application. A means must be devised for bringing to the attention of the debtor that a separate application must be made for a Judgment Summons.”
- 1.165 In addition to that specific issue, two consultees noted that creditors often do not have any idea what they want the court to do. District Judge Robinson said that “litigants in person often have no idea what sort of enforcement they want, and the judge has to undertake an investigation. To some extent, the system is used to get guidance from a judge in the absence of proper legal advice, while at the same time getting the judge to carry out an oral examination (if the debtor attends).” Similarly, the Law Society noted that: “The general enforcement application is useful, but an occasional problem is that parties may believe that the general enforcement application circumvents the need to ask the court to make specific orders. For example, general enforcement applications do not automatically include general enforcement orders. The creditor must be clear about what they are asking the court to order.” The Law Society suggested that, when issuing an application, the creditor “should be prompted by the court to consider whether a specific enforcement order also needs to be requested.”

The application requires co-operation by the debtor

- 1.166 Two consultees made the point, that to be a successful process, the general enforcement application requires a certain level of co-operation on the part of the debtor. In reference to both the general enforcement application and orders to obtain information, Clarion Solicitors said “both applications require a degree of cooperation from the paying party, which often results in difficulty and expense for the receiving party.” The Family Justice Council noted the problem that arises if the debtor does not bring the required information to court, “the case is adjourned and the creditor is still not receiving any money.”
- 1.167 International Family Law Group suggested that consideration should be given to adopting a new procedure similar to that currently in practice at the Central Family Court in without notice applications for non-molestation orders.³¹ The procedure is that where a party has obtained a without notice non-molestation order, there is no need for the applicant to attend on the return date; it is for the respondent to attend and provide an explanation. If the respondent’s case raises legitimate issues then a further hearing will be listed and necessary directions given. International Family Law Group explained that the procedure avoids the need for the applicant to incur the costs of the return date hearing, where often the respondent will attend and “may well have all sorts of complaints and concerns arising from the relationship but not a defence to the non-molestation order itself.”

³¹ A non-molestation order is an order prohibiting the respondent from acting in a certain way, for example from seeking any contact with the applicant, made under the Family Law Act 1996.

- 1.168 International Family Law Group explained that such a process acts as a “filter”. It advocated that a similar procedure could be used in applications for enforcement. It said: “Of course there are differences with the enforcement process but we ask for consideration of whether there should be some form of return date, with a fairly short hearing, perhaps with a show cause indication on the paperwork for the respondent to explain his or her position, thereby allowing the judge to treat akin to a form of case management and decide whether the proper process was being used and what other directions were needed for the most efficient disposal of the application with the applicant then to attend on the next occasion.”

Proceedings in absence of debtor

- 1.169 The Justices’ Clerks’ Society raised the issue of how to proceed in the debtor’s absence. It said: “The court is able to proceed in absence if the debtor does not attend court. In practice, this is unrealistic as the court does not have any information to make an informed decision as to which method of enforcement is likely to be appropriate. It would be helpful if proceeding in absence could be made a viable informed option for the court since the process of securing a debtor’s attendance via warrant through the contempt provisions is lengthy and expensive for the court to administer in terms of bailiff’s time. Whilst attendance is being pursued by the court, the maintenance arrears continue to accrue causing hardship for the creditor and the debt to increase to more challenging amounts when the debtor finally attends court. The ability to proceed in absence with sufficient information would be a welcome option.”

Conduct money (the requirement that the creditor offer the debtor his or her reasonable travel expenses to attend court)

- 1.170 District Judge Robinson described “conduct money” as an “obvious problem”. The Judges of the Family Division said that this requirement needed to be made clear.

ORDERS TO OBTAIN INFORMATION

Generally

- 1.171 Six consultees³² responded to the question specifically in relation to orders to obtain information (although it was sometimes difficult to tell whether consultees were commenting on the general enforcement application or orders to obtain information, or both). Responses generally did not show a great enthusiasm for the use of orders to obtain information, with responses focusing on the difficulties with the application. However, International Family Law Group said “orders to obtain information are vital to many creditors considering whether to issue enforcement proceedings.” And, Clarion Solicitors said “These [referring to both the general enforcement application and orders to obtain information] are good ideas in principle...”

³² Clarion Solicitors; District Judge Robinson; International Family Law Group; Justices’ Clerks’ Society; Penningtons Manches; Tony Roe.

Use of the order

- 1.172 District Judge Robinson said that applications for orders to obtain information have been replaced by general enforcement applications: “They are not missed, and added a level of complication.” Tony Roe said that “they can work but, at best, are patchy.”
- 1.173 The Justices’ Clerks’ Society reported that their members have limited experience of the order but “those members who have experience report that the process is cumbersome compared to the means enquiry system used in magistrates’ courts.” Penningtons Manches commented that “the requirement to cross-refer to the [Civil Procedure Rules] for orders to obtain information is confusing and unnecessary. A single set of rules specific to family financial orders should apply.”

The involvement of, and provision of information by, the debtor

- 1.174 Clarion Solicitors complained that the application requires “a degree of co-operation from the paying party, which often results in difficulty and expense for the receiving party.” International Family Law Group thought that efficiency would be better served by compelling the debtor to provide the information and documents sought to the creditor before the hearing, rather than at it, commenting:

We would suggest that the current procedure could be improved if the debtor was given reasonable opportunity to provide answers and any documents sought to the creditor, say, seven days before the hearing; the creditor can then consider whether the debtor has provided everything sought and, if so, vacate the hearing. This would not only save time and money, but also reduce the burden on the Courts.

- 1.175 In a similar vein, International Family Law Group suggested that what would be, effectively, an interim hearing, could be adopted, to be attended only by the debtor. This would allow the judge to use that hearing as a case management hearing to assess what directions were needed for the efficient disposal of the case, with the applicant only attending on the next occasion.

Fees and travel expenses

- 1.176 International Family Law Group said that orders to obtain information are useful for creditors with less financial means to check whether it is worth them expending funds to apply to enforce an order but point out that, in addition to the court fee, there are the expenses of personally serving the debtor and, potentially, paying the costs of his or her travel expenses for the hearing. It asked whether “the court fee could be reduced or waived for those creditors in financial hardship especially in the absence of legal aid.”
- 1.177 Further, International Family Law Group said: “We also question whether, given that the debtor is arguably in contempt of court for failing to comply with a financial order, it is necessary for the creditor to offer to meet their travel expenses in attending court in the first instance”. They suggested that the payment of travel expenses “be in the power of the court to order at the conclusion of the enforcement application or on special application.”

- 1.178 We do not recommend any reform to orders to obtain information as we take the view that, in the context of the enforcement of family financial orders, they are largely superseded by the general enforcement application, taking account of the reforms that we suggest to that application.

International considerations

- 1.179 Clarion Solicitors noted the “hurdle” of orders to obtain information not applying “to those living abroad”.
- 1.180 International Family Law Group urged the Law Commission to consider the obligations in reciprocal enforcement cases on central authorities (in this jurisdiction, the Lord Chancellor) “...for the provision of information, assistance with enforcement procedures and similar help...”. It commented that: “We are pleased at this international comity and assistance from this international law but we must make sure that no lesser service and central government assistance is given to... national enforcement.”

INFORMATION ABOUT THE DEBTOR

We provisionally propose that:

- (1) **an obligation be placed on the debtor to complete a financial statement where the creditor makes an application for enforcement proceedings; and**
- (2) **that the form of the financial statement be based on a variant of the Form E.**

Do consultees agree?

- 1.181 Fourteen consultees responded to this question and of those:
- (1) Thirteen agreed that a financial statement completed by the debtor, in some form, would be desirable,³³ and
 - (2) One did not agree.³⁴
- 1.182 The area that was identified as most problematic, and on which there was no consensus, was the information that a debtor should be asked to provide. The issue being, as one consultee put it, finding the correct balance “between a statement which provides sufficient information to be meaningful without being an overwhelming burden [for the debtor]”.³⁵

³³ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Law Society; Money Advice Trust; Penningtons Manches; Resolution; Tony Roe.

³⁴ One member of the public; the response also helpfully continued to set out views on relevant points if such an obligation was introduced.

³⁵ Clarion Solicitors.

Arguments in favour of the obligation

- 1.183 The general consensus was that it would be sensible and helpful to have a requirement that the debtor produce disclosure in enforcement proceedings. Resolution identified insufficient information about the debtor's circumstances as the "biggest barrier to creditors who wish to obtain payment". International Family Law Group focused on addressing the risk of the creditor "throwing good money after bad" if the debtor does not, in fact, have any resources. The Justices' Clerks' Society commented that a lack of information limits both the creditor's and the court's ability to make informed decisions about enforcement.

Arguments in favour of using Form E

- 1.184 Janet Bazley QC and a section of the FLBA³⁶ favoured a requirement on the debtor to file Form E. Janet Bazley QC considered the existence of "a different (shorter) Form E for Schedule 1 applications ... has proved unhelpful" and agreed with the recommendations of the Financial Remedies Working Group that there should only be one form of financial statement in family proceedings.
- 1.185 Janet Bazley QC considered that placing a burden of full and frank disclosure on the debtor is not disproportionate as it is the debtor who is claiming to be unable to comply with a financial order made after consideration of the debtor's ability to pay. In favour of the Form E, the FLBA suggested that it may be hard to determine what information is relevant unless a complete overview is provided to the creditor. Finally, there is an argument that if the debtor has few or no assets (as is presumably claimed) then the Form E should be relatively easy to complete.

Arguments in favour of a new enforcement financial statement

- 1.186 Many of the consultees who responded to this question preferred the idea of a simpler version or a variant of the Form E (which, in light of the discussion in the Consultation Paper, we take to mean a shorter, simpler version).³⁷
- 1.187 The common arguments advanced for this included the cost and delay involved in completing (and considering, for the creditor) a Form E and the likelihood that much of the information will be irrelevant for enforcement purposes. Two further arguments made by the FLBA were:
- (1) the obligation to complete a Form E may encourage debtors to seek variation, as they would be under the same obligation and incur the same cost in such proceedings; and
 - (2) "[the risk of] disproportionate (and strategic) enforcement applications ... to compel unilateral disclosure because e.g. the receiving party is considering whether to apply to vary the previous order".

³⁶ The FLBA's response was split on this point.

³⁷ District Judge Robinson; FLBA (as the second example of the views generally expressed by its members); International Family Law Group; Judges of the Family Division; Law Society; Penningtons Manches; Resolution; One member of the public.

- 1.188 The Law Society proposed that a new form of financial statement for an enforcement application could include a requirement for the debtor to provide a narrative explanation of why he or she has defaulted and what proposals he or she makes to improve compliance with the order.
- 1.189 Those within the FLBA advocating a simpler form of financial statement for enforcement thought that this could be supplemented by “further disclosure if the particular case warrants it”, a view shared by Penningtons Manches. International Family Law Group also proposed that creditors should be able to ask questions about the disclosure provided, as applicants can in financial remedy proceedings.

Documents in support

- 1.190 There were differing views on the amount of information that ought to be provided in support of a financial statement by the debtor; for example the view on bank statements and payslips ranged from those covering a period of one month to a period of six months.³⁸
- 1.191 There was, however, general consensus amongst consultees that significantly less documentation would be required on an enforcement application than in support of a Form E in financial remedy proceedings. It was suggested by consultees that the following could be produced (in various combinations):
- (1) documentary evidence of any properties owned by the debtor (or in which he or she has an interest);
 - (2) bank statements;
 - (3) payslips;
 - (4) employment contract (if the debtor is employed);
 - (5) accounts and tax returns (if the debtor is self-employed); and
 - (6) documentary evidence of income from any other sources.
- 1.192 It was also suggested that there could perhaps be more flexibility about the form of documentary evidence required. The Law Society gave the example of a debtor who had left his or her employment and had lost previous payslips; the Society considered that alternative evidence of that income should be acceptable.

Time periods

- 1.193 Only two consultees commented specifically on the time period that debtors should be given to complete the financial statement. The Law Society recommended four weeks. A member of the public recommended a period of six weeks.

³⁸ Both of these suggestions appeared in the FLBA’s response, which set out two alternative views expressed by its members.

1.194 International Family Law Group proposed a time period at a different stage in the obtaining of disclosure. Conscious of malicious or unreasonable enforcement applications, it said it would be worth considering a minimum time period after the default occurs before the debtor is placed under the obligation to provide a financial statement.

Other points to note

1.195 District Judge Robinson proposed that completion of the form should be compulsory, but that there should be scope for a judge to waive the obligation in an appropriate case. International Family Law Group agreed that the obligation should apply “unless on specific application to the contrary”.

1.196 The Justices’ Clerks’ Society thought that the obligation could be supported by the possibility of drawing adverse inferences from a failure by the debtor to complete the financial statement. However, it also generally queried the reliability of any information provided by the debtor, which would not be independently checked, and indicated a preference for information requests and orders.³⁹

1.197 A member of the public suggested that the creditor should also be obliged to complete a financial statement in the same form.

1.198 The Law Society proposed a checklist at the time of the final financial order directing the judge to ensure that the following critical information is on the court file:

- (1) name and address of employer(s);
- (2) salary;
- (3) bank accounts; and
- (4) saving accounts and other relevant details.

1.199 The justification for this is that information would remain on the court file and so be available to the creditor at the point of enforcement.

1.200 Family Justice Council suggested that the order to obtain information and the general enforcement application should be consolidated. The Council proposed that upon application for the consolidated enforcement procedure, the court would issue standard directions (as is the case in financial remedy proceedings) within a specified time period of, say, five days. One of those directions would be for the debtor to file a financial statement “similar to a Form E”. The hearing would take place before a judge and a failure to comply with the directions would be punishable by contempt. As a general point, it was suggested that litigants in person struggle with personal service (although this extends beyond purely enforcement) and that providing a list of process servers would be of assistance.

³⁹ We recommend the introduction of information requests and orders to enable the court to obtain information about the debtor from third parties. Information requests would be directed at certain government departments and information orders at certain private bodies.

Consultation events

- 1.201 One district judge at a consultation event told us that the attachment of earnings disclosure forms are hardly ever completed by debtors; the judge considered that an obligation to complete a financial statement is likely to be ignored.

INFORMATION REQUESTS AND ORDERS

We ask for the views of consultees as to:

- (1) **whether the provisions of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) relating to information requests and orders should be brought into force in relation to family financial orders; and**
- (2) **whether the information so obtained should be disclosed to the creditor.**

Responses to question 1

Introduction

- 1.202 Fifteen consultees answered this question. Fourteen consultees⁴⁰ said, either explicitly or implicitly, that the relevant provisions of the 2007 Act should be brought into force. Two consultees⁴¹ were not in favour. Charles Russell Speechlys and Land Registry did not specifically address the question but commented on related issues.
- 1.203 The FLBA thought that the provisions would assist the court and the creditor to target the enforcement process where it is most likely to achieve success. It said that “underlying this framework ... is the fact that the debt represents payments that a court has already ordered the debtor to make” and that, if he or she has the funds to do so, such payments should be swiftly and effectively enforced. The positive response of the Money Advice Trust was, tentative, as it said that it does not object “in principle” to the provisions being brought into force for the enforcement of family financial orders.

⁴⁰ Association of Pension Lawyers; Clarion Solicitors; District Judge Robinson; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Law Society; Money Advice Trust; National Family Mediation; Penningtons Manches; Resolution; Tony Roe.

⁴¹ Wendy Kennett and one member of the public.

The importance of information

- 1.204 Consultees stressed the importance of information requests and orders providing information to creditors and therefore allowing effective enforcement. District Judge Robinson said "... anything which provides independent sources of information should be welcomed." Penningtons Manches commented that "the provision of information from independent third parties such as HMRC, financial institutions and credit agencies would be invaluable aids to enforcement." The FLBA and Janet Bazley QC agreed with the view of an academic article, referred to in the Consultation Paper, that information requests and orders represented "the Government's best idea" for enforcement.⁴²

Other benefits of bringing into force these provisions of the 2007 Act

- 1.205 Some consultees saw other benefits of the provisions of the 2007 Act being brought into force: the Justices' Clerks' Society believed that "these measures would support the ability of the court to proceed in absence [of the debtor]". Penningtons Manches thought that "it might also avoid the need for coercive steps to be taken to obtain information from the debtor." Wendy Kennett thought that it would be useful if information about any other concurrent enforcement action against the debtor could be provided, as this would indicate the "... level of overindebtedness and potential vulnerability of the debtor." It could allow enforcement action to be coordinated, trigger referral of the debtor to debt advice and might allow priority to be given to family financial orders.

How might information requests and orders work?

Information providers

GENERALLY

- 1.206 Some consultees specifically agreed that information requests and orders could be directed to government agencies and financial institutions, as suggested in the consultation paper (for example, Janet Bazley QC and the FLBA), others also mentioned HMRC specifically (Penningtons Manches). None suggested that such respondents were not appropriate targets for these provisions. From a comparative perspective, Wendy Kennett said that a debtor's current address, national insurance number and details of any employment were the most commonly sought items of information in the jurisdictions that she had studied but that details of bank accounts were less readily available.

PENSIONS

- 1.207 Specifically in relation to pensions, the Association of Pension Lawyers, thought that "the ability of the Court to obtain up-to-date information is important" and said that there was a case for information being provided about pensions whether or not a pension order was contemplated:

⁴² J Baldwin and R Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 *Civil Justice Quarterly* 159.

bearing in mind that pensions may be a major part of the debtor's assets and the Court may want to ascertain the extent of a party's pension funds in evaluating whether enforcement may be reasonably ordered against the party's other assets.

CREDIT REFERENCE AGENCIES

- 1.208 Penningtons Manches thought that it would be beneficial if information orders could be used against credit reference agencies, given the detailed information held by these agencies. They said that "credit reference agencies can hold a treasure trove of information for a creditor, as they may reveal assets against which direct enforcement measures can be taken, such as bank accounts and properties."

LAND REGISTRY: SEARCH OF INDEX OF PROPRIETORS' NAMES

- 1.209 Land Registry set out the limitations of a search of the Index of Proprietors' Names maintained by the registrar pursuant to Rule 11 of the Land Registration Rules 2003. Land Registry explained that the result of a search under this provision "cannot prove that an individual does not own property within England and Wales." This is because a search might reveal properties owned by individuals or organisations with the same name and because unregistered property would be not be found by the search. Land Registry said that a "search against an individual name may be permissible under the terms of a court order, or with the written consent of the individual concerned."

Confidential information and data protection

- 1.210 Several consultees⁴³ picked up on the discussion from the Consultation Paper around information orders not applying to those who hold privileged or sensitive information, such as solicitors and debt advice professionals, and said that they agreed with this approach. The Justices' Clerks' Society said that "protection must be afforded to the debtor in terms of data protection and which third parties may be approached." The Money Advice Trust also expressed concern that these issues be addressed. However, Janet Bazley QC said that a debtor should not be allowed "to unreasonably use data protection as a shield."

Costs

- 1.211 The Judges of the Family Division said that the creditor would have to bear the cost of obtaining an information order against a third party in the first instance.

⁴³ The FLBA, Janet Bazley QC and the Money Advice Trust

- 1.212 The Association of Pension Lawyers, in considering information orders being made against pension providers, cautioned that the costs implications and practicalities of pension trustees and administrators complying with information orders would need to be addressed. It suggested that, where possible, pension schemes could be allowed to recover reasonable compliance costs from the debtor's pension fund, with costs being calculated in accordance with a set scale, akin to the scale produced by the National Association of Pension Funds for the calculation of administration costs for pension sharing. The Association said that there might be difficulties both where the information order was not followed by a pension sharing order and where the debtor has benefits under a defined benefit scheme because, in the latter situation, there would be no ready fund from which to meet the charges.

FILTER

- 1.213 District Judge Robinson said that "There could be some filter to demonstrate that the [information] request is justified."

Potential problems

- 1.214 Other consultees point out the potential pitfalls of information requests and orders. The Money Advice Trust said that it was concerned that the procedure might be "cumbersome": "It would be a duplication of effort, resources and time to have separate information orders on each occasion. This needs to be addressed when looking at the rules in detail."
- 1.215 Wendy Kennett's response echoes this concern; she was not convinced that "Part 4 of the Tribunals, Courts and Enforcement Act is workable – although of course much depends on the method of implementation. Nevertheless, the process seems to be labour intensive and unwieldy." She found it implausible that resources would be found to enable access to information only in the context of family financial orders, pointing out that the number of such cases was small in comparison with the number of court orders enforced in other contexts.

Bankers' Books evidence act

- 1.216 Charles Russell Speechlys pointed out that the Bankers' Books Evidence Act 1879 provided the power for the court to obtain evidence from a debtor's bank, but said that the Act was "little known and little used." They thought that this Act could be integrated with information requests and information orders "in the interests of keeping the statute book tidy".

An alternative to information requests and orders

- 1.217 Wendy Kennett's opposition to information requests and orders was not based on any opposition to the provision of information from third parties to the court; her response acknowledged that "good information about the debtor is key to effective enforcement". However, she considered that "real improvement in the enforcement of family financial orders needs to be part of a more comprehensive arrangement that also provides for access to information in other areas of enforcement work." Drawing on her knowledge of other jurisdictions, she envisaged a system where authorised persons would access, for enforcement purposes, a database on which information from government departmental records would be automatically placed. This data could include the debtor's address and employment, and any other enforcement action and the nature of the judgment or order. The authorised persons could determine, using the data, whether a case was suitable for immediate enforcement action or whether it should be referred for debt advice. Wendy Kennett therefore supported:

imaginative structural reform and/or linkage of institutions (courts, enforcement firms, specialist law firms....) so that experience and expertise can be concentrated, limited information about the debtor can be made available, focused training can be provided, the various elements of enforcement practice can more effectively be supervised and regulated, and a central advice point can be created for litigants in person.

She believed that developments in IT and digital media and decreases in costs made such reform more affordable.

- 1.218 We think that complete structural reform of the enforcement system is not feasible but we have tried to incorporate some aspects of these ideas into our recommendations for information requests and orders, and those for enforcement liaison judges and better guidance for litigants in person.

Responses from consultation events

- 1.219 There was support for information requests and information orders at the consultation event in Cardiff. One attendee felt that most of the issues with enforcement involve getting information; he liked the idea of going to HMRC. He thought information from HMRC could help with finding the whereabouts of litigants in person and the details of a debtor's employment for the purposes of attachment of earnings orders. He noted that at present, trying to obtain the latter is time consuming because often neither the debtor nor the employer respond to requests.
- 1.220 At the consultation event in London, one attendee had a case where a reluctant husband refused to pay and went to live abroad. In that case, Mr Justice Mostyn suggested investigating the powers available in child abduction matters and then used this power to make an order that when the husband comes back into the country the court or tipstaff will be informed. This is the first time the attendee was aware of such an order in financial proceedings.

- 1.221 The same attendee suggested that the creditor contemplating enforcement could apply for an order against a third party like Experian to produce a report. Such reports give detailed information about bank accounts, credit arrangements and so on.

Responses to question 2

Introduction

- 1.222 Responses were mixed as to whether information obtained under information requests and orders should be disclosed to the creditor. Ten consultees⁴⁴ were of the view that the information obtained should be disclosed to the creditor, three⁴⁵ thought that it should not, and three⁴⁶ of the consultees who answered the first question did not answer the second question.

The balance of interest between the debtor's privacy and the creditor's need to enforce an order

- 1.223 Clarion Solicitors and Penningtons Manches both referred to the balance to be struck on whether disclosure should be made, but came down on opposite sides. Clarion Solicitors said: "On balance, we feel that leaving the information in the hands of the court may be the most appropriate provided that the court has sufficient resources to deal with that information proactively." In contrast, Penningtons Manches considered that "the balance between preserving the privacy of the debtor and the right of the creditor to receive payment ordered by the court should be determined in favour of the creditor."
- 1.224 International Family Law Group contended that "any arguments about violations of privacy to the debtor lose much (if not all) of their weight as the debtor is likely to have already been ordered within previous proceedings to provide full and frank disclosure". It noted also that further disclosure would be required in any event if the debtor applied to the court to vary his or her obligations under a financial order. The Justices' Clerks' Society also thought that privacy arguments were not so strong in the Family court "where there is an expectation of full and frank disclosure."

The creditor being placed in an informed position

- 1.225 Several consultees⁴⁷ made the point that disclosure should be made to the creditor of the information obtained because this places the creditor in an informed position to make decisions, such as how, and even whether, to enforce. International Family Law Group said that "if the creditor is denied information about the debtor's financial situation, they are not properly able to determine which method of enforcement is most appropriate."

⁴⁴ District Judge Robinson; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices' Clerks' Society; Law Society; Penningtons Manches; Resolution; Tony Roe.

⁴⁵ Clarion Solicitors; One member of the public; Wendy Kennett.

⁴⁶ Association of Pension Lawyers; Money Advice Trust; National Family Mediation.

⁴⁷ The FLBA, the Law Society, Janet Bazley QC, the Justices' Clerks' Society and International Family Law Group

Article 6 of the ECHR considerations

- 1.226 Two consultees,⁴⁸ specifically mentioned the creditor's rights under article 6 of the European Convention on Human Rights (right to a fair trial). They suggested that if information obtained under these provisions was not disclosed to the creditor that could amount to a breach of the creditor's rights.

Burden on the court if disclosure not made to the creditor

- 1.227 District Judge Robinson thought that, on a practical level, if disclosure were only made to the court then this would, unless the court were to be given "Enforcement Officers", "...not assist much and add to the burden." He was of the view that disclosure should "be to the parties direct."

Confidential basis of disclosure

- 1.228 Resolution, supporting disclosure to the creditor, commented that the disclosure should be made on a confidential basis. A member of the public also said that this should be the case but that comment was made in the context of disagreeing generally with information requests and information orders being brought into force.

Opportunity for debtor to object to disclosure?

- 1.229 The Justices' Clerks' Society thought that the question of whether disclosure should be made to the creditor could be decided by the court if the debtor objected: "The court could then conclude whether the information should be passed on having heard the debtor's representations." It went on to say, "However, for this to happen, the debtor would need to be made aware of the application for the request for information. This may defeat the object of the application."

Consultees who did not think that disclosure should be made to the creditor

- 1.230 As noted above, Clarion Solicitors thought that the balance between disclosure and the debtor's privacy should be resolved in favour of the debtor's privacy, the other consultees who did not support disclosure to the creditor raised different arguments.

CONFIDENTIALITY AND FAMILY RELATIONSHIPS

- 1.231 One member of the public, who considered that information requests and information orders should not be brought into force, argued that creditors may not respect the confidentiality of the information received. He said that "the ease with which the creditor can leak this information to third parties is a reason not to bring this into force." He thought that the greater level of acrimony in family proceedings, distinct from other civil proceedings, meant that there was a greater risk that the information would be "leaked". He said that disclosure could be made to third parties, or any children of the debtor and creditor, which raises the prospect of disclosure affecting family relationships.

⁴⁸ The FLBA and Janet Bazley QC.

- 1.232 The Money Advice Trust did not comment on whether information should be disclosed to the creditor but it said that “there are issues to do with the family relationship for the creditor and defendant which could be affected by such a move.”

DISCLOSURE TO CREDITOR NOT EFFICIENT

- 1.233 Wendy Kennett’s view was that information should ideally be disclosed only to an enforcement agent or court officer not the creditor, as she thought that “an efficient system needs to be much more automated and routine, which cannot be achieved if the information is passed to the creditor.” She did acknowledge that disclosure only to the court (or another agency) and not to the creditor might not be feasible, “given the position of the creditor as the main decision-maker within the enforcement system.”

ATTACHMENT OF EARNINGS ORDERS

Do consultees think that the provisions for tracking, contained in the Tribunals, Courts and Enforcement Act 2007, should be brought into force for family financial orders?

Introduction

- 1.234 In total, thirteen consultees⁴⁹ responded to this question. The results were overwhelmingly positive with all consultees agreeing that tracking should be introduced; however, some consultees emphasised the need for certain restrictions.

Introduction of tracking

- 1.235 Clarion Solicitors stated that they would welcome tracking to “ensure that basic information regarding the debtor’s financial circumstances is available to the court.”
- 1.236 In District Judge Robinson’s response to this question, he commented that he has had “relatively little dealings with Attachment of Earnings Orders” as most are dealt with by magistrates. However, he stated that “any steps which make them more difficult to avoid would be welcome.” He commented that “they are one of the most effective remedies.”
- 1.237 The Family Justice Council agreed that tracking should be introduced. It also said that attachment of earnings orders are, in its experience, “an effective method of enforcement.”
- 1.238 The Justices’ Clerks’ Society supported tracking to “ensure continued compliance with the court order.” It noted that, at the moment, the “court is reliant on the debtor disclosing his new employment.”
- 1.239 The Law Society thought it “should be made as easy as possible for the creditor to discover the debtor’s new employer.”

⁴⁹ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Law Society; Money Advice Trust; Penningtons Manches; Resolution; Tony Roe.

- 1.240 Resolution described the proposal as a “sensible and welcome measure.”

Introduction of tracking with possibility of suspending the order

- 1.241 The FLBA agreed that “tracking would provide a useful addition to the attachment of earnings enforcement process.” However, it envisaged “circumstances in which a paying party might not wish for his employer to be made aware of the existence of such an order.” For this reason, it proposed a “mechanism (as in Australia) whereby the paying party can seek to prevent tracking either by agreement with the receiving party or an order of the court.” Janet Bazley QC responded in the same terms.
- 1.242 The Money Advice Trust “did not object” to the tracking provisions being brought into force. It noted that “a system that relies on individuals who are in debt and under pressure to inform the court whilst under the stress of starting a new job is bound to have inherent failings with no intention on the part of the defendant to avoid paying.” However, it strongly supported “the retention of a mechanism to allow an application to suspend an attachment of earnings order as there may be many reasons why it is important that the existing or new employer are not made aware of the order if for example, there is a threat to the individual’s job.” It saw “little advantage in using an enforcement method to obtain regular payments from income, if the continuation of that income is put into jeopardy.”

Do consultees think that, in family proceedings, information obtained by the tracking provisions should be disclosed only to the court or should it also be disclosed to the creditor?

Introduction

- 1.243 In total, eleven consultees responded to this question. Seven consultees⁵⁰ were in favour of disclosing the information to the creditor. Four consultees⁵¹ were opposed to disclosing the information to the creditor.

In favour of disclosure

- 1.244 District Judge Robinson saw “no reason why information should not be disclosed to the payee,” but that it should be “subject to the discretion of the court.”
- 1.245 The FLBA thought the court should not have information that is not disclosed to the parties. Therefore, it agreed that the “complete information as prescribed in the regulations should be disclosed to the receiving party.”
- 1.246 Janet Bazley QC thought similarly that the court should not have information that is not disclosed to the parties. She proposed that “the regulations should set out the information to be supplied so that only necessary confidential information (probably only the details of the new employer) is disclosed.”

⁵⁰ District Judge Robinson; FLBA; Janet Bazley QC; Law Society; Penningtons Manches; Resolution; Tony Roe.

⁵¹ Clarion Solicitors; International Family Law Group; Judges of the Family Division; Justices’ Clerks’ Society.

1.247 The Law Society agreed that “in principle ... such information should normally be disclosed to both the court and to the creditor for reasons of transparency.” However, it recognised that “there may be occasions where the debtor may legitimately consider that the former spouse should not be given the information – for example, where that spouse is behaving inappropriately.” In these circumstances, it proposed that “there should be a provision allowing confidentiality.”

1.248 Penningtons Manches said that for the same reasons it gave in respect of information requests and information orders, the information should be disclosed to the creditor. Its reasons were that “where a party is in default of a family financial order, the balance between preserving the privacy of the debtor and the right of the creditor to receive payment ordered by the court should be determined in favour of the creditor.”

Opposed to disclosure

1.249 Clarion Solicitors thought that “provided that the court is proactive in ensuring that orders are progressed where necessary, [it] can see no need for the information obtained via tracking to be disclosed to creditors.” They suggested that an appropriate safeguard may be for “the creditor to be alerted to the fact that there has been a change which the court will act upon and to be entitled to check that appropriate action has been taken.”

1.250 International Family Law Group felt it would be “disproportionate” to disclose a debtor’s new employer to the creditor.” It considered that “the purpose of tracking would be to discover a debtor’s new employer so that an attachment of earnings order could be transferred to a new employer and this can be achieved without informing the creditor of the new employer.”

1.251 The Justices’ Clerks’ Society saw no reason “why the creditor would be required to know when the debtor changed employment and the identity of the new employers.” It considered that it was “sufficient for enforcement purposes that they are aware the debtor is in employment.”

Additional comments

1.252 A member of the public commented on disclosure to the debtor. He stated that for reasons of confidentiality “information should only be disclosed to the Court and the debtor”. He thought that “the debtor should be allowed access to information from the tracking provisions so he can contest them if not true – the information should not just go to the court.”

Do consultees think that it is practicable for attachment of earnings orders to be redirected automatically when the debtor changes employment?

Introduction

- 1.253 Eleven consultees responded to this question. Eight consultees⁵² were in favour of automatic redirection; two consultees⁵³ were opposed.

In favour of automatic redirection

- 1.254 District Judge Robinson commented that he did “not know how often it would in fact work.” However, he saw “no objection in principle.” He noted that “the administration in dealing with job moves is very dispiriting for the Applicant.” International Family Law Group thought the automatic redirection “would significantly reduce the time and cost creditors have to endure when debtors change employment.”
- 1.255 The Law Society agreed with the proposal and commented that if the tracking provisions were brought into force then “automatic redirection would be straight forward to implement.” Resolution felt that automatic redirection of orders “could make a real difference for some creditors and should be possible.”
- 1.256 Both the FLBA and Janet Bazley QC agreed with the proposal and noted that “section 92 of the 2007 Act provides the mechanism to achieve this.”

Opposed to automatic redirection

- 1.257 The Money Advice Trust thought the “proposal may not be fair unless the person concerned is given the opportunity to ask for the order to be suspended if their new employment will be affected by an order being put in place.”
- 1.258 A member of the public thought this could be “time-consuming and costly to implement.”

Other views

- 1.259 Birmingham Law Society said that “the general view of the Committee was that it would be difficult to practically transfer an attachment of earnings order attached to one employer to another.” However, it commented that “an idea was put forward that it would be helpful if HMRC tracked the position.” It stated that “the present position is that the onus is on the debtor to update their income and employment details and generally this information is not offered.” The Society felt this was “inefficient because a creditor with missed payments is generally not notified until several payments had not been made.” It concluded that “if HMRC were involved, they could administer or monitor the position.”

⁵² District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Law Society; Resolution; Tony Roe.

⁵³ Money Advice Trust; a member of the public.

We would welcome consultees' views on the idea of a national register of attachment of earnings orders.

Introduction

- 1.260 In total, twelve consultees responded to this question. Five consultees⁵⁴ were in favour of a national register of attachment of earnings orders; seven consultees⁵⁵ were opposed to this reform.

In favour of introducing a national register

- 1.261 The FLBA stated that “if practical and proportionate to set up ... it would assist the enforcement process.” Further, it thought a register “would also save the wasted cost of unnecessary or ineffective applications.”
- 1.262 The Justices' Clerks' Society thought the national register “may provide more information for the creditor and the court to make an informed decision as to enforcement.” At least, the register would “confirm an individual was in employment ... and that they are currently in debt to other individuals and organisations.”
- 1.263 The Law Society supported the proposal in principle because “it should make information more accessible.” However, it also thought it was “unclear who would be responsible for maintaining and updating such a register and what would be the associated costs.” It commented that “there would have to be clear rules and safeguards about the use of the information and who was able to access it.”

Opposed to introducing a national register

- 1.264 Birmingham Law Society stated that the proposal “was not felt to be of potentially considerable assistance.” The Society considered that there “may be other more useful measures that can be put in place with resources being allocated more efficiently elsewhere.”
- 1.265 District Judge Robinson was “unconvinced for the need for a National Register” and could see “possible unintended consequences.”
- 1.266 International Family Law Group said it was “intrigued” by the idea of a national register of attachment of earnings orders. It noted that “many lay clients are surprised to learn that there are relatively few national registers for important documents (for example, wills, divorce certificates and final financial orders).” However, they suspected that “the administrative time and cost in compiling and maintaining a national register of attachment of earnings orders might be disproportionate.”
- 1.267 The Judges of the Family Division were “not persuaded that a national register is necessary.” They felt that the “current system worked pretty well.” Finally, they thought the “protected earning rate” largely dealt with the difficulty of more than one such order which they suspected was very rare in any event.

⁵⁴ FLBA; Janet Bazley QC; Justices' Clerks' Society; Law Society; Tony Roe.

⁵⁵ Birmingham Law Society; District Judge Robinson; International Family Law Group; Judges of the Family Division; Resolution; a member of the public.

- 1.268 Resolution stated that whilst a register may be “helpful”, it would not be a “high priority.” It queried “who would maintain and pay for such a register in the current economic environment.”
- 1.269 One member of the public did not support the proposal because of the “risk of invasion of privacy of the debtor’s financial position.”

Additional comments

- 1.270 The Money Advice Trust conceded that a national register “might be helpful to establish whether there are multiple attachment of earnings orders for a particular person.” However, it thought it was not clear “why a national register would be useful only for attachment of earnings orders and not additionally for other types of enforcement order.” It therefore mused that “perhaps a register with a wider remit could be more useful overall, possible via the existing county court judgment register.”
- 1.271 The Money Advice Trust mentioned that “there is a mechanism for a consolidated attachment of earnings orders in county court debt enforcement where 2 or more orders are in place.” However, this mechanism “does not help where someone is in multiple debt with various creditors, some of whom may have taken court action and some have not.” It concluded that “unless this provision is linked to multiple attachment of earnings order system that allows payment distribution of the amount deducted to be shared amongst all the creditors, then the result will favour the creditor that took the action first.” Otherwise, the other creditors “may be left with little more than token payment offers.”

PENSIONS

Consultees are asked to give us their views:

- (1) **on the court being given the power, at the time of any enforcement proceedings, to exercise its powers to share and attach pensions;**

- 1.272 In total, fifteen consultees responded to this question.⁵⁶ The responses were overwhelmingly positive with all fifteen responses supporting the introduction of the power to share and attach pensions at the time of enforcement.

Arguments in support

Characteristics of a pension

- 1.273 In the Consultation Paper, we noted that a debtor might have significant funds in a pension and that this pension could be the debtor’s main asset. This was echoed by the consultation responses we received.

⁵⁶ Association of Pension Lawyers; Birmingham Law Society; District Judge Robinson; Family Justice Council; FLBA; Gavin Smith; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Law Society; Penningtons Manches; Resolution; Rhys Taylor; Tony Roe.

- 1.274 The Association of Pension Lawyers stated that “next to real property, a debtor’s pension fund may be the only other significant asset ‘owned’ by the debtor”. Gavin Smith (a family law barrister) noted that “in many financial remedy cases pensions are the most valuable asset apart from the family home.” Tony Roe commented that “pensions are normally the second largest matrimonial asset, and sometimes the first.” Further, he referenced the fact that “automatic enrolment in workplace pensions is likely to increase the significance and worth of an individual pension.” The Judges of the Family Division referred to pensions as “valuable assets.”
- 1.275 District Judge Robinson stated that “there will be ... circumstances where the pension is the only remaining asset, and I do not see why it should be inviolate.”
- 1.276 The FLBA referenced the fact that “pensions often represent a significant proportion of the assets in a financial remedies case, and thus it is wrong in principle ... for a debtor to be able to avoid payment even though he or she had sufficient pension resources to be able to meet the debt.”
- 1.277 In addition to the argument that pensions are often substantial, there is a further argument that, even if the debtor has behaved irresponsibly and is in financial difficulties, the pension may nonetheless remain intact. The Association of Pension Lawyers said this is because “pensions continue heavily regulated” and so are “more likely not be dissipated and be kept intact than other assets notwithstanding the recent limited liberalisation of defined contribution (“DC”) pension funds.” Penningtons Manches agreed, noting that “pensions have the advantage of being a relatively static target that is difficult to dissipate.” This is the case even though the position is somewhat altered by the recent legislative changes, which enable greater access to certain pension funds (where the scheme allows).
- 1.278 The FLBA noted that pensions may also be viewed as having special status by the parties. After referencing the potentially disproportionate, adverse effect on the debtor of enforcing against his or her pension, it concluded that “this might have a beneficial impact on the non-payer: pensions arouse strong emotions and are frequently highly prized and protected. The possibility of an invasion of pension provision might just encourage compliance with orders.”

Increased accessibility of pension funds

- 1.279 We noted in the Consultation Paper the increased flexibility relating to pensions that would take effect from April 2015. We said that
- Those aged 55 or over will have the right to withdraw up to 100% of their defined contribution pension, taxed at their marginal rate of income tax on the amount in excess of 25% of the pension.⁵⁷
- 1.280 Some of the consultation responses expanded on this and pointed out that it may be a further justification for the extension of powers over pensions to enforcement proceedings.

⁵⁷ *Enforcement of Family Financial Orders* (2015) Law Com Consultation Paper No 219, p 47, footnote 77.

- 1.281 The Association of Pension Lawyers said that the increased flexibility means that “pension savings are now more akin to ordinary savings; continuing to treat such pension saving as outside an ‘enforcement order’ is in our view less justifiable than previously.” However, it was pointed out that the flexibility would be available only where “the arrangements so allow”.
- 1.282 The FLBA noted that “the changing nature of pension assets, and the new ability to draw upon them and to avoid the need for an annuity purchase, means that pension assets are more readily accessible.”
- 1.283 International Family Law Group referenced the fact that “the changes to direct benefit pensions effective in April 2015 mean that pension holders now have much greater access to pensions.” It was suggested that this is changing practice at the time of the original financial remedy proceedings, for example undertakings may now have to be requested not to encash pension funds pending the determination of proceedings.
- 1.284 The Judges of the Family Division referred to the fact that “the Government has significantly relaxed the rules to enable greater access to pension funds.”
- 1.285 Penningtons Manches stated that “recent reforms have made [pensions] more flexible and of more benefit to the receiving party.”

The debtor has failed to meet obligations under an existing order

- 1.286 The Association of Pension Lawyers defined the “context of enforcement” as the fact that the debtor has not complied with a court order; this means that “the creditor is not receiving the amount due under the original court order.” It concluded that this “points towards the Court being given wide powers of enforcement.”
- 1.287 The Family Justice Council said that “if the original order provided for the debtor to make payments to the creditor but to retain his pension and he fails to comply with his obligations, enforcement should be available against the asset the debtor has retained.”
- 1.288 The Judges of the Family Division stated “even if a creditor has already been awarded half the debtor’s pension, it is hard to see why the creditor should be prevented from seeking payment of a lump sum order or arrears of periodical payments from the other half, if the sums are legitimately owed to the creditor.”
- 1.289 At the consultation event in Cardiff, there was general support for enforcement against pensions. In light of the new pension rules, one attendee was in favour of introducing a requirement to cash in and take 25% of a pension and pay it to the creditor and attach the balance. That attendee felt this would clear capital debt and also help on a continuing basis.

Potential difficulties or issues to consider

- 1.290 As the FLBA pointed out, “pensions come in many forms: money purchase, defined benefit, defined contribution schemes for example, and it is often difficult to define or grasp the ‘value’ of the pension.” This may result in some “complexities”. The FLBA continued, “there may be a significant difference between the financial loss to the respondent and the sum that the applicant is seeking to enforce” Its members felt this was particularly an issue in the case of “defined benefit final salary schemes.”
- 1.291 The FLBA also recognised that “there may be increased financial burdens upon pension schemes”; however, it said that “these are currently met through a charge levied in respect of each pension share.” Further, it felt that pension providers could “meet any increased cost without too great a difficulty.” The Association of Pension Lawyers stated that “generally, insofar as you are contemplating the Court on enforcement having powers to make Pension Sharing and Attachment Orders, we recommend you discuss your proposals directly with pension scheme trustees and administrators in relation to practicality and costs.” District Judge Robinson proposed that the “costs can be met from the fund”.
- 1.292 There were also concerns about matters of wider pension policy. International Family Law Group stated that “pensions are designed to meet people’s needs in their retirement and attract favourable tax treatment”; for this reason, they suggested that “we should exercise caution before interfering with a debtor’s pension(s).”
- 1.293 The Association of Pension Lawyers raised the issue of tax, it said that “the tax implications would have to be addressed (if necessary by amendments to tax legislation) so that if on enforcement a Pension Sharing Order is made, the party benefitting would be liable to any income tax payable on electing to access funds.” The Judges of the Family Division felt that “the debtor would have to be responsible for any tax resulting (if, for example, the order exceeded the 25% tax free lump sum).”

Legislative amendments

- 1.294 The Association of Pension Lawyers considered the statutory amendments that may be necessary to implement the proposed change. It stated that “any new legislation in this area:
- (a) might require a new exemption to section 91 of the Pensions Act 1995 (which contains rules against assignment, surrender etc of pensions).
 - (b) would probably also need to disapply any pension scheme rule under which a member’s pension is forfeited if it would otherwise become payable to a third party (these rules are common in our experience), and
 - (c) might require a change to the definition in the Finance Act of an authorised member payment’.”

Obtaining lump sum payments

- 1.295 In the Consultation Paper we considered, but dismissed, the possibility of creating powers to access capital from pension funds outside of the powers of commutation available to the debtor. This conclusion was not universally supported. Gavin Smith proposed two procedures by which to directly enforce against pensions, “irrespective of whether the debtor is entitled to draw down pension benefits”. He stated that the power could “a) take the form of a remedy akin to a conventional pension sharing order (and in such cases the bar on a second pension sharing order against the same pension should be removed) and / or (b) enable the court to direct the extraction of cash from the pension fund, net of tax as applicable.” The Judges of the Family Division also stated that they can “see force in giving the court the power to direct payment to a creditor from the debtor’s pension once the debtor has attained 55 years of age (thus permitting access to the fund.)”
- 1.296 In contrast, the Association of Pension Lawyers agreed with our conclusion, as it considered that a wide power would “run contrary to the existing statutory and tax pensions framework”. The Association of Pension Lawyers argued that “the party in whose favour an enforcement Pension Sharing Order is made should have the same rights, and not greater rights, than the original scheme member. Therefore, whether to access funds under the April 2015 flexibilities is available will depend on the rules of the particular scheme.”
- 1.297 Consultees also discussed a number of other issues relating primarily to the extraction of lump sum payments from pension funds.
- 1.298 The Association of Pension Lawyers noted that there are two limitations to the new pension flexibility, which may limit the utility of any new powers based on the change in the law:
- (1) “it applies only from age 55 onwards – in the case of the enforcement of many family Financial Orders the creditor may be much younger and therefore will not be ... a means of immediately putting the creditor in funds;” and
 - (2) even if the party is over 55, the new flexibility (including the right of commutation) are available options only where the scheme rules permit. However, “current ‘press’ reports indicate, and our experience confirms, that many pension providers are at present not offering the new flexibilities, or limiting them, presumably on grounds of administrative complexity/cost.” In the Association’s experience, very few schemes are offering anything other than the option of taking a one-off lump sum. It stated that “occupational schemes are not geared up to offering anything akin to a banking facility”.

- 1.299 The Association of Pension Lawyers referenced the fact that “members of defined benefit (“DB”) registered pension schemes can, generally speaking, access the new DC flexibilities by transferring to a DC arrangement.” The Association felt that any pension sharing or arrangement order should “not go as far as entitling the Court to order a DB to DC transfer.” It further stated that, “besides complexity and exposing the scheme member to the higher degree of risk that his or her DC investments will perform badly, such an Order would run counter to the principle that whether to transfer is a matter of member choice having considered financial advice.”
- 1.300 Rhys Taylor noted that “it is being suggested that holders of annuities might shortly be able to sell them back to their annuity provider or on the open market.” If this comes to fruition, he suggests that “the court might be able to use s.24A MCA⁵⁸ (if there has been a lump sum or property adjustment order) to require the sale of an annuity to extract a cash sum.” This would be based on the fact that the “holder of the annuity has a ‘property’ interest which is amenable to s24A.” He then stated that “whilst this would only apply to those of an age who have been able to purchase an annuity, if possible, this would be a draconian power to assist compliance.”

Existing powers to order commutation

- 1.301 Rhys Taylor also queried whether “the Family Court might be able to use s.24A (2)⁵⁹ to require commutation of a cash sum (aside from Pension Attachment Power) in a pension for someone over 55 as a means to enforce a s.24A order.”

⁵⁸ Orders for sale of property: “Where the court makes [an order under section 22ZA or makes] under section 23 or 24 of this Act a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.”

⁵⁹ Any order made under subsection (1) above may contain such consequential or supplementary provisions as the court thinks fit and, without prejudice to the generality of the foregoing provision, may include—

(a) provision requiring the making of a payment out of the proceeds of sale of the property to which the order relates, and

(b) provision requiring any such property to be offered for sale to a person, or class of persons, specified in the order.

- 1.302 In his response, Gavin Smith referenced the case of *Blight v Meredith & Ors*⁶⁰ in which the “court ordered the debtor to delegate to the creditor’s solicitor the power to make the election [to commute a lump sum] in the debtor’s name (and in default, he authorised the creditor’s solicitor to write in the debtor’s name to the pension company making the election on his behalf and in his name.) Once the election had been made, the sum payable by the pension company would be due to debtor and would at that point be caught by a third party debt order.” Gavin Smith went on to say that “the judge was presumably exercising his power under [Civil Procedure Rule] 70.2A (Court may order act to be done at expense of disobedient party)”.⁶¹ He then suggested that “the Law Commission may wish to consider how the existence of this power might be given greater prominence.”
- 1.303 District Judge Robinson also referenced *Blight v Brewster*, which he described as “helpful” and said that he had “used this decision in a case recently”.

Consultees are asked to give us their views on:

- (2) **the restrictions that should apply to the exercise of any such power; should those that currently apply to the exercise of these powers on the making of the original order apply at the time of enforcement and should there be any additional restrictions?**

- 1.304 Twelve consultation responses specifically addressed this question; several consultees conflated questions (1) and (2) and we have had regard to all comments that we consider relevant in this section.

Application of the existing restrictions to any new power

- 1.305 The Family Justice Council stated that it “would support changes to allow pension sharing and attachment orders to be made as a means of enforcement with the same restrictions as applied to the making of the original order.”
- 1.306 Tony Roe recommended that “restrictions should be those that currently apply to the exercise of these powers on the making of the original order.”
- 1.307 Birmingham Law Society felt that “some restrictions may be appropriate” but did not go into any further detail.

Disapplication of existing restrictions

- 1.308 The Association of Pension Lawyers mentioned the following two “original” restrictions:
- (1) a pension sharing order cannot be made where the pension is already subject to an attachment order; and
- (2) where there is a pension sharing order, the party cannot have a second bite of the cherry and obtain a further pension sharing or attachment order.

⁶⁰ [2012] EWHC 165 (Ch).

⁶¹ This is applied to family proceedings by Family Procedure Rules, r 33.2.

The Association did not consider there to be “any legal difficulty in principle in disapplying these normal restrictions in an enforcement case where the original family financial Order has not been complied with.”

Disapplication of the “second pension sharing order” restriction

- 1.309 The FLBA was keen for there to be “some relaxation of the restrictions imposed on the treatment of pensions.” In particular, it questioned the “rationale for the embargo on second pension sharing orders in relation to the same pension.” It argued that, “given that a large proportion of financial remedy orders include pension sharing orders and, for example, term maintenance orders, any powers to exercise enforcement mechanisms against pensions will be rendered ineffective unless there is such a relaxation.” It thought it was unfair that “a party could only enforce an order against pension funds where there had not already been a pension sharing or attachment order.” It proposed “that there should be provision to enable a sharing or attachment order to be increased so as to meet sums due from other parts of the financial order.”
- 1.310 Gavin Smith stated that if the power were to be exercised in the same way as a conventional pension sharing order, the “bar on a second pension sharing order against the same pension should be removed.”
- 1.311 Janet Bazley QC agreed that the “limitation on making a second pension sharing order in relation to the same pension should go”. Otherwise, she felt the “usual restrictions (and no others) should apply”.
- 1.312 The Judges of the Family Division implicitly recommended the disapplication of this restriction when they stated that “even if a creditor has already been awarded half the debtor’s pension, it is hard to see why the creditor should be prevented from seeking payment of a lump sum order or arrears of periodical payments from the other half, if the sums are legitimately owed to the creditor.”
- 1.313 Although not explicitly referencing the need to remove restrictions, District Judge Robinson stated that “I do not see why there cannot be a ‘second bite’ in an appropriate case.”

Application of new restrictions

- 1.314 International Family Law Group considered that enforcement, by way of a pension sharing or attachment order, should only be available to creditors where “(i) the debtor’s financial statement does not show sufficient other assets to enforce against and (ii) the administrative costs in doing so is proportionate to the arrears in question”.
- 1.315 Resolution suggested a combination of existing and new restrictions. It stated that “the restrictions should include not exercising the power where:
- (1) a pensions attachment or sharing order has already been implemented;
 - (2) the making of an order would ultimately reduce the benefit of the creditor who is already the beneficiary of an existing pensions order; or

- (3) the making of an order would prejudice a third party – we have in mind a first spouse with the benefit of a pension attachment order and so with an interest in the pension income.”
- 1.316 The Law Society thought that the inability to draw down a pension would serve as a restriction. As such, it felt that “before using such powers, the court would need to know if or how the pension could be drawn down.” It also suggested that the “court would need to understand how this asset had been shared in the past.”

We provisionally propose that Part III of the Matrimonial and Family Proceedings Act 1984 be amended so as to provide that the existence of an English pension arrangement is a jurisdictional ground for financial relief after an overseas divorce.

Do consultees agree?

Introduction

- 1.317 In total, twelve consultees responded to this question. All except one⁶² of the consultees agreed that this area was in need of reform and were positive about the proposal.
- 1.318 Although Janet Bazley QC and the FLBA agreed with our proposal, both noted that it was not strictly a matter of enforcement.

Experience of consultees

- 1.319 The Consultation Paper noted that this issue was originally referred to us by David Hodson of International Family Law Group. In its response, International family Law Group explained that the firm is “consulted at least once a fortnight in respect of foreign pension sharing arrangements” and that “too often we have had to say that jurisdiction under Part III [of the Matrimonial and Family Proceedings Act 1984] does not exist ie as there is no continuing domicile or habitual residence.” The firm said that this advice is often sought too late because of the “expectation by foreign lawyers and courts that we will in this jurisdiction enforce an order to share an English pension.” This results in lawyers abroad having to “unravel the financial statement to take account of the inability to obtain a local, English pension sharing arrangement.”
- 1.320 International Family Law Group suggested that “this power should be extended to the UK because in practice, in our experience, pension companies based in Scotland, where many historically are, will follow English orders.”
- 1.321 Other consultees also shared their experience of this problem arising in practice. James Pirrie referenced his experience of “foreign lawyers ... trying to secure a sharing of a UK pension following a foreign divorce” and the fact that “very often it just can’t be done and they have to go back to the drawing board of settlement.” For this reason, he stated the reform would be “hugely welcomed.”

⁶² Birmingham Law Society thought “it may be of greater assistance for there to be reciprocal enforcement of the provision in an English court order against a foreign pension arrangement.”

- 1.322 The Judges of the Family Division also found that “a significant number of applications pursuant to Part III of the 1984 Act are brought to enable pension sharing of English and Wales pensions following an overseas divorce.” For this reason, they felt it would be “very sensible to extend jurisdiction to cases to those where there is a pension in this jurisdiction but the parties are not domiciled or habitually resident here.”
- 1.323 District Judge Robinson said that he receives a “steady flow of applications for pension sharing after US or Australian financial orders under sections 12 and 13 of the MFPA 1984” and usually makes them by consent. He felt it “would do no harm to make this clear, and might help in cases where there is no consent.”

Arguments in support of the proposal

- 1.324 The Law Society said that the current law “can cause cost and delay to a claimant attempting to enforce an order.”
- 1.325 International Family Law Group suggested that under Part 3 of the 1984 Act should be treated in the same way as a matrimonial home. “The [matrimonial home] is real property which, across the world, is most distinctively the subject of the local law provisions hence the opportunity in part III. But for enforcement purposes, a pension is identical to real property in this regard because, again across the world, pension companies will only follow local pension sharing orders. So there should be immediate reform to allow jurisdiction on the basis of a UK pension company, limited to orders to the extent of the value of that pension interest.”
- 1.326 International Family Law Group stated that David Hodson has been in touch with the Ministry of Justice over many years with the suggested reform. However, officials have “several times indicated to him that they are sympathetic, have no problems with this reform but cannot find, they say, appropriate space in legislation.” International Family Law Group were sceptical as to whether this will become a priority in the future and explained that “this is why this opportunity for reform is so vital.”

Potential issues with the proposal

- 1.327 The Association of Pension Lawyers referenced “the potential cost implications for UK schemes.” For this reason, it recommended that we discuss this issue with trustees and administrators “especially bearing in mind the very substantial increase in membership of UK pension schemes due to auto enrolment.”
- 1.328 District Judge Robinson thought there could be difficulty in determining whether the foreign jurisdiction had already accounted for the pension f in the exercise of its powers. He said that if the lack of a pension sharing order has been compensated for by other means it would not be appropriate for the English or Welsh courts to undermine that.
- 1.329 Resolution considered the potential scope of the power; it was in favour of the proposal provided that the claim is “restricted to dealing with the English pension arrangement.”

- 1.330 Resolution also emphasised the importance of addressing “complex international issues from the outset, for example, where a party lives abroad and has a pension or other assets here, rather than at the later enforcement stage”.
- 1.331 Birmingham Law Society said that there “was difficulty foreseen with the enforcement of a foreign order against an English pension arrangement in terms of implementation and interpretation of a foreign order.”

THIRD PARTY DEBT ORDERS

We ask for consultees’ views about the following options for reform:

- (1) **the introduction of third party debt orders against joint accounts;**
- (2) **the use of the streamlined procedure for third party debt orders against joint accounts; and**
- (3) **whether, in any event, there should be provision for disclosure of details of any joint accounts held by the debtor and another person, by the bank, when a third party debt order is made against a bank.**

We also ask for consultees’ views about:

- (4) **the introduction of periodical third party debt orders;**
- (5) **the introduction of a protected minimum balance when a third party debt order is made against a bank account; and**
- (6) **provision for disclosure of a debtor’s bank statements, by the bank, when a third party debt order is made against a bank.**

- 1.332 Thirteen consultees responded to this question.⁶³

Joint accounts

- 1.333 Opinion was divided in relation to the possibility of enforcement against joint accounts.
- (1) Nine consultees supported the extension of third party debt orders to joint accounts.⁶⁴
 - (2) Two consultees objected to the extension.⁶⁵
 - (3) Two consultees were “cautious” about the proposal.⁶⁶

⁶³ Birmingham Law Society; Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Law Society; Money Advice Trust; Penningtons Manches; Resolution; Tony Roe.

⁶⁴ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; Janet Bazley QC; Judges of the Family Division; Penningtons Manches; Resolution; Tony Roe.

⁶⁵ Birmingham Law Society and Money Advice Trust.

- 1.334 The reasons for opposing the extension of third party debt orders were twofold; practicalities and potential unfairness to the joint account holder(s). Birmingham Law Society emphasised the “real difficulties” and Law Society saw “particular complexities” with enforcing against joint accounts. International Family Law Group, whilst recognising a lacuna in the law, were concerned about potential unfairness. A particular point raised in its response was the potential effect on the joint account holder’s credit rating if payments are stopped from the joint account. Money Advice Trust foresaw “fundamentally unfair and unjust results” and, in particular, mentioned the potential adverse impact on the joint account holder and his or her family including dependent children. It said it could “see no justification for the assumption that 50% of the funds ... belong to the [debtor]”.
- 1.335 Clarion Solicitors acknowledged that this is a “vexed issue” but were concerned about the “obvious avoidance technique” that exists by not enabling enforcement against funds in a joint accounts. District Judge Robinson also referred to the “frequent abuse” by debtors sheltering funds in joint accounts. The FLBA, Janet Bazley QC and the Judges of the Family Division all referred to the ease with which enforcement can be avoided by using joint accounts.
- 1.336 Another argument advanced in support of reform was the existing possibility of a charging order over jointly owned property. Tony Roe suggested it was illogical to apply different reasoning to funds held in a joint accounts.
- 1.337 Although the responses were generally positive, as the Judges of the Family Division pointed out, the “devil is in the detail”. Consultees often qualified their support for the proposal in some way:
- (1) The consensus was that there would need to be a rebuttable presumption that the debtor owned only half (or the relevant proportion) of the funds in the account.⁶⁷
 - (2) Clarion Solicitors suggested enforcement against a joint account should be possible “on the proviso that [it] is an option of last resort”.
 - (3) The majority of consultees who responded to this question particularly emphasised the importance of giving the debtor (or joint account holder or other third parties) the opportunity to make representations and challenge any decision.⁶⁸ Generally, it was felt a hearing would be necessary for this purpose.⁶⁹

⁶⁶ International Family Law Group and Law Society.

⁶⁷ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; Janet Bazley QC; Judges of the Family Division; Resolution; Tony Roe. Penningtons Manches did not refer to this aspect of the discussion either in support or against.

⁶⁸ District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Resolution; Tony Roe.

⁶⁹ However, Resolution referred to “the debtor having the opportunity to argue otherwise” and Tony Roe referred to “the other joint holder(s) could be given liberty to apply”. Those responses may envisage some form of hearing, but do not specifically require this.

- 1.338 Despite expressing support for the principle of third party debt orders against joint accounts, District Judge Robinson, the Law Society and the Judges of the Family Division all raised concern about the potential cost and uncertainty which could make it an undesirable route for the creditor to pursue. The Judges of the Family Division suggested that the argument over beneficial ownership of the funds “could give rise to expensive and complicated litigation, possibly out of all proportion to the amount at stake”. The Law Society proposed in this regard that it might be sensible to have “a minimum amount below which such orders should not be pursued”.
- 1.339 James Pirrie commented that “the co-account holder is in a much better situation to sort out/regularise the situation than the creditor”.

Streamlined procedure in relation to joint accounts

- 1.340 As set out above, the majority of consultees favoured an opportunity for the debtor and joint account holder to make representations. In some cases this did not preclude support for the streamlined procedure. Tony Roe and the Judges of the Family Division all thought it was sensible to use the streamlined procedure (subject to the safeguards discussed in relation to that generally). Resolution and Penningtons Manches both expressed support for points (1) to (3) (as set out in the question) and so implicitly supported the streamlined procedure.
- 1.341 However, District Judge Robinson, the Family Justice Council, the FLBA and International Family Law Group all made specific reference to a hearing to determine if a final order is appropriate and at which the rebuttable presumption as to ownership of the funds could be considered. Janet Bazley QC emphasised the need for judicial decision.
- 1.342 Janet Bazley QC and the FLBA both remarked on the desirability of the same procedure applying to third party debt orders against both sole and joint accounts.
- 1.343 Money Advice Trust specifically raised objections to a streamlined procedure for third party debt orders against joint accounts (in addition to its objection to the principle in general). Clarion Solicitors also commented that a streamlined procedure would not be appropriate if obtaining an order against a joint account.

Disclosure of joint accounts by financial institutions served with an order

- 1.344 Birmingham Law Society did not support enforcement against joint accounts and so, in that case, thought information about the accounts held in the joint names of the debtor and another person would not be useful to the creditor.

- 1.345 Nine consultees specifically supported an obligation on the bank to disclose a list of any joint accounts held by the debtor and another person.⁷⁰ International Family Law Group did, however, suggest limiting this to “*significant* joint bank accounts”.⁷¹ It considered that “where [they have] a balance below, say £500, the benefit to the creditor is outweighed by the inconvenience to and invasion into the financial situation of an innocent third party”.
- 1.346 Clarion Solicitors said “there should be no barrier to establishing whether joint accounts exist” indicating support for the disclosure of such accounts.

Periodical third party debt orders

- 1.347 Twelve consultees commented specifically on the possibility of periodical third party debt orders.⁷² None of these objected in principle to such a method of enforcement being made available and for example Janet Bazley QC said it “would be of great benefit in avoiding the need for repeated applications” and the FLBA called it “a sensible proposal”.
- 1.348 Where the responses were qualified, there were various reasons for this. One concern was the ease with which the order could be avoided by the debtor changing his or her financial arrangements. This was raised by the Judges of the Family Division and was the reason that Resolution felt the proposals for periodical third party debt orders, and the introduction of a protected minimum balance, were not “straightforward or ‘must haves’ for reform”. District Judge Robinson thought that such orders would be “uncommon” perhaps also due to the practical difficulties. However, Penningtons Manches for example, whilst acknowledging the potential limitations of the reform, did not consider them to be sufficient justification to deny the court the power to make periodical third party debt orders in appropriate cases. This is particularly so since it would be a form of “ongoing security”, which in general, Penningtons Manches said, the enforcement tools do not provide.
- 1.349 Another issue raised was the additional burden placed on third party institutions. However, the FLBA and Janet Bazley QC considered any such increase to be “proportionate” where the creditor could be suffering considerable hardship as a result of non-payment.
- 1.350 International Family Law Group recognised the additional burden, but thought that periodical third party debt orders “could be a useful tool”. They suggested the success rate of the Child Maintenance Service scheme for regular deductions from accounts could be a helpful indicator of their utility.

⁷⁰ District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Penningtons Manches; Resolution; Tony Roe.

⁷¹ Emphasis in original.

⁷² Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Law Society; Money Advice Trust; Penningtons Manches; Resolution; Tony Roe.

- 1.351 A final factor when considering periodical third party debt orders was fairness to the debtor. Clarion Solicitors supported the method “provided there is a protected minimum balance”. Money Advice Trust also highlighted that a periodical third party debt order combined with a streamlined procedure could be detrimental if the debtor was repeatedly required to challenge the intended deductions and ask for multiple hearings. The argument advanced was that “many people are not in the financial or emotional position to take proactive measures in this way”.

Protected minimum balance

- 1.352 Ten consultees expressed views specifically on whether or not a minimum balance should exist below which the debtor’s account cannot fall. Of those, seven favoured setting a minimum balance⁷³ and three did not favour this approach.⁷⁴
- 1.353 The Family Justice Council argued that in making the original order the courts have found that the debtor has the means to pay the amount ordered after a process of full and frank disclosure and a minimum protected balance would undermine this; in the Council’s view, “enforcement should have teeth”.
- 1.354 The other consultees who opposed the introduction of a protected minimum balance specifically referred to the existing mechanism to obtain relief by way of hardship applications, which they said should be retained. The argument advanced by these consultees was that a fixed protected minimum balance would not be appropriate as there will be various factors affecting what level of funds it is appropriate for the debtor to retain in the context of enforcement. For example, the asset in question (perhaps one bank account) may not be the only resource available to the debtor either in this jurisdiction or elsewhere.
- 1.355 Some consultees agreed in principle with the introduction of a minimum protected balance, but preferred judicial discretion to impose a protected balance in an appropriate case rather than setting a compulsory minimum balance in all cases. The Judges of the Family Division took a different view; they agreed it was “hard to know at what level this would be set” but found it “logical” to have a protected minimum balance.
- 1.356 Money Advice Trust favoured a protected minimum balance that would exist alongside the existing hardship applications to offer an extra layer of protection for the debtor. It noted that a protected minimum balance exists in the Scottish arrestment proceedings. Further, the Money Advice Trust said that where an account contained benefit income then that should also be protected.
- 1.357 International Family Law Group favoured a protected minimum balance, but proposed that this be accompanied by the possibility for the creditor to apply for permission to take an account below that protected level. This was thought necessary to avoid a debtor maintaining a number of different accounts with balances just below the prescribed minimum for the purpose of frustrating the creditor’s attempts at enforcement.

⁷³ Birmingham Law Society; Clarion Solicitors; District Judge Robinson; International Family Law Group; Judges of the Family Division; Money Advice Trust; Tony Roe.

⁷⁴ Family Justice Council; FLBA; Janet Bazley QC.

- 1.358 Clarion Solicitors focussed on a minimum balance as a condition for the introduction of periodical third party debt orders, but it considered that further detail was required in terms of how it was proposed that the minimum figure would be calculated.

Disclosure of bank statements

- 1.359 Birmingham Law Society, Family Justice Council and Penningtons Manches expressed their support for the proposal without qualification.
- 1.360 District Judge Robinson was concerned to ensure that there was “protection against ‘fishing expeditions’” and indicated that this should be framed as a power for the court to order disclosure when making the interim order. The Judges of the Family Division considered this to be “a useful addition to the powers of the court”, which also suggests a discretionary element to the provision. Tony Roe also did “not feel entirely comfortable ... at least on an automatic basis” with this idea. In contrast, Janet Bazley QC thought that the obligation upon the bank should arise automatically pursuant to the interim order.
- 1.361 District Judge Robinson suggested that statements could be provided for “say, 3 months” whereas the FLBA suggested a period “say for 28 days”.
- 1.362 There were no strong objections to the proposal that banks should disclose statements upon service of a third party debt order. The most negative responses came from International Family Law Group, which felt information requests and orders and a streamlined procedure would render this disclosure unnecessary, and Resolution, which simply did not see this “as a high priority for reform”.
- 1.363 Both the Law Society and Money Advice Trust raised practical concerns. The Law Society said “the design of any formal request of information from the defaulting party is important to making the system work well”. Money Advice Trust agreed with the conclusion in the Consultation Paper that such an obligation may be “tricky to implement” alongside streamlining and other proposals. However, it did not object to the disclosure of bank statements “where this will assist with transparency, if the measures can be made to work in practice”.

CHARGING ORDERS

Are consultees aware of any problems with the application of charging orders to financial products?

- 1.364 Seven consultees responded to this question. One consultee⁷⁵ was aware of problems with the application of charging orders to financial products; the other six⁷⁶ were not.

⁷⁵ Law Society.

⁷⁶ District Judge Robinson; FLBA; Janet Bazley QC; Money Advice Trust; Resolution; Tony Roe.

Problems with the application of charging orders to financial products

- 1.365 The Law Society described this as an “unwieldy process” which is “not often used.” They commented that the application process is too complicated for most litigants in person to navigate” and that the “costs involved in instructing a lawyer might be uneconomic.”

Additional comments

- 1.366 Whilst District Judge Richard Robinson had not come across problems with financial products, he favoured extending provision for stop orders.

Do consultees think there is scope to use assets other than land and securities as security for family judgment debts?

- 1.367 Eleven consultees responded to this question. Five consultees⁷⁷ thought there was scope to use assets other than land and securities as security for family judgment debts and six consultees⁷⁸ were opposed to the idea.

Assets other than land and securities

- 1.368 Birmingham Law Society noted that the power is already in place to attach a charging order to investment funds as well as real property. It thought this may be a useful enforcement method in respect of shares held by the debtor.
- 1.369 District Judge Robinson argued that there needed to be a better system for enforcing against other assets, particularly vehicles; he noted that warrants of control are very difficult for a judge. He favoured a clear, codified procedure for security against vehicles, boats and similar assets, and thought that the costs would be acceptable.
- 1.370 Gavin Smith thought that the court should be vested with the power, at the time of making any financial remedy order, to “charge assets of any kind owned by the debtor pending compliance with the order” and that the court should be expressly required to consider whether it should make such an order. He also thought that an order for sale⁷⁹ should be available as an enforcement remedy irrespective of the nature of the financial remedy made.
- 1.371 The Judges of the Family Division thought it should be possible to devise a simple scheme for enforcing a financial remedy order against a debtor’s motor vehicle. By analogy to the proposal to ban a debtor from driving, they thought that taking away a debtor’s vehicle could be a powerful incentive. They thought a possibility may be authorising a bailiff to clamp and/or seize such a vehicle, and commented that the French system, at first sight, has real attractions. They acknowledged that the costs of the exercise would have to come from the proceeds of sale of the vehicle rather than from the civil justice system.

⁷⁷ Birmingham Law Society; District Judge Robinson; Gavin Smith; Judges of the Family Division; Resolution.

⁷⁸ FLBA; International Family Law Group; Janet Bazley QC; Law Society; One member of the public; Tony Roe.

⁷⁹ Under section 24A of the Matrimonial Causes Act 1973.

- 1.372 Resolution thought that consideration might be given to enabling the freezing of bank accounts to help secure the payment of family judgment debts. It also wondered whether thought should be given to the use of the charging order device against overseas property (particularly where that is the only asset) and issues around reciprocal enforcement.

Arguments against the use of assets other than land and securities

- 1.373 The FLBA and Janet Bazley QC did not believe there was scope to use assets other than land and securities as security for family judgment debts; they both considered that other enforcement methods provide better ways of targeting such resources.
- 1.374 International Family Law Group stated that “owing to the lack of registration of assets other than land or securities” they failed to see how the scope of charging orders can be extended. In any event, they thought that the power already exists to seize the debtor’s assets to pay debts.
- 1.375 The Law Society thought it would be difficult to identify what other assets could be used. It noted that, for example, business assets cannot be considered if the business is incorporated. It argued that for any assets to be used in enforcement, they would need to be registered in a formal way and be easily valued. The Law Society thought that, in the majority of cases, a family only has property to use as security.
- 1.376 One member of the public thought it would be too complicated to extend charging orders beyond land and securities.

JUDGMENT SUMMONS AND COERCIVE ORDERS

We welcome consultees’ views on the use of the judgment summons procedure and whether any reforms could usefully be made to the procedure, bearing in mind the need for it to be human rights compliant.

Introduction

- 1.377 In total, eleven consultees responded to this question. Eight consultees⁸⁰ thought that reform could be useful and three consultees⁸¹ were either opposed to reform or doubtful about its utility.

General Comments

Use of judgment summons

- 1.378 District Judge Robinson commented that “except in the High Court, judgment summons are virtually extinct.”

⁸⁰ District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Penningtons Manches.

⁸¹ Law Society; Resolution; Tony Roe.

- 1.379 International Family Law Group agreed that “in practice, very few debtors are committed to prison for failing to comply with a financial order.” Despite this, they still felt that “the judgment summons option does provide a very forceful incentive to debtors to pay.”
- 1.380 Penningtons Manches thought that “recent case law has demonstrated its continued importance in international cases where assets are retained in complex structures beyond the jurisdiction of the English Court.”
- 1.381 The Law Society noted that the judgment summons procedure is rarely used in family proceedings.
- 1.382 Resolution commented that the “judgment summons process is full of hurdles and probably only has a very limited role to play in family cases.” It recommended focusing on “the development of the Law Commission’s provisional proposals to introduce civil coercive measures to produce compliance.”
- 1.383 The FLBA noted that “reliance placed on the decision of Mostyn J in *Bhura* and the suggestion that [judgment summons] may experience a limited revival” has been thrown into doubt by the “observations by the decision of McFarlane LJ in *Prest*.”

Should judgment summons be retained?

- 1.384 The Family Justice Council thought the judgment summons procedure should be maintained. Despite commenting on the inadequacy of the six weeks’ term of imprisonment, it thought that the judgment summons procedure was a “useful tool for non-compliance.”
- 1.385 The FLBA said that “the ability to apply for a judgment summons remains a useful tool in the enforcement process.”
- 1.386 International Family Law Group stated that “the judgment summons option does provide a very forceful incentive to debtors to pay.”
- 1.387 The Judges of the Family Division commented that “the use of a Judgment Summons is a vital part of the armoury of the court.”
- 1.388 Penningtons Manches stated that, in their experience, the judgment summons remains an essential tool of last resort in enforcing family financial orders.
- 1.389 The Law Society argued that the judgment summons is “not an effective enforcement method for family procedures because the proceedings have to be conducted under the criminal burden of proof.” It also questioned whether it was reasonable to send someone who has failed to comply with a family financial order to jail.

Reform options

Costs of judgment summons

- 1.390 District Judge Robinson argued that “the problem for all but the richest is the costs of mounting such an application, even if *Bhura* shows that it is theoretically possible.” For this reason “the possibility of a litigant in person seeking a judgment summons and complying with the requirements is not realistic.” Therefore, he recommended that “in REMO cases, the Enforcement Unit should be able to instruct an agent to make the application.”

Maximum term of imprisonment

- 1.391 The Family Justice Council, whilst maintaining that the judgment summons procedure is a “useful tool for wilful non-compliance”, argued that “the six weeks maximum sentence is inadequate if the case has been proved to the criminal standard.”
- 1.392 The Judges of the Family Division thought that the use of judgment summons is a “vital part of the armoury of the court.” However, they thought it was “quite inadequate to be able to sentence a debtor only to six weeks in prison, of which the debtor will serve a maximum of three weeks.” They stated that “there are a significant number of cases where the debtor considers this to be a small price to pay to ensure the lump sum order is not complied with.” They recommended that “the maximum sentence should be increased to two years to bring it in line with the maximum sentence for contempt of court.”
- 1.393 The FLBA thought that, on balance, “the ability to impose a maximum penalty of 6 weeks’ imprisonment is sufficient to ensure compliance.”
- 1.394 Janet Bazley thought that six weeks’ imprisonment is sufficient to ensure compliance.
- 1.395 The Law Society questioned whether it was reasonable to send someone who had failed to comply with a financial order to jail. They commented that “recent guidance and judgments show that neither the government nor the judiciary believes that imprisoning debtors is a good way to retrieve a debt, or a proportionate punishment.”

Second committal for the same debt

- 1.396 The Judges of the Family Division considered it “would be an abuse of process to permit a second committal in relation to the same lump sum debt, if reliance is placed solely on additional interest accruing to the liability.” However, they felt that “default in relation to periodical payments comes into a different category such that repeated judgement summonses are not necessarily an abuse of process.”
- 1.397 Janet Bazley thought six weeks’ imprisonment should apply to a first default only.

Safeguards

- 1.398 The Judges of the Family Division thought that “given that the liberty of the subject is involved, the requirements set out in Mubarak are a necessary safeguard for the debtor.” They commented that “in practice, the requirements have not prevented the court making orders in appropriate cases.”
- 1.399 The FLBA “noted” our view that it is “not possible to relax safeguards within the judgment summons procedure to make it easier to obtain committal.”

Travel expenses

- 1.400 The Family Justice Council said that “the N67 should be clearer on the requirement to offer to pay the debtor’s travel expenses.”
- 1.401 International Family Law Group agreed that the “Form N67 should be amended clearly to inform creditors of the requirement to offer the debtor payment of his or her travel expenses to avoid any procedural hiccups.”
- 1.402 The FLBA were of the view that “the rules requiring the payment of travel expenses impose an unnecessary procedural burden on the creditor” and suggested that “this rule should be removed entirely.” Janet Bazley QC was of the same view.
- 1.403 The Justices’ Clerks’ Society noted that “it is understandable that any maintenance creditor would express surprise that despite being owed money by an individual which was causing genuine hardship to them and their family was now required to provide travel expenses for the debtor to attend court.” It thought that this requirement, as well as the exclusion of judgment summons from the D50K procedure, is why judgment summons is rarely used. For this reason, it thought that the travel expenses requirement should be removed.

Use of information from prior proceedings

- 1.404 Whilst the Family Justice Council noted the need for the procedure to be human rights compliant, it argued that “the creditor’s and the children’s family life is affected by wilful non-payment and it seems unfair to them if information obtained at a hearing following the general enforcement application is not admissible on a judgment summons.” Ultimately, it thought that “a balance needs to be struck.”
- 1.405 The Justices’ Clerks’ Society recognised the “clear obligation to comply with the European Convention on Human Rights when considering the removal of an individual’s liberty.” However, it thought that “the current evidential requirements upon the applicant and restrictions upon use of evidence obtained previously in proceedings are too high.”

Arrest warrant

- 1.406 The Justices’ Clerks’ Society thought it would be of assistance if there was “a statutory power to issue an arrest warrant” as “the current need for the court to rely on contempt powers to issue a warrant prolongs the process.”

Responses from consultation events

- 1.407 One attendee at the consultation event in Cardiff asked if changing the provisions of the Debtors Act 1869 was a possibility; it was considered restrictive that only one application could be made and the maximum sentence is six weeks. The attendee had applied for committal in one case and a sentence of one week was imposed. The respondent only, in fact, served one day, but this prevented enforcement via judgment summons again. There were various debts in that case and it was necessary to enforce them in batches with the aim of obtaining six week sentences. When proceedings reach that stage the debtor is simply playing the system. Often he or she will be self-employed, will not be putting any money through the books and is refusing to give any disclosure. It reaches the stage where judgment summons is the only option.
- 1.408 Another attendee said the problem arises from having to show that the debtor can but will not pay. *Mubarak* made this task impossible. Personally, the speaker did not see any problem with a debtor being compelled to give evidence.
- 1.409 At the consultation event in Cardiff, in relation to judgment summons, it was felt that there was a natural reluctance to make orders when such matters went to the circuit bench. Those judges deal with childcare and so won't do enforcement/financial cases often.
- 1.410 One attendee felt the judgment summons was getting better. There is pressure in the system to make a decision and to make more "proper" decisions. When pressed for more information, the attendee said pressure is coming from solicitors. The attendee felt, however, some solicitors are too weak and don't make judgment summons applications because they don't think they will be successful.
- 1.411 An attendee at the consultation event in London asked if there would be any steps to bring judgment summons back into popular use. There is an ever increasing sophistication of debtors who have been found to have or deemed to be able to get to assets. The judgment summons process needs to be more user-friendly.

COERCIVE ORDERS

- 1.412 In the consultation paper, we provisionally proposed and asked consultees whether they agreed the following:
- (1) **an order disqualifying a debtor from driving should be introduced;**
 - (2) **an order disqualifying the debtor from travelling outside the United Kingdom should be introduced;**
 - (3) **an order imposing a curfew on the debtor should be introduced;**
 - (4) **that disqualification or curfew orders should be available where the court is satisfied on the balance of probabilities that the debtor has the ability to pay and has not done so;**

- (5) **that disqualification or curfew orders should be imposed where the court believes it to be in the interests of justice, taking account of all the circumstances of the case including:**
- (a) **the degree of non-compliance;**
 - (b) **the other enforcement methods that are available to the creditor and the likely success of those methods;**
 - (c) **the effect of making the order on the debtor's ability to earn a living; and**
 - (d) **the effect of making the order on any dependants of the debtor**
- (6) **that disqualification orders should take effect, in the first instance, for up to 12 months and curfew orders for up to six months.**

Introduction

1.413 In addition to responses to the specific questions we posed several consultees made general comments about the principle of coercive orders. We summarise those general comments first.

In favour of reform

1.414 District Judge Robinson commented that he could “see the attraction of coercive orders.”

1.415 The Judges of the Family Division thought that the coercive orders proposed would all be useful additional weapons in the armoury of the court. They thought that they should, however, be coercive rather than punitive.

1.416 The Justices' Clerks' Society encouraged the introduction of alternative measures to custody. Having regard to the cost involved in custody and that the debtors do not pose a risk to society, the Society thought it would be helpful to have other enforcement sanctions available which encourage payment. Ultimately it argued that the purpose of enforcement is payment of orders and not to send debtors to prison. Sanctions should promote payment. Breach of those sanctions could be regarded as contempt.

1.417 The FLBA and Janet Bazley QC thought that coercive orders would give the court and the creditor wider options to secure payment in circumstances where the debtor's financial resources are held within structures which are not susceptible to conventional enforcement orders and/or where the debtor's lifestyle is inconsistent with a suggestion that he or she is unable to discharge the family financial order made in favour of the creditor.

1.418 The Family Justice Council supported our proposals for disqualification and curfew orders. Provided the procedure did not become too complicated for litigants in person, it supported such orders being part of the general enforcement application.

- 1.419 Resolution noted that the serious reservations it has had about the use of coercive powers against parents in the child maintenance context did not apply to our proposals. The historic concerns in respect of child maintenance have been for example around guaranteeing accurate calculations of arrears and the adoption of fair processes. Similar concerns did not arise for Resolution in the context of our proposals.
- 1.420 Resolution concluded that the new orders would be worth introducing even if there was not an overhaul of the whole system: it stated that it was “not persuaded that there is no point in introducing new orders at all or in the absence of a wholesale simplification of the existing system.” It thought that coercive measures might fit the circumstances of the case and would provide a wider range of tools in the court’s armoury for dealing with wilful non-payers.
- 1.421 In its members’ experience, Resolution found that creditors find the threat of prison to be draconian but unrealistic, and unlikely to reduce tensions or change the debtor’s attitude. It thought that adding disqualification orders to the package of available coercive measures would, in its view, provide more affordable, appropriate and practical options to promote compliance.
- 1.422 An attendee at the consultation event in Cardiff expressed the view that disqualifications are “innovative”.
- 1.423 At the consultation event in Manchester, a district judge thought that driving licence and passport confiscation was a way to deal with the problem. She said the court had made findings and so the debtor must have the means to pay. She accepted that with maintenance this might not be the case after some time has passed. However, one party compromised her claims and accepted a non-extendable term, but she has now not even received what she was entitled to under that compromise. This is a way of defeating the claims that were agreed to. The system needs to be more robust where someone has consented to an order or it has been imposed after investigation by the court.
- 1.424 Another district judge felt that facing the prison door, or the prospect of losing something, was the only way to concentrate minds.
- 1.425 One attendee noted the need to establish why debtors in family proceedings should be treated differently from debtors in civil proceedings. In considering the introduction of coercive orders, he thought family debts were different in that the original order is premised on the basis that the debtor can meet the order. Secondly, family financial orders are to meet needs and, if not paid, there can be real hardship. In terms of curfew orders, he appreciated that they were controversial but questioned, in the absence of judgement summons, how else can the court put pressure on the payer to comply?

Mixed views

- 1.426 As a team, Clarion Solicitors had mixed views on these proposals. They noted that we had made it clear that a distinction needs to be drawn between those who can’t pay and those who won’t pay, with the latter group being subject to a much more rigorous approach. They agreed with this and the need to make a distinction.

Operational Issues

- 1.427 District Judge Robinson thought the problems of extensive use of coercive orders outside the High Court would be administrative and cost based. He questioned who would be expected to present the case and ensure that it was human rights compliant. Further, he queried who would liaise with DVLA/Passport Office/Police to ensure the orders work. He concluded his response by stating that he would be in favour of coercive measures only if steps are taken to ensure there is effective administration.

The Judges of the Family Division assumed that the driving disqualification could be enforced via the DVLA and the police. They commented that travel bans are practically more problematic than driving disqualifications. They questioned whether the court would hold the debtor's passport or whether there would be a port alert. If it were the latter, they said it should be noted that the current regime for such orders tends only to register the breach on the return of the individual to this jurisdiction. They assumed there would be a power to imprison for contempt in the event of a breach of the coercive measure. In addition to the proposed curfew orders, they considered that there should be the ability to tag a debtor. They thought it would be hard to enforce such orders in the civil jurisdiction without such a power.

Opposed to reform

- 1.428 Charles Russell Speechlys noted that there are many high profile cases which take up a considerable amount of court time and which deal solely with the lengthy efforts made to enforce various judgments; for the debtors in these cases, they thought that the coercive and other measures set out in the Consultation Paper would be unlikely to assist.
- 1.429 Charles Russell Speechlys thought that many debtors are genuinely prepared to go to prison, lose their driving licence, and give up their passport rather than pay. They stated that they have all had clients who have said they would prefer to give all their money to their solicitors, or stop working altogether, or go to prison, rather than pay their ex-partner money to which they do not think they are entitled.
- 1.430 The Law Society disagreed with our proposals for introducing coercive orders and doubted they would be effective. It thought that the aim of the system should primarily be to ensure that, where payment is possible, it is made and the most effective way of doing that is to go directly to the debtors' assets. The Law Society commented that the effect of the proposals would be to create a quasi-criminal jurisdiction in an area where criminal sanctions already exist. They stated that "the courts are, for good reason, reluctant to use those sanctions."
- 1.431 The Law Society was unaware of any evidence which suggested that sanctions would be successful. Further, it thought there would be very few cases where a court would be able to impose the sanctions because the effects on a livelihood and dependents are likely to be significant. Even when they are imposed, the Law Society thought they would be unlikely to make the debtor any more willing to pay and would certainly affect any continuing relationship between the parties.

- 1.432 Finally, the Law Society thought that there could be difficulties in enforcing the sanctions with, in effect, a further series of criminal offences being created. Ultimately, in practice, it doubted that the threat of the sanctions would encourage payment or that the sanctions would create anything other than further expense, including to the State, without significant benefit.
- 1.433 One member of the public proposed that the court should review the original judgment before stricter enforcement and coercive powers are considered as the circumstances may have changed. He thought that the debtor may not have had the money or time to go to court to prove his or her decreased income. He added that people can be pushed into agreeing payment schedules because they could not afford, in terms of time and money, to oppose them in court or elsewhere.
- 1.434 The same member of the public proposed that, at the same time as considering enforcement proceedings, the court should carry out a new assessment of the circumstances of the debtor and creditor, consider a write-off, give advice, review amounts paid, consider a moratorium in proceedings for IVA discussions, negotiations, and/or financial advice. He thought that the proposals for coercive orders could cause huge resentment; he noted that the public at large have not yet expressed views on the proposals.
- 1.435 It was his opinion that we had considered powers from jurisdictions with a reputation for a very coercive approach to family law; he suggested that more countries should be looked at which have a more effective mediation based approach and more reasonable initial settlements. He said that we should consider the likelihood of coercive powers having unintended consequences on the debtor; that is, damaging the relationships within the family, creating disincentives for the debtor to work which would result in the creditor and debtor and children all losing out over the longer term.
- 1.436 At the consultation event in London, an attendee queried why debtors in family proceedings should be treated differently to civil debtors. She was particularly concerned that curfew orders sounded draconian. Judgment summons is only really applicable to maintenance orders now and so she questioned why we were still prepared to go along this route. Even in criminal proceedings, there is anxiety about curfew orders. She commented that there are lots more litigants in person at present who may not have received or given full disclosure and have had no advice and they may get caught by this power. She urged the recommendations not to be too “gung-ho”.
- 1.437 At the Manchester consultation event, a district judge thought, in relation to coercive orders, one has to look at unpaid work for the enforcement of contact orders. This isn't funded and she cannot make these orders because CAFCASS cannot provide places. With the cuts at the moment, she asked who is going to enforce curfew orders? In her view, these will not get off the ground.

We provisionally propose that:

(1) an order disqualifying a debtor from driving should be introduced.

Do consultees agree?

Introduction

- 1.438 In total, seventeen consultees responded to this question. Thirteen consultees⁸² were in favour of the introduction of an order disqualifying a debtor from driving, three⁸³ were opposed and one⁸⁴ was mixed in its response.

In favour of disqualification from driving

- 1.439 District Judge Robinson noted that “[the Child Maintenance Service] have found disqualifying from driving to be an effective threat.”
- 1.440 International Family Law Group supported our proposal and thought that it was consistent with the 2007 Hague Convention on Child Support and Other Forms of Family Maintenance. They commented that creditors will “obviously have to carefully balance the incentive disqualification from driving will provide against the possibility that it may restrict the debtor to travel to or undertake work (and thereby reduce their income).”
- 1.441 The Justices’ Clerks’ Society stated that lay justices are familiar with using an order for disqualification from driving, either suspended or immediate, as a sanction against non-payment of Child Support Agency/Child Maintenance Service assessments. It commented that this results in far less cost to the state than custody.
- 1.442 Penningtons Manches thought that, in the right cases, the threat of being disqualified from driving could prompt reluctant payers to comply with their obligations.
- 1.443 In terms of whether the creditor should apply to disqualify the debtor from driving, Birmingham Law Society thought that “this was something for the creditor to consider in each case.” The Society thought that disqualification generally could be a very effective method of enforcement but was concerned that disqualification from driving could be “counter intuitive to the judgment creditor in terms of the impact that may have [in] regards to the debtor’s ability to work”.

⁸² Birmingham Law Society; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Penningtons Manches; Resolution; Stone King; Tony Roe.

⁸³ Charles Russell Speechlys; Law Society; one member of the public.

⁸⁴ Clarion Solicitors.

Opposed to disqualification from driving

- 1.444 One member of the public opposed the proposal and stated that the Family Court needs to look at the consequences for the debtor, including increased costs, any other obligations he or she may have (such as looking after an elderly relative), the increased expense of travelling to work and the difficulty in making money. He also thought that the court should take into account the level of impact such an order would have on different people, for example someone with a bad leg, relatives, someone with increased expenses; otherwise, there could be an arbitrary level of impact.

We provisionally propose that

- (2) **an order disqualifying the debtor from travelling outside the United Kingdom should be introduced.**

Do consultees agree?

Introduction

- 1.445 In total, sixteen consultees responded to this question. Twelve⁸⁵ were in favour of the proposal, three⁸⁶ were opposed and one consultee⁸⁷ had mixed views about the proposal.

In favour of reform

- 1.446 Birmingham Law Society considered this proposal to be “potentially very effective.”
- 1.447 International Family Law Group supported the introduction of a power to revoke a debtor’s passport or disqualify him or her from travelling outside the UK until payment or securing provision for payment. They appreciated that in some jurisdictions, where many people do not travel internationally, these type of orders are not effective. However, they felt that it would be a useful tool in the UK in appropriate circumstances and could prove a powerful incentive to certain debtors to pay.
- 1.448 The Justices’ Clerks’ Society noted that lay justices do not have the power to disqualify a person from travelling abroad. However, it commented that any sanction which encourages payment, is enforceable and proportionate would be welcomed as a means of securing payment especially in cases where debtors will not pay and the creditors are aware that the former spouse has gone on expensive foreign holidays.

⁸⁵ Birmingham Law Society; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Penningtons Manches; Resolution; Stone King; Tony Roe.

⁸⁶ Charles Russell Speechlys; Law Society; One member of the public.

⁸⁷ Clarion Solicitors.

- 1.449 Penningtons Manches thought that the proposed travel bans could be “particularly effective”. In their experience many non-paying debtors lead an international lifestyle and keep assets off-shore to avoid direct enforcement. They added that there would be “substantial inconvenience to debtors if they could have their wings clipped by a travel ban” which in their view would be a significant incentive to compliance.

We provisionally propose that:

(3) an order imposing a curfew on the debtor should be introduced.

Do consultees agree?

Introduction

- 1.450 In total, sixteen consultees responded to this question. Seven consultees⁸⁸ were in favour of the introduction of curfew orders, six⁸⁹ had mixed views and four⁹⁰ were opposed.

In favour of reform

- 1.451 International Family Law Group stated that they “cautiously support” the introduction of curfew orders which they thought may prove a useful tool when dealing with “perhaps a younger/less wealthy debtor who does not regularly drive or travel internationally.”
- 1.452 The Justices’ Clerks’ Society stated that lay justices are familiar with the making of curfew orders as an element in community orders in criminal proceedings. It thought that, in order to increase its enforceability, a curfew order requires electronic monitoring.

Mixed

- 1.453 Birmingham Law Society thought that curfew orders may be difficult to police. It proposed that we consult with local police authorities to ascertain how they could be monitored.
- 1.454 Clarion Solicitors had concerns that “a curfew order may be too draconian, although potentially justified as an option of last resort.”

⁸⁸ District Judge Robinson; Family Justice Council; International Family Law Group; Judges of the Family Division; Justices’ Clerks’ Society; Stone King; Tony Roe.

⁸⁹ Birmingham Law Society; Clarion Solicitors; FLBA; Janet Bazley QC; Resolution.

⁹⁰ Charles Russell Speechlys; Law Society; Penningtons Manches; One member of the public.

- 1.455 The FLBA noted that, in the context of child support obligations, section 28 of the Child Maintenance and Other Payments Act 2008 amended the Child Support Act 1991 by introducing a new section 39H which conferred upon the court a power to make an order “requiring a person to remain, for periods specified in the order, at a place so specified (a “curfew order”)”. Section 39H has not been brought into force and the FLBA suspected, in part, the reason for this can be found in the resource implications: the need for effective monitoring of compliance with this order whether by way of electronic tagging or otherwise would involve substantial costs to the public purse.
- 1.456 Although in principle the FLBA supported the introduction of curfew orders as a further type of coercive order to induce a debtor who can but won’t pay, it questioned whether we should expend our efforts on formulating proposals for new curfew orders if they are unlikely to ever be brought into effect because of the costs in implementing a regime to ensure compliance with such orders.
- 1.457 The FLBA also noted that section 39 of the Child Support Act 1991 (not yet in force) provides that a curfew order is limited to not less than two hours and no more than twelve hours and, if so limited, it is likely that such an order would not amount to a deprivation of liberty under Article 5 of the Convention (*Trjonis v Lithuania*⁹¹).
- 1.458 Janet Bazley QC agreed that curfew orders may be helpful, but thought there may be resource implications for their implementation.
- 1.459 Resolution was not opposed in principle to the introduction of curfew orders, although the views of its members on this point were more mixed, including as to whether this could be an entirely civil matter to which the civil burden of proof would apply. Resolution thought that curfew orders would be perceived as more draconian and punitive rather than coercive to produce compliance. Further, it noted that these orders and the monitoring of such would give rise to a greater logistical and costs burden than the other two types of coercive order.

Opposed to reform

- 1.460 Penningtons Manches were concerned about the introduction of curfew orders, particularly as a civil enforcement measure. They thought they could appear punitive rather than coercive in nature. Further, they considered that curfew orders amount to a judgment summons by the back door, effectively imposing house arrest without the safeguard that the debtor’s ability to pay must be proved beyond reasonable doubt.

⁹¹ App No 23333/02.

We provisionally propose that:

- (4) that disqualification or curfew orders should be available where the court is satisfied on the balance of probabilities that the debtor has the ability to pay and has not done so;**

Do consultees agree?

Introduction

- 1.461 In total, eleven consultees considered this proposal. Six consultees⁹² thought the civil standard should apply, three consultees⁹³ thought the criminal standard should apply and two consultees⁹⁴ merely referenced the need to determine that the debtor could pay. Several consultees had differing views as to the stage at which the creditor would need to establish the debtor has or had the means to pay; can it be anytime preceding the application or does it have to be at the time of the application? We took the view in the Consultation Paper that it must be proved that the debtor *has* the means to pay. The FLBA agreed with our proposed test, but suggested an additional criterion that should be met.

Need to show debtor has or *has had* the means to pay

- 1.462 International Family Law Group agreed that “disqualification and curfew orders should only be available where the debtor has the means to pay and the introduction of a financial statement upon enforcement proceedings being issued will assist the court in separating those who cannot pay from those who are unwilling to do so.”
- 1.463 The Justices’ Clerks’ Society thought that these methods of enforcement should only be available where “the court has made a determination that the debtor *has had* the means to pay and has failed to do so.” This is different to the test proposed in the Consultation Paper which is where the debtor *has* the means to pay; namely, the court must find the debtor *has* the means to pay at the time of the making of the order.

Civil standard of proof

- 1.464 The FLBA and Janet Bazley QC considered that the civil standard of proof should apply but noted that the coercive orders proposed might be determined to be criminal sanctions under the European Convention of Human Rights, and would, therefore, attract the additional safeguards set out in article 6 of the Convention.

⁹² Family Justice Council; FLBA; Janet Bazley QC; Penningtons Manches; Resolution; Tony Roe.

⁹³ Judges of the Family Division; Law Society; One member of the public.

⁹⁴ International Family Law Group; Justices’ Clerks’ Society.

1.465 Both referred to the court's interpretation of section 39A of the Child Support Act 1991 as requiring the criminal standard.⁹⁵ This section gives the court the power to commit a debtor to prison or disqualify him or her from driving. Both were concerned "about the implications of having two separate regimes of coercive orders where:-

a. In the case of unpaid child support orders, an order for disqualification from driving and, if brought into force, other disqualifications and curfew orders are criminal sanctions. They can be made by the Court only after the CMS prove beyond reasonable doubt the debtor had the means to pay and refused or neglected to pay with all the safeguards contained within Article 6(3).

b. In the case of unpaid family financial orders (excluding child support), the Law Commission's proposal is that an order for disqualification (from driving; from foreign travel) and a curfew order would be civil sanctions, and the creditor would only have to establish on the balance of probabilities that the debtor had the means to pay."

1.466 The FLBA and Janet Bazley QC thought this difference seemed anomalous and heightened the risk that the proposed coercive orders would be determined criminal sanctions, notwithstanding their categorisation as "civil". They thought care would have to be taken to distinguish the proposed coercive orders from those contained in the Child Support Act 1991 as amended.

1.467 The FLBA and Janet Bazley QC supported our proposal that the orders be formulated as civil sanctions. In order that any future analysis under the three criteria located in the decision of *Engel v Netherlands*⁹⁶ would not lead to a determination by the court that the proceedings amount to a criminal charge because they are punitive in nature, the FLBA suggested the statutory framework which creates these new powers "must:-

a. Designate them as civil sanctions (though we recognise this is not determinative);

b. Provide for a threshold consideration which will include a finding that:

i. The debtor has the means to pay but has not;

ii. The creditor has already attempted to obtain payment by way of a conventional enforcement order; or

iii. it appears to the Court that a conventional enforcement order would not be effective as means of obtaining payment.

c. Once the threshold consideration has been met, provide for a general checklist of factors the court must take into account before making a coercive order;

⁹⁵ See *Karoonian v CMEC; Gibbons v CMEC* [2012] EWCA Civ 1379.

⁹⁶ (1976) EHRR 647.

d. Specify the standard of proof required in relation to the threshold is that of the balance of probabilities;⁹⁷

e. Provide limitations which reduce the severity of these penalties. These limitations will include;

i. Specified maximum durations for any coercive order;

ii. Provision for the debtor, during the currency of a coercive order, to make an application for an order to be discharged and/or suspended.”

1.468 Penningtons Manches thought that disqualification orders should be available where the court is satisfied on the balance of probabilities that the debtor *had or has* the ability to pay in compliance with the court’s order but has failed to pay. They did not mention curfew orders as they were opposed to their introduction.

Criminal Standard

1.469 The Judges of the Family Division thought that it would be a serious matter to make a coercive order. On balance, they took the view that such orders should only be made where the non-compliance is proved to the criminal standard. They thought that the proposed orders are draconian and all contain significant restrictions on the liberty of the subject.

1.470 The Law Society stated that “the courts are likely to apply the criminal burden of proof before imposing such sanctions which would take time and expense for the parties.”

1.471 One member of the public opposed the introduction of both disqualification and curfew orders. He did, however, specify that a curfew order should only be made on beyond reasonable doubt grounds as he considered it was a criminal sanction.

We provisionally propose that:

- (5) **that disqualification or curfew orders should be imposed where the court believes it to be in the interests of justice, taking account of all the circumstances of the case including:**

⁹⁷ An example of specifying the burden of proof can be found in section 11J of the Children Act 1989.

- (a) the degree of non-compliance;
- (b) the other enforcement methods that are available to the creditor and the likely success of those methods;
- (c) the effect of making the order on the debtor’s ability to earn a living; and
- (d) the effect of making the order on any dependants of the debtor

Do consultees agree?

Introduction

1.472 In total, ten consultees responded to this question. Nine consultees⁹⁸ agreed with our proposals and/or suggested additional considerations. One consultee⁹⁹ rejected our proposal.

In favour of the proposed test

1.473 After the threshold been crossed, the FLBA thought the court should then embark on considering a checklist of factors before making any coercive order. They agreed with the four factors listed above but suggested adding the following consideration:

(5) The effect of making the order on a debtor’s family life.

1.474 In justification of this fifth consideration, the FLBA cited the “age old unwritten distinction drawn in family proceedings between financial obligations and child arrangements.” It argued that the children of a debtor should not indirectly suffer the adverse consequences of a coercive order.¹⁰⁰

1.475 International Family Law Group agreed with our criteria but thought the court should also specifically consider the effect that non-compliance is having on the creditor and the likelihood that such an order would result in partial or complete performance with the order. They thought that the “so called ‘victim’ must be fully heard.”

⁹⁸ Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Penningtons Manches; Resolution; Tony Roe.

⁹⁹ One member of the public.

¹⁰⁰ For example, the FLBA said that if a non-primary carer implements a child arrangements order providing for him or her to spend time with the children of a former marriage by driving to and from his or her household, the court should not make an order disqualifying the debtor from driving, even if he or she falls into the category of a debtor who can but won’t pay. In the same vein, a debtor should not be disqualified from overseas travel if that has the effect of rendering him or her unable to have contact with his or her children.

- 1.476 Janet Bazley QC agreed that it may not need to be an absolute requirement that a creditor has obtained a conventional enforcement order before the court makes a coercive order. However, she thought it is right to treat coercive orders as exceptional. Although they were probably not a deprivation of liberty within the meaning of Article 5 of the ECHR, she stated that orders for the disqualification from travel or driving and curfew orders are restrictions on the inherent liberty of the subject. She recommended that, once the court is satisfied the threshold (namely, the ability to pay) is crossed, the court should consider (against a checklist of relevant factors and circumstances) whether a coercive order is necessary and proportionate. She thought the following might be included:
- (1) the extent of non-compliance (both in terms of duration and quantum);
 - (2) the likely impact of the order on the debtor and any dependents (in terms of his ability to earn a living and generally); and
 - (3) the likely impact on the creditor (and any dependent children) of not making the order on any dependents of the debtor.
- 1.477 The Judges of the Family Division thought that the orders should not be counter-productive. They agreed with our criteria and thought the court should focus in particular on the effect of making the order on the debtor's ability to earn a living and the effect of making the order on any dependents of the debtor.
- 1.478 The Justices' Clerks' Society thought that the introduction of the interests of justice test and our criteria would require the court to take a proportional view in considering whether the sanction is appropriate in any particular case.

Mixed views

- 1.479 Resolution agreed with our criteria in relation to curfew orders. However, it thought that disqualification orders were arguably less draconian than curfew orders. It stated that where there is non-compliance and the court is satisfied that the debtor, having had the opportunity to be heard, has the ability to pay, judges should exercise their discretion to impose a disqualification order as a coercive measure, unless a more suitable enforcement method is available in the particular case.

Opposed to our criteria

- 1.480 One member of the public explicitly rejected our criteria. He proposed that we need to consider the likelihood of coercive powers having unintended consequences on the debtor, for example damaging the relationships within the family, creating disincentives for the debtor to work, the creditor and debtor and children all losing out over the longer term.

We provisionally propose that:

- (6) **disqualification orders should take effect, in the first instance, for up to 12 months and curfew orders for up to six months.**

Do consultees agree?

- 1.481 In total, eleven consultees responded to this question. Nine consultees¹⁰¹ were in favour of our proposed durations, one¹⁰² had mixed views, and one¹⁰³ was opposed. Several consultees also commented on the circumstances in which the order should be lifted.

In favour of our proposal

- 1.482 The FLBA and Janet Bazley QC agreed with our proposed durations. They thought it should be in the discretion of the court to
- (1) impose a suspended order on terms; and
 - (2) impose an order for a lesser period.
- 1.483 The Judges of the Family Division agreed with the proposed durations. They added that the orders should be discharged on compliance in full with the financial provision order. In terms of proving compliance, they thought that the creditor would have to provide a certificate of compliance or the matter would have to return to court for the judge to discharge the coercive measure if satisfied as to compliance.
- 1.484 The Justices' Clerks' Society agreed with our proposals. It noted that the purpose of the sanction is to prompt payment. Consequently, on payment of the debt, the Society thought there should be a mechanism for the disqualification to be lifted earlier than the expiry date ordered by the court. It also thought that part payment should be recognised.
- 1.485 Penningtons Manches agreed that disqualification orders should take effect in the first instance for up to 12 months. They did not respond in respect of the duration for curfew orders.

Mixed views

- 1.486 The Law Society considered that imposing sanctions for the period of times envisaged might be of little consequence in the context of orders that are likely to run over many years, as, it said, there is nothing to suggest that debtors will be more compliant after the periods of time. On the other hand, it thought that extending the period further is likely to have consequences for the individual's human rights.

Alternative measures suggested

- 1.487 Rhys Taylor suggested that, whilst our Consultation Paper came out against regulatory/professional suspension, we might want to consider director disqualification. He thought this would "target a cohort that is most likely to be able to affect the manner in which their emoluments are drawn."

¹⁰¹ Birmingham Law Society; Family Justice Council; FLBA; Janet Bazley QC; Judges of the Family Division; Justices' Clerks' Society; Penningtons Manches; Resolution; Tony Roe.

¹⁰² Law Society.

¹⁰³ One member of the public.

- 1.488 At the consultation event in Cardiff, there was support for disqualification from acting as a director as an additional enforcement measure. One attendee expressed approval of disqualification measures and suggested director disqualification as a new remedy in enforcement proceedings. The role of director really matters to self-employed people in charge of a company and so it would be a real threat. It also seems that such people are unfit to be a director if they refuse to comply with court orders.
- 1.489 At first glance, we thought disqualification from directorship was an attractive option. However, following research into the area we are not minded to make this recommendation. In summary:
- (1) The existing grounds for disqualification from directorship are very different in nature to the one we would recommend, they are focussed on wrongful actions in respect of running the company.
 - (2) The consequences could be widely felt and hard to predict.
 - (3) The effects of disqualification could have a considerable impact on the debtor beyond the lifetime of the order.
- 1.490 Resolution wondered whether we had explored the introduction of community service orders as part of the package of coercive measures. It thought this type of penalty was cheaper than imprisonment, which it considered to not be an effective threat.

ARREARS OF MAINTENANCE

Do consultees think that change is required to the rule that arrears more than 12 months old are recoverable only in special circumstances? If so:

- (1) **should the 12 month period be increased?**
- (2) **should the starting point be that all arrears are enforceable, with the debtor having the opportunity to argue otherwise (whether after 12 months or longer)?**

Introduction

- 1.491 Thirteen people responded on this issue. Nine responses¹⁰⁴ were positive towards reform, three responses¹⁰⁵ were opposed to any reform and one response¹⁰⁶ had mixed attitudes towards reform.

Positive Reactions to Reform

- 1.492 In total, there were ten responses in favour of some reform. The following reasons were given to support the need for reform.

¹⁰⁴ District Judge Robinson; Family Justice Council; International Family Law Group; Justices' Clerks' Society; Law Society; Money Advice Trust; Penningtons Manches; Resolution; Tony Roe.

¹⁰⁵ Janet Bazley QC; Judges of the Family Division; One member of the public.

¹⁰⁶ FLBA, whose response was split on this issue.

Legitimate reasons for the creditor's delay

- 1.493 The Family Justice Council stated that "the creditor is often deterred from enforcing arrears ... not only by the cost of enforcement proceedings but also by the fear that the debtor will cease payment altogether."
- 1.494 The FLBA focused on the difficulties inherent in litigation: "litigation is expensive, time consuming and stressful." As a consequence, the creditor will often try to "avoid litigation if possible, for example, by informal attempts at enforcing orders."
- 1.495 The Justices' Clerks' Society also focused on the blamelessness of the creditor's delay: he or she "may have relied on promises that the money would be paid, is not familiar with the process of enforcement, and there may correspondingly have been a long period of non-payment."
- 1.496 Penningtons Manches emphasised the economic reasons behind choosing to delay enforcement proceedings: "often [it] is uneconomic for parties to enforce arrears of maintenance of less than 12 months due to the cost of pursuing enforcement proceedings." Equally, it said, it may be economic to wait for a certain event: "there may be a sale of a company in which the debtor had an interest that makes enforcement proceedings worthwhile". Further, it noted the factors that are often beyond the creditor's control: "it may be that a debtor who has been resident abroad has returned to the jurisdiction, making enforcement a viable option."
- 1.497 Resolution was aware that "a creditor might commonly wait for almost a year to make an enforcement application worthwhile under the current system."
- 1.498 Tony Roe thought that "change is required, if only because 12 months often passes before an application is made."

Orders are there to be obeyed

- 1.499 A few consultees noted that the final order is there to be obeyed; namely, the debtor should not be able to escape his or her obligations by virtue of the 12 month period.
- 1.500 The FLBA stated that, "orders are there to be obeyed." International Family Law Group emphasised the need to allow "creditors to recover moneys they are owed."
- 1.501 This point was echoed by Resolution, which justified an extension to the 12 month period by stating: "this would be fairer to creditors who, after all, have the benefit of a court order."

Incentive for debtors not to pay

- 1.502 A few consultees considered that reform was necessary as the current 12 month period serves as a disincentive for debtors to comply with their obligations under the final order; if the debtor waits until the 12 month period has elapsed, the creditor may have his or her application for permission to enforce rejected or the debtor may have his or her arrears remitted.

- 1.503 International Family Law Group said of the rule that: “It can also act as an incentive to debtors not to comply with financial orders in the knowledge that the slate will be wiped clean after 12 months.”
- 1.504 This criticism was echoed by the Justices’ Clerks’ Society: “currently a debtor may have a disincentive to pay if there is the belief that debts over 12 months may be automatically remitted.”
- 1.505 Further, the Money Advice Trust argued that, ‘it does not seem fair that the current arrangements would incentivise someone not to pay in the hope that they would reach the point after 12 months that their arrears would not be recoverable.”

RECOMMENDATIONS FOR REFORM

- 1.506 There were various recommendations for reform.
- 1.507 District Judge Robinson was of the view that the “12 month rule for arrears is reasonable in itself.” However, he took issue with the present case law on granting extensions for litigants in person where they “have been seeking to negotiate ... before bringing enforcement proceedings.” He found the present case law to be “unduly restrictive.”
- 1.508 After balancing the interests of the creditor and debtor, the Family Justice Council argued that it “would support an increase in the 12 month period to 5 years.”
- 1.509 The Money Advice Trust recommended that “the 12 month period to recover arrears should be increased.” However, it did not “have a fixed opinion as to whether a statutory limitation period should apply and if so, what it should be.” If no limitation period were to apply, the Money Advice Trust would be recommending that all arrears should be enforceable.
- 1.510 The Law Society argued that the limitation period should take account of the fact that “parties might endeavour to resolve the matter directly before making an application to the court.” In such a situation, the “time to be taken to resolve the matter should be taken into account in relation to exercising the limitation period.”
- 1.511 International Family Law Group suggested that “the starting point should be shifted so that all arrears are enforceable, but that a debtor can make an application to prevent a creditor’s application to enforce proceedings of, say, more than two years.”
- 1.512 Resolution considered that the “12 month period should be increased.” Equally, it argued that “all arrears should be enforceable with the burden shifted to the debtor to argue otherwise whether after 12 months or longer.” Therefore, Resolution envisaged a situation in which the limitation period is increased and the onus is reversed; that is, the debtor will have to object to the enforcement proceedings.
- 1.513 Tony Roe also recommended a system whereby the debtor is able to object after a certain period of time: “the starting point should be that all arrears are enforceable, with the debtor having the opportunity to argue otherwise after 6 years have passed, adopting a figure from limitation legislation.”

- 1.514 Penningtons Manches argued that “the onus should be on the party who has not met obligations due under a court order to explain why all those arrears should not be repaid.” Whilst they do not expressly suggest limiting this right to a time period they state that “at the very least, a 12 month period is too short.”
- 1.515 The Justices’ Clerks’ Society suggested that “the 12 month period for the recovery of arrears should be increased and also that the principle should be that all arrears are enforceable with the debtor having the opportunity to argue otherwise.”
- 1.516 The Law Society stated that the 12 month period “strikes the right balance”. However, it said that “the starting point should be that all arrears are enforceable with the onus on the debtor to argue otherwise.” The Law Society recommended a statutory check list for when the court considers the debtor’s claim that the arrears are unenforceable.

Opposed to reform

- 1.517 Janet Bazley QC considered that the current system works well by providing an incentive for the creditor to issue proceedings promptly whilst ensuring that the court could enforce older arrears in appropriate cases. She said that the rule “provides an incentive to the receiving party to make an application without delay when arrears accrue but the court retains a discretion to enforce older arrears in appropriate cases.”
- 1.518 The Judges of the Family Division also considered that the current system struck the appropriate balance. They said: “it is important to bring enforcement proceedings promptly. Equally, debtors can be lulled into a false sense of security. The 12 month rule is not absolute. The court may permit enforcement of earlier arrears.”
- 1.519 One member of the public did not want a system whereby “un-payable debts mount up.” This means that “with old debts hanging around, people cannot move forward.” As such, the “system needs to allow debts to be written off which are un-payable, so that person can be back in the system and start payments.” The member of the public was critical of the absolute nature of the current system: “the way the current system is structured you have to be either 100% compliant and in the system, or pay nothing at all, there is no allowance for partial payment.”

Mixed reactions to reform

- 1.520 The FLBA gave two separate responses to reflect the varying views of its members.
- 1.521 Those members in favour of reform recommended that “the 12 month period be increased either to 24 or 36 months.” However, they also recommended that “arrears that are older than that period should not be enforceable.”

- 1.522 Those members who were opposed to reform stated that “they consider that the current system works well in practice.’ Further, they argued that the 12 month period “works both as an incentive to the receiving party to make an application in a timely manner when arrears accrue but also allows the court to enforce older arrears where the circumstances dictate that this is appropriate.” Ultimately, whilst some of the FLBA’s members conceded that there may be some “legitimate arguments about whether 12 months is the right ‘time frame’”, they considered that “in their view, this is not a pressing area of reform.”

Responses from consultation events

- 1.523 At the London consultation event, an attendee suggested that, in terms of the 12 month rule on arrears, it is useful to distinguish between lump sums and periodical payments. Arguably, if a person has managed without periodical payments, then the immediate need is gone. However, parties may negotiate a lump sum to be paid in the future and that will still need to be paid.

We provisionally propose that the court be given the power to remit arrears on a free-standing basis.

Do consultees agree?

- 1.524 Fourteen consultees¹⁰⁷ responded to this question. All of the consultees agreed with the proposal; some were more cautious than others citing that the current powers were probably sufficient or that there would need to be some limitation on the power.

Absolute power to remit arrears

- 1.525 Clarion Solicitors cited their previous experience; they had “acted in a number of cases where the debtor had failed to make the necessary application for variation and remission of arrears in the mistaken belief that an informal agreement between parties would suffice.” They therefore favoured the introduction of a “straightforward, cost-effective, discrete application” leading to “clarity and certainty for both parties.”
- 1.526 The Family Justice Council unequivocally supported the proposal: “we would give the court the power to remit the arrears on a free-standing basis.”
- 1.527 International Family Law Group welcomed the introduction of this free standing power “without the need for live variation proceedings”.
- 1.528 The FLBA pointed to the fact that “the court can in effect remit arrears by refusing an application to enforce.” However, it still felt that it “would be helpful for there to be an express power to remit arrears on a free standing basis.”
- 1.529 Janet Bazley QC also pointed out the fact that “the court may achieve this by refusing an application to enforce”. However, she agreed it would be “helpful for there to be an express power to remit arrears on a free standing basis.”

¹⁰⁷ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Law Society; Money Advice Trust; Penningtons Manches; Resolution; One member of the public; Tony Roe.

- 1.530 The Judges of the Family Division were equally aware of the fact that there is “no real difficulty in the court remitting arrears as the court is almost always seized of the issue one way or the other.” Regardless, they still welcomed the power for “arrears to be remitted without the need to apply separately to vary the order.”
- 1.531 The Justices’ Clerks’ Society were equally welcoming of a power to remit arrears on the application of the debtor. It questioned whether permission would be required stating that “whether permission is required depends on which Act the original order was made under.” For example, the Children Act 1989 is “silent on whether there is a requirement for permission to enforce or remit arrears due under Children Act 1989”. Nevertheless, the Society advocated “a rule making the power to remit clear and that the onus lies on the debtor to demonstrate why all arrears should not be enforced.”
- 1.532 The Money Advice Trust thought that “the proposal seems fair and reasonable” as it would allow the court to make decisions based on “all the necessary information as to the financial position of the applicant.”
- 1.533 One member of the public was extremely supportive of this proposal. He emphasised the need for guidance: “judges need guidance that there are circumstances where arrears should be remitted.” He also advocated the use of the power where the debtor is bankrupt. Further, he felt that the “law needs to encourage judges to exercise his or her power more frequently or use financial reconstruction experts who are cheaper than the legal process.” He highlighted that the issue with the current system is that the debtor is in the same position if her or she is completely non-compliant with financial orders or partially non-compliant with financial orders.

Power to remit arrears in appropriate circumstances

- 1.534 The Law Society agreed the court should have this power where “it believes it would be fair to both parties to do so.” It thought the power would be of particular use where the original order was made without assessment of the debtor’s ability to pay: “for example, if the debtor was assessed on their earning capacity rather than their actual income.”
- 1.535 Resolution advocated a similar approach; it thought the “court could remit where it considers that this would be fair to both parties.”
- 1.536 Pennington Manches stated that the court should have the power to remit arrears without an application being made for variation “in appropriate circumstances.”

Qualified power to remit arrears

- 1.537 District Judge Robinson was extremely critical of the current system: “the present situation is a mess.” He therefore advocated a “free-standing discretion to remit arrears.” However, he did not want this discretion to “be a back door route to appeal”; he suggested that there “should be some restriction on applications by the debtor, say not within 12 months of the original order.”

STREAMLINING

We provisionally propose the streamlining of the procedure for a third party debt order so that there is a final hearing only where a debtor or third party raises an objection following the service of the interim order.

Do consultees agree?

- 1.538 In the Consultation Paper we outlined the Government's previous proposal for streamlining third party debt orders. This involved a judge making an interim order, which could then be made final by a court clerk without a further hearing if the debtor or a third party did not raise any objection to the order within a specified period of time.
- 1.539 Fourteen consultees responded to this question.¹⁰⁸ Of those
- (1) six consultees supported the proposal;¹⁰⁹ and
 - (2) eight consultees did not or, without explicitly objecting, only raised concerns within their response.¹¹⁰

Support for streamlining

- 1.540 The main argument for streamlining the third party debt order procedure was "the cost and time saving" as explained by International Family Law Group. They were of the view that these benefits outweighed the potential hardship to a debtor. However, they also proposed a number of important safeguards that they would require in order to support reform. These were:
- (1) a reasonable period in which to respond to the interim order;
 - (2) clear information about the consequences of the order being made final (including bank charges, unpaid direct debits, etc); and
 - (3) sufficient guidance on how to issue a notice of objection.
- 1.541 The Judges of the Family Division, who also supported streamlining, emphasised the need for proper notice to the debtor and the third party.

¹⁰⁸ Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Law Society; Money Advice Trust; Penningtons Manches; Resolution; One member of the public; Tony Roe; Tina Villarosa.

¹⁰⁹ Clarion Solicitors; International Family Law Group; Judges of the Family Division; Penningtons Manches; Resolution; Tony Roe.

¹¹⁰ District Judge Robinson; Family Justice Council; FLBA; Janet Bazley QC; Law Society; Money Advice Trust; One member of the public; Tina Villarosa.

Concerns about a streamlined procedure

Risk of injustice

- 1.542 Those consultees who objected to the proposal were of the opinion that the current law (an interim order followed by a hearing on notice) strikes the correct balance between the competing claims of the debtor, the creditor and any third parties who may claim an interest.¹¹¹
- 1.543 District Judge Robinson and the Family Justice Council raised the possibility of mistakes and failures to comply with procedure, particularly where the interim order is made on paper, as is usually the case. These can be identified and rectified at a final hearing. District Judge Robinson said he was “uncomfortable with doing away with the two stage process.” He did not think it was a “major problem, and it allows judges to make orders in the knowledge that mistakes can be put right.”
- 1.544 The Law Society commented that “local courts often do not know how to handle claims under the hardship provision. Applications can be wrongly rejected”. This also suggests that safeguards should ensure full consideration of the evidence in the application and that a final hearing may be the only way to ensure a fair hearing for the debtor.
- 1.545 Three consultees raised the problem of debtors who are abroad, ill or otherwise do not receive notice of the order.¹¹² The FLBA was concerned that some creditors may even make an application specifically in the knowledge of such circumstances to take advantage of the debtor; this would be an abuse of process.
- 1.546 One member of the public outlined a number of scenarios in which it would be inappropriate to make an order, for example if the funds had been lent to the debtor, were set aside to meet specific liabilities such as a tax obligation or would be needed for day to day living during a period of unemployment.
- 1.547 If, for any reason, the final order should not in fact have been made, Money Advice Trust and Family Justice Council raised the possibility of appeals or applications to set aside the order. Dealing with an increase in those may outweigh the savings in time and cost achieved by streamlining the initial procedure. Furthermore, if money has been paid under the order, the FLBA envisaged potential difficulties for the debtor to recover those funds.

¹¹¹ FLBA and Janet Bazley QC.

¹¹² FLBA, Money Advice Trust and Tina Villarosa.

Potential delay

- 1.548 If the procedure was streamlined it would also be necessary to determine the appropriate amount of time in which a debtor or third party could object and request a final hearing.¹¹³ In order to be fair to the debtor or third party, such a time period may actually increase the current delay for the creditor and, conversely, if the period was too short then the debtor or third party may have difficulties in complying. Family Justice Council and the Law Society both stressed the need to protect “vulnerable” people who may already be struggling with debt.

We provisionally propose that the procedure for charging orders should be streamlined so that a final hearing only takes place where a debtor raises an objection following the service of the interim order.

Introduction

- 1.549 In total, thirteen consultees responded to this question. Eight consultees¹¹⁴ were in favour of reform, four¹¹⁵ were opposed and one¹¹⁶ generally discussed the reform.

Arguments for reform

- 1.550 The FLBA agreed with our proposal on the basis that the making of a final charging order is not the final step in the enforcement process, as the creditor would still need to obtain an order for sale. It felt that any difficulties caused by the accelerated process could be resolved at the stage of applying for an order for sale including, where appropriate, the variation or discharge of the final charging order. The Association considered that the final charging order should be made by a judge.
- 1.551 Further, the FLBA noted that the various applications available to achieve an order for sale, as set out in our Consultation Paper, emphasise the need for a single consolidated set of rules and process.
- 1.552 For the same reasons given in support of streamlining third party debt orders, International Family Law Group supported the streamlining of charging orders. They also noted that charging orders are “less likely to have an immediate damaging effect on the debtor than a third party debt order.” The Law Society also agreed that “interim charging orders are less likely to have a damaging effect on the debtor than an interim third party debt order”; it thought that “if the debtor was mistaken in not raising objections, issues can be rectified before any serious impact happens.”
- 1.553 The Judges of the Family Division thought the procedure for charging orders should be the same as the procedure as those for third party debt orders.

¹¹³ Family Justice Council, Money Advice Trust, International Family Law Group.

¹¹⁴ FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Law Society; Penningtons Manches; Resolution; Tony Roe.

¹¹⁵ District Judge Robinson; Family Justice Council; Money Advice Trust; One member of the public.

¹¹⁶ Land Registry.

Arguments against reform

Safeguards

- 1.554 District Judge Robinson thought that the current two stage system is satisfactory; the interest is immediately protected and the final order is often unopposed. He thought that the return date provides a “valuable check”.
- 1.555 The Family Justice Council noted that the final hearing is “usually short and administrative in nature” but that it “provides safeguards that the procedure has been properly complied with and for a vulnerable creditor in debt.”
- 1.556 One member of the public thought that the court needs to be aware of the debtor’s other creditors and financial obligations.

Delay

- 1.557 The Family Justice Council said that if a final hearing was listed only if the debtor (or third party) raises objections, there will be delay for the creditor. Further, the debtor would need to be given more time to respond and if administrative errors are made that would cause additional delay.

COSTS

Do consultees think that any reform of the costs rules, and provisions for the payment of fees, for proceedings for the enforcement of family financial orders would be useful?

Introduction

- 1.558 In total, fourteen people responded to the question on costs. The responses were extremely positive with twelve responses¹¹⁷ expressing a positive attitude towards reform. Only one response¹¹⁸ was opposed to any reform. The other negative response,¹¹⁹ whilst rejecting the need for any major reform, was still willing to suggest some minor reform.

In favour of reform

- 1.559 Consultees gave various reasons for supporting reform of the costs rules.

Unfair for the creditor to bear the costs of enforcement

- 1.560 Clarion Solicitors argued that it “is not fair for a receiving party to bear the burden of enforcing a financial order.”
- 1.561 The Justices’ Clerks’ Society stated that reform would “provide some relief for an already impoverished creditor.”

¹¹⁷ Birmingham Law Society; Clarion Solicitors; District Judge Robinson; Family Justice Council; FLBA; Janet Bazley QC; Judges of the Family Division; Justices’ Clerks’ Society; Penningtons Manches; Resolution; One member of the public; Tony Roe.

¹¹⁸ International Family Law Group.

¹¹⁹ Law Society.

Need to cross-refer between the Family Procedure Rules and Civil Procedure Rules

- 1.562 The FLBA stated that “it is unhelpful, as with enforcement matters generally, to be required to cross refer between the [Family Procedure Rules] and [Civil Procedure Rules] on cost issues.”
- 1.563 Janet Bazley QC agreed and said that “the need to cross refer between the [Family Procedure Rules] and [Civil Procedure Rules] on cost issues (as with enforcement generally) is unhelpful and unwieldy.”

Rules on fixed costs

- 1.564 District Judge Robinson highlighted that “the distinction between fixed costs and general costs is not clear, even ... to some judges.” He said that reform needs to ensure that the position is made clear so that “a litigant in person can understand.”
- 1.565 Penningtons Manches were also critical of the rules governing fixed costs: “the rules for fixed costs in enforcement proceedings are arcane and outdated.” They concluded that “the fixed costs regime ... causes confusion.”

Clarity

- 1.566 The FLBA noted that “there needs to be greater clarity and certainty.”
- 1.567 The Family Justice Council focused on the effect on litigants in person stating that “litigants in person (and some legal representatives) find the cost rules confusing.” Further, it noted that “it is unhelpful that the rules are clearly spelt out in respect of the substantive proceedings but there is then an effective lacuna in respect of interim issues, enforcement etc.”

Discouragement of the creditor

- 1.568 The Judges of the Family Division noted the “difficulty of charging significant fees to enforce family financial orders that have already been made. Litigants view such provisions as a further tax on justice.”
- 1.569 The Justices’ Clerks’ Society expressed a similar concern: “it is important that the creditor is not discouraged from applying to court for enforcement of the debt by the enforcement process.” Further, it said that “a system that leaves an individual reluctant to take action and which therefore reluctantly encourages non-payment will not enjoy public confidence.” In terms of the relationship between costs and the willingness of the creditor to bring proceedings, the Society referenced the “change in emphasis from the court applying for enforcement to the creditor applying” which means that “now costs are of greater significance to the creditor.”

Encouragement of the debtor

- 1.570 The Justices’ Clerks’ Society suggested that reform could mean that “a debtor who is unwilling to pay may be encouraged to do so.”

Recommendations for Reform

- 1.571 The twelve consultees recommended a range of reforms to improve the law governing costs in enforcement proceedings.

Presumption that the debtor pays the creditor's costs

- 1.572 The FLBA proposed that “if the court makes an enforcement order, there should be a presumption that the debtor pays the costs, unless there is a good reason why not.”
- 1.573 Janet Bazley QC also felt it would be “helpful and likely to encourage payment of family finance orders” if there was a presumption that “where an enforcement order is made, an order that the debtor pays the costs of enforcement should follow”. In order to rebut this presumption, the debtor would have to show “cause why costs should not follow the event”.
- 1.574 The Judges of the Family Division stated that “the most obvious solution is to have a presumption that the debtor will pay the costs of enforcement.” Although the judges were aware that “this may simply increase the size of the (irrecoverable) debt, it is a logical change to make.” Equally, the judges emphasised that “creditors must be aware that, in the absence of full or partial exemption, they will have to pay court fees in advance as well as any costs they themselves incur with their own lawyers”.
- 1.575 The Justices’ Clerks’ Society was not as explicit as the other consultees and merely stated that “confidence that [the creditor] will receive recompense for the action is likely to encourage pursuance of the debt”. It then stated that its suggested reforms would “provide some relief for an already impoverished creditor”. Further, it would also mean that “a debtor who is unwilling to pay may be encouraged to do so if faced with potential court costs on top of the debt”.
- 1.576 Penningtons Manches stated that the “starting point for a successful application for enforcement should be that the debtor pays the creditor’s costs”.

Presumption of “no order for costs” if debtor successfully opposes enforcement application

- 1.577 The FLBA proposed that “if the debtor is successful in opposing an application for enforcement there should be a presumption of no order for costs unless the creditor has behaved unreasonably in the commencement of or conduct of the enforcement proceedings.”
- 1.578 Janet Bazley QC agreed and stated that “if ... the application to enforce was unsuccessful, a general rule that no order for costs should be made would be appropriate, unless the court determined that the creditor was unreasonable in his/her conduct of the application or there were other circumstances justifying a different order.”

Distinction between consent orders and orders imposed by the court

- 1.579 Although it was generally in favour of retaining the current law, Birmingham Law Society stated that “one suggestion was made that the judiciary could take a more robust view when considering whether to make a Costs Order when dealing with an application to enforce a consent order, as opposed to an order that has been determined by the court”.

Costs on an indemnity basis

- 1.580 Clarion Solicitors thought that “the costs should follow the event and that the receiving party should be in a position to recover costs on an indemnity basis from the defaulting debtor.”

Calderbank offers

- 1.581 The FLBA commented that “the ability of a party to make an offer on a ‘Calderbank basis’ was a useful tool both for those involved in litigation and for a judge at FDR to place a degree of pressure on the parties to achieve settlement.” It proposed that “*Calderbank* letters should be reinstated and provision should be made expressly under the rules for this to be a factor to be taken into account on costs.”

Clarify the distinction between fixed costs and general costs

- 1.582 District Judge Robinson recommended that reform should “make the position clear so that a litigant in person can understand.”

Remove the need to cross refer between the Civil Procedure Rules and the Family Procedure Rules

- 1.583 The Family Justice Council supported “amendments to Part 28 of the Family Procedure Rules to incorporate the relevant parts of Part 44 to 48 of the [Civil Procedure Rules] into the [Family Procedure Rules] without the need to cross refer.”

Fixed costs

- 1.584 The Family Justice Council recommended that “there should be fixed costs but the court should retain the discretion to makes costs orders”. Although this is the current position, the fact it is referred to as a reform might indicate that the Family Justice Council agreed with the team’s proposal to make the discretion an explicit power under the Family Procedure Rules.
- 1.585 Even though the Law Society did not recommend any major reforms, it stated that “the process could be simplified if family court judges gained the general discretion to make a cost orders based on the [Civil Procedure Rules] provisions in Part 44.” The fact it does not recommend any other major reforms indicates it would retain “fixed costs” as the default position.
- 1.586 Tony Roe said that “fixed costs should be scrapped with the court able to make full costs orders in all enforcement cases on an indemnity basis on summary assessment.”

Opposed to reform

- 1.587 Only two consultees were opposed to reform.
- 1.588 The Law Society stated that it did not “suggest any major reforms”. It conceded that the current system “has its complexities, and leaves creditors uncertain as to what costs may be recovered.” However, the Society concluded that the system “also provides the court with the flexibility to award the costs as it sees fit.” Ultimately, it felt that “reforming other areas analysed in the consultation will have a greater impact on improving enforcement.” It did, however, suggest a minor reform to the court’s discretion to make cost orders: “The process could be simplified if family judges gained the general discretion to make a costs order based on the Civil Procedure Rules general provisions in Part 44.”
- 1.589 International Family Law Group were of the view that “the current costs position whereby the ‘no order’ presumption does not apply to enforcement proceedings is appropriate.” They recognised that “the very fact that a creditor is having to issue enforcement proceedings means that the debtor may have defaulted on a financial order and therefore the “no order” principle would be unjust.” However, they commented that “very often it’s a case of the debtor being unable to pay rather than unwilling to pay and therefore a presumption in favour of costs would also be unfair.” Ultimately, they concluded that a “combination of the factors the court has to take into account when determining whether to make a costs order and the proposed introduction of an obligation to file a financial statement (which would help determine whether a debtor has the ability to pay) will assist the court in making appropriate costs orders when the debtor has unreasonably defaulted on a financial order.”

Responses from consultation events

- 1.590 At the Cardiff consultation event, it was felt that a presumption that costs follow the event would have both advantages and disadvantages. One attendee thought it may be helpful to make explicitly clear that costs follow the event in enforcement. Another attendee pointed out this can work both ways since it might make the creditor scared to bring an application.
- 1.591 Another attendee at the Cardiff consultation event was concerned that the cost rules didn’t address the need for the creditor to find the court fee at the beginning to make the application.
- 1.592 At the London consultation event, an attendee was concerned about access to advice where the sophisticated debtor receives advice whilst the creditor cannot afford any. They thought that a pound for pound order might be useful; this would ensure parity and could be put on a statutory footing. *The power to make pound for pound orders already exists.*
- 1.593 At the Manchester consultation event, an attendee suggested that a presumption that costs follow the event would be likely to assist. They had recently had a client who had a “paper win” in enforcement proceedings because the costs cancelled out what had been recovered. They commented that often the solicitor has to give the reluctant advice that it isn’t really worth pursuing.

- 1.594 An attendee thought that a presumption about costs should extend to costs even if there is no hearing. Otherwise, payment will be made the day before the hearing just to avoid the costs provision, which will still leave the creditor out of pocket.
- 1.595 Another attendee said the important point is to take the pressure off of the one who is owed money and put the burden on the other party. They felt the presumption that costs follow the event would be a good idea in this regard.

BANKRUPTCY

We ask consultees for their views as to whether arrears of periodical payments should be provable in bankruptcy.

Introduction

- 1.596 In total, eleven consultees responded to this question. Eight consultees¹²⁰ favoured periodical payments being provable in bankruptcy whilst three consultees¹²¹ opposed the proposal. However, the Family Justice Council opposed the proposal on the basis that it is more beneficial to the creditor for the debt to survive the bankruptcy, but we do not consider that the two need be mutually exclusive.

Consultees in favour of the proposal

- 1.597 The FLBA and Janet Bazley QC could not see a reasoned basis for the current distinction between lump sums (which are provable) and arrears of periodical payments (which are not). They also thought it was important to retain the protection afforded by section 281(5) of the Insolvency Act 1986; namely, that debts due by reason of an order made within family proceedings will survive the bankruptcy and will not be extinguished unless the court orders otherwise.
- 1.598 The Judges of the Family Division also agreed that arrears of periodical payments should be both provable and survive the discharge of the bankruptcy. They thought this should be subject to the usual powers to remit arrears.
- 1.599 Resolution agreed with our proposal. It also commented that “arrears are a debt and the debtor may have deliberately allowed arrears to accrue with a view to seeking bankruptcy.” However, it noted the minimum debt requirement applying from 1 October 2015 which would require substantial arrears to arise before a bankruptcy petition could be issued on the basis of those arrears.

Consultees opposed to the proposal

- 1.600 The Family Justice Council explicitly rejected the proposal. It argued that “bankruptcy can be used as a tactic by the debtor to avoid meeting his obligations”; therefore, it felt that “the former spouse is in a better position if the order in the family proceedings survives the bankruptcy.”

¹²⁰ District Judge Robinson; FLBA; International Family Law Group; Janet Bazley QC; Judges of the Family Division; Penningtons Manches; Resolution; Tony Roe.

¹²¹ Family Justice Council; Law Society; One member of the public.

- 1.601 The Law Society thought the current position struck “the right balance between family and other creditors.”
- 1.602 One member of the public noted that if a bankrupt goes to court and periodical payments are provable, there may be “an incentive for a court to award periodic payments where realistically the trustees in bankruptcy rather than the Court are in a much better position to judge this.”
- 1.603 The member of the public thought that “if the bankrupt person for some reason is, on discharge of bankruptcy, shown to have had more assets than liabilities, then the periodical payments could be provable retrospectively”; the member of the public thought that this would be unlikely in practice as most people who are declared bankrupt will have fewer assets than liabilities. The member of the public also argued that the Family Court should not be able to set aside a bankruptcy as the Family Court will “have far less experience and time and expertise to make such an assessment, court time being so limited.”¹²²
- 1.604 In addition, the member of the public suggested that:
- while courts have discretion to remove debts post-bankruptcy courts should be given much more guidance to do this otherwise bankrupts will remain permanently bankrupt unless a windfall is received. Alternatively family law debts should not outlive the bankruptcy unless there are special circumstances for doing so.¹²³

Additional Comments

- 1.605 At the consultation event in London, it was asked whether, if periodical payments were provable in bankruptcy, it would still be possible to enforce any remaining debt after the bankruptcy had terminated. It was asked if this would be fair from a “higher perspective.”
- 1.606 A district judge noted that there is an issue about consolidation of bankruptcy and financial proceedings in the Family Courts/County Courts. He proposed that thought should be given as to how such matters can be heard together; he noted that currently at the Central Family Court, they are unable to deal with bankruptcy without transferring to the High Court.
- 1.607 One attendee thought that “existing orders should be treated as needs of the bankrupt on an application for an income payments order”; he could not see why this should not be the case as the bankrupt can always apply to vary. He added that existing orders must be enforceable (subject to issues around the 12 month rule) following the termination of bankruptcy; he thought this was “crucial or there will be swathes of people going bankrupt to evade orders that they cannot come to terms with paying.”

¹²² The court can annul or rescind a bankruptcy under ss 282 and 375 of the Insolvency Act 1986.

¹²³ The court has a discretion to release the discharged bankrupt from some of those debts that would otherwise survive the bankruptcy under the Insolvency Act 1986, namely debt consisting of a liability to pay damages in respect of personal injuries and debt arising from an order made in family proceedings or under a maintenance calculation made under the Child Support act 1991. See Insolvency Act 1986, s 281(5).

1.608 One member of the public commented that family financial orders can compound credit problems. They thought that the tight deadlines for payment (of 7 or 14 days) made it difficult to carry on without going bankrupt; the time restrictions means there is insufficient time to gather the funds to pay the debtor or alternatively make arrangements such as an Individual Voluntary Arrangement (IVA). They thought that family courts seem to be unable to work effectively to make an IVA happen, that they do not support an IVA or allow for a moratorium on family law debts. They added that the creditor will often not have the experience of financial reconstructions to make the compromises necessary to make an IVA happen. They concluded that there needs to be some equivalent moratorium in the enforcements of Family law debts to allow the creditor if necessary to obtain more time and make compromises with all creditors including the family law creditors.

EXECUTION OF DOCUMENTS

Do consultees believe that any reform is needed to the procedure for the execution of documents by the court, for example the removal of the conditions that the power can only be exercised where the party has refused or neglected to comply with the order to execute the document, or where that party cannot, after reasonable inquiry, be found?

1.609 Fourteen consultees responded to this question. Seven consultees¹ did not consider that any reform was necessary or desirable, and five² suggested that varying levels of reform would be helpful. In addition, Resolution said that the focus should be on building the power to execute documents into the original order. Land Registry also responded and highlighted the court's power under section 50 of the Trustee Act 1925 to appoint a person to convey land or any interest in land, but Land Registry was unable to comment on the policy of the execution of documents by the court.

Against reform

1.610 The two themes emerging from the responses against the idea of reform were that the current law is working well and that to remove the pre-conditions currently in place would be to remove important and necessary safeguards.

1.611 Birmingham Law Society said that the current system "appears to work extremely well" and is "efficient". Similarly, the Family Justice Council said that "most courts deal swiftly with applications under section 39 of the Senior Courts Act 1981" and it was the Council's experience that many litigants are made aware of the power at the time of the original order if it is apparent that the debtor is likely to be uncooperative.

1.612 The Family Law Bar Association considered that the current law contains "sensible pre-conditions to the making of the order to allow the court to execute the transfer." The Association was concerned that a relaxation of the "procedural safeguards" might enable an "unscrupulous party... to effect a quick transfer and sale to an unconnected third party when further enquiry would have revealed this to be inappropriate on the facts of the case."

1.613 Janet Bazley QC was of a similar view and said that the current pre-conditions "provide important safeguards for unconnected third parties." Pennington Manches stated that the "current process is a necessary safeguard."

1.614 One member of the public said that "a legal process" is necessary to protect the debtor and that courts often "impose very tight deadlines, too short for people to implement orders." He considered that the current law is "sufficient".

¹ Birmingham Law Society; Family Justice Council; Family Law Bar Association; Janet Bazley QC; Law Society; Penningtons Manches; One member of the public.

² Clarion Solicitors; District Judge Richard Robinson; International Family Law Group; Judges of the Family Division; Tony Roe.

In favour of reform

- 1.615 The Judges of the Family Division were unequivocally in favour of reform, they said: “A District Judge should be able to execute documents at any stage to ensure compliance with a financial remedy order. The current process is cumbersome and slow. The judge will ensure that only the correct documents are executed. There is therefore no need for further safeguards.”
- 1.616 District Judge Robinson was of a similar view, he said that it “would be helpful to give judges a general power to execute documents at the time of the original order, or where there has been failure to comply for any reason.” He considered that although the current system works well for those who know what to do, it is “a minefield for the unrepresented”.
- 1.617 International Family Law Group suggested that the court “should have a discretion, when a party to financial remedy proceedings has a history of failing to comply with orders, to execute documents or give itself future power to execute the documents at the final hearing.” They did not think that such a power would create any prejudice to the debtor, who would have to execute the document themselves in any event, and would be a “significant benefit to a creditor (who would avoid the delay, cost and stress of trying to force a debtor to execute a document they had been ordered to execute).”
- 1.618 Clarion solicitors thought that “it would save considerable cost and time for the court to be automatically empowered to execute documents in the event that the debtor should default within a fixed period of time.”
- 1.619 Tony Roe, a family law solicitor, said that the pre-conditions should be removed and the power to execute documents should, where possible, be built into the original order at the time it is made.
- 1.620 On balance, and considering the responses received, we do not recommend any change to the current rules. We consider that the safeguards, while not essential in all circumstances, provide a useful function in protecting the debtor against premature or even unscrupulous applications by the creditor. In appropriate circumstances, the execution of documents by the court can be facilitated by careful drafting of the original order and, in our view that is sufficient to protect the interests of the creditor.

Do consultees think that existing case management powers are sufficient and used effectively, whether at the time of the original financial order or at the time of enforcement proceedings?

- 1.621 Twelve consultees responded to this question:

- (1) one felt that it was too soon after the changes that came into force on 22 April 2014 to evaluate case management powers or suggest amendments;³ and
- (2) eleven suggested at least one possible change or improvement to the powers or their use.⁴

Approach to case management

- 1.622 A theme that became apparent during the consultation was that the courts are not perceived to be sufficiently robust. Pennington Manches commented that “one reform of central importance is the introduction of more robust case management”. Resolution considered the existing powers sufficient “but not always used”. It was suggested that there is very little excuse for not complying with some orders, for example a transfer of property, and such cases can be dealt with more robustly than perhaps enforcing periodical payments five years after the order was made and where circumstances may have changed.
- 1.623 However, much of the focus of the consultation paper and response was on case management at the time of the original financial order, rather than at the stage of enforcement proceedings.
- 1.624 Tony Roe noted that, unless certain provisions are to be automatically inserted into orders, the insistence on enforcement-related provisions (which were considered a good idea in principle) in the original order is likely to make it harder to reach agreement. This may be why consultees generally confirmed that secured orders are not often seen. Clarion felt there was “significant resistance” from the judiciary to secure periodical payments and a change to this approach “would be a helpful shift”. Consultees hoped that the standard financial orders, if and when adopted, would assist in good practice in drafting, which facilitates enforcement if necessary at a later stage.
- 1.625 Many of those who responded to this question, and attendees at consultation events, felt that judges could also take greater account of potential problems and exercise case management powers with a view to enforcement when making or approving an order. The suggested framework for this differed. The FLBA thought a statutory direction to consider enforcement had “much merit,” whereas Resolution would welcome, more generally, “the judiciary being more directive about the consequences of non-compliance”. National Family Mediation asked whether the court could and should be raising awareness by providing information about enforcement at the time of the final order.

³ Law Society. However, when commenting on training the Law Society commented that it would be “worth exploring” the possibility of specialist enforcement judges in each court.

⁴ Clarion Solicitors; District Judge Richard Robinson; Family Justice Council; Family Law Bar Association; International Family Law Group; Janet Bazley QC; Justices’ Clerks Society; National Family Mediation; Penningtons Manches; Resolution; Tony Roe.

- 1.626 The responses tended to discuss existing, but perhaps underused, powers at the time of the original order, such as pre-emptive attachment of earnings orders, provision for execution of documents, payments by standing order, penal notices and unless or Hadkinson orders. A number of consultees suggested that the powers would not need to be exercised in every case, but particularly where there is a contested order and the history suggests that problems of enforcement are likely to arise.
- 1.627 FLBA, in its response, raised the listing of further hearings to anticipate enforcement issues, which could be vacated by agreement if the order was complied with. It proposed that this type of hearing could be triggered where the court “has reasonable grounds to believe that a party will not comply, or will have difficulty complying, with all or part of the order”. As with unless orders, this may avoid the need for a creditor to make a fresh application incurring further costs, delay and the frustration of having to start again after what may have been lengthy original proceedings.
- 1.628 The Justices’ Clerks Society said it would welcome “a simple method of issuing an arrest warrant upon being satisfied as to proper service” to ensure the debtor’s attendance at hearings. The concern is primarily where proceedings in a debtor’s absence are not a viable option and therefore, we think, such a change would be of relatively limited utility in enforcement; attendance does not equate to disclosure, which is likely to be a more problematic issue.

Responses from consultation events

- 1.629 At the consultation event in Cardiff, there was general dissatisfaction with case management and it was felt that a more robust approach to enforcement by the judiciary was required. Attendees thought there was a need to make account of enforcement at the time of the original order and “front load” the enforcement process.
- 1.630 One attendee at the Cardiff event asked if, for debtors in employment, the attachment of earnings order could not be made in the final financial order and the rules changed to ensure this, and the making of payment by standing order, happens as a matter of course.⁵
- 1.631 An attendee queried whether it might be possible to prove the enforcement case in advance by setting out the history of the case. Everything depends on the judges, who are not prepared to be draconian. If the creditor is able to establish a history to the case, why not make it a prerequisite that, if the debtor doesn’t prove he or she wants to pay, they should be subject to remedies. It was said that the greatest problem is the judges.
- 1.632 It was suggested by one attendee that it would provide “a back up” to have provision in the rules for judges to take on board at the time of the original order that it will be hard to enforce.

⁵ It was suggested by another attendee that attachment of earning orders could not be made until there had been default, which is incorrect.

- 1.633 Some attendees felt strongly that financial orders should be unless orders. Court fees have been hiked up, and we have to build in to the system that the creditor doesn't need to make a new application. The issues should be front-loaded.
- 1.634 It was pointed out by another attendee that you don't really see secured orders, even though these are available now.
- 1.635 One attendee thought judges should look at the original order and identify aspects that can't be argued about. If a party has failed to comply with a transfer of property order then he or she just didn't want to do it. That can be compared with enforcing maintenance three or five years on from the order, which is very different.
- 1.636 At the consultation event in London, an attendee said that the majority of orders are made at FDR or shortly thereafter. A judge who has presided over and perhaps assisted with negotiations before giving them authority in an order should be capable of dealing with problems arising from it. It may be that enforcement would be easier in cases where a debtor, who might have accepted certain points in front of the judge at the FDR, later refuses to do in further proceedings. The rules would need to change to allow matters to go back to the FDR judge, but the attendee felt that this would be a good idea.

Summary of suggested case management reforms

- 1.637 The complete list of reforms (excluding those concerning allocation, which have been addressed in a separate section above) arising from consultation responses, which could be considered individually or in combination,⁶ is as follows:

Drafting of original order

- (1) Greater use of secured orders, default orders, unless orders;
- (2) Pre-emptive use of enforcement provisions such as attachment of earnings orders, execution of documents provisions or penal notices;
- (3) Guidance in standard and precedent orders as to when the above could be considered;
- (4) Careful review of drafting by the judge specifically with a view to enforcement, especially where parties unrepresented;

Case management at time of original order

- (5) A direction (perhaps statutory) to consider enforcement at the time of making the order;
- (6) Listing a hearing for enforcement issues where the court "has reasonable grounds to believe that a party will not comply, or will have difficulty in complying, with all or part of the order";

⁶ Although some are clearly contradictory and so could not both be implemented.

- (7) Case management directions to apply after final order if appropriate;
- (8) Judges to be more directive about non-compliance and provide information about enforcement;

Case management at time of enforcement

- (9) More robust use of the existing powers;
- (10) Improvements to the general enforcement application procedure;
- (11) Simple arrest warrant procedure to secure attendance of the debtor;
- (12) Presumption that applications to vary periodical payments downward only possible where debtor paying a certain proportion of money due; and
- (13) Pound for pound legal services order.