

Enforcement of Family Financial Orders A Consultation Paper



Law Commission

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Consultation Paper No 219



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About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, *Chairman*, Professor Elizabeth Cooke, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

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After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

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THE LAW COMMISSION

ENFORCEMENT OF FAMILY FINANCIAL ORDERS

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GLOSSARY AND ABBREVIATIONS

“ADR”: alternative dispute resolution: methods of resolving disputes without taking the case to court. The term “non-court dispute resolution” is an alternative, and is the title of Part 3 of the Family Procedure Rules, which deals with these methods.

“Civil partnership”: a legal status acquired by same-sex couples who register as civil partners which provides substantially the same legal rights as marriage.

“Civil Procedure Rules”:¹ the rules of court setting out the procedure in the civil courts in England and Wales.

“Clean break”: an order which imposes no ongoing financial liability on either party for the other.

“Codification”: the collection in one statute of all the law in a particular area.

“Consent order”: an order that is reached by agreement between the parties and then approved and made by the court, in contrast to an order that is imposed by the court. A consent order may be made at any stage in proceedings.

“Consolidation”: the replacement by a single statute of several statutes or parts of statutes.

“Contempt of court”: conduct which includes disobedience to court orders and judgments, interference with the administration of justice and disrupting court proceedings.

“Creditor”: in this paper, the person to whom payment is owed, or to whom the other party has an obligation, under a financial order made in family proceedings.

“Debtor”: in this paper, the person who must make a payment or who has an obligation to the other party under a financial order made in family proceedings.

“Dissolution”: the legal termination of a civil partnership.

“Divorce”: the legal termination of a marriage.

“Family Procedure Rules”:² the rules of court setting out the procedure in family proceedings in England and Wales.

¹ Civil Procedure Rules 1998, SI 1998 No 3132.

² Family Procedure Rules 2010, SI 2010 No 2955.

“Financial Dispute Resolution (FDR) hearing”: the (usually) second hearing that occurs following the making of an application for a financial order. The first hearing, called the First Directions Appointment, is for the court to make directions as to the provision of evidence and the conduct of the case. The purpose of the FDR hearing is to help the parties to agree a financial settlement with the assistance of the judge, whose role is to provide a neutral evaluation of the case, and to mediate between the parties. This may include providing an indication to the parties of what the judge believes to be the range of possible outcomes, were the matter to proceed to a final hearing. The FDR hearing is “without prejudice” so that anything said or any admission made in an FDR will not generally be admissible as evidence at any other hearing, in order to encourage open discussion and settlement.

“Financial needs”: This term is used in the checklist of factors to which the court is directed when considering whether to make financial provision under the Matrimonial Causes Act 1973, the Civil Partnership Act 2004 and Schedule 1 to the Children Act 1989. Its meaning is not defined in statute but, in the context of divorce and dissolution, encompasses where practicable the provision of a home for each of the former spouses and any dependent children, and an income with which to meet living expenses. The question of the level at which needs should be met, and for how long, on divorce and dissolution, is a complex one, which we address in our report Matrimonial Property, Needs and Agreements.³

“Financial order” or “family financial order”: financial orders made for the benefit of a spouse or children on divorce and dissolution, usually under the Matrimonial Causes Act 1973 or the Civil Partnership Act 2004, and financial orders made under Schedule 1 of the Children Act 1989 for the benefit of children.

“Financial Remedies Working Group”: the group established by the President of the Family Division in June 2014 to explore ways of improving the accessibility of the system for litigants in person and to identify ways of further improving good practice in financial remedy cases.

“Interim order”: a court order intended to last for a limited period of time, usually until the next court hearing or the making of a final court order or until a party has carried out a particular act.

“Legal aid”: a means of funding legal advice, representation and mediation, by which a party receives such services on a free or subsidised basis. Legal aid is usually means-tested and is administered by the Legal Aid Agency.

“Legal help”: a form of legal aid that involves the provision of legal services other than issuing or providing representation in proceedings, or acting as a mediator or arbitrator.

“Lump sum order”: an order for one party to pay to the other a specified amount of money. This can be payable as a single payment, in instalments or as a series of payments.

³ (2014) Law Com No 343.

“Periodical payments”: a series of payments made for a definite or indefinite period of time, typically on a monthly basis.

“Penal notice”: a warning set out in a court order to the effect that if the recipient of the warning fails to comply with the order he or she may be imprisoned.

“Pension attachment order”: an order requiring a percentage of the income or capital benefits of a pension to be paid to the other party.

“Pension sharing order”: an order dividing an existing pension, giving the person benefiting from the order a proportion of the fund to invest in a pension of his or her own.

“Personal service”: when an application or an order is served personally it is delivered to a party in proceedings in person, rather than by another method of service, such as by post.

“Spouse”: one of the parties to a marriage or a civil partnership.

“1998 Enforcement Review”: the Review of the Enforcement of Civil Court Judgments conducted by the Lord Chancellor’s Department over a number of years from 1998 onwards.

“2003 White Paper”: the document produced by Government setting out details of future policy on enforcement entitled: Effective enforcement: improved methods of recovery for civil court debt and commercial rent and a single regulatory regime for warrant enforcement agents: a white paper (2003) Cm 5744.

“2011 Consultation”: the consultation paper produced by Government entitled: Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales (2011) Cm 8045.

“2012 Government response”: the response of Government to the responses to the 2011 Consultation entitled: Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales: the government response (2012) Cm 8274.

CHAPTER 1

INTRODUCTION

FAMILY FINANCIAL ORDERS AND THEIR ENFORCEMENT

- 1.1 A year ago the Law Commission published the final Report in our project entitled *Matrimonial Property, Needs and Agreements*.¹ In doing so we made recommendations about the financial provision that can be made for adults on divorce or the dissolution of civil partnership. As we explained in that Report, the ending of marriage and civil partnership almost always involves some financial re-organisation between the two adults involved. A house may need to be sold and the proceeds shared, or the ownership of the house may have to be changed. Savings may need to be shared or transferred. A pension may have to be shared. Sometimes the financial needs of one or both of the former spouses² mean that a clean break is not possible, so that ongoing periodical payments have to be made.
- 1.2 Although in many cases these financial arrangements will be made by agreement between the two parties, they ought to be expressed in a court order.³ In any event, pensions cannot be re-arranged by agreement alone; a court order is always needed. For other financial arrangements, an order should be put in place – by presenting a consent order to the court – in order to ensure that the order can, if necessary, be enforced.
- 1.3 By contrast, it is rare for court orders to be made for the financial support of children, because in most cases maintenance for children is dealt with by agreement between the parents or through the Child Maintenance Service⁴ (operating under the Child Support Act 1991 and associated legislation), by way of a formula. Even so, court orders are occasionally made, in particular where one of the parents or the child is outside the jurisdiction or where the parents are

¹ (2014) Law Com No 343.

² We use the term “spouse” to refer to one of the parties to a marriage or a civil partnership.

³ An order made in family proceedings for financial provision for a spouse, civil partner (or former spouse or civil partner) or child is called a financial remedy.

⁴ Part of the Department for Work and Pensions and the successor to the Child Maintenance and Enforcement Commission and (before that) the Child Support Agency.

unusually wealthy.⁵

- 1.4 The expectation is that once a court order is made in this context it will be complied with in a reasonable time – allowing for the delays that are sometimes involved, for example, in selling property. But sometimes that does not happen. A property may not be transferred or a lump sum may not be paid. Periodical payments may not be paid, perhaps once, perhaps persistently. There may be many reasons for failure to comply with a financial order. At one extreme the debtor cannot pay. At the other, he or she will not pay. Whatever the reason, at some stage the creditor is likely to consider enforcement options.
- 1.5 This Consultation Paper is the first publication in our new project on the enforcement of family financial orders.
- 1.6 The law provides a number of tools for enforcement, ranging from attachment of earnings orders to committal to prison. Some are more complex than others; some are more effective than others. The objective of our project is to consider to what extent the law could be reformed to make enforcement proceedings more efficient, by which we mean more likely to produce compliance with a court order, in a way that is fair to both parties.
- 1.7 In this introductory Chapter we begin by looking back at the origins of our project in order to explain how the legal landscape has changed since we agreed to take it on. Next we define its scope. We then discuss the relationship between the enforcement of family financial orders and the enforcement of civil court orders more generally. This serves as background to the relevant law and to an important question about the practical and financial impact of difficulties in the enforcement of family financial orders. Finally we explain our research and working methods and the structure of this paper, and we acknowledge the help we have received.
- 1.8 Consultees are referred to the glossary and list of abbreviations at pages vii to ix of this Consultation Paper. The enforcement of family financial orders is a technical area of the law and so further explanation of terms that arise frequently in this Consultation Paper has been provided to make it accessible to everyone, including non-specialists.

⁵ See Child Support Act 1991, ss 8 and 44. The court has jurisdiction to make a maintenance order where the non-resident parent's annual income exceeds a certain level – in the newest scheme this is £156,000 gross – and the Child Maintenance Service has calculated that the non-resident parent should pay the maximum amount under the statutory scheme. The court can also make an order for the payment of school fees or to meet costs associated with the child's disability. If child maintenance is agreed between the parties and recorded in a court order within financial proceedings then the court will retain jurisdiction for one year or until one of the parties makes an application to the Child Maintenance Service, whichever is later (see Child Support Act 1991, s 4(10)).

THE ORIGINS OF OUR PROJECT

- 1.9 It is worth looking back to the point when we agreed to take on this project, because the timing has had some practical consequences.
- 1.10 The project was adopted as part of our 11th Programme of Law Reform in 2011. It was proposed to us by the Family Law Bar Association in 2010 in its response to the 11th Programme consultation. The response described the law on enforcement in this context as “hopelessly complex and procedurally tortuous”, and argued that the current system is ineffective. The Family Law Bar Association maintained that there was “universal support” for a single piece of legislation dealing with enforcement.
- 1.11 The start date for this project was postponed due to the extension of the project on Matrimonial Property, Needs and Agreements, which was part of the 10th Programme. That project was extended in 2012 to cover the areas of financial needs and matrimonial property, having originally been conceived as a project on marital property agreements. It concluded in February 2014, and work on this new project began in April 2014.
- 1.12 The enforcement project is therefore starting almost four years after it was first proposed. In the interim there have been two very significant legal developments.

The introduction of the Family Court

- 1.13 For many decades, family financial orders have been able to be made in the magistrates’ court, the county court and the High Court. Over the years there have been many calls for the introduction of a single family court.⁶ Following the recommendation of the Family Justice Review chaired by Sir David Norgrove, a Family Court has been created by the Crime and Courts Act 2013. All family cases will now be heard in the Family Court, which came into being on 22 April 2014.⁷

Changes to legal aid

- 1.14 Another important development is the significant reduction in the availability of civil legal aid, including its removal from most private family law proceedings (save where the applicant is a victim of domestic violence), following the coming

⁶ See for example sections 13 and 14, beginning at page 170, Report of the Committee on One-Parent Families (1974) Cmnd 5629.

⁷ With the exception of cases invoking the inherent jurisdiction of the High Court, for example, wardship, proceedings under the Child Abduction and Custody Act 1985 and other international child abduction cases, which will remain in the Family Division of the High Court. It is difficult to envisage a case in which a financial order is likely to be made by the High Court, except where such an order is ancillary to one of these situations, for example a financial order for the benefit of a child who is a ward of court, see Children Act 1989, sch 1, para 1(7).

into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In 2011 the Government estimated that 84% of those who received some form of legal aid (Legal Help) in relation to private law family matters in 2010 would no longer be eligible for help under the new regime.⁸ Court quarterly statistics produced by the Ministry of Justice show a drop in the number of family Legal Help matters started, from 204,247 in the financial year 2012/13 to 42,703 in the financial year 2013/14.⁹

The impact of these changes on our project

- 1.15 The introduction of the new court may address effectively some of the problems that practitioners and the public have previously complained about. These include the difficulties of knowing in which court to enforce a family financial order, the need to arrange for an order made in one court to be enforced in or by another court, and the different procedural rules applicable in different courts. In theory at least the need to attend at and deal with different courts is a thing of the past, although where the judges of the Family Court in a particular area do not sit entirely under one roof – for example, where magistrates and district judges sit in different court buildings – some logistical problems may remain. But in general we think that the introduction of the Family Court can only have been a positive step in the context of enforcement. It is, however, too early in the life of the Family Court to tell how far these problems have been solved and there may well still be some “teething troubles” as the new system gets under way.
- 1.16 The consequences of the changes to legal aid are becoming clear; numbers of litigants in person have increased substantially in family law proceedings.¹⁰ Enforcement has in any event been an area where people often act without legal representation because the costs of representation may not be worthwhile when set against the money which may be recovered. So the impact of the changes in legal aid may be less dramatic in the context of enforcement. But at any rate, there is a greater need than ever before for the law and the rules of court to be accessible and understandable, and for procedures to be simple and effective.

⁸ Ministry of Justice, *Cumulative Legal Aid Reform Proposals: Impact Assessment Annex A: Scope* (2011) table 1, available at <http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/annex-a-scope.pdf> (last visited 13 February 2015).

⁹ See Ministry of Justice, *Legal Aid Statistics: main tables July 2014 to September 2014* (December 2014) table 5.1, available at <https://www.gov.uk/government/statistics/legal-aid-statistics-july-2014-to-september-2014> (last visited 13 February 2015).

¹⁰ Court statistics show that in private law family cases disposed of in June to September 2014 there was a 40% reduction in cases where both parties were represented compared to the same period in 2013. There have also been increases in the number of cases where only the applicant or neither party is represented. See Ministry of Justice, *Family Court Statistics Quarterly* (December 2014) p 12, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388811/family-court-statistics-quarterly-july-to-september-2014.pdf (last visited 13 February 2015).

THE SCOPE OF OUR PROJECT

- 1.17 This project is only concerned with financial orders in family proceedings; the enforcement of non-financial orders concerning children, in particular orders for children to spend time with each parent (formerly called contact orders), has received fairly recent and thorough attention¹¹ and is not within the scope of this project.
- 1.18 Child maintenance outside the court system is also outside our terms of reference: the Child Maintenance Service has its own enforcement procedures, some of which operate administratively without the court's involvement, and it will be seen in later Chapters that we have been able to make some helpful comparisons with these procedures.
- 1.19 By contrast, the enforcement of orders for child maintenance made by the court does fall within the scope of the project. Such orders may be made between former spouses; equally they may involve unmarried parents.¹² There is, of course, no provision for financial remedies for former cohabitants;¹³ accordingly in the vast majority of cases relevant to this project the adults involved will be former spouses. We refer to them as such for the sake of simplicity, while not forgetting that unmarried parents may also be involved.
- 1.20 A further issue that falls outside our terms of reference is the extent of the resources available for redistribution between the former spouses, rather than enforcement of orders ultimately made. The decision of the Supreme Court in *Prest v Petrodel Resources Ltd*,¹⁴ where a wife was endeavouring to access funds held by a company controlled by her husband, has aroused considerable publicity. Although the wife succeeded, the basis on which the Supreme Court eventually found in her favour made it far more difficult for assets held in that way to be regarded as matrimonial property – contrary to the previous practice in the family courts. Family law practitioners are concerned about their ability to take into account, in calculating assets, funds held by companies or upon trust. But this is not about enforcement. It is about the question “how much is there?” rather than “give me my money”.
- 1.21 Our project is about the enforcement of family financial orders made in England

¹¹ The Children and Adoption Act 2006 amended the Children Act 1989 to introduce support and enforcement measures, such as activity directions and conditions (for example, parenting programmes) and orders for an unpaid work requirement and financial compensation. Further amendments were made by the Children and Families Act 2014. See Children Act 1989, ss 11A to 11P.

¹² Under schedule 1 to the Children Act 1989.

¹³ The Law Commission has recommended the introduction of such remedies: see our Report, *Cohabitation: the financial consequences of relationship breakdown* (2007) Law Com No 307.

¹⁴ [2013] UKSC 34, [2013] 2 AC 415.

and Wales, or made in another jurisdiction and enforceable here; the same methods are common to both categories. We are not concerned here with the recognition of foreign orders,¹⁵ nor with the enforcement of family financial orders made in England and Wales in other jurisdictions. Such issues are governed to some extent by EU legislation and in other cases by international treaties and we regard them as outside our scope, not least because the amendment of EU law and of international treaties is not a matter for the UK Government alone.¹⁶ We are not aware of any problems with cross-border enforcement between the different jurisdictions in the UK (for example, the enforcement of an English order in Scotland)¹⁷ but we would welcome any comments from consultees if they believe that there is any need for law reform in this area.

1.22 Within the context of the enforcement of family financial orders we have considered:

- (1) the reform of existing methods of enforcement by amendment of primary legislation, that is, provisions in a statute enacted by the full Parliamentary procedure, or by amendment of the rules of court;
- (2) the possible introduction of new enforcement remedies;
- (3) the potential for improvement of the system through change within the court system, without changes to legislation or court rules;
- (4) the potential for better legal training and professional education;¹⁸
- (5) the potential for consolidation of legislation, and of procedural rules; and
- (6) the information available to the public and litigants in person.

1.23 We have not felt it appropriate to explore the possibility of a radical shift in the basis on which orders are enforced, taking responsibility for enforcement away from the individual altogether and placing it with the court as a publicly funded service. It goes without saying that it would be wholly unrealistic to suggest such

¹⁵ Except for a discrete point regarding the enforceability of a foreign pension sharing order in this jurisdiction: see Chapter 3, paras 3.73 to 3.76.

¹⁶ The Reciprocal Enforcement of Maintenance (“REMO”) Unit at the Office of the Official Solicitor and Public Trustee provides assistance with the international enforcement of orders for maintenance.

¹⁷ Reciprocal enforcement within the UK is governed by Part II of the Maintenance Orders Act 1950 and Part 32 of the Family Procedure Rules.

¹⁸ There is anecdotal evidence that many family lawyers only rarely undertake enforcement proceedings and that where they do take it on it is often the task of junior staff.

a change at present.¹⁹ As things stand, however, we are pleased to find that it is still possible to have an order for periodical payments enforced by the court – now, of course, by the Family Court rather than, as before, by the magistrates' court. This is an important facility and it should remain available. It may well be in the interests of the public purse to have it better resourced. Likewise we think it well worth making suggestions about sources of information and assistance for litigants in person. Other jurisdictions have found it helpful, and ultimately cost-saving,²⁰ to develop such resources once public funding for legal representation is withdrawn.²¹

FAMILY ENFORCEMENT IN A CIVIL CONTEXT

Why examine family enforcement separately?

- 1.24 The enforcement of financial orders in family proceedings overlaps almost entirely with civil enforcement; the methods that are used to enforce, say, a lump sum order or an order for periodical payments made on divorce are, largely, no different from those used to enforce any civil judgment debt. An originating statute for a given method, for example the Attachment of Earnings Act 1971, can apply in both civil and family proceedings. Aside from the use of the judgment summons,²² and the general enforcement application²³ that apply only to family proceedings, those seeking to enforce the payment of a financial order in family proceedings will be using methods governed by the Civil Procedure Rules and simply cross-referred to in the Family Procedure Rules.

¹⁹ It has not always been thus. In 1974 the idea of a guaranteed maintenance allowance for children, paid by the state to single parents and with the state pursuing the other parent for payment, was regarded as worth considering, see section 6, beginning at page 289, Report of the Committee on One-Parent Families (1974) Cmnd 5629.

²⁰ There is considerable anecdotal evidence that the fall in legal representation in this jurisdiction following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is generating longer hearings, and that fewer cases settle where lawyers are not involved.

²¹ For example, in California there is state funded provision for specific, detailed and free legal support and information for litigants in person within the court building. It has been found that this saves court time and resources: Judicial Council of California Administrative Office of the Courts, *Model Self-Help Pilot Program A Report to the Legislature* (March 2005) available at <http://www.courts.ca.gov/partners/211.htm> (last visited 13 February 2015).

²² A method of enforcement that involves the threat, and sometimes the reality, of committing the debtor to prison for non-payment of a financial order, as an exception to the general principle that a defaulter cannot be imprisoned for debt. The method is not exclusively confined to family proceedings as it is also available to enforce the payment of certain debts due to the state such as arrears of taxes. The judgment summons procedure is discussed in Chapter 4, paras 4.5 to 4.23.

²³ This is an application for such method of enforcement as the court may consider appropriate. It was introduced by the Family Procedure Rules and avoids the necessity, at that stage, of the applicant choosing a particular method of enforcement. See Chapter 2, paras 2.19 to 2.22.

- 1.25 So why are we examining family enforcement as a discrete topic?
- 1.26 It has been clear to us from the outset, starting with the 2010 consultation response from the Family Law Bar Association,²⁴ that specific considerations arise in the family law context that are not relevant generally in civil debt collection. Family financial orders are almost always related specifically to financial need; non-payment impacts upon the ability of adults to house themselves and make ends meet and, even more importantly, upon the health and well-being of children. Liability is generated by personal commitment (that is, marriage or having children), even though that commitment may now have been renounced. The amount a person is liable to pay is determined, whether by order or agreement between the parties, in family proceedings in which the parties are obliged to give each other full and frank disclosure of their financial circumstances.²⁵ And liability has been determined by ability to pay amongst other factors.
- 1.27 Accordingly, family financial orders may differ from the enforcement of other civil debts, even judgment debts, in terms of:
- (1) the source of the obligation;
 - (2) the practical effect of non-payment, particularly upon children;
 - (3) the possibility that liability can change over time; and
 - (4) the information available to the creditor.
- 1.28 These differences may mean that the substance of the law should be different from the law relating to other civil enforcement. Our provisional approach has therefore been to confine ourselves to proposals relating to *family* financial orders. It may be that some of our eventual recommendations will be of interest and potentially useful outside the family context, and it will be for Government to take a decision on whether our recommendations should be of broader application.
- 1.29 There is also an issue about the possibility of consolidation of legislation on enforcement. This, on a provisional view, appears to be a popular idea among family practitioners. It would be possible to propose consolidation of primary legislation, but it would be difficult to determine whether that should be done by way of legislation specific to *family* orders. More practicable might be the revision of procedural rules; it is possible that consolidation, or codification, if it is needed, could take place entirely at the level of secondary legislation such as the Family Procedure Rules. These questions will, of course, need to be addressed in the

²⁴ See para 1.10 above.

²⁵ *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424.

light of the responses we receive from consultation.

Recent developments in civil enforcement

- 1.30 There has been a number of developments in civil enforcement in recent years. We explain here what has happened. A number of reforms have been considered; some have been enacted; some of those, although enacted, have not been brought into force. In this Consultation Paper we have to examine the law in the light of those recent developments. In some cases we ask consultees about legislation that has been enacted but is not in force, because we think that the family law context may generate specific issues and considerations which may influence Government in deciding whether to bring certain provisions into force.
- 1.31 Milestones in the story are the 1998 Enforcement Review; the 2003 White Paper;²⁶ the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”); and the 2011 consultation²⁷ and the Government’s 2012 response.²⁸

The 1998 Enforcement Review and its outcome

- 1.32 The Lord Chancellor announced an “Enforcement Review”, relating to civil enforcement, in 1998. This followed previous reports by the Payne Committee²⁹ and the Review Body on Civil Justice,³⁰ published in 1969 and 1988 respectively.
- 1.33 In 2001, a Green Paper³¹ was published, followed by the 2003 White Paper. The 2003 White Paper recognised the need for better access to information for judgment creditors and recommended the introduction of “data disclosure orders” to enable a creditor to seek information about a debtor from third parties in both the public and private sector. The 2003 White Paper also recommended the introduction of a fixed deduction scheme for attachment of earnings orders and a “tracking” procedure in order that debtors who changed employment could be tracked more easily. The regulation of enforcement agents (bailiffs) was also dealt with by the 2003 White Paper, which set out a raft of recommendations to

²⁶ A White Paper is a document produced by Government setting out details of future policy on a particular subject.

²⁷ Details of this consultation appear in the glossary. The document is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238301/8045.pdf (last visited 13 February 2015).

²⁸ Details of this response appear in the glossary. The document is available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/solving-disputes-in-cc-response.pdf (last visited 13 February 2015).

²⁹ Report of the Committee on the Enforcement of Judgement Debts (1969) Cmnd 3909.

³⁰ Civil Justice Review: Report of the Review Body on Civil Justice (1988) Cm 394.

³¹ Towards effective enforcement: a single piece of bailiff law and a regulatory structure for enforcement: a green paper (2001) Cm 5096. A Green Paper is a discussion paper for consultation, produced by Government.

introduce a new regulatory regime for enforcement agents.

Tribunals, Courts and Enforcement Act 2007

- 1.34 As a result of the 1998 Enforcement Review, the Tribunals, Courts and Enforcement Bill was introduced in the House of Commons in February 2007 and received Royal Assent in July of the same year. Part 4 of the 2007 Act introduced changes to attachment of earnings orders³² and charging orders³³ as well as a form of data disclosure order, now called information orders and requests. Part 3 of the 2007 Act introduced tighter regulation of enforcement agents and renamed some procedures: writs of *fiery facias* and warrants of execution became “writs of control” and “warrants of control” respectively.³⁴
- 1.35 On 17 March 2009, Bridget Prentice MP made a written ministerial statement³⁵ stating that Part 3 of the 2007 Act, dealing with bailiff reform, would be brought into force but that the majority of Part 4, which would have introduced fixed tables and tracing for attachment of earnings and information requests and orders³⁶ would not be.

The 2011 consultation and the 2012 Government response

- 1.36 Another Government consultation took place in 2011, and Government published its response to consultees in 2012. Part 4 of the 2011 consultation focused on the changes enacted in Part 4 of the 2007 Act, but not brought into force. The 2012 Government response stated that it would take forward the minor reforms to charging orders enacted in the 2007 Act³⁷ and would streamline the procedure for charging orders and third party debt orders³⁸ but would be unable to implement information orders and requests, owing to lack of resources.

The impact of enforcement problems

- 1.37 The impact of unpaid debt in the family context is among the reasons why we think it worthwhile to examine the enforcement of family financial orders

³² Attachment of earnings orders, and their reform, are discussed in Chapter 3.

³³ Charging orders, and their reform, are discussed in Chapter 3.

³⁴ A writ is the technical term for an order, in this case, for seizure of the debtor's goods. Writs are discussed in Chapter 3.

³⁵ Written Ministerial Statement, *Hansard* (HC), 17 March 2009, vol 489, col 46WS.

³⁶ Information requests and orders are explained in Chapter 2, paras 2.28 to 2.45 and fixed tables and tracking are discussed in Chapter 3, paras 3.89 to 3.99.

³⁷ Sections 93 and 94 of the 2007 Act were brought into force in 2012, amending the Charging Orders Act 1979. The Charging Orders (Orders for Sale: Financial Thresholds) Regulations 2013, SI 2013 No 491, were subsequently made under the new section 3A of the Charging Orders Act 1979.

³⁸ Charging orders and third party debt orders, and their reform, are discussed in Chapter 3.

separately from the enforcement of other civil debts, and even to ask consultees to give us their views on legislation that has been enacted, following consultation, but is not yet in force. Put bluntly, an unpaid family financial order will often – not invariably – cause more hardship than any other unpaid order. We have been told by Resolution³⁹ that creditors often face many problems in enforcing any type of order, including the potentially disproportionate time and costs involved in pursuing any presently available remedies. The difficulties experienced in enforcing financial orders can be particularly acute where an order is periodic in nature and arrears continue to accrue over a long period or if the arrears are enforced up to the date of the application but the payer then defaults again. The Family Law Bar Association has commented that, in some cases, the courts make family financial orders with little expectation that the payer will comply.⁴⁰

- 1.38 Equally, the obligation to make a payment under a family financial order may also cause hardship for the debtor; liability is determined in the first place, as we said above, to some extent by ability to pay, and ability may change. People who can just about manage to pay may be in great difficulties if they lose their jobs, or have their hours cut, or if rent goes up. Of course, such eventualities could be grounds for an application to vary the original order;⁴¹ but the debtor may not think of doing so, or may not realise it is a necessity.
- 1.39 Moreover, although non-payment may arise from financial circumstances, it may also arise from unwillingness to pay. Some debtors cannot pay and some can but will not. The reasons why debtors refuse to pay, even where they have the means to do so, will vary; the emotional context in which these orders are made means that they may be especially unwelcome and resented. That is not a reason for non-payment. A good enforcement system will be able to sift those who cannot pay from those who can but do not. This is crucially important not only as a matter of justice but also because in many cases the parties have an ongoing relationship as parents of their children. Ill-judged enforcement proceedings may make it even more difficult for parents to relate to each other and to manage a co-operative relationship for the sake of their children.
- 1.40 It should be said that the distinction between “can’t pay” and “won’t pay” is not

³⁹ Formerly known as the Solicitors Family Law Association, Resolution is an organisation of 6,500 family lawyers and other professionals in England and Wales.

⁴⁰ In its further response to the Law Commission’s consultation for the 11th Programme of law reform: Family Law Bar Association, *Law Commission: Enforcement [consultation response]* (15 October 2010) and further response dated 23 December 2010.

⁴¹ Matrimonial Causes Act 1973, s 31. On an application for variation the court must consider all the circumstances of the case; generally, a material change in circumstances will need to have occurred since the making of the original order to justify the variation.

always clear-cut.⁴² This Consultation Paper addresses the whole spectrum of debtors: it suggests ways of improving access to information about the debtor, to judge where he or she falls on that spectrum,⁴³ and discusses reforms to expand the range of assets against which the debt can be enforced.⁴⁴ Some debtors will not pay even if they have the means to do so. However, we feel that there is scope to consider ways to increase the pressure to pay on these debtors, as the enforcement system currently lacks such measures, save for judgment summons, which, in practice, may be difficult to use.⁴⁵

- 1.41 We are mindful that enforcement can involve third parties, such as banks, for example where the creditor wishes to enforce using a third party debt order. We would like to know about the burdens that involvement in enforcement places on these third parties.
- 1.42 We would like to know more about the impact of enforcement difficulties and of potential reform.
- 1.43 **We ask consultees to tell us about their experiences of the impact, financial and otherwise, of:**
- (1) non-payment of sums due under family financial orders;**
 - (2) difficulties in obtaining information and advice about the enforcement of family financial orders, including court procedure; and**
 - (3) enforcement proceedings on**
 - (a) debtor and creditor;**
 - (b) third parties (such as the debtor's other creditors);**
 - (c) banks and financial institutions; and**
 - (d) the family justice system.**
- 1.44 **We ask consultees to tell us their views about the economic impact of any potential reform of the law relating to enforcement.**

⁴² See, for example (albeit in a different context), N Dominy and E Kempson, *Can't pay or won't pay? A review of creditor and debtor approaches to the non-payment of bills* (2003) prepared for the Lord Chancellor's Department, available at <http://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0307.pdf> (last visited 13 February 2015).

⁴³ Chapter 2.

⁴⁴ Chapter 3.

⁴⁵ See Chapter 4.

RESEARCH AND WORKING METHODS

- 1.45 Enforcement in general has been described as “in a kind of backwater, seldom studied or examined”;⁴⁶ although some calls for reform have been made over the years this has not resulted in extensive reform. There is little academic writing on the subject of the enforcement of family financial orders generally between adults in this jurisdiction, in contrast to child support⁴⁷ and the enforcement of maintenance in the European and international context.⁴⁸ There has been some academic study of the broader question of civil enforcement reform⁴⁹ and, again, there exists European comparative material.⁵⁰ We look forward to the publication of the new edition of *Enforcing Family Finance Orders* by His Honour Judge Simon Oliver, Daisy Brown and Gareth Schofield.⁵¹ There is also a dearth of statistics on the use of different methods of enforcement in family financial proceedings, a topic we address in Chapter 5.
- 1.46 Given the rapidly changing context in which the project is taking place, together with the lack of research, we have been particularly concerned to engage early and widely with stakeholders. We have been meeting both practitioner groups and officials in Government departments over several months and have also contacted representatives of the judiciary, and appropriate bodies in other jurisdictions. Such contact has already proved invaluable in formulating our provisional approach to the project and to reform.
- 1.47 Comparative research has not revealed any startling ideas that have not been thought of in this country. What we do find is that some other jurisdictions have a harsher attitude to punitive methods of enforcement. We say more about this in Chapter 4. We have taken a careful approach to such methods; we think that there are important moral and legal reasons not to develop purely punitive methods, but we do see some force in the argument that certain orders are worthwhile as an incentive for payment. Perhaps most significant among these is an order for disqualification from driving; provided that it does not in itself impact upon ability to pay (for example by preventing the debtor from getting to work) it

⁴⁶ Sir J Jacob, *The Fabric of English Civil Justice* (1987) p 188, available at https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/The_Fabric_of_English_Civil_Justice.pdf (last visited 13 February 2015).

⁴⁷ On which, of course, there is a great deal of academic material, not relevant to our project.

⁴⁸ See P Beaumont, B Hess, L Walker and S Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (2014).

⁴⁹ See J Baldwin and R Cunnington, “The Abandonment of Civil Enforcement Reform” (2010) 29 *Civil Justice Quarterly* 159 and J Baldwin and R Cunnington, “The Crisis in Enforcement of Civil Judgments in England and Wales” [2004] *Public Law* 305.

⁵⁰ See M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (2005) and W Kennett, *Regulation of Enforcement Agents in Europe: A Comparative Survey* (2010).

⁵¹ Forthcoming, April 2015 by Jordan Publishing.

may be very effective in prompting payment, so long as it is used against a debtor who is actually able to pay.

- 1.48 Resolution undertook, at the end of June 2014, an email survey of its members on the topic of enforcement on our behalf, with results being received in early September 2014. While the number of Resolution members (47) who replied was not large enough to be statistically significant, this survey, together with the feedback we received through Resolution's committee structure, helped us to formulate our thoughts for this Consultation Paper. The feedback we received said that enforcement should be simpler, quicker and cheaper and that information was key to making enforcement work.
- 1.49 A number of themes emerged. We were told that more action should be taken at the time of the making of the original financial order to try to ensure compliance and Resolution members commented that judges should be more pro-active and robust when it came to the management of enforcement cases. Respondents suggested options ranging from greater use of secured provision (such as secured periodical payments)⁵² and penal notices, to the introduction of "default" remedies like automatic fines for non-compliance.⁵³
- 1.50 Enforcement was felt to work less well for parties who were unrepresented, and less well for income rather than capital orders.
- 1.51 Charging orders were largely seen as effective for the enforcement of capital orders (that is, in this context, orders for the payment of lump sums of money) and attachment of earnings orders were seen as effective for the enforcement of income orders. Most people thought orders to obtain information, judgment summons and third party debt orders were not effective and the vast majority thought warrants of control were not effective at all. Most respondents said that they did not know whether the application for such method of enforcement as the court may consider appropriate was resulting in more successful enforcement, whether of capital or income orders. It may be that it is simply too early to make that assessment.

THE STRUCTURE OF THIS PAPER

- 1.52 This Consultation Paper is structured in a way that reflects a typical process. Chapter 2 looks at the very beginning of the enforcement process when a creditor is typically trying to find out information about the law and about the debtor, and

⁵² In this context "secured" means that property owned by the payer, such as land, is provided as security for the payments to be made. This is usually achieved by way of a charge against the property. The debt can then be recovered by the creditor obtaining an order for sale; in some cases the property might provide income (like rent) to satisfy the debt.

⁵³ See the responses to Question 6 in Appendix A. Income orders are referred to as "maintenance" in Appendix A.

to choose an appropriate enforcement method. In Chapter 3 we look at the range of methods available that will directly produce payment. In Chapter 4 we move on to less direct methods, which are generally considered when more direct methods have failed. For example, the judgment summons is usually a last resort rather than a first port of call.

- 1.53 Finally in Chapter 5 we look at possibilities that would not involve law reform. It is here that we consider the allocation of court business, and the possibilities for better information and training.

ACKNOWLEDGEMENTS

- 1.54 We have held a number of meetings with individuals and organisations while we have been preparing this paper, and we are extremely grateful to them all for giving us their time and expertise so generously.
- 1.55 In particular we would like to extend our thanks to Professor Bill Atkin, Victoria University of Wellington; Emeritus Professor John Baldwin, University of Birmingham; David Hodson, The International Family Law Group; Family Law Bar Association; John Fotheringham, BTO Solicitors; Bonnie Hough, California Administrative Office of the Courts; Justices Clerks' Society (the professional society for lawyers who advise magistrates); Dr Wendy Kennett; Kate McKenzie-Bridle, the New Zealand Law Commission; Joanna Miles, University of Cambridge; the Money Advice Trust; Professor Thomas Oldham, University of Houston; the Honourable Mrs Justice Parker; Professor Patrick Parkinson, University of Sydney; Professor Carol Rogerson, University of Toronto; Dr Jens Scherpe, University of Cambridge; Gavin Smith, 1 Hare Court; StepChange Debt Advice; Tony Roe, Tony Roe Solicitors; His Honour Judge Simon Oliver; District Judge Christopher Falvey; and the judges and staff of the Central Family Court.
- 1.56 We are also very grateful to Resolution for meeting us, conducting the survey of its members and providing feedback from its committees.

CHAPTER 2

INFORMATION AND CHOICES

INTRODUCTION

- 2.1 Ideally, once financial orders have been made in favour of a former spouse or civil partner, they are complied with. A house might be transferred, a lump sum paid, or periodical payments commenced, depending upon the “package” ordered by the court, whether by consent or after a hearing. However, reality is not always so tidy. If an order is not complied with the creditor will need to consider enforcement options. As we pointed out in Chapter 1, there are many, and the choice of enforcement method will be determined by the individual circumstances, including not only the type of order sought to be enforced and the level of non-compliance but also the financial means of the debtor.
- 2.2 In some cases the creditor will already have opted for enforcement of the order by the court. This is a choice that can be made at the time that the order is made; a creditor who has taken that course will not have to make decisions about enforcement as the court will select the appropriate method. Otherwise, the creditor must organise enforcement him or herself.
- 2.3 In some cases the creditor will know what to do. If a lump sum has not been paid and the debtor is the sole owner of a house, a well-informed creditor can apply for a charging order, for example; if periodical payments are not being made and the debtor is in employment, an attachment of earnings order is the obvious choice. But in many cases the beginning of the enforcement process is marked by uncertainty and by the need for information both about the legal options and about the circumstances of the debtor. Without information about the legal options the creditor will be unable to confront the debtor’s non-compliance; without information about the debtor’s circumstances enforcement is less likely to be successful. For example, it is no use applying for an attachment of earnings order if the debtor is self-employed.
- 2.4 In this Chapter we look first at the potential for the court itself to enforce orders; we explain when this is available under the current law and ask whether the process might be improved or the scope of the service extended. We then go on to consider enforcement by the creditor him or herself and the ways in which information can be obtained and a choice of enforcement method made. The important legal tools here are the order to obtain information, and the application using Form D50K for such method of enforcement as the court considers appropriate (the “general enforcement application”). We look at these two processes under the current law and ask whether they could be improved. In the third main section of this Chapter we consider some options for the introduction of new tools for gathering information.

ENFORCEMENT BY THE COURT

- 2.5 Before the creation of the Family Court it was possible to register an order for periodical payments, made in the High Court or county court, in the magistrates' court for collection and enforcement.¹ The magistrates' court would then order that the payments owed to the creditor were to be paid directly into court for forwarding to the creditor.² This created a reliable, neutral record of payments made.³ More importantly, it was a cost-effective enforcement service, as the magistrates' court had the power to enforce the registered order on behalf of the creditor.⁴ This was often the preferred course of action for creditors.⁵ The creditor had to pay the cost of the registration⁶ and was liable for the costs of the proceedings taken on his or her behalf.⁷
- 2.6 Following the reform of the court system, where the debtor resides in England and Wales the Family Court can still require that periodical payments are paid into court,⁸ which provides a record to which the creditor has access.⁹ The creditor can make a request in writing for the court officer to take enforcement proceedings where payments are in arrears; alternatively, the creditor can authorise the enforcement officer to take action if payments are not made in due course.¹⁰ There is a fee of £155 for an application for the payments to be made to

¹ Maintenance Orders Act 1958, s 1 as in force prior to 22 April 2014 (now amended by Crime and Courts Act 2013, s 17(6) and sch 10, para 4).

² Maintenance Orders Act 1958, s 2(6ZA)(b) as in force prior to 22 April 2014 (now repealed by Crime and Courts Act 2013, s 17(6) and sch 10, paras 5(1) and (6)(b)).

³ Other jurisdictions adopt this approach too: for example in Australia rule 20.58 of the Family Law Rules 2004 provides that where an order specifies that maintenance must be paid to the Court Registrar or an authority, the Registrar or authority must, on request, provide the court or a party with a certificate as to the amounts that have been paid or remain unpaid.

⁴ Magistrates' Courts Act 1980, s 59A as in force prior to 22 April 2014 (now amended by Crime and Courts Act 2013, s 17(6) and sch 10, para 42).

⁵ G Smith and T Bishop, *Enforcing Financial Orders in Family Proceedings* (2000) pp 228 to 229.

⁶ £45 being the fee applicable at 21 April 2014 before the creation of the Family Court, see Family Proceedings Fees Order 2008, SI 2008 No 1054, sch 1, fee 9.1.

⁷ Magistrates' Courts Act 1980, s 59A(5).

⁸ Maintenance Enforcement Act 1991 ("the 1991 Act"), ss 1A and 4A. The section applies to a "qualifying periodical maintenance order". A "maintenance order" is defined by reference to the Administration of Justice Act 1970, sch 8; it must be paid periodically, and this includes a lump sum payable by instalments (ss 1(2) and 1(10) of the 1991 Act). Such an order is "qualifying" if the debtor is ordinarily resident in England and Wales (s 1(2) of the 1991 Act). However, due to Family Procedure Rules, r 32.33 payment of a lump sum by instalments cannot be enforced by the court.

⁹ We understand that it is the practice of the courts to give the creditor access to the record of payments, although it does not appear that there is any right to this information.

¹⁰ Family Procedure Rules, r 32.33. This new provision came into force on 22 April 2014.

the court,¹¹ and the creditor is also liable for the costs of the proceedings taken on his or her behalf, including any court fees.¹²

- 2.7 There are no statistics to indicate how often parties take advantage of the provisions for enforcement by the court. In addition to any Family Court orders which the court is enforcing on the creditor's behalf, there will inevitably still be orders registered prior to the introduction of the Family Court that are still being enforced by the court.¹³
- 2.8 We have very little information about the operation of the system of enforcement of periodical payments by the Family Court. One issue may simply be that there is very low awareness of the facility, and we pick that point up in Chapter 5 when we discuss non-legal reform. Another issue may be that only periodical payments can be enforced in this way; it may be that it would be helpful for the court also to be able to enforce the payment of lump sums by instalments.
- 2.9 We understand that it is the practice of court staff to ask the creditor whether he or she has a preference as to how to proceed with enforcement and what further information he or she can supply that could help the court to enforce. If the creditor is content to leave the choice of enforcement method to the court then, if there is insufficient information available to the court to decide on the best way to enforce, it will effectively adopt the procedure used in the general enforcement application,¹⁴ requiring the debtor to attend court to answer questions and provide documents; the judge will then order the most appropriate method to be used. Practice may vary between different courts.
- 2.10 **We invite consultees' views on the enforcement of family financial orders by the court. Could the system be improved or extended?**

ENFORCEMENT BY THE CREDITOR: THE CURRENT LAW

- 2.11 The creditor whose debt is not being enforced by the court (because he or she has not asked for that to happen, or because the debt is not a periodical payment) has to make his or her own choices about the enforcement process. For some there is an obvious option among the various available methods which we outlined in Chapter 1 and discuss in detail in Chapter 3. For the rest, what is wanted is information both about the legal tools that might be used and about the

¹¹ Family Proceedings Fees Order 2008, SI 2008 No 1054, sch 1, fee 5.3; it appears that no fee is payable if the creditor asks for this in the course of the hearing when the order is initially made, see Lord Wilson of Culworth and others (eds), *The Family Court Practice 2014* (2014), Procedural Guide C9, pp 135 to 136.

¹² Family Procedure Rules, r 32.33(6).

¹³ Under the transitional provisions: Crime and Courts Act 2013 (Family Court: Transitional and Saving Provision) Order 2014, SI 2014 No 956.

¹⁴ See paras 2.19 to 2.22 below.

debtor.

- 2.12 Information about enforcement methods is available from a variety of sources. It is not altogether easy to access. The improvement of sources of information may be achieved without law reform, but we discuss it in Chapter 5 along with a number of other non-legal issues. In many cases, however, even if the creditor understands the range of enforcement methods, the choice is not clear because more information is needed about the debtor. For creditors in that position, the obvious options are the order to obtain information,¹⁵ and the general enforcement application.

Order to obtain information

- 2.13 Information is vital for effective and successful enforcement:¹⁶ overall 35 pence of each pound owed was recovered from warrants of execution in 2011, but 84 pence in the pound was recovered from such warrants where the creditor had provided a correct address for the debtor.¹⁷ Information about the debtor's financial circumstances can make it possible to distinguish those debtors who cannot pay from those who can but choose not to, although of course it is not always possible to make a clear distinction.
- 2.14 The rules relating to the order to obtain information are contained in Part 71 of the Civil Procedure Rules.¹⁸ This order is available for the enforcement of all civil judgment debts including those arising from family financial orders; it requires the debtor to attend court to produce any information that is needed to enforce the order. That information is then provided to the creditor so that he or she can consider the next steps.
- 2.15 The creditor applies to the court that made the original order¹⁹ by submitting Form N316 together with the court fee of £50. Form N316 refers the creditor to another form,²⁰ which sets out a list of standard questions to be used at court to

¹⁵ Formerly known as the oral examination procedure.

¹⁶ J Baldwin and R Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 *Civil Justice Quarterly* 159.

¹⁷ Ministry of Justice, *Judicial and Court statistics 2011 – full report* (2012) p 19, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf (last visited 13 February). The statistics for enforcement in *Judicial and Court statistics* relate only to civil proceedings in the county court and do not include family proceedings, for which a breakdown of enforcement of financial order by method of enforcement is not available.

¹⁸ Applied to proceedings in the Family Court by Family Procedure Rules, r 33.23.

¹⁹ Unless the proceedings have since been transferred to a different court. The order will, in any event, provide for the questioning to take place at the court local to where the debtor resides or carries on his or her business.

²⁰ Form EX140, which is the record of examination that the court officer will complete with the debtor's responses when the debtor attends court.

determine the debtor's means and the documents that the debtor will be asked to produce. The creditor can list additional questions and require additional documents when completing the application Form N316. The creditor may also ask on the application form for the questioning to be conducted in front of a judge,²¹ but must say why this is necessary. Once the application has been submitted to the court, an order will be made²² requiring the debtor to attend court to answer the questions and produce the documents listed. The order will be endorsed with a penal notice, which warns the debtor of the risk of imprisonment if he or she fails to comply.

- 2.16 The creditor must ensure that the debtor is personally served with the order at least 14 days before the hearing. The debtor then has seven days to ask the creditor to pay his or her reasonable travel expenses to attend court, which must be paid if requested.
- 2.17 When the debtor attends court, he or she will be questioned either by a senior member of the court staff or before a judge if that has been requested. The creditor may attend and ask questions if the court officer conducts the hearing, but does not have to do so; if the hearing is before a judge the creditor or his or her representative must attend and ask the questions.
- 2.18 If the debtor fails to comply with the order by refusing to provide documents, answer questions or even attend court then the matter will be referred to a High Court or Circuit Judge who can make a committal order, that is, an order sending the debtor to prison. This order will be suspended in order to give the debtor a further opportunity to comply with the order to obtain information.

General enforcement application

- 2.19 The second option, which is specific to family proceedings, is an application for such method of enforcement as the court considers appropriate – the general enforcement application.²³ This again requires the debtor to attend court at a particular time to produce documents and answer questions, but it also goes further since the court can then proceed to make an order enforcing payment without the creditor making any further application to the court.²⁴
- 2.20 The creditor submits Form D50K together with the court fee of £50; this gives rise to an order requiring the debtor to attend court to answer questions and produce

²¹ In practice this will be a district judge.

²² The order may be made by a court officer: Civil Procedure Rules, r 71.2(4).

²³ Family Procedure Rules, r 33.3(2)(b).

²⁴ It appears that the same procedure is followed by the court when it enforces orders for periodical payments: see para 2.9 above.

documents.²⁵ The initial stage of the general enforcement application follows the same procedural rules (as to service and travel expenses) as does the order to obtain information. The consequences of failing to comply with an order to attend court are also the same. There are standard questions, but the creditor can set out in the application additional questions for the debtor to answer and documents required to be produced.²⁶

- 2.21 The hearing, which the debtor is required to attend, should be listed before a judge, because the objective is not simply the transmission of information to the creditor. Instead, the court can proceed to the next stage and make an order for the method of enforcement that it considers appropriate. The options available to the court are an attachment of earnings order,²⁷ a charging order,²⁸ a third party debt order,²⁹ an order appointing a receiver³⁰ or a writ or warrant of control.³¹ It can also make an order for the execution of documents.³² No other methods of enforcement can be ordered and the court is unable to embark on the judgment summons procedure.³³
- 2.22 In practice, it may be that an enforcement order cannot be made at the same hearing; more information may be needed, or the hearing may be before a judge who lacks the power to make the appropriate order in that case. For example, if the debtor reveals he has a valuable property during the course of the hearing before a magistrate, the case will have to be referred to a district judge: a district judge can make a charging order whereas a magistrate does not have the power to do so.³⁴

²⁵ Family Procedure Rules, r 33.3(3): "If an application is made under paragraph (2)(b) [the general enforcement application], an order to attend court will be issued and rule 71.2 (6) and (7) of the CPR [Civil Procedure Rules] will apply as if the application had been made under that rule." Yet Family Procedure Rules, r 33.23 states that Part 71 will apply to "proceedings under this Part", so it appears that in fact the whole of Part 71 of the Civil Procedure Rules is relevant.

²⁶ In Form N316, the application form for an order to obtain information, the creditor has to strike out sections if they have chosen not to attach a list of extra questions or documents required. Form D50K, by contrast, does not refer the creditor to the standard questions nor tell the creditor that he or she could also ask for further information.

²⁷ Attachment of earnings orders are discussed in Chapter 3, paras 3.79 to 3.104.

²⁸ Charging orders are discussed in Chapter 3, paras 3.43 to 3.58.

²⁹ Third party debt orders are discussed in Chapter 3, paras 3.14 to 3.40.

³⁰ The appointment of a receiver is discussed in Chapter 3, paras 3.109 to 3.111.

³¹ Writs and warrants of control are discussed in Chapter 3, paras 3.63 to 3.65.

³² The execution of documents is discussed in Chapter 3, paras 3.10 to 3.12.

³³ The judgment summons is discussed in Chapter 4, paras 4.5 to 4.22.

³⁴ Family Court (Composition and Distribution of Business) Rules 2014, SI 2014 No 840, r 17 and sch 2.

Improving the current procedures

- 2.23 It was observed some years ago, in the context of civil proceedings, that only a small proportion of creditors applied for orders to obtain information and that the number of such applications had declined.

The upshot is that most creditors lack detailed and reliable information about the financial circumstances of the debtors they are pursuing, and the enforcement steps they take (assuming that they bother to take any at all) are often in consequence something of a stab in the dark.³⁵

- 2.24 Today, orders to obtain information are not particularly popular in civil proceedings generally (22,693 such orders were made in 2011 compared to over 90,000 applications for charging orders and over 176,000 for writs and warrants).³⁶ In the context of family proceedings it might be hoped that the general enforcement application, directly linking the obtaining of information to the enforcement of the order, would be used more often by creditors who, as a result, would be better informed. However, our discussions with legal practitioners and with court staff have revealed a variety of views as to whether the current procedures are satisfactory.³⁷ This doubtless reflects the variability of local practices. Points that have been brought to our attention are matters of detail, and we do not know to what extent they cause problems. It appears that in some court centres where a general enforcement application is made, the order requiring debtors to attend court does not always make clear that they will be asked questions on oath and that they must bring documents.³⁸ And the D50K form does not provide the creditor with any guidance as to the questions that could or should be asked.

- 2.25 It may be that any current problems are temporary issues following reform of the court system. Nevertheless, we ask for consultees' views about these procedures and the practical effect, if any, of the need to cross-refer between the Family Procedure Rules and the Civil Procedure Rules. There may be some inconsistencies arising from the co-existence and interaction of the two sets of

³⁵ J Baldwin and R Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 *Civil Justice Quarterly* 159, p 167.

³⁶ Ministry of Justice, *Judicial and Court Statistics 2011 – full report* (2012) pp 15, 19 and 20, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162460/courty-courts-tables-chp1-2011.xls (last visited 13 February 2015).

³⁷ See Chapter 1, paras 1.37 and 1.48 to 1.51 and Appendix A.

³⁸ This is likely to be an issue about court staff training, which we discuss in Chapter 5.

rules,³⁹ and indeed some inconvenience and confusion, and we discuss in Chapter 5 some options for consolidation.

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

OPTIONS FOR REFORM

2.27 We now turn to look at possible new legal tools. We examine in turn:

- (1) provisions for the bringing into force of information requests and orders under the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"); and
- (2) financial statements by the debtor.

Information requests and orders

2.28 The 2007 Act contained provisions, which have not yet been brought into force, relating to the enforcement of judgment debts in both civil and family proceedings. Relevant to this Chapter is the introduction of two new enforcement tools, closely related to each other: information requests and information orders.⁴⁰

2.29 On 17 March 2009, the Government of the day announced⁴¹ that it would not bring these provisions into force. In 2012, Government described the response to the 2011 consultation on information requests and orders as positive and said that it intended to bring into force all these provisions when resources were available to do so.⁴² We understand from our discussions with the Ministry of Justice that there is currently no timeframe for the provisions on information requests and orders to be brought into force, owing to resource issues, particularly concerning information technology. As these two new methods have already been enacted we have confined our discussion below to explaining the nature of each and asking consultees for their views on whether they should be brought into force specifically in the context of family financial orders.

More detail about information requests and orders

2.30 In 2000, the Lord Chancellor's Department's 1998 Enforcement Review found

³⁹ In Part 33 of the Family Procedure Rules at rule 33.3(3) rules 71.2(6) and (7) of the Civil Procedure Rules are specifically applied to a general enforcement application. However, it appears that Part 71 of the Civil Procedure Rules in its entirety is applied by rule 33.23 to Part 33 of the Family Procedure Rules.

⁴⁰ It also has provisions relating to attachment of earnings orders, which we examine in Chapter 3.

⁴¹ Written Ministerial Statement, *Hansard* (HC), 17 March 2009, vol 489, col 46WS.

⁴² See Chapter 1, para 1.36.

during consultation that the oral examination⁴³ was heavily criticised as being too slow and yielding limited information of dubious quality and accuracy.⁴⁴ The 2003 White Paper proposed that a new form of “data disclosure order” be introduced. This order would allow information about the debtor to be sought from relevant third parties in both the public and private sectors, ensuring the accuracy of the information provided and speeding up the process of gathering information.

- 2.31 These proposals formed the basis of sections 95 to 105 of the 2007 Act, which introduce information requests and information orders. Information requests would be addressed to Government departments or to the Commissioners of Her Majesty’s Revenue and Customs (“HMRC”) and information orders to other persons or organisations. The court would be able to make such a request or order on the application of the creditor (normally without notice to the debtor, so as to avoid prompting evasive action), only if it was satisfied that to do so would help it to deal with the creditor’s application.⁴⁵ The aim would be to provide the court (not the creditor) with reliable information from third parties which would be of use in enforcing the family financial order.

DEPARTMENTAL INFORMATION REQUESTS

- 2.32 An information request would seek the debtor’s full name, address, date of birth and national insurance number and “prescribed information”. In the case of a request to the Commissioners of HMRC, the court would be able to request the debtor’s national insurance number, whether or not the debtor is employed, the name and address of any such employer and seek “prescribed information”.⁴⁶ The categories of “prescribed information” would be set out in regulations, yet to be made.

INFORMATION ORDERS

- 2.33 The court order would specify a prescribed person, “the information discloser”, who must disclose prescribed information to the court. Again, the detail of information disclosers and the required information will be set out in as yet unmade regulations.⁴⁷ Organisations to which the orders could be addressed could include financial institutions and credit reference agencies; information could be obtained from such agencies about a debtor’s bank or building society

⁴³ As the order to obtain information was formerly known.

⁴⁴ Lord Chancellor’s Department, *Enforcement Review: Consultation Paper 4: Warrants and Writs, Oral Examinations and Judgment Summons* (January 2000) para 4.2, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/enforcement/contentsfr.htm> (last visited 13 February 2015).

⁴⁵ Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”), ss 95 and 96.

⁴⁶ The 2007 Act, s 97.

⁴⁷ The 2007 Act, s 98.

accounts.⁴⁸

- 2.34 The legislation sets out “permitted reasons” for an information discloser not to provide the information sought. These are that the discloser does not hold the information or cannot ascertain whether or not it holds it, or that the disclosure would involve unreasonable effort or expense. If information is not disclosed the provider must explain the reason in a certificate.⁴⁹

USE OF THE INFORMATION OBTAINED

- 2.35 The court can use the information in the following ways:

- (1) to make another request or order;
- (2) to provide the creditor with information about what enforcement action it would be appropriate to take to recover the debt (*not* the information disclosed about the debtor);
- (3) if the creditor takes action to recover the debt, to carry out functions in relation to that action; and
- (4) disclose it to another court if the creditor is taking action in that court.

- 2.36 However, the information can only be used in this way if regulations about such use and disclosure are in force (and none have yet been made); information disclosed by the Commissioners of HMRC can only be used with their consent.⁵⁰

Discussion

- 2.37 The creation of information requests and orders has been called “the Government’s best idea about how to assist those seeking to enforce a judgment debt”.⁵¹ We understand that access to data from credit reference agencies greatly increased the Child Support Agency’s⁵² success in enforcement and we think that the disclosure of the details of bank and building society accounts would be proportionate in the service of improving enforcement.

⁴⁸ The 2003 White Paper, pp 60 to 61.

⁴⁹ The 2007 Act, s 100.

⁵⁰ The 2007 Act, s 101. The use for any other purpose of information disclosed pursuant to an information request or order, and that is not in the public domain, is a criminal offence: the 2007 Act, s 102.

⁵¹ J Baldwin and R Cunnington, “The Abandonment of Civil Enforcement Reform” (2010) 29 *Civil Justice Quarterly* 159.

⁵² Now the Child Maintenance Service.

2.38 The Money Advice Trust⁵³ has given us its views on these provisions. Whilst it broadly supported them, it expressed the view that information orders should not be used to obtain information from certain third parties such as debt advice services, or professionals such as solicitors and accountants. They asked how obligations of confidentiality for clients would interact with the provisions for information orders.⁵⁴

2.39 In its response to the 2011 consultation, the Money Advice Trust also raised some concerns about the cost-effectiveness and practicalities of the procedure, saying:

It would appear to be a labour intensive, time consuming and possibly cumbersome process for court staff in the current climate of resource difficulties. Would the process be repeated for each creditor that took court action or would the outcome of the Information Order be available for each subsequent creditor? Otherwise, there would be duplication of effort, resources and fees. We appreciate however, that the usefulness of the information obtained in making a decision on the best enforcement option would be time-limited.⁵⁵

2.40 We take the view that any issues of data protection, the identity of the third parties who can be approached, and the practicalities of the process can all be dealt with in regulations. We think it unlikely that solicitors would be listed as potential information disclosers, precisely because of client confidentiality issues.⁵⁶

Disclosure of information about the debtor to creditors

2.41 Although no regulations have yet been made, it appears from the comments in the 2003 White Paper and the provisions of the 2007 Act itself that the intention is that information obtained by way of information orders and requests would not be disclosed to the creditor. It appears that the 2007 Act contemplates the disclosure of information obtained by information requests and orders to the court, rather than the creditor, although further detail is to be provided in regulations.

2.42 Would it be right for information to be passed to the creditor in the family context?

⁵³ The Money Advice Trust provides free-to-client debt advice, both via telephone helplines and online, and trains free-to-client money advisers.

⁵⁴ Money Advice Trust, *Ministry of Justice Solving Disputes in the County Courts Consultation Paper: Response by the Money Advice Trust* (June 2011) p 27.

⁵⁵ Money Advice Trust, *Ministry of Justice Solving Disputes in the County Courts Consultation Paper Response by the Money Advice Trust* (June 2011) p 27.

⁵⁶ The 2003 White Paper, pp 60 to 61. The 2003 White Paper only mentions financial institutions and credit reference agencies as third party information disclosers, at least initially.

This is a difficult issue. On the one hand, it would appear to be a violation of privacy – even if legislation were to authorise what would otherwise be prohibited under the Data Protection Act 1998. It would also appear to offend the idea of a clean break and the need for parties to move on after family breakdown.

2.43 Yet, because of the family law context, the parties should already have made full and frank disclosure of their financial circumstances to each other before an order was made.⁵⁷ Further disclosure would have to be made if either party applied for a variation of a family financial order. So it may be that arguments about privacy carry less weight in this context than they would have in the context of other civil judgment debts. It might also be argued that there is a greater public interest in ensuring the maintenance of a former spouse than in the payment of some other civil debts.

2.44 If the information is passed to the creditor rather than being restricted to the court, this places the creditor in a more informed position to make choices about enforcement. The creditor may, for example, be able to make an immediate choice of a particular enforcement method, rather than using the general enforcement application; and that may make the enforcement process faster and cheaper. It may also reduce the court's costs as less judicial and administrative work will be required.

2.45 **We ask for the views of consultees as to:**

- (1) whether the provisions of 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.**

Obligation for the debtor to complete a financial statement

2.46 The current law makes available an information-gathering process through the order to obtain information, and a similar process through the general enforcement application. But unless those procedures are used there is no consistent requirement on the debtor to provide information about his or her finances.

2.47 For example, where a creditor applies for an attachment of earnings order the debtor is required to complete, in response to the application, a statement of means form that provides details of his or her savings, income, expenses and debts. No documentation is required except for the debtor's latest payslip if available. Other methods of enforcement do not specifically impose a

⁵⁷ *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424.

requirement on the debtor to provide financial information.⁵⁸

- 2.48 To some extent matters would be improved by the introduction of information requests and orders; but there may be relevant information held only by the debtor. In any event, we do not know whether or when information requests and orders will be introduced and they would each require standalone applications. Accordingly we explore here a further possibility.
- 2.49 In order to ensure that the debtor's financial situation is before the court on every enforcement application, it might be helpful to introduce a standard requirement for the debtor to provide information about his or her finances, supported by proportionate documentary evidence. We suggest that this could apply on any application for enforcement.⁵⁹ Service of such an application would trigger an obligation for the debtor to complete a statement within a specified period and provide it, together with supporting documents, to both the court and the creditor.

Procedure

- 2.50 Would this requirement prejudice the creditor by slowing the proceedings down? Currently a debtor served with an application for an attachment of earnings order has eight days in which to complete and return the relatively simple means form.⁶⁰ Depending on the complexity of the form and the documents required a realistic period to meet any new disclosure requirement might be two weeks. Some adjustment might be needed in the current service requirements: currently in the case of third party debt orders the interim order is served first on the third party, and need only be served on the debtor at least seven days before the hearing; that period might need to be extended in order to provide the debtor with a reasonable opportunity to file a statement.⁶¹
- 2.51 Failure to provide the statement as required could, in the usual way, be punishable as a contempt of court, or attract an adverse costs order. The court

⁵⁸ A debtor who applies for a hardship payment order following the making of an interim third party debt order is required to provide evidence of his or her financial situation: see Chapter 3, para 3.20.

⁵⁹ Except on an application for committal or for a judgment summons, where it is for the creditor to establish the case against the debtor: see Chapter 4, para 4.14. A further exception would be the third party debt order where there is an element of surprise, so that the obligation to file a statement should arise on the service of the interim order. In the context of a third party debt order, the debtor's financial statement would also serve as evidence for a hardship payment order, if he or she wished to make an application for one: see Chapter 3, para 3.20.

⁶⁰ County Court Rules, order 27, r 5(2) at Civil Procedure Rules, sch 2 (former County Court Rules that continue to be relevant are preserved in schedule 2 to the Civil Procedure Rules).

⁶¹ The Australian family law rules allow a payee, before applying for an enforcement order, to require a payer to complete a Financial Statement within 14 days: [Australian] Family Law Rules 2004, r 20.10(1).

could also draw adverse inferences against the debtor where he or she fails to provide full disclosure.

The form of the statement

- 2.52 As to the form of statement required, we suggest that Form E⁶² would be too onerous (it requires, for example, 12 months' bank statements for each of the debtor's accounts). Alternatives exist, namely the Form E1 or Form E2, which might be more appropriate or convenient.
- 2.53 Forms E1 and E2 are variations of the Form E, and are used in financial proceedings other than those on a divorce or dissolution of civil partnership. Form E1 is used, for example, on an application for financial relief for a child under schedule 1 of the Children Act 1989 and Form E2 is used, subject to a direction to the contrary from the court, in proceedings for the variation of an order for a financial remedy.⁶³ Form E2 is substantially shorter than a Form E and requires much less documentation – typically six months' bank statements, the last three payslips, and the last P60 and P11D.⁶⁴ It does not require any information about investments or pensions, nor does it ask for disclosure of the amount of any mortgage nor a statement of the mortgage, which could be vital where a charging order over the property was sought. Form E1 is less onerous than a Form E but more comprehensive than the Form E2 and so might provide a useful basis on which to develop a standard form for use in enforcement proceedings, although it would still require some amendment; for example, it does not require information about pensions. Both variants require the party completing the form to sign a statement of truth confirming that the information given in the form is a full, frank, clear and accurate disclosure of his or her financial and other relevant

⁶² This is the detailed form that each of the parties must complete in financial remedy proceedings on divorce. It requires comprehensive information about their financial resources (with documentary evidence) and financial needs so the judge can decide what financial orders, for example a lump sum payment, periodical payments or the transfer of a property such as a former matrimonial home, may be appropriate.

⁶³ Family Procedure Rules, Practice Direction 5A.

⁶⁴ The P60 form is the annual statement of the tax the employee has paid on his or her salary; the P11D form is an annual statement of the value of benefits and expenses received by an employee.

circumstances.⁶⁵

2.54 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?

⁶⁵ However, the Financial Remedies Working Group, in their interim report, recommended that there should be only one form of financial statement, commenting that “the existence of Forms E1 and E2 is a complication likely to be confusing to litigants in person and the advantages of their separate existence are far from obvious”. See Report of the Financial Remedies Working Group (31 July 2014) paras 6 to 13, available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp.pdf> (last visited 13 February 2015). These recommendations were maintained in the final Report of the Financial Remedies Working Group (15 December 2014) save that the Group suggested that in straightforward variation cases it should be possible to continue to use the abbreviated procedure for a financial remedy application contained in Part 9, Chapter V of the Family Procedure Rules. In that case, directions might be given by the court that only the income parts of the Form E should be completed. The final report suggests an amalgamated Form E. See <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/frwg-final-report-15122014.pdf> (last visited 13 February 2015).

CHAPTER 3

ENFORCING COMPLIANCE

INTRODUCTION

- 3.1 In Chapter 2 we looked at some of the ways in which the enforcement process can begin. Often the starting point is the need for information, and sometimes it is difficult for a creditor to know what method of enforcement to employ. For some, however, there is an obvious choice. Whatever the starting point, enforcement is likely to involve a method that results directly in the payment of money or the transfer of property. In this Chapter we explore the current methods of this kind, along with some suggestions for reform.
- 3.2 All of the methods discussed in this Chapter¹ are regulated by the Civil Procedure Rules, incorporated with amendments by Part 33 of the Family Procedure Rules.
- 3.3 In our discussions of individual methods, particularly third party debt orders and charging orders, we include consideration of reforms which have been enacted but not yet brought into force, and on which the Government has already consulted. We do so for two reasons:
- (1) The consultations were in the context of civil litigation; we want to bring them to the attention of family lawyers, and consider the questions raised in a specific family law context.
 - (2) Views on some points of reform have evolved over the last 15 years and it is useful to summarise this evolution when thinking about what sort of reform might still be appropriate.
- 3.4 The methods discussed here are divided into orders against capital and orders against income. In the former category we discuss:
- (1) the execution of documents by the court;
 - (2) third party debt orders; and
 - (3) charging orders.
- 3.5 We mention warrants of control only briefly; they have been recently and comprehensively reformed and so we do not consult about them in this paper.
- 3.6 Before we turn to income orders we consider using orders against pensions for the purpose of enforcement, and make a proposal on a discrete point of

¹ With the exception of the pension orders and the execution of documents by the court.

international enforcement, dealing with the enforcement of a foreign pension order against an English pension.

3.7 Orders against income are as follows:

- (1) attachment of earnings; and
- (2) appointment of a receiver.

3.8 We also look at the rules relating to arrears more than 12 months old, and the remittance of arrears.

3.9 Finally, we consider how the rules on the payment of parties' legal costs operate in enforcement proceedings.

ENFORCEMENT AGAINST DEBTORS' CAPITAL

The execution of documents by the court

- 3.10 Perhaps the simplest way to access a debtor's capital is the execution of documents by the court. If a court has made an order compliance with which requires the execution of a document – for example an order for the transfer of the former matrimonial home to one spouse, or the transfer of a life assurance policy – the court may direct that a nominated person (such as a district judge) executes the required document if the party fails to do so.² The document will then be treated as if it had been executed by the person required to do so by the original order. In family proceedings, an application for the execution of documents should be made under Part 18 of the Family Procedure Rules.
- 3.11 This is a useful power, allowing the court to “bypass” an uncooperative party who refuses to sign a transfer following an order to do so. However, the power can only be exercised where the person has refused or neglected to comply with that order, or where that person cannot, after reasonable inquiry, be found.³
- 3.12 If the law were amended to remove those conditions on the use of this power then, if the court took the view that a party was likely to be uncooperative in dealing with the transfer, it could proceed directly to making the order for the execution of documents along with the order for transfer. This would avoid later delay; clearly it would be workable only for a transfer to one of the parties and not in the context of an order for sale. We would be interested to hear consultees' views as to whether that or any other reform would be useful.
- 3.13 **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**

² Senior Courts Act 1981, s 39.

³ Senior Courts Act 1981, s 39(1).

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?

Third party debt orders

Current law and procedure

- 3.14 A third party debt order, under Part 72 of the Civil Procedure Rules, requires a third party (either an individual or an organisation) who owes money to the debtor to pay the creditor instead of the debtor. It can be made against any third party and in relation to any debt, but is most often used against banks and building societies, which owe to the debtor any balance held in his or her account.
- 3.15 Although the scope of a third party debt order appears to be very wide, there are some important limitations. The third party must be in England and Wales⁴ and the debt must exist and be due at the time of the order.⁵ In the case of a bank account, this means that only the balance at the date of the order, and not any further deposits, can be paid to the creditor. The timing of the application is therefore crucial. The order is unsuitable for use against an employer; where the creditor seeks payment out of the debtor's regular earnings, an attachment of earnings order should be used.
- 3.16 It is not possible to obtain a third party debt order over a bank account that the debtor holds jointly with another person.⁶
- 3.17 The creditor applies on Form N349 to the court that made the original order. The application must be supported by a statement setting out specified information, and include details of the debtor's account where the third party debt order is addressed to a bank or building society. If the creditor does not know the name and address of the branch and/or the account number, this does not prevent an application, but there must be some evidence that the debtor holds an account; the application must not be purely speculative.⁷
- 3.18 A third party debt order is made in two stages, first an interim order then a final order. The court will consider the application without a hearing in the first instance and, if satisfied, grant an interim order, listing a hearing date not less than 28 days later. The order will specify the sum the third party must retain, namely the amount of the debt plus any costs awarded to the creditor; it must be served on the third party at least 21 days before the hearing date. The debtor must also then be served, not less than seven days after the date of service on the third

⁴ Civil Procedure Rules, r 72.1.

⁵ Civil Procedure Rules, r 72.2(1).

⁶ *Hirschorn v Evans* [1938] 2 KB 801.

⁷ Civil Procedure Rules, Practice Direction 72, paras 1.2 and 1.3.

party and at least seven days before the hearing date.⁸

- 3.19 The third party has seven days from receipt of the order to notify the court and the creditor of any dispute over the existence or amount of the debt. A bank or building society has an additional obligation to inform the court and the creditor of any accounts held by the debtor in his or her sole name, whether there were sufficient funds to comply with the order as at the date of service and, if not, the balance of the account or accounts at that date.⁹
- 3.20 Upon being served with the order, the third party becomes bound by its terms and must not pay the debt to the debtor.¹⁰ If the debt is funds in a bank or building society account it will effectively be frozen upon receipt of the interim order. However, debtors can apply for permission for the third party to make one or more payments to cover their ordinary living expenses, supported by evidence of hardship suffered by themselves and any relevant family members or dependants.¹¹
- 3.21 If the debtor or third party objects to the third party debt order, or has notified the court that the debt is insufficient to meet the order, or knows that another person has a claim over the funds, he or she must file written evidence at least three days before the hearing.¹²
- 3.22 At the hearing, the court will decide whether to discharge the interim order or make it final. The court will not make a final order where it would be inequitable to do so.¹³ The effect of the final order is that the third party pays the creditor the amount due to the debtor and is released from the obligation to pay the debtor that amount.¹⁴

Options for reform

- 3.23 Clearly information is crucial to the successful use of third party debt orders, and it has been suggested that lack of information has dissuaded creditors from using

⁸ Civil Procedure Rules, rr 72.4 and 72.5.

⁹ Civil Procedure Rules, r 72.6.

¹⁰ Civil Procedure Rules, r 72.4.

¹¹ Civil Procedure Rules, r 72.7.

¹² Civil Procedure Rules, r 72.8.

¹³ *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192. Despite the reversal of this Court of Appeal decision in the House of Lords, the principles set out in it (including the need to do equity between the creditor, debtor and other creditors when making interim charging or third party debt orders absolute) were approved in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 252, [2014] 1 All ER (Comm) 993.

¹⁴ A deposit taking institution can deduct the sum of £55 from an account for implementing a third party debt order: Senior Courts Act 1981, s 40A(1); County Courts Act 1984, s 109(1); Attachment of Debts (Expenses) Order 1996, SI 1996 No 3098, art 2.

them.¹⁵ Applications for third party debt orders are much less common than for charging orders and attachment of earnings orders; in 2011 there were only 4,137 applications for such orders in the county court, in which court statistics are available. And only around a third (1,357) of those applications resulted in an order being made.¹⁶ It may be that family judgment creditors have an advantage over other creditors, because a former spouse may know about the debtor's financial situation, at least where enforcement is sought fairly soon after the original financial order; but the available statistics do not include family orders. If the provisions relating to information orders¹⁷ are brought into force then the utility and frequency of third party debt orders may be increased.

3.24 We consider below the following options for reform of third party debt orders:

- (1) Streamlining of the procedure.
- (2) The range of accounts to which such orders apply.
- (3) Whether "periodical" third party debt orders should be possible.
- (4) Whether there should be a restriction on the level of funds subject to the order.
- (5) The actions that should be taken by a deposit taking institution on receipt of the interim order.

STREAMLINING

3.25 The Government stated in its response to the 2011 consultation that it would seek to streamline the procedure for third party debt orders.¹⁸ It proposed that a final hearing in such cases would only take place where a debtor or third party raises an objection following the service of the interim order. Otherwise, interim orders would become final orders, made by a court clerk, once the required time for response had elapsed. Notices sent to judgment debtors would be revised to provide more information on the nature and consequences of a third party debt order and explain that the order would automatically be made final unless a

¹⁵ N Dominy and E Kempson, *Can't Pay, Won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (2003) prepared for the Lord Chancellor's Department, available at <http://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0307.pdf> (last visited 13 February 2015).

¹⁶ Ministry of Justice, *Judicial and Court Statistics 2011 Chapter 1: County courts (non-family work)* (2012) table 1.18, available at <https://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011> (last visited 13 February 2015).

¹⁷ See Chapter 2, paras 2.28 to 2.45.

¹⁸ The 2012 Government response, p 54.

hearing is requested.¹⁹ We understand that these proposals are still under consideration by the Ministry of Justice.

- 3.26 It is claimed that streamlining could reduce delays leading to the faster payment of the debt, simplify the process for the parties, and save court time.²⁰ Members of the judiciary consulted in 2012 took the view that judicial consideration was only necessary at the interim stage of the order and that most final hearings were administrative in nature.²¹
- 3.27 However, a third party debt order may give rise to bank charges, lapsed direct debits, unpaid bills, and hardship for the debtor. Omitting the final hearing in some cases would remove an important safeguard for those in debt, particularly for vulnerable groups who may find it particularly hard to deal with the court process.²² Additional time for the debtor to object to the interim order being made final (and thus to trigger a final hearing) might be helpful, but at the cost of delay and possible prejudice to the creditor. Streamlining may be less suited to occasions where third party debt orders are made against joint accounts, if this were to become possible. It would have a particularly harsh effect in these cases if it prevented the third party from making representations about the ownership of funds in the account or from effectively exercising any ability to object to the proposed order.
- 3.28 Essentially, streamlining is a reversal of the default position: an interim order is made final unless the debtor or the third party call that into question. We look at a similar proposal in the context of charging orders in paragraphs 3.54 to 3.56 below.

THE RANGE OF ACCOUNTS TO WHICH THE ORDERS APPLY

- 3.29 Currently, third party debt orders addressed to banks or building societies can only apply to accounts held in the debtor's sole name (unless both joint account holders are debtors of the creditor in relation to the same debt).²³ Debtors can therefore use joint accounts to shield funds from enforcement. There is a power

¹⁹ Ministry of Justice, *Impact assessment: Proposed reforms to third party debt orders* (2011) pp 9 and 10, available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/supporting_documents/Enf_IA_third_party_debt_orders.pdf (last visited 13 February 2015).

²⁰ Ministry of Justice, *Impact assessment: Proposed reforms to third party debt orders* (2011) p 10, available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/supporting_documents/Enf_IA_third_party_debt_orders.pdf (last visited 13 February 2015).

²¹ The 2012 Government response, p 53.

²² Money Advice Trust, *Ministry of Justice Solving Disputes in the County Courts Consultation Paper: Response by the Money Advice Trust* (June 2011) p 24.

²³ See para 3.16 above.

in legislation, not yet in force, for the Child Maintenance Service to make orders against joint accounts when enforcing assessments for child support using the equivalent of third party debt orders.²⁴

- 3.30 Government thinking on whether third party debt orders could or should be extended to joint accounts has varied over the years. In the first phase of the 1998 Enforcement Review it was proposed that joint accounts should be brought within scope;²⁵ this position was reversed in the 2003 White Paper but the question was revived in the 2011 consultation. The 2012 Government response reported that 93% of respondents agreed that third party debt orders should be applicable to a wider range of bank accounts, including joint and deposit accounts (but not trust accounts).²⁶ This positive response is echoed by the initial feedback that we have received from Resolution, which says that this method of enforcement is not currently effective and which favours extending the possibility of third party debt orders to include joint accounts for the enforcement of family financial orders.²⁷
- 3.31 There are obvious difficulties in extending third party debt orders to joint accounts, in terms of fairness to the third party; contributions to, and beneficial ownership of, a joint account may be anywhere in the range from 50/50 to 100/0. And such a reform could place unacceptably high financial and administrative burdens on the courts and financial institutions, because there would probably be a need to allocate the ownership of funds in the account, to create a new “unfrozen” account for the “innocent” third party to use, and to notify and give a right of appeal to that third party.²⁸
- 3.32 Realistically, there would probably have to be provision that 50% of a joint account should be deemed to belong to the other party (reduced accordingly where there are more than two account holders) and therefore protected from the

²⁴ The regulations required by s 32E(2)(b) of the Child Support Act 1991 to enable the power to be exercised have not yet been made.

²⁵ Lord Chancellor’s Department, *Report of the First Phase of the Enforcement Review* (July 2000) para 198, available at <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/enforcement/firstphasefr.htm> (last visited 13 February 2015).

²⁶ The 2012 Government response, p 54.

²⁷ See Chapter 1, paras 1.48 to 1.51 and Appendix A.

²⁸ The 2003 White Paper, p 89.

order.²⁹ In the child maintenance context joint holders of the account can make representations about the proposed order and the amount to be taken from the account; the court is directed to order payment to the creditor of no more than is fair in all the circumstances.³⁰

PERIODICAL THIRD PARTY DEBT ORDERS

- 3.33 Third party debt orders are currently only effective where the debt owed by the third party to the debtor is already in existence. The possibility of third party debt orders being extended to apply to future debts, on a periodical basis, has been raised by stakeholders such as the Family Law Bar Association.³¹ This would be of assistance in enforcing both capital debts owed to the creditor (for example a large lump sum order) and periodical payments owed by the debtor to the creditor.³² The possibility of such a reform has also been raised in Government consultations and 87% of the respondents to the 2011 consultation welcomed the proposal that such orders be introduced.³³ A similar order, called an “order for regular deductions from accounts” with deductions taken either weekly or monthly, has been created for the enforcement of child maintenance debts by the Child Maintenance Service.³⁴
- 3.34 Such an order might be used where the debtor has regular unearned income, for example from investments, and would remove the need for repeated applications by the creditor. It could also help with payments received into an account just after the interim third party debt order is served on the bank because, where that order applies only once, such payments will not be caught.

²⁹ See Lord Chancellor's Department, *Report of the First Phase of the Enforcement Review* (July 2000) para 198, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/enforcement/firstphasefr.htm> (last visited 13 February 2015) and the 2011 consultation, pp 60 to 61. Article 1 of protocol 1 of the European Convention on Human Rights, which provides for the peaceful enjoyment of possessions, is likely to be engaged here. The article permits deprivation of possessions in the public interest and subject to conditions provided by law; and it would clearly be important not to take funds from a third party, namely the other joint account holder, in the interests of the creditor.

³⁰ Child Support Act 1991, ss 32B and 32F. The need for safeguards was also noted in the 2012 Government response, p 54.

³¹ In its response to the Law Commission's consultation for the 11th Programme of law reform – Family Law Bar Association (2010) Law Commission: Enforcement [consultation response] 15 October 2010 and further response dated 23 December 2010.

³² Note that a third party debt order cannot currently be used where the third party debt is a large capital sum (for example a company director's loan account) and the creditor is seeking to enforce a periodical payments order under which future payments are not yet due. A periodical third party debt order could, if introduced, require future periodical payments to be paid out of the third party's capital debt.

³³ The 2012 Government response, p 54.

³⁴ Child Support Act 1991, s 32A.

- 3.35 A periodical third party debt order would be available where payments were sufficiently regularly received by the debtor, and could allow enforcement akin to attachment of earnings where the debtor is self-employed.³⁵ Debtors might be able to evade such orders by manipulating bank accounts,³⁶ although that will not be the case where the order is addressed to a business for which a debtor is providing services. There has certainly been cynicism in the past about whether applying an attachment of earnings style enforcement regime to the self-employed raises insurmountable problems³⁷ but it is clear that, in family proceedings at least, the inability to gain periodic access to bank accounts represents a gap in the law.
- 3.36 Periodical third party debt orders are also likely to place greater administrative and financial burdens on the third parties charged with operating them, whether businesses or financial institutions. There would have to be provision for third parties to charge a fee to cover their costs, and indeed to challenge the order; a greater burden would almost certainly be placed on the court service. As with all the potential reforms discussed here, the potential benefits of change have to be balanced carefully against the potential cost.

SHOULD THERE BE A RESTRICTION ON THE LEVEL OF FUNDS SUBJECT TO A THIRD PARTY DEBT ORDER?

- 3.37 It has been suggested that there should be a protected balance, below which a debtor's personal bank account could not be taken by a third party debt order, providing a minimum level of funds to meet the debtor's needs.³⁸ This concept appears in both the equivalent Scottish law and the law governing the enforcement of child maintenance assessments.³⁹ Debtors can already apply to court for a hardship payment;⁴⁰ a protected balance would in some cases avoid the need for an application.⁴¹
- 3.38 Clearly there would have to be anti-avoidance provisions to prevent the debtor

³⁵ The 2011 consultation, p 61.

³⁶ The 2011 consultation, p 61.

³⁷ Lord Chancellor's Department, *Report of the First Phase of the Enforcement Review* (July 2000) para 157, available at <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/enforcement/firstphasefr.htm> (last visited 13 February 2015).

³⁸ Money Advice Trust, *Ministry of Justice Solving Disputes in the County Courts Consultation Paper: Response by the Money Advice Trust* (June 2011) p 25.

³⁹ See Debtors (Scotland) Act 1987, s 73F; Diligence Against Earnings (Variation) (Scotland) Regulations 2012, SSI 2012 No 308, sch, table B and Child Support (Collection and Enforcement) Regulations 1992, reg 25D.

⁴⁰ See para 3.20 above.

⁴¹ Money Advice Trust, *Ministry of Justice Solving Disputes in the County Courts Consultation Paper: Response by the Money Advice Trust* (June 2011) pp 26 to 27.

from maintaining several accounts below the minimum level; and that might be difficult to achieve, being dependant upon the creditor and the court having access to reliable information about the debtor's financial situation. Information orders⁴² might go some way towards giving such anti-avoidance provisions teeth.

STEPS TAKEN BY FINANCIAL INSTITUTIONS ON RECEIPT OF AN INTERIM THIRD PARTY DEBT ORDER

- 3.39 Where an interim third party debt order is served on a bank or building society it must search for accounts in the debtor's name and provide this information to the court, and must freeze the account pending a final order being made.⁴³
- 3.40 It would be possible to require banks to disclose statements for the account(s) in question for a specified period. This could help the court to distinguish between the "can't pay" and "won't pay" cases and allow it to make orders that are fair in their effect on both parties. The statements could be copied to the creditor or be provided to the court only.⁴⁴ However, information orders, if brought into force, might well remove the need for a provision of this kind for third party debt orders, as the court would have a more comprehensive way to access information about the debtor. Moreover, such an additional obligation would not fit with the streamlined third party debt order procedure,⁴⁵ because there would be no final hearing unless an objection was received and so no scope for the court to consider bank statements.⁴⁶
- 3.41 **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?

- 3.42 **We ask for consultees' views about the following options for reform:**
- (1) the introduction of third party debt orders against joint accounts;**

⁴² See Chapter 2, paras 2.28 to 2.45.

⁴³ See para 3.20 above.

⁴⁴ Lord Chancellor's Department, *Enforcement Review Consultation Paper 3: Attachment of Earnings Orders, Charging Orders and Garnishee Orders* (October 1999) paras 3.28, 3.32 and 3.33, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/enfrevfr.htm> (last visited 13 February 2015).

⁴⁵ See paras 3.25 to 3.28 above.

⁴⁶ If it were compulsory for the debtor to file a financial statement in enforcement proceedings, as proposed in Chapter 2, that might serve as an alternative to this requirement provided bank statements had to be attached to that financial statement. However, an obligation on the bank to provide statements might well be more effective.

- (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.

Charging Orders

- 3.43 Charging orders can be used to secure the payment of a lump sum, arrears of maintenance and costs. If a lump sum is payable by instalments the court can make a charging order even if no payments have been missed.⁴⁷ A charging order does not lead to immediate payment; it provides security over an asset to enable recovery of the debt when that asset is sold.⁴⁸ Having obtained the charging order, the creditor can then accelerate sale and payment by applying for an order for sale.

Current law and procedure

- 3.44 The assets susceptible to a charging order are land, funds in court and certain securities including Government stock, stock of incorporated bodies and units in unit trusts. Jointly owned property or that held on trust for the debtor can also be charged.⁴⁹ The creditor applies to the Family Court on Form N379, if the application relates to land, or Form N380, if the application relates to securities.
- 3.45 The making of a charging order is a two stage process, consisting of an interim order and final order, and the court will often deal with the application without a hearing in the first instance. If satisfied in all the circumstances that a charging order will not unduly prejudice the debtor or other creditors, the court will make an interim order and fix the date for a final hearing. The interim order is served on the debtor, other creditors, trustees (if relevant) and the relevant body or registrar in the case of securities. Anyone who objects to the charging order can then file

⁴⁷ Charging Orders Act 1979, s 1(7).

⁴⁸ Charging Orders Act 1979, s 1.

⁴⁹ Charging Orders Act 1979, s 2.

written evidence before the final hearing.⁵⁰

- 3.46 At the hearing the court can make the charging order final or discharge the interim order, and can also decide any issues in dispute or direct a trial of those issues.⁵¹ The court has to consider all of the circumstances of the case⁵² and this will include balancing competing interests of the creditor and a joint owner or anyone with a right of occupation. In practice, the interests of the creditor will usually be respected and a charging order made, although the court may decide to refuse the making of a charging order after consideration of all the circumstances.⁵³ Even if made final, a charging order can contain conditions; the debtor or interested parties can also apply for variation or discharge of the order at a later date.⁵⁴
- 3.47 If a charging order is made over securities then a stop notice will be included. This means the creditor is given 14 days' notice before certain steps are taken in relation to the securities, such as a transfer.⁵⁵ A further option is a stop order, which prevents certain dealings with securities.⁵⁶ Both a stop notice and a stop order can be applied for by a person claiming to be beneficially entitled to an interest in the securities,⁵⁷ which would include the creditor who succeeds in obtaining a charging order over those securities.
- 3.48 A charging order over land can be registered as a land charge (in unregistered land) or protected by notice on the land register (if the debtor's title is registered).⁵⁸
- 3.49 Creditors who have obtained a charging order can then apply for an order for sale to realise the charge.⁵⁹ The application should be made under Part 8 of the Civil Procedure Rules or, if the asset is jointly owned, under the Trusts of Land and Appointment of Trustees Act 1996. The application should be supported by written evidence dealing with various matters including an estimate of how much the asset would sell for. Whether obtaining a charging order or an order for sale, the creditor must so far as possible identify any other creditors and the amount

⁵⁰ Civil Procedure Rules, r 73.

⁵¹ Civil Procedure Rules, r 73.8(2).

⁵² Charging Orders Act 1979, s 1(5).

⁵³ *Kremen v Agrest* [2013] EWCA Civ 41, [2013] 2 FCR 181.

⁵⁴ Charging Orders Act 1979, s 3.

⁵⁵ Civil Procedure Rules, r 73.18.

⁵⁶ Charging Orders Act 1979, s 5.

⁵⁷ Civil Procedure Rules, rr 73.12(1)(b) and 73.17(1).

⁵⁸ Charging Orders Act 1979, ss 3(2) and 3(4).

⁵⁹ Civil Procedure Rules, r 73.10.

owed to them.⁶⁰

- 3.50 The court has discretion when considering an application for an order for sale, which must be exercised in accordance with the debtor's human rights⁶¹ (but not his interests beyond that) and the rights of other interested parties such as the debtor's family. Usually, the creditor's rights will prevail and the property will be sold.⁶² The court can order an immediate sale or a sale at a later date.⁶³
- 3.51 An order for sale can also be obtained by making an application under section 24A of the Matrimonial Causes Act 1973. This is only possible where a creditor has an order for a lump sum, secured periodical payments or a property adjustment order. However, the original order does not have to relate to the same asset to which the application for an order for a sale relates and so this section is more useful for enforcement purposes than is at first apparent. If the original order meets the requirements then the creditor may well find this application offers a quicker and more efficient way to achieve a sale of a debtor's property than the charging order procedure.⁶⁴

Options for reform

- 3.52 Charging orders are the second most common method of enforcing an order in civil cases,⁶⁵ having overtaken attachment of earnings orders in popularity over the decade from 2000 to 2010.⁶⁶ Charging orders only provide security for creditors, rather than recovering sums due to them. The creditor will only recover what is owed when the property that has been charged is sold; he or she can either wait for that to happen or seek to enforce the charging order by making an application for an order for sale. Such applications are rare – the number of orders for sale is only around half a percent of the number of charging orders

⁶⁰ Civil Procedure Rules, Practice Direction 73, para 4.3.

⁶¹ In particular, article 1 of protocol 1 (the right to peaceful enjoyment of possessions) and article 8 (the right to respect for private and family life, home and correspondence) of the European Convention on Human Rights have both been considered in the case law. However, both articles permit interference in accordance with the law and in pursuance of a legitimate aim provided that the action is proportionate.

⁶² *Pritchard Englefield v Steinberg* [2004] EWHC 1908 (Ch), [2004] All ER (D) 580 (Jul).

⁶³ *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch), [2009] 1 FLR 873.

⁶⁴ G Smith and T Bishop, *Enforcing Financial Orders in Family Proceedings* (2000) p 56; J Booth, "Lump sum orders: be prepared" (2014) 142 *Family Law Journal* 9.

⁶⁵ Ministry of Justice, *Judicial and Court Statistics 2011 Chapter 1: County courts (non-family work)* (2012) tables 1.15 and 1.18, available at <https://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011> (last visited 13 February 2015).

⁶⁶ John Baldwin and Ralph Cunnington "The Abandonment of Civil Enforcement Reform" (2010) 29 *Civil Justice Quarterly* 159.

made each year.⁶⁷

3.53 We look at two ways in which charging orders might be reformed:

- (1) streamlining the procedure; and
- (2) extending the scope of charging orders.

STREAMLINING

3.54 The proposal for the streamlining of the procedure for charging orders is very similar to that proposed for third party debt orders and was made by the Government in the same document.⁶⁸ Under the proposal a final hearing before a judge should not happen automatically, but only if the debtor raises an objection to the interim order. Otherwise, the interim order would become final after a defined period of time. Again, notices sent to judgment debtors would be revised to provide more information about the nature and consequences of a charging order.⁶⁹

3.55 In a reversal of the procedure suggested for third party debt orders, the interim order would be issued by the court clerk and the final order (without a hearing unless an objection has been raised) would be made by the judge; contrast the third party debt order where the interim order would be made by a judge and the final order would be made administratively. This may be because an interim charging order is less likely to have a damaging effect on the debtor than an interim third party debt order, which will freeze a bank account to which it is applied.

3.56 Similar considerations are relevant here to those set out above in respect of the streamlining of third party debt orders. However, as charging orders secure rather than recover a debt, streamlining would not mean that the debtor received payment any earlier. Thus the advantages of streamlining the charging order procedure relate only to the initial application.

EXTENSION OF THE SCOPE OF CHARGING ORDERS

3.57 The effectiveness of a charging order depends upon the availability of registration or other protection, so as to ensure that the asset is not sold without the debt

⁶⁷ Ministry of Justice, *Judicial and Court Statistics 2011 Chapter 1: County courts (non-family work)* (2012) table 1.18, available at <https://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011> (last visited 13 February 2015).

⁶⁸ See paras 3.25 to 3.28 above.

⁶⁹ Ministry of Justice, *Impact assessment: Proposed reforms to charging orders* (2011) p 15, available at https://consult.justice.gov.uk/digital-communications/county_court_disputes/results/charging-orders-response-ia.pdf (last visited 13 February 2015).

being paid. Accordingly it does not seem practicable to extend the scope of charging orders to assets other than land or securities.⁷⁰ We are aware that other jurisdictions have devised ways of using other assets as security; for example in France it is possible to obtain an attachment order against a vehicle so as to prevent dealings with it for up to two years, or physically to immobilise it, giving the debtor one month to pay or contest the measure, after which the car can be sold.⁷¹ To implement a similar procedure in this jurisdiction would, we think, require a new framework for registration of the charging order against the vehicle, which would impose further administrative costs on the civil system. In addition, there already exists the possibility of seizing a debtor's vehicle for sale to pay debts: therefore, extension of the scope of charging orders to vehicles seems, on balance, unnecessary.

- 3.58 Reverting to the current law, there has been some concern over whether charging orders adequately cover modern financial products, although it is unclear what caused this concern.⁷² If this is an issue it should be possible to address it using the existing mechanisms of stop orders and stop notices, rather than any new system of registration to protect charging orders having to be devised. We would welcome comments from consultees on whether there are any problems with the application of charging orders to such products and whether any reform is necessary.

- 3.59 **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.**

Do consultees agree?

- 3.60 **Are consultees aware of any problems with the application of charging orders to financial products?**
- 3.61 **Do consultees think that there is scope to use assets other than land and securities as security for family judgment debts?**
- 3.62 We would welcome consultees' observations about all aspects of a streamlined procedure for third party debt orders and for charging orders. For example, views on the period to be allowed for objections before the interim order becomes final

⁷⁰ See para 3.44 above. Securities include unit trust investments.

⁷¹ M Andenas, B Hess and P Oberhammer (eds), *Enforcement Agency Practice in Europe* (2005) p 159.

⁷² Lord Chancellor's Department, *Enforcement Review: Consultation Paper 3: Attachment of Earnings Orders, Charging Orders and Garnishee Orders* (October 1999) para 2.41, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/enfrevfr.htm> (last visited 13 February 2015).

would be useful.

Warrants of control

- 3.63 Writs and warrants of control are used to seize assets belonging to the debtor so that these can be sold and the proceeds paid to the creditor. They are the most popular methods of enforcement of civil debts.⁷³
- 3.64 The law relating to taking control of and selling goods was reformed with effect from 6 April 2014 by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). This introduced writs and warrants of control,⁷⁴ previously known as writs of fieri facias and warrants of execution. Consolidated and updated procedural rules are now contained in Parts 83 and 84 of the Civil Procedure Rules, which are applied to family proceedings by Part 33 of the Family Procedure Rules.⁷⁵ Detailed regulations were also introduced to clarify and regulate the procedure of taking control of the debtor's goods to offer protection against unfair or unlawful practices.⁷⁶ All these provisions came into force during April 2014.
- 3.65 Because of this recent and comprehensive reform we do not discuss this method any further.

ENFORCEMENT AGAINST PENSIONS

Power to make pension orders at the time of enforcement

- 3.66 Enforcement proceedings may result in the creditor getting access to assets of the debtor, for example by the use of charging orders. But the court has no power to make orders against pension assets on an enforcement application if claims between the parties, against such assets, have been dismissed. This may be problematic at the time of any enforcement proceedings where the debtor's main asset or assets are pension funds, as the creditor may be unable to enforce the

⁷³ In 2011 129,778 writs and warrants of control were issued in England and Wales in the county court. See Ministry of Justice, *Judicial and Court Statistics 2011 Chapter 1: County courts (non-family work)* (2012) table 1.18, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162460/county-courts-tables-chp1-2011.xls (last visited 13 February 2015).

⁷⁴ Writs of control are issued in the High Court, warrants in the Family Court.

⁷⁵ Part 83 of the Civil Procedure Rules also applies to writs and warrants for the possession of land, although, where an order for sale has been made under certain statutory provisions, the court also has the power, under rule 9.24 of the Family Procedure Rules, to order possession.

⁷⁶ Taking Control of Goods Regulations 2013, SI 2013 No 1894.

debt despite the debtor having significant funds in a pension.⁷⁷

- 3.67 At the time of the original financial order the court is currently able to order pension attachment or pension sharing. We have considered, only to dismiss, the court being given powers beyond this for the purposes of enforcement. For example, one can imagine a power to remove funds from a debtor's pension fund to be paid as a cash lump sum to the creditor. Where the legislature has not seen fit to provide such powers to the court at the time of the original application for a financial remedy on divorce we do not consider that it is open to us to recommend that such powers should be available at the time of any enforcement proceedings. Pensions attract favourable tax treatment because of their structure and to invade the fund in this way would not be consistent with that treatment.
- 3.68 The law could be changed to allow pension sharing and pension attachment orders to be made as a means of enforcement, even if such claims have already been dismissed. And in the case where the debtor is on the point of retiring, where a lump sum has not been paid and the debtor's only asset is a pension fund, it could be possible to order commutation of the debtor's pension to pay the lump sum.
- 3.69 This could increase the administrative and therefore financial burdens on pension schemes if that means many more such orders are made. We would therefore be interested to hear from the pension industry about the likely effect of such proposals. As the law stands, the court can make a pension sharing order in response to an application to replace periodical payments with a capital sum,⁷⁸ so reviving the availability of pension orders after their dismissal is not a completely foreign concept.⁷⁹
- 3.70 If pension sharing and attachment were to be available as a means of

⁷⁷ In the unusual case where claims were not dismissed at the time financial orders were made, then of course a pension sharing or attachment order could be made as part of the enforcement process; so could an order for commutation of a pension, under section 25B(7) of the Matrimonial Causes Act 1973, to force commutation of the debtor's pension. Commutation involves giving up all or part of a pension in exchange for an immediate lump sum payment. Currently, it is possible for a person, on their retirement, to withdraw up to 25% of their defined contribution pension as a tax free cash lump sum. From April 2015, 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. These changes were announced in the 2014 Budget and implemented in the Taxation of Pensions Act 2014.

⁷⁸ Matrimonial Causes Act 1973, s 31(7B).

⁷⁹ Under the Welfare Reform and Pensions Act 1999, s 85(3) and the Welfare Reform and Pensions Act 1999 (Commencement No 5) Order 2000, SI 2000 No 1116, art 2, pension sharing is only available where the original petition for divorce was issued on or after 1 December 2000. Pension attachment is available where the petition for divorce was issued on or after 1 July 1996, see Pensions Act 1995 (Commencement) (No5) Order 1996, SI 1996 No 1675, art 4(2).

enforcement then thought would need to be given as to whether they would have to be subject to the same restrictions as generally apply to the exercise of these powers. A pension sharing order cannot be made against a pension scheme that is already subject to a pension attachment order.⁸⁰ Nor can a party who has already had the benefit of a pension sharing order have a “second bite of the cherry” against the same pension scheme at a later date, whether by way of a pension sharing order or a pension attachment order.⁸¹

3.71 Should there be any further restrictions on a power to make pension orders as part of the enforcement process? We take the view that such powers are no harsher than existing enforcement powers to require third party debtors to pay money owed to the debtor to the creditor, or to charge and sell the debtor’s property, and so we think that no further restrictions are needed.

3.72 **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; and**
- (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?**

INTERNATIONAL ENFORCEMENT: FOREIGN PENSION SHARING ORDERS

3.73 The recognition of family financial orders internationally, whether that relates to enforcing domestic orders abroad, or foreign orders in this jurisdiction, is generally outside the scope of our project. However, we have been alerted to one discrete point. We understand that persons with a pension sharing order from a foreign jurisdiction face difficulties in enforcing the order against an English pension.⁸² We understand that it is usually the case that English pension providers are not prepared to recognise a pension sharing order made by a foreign court and that they will only implement pension sharing orders from this jurisdiction.⁸³

⁸⁰ Matrimonial Causes Act 1973, s 24B(5).

⁸¹ Matrimonial Causes Act 1973 ss 24B(3) and (4), 25B(7B) and 25C(4).

⁸² We are grateful to David Hodson, a solicitor practising in international family law, for drawing this to our attention; he also suggested to us the solution we propose.

⁸³ See A Fraser, “Pension sharing and divorce: implementing a pension sharing order” (May 2012) *Techtalk*, available at <http://www.scottishwidows.co.uk/Extranet/Literature/Doc/FP0297> (last visited 13 February 2015).

- 3.74 However, the parties may have difficulty obtaining the necessary English pension sharing order because the courts in England and Wales lack jurisdiction to make one. Under Part III of the Matrimonial and Family Proceedings Act 1984, the court's jurisdiction to make such an order depends, in part, on a party establishing that he or she, or the former spouse, is either domiciled or habitually resident in England and Wales.⁸⁴ In many international cases, neither party will be resident or habitually resident in England and Wales and so establishing sole domicile may offer the only route of obtaining an English pension sharing order. Even that may not be available.
- 3.75 One solution would be to amend section 15 of the Matrimonial and Family Proceedings Act 1984 so that jurisdiction for financial relief after a foreign divorce could additionally be founded on either party having a pension based in England and Wales.⁸⁵ The financial relief that could be provided on an application based on this ground could be limited to the value of the pension or restricted to the making of a pension sharing order.⁸⁶
- 3.76 **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?

ENFORCEMENT AGAINST THE DEBTOR'S INCOME

- 3.77 Many debtors will have some form of income and enforcement against income may be the most appropriate method particularly where the order being enforced is an income order for periodical payments.

⁸⁴ Matrimonial and Family Proceedings Act 1984, section 15(1). Part III of the Act deals with financial relief after an overseas divorce. It is also possible to establish jurisdiction based on a party having a house in England and Wales which was used as the matrimonial home. The marriage must have been ended by overseas proceedings (judicial or otherwise) and the divorce must be recognised as valid in England and Wales.

⁸⁵ This solution is also suggested in G Howell and J Montgomery, *Butterworths Family Law Service* (Issue 192, December 2014) Vol 4(I), para 1655.

⁸⁶ Similarly to the way in which section 20 of the Matrimonial and Family Proceedings Act 1984 restricts the financial provision that can be made where the ground for jurisdiction is the existence of a matrimonial home in England and Wales. There are additional restrictions, the detail of which is outside the scope of this paper, in EU and European law which can restrict the availability of financial relief, where that is an order for "maintenance", in England and Wales after an overseas divorce. Whether a pension sharing order will be an order for maintenance will depend on the facts of the case. See Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (EC) No 4/2009, Official Journal L7 of 10.01.2009 and the Civil Jurisdiction and Judgments Act 1982.

- 3.78 The debtor may also have capital assets that produce income and the appointment of a receiver could be appropriate in that case.⁸⁷ However, more often the creditor will seek payment from the debtor's earnings. Accordingly in this context the primary method of enforcement is the attachment of earnings order.⁸⁸

Attachment of earnings

- 3.79 An attachment of earnings order can be made to enforce any family financial order; it is most useful for periodical payment orders. It enables the debtor's employer to deduct a fixed amount from the debtor's earnings and pay it into the court for distribution to the creditor.⁸⁹ The definition of earnings extends to bonuses, overtime, commission, pension and statutory sick pay as well as wages and salary and so all of those payments should be taken into account.⁹⁰

Current law and procedure

- 3.80 The Family Court can make an attachment of earnings order at the same time as ordering periodical payments,⁹¹ but we think that this is relatively rare and it is far more likely that an application will be made at a later date to enforce the periodical payments order following missed payments. The creditor applies on Form N337 to the Family Court where the original order was made. If the creditor wishes to enforce arrears that have been outstanding for 12 months or more then it is also necessary to ask permission for this within the application.⁹²
- 3.81 Notice of the application must be served on the debtor at least 21 days before the hearing together with the standard Form N56 that the debtor will need to complete in response.⁹³ The debtor has eight days from the date of service to complete this form, which requires details of the debtor's income, expenses, savings and existing liabilities. Once the court receives the completed form a copy will be sent to the creditor.⁹⁴

⁸⁷ See paras 3.109 to 3.111 below.

⁸⁸ Where the debtor is a member of HM armed forces, family financial orders cannot be enforced by the usual methods. Instead, enforcement is governed by the Armed Forces Act 2006, s 342 and the Armed Forces (Forfeiture and Deductions) Regulations 2009, SI 2009 No 1109, under which provision is made for the Defence Council to organise deductions from the debtor's pay.

⁸⁹ Attachment of Earnings Act 1971, s 6.

⁹⁰ Attachment of Earnings Act 1971, s 24.

⁹¹ Maintenance Enforcement Act 1991, s 1.

⁹² Family Procedure Rules, r 33.19A(5); see para 3.112 below.

⁹³ Family Procedure Rules, r 33.19A (6).

⁹⁴ County Court Rules, Order 27, r 5.

- 3.82 The court will need to consider the application and determine the amount to be deducted by the employer, called the “normal deduction rate”, and the amount below which the debtor’s income should not be reduced, the “protected earnings rate”.⁹⁵
- 3.83 The court will need to consider whether there are any existing attachment of earnings orders against the debtor, although employers must deal with priority orders first; these include attachment of earnings orders made to enforce debt arising from a family financial order.⁹⁶
- 3.84 A copy of the attachment of earnings order will be sent to both parties and to the debtor’s employer once it is made. The employer then has seven days from the service of the order to start complying with its terms and making the deductions ordered.⁹⁷ The employer can deduct an additional £1 every time a deduction is made to cover the administrative costs of implementing the order.⁹⁸
- 3.85 Once an attachment of earnings order is in force, if the debtor’s employment comes to an end, then the employer must write to inform the court of this within 10 days.⁹⁹ New employment details must be provided by the debtor and failure to comply is punishable by a fine or up to 14 days’ imprisonment.¹⁰⁰ Research has, however, suggested that these powers are rarely used in practice.¹⁰¹

Options for reform

- 3.86 The results from the survey conducted on our behalf by Resolution of its membership indicate that attachment of earnings orders are considered largely effective for the enforcement of maintenance orders.¹⁰²
- 3.87 The 2003 White Paper identified a number of problems with the current system of attachment of earnings orders including difficulties with obtaining accurate information about the debtor’s finances, and variations between courts as to what expenses debtors should be allowed to deduct from their income and what the protected earnings rate should be. It also pointed out that the deduction rate did not automatically change with any increases or decreases in the debtor’s pay, for

⁹⁵ Attachment of Earnings Act 1971, s 6(5).

⁹⁶ Attachment of Earnings Act 1971, sch 3, para 8.

⁹⁷ Attachment of Earnings Act 1971, s 7(1).

⁹⁸ Attachment of Earnings Act 1971, s 7(4), The Attachment of Earnings (Employer’s Deduction) Order 1991, SI 1991 No 356.

⁹⁹ Attachment of Earnings Act 1971, s 7(2).

¹⁰⁰ Attachment of Earnings Act 1971, ss 15 and 23.

¹⁰¹ The 2003 White Paper, p 79.

¹⁰² See Chapter 1, para 1.51.

example due to changes in salary, working hours or role.¹⁰³

- 3.88 The 2003 White Paper recommended two major reforms of attachment of earnings orders. One reform proposed by the paper was to introduce a new fixed table deduction scheme similar to that already in place for council tax arrears and child support maintenance; the other was to introduce a tracking system to trace debtors who changed employment, using HMRC employment records. Both were enacted by the 2007 Act, but neither has been brought into force. Accordingly in what follows we look at fixed tables and tracking. We go on to look at the automatic redirection of orders, and the possibility of a register of orders.

FIXED TABLES

- 3.89 The idea of fixed tables is that the deduction rate is linked solely to the debtor's income and not to the size of the debt owed.¹⁰⁴ Such a scheme would remove the need for the debtor to complete the means form; only his or her income would be relevant.
- 3.90 Section 91 of the 2007 Act (along with Schedule 15) provides for such a scheme, but is not yet in force. Deduction tables would be set out in secondary legislation. However, if the court was satisfied that the fixed deductions order would require deductions to be made at a rate or times which were not appropriate then it would have to suspend the fixed deductions order and specify the rate and times at which repayments must be made. The court would also have to revoke that suspension order if any of its terms was broken.¹⁰⁵
- 3.91 The fixed table deduction scheme reform does not, as currently drafted, apply to maintenance orders. The Attachment of Earnings Act 1971 distinguishes between "judgment debts" and "maintenance orders" (the latter equate to family financial orders). Schedule 15 of the 2007 Act, which contains the provision for the fixed table deduction scheme (to be made by regulation) applies specifically and only to judgment debts.
- 3.92 We do not think that it would be at all appropriate for fixed tables to have application where the attachment of earnings order relates to maintenance orders. This would be tantamount to creating fixed tables for periodical payments as, where the party in question derived most or all of their income from earnings, the rate of maintenance which he or she could be ordered to pay would effectively become the fixed rate applicable to the band of earnings within which that particular individual's salary would fall. Such a change is outside the scope of this project and should only be undertaken as part of a wide-ranging review of financial relief on divorce or the dissolution of civil partnership. The Law

¹⁰³ The 2003 White Paper, pp 72 to 73.

¹⁰⁴ The 2003 White Paper, p 73.

¹⁰⁵ The 2007 Act, sch 15(5).

Commission has already recommended, in our Report Matrimonial Property, Needs and Agreements¹⁰⁶ that work be commenced to assess the feasibility of developing guidance setting out numerical ranges for spousal support. Pending any wider review, the development of fixed tables in the context of securing maintenance orders simply does not work.

- 3.93 Equally, the recovery of any arrears of maintenance on the basis of fixed tables would be problematic if, at the same time, the periodical payments order continued. Any rate payable under the fixed tables to meet the arrears might well prevent the debtor from being able to afford the ongoing payments due under the order, raising concerns about the potential hardship to a debtor and his or her family. However, where there is no periodical payments order it would be practicable for an unpaid lump sum to be recovered by an attachment of earnings order using fixed tables. Whether it would be appropriate is another matter.¹⁰⁷
- 3.94 We take the view that in family proceedings the deduction rate and protected earnings rate should continue to be determined by judicial discretion, whether the debt concerned is periodical payments, arrears of periodical payments, or a lump sum.

TRACKING

- 3.95 As discussed above, an attachment of earnings order may not survive a change of employment, leaving the creditor with the potentially difficult task of trying to discover the debtor's new employer him or herself. Tracking of the debtor's employment using Government information would overcome that difficulty. A feasibility study was undertaken alongside the 2003 White Paper, which indicated that a computerised link between existing court and HMRC systems was possible and that set up costs were, at that time, likely to be in the region of £500,000.¹⁰⁸ Prior to the 2007 Act, confidentiality legislation prevented HMRC from providing information about a debtor's employer to courts or creditors. To overcome this problem, the 2007 Act enacted provisions for "tracking" the debtor's employment.
- 3.96 Section 92 of the 2007 Act, when brought into force, would allow the court, where an attachment of earnings order has lapsed due to the debtor changing employment, to make a request to the Commissioners of HMRC for disclosure of whether the debtor has a current employer and, if so, the name and address of that employer. This would enable the lapsed order to be directed to the debtor's current employer.

¹⁰⁶ (2014) Law Com No 343.

¹⁰⁷ See the concerns raised in Money Advice Trust, *Ministry of Justice Solving Disputes in the County Courts Consultation Paper: Response by the Money Advice Trust* (June 2011) pp 21 to 23.

¹⁰⁸ The 2003 White Paper, p 80.

- 3.97 The 2003 White Paper suggested that the provision would only be used where a debtor had not voluntarily provided details of any new employment, or where the creditor was not able to supply that information. The 2003 White Paper stated that it was not intended that the information would be released to the creditor.¹⁰⁹ Provisions covering these points would be set out in the regulations, which have not yet been made.¹¹⁰
- 3.98 Section 92 of the 2007 Act also creates an offence of unauthorised use or disclosure of the tracking information obtained from HMRC. Use or disclosure will be authorised where it is permitted in accordance with a court order or rules of court, in accordance with the regulations. It will also be authorised where the information has previously been lawfully disclosed to the public, and where the HMRC Commissioners have given their consent and it is for a purpose connected with the enforcement of the lapsed order.
- 3.99 We understand that the Government is considering the costs and benefits of implementing the tracking provisions for attachment of earnings.

AUTOMATIC REDIRECTION

- 3.100 Where a debtor changes employer an attachment of earnings order will lapse but the court has the power to redirect the order to a new employer.¹¹¹ In Australia the federal family law rules provide that a notice naming a new employer *must* be issued by the court where the payer's employment with a former employer has ceased. This must be done unless written objection is received from the payer or payee within 21 days after the court is notified that the payer is no longer employed by that employer.¹¹²
- 3.101 If the tracking provisions discussed above were brought into force for attachment of earnings orders made in the Family Court then the court would have the information needed to redirect any attachment of earnings order, lapsed because the debtor has left his or her former employment, to any new employer. Tracking should therefore assist the court to fulfil its obligation to redirect attachment of earnings orders automatically. However, even with tracking, practical problems would have to be surmounted; in particular it would be important to ensure that a new employer was alerted immediately to its liability.

¹⁰⁹ This would raise issues very similar to those discussed in Chapter 2 on the subject of information orders and requests; see paras 2.41 to 2.44.

¹¹⁰ The 2003 White Paper, p 80.

¹¹¹ Attachment of Earnings Act 1971, s 9(4) and County Court Rules, Order 27, r 13. The court already has the power to make consequential variations when redirecting an order to a new employer under County Court Rules Order 27, r 13(3).

¹¹² [Australian] Family Law Rules 2004, r 20.40(4).

A REGISTER OF ORDERS

- 3.102 The idea of a national register of attachment of earnings orders was raised by the Government during the earlier stages of the 1998 Enforcement Review.¹¹³ While there are registers of judgments, and local registers of attachment of earnings orders, the latter do not exist on a national basis.¹¹⁴
- 3.103 How useful would a national register be in the context of family proceedings? Usually, debtor spouses would be keen to disclose the existence of debts in their financial disclosure, to ensure that any orders made take full account of their financial position. Where enforcement is sought relatively soon after a final order the creditor might therefore be aware of other attachment of earnings orders. That would probably not be the case five years later, for example. The creditor, and the court, if they knew, from a national register, whether the debtor was already subject to an attachment of earnings order, would benefit from being better informed about the debtor's financial situation. The debtor could also benefit from not being made subject to a further order where this would clearly be ineffective or oppressive.
- 3.104 We mention one final possibility only to dismiss it. The scope of attachment of earnings orders could be expanded to include categories of earnings that are currently excluded by the statute.¹¹⁵ However, that would mean making it possible for attachment of earnings orders to be made against sources of income which a person receives, usually from the state, to meet their minimum needs, such as a disability pension or social security benefits. We take the view that it would not be fair or sensible to include this income within the scope of that which can be attached.
- 3.105 **Do consultees think that the provisions for tracking, contained in the**

¹¹³ Lord Chancellor's Department, *Enforcement Review Consultation Paper 3: Attachment of Earnings Orders, Charging Orders and Garnishee Orders* (October 1999) paras 1.41 to 1.43, available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/enfrevfr.htm> (last visited 13 February 2015).

¹¹⁴ There is a Register of Judgments, Orders and Fines, maintained by Registry Trust Limited (contracted to the Ministry of Justice) which is searchable online for a small fee. It does not, however, indicate whether an attachment of earnings order is in place but simply, in the case of a county court judgment, provides the name and address of the defendant, the court and the case number, and the date and amount of the judgment. It does not record family financial orders – see Register of Judgments, Orders and Fines Regulations 2005, SI 2005 No 3595, art 9. Under County Court Rules, Order 27, r 2, a court must keep an index of debtors within the district of the court in respect of whom an attachment of earnings order is in force. This is searchable by using Form N336, which must be sent to the court manager of the appropriate court. No fee is payable. Any attachment of earnings order in respect of a maintenance order will be included in the results of the search but, in this context, unlike for an attachment order in respect of a judgment debt, the form does not provide the normal deduction rate.

¹¹⁵ Attachment of Earnings Act 1971, s 24.

Tribunals, Courts and Enforcement Act 2007, should be brought into force for family financial orders?

- 3.106 **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?**
- 3.107 **Do consultees think that it is practicable for attachment of earnings orders to be redirected automatically when the debtor changes employment?**
- 3.108 **We would welcome consultees' views on the idea of a national register of attachment of earnings orders.**

Appointment of a receiver

- 3.109 This is a discretionary remedy whereby an individual is appointed to collect rent, profits or other monies arising from an asset belonging to the debtor and pay this to the creditor to satisfy the debt.¹¹⁶ It is rarely used; not only must the court have regard to why another method of enforcement cannot be used, the complexities would usually require an insolvency practitioner or other professional to be appointed as the receiver, leading to significant costs.
- 3.110 The effect of the appointment of a receiver is that the debtor will no longer be permitted to deal with the property or receive the income from it; the receiver takes the debtor's place in dealing with the asset. Receivers should normally be ordered to provide security to cover their acts or omissions when undertaking the role.¹¹⁷ They can charge for their work if the court orders this and the court may also order receivers to prepare accounts.¹¹⁸
- 3.111 The method has been used recently as a last resort to enforce a debt in family proceedings, in a case where the court strongly criticised the husband's behaviour as both extreme and vexatious.¹¹⁹ If the creditor could be appointed as a receiver this would help to reduce the cost of using this method of enforcement. However, while this was done in a nineteenth century case,¹²⁰ we struggle to see how that could be done in a family context.

¹¹⁶ Procedural rules are contained in Part 69 of the Civil Procedure Rules and Practice Direction 69.

¹¹⁷ Civil Procedure Rules, Practice Direction 69, paras 6.2.

¹¹⁸ Civil Procedure Rules, rr 69.7 and 69.8.

¹¹⁹ *Maughan v Wilmot* [2014] EWHC 1288 (Fam), [2014] Fam Law 1108.

¹²⁰ *Fuggle v Bland* [1883] 11 QBD 711.

Arrears more than 12 months old

- 3.112 In family proceedings, arrears due under any financial provision order¹²¹ which are more than 12 months old at the time enforcement proceedings are started may only be enforced with the leave of the court.¹²² The starting point is that such arrears will only be enforced where there are special circumstances and where there is evidence that the debtor has the means to pay.¹²³
- 3.113 The point of the rule is to enable the parties to move on, to put an end to stale claims and to prevent the debtor from accruing unaffordable liabilities. But it can be problematic for those former spouses in receipt of periodical payments who must balance their own financial need against the often disproportionate expense of litigating over a small amount of arrears. It may also be a disincentive to compliance, because the debtor knows that the slate will probably be wiped clean after 12 months.
- 3.114 The rule could be reversed so that the starting point would be that arrears more than 12 months old would be enforceable, with the debtor having to argue why this should not be the case. A statutory checklist setting out the factors that the court should consider on such an application could be provided; this might include whether the debtor is obviously culpable in his or her failure to pay, and whether the creditor has unreasonably delayed in seeking to enforce the older arrears. Or the period beyond which arrears could not be enforced without the leave of the court could be extended to, say, two or five years. If a longer period were chosen would it then be fair for the statute to provide that any older arrears should *never* be enforceable? This would at least provide certainty for both parties.
- 3.115 **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)?**

Power to remit arrears

- 3.116 Having looked at which arrears should be enforceable we turn to the court's power to "remit" (cancel) arrears. The court can remit arrears when the debtor

¹²¹ The section refers to orders for "financial provision", so, as well as maintenance pending suit, interim maintenance and periodical payments, the enforcement of lump sum orders is also included. Typically, however, the arrears will be of periodical payments.

¹²² Matrimonial Causes Act 1973, s 32(1).

¹²³ *B v C (maintenance: enforcement of arrears)* [1995] 1 FLR 467.

has made an application for variation of a financial order under section 31 of the Matrimonial Causes Act 1973. But it is unclear whether the court can exercise this power on a “free-standing” basis, that is, whether the debtor can apply only to remit arrears without also seeking a variation.¹²⁴ A debtor may wish to avoid enforcement action but not seek a variation, for example, where he or she has been out of work for a period and unable to pay all the maintenance due, but is now able to pay the ongoing maintenance although not the arrears. To apply for a variation would be artificial and potentially slow. We think that providing the court with a specific power to remit arrears, on the debtor’s application, would remove any confusion in the current law and be a useful addition to the court’s powers.

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

Do consultees agree?

THE RECOVERY OF COSTS IN ENFORCEMENT PROCEEDINGS

- 3.118 We would be interested to hear about consultees’ experiences of the operation of the rules governing how parties’ legal costs and court fees are paid, in the context of enforcement proceedings.
- 3.119 Both the Family Procedure Rules and the Civil Procedure Rules deal with costs and there is a need to cross-refer between them to find the rules applicable to costs in family proceedings.¹²⁵ There is a presumption in financial remedy proceedings that the court will not make an order about costs.¹²⁶ This “no order” presumption means that the parties will each pay their own costs, subject to arguments about how each party has conducted the litigation.¹²⁷ Misconduct by a party may justify an order that he or she pay some or all of the other party’s costs. For costs purposes, proceedings for the enforcement of orders are not financial remedy proceedings¹²⁸ and so the no order presumption does not apply.

¹²⁴ Matrimonial Causes Act 1973, s 31(2A).

¹²⁵ The costs provisions of Parts 44, 46 and 47 and rule 45.8 of the Civil Procedure Rules apply to family proceedings except for certain specified rules. The application of the Civil Procedure Rules is also subject to the modifications set out in Practice Direction 28A of the Family Procedure Rules and “any other necessary modifications”.

¹²⁶ Family Procedure Rules, r 28.3(5).

¹²⁷ Family Procedure Rules, r 28.3(6).

¹²⁸ Family Procedure Rules, r 28.3(4)(b).

There is no presumption in relation to costs in enforcement proceedings.¹²⁹ The court still retains its general discretion to make any order about costs that it thinks just¹³⁰ and the party seeking the costs order must persuade the court that this is appropriate.

- 3.120 The rules for some enforcement methods specifically apply fixed costs, which are typically very modest: such fixed costs apply to applications for writs and warrants of control, attachment of earnings orders, charging orders, orders to obtain information and third party debt orders. These fixed costs are set out in the Civil Procedure Rules and have been incorporated into family proceedings. However, confusion could arise since the part of the Civil Procedure Rules setting out the power to award an amount other than fixed costs¹³¹ does not apply to family proceedings. This does not mean that the Family Court cannot order costs of a different amount, but it relies on its general discretion rather than an express power to do so. The creditor in family proceedings must persuade the court that it is just to make a costs order at all and, if so, that the order should be for a higher amount than the fixed costs.
- 3.121 When costs are assessed by the court to decide what should be paid this may be done on the “standard” or the “indemnity” basis. On the former basis any doubts as to whether the costs were reasonable will be decided in favour of the paying party, if the latter then any doubts will be decided in favour of the receiving party. Costs assessed as payable on the standard basis must also have been proportionately as well as reasonably incurred.¹³² Rules for some enforcement methods permit a party’s costs to be allowed without detailed assessment.¹³³ We understand that, in practice, costs are likely to be awarded without detailed assessment provided the debtor has assets available to pay them. However, except in the case of charging orders, there are often no available assets.
- 3.122 The court fee for the application for the majority of enforcement methods is currently set at £100,¹³⁴ although there will be additional fees to pay in some cases. For example, proceeding to an application for an order for sale to enforce

¹²⁹ The general rule in civil proceedings is that the court will award costs to the party that has successfully made or defended an application; see rule 44.2(2) of the Civil Procedure Rules. However, in family proceedings that are not financial remedy proceedings rule 28.2 of the Family Procedure Rules applies. This specifically disapplies the general rule in civil proceedings. In enforcement proceedings there is therefore no presumption in relation to costs.

¹³⁰ Family Procedure Rules, r 28.1.

¹³¹ Civil Procedure Rules, r 45.1(1).

¹³² Civil Procedure Rules, r 44.3.

¹³³ For example, for an attachment of earnings order (County Court Rules, Order 27, r 9) and judgment summons (County Court Rules, Order 28, r 10).

¹³⁴ Family Proceedings Fees Order 2008, SI 2008 No 1054, sch 1.

a charging order costs a further £245 and, when appointment of a receiver is used, the professional receiver will also charge (probably substantial) fees. The creditor will need to assess the risk before incurring further costs that may not be recovered. Additional costs may also be problematic where the court is responsible for enforcement. The court may not be prepared to incur any disbursements, such as Land Registry fees,¹³⁵ without payment in advance. In the case of third party debt orders and orders for the attachment of earnings the rules specify deductions that financial institutions and employers respectively are entitled to make when administering such orders.¹³⁶

- 3.123 Court users can obtain a full or partial exemption from the payment of court fees under a test which considers an applicant's disposable capital and gross monthly income.¹³⁷
- 3.124 **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?**

¹³⁵ For example, in the context of an application for a charging order, a Land Registry fee may need to be incurred to obtain official copies of the title for the property, and to register the charging order, once made, against that title.

¹³⁶ See para 3.84 above.

¹³⁷ Family Proceedings Fees Order, SI 2008 No 1054, sch 2.

CHAPTER 4

RESPONSES TO NON-COMPLIANCE

INTRODUCTION

- 4.1 In Chapter 2 we discussed the typical starting point for enforcement proceedings: the search for information. In Chapter 3 we explored methods of enforcement aimed at the direct recovery of money or property. In this Chapter we move on to consider methods of enforcement that are generally approached, if not as last resorts, then certainly as options when more direct methods have failed. Ideally, enforcement produces compliance. But where, for example, a warrant of control or an attachment of earnings order has proved futile, the creditor may turn to consider whether pressure can be brought to bear upon the debtor in other ways.
- 4.2 In this Chapter we first discuss the judgment summons. This is the procedure whereby a judgment debtor is invited to attend court and, on proof to the criminal standard (that is, beyond reasonable doubt) that he or she has failed to pay, can pay and is refusing to do so, can be committed to prison. Usually the order for committal is suspended so as to provide an opportunity for compliance; the imminent threat of imprisonment is perhaps the most directly coercive order that the court has at its disposal. Because of the sanction of imprisonment, the judgment summons engages human rights considerations for the protection of the debtor. We consider whether it is possible to make the judgment summons procedure more effective without compromising that protection.
- 4.3 The second part of this Chapter is about other methods that can be described broadly as coercive. We look at the analogy of the child support legislation and ask whether there would be any virtue in introducing, in the context of family financial orders, sanctions such as disqualification from driving. We take the view that such measures are appropriate only insofar as they are likely to prompt the debtor to pay; it is not the role of the civil law to punish wrongdoing, save where this takes the form of contempt of court. We discuss the human rights issues that would need to be considered if curfew and disqualification orders were introduced.
- 4.4 In the final section of this Chapter we discuss the use of bankruptcy in the context of enforcement. We do so more by way of explanation than with a view to reform; the bankruptcy legislation is of wide application far beyond the context of family financial orders and it is difficult to see that family-specific reform is practicable; however, we do propose that maintenance arrears should be provable in bankruptcy.

THE JUDGMENT SUMMONS

- 4.5 Failure to comply with a court order is a contempt of court, and like any other contempt (for example, disruptive behaviour in court) can be punished by committal to prison; the procedure is set out in Part 37 of the Family Procedure Rules.¹ The hearing will usually take place in public and there are a number of safeguards in place to ensure the procedure is compliant with the Human Rights Act 1998.² The court can make a committal order for up to two years,³ but has the power to suspend this to encourage compliance.⁴ Lay justices in the Family Court may only commit a person to prison for breach of an order or undertaking for up to two months.⁵ We understand that, in practice, committal to prison for contempt of court in family proceedings is rare.
- 4.6 Committal is even rarer in the enforcement of family financial orders, as the non-compliance will commonly be the failure to pay a sum of money. It was decided in the Victorian era to limit the availability of imprisonment as a sanction for the non-payment of debt. Therefore, the ability to imprison those who fail to pay a sum due under an order of the court was restricted; committal is now only available for failure to pay taxes or similar liabilities and debts arising under maintenance orders, which is given a wide meaning and covers all family financial orders.⁶ Although the failure to make payment as ordered by the court is a form of contempt, there is a specific procedure, the judgment summons, which must be used on an application for committal in these circumstances.⁷
- 4.7 A debtor can be committed to prison where it is proved that:

¹ There is no specific application form for a committal application and this is therefore a general application within family proceedings under Part 18 of the Family Procedure Rules.

² Family Procedure Rules, Practice Direction 37A.

³ Contempt of Court Act 1981, s 14(1).

⁴ Family Procedure Rules, r 37.28. Although there is no principle that courts should make suspended rather than immediate committal orders, this is the established practice; see *Cherwayko v Cherwayko* [2014] EWHC 4252 (Fam), [2014] All ER (D) 33 (Jan) at [11] (Mostyn J).

⁵ Family Court (Contempt of Court) (Powers) Regulations 2014, SI 2014 No 833, reg 4.

⁶ Administration of Justice Act 1970, s 11. "Maintenance order" includes orders for both periodical and other payments (therefore lump sum orders would be included) under the Matrimonial Causes Act 1973 and Schedule 1 to the Children Act 1989.

⁷ Previously, there was also a power for magistrates to commit debtors to prison for the non-payment of arrears under a maintenance order, under section 93 of the Magistrates' Court Act 1980 (repealed by the Crime and Courts Act 2013, sch 10, para 49(a)).

... the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.⁸

The procedural requirements for the judgment summons are set out in rules 33.9 to 33.17 of the Family Procedure Rules.

- 4.8 Where a debtor fails to pay the sum due under a family financial order the creditor can only apply to have the debtor imprisoned for up to six weeks.⁹ The application is made on Form N67 to the Family Court centre that the creditor considers most convenient, along with a statement setting out the evidence on which the creditor intends to rely.
- 4.9 Upon receipt of the application, the court sets a date for a hearing. The judgment summons and written evidence relied upon by the creditor must be served personally on the debtor not less than 14 days before that hearing. The creditor must offer to pay the travelling expenses of the debtor to attend the hearing.¹⁰ The creditor can ask the court to serve the documents by post, but in that case the court can only commit the debtor to prison if he or she attends the hearing or fails to appear at both the original and an adjourned hearing.¹¹
- 4.10 Although all levels of judge can hear the application, the matter will usually be allocated to the same level of judge who made the order requiring payment because only a judge of that level or higher is able to make a committal order at the hearing.¹² The hearing will usually be held in public.¹³ If the debtor does not attend, the court may adjourn the hearing to a later date. If the debtor also fails to attend the second hearing the court can make a committal order on that basis.¹⁴

Possible outcomes

- 4.11 In the light of the evidence presented at the hearing, if the court is satisfied that the debtor has had or has the means to pay and has refused or neglected, or refuses and neglects, to pay, it can:
- (1) make an order committing the debtor to prison;

⁸ Debtors Act 1869, s 5.

⁹ Debtors Act 1869, s 5.

¹⁰ Family Procedure Rules, r 33.11.

¹¹ County Court Rules, Order 28, r 2.

¹² Family Court (Composition and Distribution of Business) Rules 2014, SI 2014 No 840, r 17.

¹³ Family Procedure Rules, rr 33.5 and r 37.27(5).

¹⁴ Family Procedure Rules, r 33.14. The sentence is limited to 14 days, see County Courts Act 1984, s 110(2).

- (2) make a suspended committal order, which provides a final opportunity for the debtor to pay before going to prison.¹⁵ The order terminates once the debtor pays the sum due;
 - (3) order a new date for payment or that payment be made by instalments. If the original debt relates to periodical payments, the court can only do this if an application to vary the payments would have been likely to succeed;¹⁶
 - (4) make an attachment of earnings order;¹⁷ or
 - (5) make a means of payment order;¹⁸ this means that a debtor is required to pay in a particular way, for example by standing order.
- 4.12 An immediate order for committal is rare; a suspended order is more usual, giving the debtor an opportunity to comply,¹⁹ and we understand that actual committal is rare. Imprisonment does not, of course, wipe out the debt (and, indeed, may prejudice the debtor's ability to pay it).

Human rights implications

- 4.13 In 2001, the Court of Appeal in *Mubarak v Mubarak*²⁰ decided that the judgment summons procedure was akin to criminal proceedings, because of the risk of imprisonment for the debtor. The procedure in place at that time was found to infringe article 6 of the European Convention on Human Rights and therefore the Human Rights Act 1998 because it combined both an examination of the debtor's means and a decision on whether a sanction should be imposed on the debtor. The debtor could be summoned to give evidence on oath about his means and was then denied the protection against self-incrimination that is afforded to those facing criminal sanctions.
- 4.14 The Court of Appeal held that the creditor must satisfy the court that the test at paragraph 4.7 above is met to the criminal standard of proof (that is beyond reasonable doubt)²¹ and that the debtor is entitled to know the case he or she must answer in full²² and in sufficient time to prepare a defence. The debtor

¹⁵ County Court Rules, Order 28, r 7.

¹⁶ Family Procedure Rules, r 33.16(1).

¹⁷ Attachment of Earnings Act 1971, s 3(4).

¹⁸ Maintenance Enforcement Act 1991, s 1(4)(a).

¹⁹ *Bhura v Bhura* [2012] EWHC 3633 (Fam), [2013] 2 FLR 44 at [50].

²⁰ [2001] 1 FLR 698.

²¹ *Mubarak v Mubarak* [2001] 1 FLR 698 at [55].

²² *Mubarak v Mubarak* [2001] 1 FLR 698 at [46] and [47].

cannot be required to give evidence or to incriminate him or herself.²³

- 4.15 Lord Justice Thorpe expressed the view that in the light of this the judgment summons would be rarely used, as it would no longer offer “sufficient value for money”.²⁴ Lord Justice Latham said that the judgment summons procedure was unlikely to have ever been intended for substantial cases like *Mubarak*.²⁵
- 4.16 Following *Mubarak*, there were a number of developments to ensure that the judgment summons procedure protected the debtor’s human rights. The Civil Procedure (Modification of Enactments) Order 2002 removed the possibility of proof of a debtor’s means being obtained by summoning him or her for questioning under oath.²⁶ In addition, the Practice Direction: (Family Proceedings: Committal Applications)²⁷ made it clear that the practice direction on committal applications in civil proceedings, which provided certain procedural safeguards, also applied in family cases. Detailed provisions in the Family Procedure Rules on both judgment summonses and committals provide further clarification.²⁸ Practitioners have taken the view that these changes meant that it would be very difficult for the creditor to meet the required standard of proof to obtain the debtor’s committal, removing much of the attraction of the procedure as a method of enforcement.²⁹
- 4.17 Insofar as the safeguards are necessary to make the judgment summons procedure human rights compliant, it is not possible to relax them to make it easier to obtain committal using judgment summons.
- 4.18 In any event, the procedure may experience a limited revival following the case of *Bhura v Bhura*³⁰ where, at paragraph 13 of the judgment, Mr Justice Mostyn set out principles that would enable effective use to be made of the judgment summons while protecting the debtor’s human rights.
- 4.19 Mr Justice Mostyn stated that the creditor must provide sufficient evidence to establish a case to answer that the debtor has neglected or refused to pay despite being in a position to do so at some point since the order was made. He

²³ *Mubarak v Mubarak* [2001] 1 FLR 698 at [57].

²⁴ *Mubarak v Mubarak* [2001] 1 FLR 698 at [41].

²⁵ *Mubarak v Mubarak* [2001] 1 FLR 698 at [66].

²⁶ SI 2002 No 439, art 3.

²⁷ [2001] 2 All ER 704.

²⁸ This also consolidates provisions that were previously criticised for being scattered over several sources; see *Constantinides v Constantinides* [2013] EWHC 3688 (Fam), [2014] 1 WLR 1934 at [37].

²⁹ G Howell and J Montgomery (eds), *Butterworths Family Law Service* (Issue 192, December 2014) Vol 4(I), para 3255.

³⁰ [2012] EWHC 3633 (Fam), [2013] 2 FLR 44.

went on to say that proof of an order and non-payment is likely to give rise to an inference that there is a case to answer. If the creditor is unable to show this the debtor cannot be committed to prison. If the creditor succeeds in showing there is a case to answer then the evidential burden shifts to the debtor to answer it. Mr Justice Mostyn went on to say that if the debtor fails to do so the creditor will have proved beyond a reasonable doubt the debtor's refusal or neglect to pay therefore allowing the court, should it choose to exercise its discretion in this way, to commit the debtor to prison.³¹ Clearly, general considerations of fairness, such as whether the debtor has had sufficient time to prepare a defence and an opportunity to seek legal advice would also be relevant.

- 4.20 Recent case law has demonstrated the continued utility of the judgment summons procedure in appropriate cases.³² However, we have been told by practitioners and the judiciary that there continues to be some scepticism that the procedure is an effective method of enforcement. We consider a minor reform to improve the procedure below but it may be the case that insufficient awareness of the *Bhura* principles accounts for reluctance to use the judgment summons procedure even in cases where this would be a suitable method of enforcement.
- 4.21 There is one small point in the judgment summons procedure which may benefit from clarification; the requirement for the creditor (applicant) to offer the debtor payment of his or her travel expenses to attend court, at the time he or she is served with the summons.³³ This seems to place an unnecessary procedural burden on the creditor and we do not think that the Form N67 clearly alerts the creditor applicant to this requirement. We take the view that Form N67 could be made more explicit on this point.
- 4.22 It would be possible to increase the length of time for which a debtor could be committed to prison for non-payment of maintenance, following the use of the judgment summons procedure. Currently it is for a maximum of six weeks. Generally, the court has the power to commit a party to prison for contempt for up to two years. However, given the general prohibition against imprisonment for debt (except in strictly defined circumstances), we think that longer periods of committal for non-payment of maintenance would be a retrograde step.
- 4.23 **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.**

³¹ *Bhura v Bhura* [2012] EWHC 3633 (Fam), [2013] 2 FLR 44 at [13 (vi)].

³² *Prest v Prest* [2014] EWHC 3430 (Fam), 164 NLJ 7630.

³³ See para 4.9 above.

OTHER COERCIVE METHODS OF ENFORCEMENT

4.24 The methods that we discuss below have been introduced in a family context in other jurisdictions, or in this jurisdiction to enforce the calculations made by what is now the Child Maintenance Service.³⁴ They have not yet been used to enforce financial orders made in family proceedings. The methods we discuss are:

- (1) Orders for disqualification (from travel outside the United Kingdom and driving).
- (2) Curfew orders.
- (3) Other coercive methods.

4.25 The orders that we discuss under this head are distinguished by the fact that they may be perceived to be purely punitive, by making an activity (for example travel or driving) impossible until payment is made. In looking at the possibilities here it is important to bear in mind both ethical and practical considerations. There are ethical issues because a debt due in a family context is an important social responsibility and society should send a clear message about the importance of payment. Yet at the same time it is vital to ensure that those who truly cannot pay are not treated unfairly.³⁵ And there are practical considerations because it is likely to be pointless to impose a penalty that in effect prevents the debtor from paying, for example by taking away the debtor's driving licence if this is required for his or her employment. However, if it is clear that the debtor can pay and that other methods of enforcement will not work, or have already failed, then the creditor may feel that he or she is left with no other option. Accordingly we think there is merit in the introduction of the possibility of an application available to the creditor to obtain a disqualification or curfew order, with the judge to decide on the most appropriate option.

Coercive methods and human rights

4.26 Article 6 of the European Convention of Human Rights ("the Convention") provides for the right to a fair trial. Article 6 draws a distinction between civil and criminal proceedings and requires additional safeguards to be in place where the proceedings are criminal. It is not clear whether disqualification and curfew orders

³⁴ Carrying out the functions formerly undertaken by the Child Maintenance and Enforcement Commission and, before that, the Child Support Agency.

³⁵ We are not attracted, therefore, to naming and shaming debtors, as is done for example in Ontario and Nigeria. See http://www.mcsc.gov.on.ca/en/goodparentspay/gpp_index.aspx (last visited 13 February 2015) in relation to Ontario. See P Beaumont, B Hess, L Walker and S Spancken (eds), *The Recovery of Maintenance in the EU and Worldwide* (2014) p 257, in relation to Nigeria.

would amount to criminal sanctions for the purposes of the Convention and therefore attract the safeguards provided by article 6. If such orders amounted to criminal sanctions it would be necessary to apply the criminal standard of proof. Although this is not expressly required by the Convention, which allows for national states to make their own rules of evidence, our national law generally requires proof to that standard in criminal proceedings.³⁶ Whether or not these orders would amount to criminal sanctions will depend, to some extent, on the duration and terms of any such order that could be imposed.³⁷

4.27 The European Court of Human Rights has held repeatedly that it is not simply a question for national law to determine whether a particular “charge” is criminal or not;³⁸ there is an autonomous meaning of a criminal charge for the purposes of the Convention. To determine whether any particular proceedings amount to a criminal charge, the court considers three criteria:³⁹

- (1) the classification under national law;
- (2) the nature of the offence; and
- (3) the nature and severity of the penalty.

4.28 A finding that the proceedings are of a criminal nature under any of the three criteria is sufficient to make it criminal for the purposes of the Convention.

4.29 Breach of a family financial order is classified as a civil not criminal wrong under our national law. That is the starting point, but either the “nature of the offence” or the “nature and severity of the penalty” may alter that classification under the Convention. We think it likely that the nature of the offence would not be considered criminal: it is not a liability that applies by way of general application

³⁶ *R v Briggs-Price* [2009] UKHL 19, [2009] 1 AC 1026: article 6(2) does not spell out the standard of proof that has to be applied in discharging the burden of proving that a defendant is guilty of a criminal offence. It does, however, provide that he or she has to be proved guilty “according to law”. This requirement will not be satisfied unless the defendant is proved to be guilty in accordance with the domestic law of the state concerned. English law draws a clear distinction between the criminal and the civil standard of proof. The criminal standard requires proof beyond reasonable doubt.

³⁷ It was accepted by the Child Maintenance and Enforcement Commission in *Karoonian v CMEC* [2012] EWCA Civ 1379, [2013] 1 FLR 1121 that the standard of proof required for an order under s 39A of the Child Support Act 1991 (which deals with non-payment of child maintenance) is the criminal standard of proof; if that is established the court may make an order either committing the debtor to prison or disqualifying the debtor from driving.

³⁸ Articles 6(2) and (3) which provide the additional safeguards apply where a person is “charged with a criminal offence”.

³⁹ *Engel v Netherlands* (1976) 1 EHRR 647 (App No 5100/71).

to all citizens, and the proceedings are not brought by a public authority.⁴⁰

- 4.30 It is the nature and severity of the penalty where a disqualification or curfew order has the potential to tip the proceedings into the criminal sphere, depending on the terms of the sanctions that judges have at their disposal. The sanction of deducting points from a driving licence⁴¹ has been held by the European Court of Human Rights to amount to a criminal sanction, but the court noted the ultimate consequence of deducting points was the invalidation of the defendant's driving licence, which does not form a part of the proposed disqualification order.⁴² A prohibition on foreign travel does not necessarily amount to a deprivation of liberty for the purposes of article 5 of the Convention⁴³ (the right to liberty and sanctity of person), and so is not necessarily a criminal sanction in the same way that imprisonment would be.⁴⁴ Similarly, curfew orders do not necessarily violate article 5.⁴⁵ Sanctions imposing certain restrictions on liberty (that did not amount to a deprivation of liberty) were not considered to make military disciplinary proceedings criminal proceedings in the decision in *Engel v Netherlands*.⁴⁶
- 4.31 The decisions of the European Court of Human Rights show a focus on the purpose of the sanction imposed: the more punitive the sanction, the more likely the court is to classify the proceedings as criminal. The intention of the disqualification and curfew orders are to produce compliance and not to punish; if the judge's powers are framed in that way we think they will not bring the proceedings into the criminal sphere. Our provisional proposals are made on the basis that we do not regard them as criminal proceedings for the purposes of the Convention.

⁴⁰ These were factors that were considered to lean towards a classification of the proceedings as criminal in *Benham v The United Kingdom* (1996) 22 EHRR 293 (App No 19380/92), where the proceedings were brought for non-payment of a community charge.

⁴¹ The French system deducts points whereas in England and Wales points are added in these circumstances.

⁴² *Malige v France* (1998) 28 EHRR 578 (App No 27812/95). The court had already determined that the offence was of a criminal nature and so the nature and severity of the penalty was not determinative.

⁴³ *Young v Young* [2012] EWHC 138 (Fam); [2012] Fam 198.

⁴⁴ *Engel v Netherlands* (1976) 1 EHRR 647 (App No 5100/71) para 82: "In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so".

⁴⁵ See para 4.57 below.

⁴⁶ 1 EHRR 647 (App No 5100/71).

Orders for disqualification

- 4.32 The only existing enforcement methods that might be considered under this head are the writ *ne exeat regno*⁴⁷ and passport seizure orders, which prevent the debtor from leaving the jurisdiction.⁴⁸ We explain these, consider potential reform and then discuss the possible introduction of a free-standing power. We then look at disqualification from driving.

Disqualification from travel outside the United Kingdom

- 4.33 The current law provides two methods of preventing the debtor from leaving the jurisdiction. Neither are free-standing methods of enforcement as they can only be applied for within existing proceedings, for example in an application for financial orders. The ancient writ *ne exeat regno* is available where there is evidence that the debtor is about to leave the jurisdiction and that this would make it more difficult for the creditor to bring his or her claim. Once a writ *ne exeat regno* has been made the debtor is prevented from leaving the jurisdiction and can be arrested if attempting to do so.
- 4.34 The more modern version of this method, the passport seizure order, which is an injunction preventing the debtor leaving the jurisdiction and requiring his or her passport to be surrendered, is of wider application since the court has a general power to grant it where it appears just and convenient to do so.⁴⁹ So it can be granted after a final order; but it cannot be applied for in the absence of some other application,⁵⁰ and will not be granted for an indefinite period until the debt is paid.⁵¹ It is not generally used in the context of enforcement.
- 4.35 Both the writ *ne exeat regno* and passport seizure order are general applications for an ancillary remedy governed by Part 18 of the Family Procedure Rules. Prior to the creation of the Family Court, only the High Court was able to make these two orders and so it is expected that any applications for these remedies will now be dealt with by a High Court judge sitting in the Family Court, even if this is not specifically required by the rules.

⁴⁷ Latin for “a writ to prevent him leaving the kingdom”.

⁴⁸ A further possibility is an order for sequestration, which is so rarely used in family cases that we have not discussed it. See G Smith and T Bishop, *Enforcing Financial Orders in Family Proceedings* (2000) pp 181 to 189 in relation to sequestration.

⁴⁹ Senior Courts Act 1981, s 37(1).

⁵⁰ A writ *ne exeat regno* appears not to be available after final judgment, therefore not in enforcement proceedings, due to the wording of section 6 of the Debtors Act 1869, which refers to the order being available “... before final judgment”. In contrast, the case law appears to accept that the passport seizure injunction (pursuant to section 37(1) of the Senior Courts Act 1981) is available after judgment; see Mostyn J in *Young v Young* [2012] EWHC 138 (Fam), [2012] Fam 198 at [13].

⁵¹ *B v B (passport surrender: jurisdiction)* [1998] 1 WLR 329.

- 4.36 In addition to the writ *ne exeat regno* and passport seizure order the power to prevent travel outside the United Kingdom also exists under the child support legislation. Amendments to the Child Support Act 1991 that have been enacted but not brought into force allow the enforcement of a child maintenance liability by preventing the debtor from holding or obtaining a passport.⁵²
- 4.37 In New Zealand there exists a free-standing power to prevent travel by ordering a person to surrender tickets or travel documents, or not to leave the jurisdiction without the written permission of the court. If the court is satisfied that there is reasonable cause to believe that the debtor is about to leave New Zealand with the intention of avoiding an actual or potential maintenance obligation it can have the person arrested and brought before the court at which point it can exercise its powers to prevent travel.⁵³
- 4.38 The writ *ne exeat regno* was described by Mr Justice Mostyn in *Bhura* as an “anachronism” and “a charming historical relic”.⁵⁴ It seems an unnecessary duplication for both procedures to be available, and we think that the writ *ne exeat regno* is obsolete in the context of family financial orders. And as we have said, the passport seizure order is an ancillary power and not designed for use as an enforcement tool.
- 4.39 We suggest that it may be useful for there to be a new power to prevent a debtor from travelling outside the United Kingdom, designed for use as an enforcement tool. The intention would be for it to be used as a way to induce the recalcitrant debtor to pay. We say more below about the conditions on which such an order could be made.

Disqualification from driving

- 4.40 Child maintenance debtors can be disqualified from driving,⁵⁵ following the making of a liability order.⁵⁶ Under the provisions currently in force a liability order can only be made where, in addition to a payment being missed, a deduction

⁵² Disqualification from driving and passport confiscation were discussed when these new powers were introduced by the Child Maintenance and Other Payments Act 2008. It was decided that article 6 of the European Convention on Human Rights would be engaged but that the administrative decision-making power coupled with the possibility of appeal to a tribunal before the disqualification took effect made the powers compliant with that Convention.

⁵³ [New Zealand] Child Support Act 1991, s 199.

⁵⁴ *Bhura v Bhura* [2012] EWHC 3633 (Fam), [2013] 2 FLR 44 at [51].

⁵⁵ Child Support Act 1991, s 39A.

⁵⁶ The relevant provisions have been substituted or amended by the Child Maintenance and Other Payments Act 2008 although these amendments are, however, not yet in force. A liability order is an order that, once made, allows other orders for enforcement to be made, such as a charging order or third party debt order.

from earnings order⁵⁷ would be inappropriate or has been ineffective.⁵⁸ Amended provisions, not yet in force, enable the Secretary of State to make a liability order simply where a debtor has failed to pay.⁵⁹

- 4.41 Disqualification from driving is used in other jurisdictions. For example, in the United States all states are required by federal law to have procedures to withhold, suspend or restrict drivers' licences as a sanction for failure to pay child support.⁶⁰ Some states allow those who are employed to continue to hold a "work-restricted" or temporary licence that will allow them to use their car to travel to and from work.⁶¹ Driving licence disqualification is also available in Canada, where it is also used to enforce the payment of spousal support.⁶²

Other forms of disqualification

- 4.42 In the United States, it is also possible to disqualify individuals who fail to pay child support from holding professional or recreational licences. The former can include for example a licence to practise law while the latter might include a hunting or fishing licence.⁶³ Such disqualification orders would be a new departure if introduced in this jurisdiction, but we are not attracted to expanding disqualification orders in this way. Disqualification from professional licences would directly attack the debtor's ability to meet his or her obligations under a family financial order. It would be likely to involve disproportionately complicated and costly procedural liaison with professional and regulatory bodies, which those

⁵⁷ A deductions from earnings order is similar to the attachment of earnings order discussed in Chapter 3: see Child Support Act 1991, s 31.

⁵⁸ Child Support Act 1991, s 33.

⁵⁹ Child Support Act 1991, s 32M (not yet in force).

⁶⁰ C Solomon-Fears, *Child Support Enforcement and Driver's License Suspension Policies* (Congressional Research Service R41762, April 2011) p 2, available at http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R41762_gb.pdf (last visited 13 February 2015).

⁶¹ C Solomon-Fears, *Child Support Enforcement and Driver's License Suspension Policies* (Congressional Research Service R41762, April 2011) p 14, available at http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R41762_gb.pdf (last visited 13 February 2015).

⁶² See http://www.mcsc.gov.on.ca/en/mcsc/programs/familyResponsibility/Enforcement/drivers_licence_suspension.aspx (last visited 13 February 2015). Pilots' licences and maritime and navigational licences and certificates can also be suspended: see http://www.mcsc.gov.on.ca/en/mcsc/programs/familyResponsibility/Enforcement/federal_licence_suspension.aspx (last visited 13 February 2015).

⁶³ <http://www.ncsl.org/research/human-services/license-restrictions-for-failure-to-pay-child-support.aspx> (last visited 13 February 2015).

bodies are unlikely to welcome.⁶⁴ There may also be unwanted social costs from the use of such disqualification as a method of enforcement, for example by preventing doctors from practising. We are not convinced that disqualification from holding a recreational licence would have a sufficient coercive effect to justify the cost of introducing such a scheme.

Considerations common to orders for disqualification from travel or from driving

WHEN SHOULD DISQUALIFICATION BE AVAILABLE?

- 4.43 If disqualification orders were to be used for the enforcement of family financial orders should they be available as one of the armoury of enforcement orders without any preconditions? Or should conditions be placed on their use, analogous to the position for child maintenance, so that disqualification is a last resort or at least not the first port of call?
- 4.44 In the child maintenance legislation disqualification orders can only be made where there is a liability order.⁶⁵ Further conditions on the use of the disqualification power are imposed so that the Secretary of State only has the power to make the disqualification order where:
- (1) recovery of the amount by way of a charging order (even if only an interim charging order has been made), third party debt order or by taking control of goods has already been tried;
 - (2) the whole or part of the amount remains unpaid; and
 - (3) the Secretary of State is of the opinion that there has been wilful refusal or culpable neglect on the part of the debtor.⁶⁶
- 4.45 The Secretary of State must consider whether the person needs the driving licence or passport to earn a living. There is also a requirement, in the current rules, to consider a person's means,⁶⁷ omitted in the new rules. The ability to make a disqualification order is therefore quite tightly restricted in the existing legislation.
- 4.46 By contrast, in the United States the "trigger" for suspension of licences, in the

⁶⁴ We think that the same argument holds true of any sanction stopping short of professional disqualification, for example the power to report a debtor to his or her professional or regulatory organisation (the Family Responsibility Office in Ontario has this power, see <http://www.mcsc.gov.on.ca/en/mcsc/programs/familyResponsibility/Enforcement/professional.aspx> (last visited 13 February 2015)).

⁶⁵ See para 4.40 above.

⁶⁶ Child Support Act 1991, s 39B (not yet in force).

⁶⁷ Child Support Act 1991, s 39A.

case of failure to pay child support, is only that there must be non-compliance in payment, either for a specific period or a specific amount, or both, depending on the state concerned. It does not appear that states must have attempted other methods of enforcement before moving on to the suspension of driving licences.⁶⁸

- 4.47 We do not think that it is just or appropriate to use a disqualification order against a debtor whom the court has found cannot pay; the use of such an order in those circumstances would be purely punitive. The use of disqualification should be limited to those debtors who can but will not pay, where a coercive technique may be more likely to produce payment. We therefore take the view that the disqualification order should be available where the creditor proves that the debtor has the means to pay and has not done so. The civil standard of proof (that is, on the balance of probabilities), should apply to the application.
- 4.48 However, we think that to impose further rigid conditions on the use of disqualification orders, for example by limiting their use to cases where other methods have been tried and have failed, would place too great a restriction on the court's powers. It may well be clear from the start of the enforcement process that methods such as attachment of earnings or third party debt orders are unlikely to work. For example, a debtor may be able to manipulate his or her income or have sophisticated financial arrangements which would make more conventional enforcement methods difficult to use. It would be unnecessarily difficult and costly, in such a situation, for a creditor to have to proceed through a hierarchy of enforcement methods, before being permitted to apply for a disqualification order.
- 4.49 The disqualification order should therefore be available as a discretionary remedy to be applied if the court believes it to be in the interests of justice, taking account of all the circumstances of the case, including:
- (1) the degree of non-compliance;
 - (2) the other enforcement methods that are available to the creditor and the likely success of those methods;
 - (3) the effect of making the order on the debtor's ability to earn a living; and
 - (4) the effect of making the order on any dependants of the debtor.

⁶⁸ C Solomon-Fears, *Child Support Enforcement and Driver's License Suspension Policies* (Congressional Research Service R41762, April 2011) p 8, available at http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R41762_gb.pdf (last visited 13 February 2015).

If the court decides that an order should be made then the court will also take account of all the circumstances, including the particular circumstances set out above, in deciding which of the coercive orders to make.

- 4.50 It should, of course, be possible for the court to suspend a disqualification order in the first instance, to allow the debtor an opportunity to comply and in the hope that the threat of such an order is all that is required. Indeed, a suspended disqualification order might be made at the same time as immediately effective orders for other, more conventional, methods of enforcement, with the suspended order to be activated should the debtor breach the other enforcement order.⁶⁹

FOR HOW LONG SHOULD DISQUALIFICATION LAST?

- 4.51 Obviously, disqualification orders should come to an end when the debtor has paid in full what they owe.
- 4.52 In the absence of payment should there be a limit to how long disqualification should last for? In the child maintenance legislation a disqualification order can take effect in the first instance for up to 12 months,⁷⁰ and may be extended up to a total of two years on conviction for the offence of failing to surrender documents (that is, the driving licence or passport),⁷¹ or where the debtor appeals against the disqualification order.⁷² In the United States, however, suspension of the driving licence appears to be indefinite where payment is not made.⁷³
- 4.53 Depending on the type of disqualification, and its impact, different lengths of disqualification may be appropriate. Disqualification from driving may be far more practically restrictive of a person's life and work, for the vast majority of people, than a disqualification from travelling abroad. But the denial of a passport could be viewed as a more fundamental infringement of personal liberty than having to manage without a car. It infringes the EU right of freedom of movement as Mr Justice Mostyn noted in *Young v Young*. However, in that case, he came to the conclusion that impounding a passport for a further nine months (until the time of the trial), where it had already been impounded for over three years, would be a

⁶⁹ See also the discussion of the use of the court's powers at the time of enforcement in Chapter 5.

⁷⁰ Child Support Act 1991, s 39C (not yet in force). Currently, disqualification from driving can be ordered for up to two years under s 40B.

⁷¹ Child Support Act 1991, s 39CA (not yet in force).

⁷² Child Support Act 1991, s 39CB (not yet in force).

⁷³ C Solomon-Fears, *Child Support Enforcement and Driver's License Suspension Policies* (Congressional Research Service R41762, April 2011) p 14, available at http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/documents/R41762_gb.pdf (last visited 13 February 2015).

proportionate restraint on freedom of movement.⁷⁴

- 4.54 The effect of different forms of disqualification obviously depends on the individual debtor's circumstances. For example, a debtor who lives in central London may be no more than inconvenienced by disqualification from driving. On the other hand, for a debtor living in rural Wales such a disqualification may be very serious, causing social isolation and potentially removing the ability to work. The removal of a passport may be devastating for the debtor whose children live abroad.
- 4.55 We take the provisional view that for a disqualification order to be effective the disqualification must be for a significant period but, given the potentially serious effects, indefinite disqualification is not justified. Disqualification for a fixed period is still likely to produce the coercive effect desired and is more proportionate. We suggest that an order for up to 12 months would be appropriate. The consequences of a partial payment of the debt would also need to be worked out; in the child maintenance legislation part payment allows the debtor to apply to reduce the period of the disqualification order, or to revoke it.⁷⁵

Curfew orders

- 4.56 The use of a curfew order to enforce child maintenance calculations is provided for in legislation that has been enacted but which is not yet in force; the conditions for making the order are the same as those for a disqualification order,⁷⁶ and the court must enquire into the debtor's means. The effect of the order is to require a person to remain at a place specified in the order, for the periods specified in the order of between two and 12 hours in any one day.⁷⁷ A curfew order can take effect for up to six months.⁷⁸ Any conflict with the debtor's religious beliefs or interference with work or education should be avoided so far as possible.⁷⁹ The effect of payment by the debtor is also the same as that for the existing disqualification orders in the child maintenance legislation.⁸⁰ Breach of the curfew order can lead to the extension of the curfew by up to a further six months from the date of the new order, or committal of the debtor to prison.⁸¹

⁷⁴ [2012] EWHC 138 (Fam), [2012] Fam 198 at [26].

⁷⁵ Child Support Act 1991, s 39E (not yet in force).

⁷⁶ See para 4.44 above.

⁷⁷ Child Support Act 1991, ss 39H and 39I (not yet in force).

⁷⁸ Child Support Act 1991, s 39I (not yet in force).

⁷⁹ Child Support Act 1991, s 39I (not yet in force).

⁸⁰ Child Support Act 1991, s 39K (not yet in force) and see para 4.55 above as to the effect of part payment.

⁸¹ Child Support Act 1991, s 39N (not yet in force).

- 4.57 The maximum length of the curfew and other considerations that are relevant when imposing a curfew order appear to have been strongly influenced by the case law of the European Court of Human Rights.⁸² Curfew orders do not, in that case law, necessarily amount to a deprivation of liberty and so article 5 is not necessarily engaged; it depends on the “degree and intensity” of the conditions imposed.⁸³ The safeguards put in place in the legislation may explain the lack of any discussion of article 5 of the Convention in the correspondence between the Joint Committee on Human Rights and the Government about the Child Maintenance and Other Payments Act 2008 (which amended the child support legislation to introduce curfew orders).⁸⁴
- 4.58 A curfew order does not prevent the debtor from working and it may have a less negative effect on the debtor than an order disqualifying him or her from driving. Practical arrangements would have to involve electronic tagging and there would be staffing and administration costs.⁸⁵
- 4.59 We take the view that adequate safeguards could be built into any new provisions introducing curfew orders to enforce family financial orders. If curfew orders were to be introduced, we would suggest that they be available where the court is satisfied, on the civil standard of proof, that the debtor has the ability to pay and has not done so.
- 4.60 The court should be able to make a curfew order on a suspended basis. As in the child maintenance context we propose that the orders may impose a curfew for up to six months, to apply between two and 12 hours per day, and that any conflict with religious belief or interference with work and education should be avoided as far as possible.
- 4.61 **We provisionally propose that:**

- (1) an order disqualifying a debtor from driving should be introduced;**

⁸² For example it was held in *Trijonis v Lithuania* (App No 2333/02) that a 12 hour curfew was not a deprivation of liberty under article 5 of the European Convention on Human Rights.

⁸³ *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45, [2008] 1 AC 385.

⁸⁴ This is annexed to Joint Committee on Human Rights, *Third Report of Session 2007-2008: Legislative scrutiny: 1) Child Maintenance and Other Payments Bill 2) Other Bills* (3 January 2008), available at <http://dera.ioe.ac.uk/6838/1/28.pdf> (last visited 13 February 2015).

⁸⁵ The child maintenance legislation requires that a curfew order must provide for the debtor's compliance with its requirements to be monitored by a specified individual. It also states that the court can only make such an order where those arrangements for monitoring compliance are available in the area of the place specified in the order, and where it is satisfied that necessary provision can be made under those arrangements: Child Support Act 1991, s 39M (not yet in force).

- (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.

Do consultees agree?

Unpaid work requirements

- 4.62 Unpaid work requirements have been available since 2008 (when the provisions were brought into force), under the Children Act 1989, for the enforcement of what are now called child arrangement orders.⁸⁶ Requiring a debtor to complete unpaid work may be attractive where imprisonment would have detrimental effects on the debtor's family or impact his or her earning capacity. Unpaid work also benefits the wider community.
- 4.63 There are, however, difficulties with this method. It requires positive action by a debtor, which he or she may refuse to undertake. In addition to the need for there to be available placements in the local area, the debtor's mental and physical health, his or her existing commitments (including employment and childcare) and various other factors could prevent an unpaid work requirement being

⁸⁶ Children Act 1989, s 11J. Child arrangement orders replaced residence and contact orders and determine where a child should live and when a child spends time with each parent.

considered or ordered.⁸⁷ Also, if a debtor cannot pay, attempts by the debtor to find paid employment will be more beneficial to the creditor, but could be hampered by unpaid work requirements. We do not think that unpaid work requirements, given their cost and administrative burden, would be appropriate for the enforcement of family financial orders.

BANKRUPTCY

- 4.64 A debtor who cannot pay what he owes may be declared bankrupt, either in response to a petition brought by the creditor or on the debtor's own application. On the making of a bankruptcy order the bankrupt's assets will become the property of the Official Receiver⁸⁸ and then, if appointed, of a trustee in bankruptcy, who will be a qualified insolvency practitioner.⁸⁹ The trustee's function is to convert the bankrupt's property into cash and to distribute it to his or her creditors.⁹⁰
- 4.65 Secured and preferential creditors are paid first,⁹¹ and the creditor in respect of a family financial order will be neither.⁹² Once those creditors have been paid, other creditors whose debts are "provable" in bankruptcy can obtain a share or dividend of the bankrupt's property. Of debts arising from orders made in family proceedings, only obligations under orders to pay lump sums and orders to pay costs are provable,⁹³ so bankruptcy is not a suitable method of enforcement of arrears of periodical payments.⁹⁴ While the bankruptcy order is in force a creditor cannot use other methods of enforcement to require payment of a provable debt without the leave of the court.⁹⁵

⁸⁷ L Trinder, J Hunt, A Macleod, J Pearce and H Woodward, *Enforcing contact orders: problem solving or punishment?* (Nuffield Foundation, 2013), available at <http://www.nuffieldfoundation.org/sites/default/files/files/Enforcement%20report%20final%20Dec%202013.pdf> (last visited 13 February 2015).

⁸⁸ An officer of the Insolvency Service who manages at least the first stage of bankruptcy.

⁸⁹ Insolvency Act 1986, s 306.

⁹⁰ Insolvency Act 1986, s 305.

⁹¹ Preferential debts are set out at Schedule 6 of the Insolvency Act 1986 and include remuneration to employees and contributions to occupational pension schemes. Secured creditors are those who have a debt that has been secured, typically by taking a charge over property owned by the debtor.

⁹² Unless the creditor has the benefit of secured periodical payments; in that event the creditor would seek to realise the security without resorting to a bankruptcy petition.

⁹³ Insolvency Rules 1986, r 12.3. The draft Insolvency Rules 2015 do not change this, see r 14.2.

⁹⁴ Unless such arrears arise under a separation agreement or deed, in which case they are provable. This principle was established in *Victor v Victor* [1912] 1 KB 247 and *McQuiban v McQuiban* [1913] P 208.

⁹⁵ Insolvency Act 1986, s 285(3).

- 4.66 The usual result of a bankruptcy order is that, a year after the date of the order, the bankrupt will be discharged from bankruptcy and released from his or her debts. However, as an exception to the general rule, debts under an order in family proceedings will survive the bankruptcy and will not be extinguished unless the court orders otherwise, so that the debtor will continue to be liable to pay obligations owed to his or her former spouse.⁹⁶
- 4.67 Is it right that, of debts arising from orders made in family financial proceedings, only those for lump sums or costs are provable debts? It has been suggested to us that arrears of periodical payments should be provable in bankruptcy. This would have the advantage of allowing creditors at least to recover some of what is owed to them by way of periodical payments, in cases where, after paying the secured and preferential creditors, there are sufficient assets to make a distribution to the unsecured creditors.
- 4.68 **We ask consultees for their views as to whether arrears of periodical payments should be provable in bankruptcy.**

⁹⁶ Insolvency Act 1986, s 281(5). This will be the case even where a creditor has proved in the bankruptcy for debts arising under orders for lump sums or costs; the balance may still be claimed by the creditor after the debtor's discharge from bankruptcy.

CHAPTER 5

BEYOND LAW REFORM; OTHER WAYS OF IMPROVING ENFORCEMENT

INTRODUCTION

- 5.1 Reforming existing methods of enforcement and creating new powers will help to improve the effectiveness and fairness of such proceedings from the point of view of both creditors and debtors, but there may be other ways to facilitate enforcement. In this Chapter we discuss:
- (1) how the court could use its case management powers proactively and preventively;
 - (2) whether there could be greater use of alternative dispute resolution methods;¹
 - (3) how guidance for litigants in person and the public in respect of enforcement, and generally, could be improved;
 - (4) how training for practitioners, the judiciary and court staff might assist;
 - (5) the need for more comprehensive statistics to be collected by the court service, to inform legal and procedural reform; and
 - (6) whether there is a case for consolidation of the law on the enforcement of financial orders in family proceedings.

CASE MANAGEMENT

- 5.2 The court has a very wide range of case management powers in family proceedings.² The improved use of existing powers could make enforcement procedures more efficient and effective. In this section we discuss ways in which proactive measures could be taken with a view to facilitating enforcement, or rendering it unnecessary, at the time the original order is made; the allocation of enforcement proceedings in the Family Court; the use of the court's powers at the time of enforcement; and the drafting of orders.

Proactive measures at the time of the original order

- 5.3 At the time of the original order, potential enforcement issues may not be

¹ These are referred to as non-court dispute resolution methods in Part 3 of the Family Procedure Rules.

² Family Procedure Rules, r 4.

considered in detail. Measures that the court could take to prevent enforcement problems arising could include:

- (1) more frequent use of secured orders;³
- (2) making attachment of earnings orders automatically to recover periodical payments whenever possible;
- (3) making default orders for the sale of property and payment from the proceeds;
- (4) setting out detailed directions to achieve implementation;
- (5) making explicit provision for interest to accrue;
- (6) providing for the parties to fulfil their obligations simultaneously so that one is not left disadvantaged by later non-compliance by the other; and
- (7) making provision in the order for a district judge to execute documents if a party fails to do so (within a specified period following a request).

5.4 A proactive approach at the time of the original order would be particularly useful where a party has proved uncooperative during the financial proceedings and enforcement problems can be anticipated.

5.5 The paying party may object to such an approach being taken before any non-compliance has occurred. For example, where an attachment of earnings order is proposed at the time of the original order, the payer may think it unfair for his or her employer to know about a periodical payments order arising from a private family matter; in such a case, a suspended order might well be effective.⁴

5.6 Procedural changes, such as including a penal notice on all orders, may also assist; without a penal notice, an order cannot be enforced by committal, and so the inclusion of a penal notice facilitates enforcement as well as sending a message to the debtor. Even if parties have failed to include such provision, the court has the power to include such notices on its own initiative.⁵ The standard

³ For example, secured periodical payments or secured lump sums payable by instalments.

⁴ A suspended order is possible under the County Court Acts 1984, s 71(2) applied to the Family Court by the Matrimonial and Family Proceedings Act 1984, s 31E.

⁵ Family Procedure Rules, r 4.3(1). However, this is subject to any enactment preventing the court making an order on its own initiative.

financial remedy order produced by the Financial Remedies Working Group⁶ includes a penal notice as well as a comprehensive set of orders, which should assist those drafting financial orders to consider at an early stage the parties' future compliance with an order.

The allocation of enforcement proceedings in the Family Court

- 5.7 Allocation is covered in the Family Court (Composition and Distribution of Business) Rules 2014 ("the 2014 Rules"),⁷ made under section 31D of the Matrimonial and Family Proceedings Act 1984. The 2014 Rules set out how specified proceedings are to be allocated between the different levels of the judges in the Family Court, subject to the effective use of judicial resources, and particular rules for the allocation of emergency applications.⁸ Where an application is made in connection with concluded proceedings, for example in enforcement proceedings, the application will be allocated to the level of judge who last dealt with those proceedings.⁹ However, the 2014 Rules also set out which remedies may not be granted by judges of a certain level;¹⁰ accordingly an application will be allocated to the level of judge who is able to grant the remedy sought.¹¹
- 5.8 While district judges will be able to use almost the entire range of enforcement remedies, the power of lay justices (magistrates) to deal with enforcement is relatively limited under the 2014 Rules. It would appear that, of the commonly used enforcement powers, lay justices will only be able to make attachment of earnings orders and use the judgment summons procedure. Another effect of the 2014 Rules is that lay justices will only be able to make orders for committal for the breach of a judgment, order or undertaking where that judgment or order was made, or that undertaking accepted, by lay justices. As lay justices do not deal with financial remedy proceedings under the Matrimonial Causes Act 1973, the Civil Partnership Act 2004 and schedule 1 to the Children Act 1989, the occasions on which lay justices will be able to deal with enforcement by way of

⁶ Report of the Financial Remedies Working Group (31 July 2014) Annex 8, available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp-annex8.pdf> (last visited 13 February 2015). These recommendations were maintained in the final Report of the Financial Remedies Working Group (15 December 2014) available at <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/frwg-final-report-15122014.pdf> (last visited 13 February 2015).

⁷ SI 2014 No 840 ("the 2014 Rules").

⁸ The 2014 Rules, rr 15 and 16 and sch 1.

⁹ The 2014 Rules, r 17(2).

¹⁰ The 2014 Rules, r 17(3) and sch 2.

¹¹ The 2014 Rules, r 17(4).

committal in family financial cases will be very limited.¹²

- 5.9 We have received suggestions that enforcement proceedings should be reserved to judges (presumably at least of district judge level) who have particular expertise in enforcement¹³ or that proceedings for enforcement should always return to the judge who made the original order being enforced. However, the rules on the distribution of business only came into force on 22 April 2014, as part of the provisions creating the Family Court, and are therefore very new. We take the provisional view that it is too early to consider any reform of the 2014 Rules but we would welcome consultees' views.¹⁴

Use of the court's powers at the time of enforcement

- 5.10 Whilst the court must balance the rights of debtors and creditors, the nature of an enforcement application makes prompt and effective case management particularly important. At the time of such an application the creditor is likely to be suffering the negative financial effects of the debtor's failure to pay, following the making of the original order, and is unlikely to have the personal and financial resources available for more than one shot at enforcement. Accordingly, robust case management is essential.
- 5.11 For example, the Family Court can specify the consequences of failing to comply with its orders.¹⁵ The most common use of this "unless order" is to prevent or limit the defaulting party's participation in proceedings unless certain conditions are met and the order may well be of use in enforcement proceedings. For example a debtor's application to adjourn an enforcement hearing could be refused unless specified documents are produced which justify the adjournment or help the court to deal with matters more effectively at the adjourned hearing.
- 5.12 Where a party is in contempt of court because he or she has failed to comply with an order, the court can make a *Hadkinson* order preventing that party being heard by the court, unless certain conditions are met,¹⁶ for example that the party meets his or her obligations under the previous order. Case law emphasises that this is an alternative to contempt proceedings; it should be considered a last

¹² The 2014 Rules, r 15 and sch 1.

¹³ There is existing provision in the 2014 Rules, under rule 9, for the President of the Family Division to specify, in directions, and after consultation with the Lord Chancellor, categories of business of the court which district or circuit judges may conduct only if authorised by the President to do so.

¹⁴ We note that the Central Family Court now has an Enforcement Liaison Judge whose role is to oversee and improve the management of enforcement proceedings in that court, and to gather information about such proceedings.

¹⁵ Family Procedure Rules, r 4.1(4).

¹⁶ *Hadkinson v Hadkinson* [1952] P 285.

resort and subjected to careful judicial scrutiny.¹⁷ A *Hadkinson* order may deprive the court of information needed to resolve a subsequent application and could also infringe the debtor's rights. This is, however, an option available in appropriate cases, the use of which could be extended. For example, there could be a presumption that debtors are prevented from making or pursuing applications for downward variation of periodical payments unless a certain proportion of the periodical payments have been and will, pending the outcome of the variation application, continue to be, paid.

- 5.13 The use of unless orders and *Hadkinson* orders raises human rights considerations such as the debtor's right of access to a court and to a fair trial. Although encouraging compliance with court orders may be a legitimate aim, any restrictions placed on the debtor's participation in proceedings must be proportionate and considered on a case by case basis.

Consistent drafting of enforcement orders

- 5.14 The Financial Remedies Working Group has produced drafts of a range of standard enforcement orders. These are intended to assist both practitioners and litigants in person engaged in enforcement proceedings by reducing the likelihood of incorrectly drafted, and ineffective, orders and by serving as an aide memoire of the different remedies available.
- 5.15 The standard orders also set out examples of findings of fact that the court may be likely to make; for example, the standard final charging order records that the parties have been reminded that they have a duty to identify other relevant parties and that none have been identified. The parties can therefore tailor the evidence provided to the court to ensure that such facts are addressed and sufficiently proved. Parties will also know what is likely to be ordered by the court if the application is successful by referring to the draft order.¹⁸
- 5.16 In the paragraphs above we have summarised a number of options which can be grouped loosely under the heading "case management powers". Essentially we are asking whether the court's existing powers can be better used, without statutory law reform. We should be grateful for consultees' views about the ideas presented here and for any other ideas that consultees consider may be useful.
- 5.17 **Do consultees think that existing case management powers are sufficient**

¹⁷ *Mubarak v Mubarak* [2004] EWHC 1158 (Fam), [2004] 2 FLR 932 at [59] and *Laing v Laing* [2005] EWHC 3152 (Fam), [2007] 2 FLR 199.

¹⁸ Report of the Financial Remedies Working Group (31 July 2014) Annexes 10 and 11, available <http://www.judiciary.gov.uk/publications/report-of-the-financial-remedies-working-group-31-july-2014/> (last visited 13 February 2015). These recommendations were maintained in the final Report of the Financial Remedies Working Group (15 December 2014) available at <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/frwg-final-report-15122014.pdf> (last visited 13 February 2015).

and used effectively, whether at the time of the original financial order or at the time of enforcement proceedings?

ALTERNATIVE DISPUTE RESOLUTION

5.18 There is increasing support for family disputes to be resolved in a forum other than court proceedings. The three main types of alternative or non-court dispute resolution, in the context of family disputes, are:

- (1) Mediation – a third party (the mediator) facilitates an agreement being reached between the two parties in a series of face-to-face meetings;
- (2) Collaborative law – each party instructs their own lawyer but the aim is to reach agreement through four-way face-to-face meetings between the parties and their lawyers, who all sign a participation agreement providing for the parties to instruct new legal representatives should the process fail; and
- (3) Arbitration – the parties, who will usually be represented by lawyers (although this is not mandatory), agree for the dispute to be heard by the arbitrator, who undertakes the role otherwise played by the judge. They decide on the identity of the arbitrator, and agree to be bound by his or her decision. The parties will agree with the arbitrator how the process should be conducted; this may be face-to-face, by telephone or on paper.

5.19 Collaborative law and arbitration are unlikely to be relevant in enforcement proceedings save where very large sums or substantial properties are in issue. However, there have been expressions of strong judicial support for the use of alternative dispute resolution in enforcement proceedings. In *Mann v Mann*, Mr Justice Mostyn went so far as to say that

Specifically, the court ought to be able to order participation in ADR [alternative dispute resolution] in enforcement proceedings.¹⁹

5.20 An applicant for financial remedies must show that he or she has attended a mediation and information assessment meeting (“MIAM”). At the MIAM an authorised family mediator²⁰ will provide information about mediation and other

¹⁹ *Mann v Mann* [2014] EWHC 537 (Fam), [2014] 1 WLR 2807 at [24]. Mostyn J recognised that the judge-led Financial Dispute Resolution (FDR) hearing is imposed on financial remedy proceedings by Part 9 of the Family Procedure Rules. He stated that this generally makes the need for parties to actively engage in alternative dispute resolution less pressing in family law proceedings. However, this requirement does not apply to enforcement proceedings.

²⁰ An authorised family mediator is someone who is subject to the Family Mediation Council’s code of conduct, and who is certified to undertake Mediation Information and Assessment Meetings: Family Procedure Rules, Practice Direction 3A, para 22.

forms of alternative dispute resolution, assess the suitability of mediation in that particular case and screen for risk of domestic violence or harm to a child (where the child would be the subject of the application).²¹ However, attendance at a MIAM is not required before enforcement proceedings are commenced.²²

- 5.21 The benefits of mediation are well known – not only may it provide a cheaper and quicker resolution of many matters than court proceedings, it may also be that a solution devised by the parties themselves may be more effective than one imposed by the court. Discussion in mediation may help the parties to understand each other's position. The debtor who resents making payments may, with the assistance of a neutral third party, be persuaded of the creditor's need for such payments. The creditor who is owed money by a debtor who cannot pay may be willing to be flexible about the amount of or time for a payment if shown the reality and the extent of the debtor's financial difficulties.
- 5.22 However, by the time enforcement proceedings are needed because of failure to comply with a court order the possibility that either party will be willing and able to mediate may be limited. Enforcement proceedings, by their very nature, are likely to encourage entrenched positions since the debtor has failed to comply with an existing order and there is likely to be an inequality in bargaining power where one party is withholding funds that the other needs. Alternative dispute resolution is unlikely to succeed in all cases and will be more difficult where the debtor could pay, but has refused to do so.
- 5.23 Accordingly we do not see any merit in extending the requirement to attend a MIAM to enforcement proceedings.
- 5.24 Nevertheless, there may be merit in judges and practitioners actively encouraging dispute resolution. One practical way to do this may be to adjourn enforcement proceedings in suitable cases, in order to give parties the opportunity to try alternative methods of resolving the dispute. A change to the Family Procedure Rules would be required for this to happen without the parties' consent.²³ This is not the same as forcing the parties to mediate, which is generally agreed to be inappropriate and counterproductive. The second, already existing, option is for the court to make an order requiring the parties to consider whether the case could be resolved by alternative dispute resolution. The order warns the parties of

²¹ Family Procedure Rules, rule 3.9. Under r 3.8, an applicant for financial remedy is exempt from attending a MIAM in limited circumstances, for example cases involving domestic violence.

²² Family Procedure Rules, Practice Direction 3A, para 13.

²³ Mostyn J in *Mann v Mann* [2014] EWHC 537 (Fam), [2014] 1 WLR 2807 urged the Family Procedure Rules Committee to consider amending Family Procedure Rules, r 3.3, which only permits an adjournment for dispute resolution where the parties agree. This is in contrast to Civil Procedure Rules, r 26.4(2A), which permits the court to stay proceedings for one month or whatever period it thinks appropriate, without the consent of the parties.

the potential cost consequences of the court concluding, where they have not explored other options, that the reasons given for refusing to do so were unreasonable.²⁴

- 5.25 **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?**

GUIDANCE FOR THE PUBLIC AND LITIGANTS IN PERSON

Published guidance

- 5.26 The number of litigants in person in the Family Court is growing due to the reduction in the availability of legal aid.²⁵ Their proportion is likely to be even higher in enforcement proceedings where we understand that a cost-benefit analysis often does not favour professional representation.²⁶ This makes it particularly important that information is publicly available to assist both creditors who wish to enforce a financial order, and debtors who are on the receiving end of such applications.
- 5.27 There are some resources available, for example HM Courts and Tribunals Service ("HMCTS") publish a leaflet (Form EX327) which sets out the options available if a maintenance order is not being paid and which is available online. This was updated in August 2014 and reflects the changes introduced by the Family Court, including the removal of registration of an order as an option since the magistrates' court can no longer perform this function.²⁷ Form EX327 also refers the creditor to the HMCTS forms dealing with individual methods of

²⁴ This is known as an Ungley order, devised by Master Ungley. Mostyn J made such an order in *Mann v Mann* [2014] EWHC 537 (Fam), [2014] 1 WLR 2807, in which he was also able to adjourn the proceedings since the parties had previously concluded an agreement that contained a mediation clause.

²⁵ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force in April 2013. Court statistics show that in private law family cases disposed of in June to September 2014 there was a 40% reduction in cases where both parties were represented compared to the same period in 2013. There have also been increases in the number of cases where only the applicant or neither party is represented. See Family Court Statistics Quarterly available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388811/family-court-statistics-quarterly-july-to-september-2014.pdf (last visited 13 February 2015).

²⁶ L Trinder and others, *Litigants in Person in Private Law Family Cases* (November 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (last visited 13 February 2015). This point was raised in focus groups during the study.

²⁷ The Maintenance Orders Act 1958 was amended and sections repealed by the Crime and Courts Act 2013, s 17(6) and the relevant provisions in sch 10. See Chapter 2, paras 2.5 to 2.9.

enforcement in more detail.²⁸

- 5.28 These leaflets provide a useful general overview and some helpful guidance on completing the relevant application forms. The creditor is also made aware that further steps may be required, for example liaising with the Land Registry to register charging orders. There are necessarily limits to what can be included in public guidance and, as enforcement is a technical area of the law, the leaflets are not comprehensive and often point the creditor to the court staff (who will not be able to give legal advice) or to a solicitor. A recent academic study found that some court staff would not provide any forms (even for people with no access to, or who were unable to use, a computer) and the opportunity for face-to-face contact with court staff for administrative queries was being curtailed as counter opening hours in courts were reduced.²⁹ The litigant in person may therefore be left without advice.
- 5.29 There is, however, scope for improvement without giving detailed advice. A creditor may assume from the leaflets that, once the court form has been completed, he or she has a passive role in the enforcement proceedings. Where the litigant is unrepresented, the court may take a more inquisitorial approach, but clear guidance as to the form and content of the supporting evidence that will be required from the creditor applicant, or that would assist the court, may save time and resources. For example, the general enforcement application is the subject of only four lines of guidance and there is no reference to a supporting statement. The creditor only has to set out how much is owed and how this was calculated in the D50K application form. The creditor could be encouraged to assist the court by providing details or evidence of the debtor's assets, for example those disclosed in the course of the financial proceedings which led to the making of the order to be enforced. This would at least provide a starting point for the court's enquiries and subsequent choice of an enforcement method. There should also be information available about the way in which the court can enforce a periodical payments order on the creditor's behalf.³⁰
- 5.30 The main difficulty with the information is, however, its inaccessibility. Unless a litigant in person knows the name of the leaflet or its form number then this will

²⁸ Although creditors are not referred to the separate attachment of earnings leaflet in Form EX323.

²⁹ L Trinder and others, *Litigants in Person in Private Law Family Cases* (November 2014) section 3.3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (last visited 13 February 2015).

³⁰ See Chapter 2, paras 2.5 to 2.9.

not be easy to locate.³¹ The report, *Litigants in Person in Private Law Family Cases*, was critical of the absence of an authoritative website and found that many people in the study sample had not used the Government websites or had not found these particularly helpful.³² The study related to family cases generally and as there is even less information specific to enforcement on the Government websites,³³ litigants in person are unlikely to find this sufficient.

- 5.31 The information available on enforcement is not specific to family law. Enforcement methods are, in part, common to both family and civil law and so guidance on general civil enforcement is relevant, but a creditor cannot be presumed to know this. The leaflets may lead to confusion as a result both of the terminology used and the content. For example, the leaflets use civil litigation terms such as “defendants” and “claim numbers” and they refer to enforcing against companies and corporations and Part 7 claims (which is a reference to civil claims made under particular procedural rules).
- 5.32 We approve the suggestion by the Financial Remedies Working Group that HMCTS could issue a guide to enforcement to send out to parties at the time that the final financial order is made.³⁴ Such a guide could be produced by HMCTS although there are other excellent providers of free information about law and people’s rights. For example, the Advicenow website contains an extensive section on family law including a comprehensive guide on “Applying for a

³¹ Both the Financial Remedies Working Group and Resolution in its response to their report agreed that this is the case. See Report of the Financial Remedies Working Group (31 July 2014), available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp.pdf> (last visited 13 February 2015) and Report of the Financial Remedies Working Group Resolution’s Response (2 October 2014), available at http://www.resolution.org.uk/site_content_files/files/resolution_response_to_the_financial_remedies_working_group_report_2_oct_14.pdf (last visited 13 February 2015). These recommendations were maintained in the final Report of the Financial Remedies Working Group (15 December 2014), available at <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/frwg-final-report-15122014.pdf> (last visited 13 February 2015).

³² L Trinder and others, *Litigants in Person in Private Law Family Cases* (November 2014) section 5.5, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (last visited 13 February 2015). It is noted at page 108 that in the 13 months up to January 2014 only 13% of people visiting the website www.sortingoutseparation.org.uk went beyond the home page.

³³ Such websites include <https://www.gov.uk/> (last visited 13 February 2015) and <http://www.sortingoutseparation.org.uk> (last visited 13 February 2015).

³⁴ Report of the Financial Remedies Working Group (31 July 2014) para 75, available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp.pdf> (last visited 13 February 2015). These recommendations were maintained in the final Report of the Financial Remedies Working Group (15 December 2014), available at <http://www.judiciary.gov.uk/wp-content/uploads/2015/01/frwg-final-report-15122014.pdf> (last visited 13 February 2015).

financial order without the help of a lawyer”,³⁵ which was praised by the Financial Remedies Working Group in their report.³⁶ Resolution’s website also provides valuable information about family law for the public.³⁷ However, these websites, like the Government website, only include very limited information about enforcement.

- 5.33 We suggest that if any guide is produced by HMCTS for distribution that it should also be available electronically to the public; it can then be signposted on websites like Advicenow, and those of organisations such as Resolution and the Law Society, to make it easier for the public to find.
- 5.34 Other jurisdictions also seek to provide information to those involved in the enforcement process. For example, in Australia, at the time that the creditor makes an application for enforcement, he or she must serve on the debtor copies of brochures providing information on enforcement. Brochures cover both enforcement hearings and third party debt notices, and explain the effect of orders. The Australian rules also provide for the service of brochures regarding other applications that can be made outside the area of enforcement.³⁸ HMCTS could consider providing similar materials, covering the relevant areas of enforcement, which could be issued to the creditor applying for a particular method of enforcement when he or she issues the application at court, with an obligation on the creditor to provide a copy to the debtor when he or she is served with the application. Any leaflet or brochure could include information about paper, online or face-to-face resources that could assist either party.
- 5.35 In California, there are well-developed resources for litigants in person (and the public) in family law, provided by the court service. The California court service website contains a self-help section which includes a wealth of information on family law including enforcement. The website’s section entitled “Collect Your Family Law Money Judgement” sets out the different methods of enforcement

³⁵ <http://www.advicenow.org.uk/> (last visited 13 February 2015). This is an independent website run by the charity, Law for Life: the Foundation for Public Legal Education.

³⁶ Report of the Financial Remedies Working Group (31 July 2014) para 41, available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/08/report-of-the-financial-remedies-working-grp.pdf> (last visited 13 February 2015).

³⁷ http://www.resolution.org.uk/advice_centre/ (last visited 13 February 2015).

³⁸ [Australian] Family Law Rules 2004, rr 20.11 and 20.33. The brochures are available online: see <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/> (last visited 13 February 2015) and <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Court+of+Australia+publications/> (last visited 13 February 2015).

with step by step guides to each and links to the necessary court forms.³⁹ The Ministry of Justice's Written Ministerial Statement of 23 October 2014⁴⁰ states that the Government will improve online information so that it is accurate, engaging and easy to find and we think that the California website would be a useful model for any development of the Government websites in this jurisdiction.

Advice in person

- 5.36 While comprehensive and well written guidance available in paper and electronic form may be very useful for the public, advice in person may be the preferred option for many. Given the decline in the availability of legal aid, those who cannot afford to engage the services of a family lawyer will look to the free services available to them. Such services are likely to require further investment to cope with this additional demand, a fact recognised by the Government who have announced:

a new package of support ... aimed at keeping disputes away from court and providing better support for those who do end up in court.

- 5.37 In addition to better online resources this package will include:

A new strategy, funded by the Ministry of Justice, and agreed with the legal and advice sectors which will help to increase legal and practical support for litigants in person in the civil and family courts.

A new '*Supporting separating parents in dispute helpline*' pilot run by the Children and Family Court Advisory and Support Service (Cafcass) to test a more joined-up and tailored out-of-court service.⁴¹

- 5.38 The initiative will include connecting those in need of assistance with lawyers acting pro bono (that is, without charging for their services), and increasing funding for the Personal Support Unit, a charity which provides support and practical assistance to litigants in person, so that it can increase its number of volunteers.⁴² However, the Personal Support Unit does not provide legal advice,⁴³

³⁹ <http://www.courts.ca.gov/9330.htm> (last visited 13 February 2015). Enforcement is also covered, albeit briefly, in the section on Spousal/Partner support, see <http://www.courts.ca.gov/1038.htm> (last visited 13 February 2015).

⁴⁰ Written Ministerial Statement, *Hansard* (HC), 23 October 2014, vol 586, cols 80Ws to 81WS.

⁴¹ Written Ministerial Statement, *Hansard* (HC), 23 October 2014, vol 586, cols 80Ws to 81WS.

⁴² O Bowcott, "Initiative promises legal advice for those without lawyers in courts" (October 2014) *The Guardian*, available at <http://www.theguardian.com/law/2014/oct/23/legal-advice-litigants-without-lawyers-justice> (last visited 13 February 2015).

⁴³ See the website of the Personal Support Unit, <http://www.thepsu.org/about-us/how-we-help/> (last visited 13 February 2015).

which sets a limit to the help it can provide, valuable as that is. Resolution has also pointed out that such an initiative will only assist those who go to court, rather than helping people resolve family disputes away from the courts.⁴⁴

- 5.39 There are some organisations that offer tailored advice free of charge, but access to these services is limited. For example, in relation to Citizens Advice Bureaux it was recently reported that

only four of the hundreds of bureaux offer a specialist family law advice service to deal with family legal issues in-house.⁴⁵

- 5.40 More extensive support, provided by the court service, is available to litigants in person in other jurisdictions. In California, self help centres and family law facilitators are available to assist litigants in person with a range of legal needs, focusing on family law. The family law facilitator, who is a lawyer, provides assistance with child and spousal support and establishing paternity, while the lawyers in the self-help centres may be able to provide a wider range of help with family law issues. These services are free, there is no legal professional privilege (so what is said is not confidential) and the facilitator and lawyer can help both sides in a dispute.⁴⁶ If resources were available, we think that such a model would merit closer examination by the Government if it seeks to help those who cannot afford legal representation and are no longer eligible for legal aid.

- 5.41 **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.**
- (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?

INFORMATION AND TRAINING FOR PRACTITIONERS AND THE COURTS

- 5.42 We understand that many practitioners are rarely instructed in enforcement

⁴⁴ See Resolution's website, http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=246 (last visited 13 February 2015).

⁴⁵ L Trinder and others, Litigants in Person in Private Law Family Cases (November 2014) p 91, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380479/litigants-in-person-in-private-family-law-cases.pdf (last visited 13 February 2015).

⁴⁶ <http://www.courts.ca.gov/1083.htm> (last visited 13 February 2015).

matters and that the number of enforcement cases (particularly those heard by judges as opposed to court staff) varies between courts. It may be the case that a cultural change is required to recognise that the role of legal representatives and the court does not end once the original family financial order has been obtained.

- 5.43 Representative groups, such as Resolution, could assist by continuing to encourage their members to engage with enforcement issues by promoting good practice both at the time of the original order and when enforcement action proves necessary. Resolution produces a series of Good Practice Guides and Guidance Notes for its members and it might be helpful for a guide or note to be developed on the subject of enforcement, looking both at enforcement proceedings and at what can be done at the time of the original order to minimise the risk of non-compliance.
- 5.44 The continuing professional development scheme for solicitors is being reformed to ensure a proper standard of legal practice through training and supervision. Individuals and firms are to be given more choice and flexibility on the training they feel is appropriate to improve the legal services they offer. The requirement for 16 hours of continuous professional development to be taken each year will be removed and solicitors will instead have to reflect on the quality of their practice, address any identified learning and development needs and make an annual declaration that they have considered their training needs and taken measures to maintain their competence.⁴⁷ This presents an opportunity for family lawyers to improve their knowledge of the Civil Procedure Rules so that they are able to provide cost-effective advice to creditors needing to enforce a family financial order.
- 5.45 Similarly, the judiciary should ensure that it is able to deal effectively with any enforcement matters arising. This could be achieved in various ways, which may be more cost-effective than the obvious solution of requiring every individual judge to attend regular training on enforcement. One method might be to appoint a judge in each court or designated family court area with responsibility for enforcement, following the example of the Central Family Court which has recently introduced the position of Enforcement Liaison Judge. Elements of enforcement law and practice could also be incorporated into judicial training on dealing with litigants in person; we understand that this is an area in which individuals may more often choose to represent themselves. Equally, the training of court staff in enforcement procedure is crucial, since court staff are responsible not only for the management of the court office's process but also for communication with the creditor, who may have no other source of assistance.
- 5.46 **We welcome consultees' views on what more, if anything, could be done by**

⁴⁷ See <http://www.sra.org.uk/solicitors/cpd.page> (last visited 13 February 2015) and <http://www.sra.org.uk/sra/policy/training-for-tomorrow/Resources/cpd-position-statement-q-a.page> (last visited 13 February 2015).

practitioners and the courts, in the area of training and professional development, to help improve enforcement.

STATISTICS ON ENFORCEMENT

- 5.47 Statistical data on applications and orders for enforcement are not available specifically in relation to family proceedings.⁴⁸ We take the view that in order to help monitor the effectiveness of the different methods for enforcement it would be very helpful if the court service could begin collecting and publishing those data. We understand that, at present, HMCTS' computer systems do not allow that information to be easily generated and so changes to those systems would be needed to allow this to happen. But, subject to the availability of resources, we suggest that the collection of these data would be worthwhile.
- 5.48 **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?

CONSOLIDATION OF LEGISLATION AND RULES

- 5.49 One of the criticisms of the enforcement regime for family financial orders has been that it is too scattered across different rules of court and primary legislation. Consolidation of the law on enforcement of family financial orders, that is the collection into a single statute of several statutes or parts of statutes, has been advocated by both judges⁴⁹ and groups such as the Family Law Bar Association. However, we think that the introduction of the Family Court has helped as all proceedings to enforce such an order will take place in the Family Court and the same set of rules will apply.
- 5.50 The rules of court on enforcement are now contained in Part 33 of the Family Procedure Rules which imports, with modifications, Parts 70 to 73 and 81 to 84 of the Civil Procedure Rules, which deal with the specific methods of enforcement. Part 32 of the Family Procedure Rules, which deals with the registration of orders and other aspects of enforcement, is also relevant. Orders 27 and 28 of the old County Court Rules also continue to be relevant but these are contained in schedule 2 to the Civil Procedure Rules. The Attachment of Earnings Act 1971 and the Charging Orders Act 1979 are the important pieces of primary legislation although the litigant in person or lawyer may also need to consider individual

⁴⁸ There is a new publication, *Family Court Statistics Quarterly*, first published in December 2014 and available at <https://www.gov.uk/government/collections/family-court-statistics-quarterly> (last visited 13 February 2015). However, this contains information previously found in *Court Statistics Quarterly* and does not therefore include any family enforcement statistics.

⁴⁹ *Constantinides v Constantinides* [2013] EWHC 3688 (Fam); [2014] 1 WLR 1934 at [37].

sections of the Debtors Act 1869, the Senior Courts Act 1981 and the County Courts Act 1984.

- 5.51 The Family Law Bar Association has suggested to us that all the law on enforcement could be consolidated into a single piece of legislation. However, given that the majority of the law is contained in rules of court we query whether that is necessary. Given that this law is shared, for the most part, with civil proceedings this begs the question of whether, if an enforcement statute were to be created, it should apply to all proceedings? Any such statute would also necessarily go beyond consolidation to codification, that is the setting down and restating in one statute of all the law in a particular area, and, if it were to apply to all civil proceedings, would be beyond the scope of this project. On balance, we are not convinced that there is a pressing need for such a statute.
- 5.52 Based on anecdotal evidence, we have the impression that the fact that the lawyer or litigant in person involved in family proceedings must consult both the Civil and Family Procedure Rules can sometimes be a source of difficulty. One solution might be for the Parts dealing with enforcement in the Family Procedure Rules to be made truly comprehensive, restating there the relevant rules currently found in the Civil Procedure Rules. Such a change may well be convenient for those seeking to enforce family financial orders but it is likely to lead to a divergence, over time, between the way that the same enforcement methods are used in family and civil proceedings. In itself, that may not be a problem; different proceedings may warrant different approaches.
- 5.53 **Do consultees find that the need to refer both to the Family Procedure Rules and the Civil Procedure Rules gives rise to problems?**

CHAPTER 6

LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

INTRODUCTION

- 6.1 In this Chapter, we set out our provisional proposals and consultation questions on which we are inviting the views of consultees. We would be grateful for comments not only on the issues specifically raised below, but also any other points raised in this Consultation Paper. It would be helpful if consultees could comment on the likely costs and benefits of any changes provisionally proposed when responding.
- 6.2 It would also be helpful if, when responding, consultees could indicate either the paragraph of this list to which their response relates, or the paragraph of this Consultation Paper in which the issue was raised.

THE IMPACT OF ENFORCEMENT

- 6.3 We ask consultees to tell us about their experiences of the impact, financial and otherwise, of:
- (1) non-payment of sums due under family financial orders;
 - (2) difficulties in obtaining information and advice about the enforcement of family financial orders, including court procedure; and
 - (3) enforcement proceedings on
 - (a) debtor and creditor;
 - (b) third parties (such as the debtor's other creditors);
 - (c) banks and financial institutions; and
 - (d) the family justice system.

[paragraph 1.43]

- 6.4 We ask consultees to tell us their views about the economic impact of any potential reform of the law relating to enforcement.

[paragraph 1.44]

ENFORCEMENT BY THE COURT

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

[paragraph 2.10]

GENERAL ENFORCEMENT APPLICATION

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

[paragraph 2.26]

INFORMATION REQUESTS AND ORDERS

- 6.7 We ask for the views of consultees as to:

- (1) whether the provisions of the Tribunals, Courts and Enforcement Act 2007 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.

[paragraph 2.45]

INFORMATION FROM THE DEBTOR

- 6.8 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?

[paragraph 2.54]

EXECUTION OF DOCUMENTS

- 6.9 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?

[paragraph 3.13]

THIRD PARTY DEBT ORDERS

- 6.10 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?

[paragraph 3.41]

- 6.11 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.

[paragraph 3.42]

CHARGING ORDERS

- 6.12 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.

Do consultees agree?

[paragraph 3.59]

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

[paragraph 3.60]

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

[paragraph 3.61]

PENSIONS

- 6.15 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; and
- (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?

[paragraph 3.72]

- 6.16 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?

[paragraph 3.76]

ATTACHMENT OF EARNINGS ORDERS

- 6.17 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?

[paragraph 3.105]

- 6.18 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?

[paragraph 3.106]

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

[paragraph 3.107]

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

[paragraph 3.108]

ARREARS OF MAINTENANCE

- 6.21 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)?

[paragraph 3.115]

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

Do consultees agree?

[paragraph 3.117]

COSTS

- 6.23 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?

[paragraph 3.124]

JUDGMENT SUMMONS

- 6.24 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.

[paragraph 4.23]

COERCIVE MEASURES

- 6.25 We provisionally propose that:

- (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.

Do consultees agree?

[paragraph 4.61]

BANKRUPTCY

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

[paragraph 4.68]

CASE MANAGEMENT POWERS

- 6.27 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?

[paragraph 5.17]

ALTERNATIVE DISPUTE RESOLUTION

- 6.28 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?

[paragraph 5.25]

GUIDANCE FOR THE PUBLIC AND LITIGANTS IN PERSON

- 6.29 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.
- (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?

[paragraph 5.41]

INFORMATION AND TRAINING FOR PRACTITIONERS AND THE COURTS

- 6.30 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.

[paragraph 5.46]

STATISTICS ON ENFORCEMENT

- 6.31 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?

[paragraph 5.48]

CONSOLIDATION OF LEGISLATION AND RULES

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

[paragraph 5.53]

APPENDIX A

SUMMARY OF RESOLUTION SURVEY RESULTS

1. Do you think that, currently, the enforcement of family financial orders generally works well:

	Yes - for capital	No - for capital	Yes - for maintenance	No - for maintenance	Yes - for both	No - for both	Response Total
For those parties who are represented?	19.7% (14)	9.9% (7)	4.2% (3)	23.9% (17)	11.3% (8)	31.0% (22)	71
For those parties who are not represented?	7.8% (5)	15.6% (10)	4.7% (3)	18.8% (12)	3.1% (2)	50.0% (32)	64
						answered	47
						skipped	1

1.1. For those parties who are represented?

	Percent	Total
1 Yes - for capital	19.72%	14
2 No - for capital	9.86%	7
3 Yes - for maintenance	4.23%	3
4 No - for maintenance	23.94%	17
5 Yes - for both	11.27%	8
6 No - for both	30.99%	22
	answered	47

1.2. For those parties who are not represented?

	Percent	Total
1 Yes - for capital	7.81%	5
2 No - for capital	15.63%	10
3 Yes - for maintenance	4.69%	3
4 No - for maintenance	18.75%	12
5 Yes - for both	3.13%	2
6 No - for both	50.00%	32
	answered	47

2. Do you think the following current enforcement methods are effective?

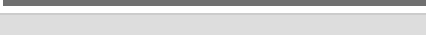
	Yes - for capital	No - for capital	Yes - for maintenance	No - for maintenance	Yes - for both	No - for both	Response Total
Attachment of earnings	4.3% (3)	27.5% (19)	52.2% (36)	1.4% (1)	4.3% (3)	10.1% (7)	69

2. Do you think the following current enforcement methods are effective?

	Yes - for capital	No - for capital	Yes - for maintenance	No - for maintenance	Yes - for both	No - for both	Response Total
Charging orders	52.5% (32)	3.3% (2)	0.0% (0)	24.6% (15)	4.9% (3)	14.8% (9)	61
Warrants of control	2.8% (1)	8.3% (3)	0.0% (0)	8.3% (3)	0.0% (0)	80.6% (29)	36
Third Party Debt Orders	17.8% (8)	6.7% (3)	6.7% (3)	8.9% (4)	6.7% (3)	53.3% (24)	45
Judgment Summons	17.3% (9)	7.7% (4)	3.8% (2)	13.5% (7)	9.6% (5)	48.1% (25)	52
Orders to Obtain Information	8.3% (4)	6.3% (3)	4.2% (2)	14.6% (7)	16.7% (8)	50.0% (24)	48
						answered	47
						skipped	1

2.1. Attachment of earnings			Percent	Total
1	Yes - for capital		4.35%	3
2	No - for capital		27.54%	19
3	Yes - for maintenance		52.17%	36
4	No - for maintenance		1.45%	1
5	Yes - for both		4.35%	3
6	No - for both		10.14%	7
			answered	47

2.2. Charging orders			Percent	Total
1	Yes - for capital		52.46%	32
2	No - for capital		3.28%	2
3	Yes - for maintenance		0.00%	0
4	No - for maintenance		24.59%	15
5	Yes - for both		4.92%	3
6	No - for both		14.75%	9
			answered	47

2.3. Warrants of control			Percent	Total
1	Yes - for capital		2.78%	1
2	No - for capital		8.33%	3
3	Yes - for maintenance		0.00%	0
4	No - for maintenance		8.33%	3
5	Yes - for both		0.00%	0
6	No - for both		80.56%	29
			answered	47

2.4. Third Party Debt Orders			Percent	Total
1	Yes - for capital		17.78%	8
2	No - for capital		6.67%	3
3	Yes - for maintenance		6.67%	3
4	No - for maintenance		8.89%	4
5	Yes - for both		6.67%	3
6	No - for both		53.33%	24
			answered	47

2.5. Judgment Summons			Percent	Total
1	Yes - for capital		17.31%	9
2	No - for capital		7.69%	4
3	Yes - for maintenance		3.85%	2
4	No - for maintenance		13.46%	7
5	Yes - for both		9.62%	5
6	No - for both		48.08%	25
			answered	47

2.6. Orders to Obtain Information			Percent	Total
1	Yes - for capital		8.33%	4
2	No - for capital		6.25%	3
3	Yes - for maintenance		4.17%	2
4	No - for maintenance		14.58%	7
5	Yes - for both		16.67%	8
6	No - for both		50.00%	24
			answered	47

3. Which do you think are the most significant problems for creditors in family proceedings (or those representing them) who wish to enforce payment? Please select all options that you think apply:				
	For capital	For maintenance	Both	Response Total
Cost of taking proceedings.	4.3% (2)	6.5% (3)	89.1% (41)	46
Delay within proceedings.	2.6% (1)	5.1% (2)	92.3% (36)	39
Limited range of enforcement methods.	5.9% (2)	5.9% (2)	88.2% (30)	34
Existing enforcement methods that do not work well.	2.9% (1)	11.4% (4)	85.7% (30)	35
Difficulty in accessing the law and procedure on enforcement.	4.7% (2)	4.7% (2)	90.7% (39)	43
			answered	47
			skipped	1

3.1. Cost of taking proceedings.			Percent	Total
1	For capital		4.35%	2
2	For maintenance		6.52%	3
3	Both		89.13%	41
			answered	47

3.2. Delay within proceedings.			Percent	Total
1	For capital		2.56%	1
2	For maintenance		5.13%	2
3	Both		92.31%	36
			answered	47

3.3. Limited range of enforcement methods.			Percent	Total
1	For capital		5.88%	2
2	For maintenance		5.88%	2
3	Both		88.24%	30
			answered	47

3.4. Existing enforcement methods that do not work well.			Percent	Total
1	For capital		2.86%	1
2	For maintenance		11.43%	4
3	Both		85.71%	30
			answered	47

3.5. Difficulty in accessing the law and procedure on enforcement.			Percent	Total
1	For capital		4.65%	2
2	For maintenance		4.65%	2
3	Both		90.70%	39
			answered	47

4. Do you believe that there is scope to improve the enforcement of family financial orders?				
			Response Percent	Response Total
1	Yes		78.72%	37
2	No		0.00%	0
3	Yes - for capital		21.28%	10
4	No - for capital		2.13%	1
5	Yes - for maintenance		19.15%	9

4. Do you believe that there is scope to improve the enforcement of family financial orders?

		Response Percent	Response Total
6	No - for maintenance	0.00%	0
		answered	47
		skipped	1

5. If yes to (4), where do you think the solution to improving enforcement lies? Please select all options that you think apply:

	For capital	For maintenance	Both	Response Total
Substantive reform of enforcement methods	17.9% (7)	12.8% (5)	69.2% (27)	39
Procedural reform of enforcement methods	10.0% (4)	7.5% (3)	82.5% (33)	40
Consolidation of statutes dealing with this area	5.6% (2)	5.6% (2)	88.9% (32)	36
Training for family lawyers	6.5% (2)	3.2% (1)	90.3% (28)	31
More and better information for the public and litigants in person	8.3% (3)	5.6% (2)	86.1% (31)	36
			answered	47
			skipped	1

5.1. Substantive reform of enforcement methods

	Percent	Total
1 For capital	17.95%	7
2 For maintenance	12.82%	5
3 Both	69.23%	27
	answered	47

5.2. Procedural reform of enforcement methods

	Percent	Total
1 For capital	10.00%	4
2 For maintenance	7.50%	3
3 Both	82.50%	33
	answered	47

5.3. Consolidation of statutes dealing with this area

	Percent	Total
1 For capital	5.56%	2
2 For maintenance	5.56%	2
3 Both	88.89%	32
	answered	47

5.4. Training for family lawyers			Percent	Total
1	For capital		6.45%	2
2	For maintenance		3.23%	1
3	Both		90.32%	28
			answered	47

5.5. More and better information for the public and litigants in person			Percent	Total
1	For capital		8.33%	3
2	For maintenance		5.56%	2
3	Both		86.11%	31
			answered	47

6. What, if anything, could be done at the time when financial orders are made, by consent or after contested proceedings, to improve the prospects of such an order being adhered to or successfully enforced?			
		Response Percent	Response Total
1	Open-Ended Question	100.00%	29
		answered	29
		skipped	19

Question 6 (each response appears as a separate paragraph)

- A.1 Default position provided in original order so that if not complied with position clear from the outset as to consequences of non compliance.
- A.2 Make enforcement procedure quicker and cheaper.
- A.3 The law is reactive rather than preventative – so you have to wait until the respondent, who you just know from conduct within the proceedings and negotiations isn't going to pay, to default and then take recovery proceedings which clients cannot begin to comprehend. The registration of maintenance and recovery by the magistrates is good, but the public have no idea it exists. Capital is impossible to recover if there is nothing other than the house and charging orders are not effective means of recovering this. The process is slow and costly and confusing to the public.
- A.4 I don't think this is the issue – the issue seems to be the time it takes to enforce and the fact that defaulters are never in my experience actually charged with contempt or fined. If the penalties for non compliance by the payer were more severe and actually set out formally then this may deter – for example a standardised set of fees payable by the defaulter to the court and other side in the event of default which were hefty.
- A.5 Default enforcement provisions to save on costs and delay.

- A.6 A note attached as to the consequences on non-compliance as per the wording in respect of undertakings. Also wording that costs will be awarded against debtor.
- A.7 If the court in making the orders retained jurisdiction until the order had been performed, with power to direct compliance in practical ways, on restoration to the judge pending compliance ... a simple way for the court to case manage through to compliance, only closing off the case after achieving that aim.
- A.8 Consider including default provisions in the original drafting (for example enabling third parties to carry out steps to facilitate implementation). Possibly apply automatic fines at different levels depending on amount owed and time outstanding so that consequences are clear.
- A.9 Where there has been previous non compliance penal notices would help.
- A.10 I am interested in whether by our focus on the people we fail to write sufficiently edgy orders which are then not straight-forward to enforce. There is perhaps no focus on enforcement at the time so no knowledge among evaders that they will face enforcement. But the real problems are that the rules are HIGHLY technical. It took me around 4 months of weekends to write chapters on enforcement that would be rule compliant. With the collapse of the High/ County court structure, I don't know what further complications have come to exist since April 22 [2014].
- A.11 A built in penalty, so that unless the order is complied with the defaulter will have to pay a meaningful penalty, safeguarded by the need to ensure personal service in advance.
- A.12 The delay in receiving sealed orders, whether by consent or otherwise, severely hampers successful resolution or enforcement. At present I am dealing with a [litigant in person] who has changed his mind about the terms of the Consent Order because he has had too long to think about it. I am also dealing with a represented Respondent who is taking advantage of the two months that the Court has taken to produce their Order to ignore all the steps that he should have already taken in preparation for the final hearing.
- A.13 Better methods of enforcement and better procedure which means taken more seriously.
- A.14 Very clear deadlines with clarification as to what will happen in the event of non-compliance AND pre-empting those. So obvious cases of having to go back to Court. For example make a sole conduct of sale order which kicks in if the house isn't sold after a period of time.
- A.15 Perhaps more penal notices.
- A.16 Enforcement provisions brought to the attention of the parties when the order is made the sanctions and any costs implications.
- A.17 Make clearer in order what will happen if a default.

- A.18 Ensure significant financial penalties for breach – [including] interest penalties plus actual punitive payment for significant breach, plus all costs on indemnity basis. Simplify enforcement and save judicial time. Open up registers (for example Government registers of pensions, Land Registry, etc) so that we can find out, when someone is in clear breach of an order, what properties and investments he/she owns and can swiftly enforce against them before they disappear, and without the person in breach being aware of the release of this information. The "victim" should not have to pay for enforcement nor any part of it if an order is breached: whilst legal costs must be kept at a realistic level, the cost of enforcement is a huge deterrent for the injured party and can have huge consequences for them. The costs of negotiating a settlement rarely get picked up by the party in default, even when one party is clearly in the wrong. There should therefore be a "punitive" financial element automatically built in to deter breach, for example on a Mesher order or an order to discharge a mortgage within a specific timeframe, or whatever. This should be above and beyond any % interest on judgment debts. Similarly with maintenance: it is commonplace for payers to delay payments and keep the payee in a position of insecurity and uncertainty, often resulting in damage to credit rating and loss of underwriting with mortgage based on SPPO order. The payee is always the one to suffer and can rarely afford legal fees; we are not in a position to advise cost effectively as recompense/costs orders, if any, are inadequate, as payers well know. Again, there should be a punitive financial element to deter breach.
- A.19 Proper consideration to the possibility of enforcement in original order on a more standard basis.
- A.20 Increased emphasis on parties reaching an agreement rather than an agreement being imposed increases the chances of adherence. Proper drafting of the order, thus the family orders project should be welcomed.
- A.21 Making automatic default provisions to avoid having to prepare statements and issue proceedings in the event of default. Put the onus on the paying party to apply to court if there is a problem with payment. Allow costs to be recoverable in full for enforcing orders.
- A.22 The Court could include enforcement provisions at the time some orders are made. There would be no prejudice to parties agreeing to these if they had every intention of complying.
- A.23 Including order for judge to sign documents in default of party doing so within say 7 days of being asked, adding warning notices re contempt of implementation.
- A.24 Add an enforcement method for in default as automatic rather than an application to enforce after the event thus at extra cost to the client.
- A.25 A clause authorising an immediate directions appointment in breach of an order of the Court without issuing a new application.

- A.26 Greater use of secured periodical payments – use default provisions in a capital order – for example if an order is made for the sale of a property which has been bitterly contested, why not order at the time that in the absence of a signature on the transfer deed within 7 days of the transfer being sent to the party to sign, the DJ can sign in place of the party concerned? – introduce a change to section 31, [Matrimonial Causes Act 1973] to provide that a capital sum can become payable on an application for variation of a maintenance order if the order has habitually been in arrears.
- A.27 A procedure to return with a lesser fee and documentation to be provided by all parties prior to the 1st hearing.
- A.28 Far greater use of secured provision – in many cases we can tell the ones who are going to default, but unless they have already done so one is wasting ones breath asking for secured provision.
- A.29 Thought needs to be given to enforcement of an Order at the time it is made.

7. The notice of application for such method of enforcement as the court may consider appropriate (the general enforcement application, made on form D50K) has been recently introduced. Is this resulting in more successful enforcement?

	Yes	No	Don't know	Response Total
For capital	8.6% (3)	8.6% (3)	82.9% (29)	35
For maintenance	11.8% (4)	2.9% (1)	85.3% (29)	34
For both	5.3% (2)	5.3% (2)	89.5% (34)	38
			answered	45
			skipped	3

7.1. For capital			Percent	Total
1	Yes		8.57%	3
2	No		8.57%	3
3	Don't know		82.86%	29
			answered	45

7.2. For maintenance			Percent	Total
1	Yes		11.76%	4
2	No		2.94%	1
3	Don't know		85.29%	29
			answered	45

7.3. For both			Percent	Total
1	Yes		5.26%	2
2	No		5.26%	2
3	Don't know		89.47%	34
			answered	45

Question 7 (each response appears as a separate paragraph)

- A.30 Anecdotal I have heard that Courts are listing [First Directions Appointments] rather than simply enforce.
- A.31 It is a procedure unfamiliar to the court staff.
- A.32 I don't know – the other problem is that we come across it relatively rarely so that we are not skilled and experienced in this work.
- A.33 Too soon to know.
- A.34 The court staff and judiciary need training in these areas. There is too much confusion and enforcement isn't given a high priority as it remains one of the areas where there are no targets for completion (to the best of knowledge). Enforcement proceedings should be reserved to experienced trained Judges.
- A.35 Whilst it is an improvement it is still an application. An order of the Court is often made after the parties have endured a lot of expense and time. Where there has been a breach, what they want to do is get it back before the Court early and cheaply for directions on how the breach can be investigated or dealt with. A type of summary Judgement may be helpful if the other side does not appear or if there is no real defence.
- A.36 I think it is a good idea but I have no personal experience.
- A.37 The form is not the problem – the total overload of the courts/cuts in staff etc causing delays and poor service across the board does not help, but the best change would be more robustness from judges: it often seems to creditors that the defaulting party gets away with murder and courts are too hesitant, too politically correct and lacking in nerve when the respondent is frequently extracting the michael, to put it mildly. The court's reluctance to accept more informal evidence of service is one example – "I never had the papers" still works to an alarming degree.

