Taking Control Campaign response to the Ministry of Justice Control of goods regulations consultation

Introduction

We welcome the opportunity to comment on the Ministry of Justice Control of goods regulations consultation paper. This response has been submitted by the Taking Control coalition campaign for bailiff reform.[1] Taking Control is a coalition of civil society and debt advice groups[2] campaigning for independent regulation of the bailiff industry and other reforms to ensure fair and appropriate treatment of financially vulnerable people facing debt enforcement.[3]

This response has been endorsed by and should be treated as a response by each of the following organisations.

- AdviceUK
- Citizens Advice
- Community Money Advice
- Debt Justice
- Institute of Money Advisers
- Money Advice Trust
- StepChange Debt Charity

[1] https://www.bailiffreform.org/

[2] Members of the Taking Control coalition include Advice UK; Christians Against Poverty; Citizens Advice; Community Money Advice; Debt Justice; The Institute of Money Advisers; The Money Advice Trust; The Money and Mental Health Policy Institute; PayPlan; StepChange Debt Charity; and Z2K.

[3] https://www.bailiffreform.org/storage/app/media/Taking%20Control%20report%20March%202017.pdf

Christians Against Poverty are part of the Taking Control coalition and have submitted a separate response on this occasion.

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

Introductory comment

We broadly welcome the proposals in the Ministry of Justice consultation on changes to the Taking control of goods regulations.

We have set out our detailed comments on the proposals in our response below.

Responses to individual questions

Question 1: Do you agree that the minimum period of notice that must be given to a debtor before the EA or HCEO is able to take control of goods should be increased from 7 clear days to 28 calendar days?

We very much agree that the minimum notice period should be expanded to 28 calendar days. This is an eminently sensible approach which gives people in debt more time to seek debt advice, apply for formal breathing space if required under the Debt Respite Scheme, or to make affordable offers of payment to the EA firm.

Question 1a: If not, please explain why.

We would only caution that 28 days is not always a sufficient length of time for people to get debt advice as many debt advice services do not have the capacity to see everyone who needs help within that timescale.

We would like to see rules and guidance that allow for an extension of the initial compliance period in certain circumstances before the EA is allowed to take further action. This might be where someone is waiting for an appointment with a debt adviser, or there is a delay in obtaining medical evidence of vulnerability such as mental health problems.

Question 2: Do you agree that the minimum period of notice that must be given to a debtor that is not an individual, but is for example, a company, a corporation or a partnership, should remain at 7 clear days?

We do not agree that the minimum period of notice should remain at 7 clear days for companies, corporations or partnerships.

Question 2a: If not, please explain why.

We believe that the minimum period of notice should be set at 28 calendar days for all cases.

we do not think it is straightforward to put the responsibility on EA firms to carry out an assessment. It is a complicated area working out employment status and there may be little information to go on regarding trading names or legal business status in order to make an assessment.

The proposals appear to entail more investigation by the EA firm or creditor before they can issue the relevant notice. We are concerned that EAs would be more likely to err on the side of the shorter notice time period in such cases rather than the more generous 28 days.

It would be much simpler, more consistent and more transparent to avoid this area of confusion, and to treat all parties the same by issuing the same longer period of notice. Business Debtline clients may have limited companies, or run as a partnership, but they are not necessarily going to possess more sophisticated levels of business knowledge than sole traders. This seems to us to be a false distinction between classes of business which will only lead to delays and unequal treatment of different people in debt.

The Money Advice Trust latest impact survey showed that 79% of Business Debtline clients operate their businesses from home. As of September last year, more than a half (54%) of Business Debtline callers had a total household income of less than £20,000. Money Advice trust research with adults across the UK, conducted in August 2022, found that 16% of self-employed people had gone without electricity, water or heating in the three months prior, due to the rising cost of living.[4]

Question 3: Do you agree that the reference to an individual should include a sole trader?

Yes, we very much support including sole traders within the definition of an individual for notice periods. However, please note that we would prefer a standard 28-day notice across the board for the reasons set out above. Many of the self-employed clients Business Debtline deals with are sole traders and are running as micro-businesses with extremely limited means and may well have no separate trade premises. There is no justification in treating such sole traders any differently to individuals in debt. Many sole traders need the same support as people with personal debts and are likely to be trading in a manner that means their personal and business finances are entwined. They will require expert advice on their financial circumstances as a result, and in many cases, will require longer to seek debt advice.

Question 4: Do you agree that where it is not clear whether the debt is owed by an individual that the longer period of 28 calendar days should apply?

We do agree that the longer period of 28 calendar days should apply when it is not clear whether the debt is owed by an individual or a company. However, as we have said, we do not think it is straightforward to put the responsibility on EA firms to carry out an assessment. It is a complicated area working out employment status and we worry that EAs

[4] Money Advice Trust, Impossible Choices: An updated snapshot of the challenges facing households on the cost of living, September 2022

would be more likely to err on the side of the shorter notice time period in such cases rather than the more generous 28 days.

However, please note that we would prefer a standard 28-day notice across the board for the reasons set out above.

Question 5: Do you agree that the proposed amendment to the Fees Regulations makes it clear that HCEOs will be able to agree at the compliance stage to payment in instalments over a longer time-frame than the minimum notice period (currently 7 days), meaning that they do not have to visit the property if payment is not made in a single payment at the compliance stage?

We very much support the proposed amendments to the Fees Regulations to make it clear that HCEOs will be able to agree to payment in instalments at the compliance stage. This brings some much-needed clarity to the debate as to whether HCEOs must visit a property before agreeing instalments, and therefore typically can add additional enforcement fees to the debt automatically.

Question 6: Do you have any concerns about the proposal to require HCEOs to consider whether debts could be repaid in instalments before moving to the enforcement stage?

However, the clarification that HCEOs can accept instalment offers at compliance stage will not improve the likelihood of HCEOs accepting an affordable offer of payment over an extended period of time at compliance stage, unless it is a requirement in the regulations on them to do so. It will make little difference if an HCEO merely "considers" an offer of instalments and then declines it as a matter of course, when there is a clear incentive for them to move to the enforcement stage which attracts considerably higher fees. We are often told that no instalment offer can be accepted, or only an instalment arrangement over a very short period of time can be considered because that is what creditors require under their contracts. There should therefore also be a be a requirement on creditors to behave reasonably and not prevent affordable and reasonable offers of payment being accepted at the compliance stage.

It is vital that government makes it a requirement on HCEOs and EAs to accept payments in instalments, so that they **must** do so rather than "*must consider*" doing so. The wording needs to be strengthened to require HCEOS to:

- consider financial circumstances;
- accept affordable repayment offers;
- accept standard financial statements in support;
- take into account vulnerabilities; and

- accept offers of payment from debt advisers on behalf of their clients.

Question 6a: If so, please explain why

We welcome the proposed clarification in the draft regulations that HCEOS and EAs *"must consider whether the debt could be paid in instalments over a longer time period"* without the need to move to the enforcement stage. However, we would strongly recommend strengthening the requirement to make it clear that the HCEO and EAs must accept instalments in the circumstances set out in our answer to question 6 above, rather than merely consider doing so. Otherwise, the incentives remain for HCEOs to move to the enforcement stage which attracts both higher and additional fees.

At the very least there must be a clear decision taken with an explanation noted as to why the payment proposals have not been accepted before moving to enforcement.

We are not convinced that the proposed wording as it stands will lead to good outcomes for our clients as a requirement to "consider" instalments is too ambiguous.

Question 7: Do you think that it would be beneficial to set out in guidance that the steps set out in the section about proposal C, at points a to i, should be undertaken at the compliance stage before moving to the enforcement stage?

We very much support the proposal to set out what tasks should be undertaken at the compliance stage before an EA can move to the enforcement stage. This has been a long-standing policy recommendation of the Taking Control Campaign.[5]

We note that sections of the proposals are divided into guidance that refers to steps already set out in legislation (points (a), (b) and (c)) but that the proposal is to add points (d) to (i) into regulations.

"a. To act on any notification that the debt is exempt from enforcement action, for example because the debt is in a Breathing Space or has been consolidated into a Debt Resolution Order. This reflects legislation elsewhere, such as the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020."

We would just note that point (a) refers to a "Debt Resolution Order". We believe that this should be reference to a Debt Relief Order as we are not aware of a debt remedy called a Debt Resolution Order. It would be useful to include bankruptcy and IVAs into this point, as

[5] https://www.bailiffreform.org/storage/app/media/Taking%20Control%20report%20March%202017.pdf

examples of statutory debt solutions that will mean a debt is exempt from enforcement action.

We would query whether the guidance should be strengthened. The law states that enforcement agents cannot enforce a debt which is under the Breathing Space scheme, therefore "*to act on any notification*" does not seem to reflect the legal position as this is not merely guidance. We would also wonder if an enforcement agent breaching these provisions would be grounds for considering certification sanctions.

We would like to clarify point (b) which states as follows:

"b. Where the debtor is vulnerable, that the debtor has been given an opportunity to seek advice. This is required by Regulation 12 of the TCG Regulations."

We understand that this reference is to The Taking Control of Goods (Fees) Regulations 2014[6] rather than the Taking Control of Goods regulations. However, this regulation is very limited in scope and the paper rather gives the impression that the regulation is more encompassing than is the case.

It appears to us that it only applies at the removal stage where an EA would be expected to give a "*vulnerable person*" the opportunity to seek advice. This must only apply to a relatively few number of cases, perhaps where there is a vehicle concerned. We note that a recent High Court case where enforcement fees were disallowed, related to a car being removed despite proof of vulnerable circumstances.[7]

"12. Where the debtor is a vulnerable person, the fee or fees due for the enforcement stage (or, where regulation 6 applies, the first, or first and second, enforcement stages as appropriate) and any disbursements related to that stage (or stages) are not recoverable unless the enforcement agent has, before proceeding to remove goods which have been taken into control, given the debtor an adequate opportunity to get assistance and advice in relation to the exercise of the enforcement power."

We believe that this regulation should be strengthened to ensure that EAs are required to give adequate time for anyone in vulnerable circumstances to seek debt advice and to be directed to sources of free debt advice. This should happen at a **much earlier stage of the process**, from the first point that the EA is aware of the situation and is made aware of vulnerable circumstances. We do not see that regulation 12 is performing the intended function of protecting vulnerable people from enforcement in its current iteration.

The expectation is that where someone is given the time to seek debt advice, that any proposals that are put forward as a result of that debt advice should be accepted. There is a

[6] https://www.legislation.gov.uk/uksi/2014/1/regulation/12/made
[7] Progressive Property Ventures LLP v Mrozinski

disparity between the good intentions here. The reality for many debt advisers is that despite explaining to the EA that their clients are vulnerable, and putting forward an offer of payment that is affordable in their circumstances these are regularly refused. This means that a detailed and resource intensive advice process has not led to a good outcome for the client. Therefore, regulations and guidance need to be strengthened to ensure that EAs must take notice of the debt advice provided and accept proposals, or recommendations to return the account to the creditor.

We have commented on the requirement to send an information sheet in our response to questions later on in the consultation.

Question 8: Do you agree that the steps set out in the section about proposal C at, points d to i, should be prescribed in the TCG or Fees Regulations?

We very much agree that the steps that should be required to be carried out at compliance stage set out under the proposals should be prescribed in the regulations. This is a vital step forward in ensuring that EA firms are required to carry out certain steps at compliance stage before adding further enforcement fees.

We believe that the current fee stages act as an incentive on EAs to escalate enforcement action unnecessarily. Properly constituted, and enforced, the steps at compliance stage should help protect consumers, limit their costs and deter further enforcement activity.

Question 9: Are there other steps you think should be prescribed in the TCG or Fees Regulations and/ or in guidance?

We would point out that the Ministry of Justice needs to be very clear as to its role in setting standards in guidance given the potential for the role of the ECB to set standards to overlap. Statutory guidance must be able to be enforceable, and also flexible enough to be reviewed where necessary.

Any guidance and regulation amendments must complement the ECB standards which are to be developed shortly. It is also important that fee regulations and guidance is enforceable. It should be clear where the role is for supervision and enforcement and if it sits with government or the ECB. This seems to us to be an area where statutory underpinning for the ECB role will be vital in ensuring that the ECB has the powers to regulate adherence to both regulations and statutory guidance, as well as its standards.

We recommended that an equivalent to the Mortgage Pre-action Protocol Checklist[8] or an amended version of the Debt Pre-Action Protocol[9] should be considered. The checklist is required by the court to demonstrate that lenders have complied with the Protocol. An

[8] https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha
[9] https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/protocols/debt-pap.pdf

enforcement pre-action checklist should prescribe what actions must be taken by the bailiff before they can move from the compliance stage to the enforcement stage. This would safeguard the bailiff by enabling them to show that every effort had been made to contact and negotiate with the person in debt. It would also protect the person in debt and mitigate the possibility that the first stage could be bypassed without a realistic attempt to negotiate, in the search for greater fee rewards and higher returns to creditors.

We have commented on the individual steps set out below.

"d. That an Information Sheet, containing specific information for debtors about their rights and responsibilities and signposting them to advice, must be enclosed with the Notice of Enforcement. A more detailed discussion on the Information Sheet and what it should contain is set out in Section D below."

We have commented on the information sheet proposals below.

"e. That if the debtor is an individual and no response or contact has been received to the Notice of Enforcement after 14 days, the Notice of Enforcement and Information Sheet must be resent."

We agree that this is a sensible proposal. In other regulatory regimes such as when considering the FCA consumer duty, we would be required to look at other channels of communication, especially if a consumer had indicated that they prefer to communicate in a specific way. However, this might be difficult in the enforcement context unless someone has already been in touch and have given explicit consent to being contacted by other methods such as email, text and so on.

"f. Following the issue of a Notice of Enforcement, if it becomes apparent that the debtor has moved to a different address, that a new Notice of Enforcement must be sent to that address and the notice period must start again."

Again, this is sensible, and we welcome the intention that the notice period should start again, when it becomes evident that someone has moved address.

"g. Where vulnerability has been reported that the EA or HCEO must consider whether it is appropriate to proceed with enforcement action and must contact the creditor for any relevant information they have and to canvass their view. This reflects guidance in the Taking Control of Goods: National Standards."

We would question the wording here. We would point out that the vulnerability section of the national standards was due to be updated after the 2014 edition. It is now substantially

outdated in relation to current thinking on vulnerability.[10] It is not ideal to just reflect the current version of the national standards where these rules could go further.

We would query how vulnerability has been identified in this context and who makes the assessment of vulnerability? Clearly in some cases, this will not be apparent until the EA visits, or once the individual has sought debt advice.

- If it is the creditor, then they should not be allowed to send the case out for collection by an EA.
- If it is an advice agency reporting vulnerable circumstances on behalf of the consumer themselves, there should be a requirement for this finding to be accepted by the EA firm and the creditor (unless there are exceptional circumstances).
- If the consumer discloses their vulnerable circumstances to the creditor or EA, then this should be accepted unless there is very good reason not to do so.

We would question what is meant by the EA or HCEO *"must consider whether it is appropriate to proceed"* in this context. We do not think the EA should be left with the discretion to make such a decision and should not proceed at all. This should always be a situation that requires the EA to pause collections and should be required to return the warrant or writ to the creditor.

"h. That EAs and HCEOs must consider whether the debt could be paid in instalments, over a longer time period than the minimum period of notice stipulated in the TCG Regulations, without the need to move to the enforcement stage."

We would want to see this point strengthened in the light of our points regarding accepting an affordable offer of payment without arbitrary time limits. We would suggest that it is imperative that this goes beyond a requirement on the EA to "*consider*" whether the debt could be paid in instalments without any obligation on the EA to accept a reasonable offer of payment.

"i. That in cases where an agreement to pay by instalments is broken, a warning must be sent that payment is due before moving to the enforcement stage."

This is reasonable but should be strengthened to provide a timescale for how long a period should elapse before the warning is sent. There should also be a timescale for how long a

[10] https://www.fca.org.uk/publications/finalised-guidance/guidance-firms-fair-treatment-vulnerable-customers
Consumer Duty https://www.fca.org.uk/publication/policy/ps22-9.pdf

period the consumer should be provided with to make good the missing payment before the EA is entitled to move to the enforcement stage.

We are concerned that if such time period provisions are not clearly set out, then bad practice could result, with warnings being hand delivered at the same time as the enforcement visit is carried out or sent by post the day before.

Question 10: Do you agree that the TCG Regulations should be amended to require EAs to send a statutory information sheet with a Notice of Enforcement?

Yes, we support the amendment of the regulations to require EAs to send a statutory information sheet with the notice of enforcement. It is really important that a clear and simple message is conveyed that helps engagement and helps individuals to understand what will happen if they contact EAs or seek debt advice.

However, we have some additional points on the best way for this to be positioned to best encourage consumer engagement.

It is important that the information sheet conveys a clear message that help and support is available and that there will be positive outcomes if the recipient seeks advice. We are concerned that this message might be contradicted by the formal and rather more threatening message in the Notice of Enforcement which will be received at the same time.

Research by StepChange Debt Charity[11] surveyed clients about their experiences receiving collection communications from creditors. An overwhelming proportion of respondents said that these communications provoked strong negative emotions such as anxiety, helplessness and a feeling of being overwhelmed.

People who said they experienced one or more of these negative emotions were more likely to disengage and waited longer before seeking debt advice. People who thought their creditors were unhelpful were also less likely to seek debt advice early. People were more likely to deal with payment requests by borrowing where they perceived some or all of their creditors as unhelpful. Vulnerable clients who said they were *'not in a fit state to help themselves*' were disproportionately more likely to borrow money to deal with payment requests.

[11] StepChange Debt Charity (2022): *Mixed Messages: Why communications to people in financial difficulty need to offer a clearer, better route to help*. https://www.stepchange.org/Portals/0/assets/pdf/2022/policy/mixed-messages-report-2022.pdf

In the StepChange research, feedback from survey respondents and focus group participants highlighted aggressive and legalistic language as particularly stressful.

> *"The truth is, once you've started to panic after the first couple of paragraphs, you probably won't read the rest… When I first got into financial difficulty and I wasn't as mentally strong as I am now, if I read the first line, that would have put me on the floor and I wouldn't have been able to read anything else."*

> *"It's scary for me so immediately I don't know if I want to read this and I might put this in the drawer… it doesn't come across like 'we're here to help'. It comes across as a threat…"*

This suggests that leaving the enforcement notice largely as it is and adding an information sheet may not be effective in encouraging engagement. The enforcement notice may be read as a legalistic threat, and the information sheet will not necessarily counter the negative emotions created by the notice. People receiving the notice and the information sheet may read this as a mixed message that further confuses and disempowers them from seeking help.

In contrast, the StepChange research found that people who were given achievable options to deal with their debt and reassurance that they would be helped were more likely to engage and seek debt advice earlier. When we reworked a statutory Consumer Credit notice to give more prominence to options and help, focus group participants said it would have made them more likely to respond.

> *"It's like the complete opposite of what I've had before. I just think the language is a lot more focused on how they can help you sort out the problem rather than just, you know, claiming the money back".*

> *"I think I would have phoned them. It sounds like there is something they can help you with. It's less of a demand and there's more of an offer of assistance".*

This suggests that a new information sheet will not by itself lead to good outcomes for people or improve engagement if the messaging in the Notice predominates.

The Ministry of Justice should consider how the formal Notice of Enforcement can be amended to help create a clear communication that reinforces the message that seeking help will lead to a positive outcome. For example, a clear message should be conveyed that you can expect a positive response from the EA firm if you contact them, and that they will consider your circumstances and an offer of payment. Here it will be important that the conduct of enforcement firms and agents matches the messages in the enforcement notice and information sheet.

StepChange research also found that people had low awareness about debt advice and simply signposting to debt advice in a leaflet did not necessarily encourage engagement.

People also delayed seeking debt advice because they did not understand how debt advice would help them.

> *"They put contact details of advice organisations on letters but didn't really explain how they could help".*
>
> *"Eventually… when it was explained to me properly, I realised [debt advice] could help".*
>
> *"… list the options that they could help me ... I really wasn't aware of what I should do. I just thought if I didn't have the money to pay my only option was to ignore it".*

It will be important for the information sheet to describe the advantages of seeking debt advice and why this will lead to better outcomes, particularly where someone has multiple debts or are in vulnerable circumstances. However, that description of how debt advice can help will need to lead to a helpful response from enforcement agents following that debt advice.

Question 11: Do you agree with the information provided on the draft Information Sheet (Annex B)?

We think that the information provided on the draft information sheet should be amended. We have set out additional comments on the content which we have set out in our response to question 12a below.

Question 11a: If not, please explain why.

Please see our response to question 12a below.

Question 12: Is there any other information that you would want to be included in the Information Sheet?

Yes, we would like to see amendments to the information sheet. We are happy to provide detailed amendments to the wording to the Ministry of Justice in addition to this consultation response. We would like to include suggestions on simple English wording, and the information that should be included on dealing with an EA and on enforcement powers generally.

We believe that there is a vital point to make that there should be coherence between the two communications in tone. We have set out our thoughts above. Clarity of message is also vital, and too much information can be confusing for the reader. We can help to make the message more direct and simpler for the reader. In many cases, people are extremely stressed and do not have the "mental bandwidth" to take in complex information that is

caveated and nuanced. Ideally, best practice would suggest that sufficient time and resources would be dedicated to including the thinking of people who have direct lived experience of bailiff action, to understand what messages would motivate them to seek advice or respond to the notice.

We appreciate that the requirements under the FCA Consumer Duty in relation to consumer understanding, do not apply to notices issued by the Ministry of Justice. However, there are general principles that it is worth adapting to the development of consumer-facing information.[12] You may want to look at the FCA arrears and default information sheets for inspiration on wording and layout.[13] These were updated in 2021 in consultation with the advice sector.

Question 12a: If so, can you explain what it is and why it should be included?

We would suggest that the amendments listed below are considered at this point, but as we have said, we would be happy to provide a more detailed set of amendments to the information notice as it could be a lot more direct in its language and simpler to understand.

As we are concerned that the information sheet could be quite lengthy, it may be helpful to provide a summary of key points at the start of the information sheet with more details set out later in the document.

Content

In terms of content, we are concerned that the notice does not include clear information that in most cases there is no requirement to let an EA enter your home and in what circumstances there can be any form of forcible entry. This is crucial consumer information that should be included in this section.

"If you are an individual, you will usually have at least 28 days to contact the enforcement agent. If you do not contact them within the time period set out in the Notice of Enforcement, an enforcement agent will visit your home. This will increase the fees that you will be asked to pay."

The content does not explain the circumstances under which an EA may request you enter into a controlled goods agreement e.g. that this takes place after entry into the home (apart from vehicles and outside goods).

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[12] In England, adult literacy is often referred to in terms of 'levels' – for example, a 2011 government survey of adult literacy skills found that 14.9% (or 1 in 7) of adults in England have literacy levels at or below Entry Level 3, which is equivalent to the literacy skills expected of a nine to 11-year-old. https://literacytrust.org.uk/parents-and-families/adult-literacy/what-do-adult-literacy-levels-mean/

[13] https://www.fca.org.uk/publication/information-sheets/arrears-may-2021-cmyk-a4.pdf https://www.fca.org.uk/publication/information-sheets/default-may-2021-cmyk-a4.pdf

In addition, the goods listed as exempt under "What goods can an enforcement agent take control of?" is very limited. This list should include:

- Goods that do not belong to you e.g. third-party goods
- Vehicles that are on hire purchase agreements

We would also like to see information on how to complain about an EA and how to check if your EA firm is a member of the Enforcement Conduct Board (ECB). As the ECB will be setting up an independent complaints function this will also need to be included in future.

Debt advice organisations

There is an inconsistency in the information sheet in the way in which debt advice is referenced. It would be optimal to refer to debt advice in the same way throughout. We would suggest "*we suggest you seek free debt advice at this point*" or similar.

The list of debt advice organisations is incomplete.

- We would recommend including Money Helper. There will be an approved set of wording recommended by Money and Pensions Service which you may want to check. The FCA information sheet says:

  "Get free debt advice. You can get free, non-judgemental and independent help and advice from a number of organisations. You should first visit MoneyHelper's Debt Advice Locator Tool: www.moneyhelper.org.uk/debt-advice-locator. You can also call 0800 138 7777 or WhatsApp message +44 7701 342744."

- AdviceUK's web address should be amended to a link to the member directory for England and Wales, https://portal.adviceuk.org.uk/s/searchdirectory?id=a2n4J0000002KtY and their phone number removed.

- Citizens Advice has not been included in the list and needs to be added. "Citizens Advice offers free, confidential and impartial advice to anyone who needs it. For more information visit www.citizensadvice.org.uk."

- Money Advice Trust should be replaced with National Debtline and "Freephone" added in brackets.

- We would also suggest adding Business Debtline. "Business Debtline offers free and confidential debt advice to the self-employed and small businesses - www.businessdebtline.org or 0800 197 6026."

- StepChange is usually referred to as StepChange Debt Charity.

- Community Money Advice has not been included in the list and needs to be added. "Community Money Advice: You can find help and support including your nearest local CMA centre at www.communitymoneyadvice.com or 01743 341929."

Question 13: Given the proposal to require EAs to send debtors the Information Sheet with a Notice of Enforcement, do you think that it is additionally necessary to amend the notice?

Yes, we believe that the notice of enforcement needs amending for the reasons set out below.

Question 13a: If so, please set out why and how.

We suggest that we consider how the formal Notice of Enforcement can be amended to help create a clear communication that reinforces the message that seeking help will lead to a positive outcome. For example, a clear message should be conveyed that you can expect a positive response from the EA firm if you contact them, and that they will consider your circumstances and an offer of payment. It is also important to describe the advantages of seeking debt advice and why this will lead to better outcomes, particularly where someone has multiple debts or are in vulnerable circumstances.

We appreciate that the statutory notice of enforcement form can only be updated via parliamentary processes, whereas an information sheet in guidance could be amended more regularly as necessary. We are wary of suggesting that the notice moves into guidance, as it is important to ensure that all EAs are required by law to use the same prescribed notice rather than invent their own wording. Would one option be to develop a single combined notice when parliamentary time allows that considers amending both form and content to better reflect the more positive messaging in the information sheet.

Question 14: Do you agree with the proposals listed in the section about proposal E setting out the circumstances when the ES2 fee can be recovered?

We agree with the proposals listed in the section about proposal E in the paper. We agree that amending the fee regulations as proposed should make it clearer that Enforcement Stage 2 (ES2) **only c**ommences when goods are physically secured at the property or by removal for storage. We hope this will remove what is said in the paper to be *"the uncertainty and confusion which has led to a variety of inappropriate practices".*

The paper amply illustrates the different interpretations of the regulations that have led to inappropriate charging of the ES2 fee in addition to the Enforcement Stage 1 fee. We would

hope that the proposals will substantially limit the number of instances when ES2 is charged, therefore limiting the frequent examples of fees escalating unnecessarily and unreasonably in High Court enforcement cases.

We support the intention to provide guidance in the National Standards as to what reasonable steps the HCEO must take before moving to ES2. However, as we have pointed out before, this guidance is not binding and is not therefore supervised or enforced currently by government or any regulatory body.

Having said that, guidance should also make it crystal clear what is required under the compliance stage in relation to accepting affordable offers of payment to avoid any temptation to refuse to agree an instalment arrangement with the intention of securing additional fees at the enforcement stage.

Question 14a: If you do not agree, please explain why.

We note that the consultation paper suggests that data shows that High Court enforcement firms still incur greater costs *"but these costs are falling".*

We believe that the enforcement stage 2 fee does not serve a purpose and should be abolished. We do not believe that HCEOs incur sufficient extra costs to justify its continuation. We see no reason for HCEOs to charge two enforcement stage fees, and the HCEO fee structure should be aligned with the general fee structure for EAs.

At the very least, these differentials should be kept under regular review.

Question 15: Do you think the proposals could go further.

As we have said we do not agree that there should be two separate fee scales. There should be a regular review to assess if HCEO costs are really still higher with the aim of aligning the fee scales where possible.

Question 16: Do you think that the Regulations should be amended to require the non-High Court fee scale to be used for low value High Court cases?

We very much agree that the regulations should be amended to require the non-High Court fee scale to be used for lower value High Court cases. We agree with the assessment in the consultation paper that High Court fees "*are disproportionate to low value debts*". The enforcement stage fee for other types of debt is considerably lower than the combined High Court enforcement fees.

Question 17: Do you think that the threshold below which the non-High Court fee scale should be used should be set at: £800 or £1,200, or do you think the threshold should be set at a different amount?

We would argue that the threshold should be set at a higher level than £1,200 for the reasons set out in our response to question 17a. In the alternative, the threshold should be set at £1,200 for the reasons set out in the paper, that would align this with the new debt threshold above which a percentage fee can be recovered.

To help inform this debate it would be very helpful for the Ministry of Justice to obtain statistics on the types of debt and the average amount owed that is subject to High Court recovery versus the type of debt and the average amount owed under EA recovery.

We would suggest that given the cost-of-living rise, that more people than ever will be struggling to pay business debts, domestic energy, water and telecoms bills, all of which could be enforced by HCEOs if they exceed the £600 transfer threshold on their county court judgment. Ofgem recently estimated that the collective gas and electricity arrears owed was about £2.6 billion.[14] The typical energy bill under the price cap stands at £1,925 from October 2023 and is due to rise from January 2024.

We have set out the average debt type amounts below, where we have data on utilities arrears.

Citizens Advice: The mean average for quarter 2 of 2023, Citizens Advice clients owed £1,713 in energy arrears and £1,094 for water arrears.[15]

National Debtline: On average in 2023, National Debtline clients owed £1,122 in energy arrears, £956 in water arrears and £720 to telecoms firms.[16]

StepChange Debt Charity: On average, in 2023, StepChange clients owe £1,679 in energy arrears, and £1,151 for those with water arrears.

Question 17a: If you think the threshold should be set at a different amount, please set out why.

We believe that people should be protected from the practice of collecting utilities debts by HCEOs given the difficulties in dealing with HCEO action and the process for suspending warrants. In particular, we are very concerned that vulnerable people who cannot afford their ongoing energy bills and are unable to pay their arrears in the current cost of living ongoing crisis will be penalised by high fees and charges for HCEO enforcement.

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[14] https://www.ofgem.gov.uk/publications/debt-and-arrears-indicators
[15] Cost of living dashboard https://public.flourish.studio/story/1810858/
[16] 2023 National Debtline client survey

As illustrated by our examples above, in many cases energy debt is over £1,200 and water and telecoms are not far behind. This measure to reduce the fee level for debts owed below a set threshold is a step forward along the way. We believe that domestic utility debts should generally attract the lower fee scale.

As average energy bills have increased by more than £1,200 a year, more people might be swept into this cohort. Unless the threshold is set at a higher amount than £1,200, then people with utilities arrears will not be protected from extra fees.

Question 18: Do you agree with the proposed amendment to the Taking Control of Goods: National Standards?

Yes, we support the proposed amendment to the National Standards. However, we would note that the National Standards act as voluntary guidance and are not enforceable. Indeed, there is no body to enforce this provision, or is able to take action against creditors who ask that firms remit a percentage of their fee income to them.

However, we would add that creditor behaviour can be at odds with government policy on protecting people in vulnerable circumstances. We would suggest that the taking control regulations should specifically prohibit inappropriate cases being referred for enforcement, including exempting recipients of Council Tax Support, who have already been identified as requiring additional support through locally determined criteria, from bailiff action altogether. However, we are concerned that these regulations would not have the power to bind creditors' behaviour and might not be practicable.

One other possibility is to consider how to amend the Council Tax Administration and Enforcement Regulations to restrict local authorities' powers to pass a liability order to EAs for enforcement in certain circumstances, for example where people are in receipt of Council Tax Support or on benefit income.

In our experience, a large proportion of our clients will be on benefit income and have a negative budget so that their income is less than their outgoings for essential bills. However, creditors such as local authorities in particular are very likely for to pass typically council tax debts on for enforcement without due diligence to look at alternative repayment methods, or accepting offers of payment at that point.

Question 19: Do you agree with the proposal to review these reforms and the fee levels after three years, and to review the fee levels every three years thereafter?

We very much agree with the proposal to review these reforms and the fee levels. It makes sense that this review should take place after three years for the reasons set out in the paper.

In the case of the fee levels, and percentage fees, the review timetable should be made binding within the regulations to ensure that the review takes place. Government should ensure this review is carried out every three years.

We also agree with the sentiments in the paper, that say there is a *"range of factors that must be considered in order to ensure that the levels the fees are set at are fair to all parties"*. We therefore agree that reference in the Explanatory Memorandum to the Fees Regulations to review the fees *"annually with reference to the latest Consumer Price Index"* should be removed. We welcome a broader review that takes into account the various contributing factors beyond just inflation.

We would like to see some clear criteria for the future fee reviews to be set out in the regulations. The starting point for these criteria should be a clear statement clarifying the government's role in setting enforcement fees and the policy considerations that should flow from that. Three immediate points flow from this.

Firstly, the legislation. Paragraph 62, Schedule 12 Tribunal, Courts and Enforcement Act 2007 allows for regulations to make provision for the recovery of amounts in respect of enforcement related costs. Given that the primary legislation empowers recovery of these cost from 'the debtor', paragraph 62 must provide an implicit cost cap to prevent statute from allowing an unfair and unconscionable amount of fees to be recovered from people facing enforcement action.

It therefore falls on the Ministry of Justice (or another body appointed to review enforcement fees) to ensure that the regulations only allow for fees that recover reasonable enforcement related costs. So, the first task for the three-year review is to ensure that fees are reasonable in practice and the review criteria must align with this aim.

Secondly, as the Dehayan review[17] points out, enforcement firms are chosen by creditors, but enforcement costs are paid for by those who are facing enforcement. As a result, there is no market mechanism putting competitive pressure on enforcement costs. The fee regulations therefore need to consider the economic reasonableness of the fees to ensure these do not provide 'rents' for incumbent enforcement firms. Here the Dehayan review shows that policy decisions on the level of enforcement fees were based on aggregated average market costs and an average industry average profitability target. So, there should be a starting presumption that the fee regulations at any particular level may be providing rents and subsidies for less efficient firms.

Here we would argue that the reasonable recovery of enforcement costs should not take maintaining the current enforcement market structure and participants as a starting point. Effective enforcement might be possible at a lower cost by other means, for instance

[17] https://consult.justice.gov.uk/digital-communications/transforming-bailiff-action/supporting_documents/enforcementfee%20structurereview.pdf

through the public sector with a lower allowance for investments costs, or through setting fees at a level that drives efficiency.

Here we note the statement in paragraph 6 of the government response to the fee review that:

"The Regulations sought to strike a balance between providing enough revenue for EAs and HCEOs to run a profitable business, whilst seeking to protect debtors from disproportionate costs."

It is quite possible that providing enough revenue for enforcement firms to run a profitable business is not compatible with protecting 'debtors' from disproportionate costs. For the reasons outlined above, we believe that this is not the right starting point for a fee review.

Thirdly, we welcome the recognition in the government response to the review of the 2014 reforms that *"debt recovery can have a damaging impact on the physical and mental health of vulnerable people who are struggling to repay what they owe"*. Enforcement costs increase debts and can add to the damaging impact of debt recovery.

Here we would argue that the government has a duty of care to ensure that legislation imposing fees does not create harm or hardship to financially and otherwise vulnerable people. This duty of care should inform the fee review independently of considerations about enforcement firm profitability. This should include the possibility of reducing fee levels depending upon wider factors affecting the ability of people facing enforcement to pay fees without harm.

These principles suggest a number of candidate criteria for future fee reviews. A non-exhaustive list might include the following.

- A starting point that defines the reasonableness of cost recovery independently of consideration of ensuring enforcement firms' profitability. The fee review should question the current market structure rather than taking the maintenance of this as a policy aim.

- An acknowledgment that the fee structure should play a key role in driving efficiency across the sector. There should be critical examination of firms' cost data entering the fee review. It does not seem reasonable that cost recovery from people facing enforcement should subsidise inefficient firms or over-reward more efficient firms with excessive 'rents'.

- The fee review should take a separate look at costs and revenues for each specific debt type, as well as following the 'representative firm approach'. The fee review should always challenge whether differences in the costs and revenues for different debt types makes a single fee model for all debts unreasonable for any particular

debt type. If this outweighs the consumer protection of a single fee regime for all debts (which may be small) then the fee review should question the current model.

- The fee review should include consideration of other policy interventions that could lower the overall cost of enforcement that is passed on through fees. For instance, the government should set a progressive target to reduce the number of cases passed by creditors to enforcement firms that are unenforceable / there is no ability to pay. Review of both the Fee and Taking Control regulations could require creditors to take pre-enforcement 'due diligence' actions before a case can be passed to enforcement.

- The fee regulations could do more to address conduct issues. For instance, the fee review could reduce enforcement stage fees for the duration of the next review period for firms with a proportion of compliance stage settlements below a benchmark in the previous review period.

- The review should take an evidence-based approach to ability to pay enforcement fees and the risk of harm to people in financial difficulty or otherwise vulnerable.

Finally, the fee review must be transparent. Enforcement fees are imposed by statute and the government should commit to showing the factual and policy reasons for the outcome of a fee review, as other price / competition regulators do. We do not believe it was reasonable or acceptable for the government to not publish data underpinning the outcome of the most recent few reviews on the basis of 'commercial sensitivity'. Aggregate cost, revenue and profitability data was published in the Dehayan review and it unclear why this review should be any different.

Questions for EAs, HCEOs and enforcement firms

Not applicable.

Questions for Debt Advice Providers

Question 26: To understand better whether the proposals will create a greater take-up of advice for the debt advice sector, do you have any data that can help us understand the regulatory burden these proposals may have on civil societies and charities.

We would expect that the proposals would generate increased demand within the debt advice sector, particularly if the requirement for active signposting to debt advice is implemented, alongside the new information sheet. We would not describe this as a regulatory burden as such. However, any increased demand on the advice sector will lead to capacity and therefore funding issues for the sector. It is vital that further funding of the sector is considered so that debt advice providers can deal with any increased demand.

We are not in a position to estimate the scale of the burden or the cost per case of repeated interventions at this point. However, this might be possible for individual agencies to estimate if required.

There will be an associated cost to government if there is an increase in applications for the debt respite scheme and for debt solutions such as Debt Relief Orders.

We believe that setting the parameters correctly regarding enforcement agent and creditor behaviour is crucial when looking at the potential impact on debt advice. This means that where a person in debt has sought debt advice and presents a budget worked out using the standard financial statement and makes an affordable offer of payment, this should be accepted. There is no point in creating an expectation that people should seek debt advice, if that advice is then discounted and ignored. We need to see good outcomes for people how have been incentivised to "do the right thing" and seek advice. We do not want to see a revolving door where the same clients must seek further debt advice because their offers of payment have been refused, and the enforcement action is carrying on regardless of debt adviser intervention.

Policy change should drive good behaviour. The costs of providing repeated advice interventions which do not lead to good outcomes for our clients would undermine the point of the policy intention in our view. This is both frustrating for the client and their adviser, and takes up resources that could be used by the advice sector to help more people. The resource burden is increased because the service has not been able to provide a successful intervention. The impact on the debt advice sector would be relieved where there is a reduction in the failure demand of repeated advice sessions due to the behaviour of enforcement firms or creditors refusing to accept affordable offers and stopping enforcement action.

Changes should drive good behaviours, so more people seeking debt advice earlier in the process generally makes their debts easier to resolve.

Equalities impact

Question 27: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.

We believe that the government should carry out an equalities impact assessment. It is not possible for the debt advice sector to assess the equalities impacts of the proposals on individuals with protected characteristics as we do not have the resourcing to do so.

Some of the worst outcomes we see as a sector are for people who have protected characteristics, and another characteristic that places them at greater risk of harm (vulnerability).

We would expect that generally there would be positive impacts on groups with protected characteristics. Although the proposals are limited in scope, we would expect that enforcement activity is likely to affect demographics that are more likely to be both in debt, and potentially vulnerable - such as people who are at home more and likely to answer the door, such as older people, people with caring responsibilities or disabilities.

In addition, people with mental or physical health conditions may find it harder to represent their own interests or to engage in certain processes. This can be the case for a wide range of reasons including, but not limited to, difficulties with comprehension, challenges communicating or utilising certain communications channels, energy levels, the effect of medication and the inaccessibility of certain processes or communication channels.

Question 28: Do you agree that we have correctly identified the range and extent of the equalities impacts under each of these proposals set out in this consultation? Please give reasons and supply evidence of further equalities impacts as appropriate.

We cannot comment on this question at this stage.

Question 29: Are there forms of mitigation in relation to equality impacts that we have not considered?

We cannot comment on this question at this stage.

Any other observations

Question 30: Do you have any general comments to make on the proposals mentioned in this paper?

We do not have any further comments to make on the proposals in the paper. Our points have been covered in the individual responses above.