Consultation response: Civil Courts Structure Review—Interim Report

Response by the Money Advice Trust
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Introduction

About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money wisely.

The Trust’s main activities are giving advice, supporting advisers and improving the UK’s money and debt environment.

We help approximately 1 million people per annum through our direct advice services and by supporting advisers through training, tools and information. We give advice to around 200,000 people every year through National Debtline and around 40,000 businesses through Business Debtline. We support advisers by providing training through Wiseradviser, innovation and infrastructure grants.

We use the intelligence and insight gained from these activities to improve the UK’s money and debt environment by contributing to policy developments and public debate around these issues.

Public disclosure

Please note that we consent to public disclosure of this response.
Introductory comment

Given the timescale, we are unable to comment on every area in the interim report.

However, we would make a general plea for the review to take adequate account of the digitally excluded and people in vulnerable circumstances. We believe that people must still be able to make applications in person if they need or wish to. Many people, particularly those who are vulnerable, either do not have access to the internet or would not feel confident enough to use it in this way. The court process is often complicated and any online application system must be used alongside, rather than instead of, face-to-face services where people can apply in person and have the process explained to them.

Furthermore, people should be able to attend court hearings at an accessible venue, in person. This is particularly vital where they are facing mortgage or rent repossession proceedings, or are in debt and having to attend a hearing in relation to county court or High Court enforcement. Even in areas where courts are scheduled for closure, there should be facilities in place to hold hearings at a venue within a reasonable distance of a defendant’s home. It is not reasonable to expect people in financial difficulties with limited incomes to travel long distances. They are unlikely to have access to a car, or be able to afford the petrol or the public transport costs.

Steps should also be taken to ensure that any information and advice available online is also readily available and easily accessible in hard copy so that those who do not have access to, or are not able to use, the internet have access to all of the information and materials they need. Failure to do so can have a detrimental impact on many people in debt.

We have concentrated our comments on Chapter 10 of the interim report which covers enforcement of judgments and orders. We are concerned that the review may not be aware of the major concerns of the free-to-client debt advice sector in relation to this area. It would be disappointing if the review was only to hear from one particular point of view in relation to High Court enforcement, especially if those commentators may have a vested interest in the outcome of the review leading in one direction. As the review states:

“This is a potentially very important subject which has yet to receive sufficient attention or consultation in this review. I would therefore welcome as much feedback as possible in relation to it.”

We have therefore set out our concerns in relation to High Court enforcement in detail based upon the long history of concerns we have raised with the Ministry of Justice over the activities of High Court Enforcement Officers in particular. We have been heavily involved in the reform of bailiff regulation under the Tribunals Courts & Enforcement Act 2007. We have recently submitted evidence to the Ministry of Justice first year review of the regulations. We would suggest that the reforms have not reduced the flow of complaints about enforcement officer behaviour or reduced our concerns about High Court enforcement rules, high fees, escalation of action on the doorstep and the accessibility of complaints in this area.
We would also suggest that any reform to the enforcement regime in the county court should take account of the requirements under the FCA regulatory regime on consumer credit regulated creditors to comply with the Consumer Credit Sourcebook (CONC) rules\(^1\) and the overriding FCA principle that “a firm must pay due regard to the interests of its customers and treat them fairly”.\(^2\) This applies to how such creditors treat their customers in debt both before and after default and in the collections process. Any arguments that creditors are “enthusiastic” to adopt a more punitive enforcement regime using High Court Enforcement officers, should be put into perspective by these considerations.

**High Court Enforcement**

We are very concerned about any proposals to disband county court enforcement in favour of a High Court enforcement system incentivised by returns. We are also extremely concerned about any proposals that High Court Enforcement Officers should be allowed to enforce county court judgments for debts taken out under the Consumer Credit Act 1974 (CCA).

The High Court and County Courts Jurisdiction Order 1991 gives specific protections to debts under the CCA which cannot be transferred to the High Court for enforcement. We consider it to be disproportionate to allow HCEOs to enforce consumer credit debts. Consumers who have taken out ordinary credit agreements and have fallen upon hard times through a change in circumstances, are ill-suited to such enforcement methods, lacking both the income and the assets to justify the use of such costly procedures.

We oppose any such proposals for the following reasons.

- We believe that if all enforcement was carried out in the county court it would make the processes far easier for clients to understand.

- The use of the High Court for enforcement of judgments introduces an unmerited degree of complexity and formality into the process.

- In our experience, this has the effect of putting off debt advice clients from engaging in the process.

- The language and procedures of the High Court are both arcane and intimidating.

- The application process for a stay of execution is time consuming, very difficult for clients to understand and there are often delays with hearings. This contrasts with the simple, straightforward process of suspending a warrant in the county court using an N245.

- The process as it stands would be completely inaccessible to most of our clients who would be unable to deal with the application process, submitting an affidavit of means, let alone drawing up their own order and serving it on all parties. We predict that as a result vulnerable clients would have no access justice.

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\(^1\) [https://www.handbook.fca.org.uk/handbook](https://www.handbook.fca.org.uk/handbook)

\(^2\) [http://www.fca.org.uk/about/operate/principles](http://www.fca.org.uk/about/operate/principles)
It will be more costly in terms of court time to deal with the application to stay a writ of control because applications are generally scrutinised by a district judge, whereas county court staff deal with applications to suspend a warrant of execution.

There is no automatic transfer to your local court when you apply for a stay of execution. It appears that practice is different in each court and the fee you have to pay may vary too.

We would argue that this places a very much increased financial burden on the person in debt and is not supportable.

We support retaining the system of county court enforcement agents as directly employed staff of Her Majesty’s Courts and Tribunals Service. This system results in few complaints, disputes, issues in relation to entry, disputes about payment arrangements. There is no incentive for a county court enforcement agent to act improperly or use aggressive tactics to recover their fees.

The activities of county court bailiffs are rarely a cause for concern. The ability for individuals in debt to make applications to suspend warrants in the county court and to vary instalment orders is a crucial tool. There is a straightforward set scale of fees and a clear judicial process.

The two enforcement stages in the fee scale for High Court enforcement will in many cases be capable of adding a greater amount in charges than was originally owed. Additional fees can be charged at 7.5% of the amount owed above £1,000. The balances owed on consumer credit-related debts can be relatively high. This will have a huge impact on the ability of a much more potentially low-income and vulnerable group of people in debt to pay what they owe.

It has been stated by the HCEOA that it is a requirement for a HCEO to attend a property under the rules by which they are appointed, which means that an extra enforcement fee is automatically being added to the debt.

The procedure in the county court for a warrant of execution requires the creditor to make an application with the relevant court fee. The county court bailiff is required to enforce the warrant and collect the debt as well as the court fee from the debtor. No additional costs generally apply.

Advisers frequently report that HCEO charges cause debts to escalate disproportionately.

It is very difficult to challenge High Court Enforcement Officers over their fees. This is a very common complaint amongst both clients and advisers.

There is no simple, easily accessible and cheap mechanism for complaints about fees.

The High Court Enforcement Officers Association will not deal with fee-related complaints. This means that the only avenue for our clients is an obscure and costly court process.
Clients are often reluctant to take further action to recover overcharged fees due to the difficulties in doing so (e.g. applying for a detailed assessment in the county court for which you will be liable for costs if you lose).

There is a great deal of uncertainty about VAT rules. Until this is resolved, some High Court enforcement agents are continuing to add VAT to fees. There is no clear mechanism for challenging this.

From an advice sector perspective, we deal frequently with complaints and disputes relating to the private enforcement sector and HCEOs in particular.

HCEOs are not required to be certificated and do not operate under the same rules as other enforcement officers.

The enforcement industry itself accepts the need for independent regulation and an independent complaints mechanism but this has not been forthcoming under the new regulations.
Responses to individual questions

Question 1: Should the enforcement of judgments become a unified service for all the civil courts?

We do not object in principle to the enforcement of judgments becoming a unified service but we believe that this should be under county court enforcement officers. Where defendants in debt cases have no money, it is not a solution to use better and swifter enforcement.

At present we feel strongly that the private enforcement sector is not in a position to provide an adequate service and act as a replacement for county court staff and county court bailiffs. The bailiff industry itself accepts the need for independent regulation and an independent complaints mechanism.

From an advice sector perspective, we deal daily with complaints about the private enforcement sector. Concerns about the actions of individual enforcement officers are frequently in the media. In contrast, the activities of county court enforcement officers are rarely a cause for concern. The ability for individuals in debt to make applications to suspend warrants in the county court and to vary instalment orders is a crucial tool. There is a straightforward set scale of fees and a clear judicial process.

We believe that if all enforcement was carried out in the county court it would make the processes far easier for clients to understand. The use of the High Court for enforcement of judgments introduces an unmerited degree of complexity and formality into the process. In our experience, this has the effect of putting off debt advice clients from engaging in the process. The language and procedures of the High Court are both arcane and intimidating.

It is very difficult to challenge High Court enforcement officers over their fees. This is a very common complaint amongst both clients and advisers. There is no simple, easy access and cheap mechanism for complaints about fees. The High Court Enforcement Officers Association will not deal with fee-related complaints. This means that the only avenue for our clients is an obscure and costly court process.

We suggest that further thought is given to removing the process of transferring county court judgment debts to the High Court for enforcement. By doing this, those creditors who are enforcing debts which are not CCA regulated would not have the advantages of ‘transfer’ just by virtue of the type of debt they are owed. The process for applying for enforcement to be stopped and payments varied would then be simpler and more accessible for all debtors who have county court judgments. (This would not remove the right of creditors to start claims in the High Court where relevant criteria are met).
There is evidence that more creditors are enforcing county court judgments in the High Court, including unpaid nursery fees, water arrears, funeral charges and old business debts. This method tends to be more punitive than the use of county court bailiffs. Advisers frequently report that HCEO charges cause debts to escalate disproportionately. It is common for clients to report that HCEOs are very difficult to negotiate with.

We note that in section 2.47 of the interim report, the report states:

“It is sufficient for me to say, as part of my description of the current structure, that County Court enforcement is at present heavily localised, paper based, prone to error in form filling, and widely perceived to be slow, ineffective and expensive.”

We could suggest that before any decisions are made, there should be research and a full cost benefit analysis carried out into the effectiveness of enforcement officers in the county court. In particular, there should be an evaluation as to whether they are in fact much more efficient than High Court Enforcement Officers or private sector enforcement officers once the success rate for warrants discounts the instances of abandoned enforcement due to the inaccurate identity and address information supplied by creditors.

**Question 2: Which features of the current County Court and High Court enforcement procedures should be replicated or developed in a unified service?**

Any alternative process would need an equivalent mechanism to suspend warrants or other enforcement activity, and to allow applications to pay in instalments. Any move to reform the system to remove people’s ability to apply to suspend action and to make payment arrangements after judgment would be to the severe detriment of vulnerable people. This would have the effect of restricting or removing access to justice and mean that all those who are unaware of the legal consequences, did not understand or were incapable of understanding the paperwork, or sought advice too late, would have no mechanism to deal with the problem.

A debt pre-action protocol for debt is under development by the Civil Procedure Rule Committee. This may go some way to persuading creditors to “do the right thing” and accept reasonable offers of payment based on the Common Financial Statement/Standard Financial Statement, freeze interest and charges and engage with people in debt. It is vital that the pre-action protocol is put in place and retained for any new procedures.

We would favour a straightforward standardised mechanism for establishing income and outgoings could be employed throughout HMCS processes such as using the principles behind the Common Financial Statement (CFS). This would allow processes to be streamlined to ensure that financial information is gathered and used in the same manner from replying to court claims to enforcement of judgments.

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4 https://www.gov.uk/government/consultations/pre-action-protocol-for-debt-claims-further-consultation
5 http://www.cfs.moneyadvicetrust.org/
The CFS includes a set of trigger figures which provide an indication of average levels of expenditure dependent upon the number of adults, children and vehicles in a household. These figures have been calculated using the bottom income quintile from the Office of National Statistics Living costs and food survey.

The CFS model has been incorporated into the draft of the pre-action protocol for debt claims which is a very welcome step forward. We understand that the forthcoming Money Advice Service Standard Financial Statement (SFS)\(^6\) will update and replace the CFS and should be used as the industry standard in the future.

The style and format of the CFS/SFS could be built into public facing court forms where a statement of means is required, such as the N9A, the N245 and so on. This approach has been successfully adopted in the Debt Relief Order application process, the Debt Arrangement Scheme in Scotland and through the publically available CASHflow scheme.\(^7\) The advantage of introducing a consistent method of presenting income and expenditure is that clients can be assured that standards for what is an acceptable budget would not vary from one debt management scheme to another and from one enforcement method to another. It also allows the courts to receive consistent, accurate information about the applicant’s financial situation and ability to pay.

We would also draw your attention to the breathing space proposals that are under consideration by HM Treasury and the Insolvency Service.\(^8\) We have been looking at new statutory protections from interest, charges and enforcement for people seeking to deal with their debts – accessed via debt advice. A new statutory Breathing Space scheme would create a pay-off for people to get debt advice early and give people struggling with debt the best chance of financial recovery. This would hopefully have application to all types of creditor.

One option would be to develop a debt portal or gatekeeper as proposed in the Department for Business, Innovation & Skills Insolvency and Credit review call for evidence in December 2010. This could deal with the person’s debt problems as a whole with the aim of reaching a long term holistic solution rather than each creditor taking individual action piecemeal. We said in our response that Government could consider introducing a ‘gateway’ to court action, which could only be ‘passed through’ if there is a genuine dispute about the debt itself or a potentially contentious legal matter to consider. This would require a clearly defined scheme or body to deal with cases that do not progress to the court stage.

We went on to say that a gateway to accessing help and advice along the lines of the debt relief order competent authority model or approved adviser model would ensure that those accessing advice would then be protected by the gateway system and result in certain benefits for cooperation. These should include a breathing space to allow assessment, protection from creditor action, and freezing of interest and charges. This protection should continue as long as needed in return for engagement. The protection should then flow seamlessly into protection provided by the various debt options.


Question 3: Will digitisation and automation enable better enforcement?

We are concerned by any proposals that will favour the automation of a process over the ability of vulnerable defendants to halt or suspend the operation of the enforcement process. For example, it is vital to ensure that the N245 application process to suspend a warrant and vary instalments is preserved and made as simple and accessible as possible for someone to use at any point in the process.

Question 4: Should all methods of enforcement be centralised as far as possible?

We have not reached a settled view as to whether all methods of enforcement should be centralised as far as possible, along the lines now being planned for charging orders and attachment of earnings orders. Whilst it would seem sensible to have simple, centralised, and streamlined processes to follow, it is vital that all the implications of such a move are thought through.

As the paper says, some processes will require the intervention of the court at a hearing to resolve disputes such as to suspend warrants (where disputed) for possession hearings and warrants, orders for return of goods on hire purchase, charging order disputes and order for sale applications.

Our concerns centre upon the effect of such centralisation on the ability of vulnerable defendants to interact with the Court Service, to suspend action swiftly and easily where necessary and to ensure that there are safeguards in place to allow this to happen.

If access is limited to digital forms only, then for many vulnerable people, there will be little access to justice without the intervention of a third party such as the free advice sector. There needs to be thought given to assistance by way of court helplines and face-to-face support at court venues.

Question 5: Should there be a default assumption that judgments for payment of money (if not complied with) should no longer leave the creditor to have to take the initiative for the purposes of obtaining information about the debtor’s assets and resources?

We do not have any objections in principle to this proposal. However, this will depend upon the type of information that is passed on to the court and disclosed to creditors. The rules must be very clear what information can be passed on. For example, there will be strict data protection rules on how information on mental health can be passed on if at all.

We are concerned about the data protection issues that this measure would raise. We would urge HMCS to collaborate with the Information Commission over the safeguards that would need to be put in place.

If the creditor is no longer to be required to take the initiative for the purposes of obtaining information about the defendant’s income and assets, it begs the question who should be
responsible for undertaking the information order gathering process instead? It would appear to be a labour intensive, time consuming and possibly cumbersome process for court staff in the current climate of resource difficulties. It also needs to be considered whether the process would need to 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.

If it is to be considered whether the responsibility should be placed upon the defendant to supply details, then we again draw your attention to the Common Financial Statement/Standard Financial Statement process that is being built into the pre-action protocol for debt. This provides a tool for assessing income and outgoings so that it is possible to establish what available income there is to pay debts to creditors. This process does not provide a detailed assessment of assets as would be established by an information order.

We would draw your attention to the Insolvency Service insolvency online debt solutions project which is developing technology to allow debtors petitions to be filed online from April 2016. This online application process includes details of assets, income and outgoings (again to be compatible with the CFS/SFS) and would be worth considering for potential adaptation rather than reinventing the wheel.

We do, however, still have concerns that a requirement to complete an online income, outgoings and assets declaration will exclude anyone who cannot use computer technology or does not have online access. If the Court Service was to go down this route, then it is vital to retain the ability for vulnerable people to fill in the form, on paper, and with assistance from court staff.

Whilst we always encourage people to seek free debt advice, we would suggest that the impact on free debt advice providers, of requiring all defendants to complete an assets assessment needs full consideration as part of the review.

We are also concerned that there should not be harsh penalties imposed on defendants who fail to complete an income, outgoings, and assets assessment. Failure to complete forms or engage with the court process can be for many reasons to do with various forms of vulnerability, vulnerable circumstances or lack of understanding of the implications or requirements. As there is already a problem with persuading people to engage with the court process, innovative ideas to increase engagement, rather than punitive solutions should be sort.

For more information on our response, please contact:

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