



# 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 issued by The Lord Chancellor's Department**

Presented to Parliament by the Lord Chancellor  
by Command of Her Majesty  
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# Foreword

Society wants those who owe money judgments to pay their dues but also wants to protect the vulnerable. We all want to prevent unacceptable behaviour from those with the difficult task of making debtors pay but we also want to ensure that creditors, many of whom may be in financial difficulties themselves, receive the money to which they are properly entitled. It is important that individuals have the right to manage their own financial affairs, but we are all concerned to address issues of overindebtedness. We must protect individuals' rights to privacy while recognising that controlled access to information about debtors' circumstances is essential, since there will always be those who deliberately seek to avoid payment.

The courts and those who bear the responsibility of enforcing the courts' judgments have to find a way to balance these competing demands and achieve the fair balance between rights and responsibilities, for both debtors and creditors, which we all expect in a modern and democratic society.

The Civil Enforcement Review has been a comprehensive and thorough piece of work for the Lord Chancellor's Department; it is an important part of the civil justice reforms. The issues involved are sensitive, complicated and finely balanced; they are at the heart of the justice system and fundamental to its aims. There have been several previous attempts to review the enforcement system – they changed little of substance. This time we believe that we have got it right not only because we have delivered tangible results along the way but because, most importantly, we have engaged in detailed and extensive consultation through working groups and expert panels and the publication of several reports and a great deal of research. We are grateful to everyone who has participated in the Review including county court staff and bailiffs, court users, debt advisors and private sector bailiffs. There are no easy answers and no 'quick fixes' but as a result of your involvement and support we believe that this comprehensive package of proposals for legislative change is soundly based and will be effective – we commend it to you.



*Irvine Khairing*



*Patsy Scotland*

# Executive Summary

The Government is committed to improving access to, and the efficiency of, civil justice as it is crucial that creditors who have established a legitimate claim should be able to pursue it through a straightforward and accessible system, and if necessary enforce a judgment by the most appropriate means.<sup>1</sup> Equally, debtors who genuinely do not have the means to pay should be protected from the oppressive pursuit of their debts.<sup>2</sup>

## Chapter One: Background

This Chapter describes the important role that enforcement plays in the criminal and civil justice systems and in a modern, democratic society which requires ways to enforce payments such as taxes.<sup>3</sup> Without effective means of enforcement people ordered to pay a court judgment or criminal penalty would have little or no incentive to do so and the authority of the courts, the effectiveness of penalties, and confidence in the justice system would all be undermined.

The scope and progress of the Review and some of its achievements to date are then set out, including the recent introduction of unified rules for charging orders, third party debt orders, orders to provide information and the new *National Standards for Enforcement Agents*.

The Civil Enforcement Review has carefully considered the existing mechanisms and legislative processes for enforcement – much of which are archaic. It effectively draws to an end now with the comprehensive package of proposals for enforcement agents, data disclosure orders and other court-based enforcement methods that are set out in the following Chapters. These will put in place a system that is better equipped to deliver effective enforcement now and to adapt in the future. Civil justice and its enforcement processes have to continue to evolve and be responsive to other changes, for example the ongoing work in respect of personal insolvency, ideas arising from the criminal justice reforms presently before Parliament, and from Europe. The new mechanisms we propose, after careful consideration and consultation, will more readily take on board new initiatives than the structures they replace.

<sup>1</sup> For definition of the term “creditor” see Annex 3 – Glossary

<sup>2</sup> For definition of the term “debtor” see Annex 3 – Glossary

<sup>3</sup> For definition of the term “enforcement” see Annex 3 – Glossary

<sup>4</sup> For definition of the terms “enforcement agent” and “warrant” see Annex 3 – Glossary

<sup>5</sup> For definition of the term “data disclosure order” see Annex 3 – Glossary

## Chapter Two: Enforcement Agents

This Chapter sets out detailed proposals, and explains the need for, an adequate regulatory mechanism, unified law and fairer fee structure for all enforcement agents to enable straightforward effective warrant enforcement and protect vulnerable debtors who genuinely cannot pay.<sup>4</sup> It explains that in the Government’s view there may always be a need for the power to take legal control of goods in order to enforce a debt but that this should only be permitted within a regulated structure and with appropriate safeguards.

There are detailed proposals on how, with a broadened role, the Security Industry Authority (SIA) could licence all enforcement agents who take legal control of goods, undertake committal/arrest or seek limited access to information through a partial data disclosure order.<sup>5</sup> The important role that professional associations and training providers will play in assisting the SIA to raise standards across the sector is identified along with an explanation of how a complaints system could operate and the need for uniformity across public and private sectors where appropriate. The findings of a consultancy project on these issues are set out.

## Chapter Three: Data Disclosure Orders

This Chapter picks up on the central message from this and previous Reviews – *access to better information is the key to effective enforcement*. More information is needed to facilitate better choice and targeting of enforcement methods. Detailed and carefully argued proposals show how this can be achieved, since the Data Disclosure Order (DDO), being an order of the court, places a clear legal obligation on the parties to disclose information. It is noted that the Office of the Information Commissioner has been consulted, and recognising that the proposed procedures seek to strike an appropriate balance between the legitimate interests of creditors and proper respect for the privacy rights of individuals, has confirmed they see no reason why the process should lead to contraventions of the Data Protection Act.

## Chapter Four: Other Court-Based Enforcement Methods

This Chapter comprehensively explores improvements to court-based enforcement methods that do not involve taking legal control of goods. It notes that the procedure of debt recovery through deductions from earnings could be vastly improved by tracking debtors and that the use of fixed deduction rates could halve the processing time. The proposals would be beneficial for debtors, creditors and employers. The next section proposes changes to charging orders and shows how the interests of debtors and creditors would be safeguarded. The compelling reasons for not changing third party debt orders are set out.

# Introduction

At the conclusion of the Civil Enforcement Review, The Lord Chancellor's Department (LCD) is pleased to present this package of legislative proposals to provide information for, and improvements to, court-based methods of civil debt and commercial rent recovery and a single regulatory regime, law, and fee structure for warrant enforcement agents.<sup>6</sup> It sets these in the wider context including the European dimension, proposals to reform the Consumer Credit Act, ongoing work to tackle overindebtedness and relevant research. This paper is the statement of the Government's civil court enforcement policy but we are also taking the opportunity to seek views and information in order to reinforce the evidence base and to inform the detail of regulations and subordinate legislation.

An initial impact assessment indicates that bailiffs in the public and private sectors and civil court users are likely to be particularly affected.<sup>7</sup> The proposals are likely to lead to additional costs and/or savings for businesses, charities or the voluntary sector. A partial Regulatory Impact Assessment is at Annex 1.

We are grateful for the assistance of the following organisations and individuals to whom copies of this White Paper are being sent:

- The Interdepartmental Working Group on Bailiff Law
- The Sheriffs' Officers' Association
- The Association of Civil Enforcement Agencies
- Enforcement Services Association
- The Civil Justice Council – Enforcement Sub-Committee
- County court bailiffs
- Public & Commercial Services Union
- The Enforcement Law Reform Group
- The Money Advice Association

- The Lord Chancellor's Advisory Group on Enforcement Service Delivery
- The Civil Court Users Association
- The Federation of Information and Advice Centres
- Professor John Baldwin
- Professor Jack Beatson
- Professor Elaine Kempson
- AMO The trade union for magistrates' courts staff
- Citizens Advice

## Modernising the Terminology

One of the aims of the new legislation is to replace the old-fashioned language which relates to enforcement law. It is intended that the words distress, distraint, execute, levy and walking possession will no longer be used.<sup>8</sup> The phrase taking legal control of goods will replace them. The term enforcement agent will describe all those who are entitled to undertake work licensed by the proposed regulatory authority. This will include private and certificated bailiffs, sheriffs, county court bailiffs, civilian enforcement officers for magistrates' courts and those enforcing on behalf of the Inland Revenue and Her Majesty's Customs & Excise.<sup>9</sup>

It remains the Government's position that it may always be necessary to permit taking legal control of goods and the sale of such goods as part of the enforcement regime in England and Wales. However, these actions should be undertaken in a reformed and regulated system, where efforts are made to ensure it is not used indiscriminately; our proposals for licences, increased professionalism and changes to the fee structure are intended to assist here.

<sup>6</sup> For definition of the term "commercial rent recovery" see Annex 3 – Glossary

<sup>7</sup> For definition of the term "bailiff" see "Enforcement Agent (Bailiff)" in Annex 3 – Glossary

<sup>8</sup> For definition of the terms "distraint", "distress", "levy" and "walking possession" see Annex 3 – Glossary

<sup>9</sup> For definition of the term "county court bailiff" see Annex 3 – Glossary

# Chapter One

## Background



# Section One An Overview

1. The Civil Enforcement Review arose out of Government's commitment to improve access to, and the efficiency of, civil justice in England and Wales. It is based on the premise that creditors who have established a legitimate claim should be able to pursue it through a straightforward and accessible system, and if necessary enforce a judgment by the most appropriate means. In addition, debtors who genuinely do not have the means to pay should be protected from the oppressive pursuit of their debts.
2. Enforcement has a crucial role to play in the criminal and civil justice systems and in a modern, democratic society; there must be ways to enforce payments due, such as, taxes, VAT and other duties, child support debts, council tax arrears, non-domestic rates, and road traffic and criminal fines. People ordered to pay a court judgment, criminal penalties, and compensation awards, or to comply with the terms of a community sentence, have little or no incentive to do so if they know there is no effective means of enforcing it. Unless there is prompt and effective enforcement the authority of the courts, the effectiveness of penalties, and public confidence in the justice system are all undermined. An adequate regulatory mechanism, unified law and fairer fee structure are needed for all enforcement agents to enable straightforward effective warrant enforcement and offer protection to vulnerable debtors who genuinely cannot pay.
3. The package of legislative proposals in this White Paper covers the provision of information for, and improvements to, court-based methods of civil debt and commercial rent recovery and a single law, regulatory regime and fee structure for all warrant enforcement agents.
4. The Review began in March 1998; the *Report of the First Phase of the Enforcement Review* was published in July 2000. It contained 40 proposals: split into those requiring primary legislation, those requiring secondary legislation, those requiring updated guidance, and areas where change was not recommended.<sup>10</sup> Secondary legislative changes, delivered through the Civil Procedure Rules, came into effect in March 2002.<sup>11</sup>
  - The new rules provided unified procedures for the High Court and county court and aim to achieve more effective enforcement.
  - Part 70 – introduced new forms for the registration of tribunal and other awards for enforcement. The application to register must now contain a statement of truth.
  - Part 71 Orders to obtain information – introduced a streamlined procedure to achieve the debtor's questioning in a shorter period of time.
  - Part 72 – Third Party Debt Orders – creditors do not need to supply details of the branch of the bank where a debtor's account is held.<sup>12</sup> Under the new procedure, if the bank is served with an interim third party debt order it will have to make a search for all accounts in that person's sole name and tell the creditor and court if there is enough money to pay the debt. Potentially all of the debtor's accounts may be frozen by an interim third party debt order.
  - Part 73 – Charging Orders – a standard form is provided for the statement of truth. Proceedings must start where the case is proceeding although the debtor may ask for another court. Evidence for objections must be filed within seven days. A judge without a hearing will make an interim charging order.
5. The Second Phase of the Review has focused on proposals for primary legislation. As part of the Review Professor Jack Beatson QC of Cambridge University provided a report to the Lord Chancellor, *Independent Review of Bailiff Law*, published in July 2000. The report made 46 recommendations and called for a single new piece of legislation to regulate bailiffs. It set out the rights and remedies for creditors and debtors, recommended that debtors receive written warnings, and guidance is provided on forcible entry.<sup>13</sup>

<sup>10</sup> The terms of reference for the Enforcement Review are at Annex 2

<sup>11</sup> Delivered through the Civil Procedure (Amendment No. 4) Rules 2001

<sup>12</sup> For definition of the term "Third Party Debt Order" see Annex 3 – Glossary

<sup>13</sup> This report is available on the LCD website – [www.lcd.gov.uk](http://www.lcd.gov.uk)

6. Another area of the Review concerned section 13 of the Courts and Legal Services Act 1990 and Administration Orders (AOs). AOs seek to protect vulnerable debtors with multiple debts and although not, strictly speaking, a part of the enforcement system, they are relevant to it. Whilst there are some aspects of section 13 that would be welcome, its implementation in its current form would be unworkable and is therefore not a viable option. The Lord Chancellor's Department (LCD) will publish a paper on options for change later in the year.
7. The Review included distress for rent, an enforcement method that is not court based and is available only for unpaid (mostly commercial) rents. LCD issued a consultation paper, *Distress for Rent*, in May 2001, proposing the abolition of distress for rent as a remedy in the residential sector, and the introduction of a modified procedure for the commercial sector. A report of the responses to this consultation is available.<sup>14</sup>
8. On 6 March 2001, the Lord Chancellor broadened the scope of the Review enabling it to look at structures for, and the regulation of, all civil enforcement agents. Meaning that bailiffs, sheriffs' officers and approved enforcement agencies could come within a new system of regulation common to all types of warrant enforcement. As a result of this broadening of the Review, the Green Paper, *Towards Effective Enforcement*, published in July 2001, addressed issues that previous reports had found difficult because of their complexity and interdependence.<sup>15</sup> It considered the case for a common regulatory regime, powers and legislation to replace the many different elements of bailiff law and the need for common fee principles across all areas of warrant enforcement. It noted that any proposed new structure must set out clearly the powers for effective enforcement on behalf of creditors whilst incorporating satisfactory safeguards to ensure fairness to debtors.
9. By linking all these issues, the Green Paper identified the need for progress on a broad front and expert advice to inform the Review. Responses showed strong stakeholder support for:
  - regulating the enforcement industry;
  - setting fee principles;
  - increased access to information for enforcement; and
  - a balance between powers, standards and safeguards.<sup>16</sup>
10. An Advisory Group on Enforcement Service Delivery was established to provide advice from the private, voluntary and public sectors involved in enforcement, a market evaluation of the delivery of enforcement services, and to inform the Review's policy proposals.<sup>17</sup> The Group has met regularly, published updates of its progress on the LCD website and held an open meeting in November 2001. It has provided three reports to the Lord Chancellor, which are available from the LCD website.
11. Building on the considerable progress and goodwill that has been achieved through working closely with stakeholders, LCD published the *National Standards for Enforcement Agents* in May 2002. This is the first document of its kind to be issued across the whole industry, and was widely endorsed by trade associations in the private sector, by bodies representing enforcement agents within the public sector, and also by representatives of the major creditors who make use of their services. It aims to improve existing good practice, raise the level of professionalism across the whole industry, and increase awareness of creditors' responsibilities. It has become a benchmark for professional standards across the industry.
12. The Association of Civil Enforcement Agencies (ACEA) has incorporated the National Standards into their code of conduct and this will be displayed on their website. This obliges all member companies to comply with them. If a complaint is received based on a breach of the National Standards it will be dealt with by ACEA's complaints procedure accordingly. ACEA is also recommending to all member companies that they inform prospective clients that their conduct will conform to the National Standards for Enforcement Agents and that they should request that this should be recognised in any contractual requirements where appropriate.

<sup>14</sup> Responses to consultation were contained in the report CP(R) 13/01 *Distress for Rent – Responses to Consultation*, published by LCD in May 2002 and available on the LCD website – [www.lcd.gov.uk](http://www.lcd.gov.uk)

<sup>15</sup> The Green Paper *Towards Effective Enforcement* is available on the LCD website – [www.lcd.gov.uk](http://www.lcd.gov.uk)

<sup>16</sup> Responses to the Green Paper were contained in the report CP (R)00/02 *Towards Effective Enforcement – A single piece of bailiff law & a regulatory structure for enforcement – Responses to consultation*, published by LCD in April 2002 and available on the LCD website – [www.lcd.gov.uk](http://www.lcd.gov.uk)

<sup>17</sup> Details of the membership and terms of reference for the Advisory Group on Enforcement Service Delivery are contained at Annex 1 of the *Report of the Advisory Group on Enforcement Service Delivery*, published by LCD in December 2001 and available on the LCD website – [www.lcd.gov.uk](http://www.lcd.gov.uk)

13. The Enforcement Services Association (ESA) has given its wholehearted support to the National Standards and intends to incorporate adherence to them into their Code of Conduct as one of its fundamental principles by which all members of the Association are required to operate. Failure to comply with the Code of Conduct may be dealt with as a disciplinary matter under the Association's Rules. ESA proposes that all members will include it as a minimum requirement in contracts and similar service level agreements.
14. At least one Local Authority is now using enforcement agencies commitment to the use of the Standards as part of their contractual compliance. Encouraged by this, the Office of the Deputy Prime Minister (ODPM) and the Local Government Association are advertising the adoption of the National Standards for Enforcement Agents as part of the contractual arrangements between Local Authorities and Enforcement Agencies, through their regular Council Tax newsletters. We would hope that all major creditors, including local authorities, will consider using the Standards as contracts come up for renewal. LCD will also be promoting the use of the Standards at meetings of local authority representatives such as the London Revenues Group.
15. The Sheriffs' Officers' Association is undergoing change to meet the challenges of the new structure for High Court enforcement envisaged by the Courts Bill, and is working to ensure that the guidance and good practice set out in the National Standards informs this process and permeates through their Rules, Codes of Conduct and Practices down to the activities of individual members.
16. We have also published a consultation paper proposing to uplift enforcement agents' fees and charges under the Road Traffic Act 1991 and the Distress for Rent Acts 1888 and 1895. A parallel consultation is being undertaken by ODPM in relation to fees and charges for enforcing council tax and national non-domestic rates debts. We are not proposing to change the existing fee structures prior to the substantial legislative change proposed in Chapter Two, but recognise the need to ensure that the current fee levels are responsive to market conditions. The consultation paper was published on 24 February 2003.<sup>18</sup>
17. Throughout this period, LCD and Court Service have developed targets for civil enforcement through a range of Performance Indicators. This has involved refining existing targets with regard to 'pence in the pound' collected by County Court bailiffs on enforceable warrants, and also introducing targets based on turnaround times for dealing with other court-based enforcement methods, such as Charging Orders. The 'pence in the pound' targets have now also been extended to High Court enforcement. Consumers now have greater access to accurate information to assist with their decisions about enforcement.

<sup>18</sup> *Uplifting Enforcement Agents' Fees: Distress for Rent and Road Traffic Acts*. Copies may be found on the LCD website at [www.lcd.gov.uk](http://www.lcd.gov.uk). The closing date for responses is 16 May 2003

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## Section Two

# The Wider Perspective

18. The civil justice system does not exist in a vacuum. To be relevant, it must reflect the real world, be flexible enough to take on board the best that external influences have to offer, and able to adapt when change is for the best. Bearing this in mind, it is helpful to consider the influences that have affected the work of the Civil Enforcement Review, and have helped to shape our vision for the civil enforcement regime of the future. This 'wider perspective' has been influenced by many other areas of work, both across other government departments, and also beyond the boundaries of England and Wales.
19. These areas can be broken down as follows:
- Lord Justice Auld's Review of the Criminal Courts of England and Wales and the subsequent Criminal Justice White Paper *Justice for All* (July 2002);
  - The Court Service's Courts and Tribunal Modernisation Programme;
  - Provisions in the Courts Bill to permit the Registration of High Court Judgments;
  - LCD and the Insolvency Service's work on reforming Administration Orders;
  - The Department of Trade and Industry's work to tackle overindebtedness;
  - The Department of Trade and Industry's review of the Consumer Credit Act;
  - Proposed Debt Collection Guidelines from the Office of Fair Trading;
  - Provisions in the Courts Bill in respect of High Court enforcement;
  - Privacy and Data sharing;
  - Research;
  - Civil Enforcement in Scotland;
  - The European dimension;
  - The unified administration provisions in the Courts Bill.
- Criminal Justice reforms**
20. Chapter 5 of the Criminal Justice White Paper looks specifically at the area of sentencing and criminal fine enforcement. Criminal fine enforcement is closely related to civil enforcement, not least because many enforcement agents work in both sectors.
21. Nearly three-quarters of all cases sentenced result in fines being imposed, yet payment rates are poor and there are unacceptably high levels of arrears. There have been successful experiments in data sharing, not least between Magistrates' Courts Committees and the Department of Work and Pensions, and in introducing innovative payment methods, but there is still a need to provide further support to improve performance and to intervene where there is persistent failure.
22. Taken together, proposals in the Courts Bill will put in place a robust yet flexible framework for fine enforcement, with new tools to elicit prompt payment, more severe sanctions for those who try to play the system, and a dedicated fines officer managing the collection of the fine.
- Potential enforcement problems will be minimised by ensuring the courts have information about the offender's income and expenditure so that the fine can be set at a realistic level.

23. The Courts Bill will allow the appointment of specific staff in courts who will be responsible for making sure that fines and compensation orders are paid. These 'fines officers' will have discretion to vary payment terms and (subject to appropriate safeguards) to impose increasingly severe sanctions on defaulters who refuse to co-operate, without the need for further court hearings. The court will only be involved when judicial decisions are called for – giving magistrates time to deal more thoroughly with cases of persistent default.
24. A range of sanctions will be piloted for use by fines officers in tackling default. These include: an incentive for prompt payment and an increase if the offender fails to pay on time; registering the fine with the new registry of judgements to prevent defaulters getting credit; vehicle clamping; authorising bailiffs to seize defaulters' goods; and ordering deductions from defaulters' pay and benefits.
  - The new sanctions – wheel-clamping and registration of the debt – will be available to deal with persistent offenders. They will not be applied indiscriminately.
  - The new measures provide strong incentives for the offender to stay in contact with the court during the 'lifetime' of the fine, and will make it easier for the court to trace the offender in cases of default.
  - With the additional tools available to them, enforcement staff should be able to make significant improvements in payment rates, with a corresponding decrease in the build up of arrears.
  - For defaulters who are on the point of committal to prison for failing to pay fines, measures exist which (when implemented) will enable the courts to impose community punishment orders, curfew orders or a driving disqualification.
25. For those who are genuinely unable to pay, the Government expects to propose making alternative sentences (such as unpaid work) available to the courts.
26. The Courts Bill will also bring Magistrates' Courts Committees (MCCs) into a single courts organisation responsible to the Lord Chancellor for fine enforcement, with a clear performance management framework. [Note: As MCCs are independent, there are limited performance management levers at present to address poor performance].
27. In parallel with the legislative programme, LCD is developing a network of support and advice for those who need help in organising their payments or who are genuinely struggling with multiple debts.
28. The measures will be piloted and their effectiveness will be evaluated prior to implementation. The Bill will enable adjustments to the proposals to be made in the light of experience of the pilots.
29. Subsequently, a report from the Cabinet Office Performance and Innovation Unit (PIU) recommended that further work be done on the scope for centralising the administration of government debt and all financial transactions between citizens and government. This is being taken forward through a feasibility study.

## The Courts and Tribunals Modernisation Programme

30. Court Service's Courts and Tribunals Modernisation Programme (CTMP) aims to improve its service to customers through centralisation at business centres and by introducing more on-line and interactive services, building on the experience of Money Claim Online (MCOL) and the Preston E-mail Service (PREMA).
31. As part of the CTMP, Court Service's plans to modernise the bailiff service include:
  - providing all bailiffs with portable data assistants, to hold details of outstanding warrants and other work in a handy-sized electronic format;
  - enabling bailiffs to spend more time in the field and less time in the office dealing with paperwork;
  - a new management structure for bailiffs, with Regional Enforcement Managers reporting to a National Enforcement Manager with ultimate responsibility for the bailiff service;

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- bailiffs being supported by dedicated teams of support staff organised into Field Support Units;
  - centralising enforcement administrative work in a business centre environment;
  - reviewing the forms used for enforcement, in particular those used by the bulk centre and business users; and
  - reviewing payment methods, to enable payment by credit and debit cards.
32. Court Service will pilot these proposals before wider implementation, but plans to do so are in their early stages. In addition to their work on CTMP, Court Service is reviewing the procedure for service of orders to attend court under the oral examination procedure, which was reformed in March 2002. This is being evaluated and considered in the light of comments from stakeholders.

### Changes in respect of Registration of High Court Judgments

33. Court Service is reviewing the registration of judgment procedure to provide a consistent approach between county court and High Court judgments as recommended in the First Phase of the Enforcement Review. The Court Service is carrying out a full service review of the Register of County Court Judgments and plans to create a new unified register of fines and county court and High Court judgments. This review will inform the drafting of regulations to support the provisions in the Courts Bill, which is taking forward the extension of the registration to High Court judgments and criminal fines. This review aims to improve customer service at optimal cost to the taxpayer and will include an appraisal of the options for delivery of the new service.

### Section 123 of the County Courts Act 1984

34. The Report of the First Phase of the Enforcement Review put forward a proposal for a unified interpleader process for the High Court and county courts. In response, however, it was noted that as under section 123 of the

County Courts Act 1984 (CCA) the District Judges were currently responsible for the actions of bailiffs, they were effectively prohibited from hearing interpleader applications. Section 123 of the CCA provides that the District Judge shall be personally responsible for executions carried out in his name and for the bailiffs who enforce them. This section will be amended so that such responsibility can be passed to the Court Manager. This will remove any potential conflict between the District Judge's role as High Bailiff and their power to hear applications for suspension of warrants.

35. Such an amendment will make more efficient use of judicial time, as District Judges will be able to hear interpleader applications and other actions, which would otherwise only be able to be heard by Circuit Judges.

### Administration Orders

36. Administration Orders (AOs) provide the court with a mechanism for dealing with debtors with unmanageable debt problems and give the debtor respite from enforcement proceedings while paying off those debts. Although not strictly speaking an enforcement method, AOs can help to ensure that county court judgments, as well as other debts, are paid. Within this, they have benefits for the debtor, the creditor and the court: the debtor is helped to manage their debts whilst being relieved from the threat of enforcement proceedings; creditors are spared the trouble of court action but can expect complete or partial repayment of their debt; and the courts do not have to act on various enforcement applications regarding the same debtor.
37. The provisions of the current AO scheme are set out in section 112 of the CCA, with provision for an enlarged AO scheme in section 13 of the Courts and Legal Services Act 1990. Section 13 has not been implemented due to concerns over its feasibility – for instance the three-year time limit imposed on an order by section 13, combined with the absence of a statutory definition of debt would mean that technically any type of debt, including a mortgage, could be included and composed. Implementation of section 13 would also remove the current parameters to the scheme whilst not providing any safeguards, such as the opportunity to deal with excessive

interest rates, dealing with physical assets, and investigation into misconduct.

38. We have concluded that implementation of section 13 in its current form is unworkable and is therefore not a viable option for reform. Research carried out by LCD staff in 2001 has shown that AOs in their current form have not been successful in meeting their objectives and that several problems exist with the current scheme. With these issues in mind, we have also been considering the role of AOs within the wider Government perspective: the enterprise agenda – as a debt management tool AOs, like bankruptcy orders, should seek to rehabilitate the debtor. AOs can help tackle poverty and social exclusion, as the socially excluded may come into contact with the justice system in various situations, one of which is debt. Reform of AOs is also relevant to the Government's agenda to tackle overindebtedness.
39. The Government is therefore considering a wide range of options for reform in this area. These include:
  - do nothing, which would mean a dwindling number of debtors would be able to take advantage of the AO scheme;
  - increase the financial limit of indebtedness (currently set at £5,000);
  - implement a revised court-based system that would address some of the problems of the existing system;
  - a reformed personal insolvency regime: we are in discussion with the Insolvency Service to consider the role of AOs, the bankruptcy regime and how they might possibly inter-relate.
40. Any new scheme needs to be workable for both debtors and creditors and affordable for the State, i.e. there is a cost implication in providing relief for those with no ability to pay. It is important to identify the potential costs attached to each option for reform and as a starting point, we have obtained information on how much it currently costs Government to administer AOs and bankruptcies. To inform the objective assessment of feasibility of options for reform, independent research is currently being conducted into who uses AOs and bankruptcy orders and how successful they are.

## Tackling overindebtedness

41. The Government is committed to tackling overindebtedness and addressing concerns about increased levels of consumer debt. An overindebtedness task force was established by the Department of Trade and Industry (DTI) in 2000 charged with finding ways of achieving more responsible borrowing and lending. The task force published its first report in July 2001, recommending the need for a national survey to examine the cause, effect and extent of overindebtedness in the UK.
42. This research was published in November 2002 and suggested that the historically high levels of borrowing were problematic for only a small number of people and the numbers were not increasing. However, it also concluded that macro-economic uncertainties remained and there was no room for complacency. Accordingly, in line with the conclusions of the report, DTI put the task force on a permanent footing to monitor developments.
43. In March 2002, PIU published *Lending Support: Modernising the Government's Use of Loans*. One of its recommendations was that there should be a review of Government policy on reducing the overindebtedness of individuals. This review, to identify and bring together related work on overindebtedness, has been led by DTI. The publication of the study conclusions is expected in the summer.

## Reform of the Consumer Credit Act

44. As well as its work on overindebtedness, DTI is also considering possible reforms to the Consumer Credit Act 1974. The first step towards this was the publication in July 2001 of the consultation paper *Tackling Loan Sharks – and more!* This report set out DTI's plans and the key areas they proposed to tackle. The main drivers for undertaking the review were:
  - to implement the Government's manifesto commitment to tackle loan sharks;
  - the need for improvements in the current consumer credit licensing regime;

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- the Financial Services Authority taking on the regulation of mortgages;
- the European Commission's consultation on a revised Consumer Credit Directive; and
- the possible need for changes to implement the outcomes from the task force on tackling overindebtedness.

45. Priority areas for consultation and discussion were identified as follows in a report published by DTI in February 2002:

- the financial limit and exempt agreements under the Act;
- the early settlement regulations;
- enabling consumers to conclude credit agreements on-line;
- changing the licensing regime to target enforcement on keeping loan sharks out of the market;
- making the extortionate credit provisions more effective;
- simplifying the advertising regulations, including the regulations on APRs; and
- simplifying the rules on multiple agreements.

46. Since then, an ongoing series of presentations, consultation exercises and focus group discussions has been looking at all the above identified areas. The first consultation paper, issued in March 2002, sought views on options for increasing or removing the financial limit for credit agreements regulated by the Act; redefining or excluding business lending for purposes of the Act; and reducing the categories of lending exempted from the Act. Responses were published in September 2002, indicating support for an increase in the financial limit; a redefining of business lending so that only small businesses continued to receive protection; and the amendment rather than removal of current exemptions.

- The second consultation paper, published in August 2002, concerned early settlement regulations – a summary of responses is due to be published early in 2003. Further consultation papers have recently been issued regarding on-line agreements, a new licensing regime and extortionate credit provisions. Additional consultation papers on advertising regulations, APRs and multiple agreements will follow in due course over the coming months.

### Draft debt collection guidance for consumer credit licence holders and applicants

47. The Office of Fair Trading (OFT) has produced draft guidance for all consumer credit licence holders and applicants who have an involvement either directly or indirectly in debt collection activity.<sup>19</sup> This draft guidance provides advice to business on the type of unfair practices that would call into question their fitness to hold a consumer credit licence. The OFT is currently consulting on this document and will publish finalised guidance by Spring 2003.

### Provisions in the Courts Bill in respect of High Court enforcement

48. In accordance with proposals in the Green Paper and from the Lord Chancellor's Advisory Group on Enforcement Service Delivery, measures in the Courts Bill will introduce a regime to supersede the existing appointment arrangements prescribed by the Sheriffs Act 1887.<sup>20</sup> In practice, Under Sheriffs and sheriffs' officers are re-appointed annually, without any competition or other arrangement promoting the transparency of their appointments or the efficiency of the appointees. These provisions will maintain the existing competence and probity of those actively engaged in High Court enforcement, and promote their efficiency and best practice in consumer redress, employment, etc., among other things, by encouraging competition, consumer choice and an accessible complaints mechanism.

<sup>19</sup> Copies can be downloaded from – [www.offt.gov.uk/news/consultations/index.htm](http://www.offt.gov.uk/news/consultations/index.htm)

<sup>20</sup> The Advisory Group on Enforcement Service Delivery report, *High Court enforcement: The compelling need for change*, is available on the LCD website – [www.lcd.gov.uk](http://www.lcd.gov.uk)

## Privacy and Data Sharing

49. On 11 April 2002 PIU published a report entitled *Privacy and Data-sharing: The way forward for public services*. The report resulted from a project steered by an advisory group including the Information Commissioner, Liberty, and the National Consumer Council, academics and government departments. The report, which contains 25 recommendations, has two main objectives: to improve public services through better use of personal data, and to secure public trust in the handling of personal data by safeguarding personal privacy.
50. In line with its existing responsibilities for privacy, data protection, human rights and freedom of information LCD has assumed overall responsibility for championing and overseeing implementation of the report's conclusions. Work will concentrate on three main areas outlined in the report, which were the subjects of initial public consultation. They are:
- the development and adoption of a Public Services Trust Charter for the handling of personal information by public services (with a body of supporting guidance, best practice and protocols to underpin the charter);
  - the introduction of legislation to enable public bodies to share information with the consent of the data subject; and
  - the establishment of data-sharing gateways through secondary legislation, including gateways for data-sharing without consent in specified circumstances and subject to a codified list of safeguards and adequate Parliamentary scrutiny.
51. The PIU report outlined an ambitious timetable, with the aim of a draft Bill being ready for publication in Spring 2003. In practice, this has proved an unrealistic objective and the current intention is to continue developing policy in this area and, when and where appropriate, to consult widely on conclusions reached.

## Research

52. Along with other government departments, LCD contributes to the Adding It Up website.<sup>21</sup> The site aims to stimulate interest among and debate with the academic community; is used to set out the current evidence base underpinning policies designed to satisfy key Government targets; and also details some of the central initiatives including the Evidence Based Policy Fund. The significant body of research that has informed the Review can be accessed via this site.

### ***'Evaluating the Effectiveness of Enforcement Procedures In Undefended claims in the Civil Courts'***

53. In March 2003 LCD published Professor John Baldwin's Research Report, *Evaluating the Effectiveness of Enforcement Procedures In Undefended claims in the Civil Courts*. This was commissioned by LCD to inform the Enforcement Review. The author argues that:
- the enforcement of civil court judgments is the most critical issue presently confronting the civil justice system;
  - there is a growing realisation that, if public confidence in the civil courts is not to be undermined, the apparatus of enforcement needs an overhaul;
  - the key to improving enforcement efforts in the future is to ensure courts have adequate information about the financial circumstances of defendants;
  - it is of the greatest social importance that court-based enforcement mechanisms enjoy the confidence both of defendants and creditors. If the latter lose faith in the formal system of enforcement and turn to other methods of securing payment, the consequences may prove much more disagreeable and more intrusive for defendants (as well as offering them far fewer protections) than would a tougher court-based system.

<sup>21</sup> Launched in June 2002 in direct response to the *Adding It Up Report (published by the Cabinet Office in 2000)* and located at [www.addingitup.gov.uk](http://www.addingitup.gov.uk)

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**Mapping the 'Can't Pay/Won't Pay' Divide**

54. With assistance from HM Treasury's Evidence Based Policy Fund, LCD commissioned a research project to identify and characterise, where possible, the distinction between those debtors who do not and those debtors who cannot pay. The project, *Mapping the 'Can't Pay/Won't Pay' Divide*, was undertaken by Professor Elaine Kempson of Bristol University's Personal Finance Research Centre and published in 2003.
55. The research explored the following questions that arose from the *Report of the First Phase of the Enforcement Review*:
  - why don't debtors pay?
  - what features, if any, indicate a 'can't pay' debtor?
  - how effective are different bodies responsible for enforcement at identifying and responding to 'can't pay/won't pay' distinctions amongst debtors?
56. The research found that when approaching the distinction between 'can't pay' and 'won't pay' it is important to consider both the ability to pay and the intention of doing so. The great majority of people who fall into arrears have every intention of paying but are unable to do so either through a drop in income resulting from a change in circumstance or living long-term on a low income. There is, however, a minority of debtors who have little or no intention of paying the money they owe. The research also found that creditors vary in their ability to distinguish between these different groups of debtor.
57. The researchers recommend that:
  - industry codes of practice and guidance on arrears management should reflect the best practice of 'holistic creditors' and be subject to independent monitoring;
  - creditors should be required in pre-action protocols to say that they have complied with their industry code of practice or guidance;

- creditors and the courts should work closely with independent money advisers in order to identify 'can't pay' from 'won't pay' debtors.

**Civil Enforcement in Scotland**

58. The Scottish Executive announced in June 2000 that it intended to conduct a thorough review of the law of diligence (as the enforcement of civil obligations is known in Scotland). Reform of the Scottish system has been taking place in the following two streams.
59. Firstly, one specific aspect of the Scottish enforcement system which had been of particular concern was the diligence against corporeal moveable property known as pouncing and warrant sale. A Member's Bill was introduced on 24 September 1999 to abolish this diligence, which was considered to be unnecessarily harsh to domestic debtors, and was agreed by the Scottish Parliament. However, the Parliament recognised that merely to abolish this diligence without having an alternative diligence against corporeal moveable property in place would leave a loophole in the diligence system. The Parliament, therefore, delayed the implementation of the Act until 31 December 2002 to enable such a replacement to be put into place.
60. A Working Group was set up by the Executive to identify a humane and workable alternative and in July 2001 it published its report *Striking a Balance: a new approach to debt management*. This was put out to consultation, and on receiving widespread support, the Executive announced in December 2001 that it would implement the approach recommended by the group. The *Debt Arrangement and Attachment (Scotland) Act* came into force on 30 December 2002. This Act brings into force a new diligence against corporeal moveable property, called attachment. The Act also gives Scottish Ministers the power to introduce, by regulation, a national statutory debt arrangement scheme. The debt arrangement scheme is a debt management tool designed to tackle the problem of debt at its root, and to give people the support and help to manage multiple debt free from the threat of enforcement action.

61. Secondly, the Executive's principal consultation paper on all other aspects of the Scottish enforcement system, *Enforcement of Civil Obligations in Scotland*, was published in April 2002. A copy of this consultation paper can be downloaded from the Scottish Executive website at [www.scotland.gov.uk/consultations/justice/CivOb-00.asp](http://www.scotland.gov.uk/consultations/justice/CivOb-00.asp). The consultation paper sets out the Scottish Executive's policy aims and intentions for the Scottish system of diligence. It contains proposals for reform of the structure and organisation of the diligence system and methods of enforcement, and sought views on a range of proposals for reform of the law of diligence.

62. Some key issues covered in the consultation paper include:

- proposals for reform of the structure and oversight of the enforcement system, with the creation of a Scottish Civil Enforcement Commission to regulate enforcement activity;
- proposals for reform of the existing debtor protections such as time to pay arrangements;
- the proposed detail for the setting up and operation of a national statutory debt arrangement scheme;
- proposals for reform of the different types of diligence (including diligence on the dependence, arrestment and furthcoming, earnings arrestment, admiralty arrestment, various diligences against heritable property, attachment of money, civil imprisonment, delivery) along with related enforcement and procedural matters.

63. A report analysing the responses to consultation produced by independent consultants was published on 8 November 2003.<sup>22</sup> A copy of this report can be downloaded from the Scottish Executive website at [www.scotland.gov.uk/library5/justice/ecos-00.asp](http://www.scotland.gov.uk/library5/justice/ecos-00.asp). The report revealed that the proposals put forward on the paper were, as a whole, extremely well received and supported by those who responded. The Scottish Executive is currently considering the analysis and will bring forward further legislation to implement the reforms. The first step which the Scottish Executive is undertaking as a matter of urgency is consideration of the consultation results on the

debt arrangement scheme in order that regulations can be made under the Debt Arrangement and Attachment (S) Act 2002.

64. In most areas, the propositions put forward by the Scottish Executive are in line with this White Paper. However, there are differences in the respective legal systems and how their enforcement methods operate. These differences are reflected in the responses from stakeholders on which the respective proposals are based. Clearly our proposals for reform should be those best suited to the needs of court users in England and Wales based on our own Review, just as the Scottish Executive's proposals reflect what will work best in Scotland based on their own review.

## The European Dimension

65. In all areas of government policy making, Europe has a considerable role to play and a growing influence. The areas of civil justice and civil enforcement are no different in this respect. Both through the work of the European Commission and the Council of Europe, the UK continues to play a central role in work being carried out across Europe in this sphere.

66. The three main areas of work that the UK is involved in are:

- the European Enforcement Order;
- the European Order for Payment;
- the Council of Europe draft recommendations on enforcement.

## The European Enforcement Order

67. In April 2002 the European Commission issued a proposal for a European Enforcement Order (EEO). This followed from the European Council meeting in Tampere in 1999, which had endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial co-operation. In civil matters that was to be achieved by a further reduction of the intermediate measures required to enable the recognition and enforcement in one Member State of a judgment delivered in another Member State.

<sup>22</sup> Blake Stevenson Ltd

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68. The introduction of an EEO was discussed during the UK Presidency of the EU in 1998. Limited progress was made because some Member States considered that the time was not then right for the abolition of the checks associated with *exequatur* (the conversion of foreign judgments into orders enforceable in the jurisdiction).
69. The Commission decided that as a first step towards the abolition of *exequatur* there should be a pilot procedure for uncontested claims based on the principle of minimum standards rather than harmonised procedures. The proposal provides for a creditor who has obtained a judgment in a monetary claim for a specific sum to apply to the court where that judgment was obtained to certify the judgment as an EEO. The court will do this if certain procedural requirements (the minimum standards) have been met. The aim is that an EEO will allow a creditor to have a judgment obtained in one Member State recognised and enforced by the relevant authorities in another Member State without any special procedure being required in the Member State of enforcement. Negotiations on this proposal continue.

### *The European Order for Payment*

70. The European Commission issued a Green Paper in December 2002 about the introduction of a European Order for Payment procedure, which they described as a specific procedure for the speedy and efficient recovery of uncontested claims. Eleven Member States (Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, Portugal, Spain and Sweden) already have such a procedure as an integral part of their civil procedural legislation.
71. While the procedures work differently in each Member State, the general principles are the same. A claimant makes an application to the court, which decides on the issues in the absence of the defendant. The decision is served on the defendant with an instruction either to abide by the order or to contest the claim within a certain time limit. If the defendant fails to act either way, the order for payment acquires enforceability. Only if he or she lodges opposition to the case can it be transferred to ordinary proceedings.

72. As part of their consultation on the Green Paper the Commission have asked whether there should be a single procedure for use in each Member State or whether there should just be a procedure for cases involving cross-border issues.

### *Council of Europe draft recommendations on enforcement*

73. As part of its overarching aim of greater unity, the Council of Europe is looking at facilitating the efficient and cost-effective enforcement of civil judicial and non-judicial decisions (i.e. those which can be considered enforceable titles either by the law or by decision of the court). The Council of Europe is concerned that without an effective system of civil enforcement, other forms of 'private justice' may flourish. This can have adverse consequences on the public's confidence in and the credibility of the justice system.
74. The Council of Europe is therefore attempting to lay down some guiding principles for civil enforcement in Member States. These include: uniform definitions and scope of application; basic principles covering the conduct of enforcement procedures, the rights of defendants and fee structures; and principles for the conduct and behaviour of enforcement agents. This work is ongoing.
75. The Civil Enforcement Review has carefully considered the existing mechanisms and legislative processes for enforcement – much of which are archaic. It effectively draws to an end now with the comprehensive package of proposals for enforcement agents, data disclosure orders and other court-based enforcement methods that are set out in the following Chapters. These will put in place a system that is better equipped to deliver effective enforcement now and to adapt in the future. Civil justice and its enforcement processes have to continue to evolve and be responsive to other changes, for example the ongoing work in respect of personal insolvency, ideas arising from the criminal justice reforms and from Europe. The new mechanisms we propose could, after careful consideration and consultation, more readily take on board new initiatives than the structures they replace.

# Chapter Two

## Enforcement Agents



# Section One

## The Regulatory Regime

76. The Green Paper explored the existing arrangements and the need for change for regulation of enforcement agents and considered four options:
- no change;
  - increased court-based direct regulation;
  - self regulation by the existing trade associations;
  - statutory structure to license enforcement agents.
77. Responses to the Green Paper indicated overwhelming support for increased regulation, and a majority in support of establishing a statutory executive non-departmental public body (NDPB) to regulate private and public enforcement agents.

### Aims and objectives for the regulation of enforcement services

78. The current enforcement profession is fragmented, with some firms and individuals operating outside of any structures and some evidence of threats and intimidation being used against vulnerable people in their own homes.<sup>23</sup> Whilst the introduction of a single piece of law for enforcement agents and a revision of the fee structure will address some of the areas of malpractice, without regulation the impact of these changes would be insufficient.

Regulation, through a statutory body, must ensure that warrant enforcement is carried out appropriately, effectively and fairly in relation to both debtors and creditors. It is proposed that the Authority will regulate all public and private enforcement services across all areas of warrant enforcement: the High Court and county courts, magistrates' courts, road traffic act penalties, local and national taxes and duties, maintenance and child support.

79. The Government wants to raise standards across the profession, and promote best practice, fostering public confidence and creating a level playing field for all. Post judgment, the creditor has an entitlement to expect his claim to be enforced and for the reasonable costs of enforcement to be met by the debtor. It is right that creditors should make the choice about the enforcement method and have some choice about the enforcement agent they use. These choices must be well informed and exercised fairly. The indiscriminate or inappropriate use of distress is unacceptable: many debtors are in vulnerable situations and some simply cannot afford to pay.
80. All enforcement agents must be required to balance their duties to the court, the creditor and the debtor. They all do a difficult job, they all have broadly the same powers and must all behave in an appropriate way. All service users – whether creditors or debtors – are entitled to expect high professional standards.

<sup>23</sup> Green Paper *Towards Effective Enforcement* (July 2001); National Association of Citizens Advice Bureaux (now known as Citizens Advice) Report *Undue distress: CAB clients' experience of bailiffs* (May 2000). The report is available on – [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)

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We therefore see the need for a system of regulatory control that as far as possible will apply in a uniform way but that will be sufficiently flexible to be relevant to the needs of all service users and embrace the public and private sectors, with variations of approach where necessary and justified.

### Regulatory Body

81. In accordance with guidance on Better Regulation, we have considered whether any other existing body could meet the sector's needs. The only body we identified whose roles and responsibilities seemed comparable was the Security Industry Authority (SIA).<sup>24</sup> The SIA seems broadly to cover the purpose of an Enforcement Services Commission as proposed in the Green Paper. We believe therefore that with a broadened scope the SIA would be a suitable body to regulate enforcement services in principle and in practice. There is a broad but not exact fit between what we are seeking to achieve in regulating enforcement agents and the remit given to the SIA by the Private Security Industry Act 2001.

The proposed enhanced remit is to enable the SIA to regulate enforcement services and does not cover any of their other sectors for which they have responsibility.

### Current functions and duties of the Security Industry Authority

82. The Home Office is in the process of setting up the SIA. It is being established to regulate between 300,000 and 800,000 personnel in the private security industry. The Authority will be established as an executive NDPB on 1 April 2003. Thereafter their aim is to phase in licensing sector by sector, starting with wheel-clampers and door supervisors with effect from late 2003, followed by manned guards and keyholders from late 2004, and private investigators and security consultants from late 2005. The SIA Implementation Team is currently setting up stakeholder groups to look at

licence, training and qualification criteria for each sector that it will be regulating. Under the terms of the Act, the Authority must comply with any general or specific directions given to it in writing by the Secretary of State for the Home Department.

83. The SIA will also operate a voluntary company approval scheme and award a 'quality mark', and it will make recommendations to the Home Secretary on legislation and practice related to the security industry sectors that it regulates. It is charged with setting and raising professional standards in the industries that it regulates.
84. Primary legislation would be needed in order to accommodate the broadening of its current functions. It is our intention that the primary legislation would prescribe those broad requirements. These requirements will be underpinned by secondary legislation. The SIA would, however, be given considerable autonomy consistent with its status as an executive NDPB to determine how it goes about its tasks.
85. The primary legislation would need to provide for:
- the inclusion of enforcement services;
    - licensing all enforcement agents;
    - approving authorised enforcement service providers;
    - accrediting professional associations;
    - authorising training providers;
    - setting up a Complaints Board under the SIA Board; and
  - to allow the SIA to make recommendations to the Lord Chancellor.
86. Secondary legislation areas will include criteria for approvals, accreditation, authorisations and exemptions.
87. Areas of detail we would like to see the SIA consider include:
- criteria for licences for the enforcement sector;
  - issuing a code of practice;

<sup>24</sup> The Home Office White Paper *The Government's Proposals for Regulation of the Private Security Industry of England and Wales* (March 1999) referred to a licensing system to regulate security industry personnel in the private sector such as wheel-clampers, door supervisors, manned security guards, private investigators, security consultants and security staff, sector by sector. It did not include but proposed extending the legislation to 'contracted court enforcement officers'; meaning private sector bailiffs under contract to magistrates' courts

- requirements for applications;
- requirements for retaining licences;
- the complaints process.

### Primary Legislation

88. We propose that the Authority could, with the additional power to make recommendations to the Lord Chancellor on fees and a provision to include public sector employees, regulate all enforcement agents.

### Inclusion of enforcement services

89. The Authority will require a provision to be included in primary legislation to allow for enforcement services to be regulated by them. As a sector separate from its current areas of responsibility we will also need to make further provisions.

### Licensing all enforcement agents

90. We will need to provide for the inclusion of the public sector in the Authority's statutory remit.

### Approving authorised enforcement service providers

91. The Private Security Industry Act 2001 requires the SIA to operate a voluntary company approval scheme for the other sectors it regulates but gives reserved powers to make such a scheme compulsory at a future date. We propose, however, that all enforcement service providers will be subject to a compulsory approval process because of the intrusive nature of enforcement work. There are currently approximately 150 service providers in the private sector, some of which employ as many as 200 enforcement agents.

### Accrediting professional associations

92. We propose that there should be a provision for accreditation of professional associations of which there are six at this time. One of the proposed conditions of a licence for all enforcement agents will be membership of an accredited professional association. The associations will have a role to play in the complaints process as well as providing other services and advice to enforcement agents.

### Authorising training providers

93. All enforcement agents will undertake training and qualifications. We propose that the training providers should be authorised. This may include accredited professional associations but there may be other authorised training providers including organisations in the public and private sectors who may apply for authorisation to provide training and qualifications for enforcement agents.

### Setting up a Complaints Board

94. One of the Authority's primary new functions will be to oversee a complaints scheme for enforcement services, headed by a Complaints Board that will convene as and when required. Although the SIA will have the power to revoke licences for failure to act within the terms of the licence, primary legislation will give the Authority the power to set up a Complaints Board and oversee the complaints procedures of enforcement agents, service providers and accredited professional associations, ensuring that systems are fair and balanced. The Complaints Board will only monitor complaints regarding the conduct of licensed agents and approved service providers in connection with enforcement activity and the abuse of fee scales and charges. We would expect, in the first instance, employers and professional associations to deal with complaints.
95. The Private Security Industry Act already provides the SIA with the power of investigation and maintaining a register. This would need to be expanded to include approved enforcement service providers and accredited organisations.

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## Making Recommendations to the Lord Chancellor on Fees and Legislative Change

96. The Authority will require an additional power to make recommendations to the Lord Chancellor. The Authority will be responsible for making recommendations to the Lord Chancellor on a detailed fee structure. The Authority will also undertake and/or commission detailed economic analysis and research into how the fee structure operates within the enforcement market. The Authority will therefore require the necessary investigative power and adequate research capabilities to obtain any information relevant to an analysis of the market and those operating within it. This will need to include the power to obtain information from licensed agents, approved service providers and accredited associations as appropriate.
97. The SIA already has a responsibility for keeping under review the working of the legislation on private security. We propose that this responsibility should be extended to include legislation in relation to enforcement agents and should be undertaken at the Lord Chancellor's request or when the SIA deems necessary. The SIA could then draw up and submit proposals for amending legislation relating to enforcement services. Recommendations will focus on the maintenance and improvement of standards in the provision of enforcement services. We see the Authority as the central body most closely involved with the enforcement sector and best placed to make recommendations on legislation. The Authority may undertake specific research work and consult with stakeholders to fulfil this function.
98. As outlined above, the new regulatory body will be responsible for providing recommendations to the Lord Chancellor on fees and legislation regarding the enforcement profession. The Lord Chancellor should also have the final decision in the criteria for licences, approvals, accreditations and authorisations and exemptions from these. We envisage therefore a parallel role in the Authority for the Lord Chancellor (for enforcement agents) alongside the Home Secretary (for the other sectors). Overall sponsorship of the Authority as an NDPB, including financial and governance issues will remain with the Home Secretary.

Responses to the Green Paper indicated overwhelming support for increased regulation, and a majority in support of establishing a statutory executive NDPB to regulate private and public enforcement agents. In accordance with guidance on Better Regulation, we considered whether any other body could meet our needs. It will be more cost effective to use an existing regulatory body rather than set up a separate Commission.

99. The following paragraphs set out in more detail how LCD envisages regulation working in practice and in particular what secondary legislation is likely to cover.
100. We estimate that there are some 4,000 enforcement agents in the public and private sectors that will be licensed, and 150 enforcement service providers in the private sector that will be approved through the Authority. The Authority may also approve employers of licensed enforcement agents in the public sector and accredit professional associations, of which there are six at this time.
101. The Authority will advise the Lord Chancellor on all aspects of the regulation of enforcement services, including the criteria for licences, approvals, accreditations and authorisations, as well as making recommendations to the Lord Chancellor. In order to do that it will require advisors with expertise in the enforcement sector.

## Scope to Licence all Enforcement Agents

102. To be allowed to undertake enforcement work an individual will have to be licensed by the Authority, or hold an interim licence and be undertaking training under the supervision of a licensed enforcement agent with a view to becoming a full licence holder.

103. It will be an offence to undertake the designated activities and functions without a licence. This will be in line with the criminal offences for operating as an unlicensed security operative under the Private Security Industry Act 2001; unlicensed agents will be liable to imprisonment and/or a fine. The Authority's Inspectorate will have the power to check on both licensed and unlicensed individuals.
104. Individual enforcement agents will have to apply for a licence relevant to their area of work and expertise in order to exercise their relevant functions. We are recommending four separate licences for:
- **Taking legal control of goods:** Allowing an enforcement agent to go to the debtor's door, seize goods, collect payment, or, in lieu of payment, negotiate repayment options (at the request of the creditor), levy, seize, remove and sell goods as set out in enforcement agent law.
  - **Possession:** Allowing an enforcement agent to take possession of land on behalf of the creditor.
  - **Committal/Arrest:** Allowing an enforcement agent to arrest an offender or a debtor under an order of a court and to take him or her into custody.
  - **Access to Information:** Allowing enforcement agents to apply for a partial Data Disclosure Order (DDO) to assist with warrant enforcement.
105. It is expected that there will be approximately 2,500 applications for licences to take legal control of goods. A further 900 applicants are likely to come from public sector enforcement agents who will be required to acquire a licence from the Authority, and a proportion of these will also require one of the 500 licences for arrest and 200 for possession.<sup>25</sup> It is our intention that the regulatory regime will embrace all enforcement agents, since exempting parts of the public sector would put at risk the stated policy aims and objectives. An individual who undertakes more than one if not all of these activities could apply for a composite licence.
106. An individual who undertakes more than one if not all of these activities could apply for a composite licence.
107. We would expect there to be an electronic system for licence applications. We would also expect that application process to build in criminal record checks, to which the SIA already has access. It is proposed that the applicant will have to declare that they are not under liability in respect of overdue fines or court judgments, not an undischarged bankrupt and not insolvent. The Authority would be empowered to make investigations and enquiries into any of these criteria where appropriate.
108. An applicant will be able to appeal against the refusal or revocation of a licence. Under the SIA the external appeal route is currently through the magistrates' courts, and appeals against this decision can be made to the Crown Court. This may have to be reviewed in the long-term in the light of the civil jurisdiction of magistrates' courts.
- ### Compulsory Approval of Authorised Enforcement Service Providers
109. The approval process and criteria will differ for the public sector, for example they will have to provide appropriate alternative arrangements for insurance, which include Crown indemnity, and the relationship with the Authority's Inspectorate and the guidance on monies and accounts will have to be specific to the public sector's status and role.
110. It will be an offence for an enforcement service provider to employ enforcement agents and operate as enforcement firms or partnerships without being granted approval by the regulatory body. A person who operates as a service provider without approval, or holds himself out as approved when he is not so registered as approved, shall be liable to imprisonment and/or a fine. The Authority's Inspectorate will have the power to carry out checks to ensure that the new requirements are being complied with.
111. An applicant will be able to appeal against the refusal or revocation of a licence. Under the SIA the external appeal route is currently through the magistrates' courts, and appeals against this decision can be made to the Crown Court. This may have to be reviewed in the long-term in the light of the civil jurisdiction of magistrates' courts.<sup>26</sup>

<sup>25</sup> These are county court bailiffs, magistrates' courts' civilian enforcement officers, Local Authority in-house bailiffs and Inland Revenue distrainers

<sup>26</sup> See Magistrates' Courts *The Approval of Enforcement Agencies Regulations* (2000)

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112. We have explored with key stakeholders through the consultation process and subsequent discussions some of the finer detail. As already mentioned, the SIA will be given considerable autonomy and would have the final decision in settling the procedures for the regulation of enforcement agents, enforcement companies, professional bodies and training providers. The following paragraphs therefore set out issues we would expect the Authority to consider.

- declare that they are not an undischarged bankrupt, not insolvent, and not under liability in respect of overdue fines or court judgments;
- declare any business interests that could conflict with enforcement work;
- pass a criminal record check; and
- operate in line with the Code of Practice, in particular balancing duties to the creditor, debtor and the court.

### Issuing a Code of Practice

113. We envisage that the Authority will consider issuing a *Code of Practice for Licensed Enforcement Agents, Approved Service Providers and Accredited Professional Associations* to be published prior to the implementation of the procedures for licensing, approval, accreditation and authorisation. It will build on the *National Standards for Enforcement Agents* (May 2002), which has been widely distributed, well received and supported by the industry. It is envisaged that the Authority will issue additional guidance to supplement legislation on a number of issues such as the observance of religious and cultural festivals, goods that should not be removed by enforcement agents, and the enforcement agent's responsibilities to people who are potentially vulnerable.

115. We expect that an applicant for an interim licence will have to undergo the same checks and application procedures as an applicant for a full licence, with the exception of the completion of the training criteria.

116. Licences will be subject to renewals, which will be determined by the SIA in line with their forthcoming decisions relating to the issuing of all other licences. The SIA is developing proposals for a uniform licence fee across all sectors. These licence fees would be significantly cheaper than a licence fee under the model of an Enforcement Services Commission suggested in the Green Paper.

117. It is proposed that the regulation will be self-financing through the licence, approval or accreditation fees.

118. The Authority might wish to set provisions in respect of insurance required for enforcement agents. We propose that the Authority will have the power to set the standards of training and qualifications required for enforcement agents and, through the authorisation of training providers, will determine who may provide it.

### Enforcement Agents

114. We expect that in order to obtain the relevant licence, applicants will:

- complete an application form;
- pay the fee prescribed by the Authority;
- provide evidence of adequate insurance as appropriate;
- provide evidence of adequate training;
- hold up-to-date membership of an accredited professional association;
- be committed to working with the Authority and others to improve standards;

119. The Authority will have the discretionary power to prescribe business interest restrictions for related business activities undertaken by licensed enforcement agents. These are likely to include buying or trading in debt. We would then expect applicants for licences to be required to declare all other business activities on the application form, and that these may be subject to investigations by the Authority in the case of a conflict of interest that in the Authority's views would make licensing inappropriate. An appeals mechanism would be available.

120. Following on from the criteria suggested for obtaining a licence we expect that to retain a licence, licence holders will:

- undertake on-going training to a required standard by an accredited training provider;
- follow the Code of Practice issued by the regulatory body for their category of licence;
- comply appropriately with requests from the Authority in line with their investigative and regulatory powers;
- display an identification card or badge issued by the regulatory body when undertaking their work; and
- have their name included in a public register of licensed enforcement agents.

### Enforcement Service Providers

121. In order to obtain approval, we envisage that enforcement service providers will:

- complete an application form;
- pay the fee prescribed by the regulatory body; and
- undertake to:
  - be committed to improving standards in the profession;
  - ensure that all enforcement agents they employ are licensed and complying with the Authority's Code of Practice;
  - declare any related business interests for the firm/partnership;
  - comply with guidance and standards set out in the Code of Practice;
  - act within the limits of the powers given by the current legislation; and
  - provide evidence of adequate insurance or similar arrangements.

122. Approved authorised enforcement service providers should, we expect, be required to:

- inform the Authority's complaints register of upheld complaints relating to licensed activities against themselves and their licensed enforcement agent employees on request, in a form prescribed by the Authority;
- ensure that all enforcement agents they employ are licensed or in training and holding an interim licence, and that their employees are complying with the licence regulations;
- ensure that all agents, employees and contractors have appropriate training to ensure that they understand and are able to act, at all times, within the bounds of the relevant legislation and Code of Practice; and
- be committed to delivering high standards bearing in mind their responsibilities to the court, the creditors and the debtors, in line with the Code of Practice.

123. In addition, we envisage private sector enforcement service providers should:

- satisfy the provisions in respect of insurance prescribed by the Authority;
- allow the Authority's Inspectorate to enter their premises and make enquires on request;
- ensure that audited accounts are available in an accessible form on request to the Authority's investigators;
- ensure that an annual audit of the service provider's accounts by independent accountants is undertaken;
- maintain a separate account for monies due to the creditor;
- maintain accurate books and accounts, and make these available to establish monies owed to the creditor. These should be made available in an accessible form to the Authority's investigators when requested; and
- keep appropriate records for all financial transactions.

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124. Approved enforcement service providers will, we expect, be required to have their name and contact details included on the Authority's register, which will be available to the public, and will be entitled to:

- display a 'quality mark' on their literature and correspondence; and
- operate as firms employing enforcement agents.

125. The Authority will have the power to obtain information relating to licensed activities from enforcement service providers in order to inform their deliberations with regard to fee structures and charges.

126. Appeals for the non-granting of approvals will be made in a parallel process to the appeals for the non-granting of licences set out above.

## Professional Associations

127. We expect that accredited professional associations will be required to:

- operate complaints procedures for all of their members in line with the Authority's Complaints Scheme (the functions of which will differ in the public and private sectors);
- work in co-operation with the Authority to raise standards throughout the profession and promote best practice;
- maintain accurate records regarding their membership, as requested by the Authority;
- become an authorised training provider; and
- allow the Authority's inspectors access to their operations to prove that they are operating fairly and are balancing accounts.

128. In order to obtain accreditation professional associations will, we envisage:

- complete the application procedures;
- pay a fee prescribed by the Authority;

- operate an open, fair and transparent membership application process for licensed enforcement agents and approved service providers; and
- provide evidence that they are able to operate a complaints procedure for all of their members.

129. The accredited professional associations would be able to provide a number of additional services to their members specific to their needs and the sector in which they operate. These could include:

- preferential arrangements for insurance;
- IT services;
- access to debt counselling for debtors;
- corporate membership;
- newsletters; and
- providing advice to their members, including legal advice.

130. Appeals for the non-granting of accreditations could be made to a magistrates' court in a parallel process to appeals for the non-granting of licences and approvals.

## Training Providers

131. Providers will, we envisage:

- complete the application procedures;
- deliver appropriate training to the standards agreed by the Authority; and
- be subject to checks by the Authority's Inspectorate.

132. The Authority will consider the training needs of enforcement agents. Its role will involve considering the content of any qualifications and any ongoing training necessary to cover legislative and process changes and best practice. All licensed enforcement agents will have to demonstrate their knowledge and understanding of law relevant to enforcement and the implications of their licence. Training will inform the enforcement agent of their role in balancing the needs of creditors, debtors and the

court. It will also cover agents' ability to negotiate instalment plans with the debtor and involve raising awareness of the debt advice sector and handling vulnerable client groups.

133. Professional associations, service providers and education providers will be obliged to apply for authorisation to administer and/or run formal training courses and qualifications for enforcement agents, which will be provided to meet the licence criteria.
134. Licensed enforcement agents will be obliged to keep up to date with process and legislative changes, as well as best practice in the profession. There will therefore need to be training sessions to cover any changes or updates, and an enforcement agent will be required to prove, when applying to renew their licence, that they have attended these.

## Complaints Process

135. There are currently no uniform standards for dealing with complaints. The Authority will consider issuing and publishing guidance on the new Complaints Scheme. The guidance will, we envisage, set out the requirements for complaints and disciplinary procedures for licensed enforcement agents, approved service providers and accredited professional associations.
136. The Complaints Board will be responsible for considering and investigating any complaints that have not been resolved, and any appeals against the internal procedures of the enforcement service provider or professional association. The Board will have the power to award compensation to be paid by the enforcement agent, service provider and/or professional association. On making such an award the Board will also have the power to make recommendations to the Authority on the appropriate action, which could include the revocation or suspension of a licence, approval or accreditation.
137. It will be necessary when working on the details of the complaints process to look at where the role of the Authority will fit, bearing in mind the recourse available to the court on illegal enforcement and the roles of public adjudicators and the Parliamentary Commissioner for Administration.

138. We propose that the formal process for private sector enforcement services will have to allow the creditor and/or debtor to lodge their complaint against an enforcement agent or service provider to the enforcement agent, service provider, professional association, or the Authority.
139. If any complaint in either the private or public sectors is upheld and compensation is awarded, it will be an obligation for a record to be lodged with the Authority's complaints register. It is intended, however, that the accredited professional associations will have primary responsibility for the complaints process for licensed enforcement agents, with the Complaints Board ensuring that appropriate arrangements functioned effectively. This would keep the administrative and personnel burden of the Authority to a minimum.
140. We recognise that it may in some circumstances be appropriate for a Commission to have the power to award financial or other compensation. Their powers will be limited to claims of irregular action including complaints about fees by licensed enforcement agents and complimentary to those of the court, who will continue to handle complaints of illegal behaviour in respect of enforcement agents.<sup>27</sup>
141. We will prevent the potential for double jeopardy in legislation.

## A project to inform future policy proposals on the regulatory regime

142. As we have indicated, to regulate enforcement agents the SIA would need to broaden its current structure and extend its role. To inform policymakers and assist the SIA in considering how to handle these tasks LCD commissioned a project enabling stakeholders, including the key trade associations, to comment in detail on how aspects of the new regulatory structure should operate in practice. The project was undertaken by John Kruse, freelance writer, trainer and consultant, and member of the Lord Chancellor's Advisory Group on Enforcement Service Delivery. The subsequent report is available on the LCD website at [www.lcd.gov.uk](http://www.lcd.gov.uk). The closing date for responses is 16 May 2003.

<sup>27</sup> For definition of the term "irregular action" see Annex 3 – Glossary

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143. Mr Kruse noted that there was already a large degree of consensus between consultees as to the elements to be included in a new regulatory system and considerable cross sector agreement on the detail of issues such as qualifications and complaints handling. He concluded that although the SIA, as prospective regulator, may have little experience of a sector as complex and legalised as enforcement, it is likely that by the time they take over responsibility for the area they will be presented with an industry that has already taken great steps to reform itself along the lines likely to be required by any regulatory body.
144. In terms of the most important individual criteria that should be applied during the licencing process, Mr Kruse summarised these as:

- **Licences** should be required for all individuals and agencies, though different detailed criteria may apply to each;
- **Qualifications** to be obtained by licence applicants should test both their competency to perform the job as well as their technical or legal knowledge. In addition, the licensing process should ensure that there is a spectrum of ability within agencies;
- **Complaints schemes** already share many common elements. The main work of the regulator will be to harmonise the details and gradually raise standards rather than having to require the industry to create either complaints handling systems or a complaint responsive culture from nothing;
- **Compulsory membership of a professional association** will naturally be a key factor in generally raising standards within the enforcement industry but in particular it will be an important catalyst in achieving the qualifications and complaints handling criteria highlighted above;
- **Insurance criteria** should not be prescriptive. The regulator should simply be satisfied that the cover held is sufficient in terms of the nature and level of risk insured.

### Transitional arrangements

145. In line with its existing terms of reference, the Lord Chancellor's Advisory Group on Enforcement Service Delivery has been invited to provide advice to Ministers on the transitional arrangements necessary to move from the current enforcement structures, where bailiffs are certificated under the Distress for Rent Rules 1988, to those that are envisaged in the future licensing regime for enforcement agents.

PROPOSED ROLES AND STRUCTURES UNDER A REGULATORY REGIME



# 2

## Section Two

# Enforcement Agent Law

### Introduction

Government believes that regulation can only work successfully with a single piece of enforcement law, clearer guidance and an improved fee structure and that we must make the system easier for all involved – debtors, creditors and enforcement agents.

146. This section sets out proposals for a single piece of legislation to govern the actions of enforcement agents when taking legal control of goods. The legislation will bind the actions of all licensed enforcement agents and set out arrangements for actions undertaken in accordance with the new 'Commercial Rent Arrears Recovery' legislation which will replace the current remedy of Distress for Rent, which currently allows landlords to seize goods in lieu of unpaid rent.
147. Professor Beatson called for a single piece of legislation to regulate all enforcement agents, and made detailed recommendations for change. LCD accepted most of these but felt some would benefit from public consultation in the Green Paper. An Inter-Departmental Working Group has also discussed the issues in-depth.<sup>28</sup>

It remains the Government's position that the enforcement system in England and Wales permitting the seizure and sale of a debtor's goods in order to settle a judgment debt may always be necessary.

148. The above position is tempered by the belief that seizure and sale should be undertaken in a reformed and

regulated system, where efforts are made to ensure it is not used indiscriminately; our proposals for licences, increased professionalism and changes to the fee structure are intended to assist here. Other methods of enforcement and proposals to make them more effective are addressed elsewhere in this White Paper. This Section concentrates on how Government intends to unify and rationalise the mix of legislation and common law that currently governs taking legal control of goods.<sup>29</sup>

### Legislative changes

149. LCD has accepted there are two basic principles:

- that taking legal control of goods should be an effective machinery in which creditors have confidence, in order to receive payment of monies owed; and
- that the machinery should protect debtors from undue economic hardship and personal distress.

150. The Beatson Report also considered how current law and practice would need to be modified to ensure greater compliance with the requirements of the ECHR.<sup>30</sup> Currently, much of the law which affects enforcement stems either from case law arising from the Distress for Rent Act 1689 or the various statutes which permit taking legal control. The majority of private bailiffs undertaking warrant enforcement work must currently be certificated under the Distress for Rent Rules 1988. The proposed single piece of enforcement law will address these issues and, while there will be a Commercial Rent Arrears Recovery system, its regulations will not be used for certificating enforcement agents.

<sup>28</sup> Representatives from Child Support Agency (Department for Work and Pensions), Inland Revenue, Her Majesty's Customs and Excise, Office for the Deputy Prime Minister, Local Government Association, Court Service and chaired by the Lord Chancellor's Department

<sup>29</sup> For definition of the term "common law" see Annex 3 – Glossary

<sup>30</sup> Professor Beatson's conclusions on the ECHR compliance of the current legislation can be summarised as: although there are areas of doubt, the Strasbourg jurisprudence shows that a system of distress does not per se breach Articles 6(1), 8, 14 and Article 1 of the First Protocol to the European Convention on Human Rights ("ECHR"); the relatively broad discretion that can be exercised in the administration of most forms of distress may, however, make its exercise in a particular case vulnerable to a challenge based on lack of proportionality; the regime governing distress for rent may also be vulnerable to a challenge based on its lack of "lawfulness", which would mean that it fails to meet the condition in Article 8(2) that an interference with private and family life and the home must be, *inter alia*, "in accordance with the law"; the potential for challenge, particularly that based on lack of proportionality, means that it is desirable to remove uncertainties in the law and to clarify the grounds upon which distress can be levied and discretion in its administration can be exercised

151. The legislation will have a particular emphasis on:

- ensuring that there is time for the debtor (or third party) to apply to court to prevent sale of goods;
- a consistent list of goods that will be exempt from all types of legal control;
- ensuring proportionality between the size of the debt and the sale of goods; and
- a clear statement on the systems available to address any wrongful actions by the creditor or the debtor.

## Legislative Framework

152. Primary legislation will give the Lord Chancellor the power to set regulations:

- governing the actions which an enforcement agent uses in taking legal control of goods for a debt;
- that will give the Authority the power to set guidelines on an agent's behaviour through a Code of Practice;
- that will set the penalty for a person who wrongfully interferes with any goods taken under legal control;
- that will set out the remedies available for irregular and illegal action; and
- that detail the particular requirements for taking legal control of goods for the purpose of Commercial Rent Arrears Recovery.

153. Under these powers the Lord Chancellor will make secondary legislation which will set out regulations for specific actions in taking legal control of goods, as follows:

- period of notice required;
- information to be given to the debtor;
- hours of the day when taking legal control may be undertaken;
- entry to premises;

- list of exempt items (including how to deal with third party goods, joint property, hired goods and goods purchased on hire purchase terms);
- forms of legal control;
- model forms of an agreement for taking legal control of goods and inventories;
- issues around duration of levy/abandonment/second distress;<sup>31</sup>
- sale and payment of goods; and
- remedies.

154. To support these regulations, the Authority will also be responsible for producing a Code of Practice as outlined at paragraph 116. The Authority should give guidance that will underpin the secondary legislation on:

- cultural and religious sensibilities;
- dealing with vulnerable clients;
- the detail of inventories;
- the detail of exempt goods; and
- fit premises for storage of goods.

## The detail

155. The following paragraphs reflect the sequence of events we would expect when an enforcement agent seeks to take legal control of goods for the purpose of enforcing a debt. These actions should only be undertaken by a licensed enforcement agent or under the direct supervision of such an agent.

## Notice

156. At present there is no requirement to give notice before taking legal control of goods but some form of written notice is given in most cases. The purpose of giving notice is as an incentive and opportunity for the debtor to seek advice or pay the debt. It may also give debtors an

<sup>31</sup> For definition of the term "abandonment" see Annex 3 – Glossary

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opportunity to remove goods. The debtor will be entitled to notice from the creditor (or enforcement agent if the creditor wishes) or the court detailing the consequences (both procedural and financial) to the debtor if failure to pay the debt leads to enforcement action. In all cases the notice will be served not less than seven calendar days before any enforcement action is taken.

157. However, the creditor will have the right to apply to the court to dispense with notice if there are reasonable grounds to believe that the debtor may dispose of goods to avoid enforcement action. It will be for the creditor to show objective evidence, and not merely a subjective fear. An example would be evidence that the debtor had previously evaded enforcement action by removing goods.

### Information

158. If the notice as set out above fails to spur the debtor to payment, a licensed enforcement agent may take legal control of the goods. The Authority will determine the requirements for the agents to:
- carry appropriate identification; and
  - provide information to debtors.
159. The information provided to debtors will cover:
- the statutory liability or judgment which has given rise to the debt;
  - the legislative provision authorising the action;
  - the amount for which the warrant was issued;
  - the charges (which have been and can be made) in relation to it;
  - how payment can be made;
  - that the goods will be sold if the debt and costs are not paid; and
  - any rights of appeal or avenues of complaint the debtor may have (in outline).

160. To protect both the debtor and third parties, the enforcement agent will be required to direct the debtor to inform him or her of any petition for bankruptcy and the status as to the ownership of the goods.

### Days and Hours

161. Issues regarding the days and times at which taking legal control of goods may commence or be undertaken were explored in the Green Paper. The *National Standards for Enforcement Agents* usefully raised awareness of the sensitivities of these issues, particularly amongst enforcement agents themselves. As indicated in the Green Paper, taking legal control of goods will only be allowed to commence between the hours of 6.00 and 21.00 (or at any time a business is trading). However, it is envisaged that enforcement agents will be bound by a Code of Practice, issued by the Authority, recommending that enforcement should take place at a reasonable time taking into account all the circumstances.
162. Notwithstanding the guidance and Code of Practice, taking legal control of goods may take place on any day of the year. It would be problematic to seek to identify all religious festivals and adherents to all religions; to restrict a ban on this action to Christian holidays might be regarded as discriminatory. Guidance is needed on religious and cultural sensibilities from the Authority in the Code of Practice.

### Entry

163. The following paragraphs define the different types of entry. The underlying principle of allowing an enforcement agent entry to premises in order to take legal control of goods is to ensure that:
- no debt should be 'unenforceable' (although it is recognised that there are some debtors who genuinely cannot pay); and
  - continuous refusal to allow a regulated enforcement agent entry will not mean that enforcement will not take place – even within a private home.

164. Normal entry will be by unlocked outer doors (including French windows but not through windows), and includes normal access to the outer door of premises across a drive, or a yard, or a garden (at the invitation of the debtor or otherwise).
165. We seek to establish the principle that refusing to open a door or unlock a gate will not stop legitimate enforcement action, nor should superior technology to protect the entrance to a property prevent enforcement from taking place. For example, currently there is little scope for entering private homes that are protected by video cameras and electronic gates. Forcible entry in domestic premises will be permitted – but only with prior judicial authority.
166. Forcible entry in commercial premises is currently allowed for those enforcement agents who undertake civil enforcement on behalf of the High Court and County Court. It will continue to be permitted for those who presently have this power. Forcible entry to commercial premises will also be permitted for other enforcement agents with prior judicial authority. Having failed to gain normal entry, enforcement agents, save for those who are currently officers of the court, may apply to the court for permission to undertake forcible entry in commercial premises with or without notice.
167. Normal entry to third party premises will be appropriate. However, the agent should be certain that the goods are on the premises before attempting to gain entry. Forcible entry to third party premises will require prior judicial authority in all cases.

### Exempt items

168. There has been much discussion on what goods should be exempt from being taken into legal control. The types of goods that may be taken should be set out clearly and be consistent in all cases. The power to exempt goods will be exercisable by the Lord Chancellor in secondary legislation. Whilst the onus is on the debtor to show that goods are exempt, the enforcement agent will also have a general responsibility to direct the debtor to tell him or her which goods are exempt.

169. In secondary legislation the following should be set out:

- such tools, books, vehicles and other items of equipment as are necessary to the debtor for use personally by him in his employment, business or vocation not exceeding in aggregate value an amount as may be prescribed by the Lord Chancellor, and;
- such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying his basic domestic needs and those of his family.

170. The Authority will have the power to issue guidance to enforcement agents on the interpretation of this list.

171. It is intended that the important points in relation to exempt goods will be that:

- the goods are used personally by the debtor; and
- it will be acceptable for very expensive or luxury items, including tools of the trade, to be taken and replaced with similar goods that are necessary to the needs of the debtor (and his family).

### Seizure of money, banknotes and bills of exchange, promissory notes, bonds, specialities and securities for money

172. It is LCD's view that there should be a new statutory provision authorising the seizure of money, banknotes and bills of exchange, promissory notes, bonds, specialities and securities for money. We recognise that dedicated, specific training is necessary to ensure that those taking legal control of such items are fully aware of the need firstly, to recognise the worth of such items and secondly, to recognise that some debtors are in a vulnerable position. An agent will only be given the permission to seize the above when he/she can be shown to be fully qualified and have relevant expertise.

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### Third Party Goods, joint property, hired goods and goods purchased on hire purchase terms

173. It is important that all those involved in the seizure of goods have an opportunity to challenge the seizure of any item on the grounds that it is exempt. Therefore, a debtor, a joint owner with the debtor, or any person in possession of an article seized, may make an application to a court within seven days and the court will have the power to make an order releasing the goods if satisfied.

### Taking Legal Control of Goods

174. Currently there is, in theory, a distinction between seizure and impounding, however circumstances have changed and the use of 'walking possession' has become more widespread, and the distinction between seizure and impounding is less clear.<sup>32</sup> As we seek to rationalise and simplify the law, we accept that this should be replaced by a single simple process called taking legal control of goods, irrespective of the actual form of that control.

175. There should be three types of legal control of goods:

- by agreement (formerly walking possession);
- by securing goods on the premises (this includes locking them in a room, wheel clamping of vehicles and close possession, although this last is rarely used now);<sup>33</sup> and
- by removal from the premises.

176. Currently where legislation provides a statutory form for walking possession, the obligations of the signatory and the agent are set out quite comprehensively. These should be included in enforcement law. The agent should give the debtor an inventory of the goods seized, and legislation will provide for a standard form of agreement. The debtor/signatory should sign two copies of the agreement, and retain one. The agreement will set out the terms on which an agent has taken legal control of goods by walking possession and should:

- be stated in secondary legislation together with a model form of agreement;
- require the enforcement agent to agree to leave the goods on the premises and delay removal; and
- require the debtor/signatory (i.e. a responsible person on the premises) to agree that until payment is made or the warrant withdrawn, he or she:
  - will not remove the goods (or allow them to be moved) from the premises;
  - will show the agreement to anyone who calls to the premises to levy on the goods and immediately inform the enforcement agent of such a visit;
  - will not damage the goods or allow any other person to do so;
  - authorises the enforcement agent to re-enter the premises at any time to inspect the goods or to complete the enforcement action as often as he or she thinks necessary;
  - will pay the appropriate fees.

177. Where legal control by agreement has been arranged the agent will give the debtor a statement of the terms of that agreement.

### Inventories

178. It will be mandatory for enforcement agents to give debtors a document setting out the inventory. The notice/inventory should either: list and identify each item seized, or imply that all goods on the premises have been seized. However, it would be inappropriate and disproportionate to consistently use the latter – as often the debt would not be large enough to justify seizing all the goods on the premises, i.e. to do so would make it an excessive (and irregular) seizure of goods. Agents should take care in deciding the manner of the inventory taken. The Authority will provide guidance on this.

<sup>32</sup> For definition of the terms "impounding" and "seizure" see Annex 3 – Glossary

<sup>33</sup> For definition of the term "close possession" see Annex 3 – Glossary

### Duration of Levy

179. The maximum period for a levy should be the same as that of the lifetime of a warrant, which is currently 12 months. The warrant may be renewed.

### Abandonment

180. An agent will lose the right to return and remove the goods if he or she abandons them; goods are abandoned when there is evidence that the agent intended to abandon the levy. In most cases of taking legal control by agreement, this will be unusual, as the agent will not need to do anything further to keep legal control of the goods.

### Taking legal control of goods a second time

181. Secondary legislation will specify the circumstances in which an enforcement agent is permitted to make a second levy, that is:
- there were insufficient goods to satisfy the debt when the first levy was made;
  - on the first visit to the premises, the enforcement agent agreed to delay the taking of legal control of goods at the debtor's request or the debtor agreed to pay by instalments which were not subsequently paid;
  - where the enforcement agent withdrew from the first levy because the debtor had been adjudged bankrupt, and the bankruptcy has since been annulled and the debtor has been unable to enter a voluntary arrangement with his creditors;
  - if the enforcement agent was prevented from completing the action by some wrongful act by the debtor, such as deliberately disrupting the sale; or
  - where the goods are destroyed or substantially damaged by a natural event such as fire or, in the case of livestock, death.

182. The creditor should be able to issue repeat warrants for a particular debt, as many times as necessary, but it should be possible to issue a second warrant for a particular debt only after the first warrant has been returned. In addition, the up-front fee attaches each time an enforcement agent takes on a warrant because the principle of payment for taking on the case should apply.
183. However, in the case of High Court Enforcement, if no single enforcement officer were assigned to at least one of the districts involved, and no single enforcement officer assigned to at least one of the districts involved was willing to execute outside his home district, then a judgment creditor could issue more than one warrant. The creditor would only be able to recover a single up-front fee from the debtor, in addition to the original debt.

### Sale

184. No goods should be sold until the expiration of a period of at least seven calendar days following the day on which the agent has taken the goods under legal control. Sale by private treaty may be allowed with the permission of the court.
185. The sale may take place on the debtor's commercial premises unless the debtor makes a written request that it takes place elsewhere and may take place on domestic premises with the consent of the debtor. However, in all cases the cost of removal and storage is at the expense of the debtor.
186. Goods taken into the legal control of an enforcement agent and taken away from the premises must be deposited in a fit place. The Authority may issue further guidance.
187. Professor Beatson recommended that if it appears that there are insufficient distrainable goods on the premises to cover the expenses and 10% of the debt or £50, whichever is the lesser, the goods should not be sold. The sale of an item at auction is dependent on market value and will vary. This recommendation for a hard and fast rule on proportionality is not accepted. However we would still expect agents/creditors to keep in mind the need for proportionality when undertaking enforcement work. The Authority will ensure that enforcement agents act

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appropriately at all times – i.e., do not seize goods when it is obvious that the sale of such goods would not meet the expenses of the enforcement agent and some of the debt. With the introduction of an up-front fee (see Section Three, paragraph 235) it will be for the enforcement agent and creditor to agree as part of their contracts what is expected in such cases where it is obvious that the debtor may fall into the ‘can’t pay’ category.

188. The sale must be appropriately advertised, and an auction sale must be advertised at least three days before it is held. Secondary legislation will include rules governing the conduct of sale (normally by public auction) and the passing of title of goods sold.

### Payment

189. Secondary legislation should provide that action should cease if the debtor pays the amount owed and the costs, either before the enforcement agent takes legal control of the goods or at any time before sale save during the process of taking legal control or removing the goods from the premises. The debtor is responsible for all costs in the enforcement procedure and there are no plans to change this.
190. The legislation should also specify that any goods seized should be made available for collection if payment is received.
191. If the debt and the enforcement agent’s fees are paid before entry then the agent will not be entitled to proceed or to claim any further fees.

### Interfering with goods taken into legal control

192. The Government’s position is that the punishment for the debtor interfering with goods taken into legal control should be similar to the punishment for the creditor who takes legal control of goods improperly. Secondary legislation should provide that the debtor who is alleged to have interfered with goods seized must be informed promptly and in detail, of the nature and the cause of the accusation.

193. A person who wrongfully interferes with any goods taken under legal control should be liable on summary conviction to up to one month’s imprisonment, or a fine not exceeding level four on the standard scale, or both.

### Remedies

194. It is believed by those in the enforcement profession that currently, many of the complaints about enforcement agents are about the fees and costs charged (to the debtor). Complaints about fees such as overcharging should be dealt with as any other complaint. As explained earlier, under the new regulatory structure it is expected that most complaints, if they have not been successfully dealt with at an earlier stage, could be addressed by the Authority. However, there are circumstances in which a debtor will be complaining to a court about the *illegal* behaviour of an agent and this may also have an aspect of complaints about fees and/or charges. In these circumstances the court which authorised the proceedings would deal with the whole of the complaint, as the Authority would deal with the whole of a complaint about irregularities.
195. Remedies are currently little used and the Government believes that wherever possible, disputes should be resolved by the parties, with the courts used as a last resort. There is a need to reduce the likelihood of cases being taken maliciously or to prevent or delay sale of goods. By aiming for a more simplified way of defining illegal/wrongful and irregular actions we are not attempting to limit the remedies available to debtors for the actions of enforcement agents and creditors. The objective is to introduce a simplified accessible system to address the needs of the debtor.
196. We recognise that even in a well-regulated enforcement sector a complaint process will be required. The face to face nature of enforcement by taking legal control of goods means that debtors will, rightly or wrongly, feel they have cause for grievance. Therefore the procedure should be quick and simple for the benefit of the debtor, agent and creditor. We want to introduce a simplified remedial structure to provide the same regimes:

- for irregular (including excessive) action; and
- for illegal action and for wrongful execution.<sup>34</sup>

## Irregular Action

197. If a complaint has not been resolved at an earlier stage, allegations of irregular action will be dealt with under the Complaints Scheme of the Authority. Irregular action will apply:

- if any of the statutory rules or regulations have not been complied with;
- if there is an irregularity in the manner in which the action was carried out, subsequent to entry to the property, e.g. if an enforcement agent failed to release the goods to the debtor on payment of the debt and costs;
- where the action is excessive, e.g. where the value of the goods seized is clearly disproportionate to the size of the debt.

## Illegal Action

198. The courts will always deal with complaints of illegal action. Illegal seizure of goods applies where the action was not authorised or justified from the outset or where entry to the premises is obtained in an unlawful manner. Currently, damages where recoverable will be for interference with goods, trespass and/or conversion.<sup>35</sup> The existing remedies for illegal behaviour should be available under a simplified regime and we see no good argument that the distinction between distraint and execution should continue.

199. The claim for all three remedies is simple damages up to the value of the goods plus special damages which may also be claimed. Special damages would be any additional claims on top of the value of the goods, such as loss of earnings if a car was removed and the debtor needed the car to carry out their job. They might also include the

automatic return of goods, or payment of their full value to the debtor if they have already been sold (i.e. replacement value).

200. We need to ensure that debtors readily understand how to seek a remedy for an illegal action by an enforcement agent or a creditor, and that information is accessible. The enforcement agent must provide information to the debtor on any rights of appeal or avenues of complaint the debtor may have. There will be a standard form of words in secondary legislation setting out what his or her rights are.

## Interpleader and Replevin

201. If a third party claims exclusive ownership of the goods, he or she should provide evidence to the enforcement agent (or to the creditor if the creditor has nominated goods to be seized). If the agent/creditor is satisfied about exclusive ownership then the goods will be released. This does not interfere with the retention of interpleader action.<sup>36</sup>

202. The question of goods taken into legal control which are jointly owned and the opportunities for a joint owner to apply for release of that article has been addressed in Beatson's Recommendation 18, therefore interpleader action should be limited to claims to full ownership.<sup>37</sup>

203. Replevin is an ancient remedy and little used.<sup>38</sup> We consider that the proposed system of illegalities and irregularities should be sufficient and therefore there should be little need to retain replevin. It will therefore be abolished as a remedy for illegally taking control of goods.

## Priority

204. In the light of the Enterprise Act 2002, which states that for the purpose of insolvency there will be abolition of Crown Preference, and the PIU report on Modernising Government Loans, Crown priority will be abolished. We will therefore follow the lead of DTI and abolish or remove the priority which Crown debts have with regard to taking legal control of goods.

<sup>34</sup> For definition of the terms "illegal action" and "execution" see Annex 3 – Glossary

<sup>35</sup> For definition of the terms "damages" and "conversion" see Annex 3 – Glossary

<sup>36</sup> Beatson Report Recommendation (42) The interpleader procedure should be retained, but consideration should be given as to whether it requires modification in the light of the changes made by the Civil Procedure Rules

<sup>37</sup> Beatson Report Recommendation (18) As a general rule only the goods of the debtor should be liable to seizure. Joint property should be liable to seizure but the distrainor should only acquire an interest in the debtor's share, and only that interest can be sold. If the entire interest in the goods is sold, the joint owner should be paid for his or her share out of the proceeds of sale before either the enforcement costs or the debt are satisfied. If, on an application made within seven days after the date of the execution of the warrant by the debtor or any person who owns a seized article the district judge is satisfied that the article is exempt from distress, an order releasing the article from the distress shall be made

<sup>38</sup> For definition of the term "replevin" see Annex 3 – Glossary

## 2

205. The priority accorded to landlords in respect of distress for rent will be abolished. In keeping with Professor Beatson's recommendation 44, landlords using distress for rent will no longer have priority over other creditors.<sup>39</sup> LCD sees no justification of priority for landlords as they alone will be able to take legal control of goods without prior court approval.
206. Secondary legislation should provide that a warrant allowing county court enforcement agents and sheriffs to take legal control of goods will bind the property in the hands of the debtor from the time that the warrant is delivered to these officers to be executed, so that the priority for execution is determined by the time of delivery, as it is now.
208. The Government therefore intends to abolish the current remedy of distress for rent which also provides for the certification of enforcement agents who undertake distress procedures (Distress for Rent Rules 1988 and subsequent Amendment of 1999).
209. Clearly, several of the safeguards designed to make the new Commercial Rent Arrears Recovery remedy a transparent one will have very close links with a single piece of enforcement law. Therefore, we acknowledge that many of the statements made earlier in this section also apply to the actions of those who undertake rent enforcement.
210. This section of the White Paper sets out our proposals on the introduction of primary and secondary legislation, explains how the new system will operate and highlights the main differences between the new remedy and general enforcement agent legislation.

## COMMERCIAL RENT ARREARS RECOVERY

It is still the Government's position that the current Distress for Rent procedures are not an appropriate or proportionate remedy and should be abolished for residential properties. However, LCD believes that enforcement action should continue to be available for use by enforcement agents in commercial properties only, with some additional safeguards, under a new Commercial Rent Arrears Recovery system.

207. A new system, entitled Commercial Rent Arrears Recovery, will be introduced to replace the current distress for rent procedures, as part of the Government's intention to unify and rationalise the current mix of legislation and common law on distraint. It will be a non court-based remedy allowing licensed enforcement agents to collect arrears of commercial rents on the written instruction of commercial landlords. It will not be available for use in residential premises nor for commercial premises with living quarters attached which are inhabited. The new procedure will be accessible and fairer, and set out more clearly actions landlords and agents are legally entitled to undertake.

### Primary Legislation

211. Under primary legislation, the Lord Chancellor will take the power to set out the regulation allowing enforcement agents to collect commercial rent arrears on instruction from landlords of commercial premises.

### Secondary Legislation

212. Secondary legislation, setting out substantial and procedural rules, will be introduced to support primary legislation. New regulations will cover similar issues to those undertaken in taking legal control of goods as any licensed enforcement agent will be able to. For example, minimum period of rent outstanding; advance notice; sale; information given to the debtor; exempt goods and remedies. Secondary legislation will be underpinned by a Code of Practice, issued by the Authority, which will bind the actions of enforcement agents.

<sup>39</sup> Beatson Report Recommendation (44) The priority accorded to distraint for a debt owed to the Crown over any earlier distraint provided that the goods which have not been sold should not be removed. It is for consideration whether this should, in the interests of clarity in the context of bailiff law, be contained in legislation governing bailiffs

## Commercial Rent Arrears Recovery Procedure

213. The following paragraphs outline the steps to be taken by landlords and enforcement agents in using what is basically a method of taking legal control of goods for a debt (see paragraphs 174-177), in this case the debt being rent arrears.
214. Commercial Rent Arrears Recovery system will only be permitted for the collection of pure rent as set out in a lease. It is not intended for the collection of service charges or any other variable charge collected under commercial leases.
215. Landlords of commercial premises will be entitled to use Commercial Rent Arrears Recovery in premises used for commercial purposes. Where a commercial property has living accommodation attached and it is used for this purpose the landlord will not be permitted to use this system.
216. Currently under the Distress for Rent Rules, a landlord is permitted to take action as soon as the rent is overdue and without notice. In order to ensure that the use of the Commercial Rent Arrears Recovery procedure is proportionate to the amount of rent arrears owed and the action taken is proportionate, LCD considers that there should be a reasonable minimum amount of arrears outstanding before action can be taken. We have considered various formulae to establish this minimum amount, for example a percentage of the rent, or a period of rent in weeks or months, but none have been considered fully satisfactory, as yet. In order to reach a satisfactory conclusion, research work will be undertaken by the Office of the Deputy Prime Minister and LCD on the following options:
- defining a specific quantum;
  - minimum specified period overdue;
  - defining the minimum in terms of the period over which rent is payable (so if rent is payable weekly, one weeks' rent; monthly, one month etc.);
  - that enforcement agents' costs should not exceed x% of the amount overdue.
217. It will no longer be permitted for landlords to carry out enforcement action for themselves. The landlord will be able to instruct an enforcement agent to undertake Commercial Rent Arrears Recovery action without judicial authority. Only licensed enforcement agents will be legally permitted to undertake this action on the written instruction of landlords. Landlords will be required to give written instructions to an enforcement agent. They will also be required to give the tenant a minimum of seven calendar days notice that the enforcement action will commence if the arrears are not paid. (The landlord may request the enforcement agent to do this as part of their contract.) The landlord will reserve the right to apply to the court to dispense with this notice if there are reasonable grounds to do so, as set out in a single piece of enforcement agent law.
218. In undertaking the Commercial Rent Arrears Recovery system the enforcement agent will be bound by most of the legislation relating to a single piece of enforcement agent law. That is, the agent will be bound by the rules on entry, exempt items, third party goods etc., agreements, inventories, levy, abandonment, sale, payment and remedies for debtor and creditor.
219. However, LCD believes that because the Commercial Rent Arrears Recovery procedure will not have judicial oversight and will only ever be used in commercial premises, there should be some particular differences from enforcement law.

## Regulations particular to Commercial Rent Arrears Recovery

### Hours

220. There will be no limitation on the hours at which this enforcement action may be taken as it should only ever be used on commercial premises, and like all commercial premises, taking legal control of goods can be done at any time the business is trading. It should be noted however that like all enforcement action of this nature, the agents will be bound by what is reasonable in all the circumstances.

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## *Notice of sale*

221. The landlord/creditor will not be allowed to sell goods seized without 14 days prior notice to the tenant. Like other regimes under which legal control of goods is taken, a debtor is likely to have had several warnings that the debt is being pursued, for example for road traffic penalties or a judgment debt. In those cases the debtor will have had ample opportunity to seek advice. Due to the more direct nature of the Commercial Rent Arrears Recovery procedure, instead of seven days notice of sale of goods as required in the single piece of enforcement law (see paragraphs 184-188), 14 days notice of sale must be given to the tenant before goods may be sold, in order to ensure that the tenant has time to seek legal advice on his or her situation.

## *Remedies*

222. The final difference is that under a single piece of enforcement law the penalty for interference with goods is currently a fine and/or imprisonment. However this is the penalty for interfering with goods in the custody of law, i.e. the court. This is not the case with Commercial Rent Arrears Recovery. There is no judicial authority before this enforcement action is undertaken and the goods have not been seized through any court procedure, therefore it is not suitable that the penalty for such an action be the same in the case of interfering with goods taken under the Commercial Rent Arrears Recovery. It remains LCD's position that any remedies against the tenant for interfering with goods taken into legal control should be for compensatory damages, firstly, for reasons of proportionality and secondly, to ensure that excessive penalties do not increase the debt unduly.

## Section Three Fees

We are committed to ensuring that any new fee structure adequately and fairly rewards agents in public and private sectors for the work they actually do, is responsive to the market conditions in which it operates, and encourages prompt payment by the debtor. It will incorporate safeguards against malpractice and exploitation. It will be a structure that is supported by, and inseparable from, regulation of the enforcement services profession and a single piece of enforcement agent law.

### Introduction

223. This section sets out our proposals for reform of the fee principles and fee structures for those conducting warrant enforcement business. We intend these principles to apply to all licensed enforcement agents, across the following areas of warrant enforcement: High Court and county court judgments, road traffic penalties, magistrates' courts fines and penalties, local and national taxes and duties, Commercial Rent Recovery, maintenance and child support.
224. These principles and the outline structure are derived from responses to the Green Paper consultation and as a result of the work undertaken by the Advisory Group on Enforcement Service Delivery, including its market evaluation. The Green Paper consulted on fee principles to be set out in primary legislation, along with the powers to enable the regulator, after consultation, to propose clear fee scales which would then be set out in secondary legislation by the Lord Chancellor. This was generally supported.
225. The details of a potential fee scale were not addressed in the Green Paper because of the need to seek views on the wider range of proposals for a regulatory framework and

powers first. Following the analysis of responses to the Green Paper, the fee principles and potential components of a fee structure were subject to further consultation; this was undertaken through the Advisory Group.

226. The Group's Second Report, devoted to the subject of enforcement agents' fees, followed extensive consultation and analysis, including a discussion paper from LCD's Economics Branch *Warrant Enforcement: Towards a New Fee Structure*. This was submitted to many of those in the enforcement sector, and discussed at a 'Stakeholders Meeting' in June 2002. The views of a range of creditors, debtors, and enforcement agents from the public and private sectors informed the final Advisory Group Report.<sup>40</sup>
227. The Report makes ten recommendations, which are appended at the end of this chapter. These have also been subject to further responses from stakeholders, whose views, in writing and through soundings taken at major enforcement conferences and inter-Departmental meetings, have informed the proposals put forward in this chapter.

### Principles

228. The proposals put forward here are founded on a number of key principles explored in the Green Paper and subsequent economic analysis of the enforcement services market. Any new fee structure must:
- adequately and fairly reward agents in public and private sectors for the work they actually do;
  - encourage prompt payment by the debtor;
  - ensure that debtors who pay do not subsidise enforcement against those who do not;
  - be sensitive to those debtors who do not have the resources to pay;

<sup>40</sup> The Report was also informed by market research into the size, composition and behavioural characteristics of the private sector warrant enforcement market (*Market Evaluation of the Delivery of Enforcement Services*, by Arkady Granik, January 2002), and further analysis by LCD Economics Branch (*Warrant Enforcement: Towards a New Fee Structure*, LCD, Economics Branch, July 2002)

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- incorporate safeguards against malpractice and exploitation;
- be supported and monitored by regulation; and
- reflect the legal position as enshrined in a single piece of enforcement agent law.

The new fee structure must support the principles of transparency, consistency and proportionality, minimise fruitless activity and promote a sustainable response.

229. The principles referred to above should be set out in primary legislation.
230. A structure based on these principles will address many of the concerns raised by Citizens Advice in the report *Undue Distress*. Their report points to abuse of the fee structure by, predominantly, unregulated private sector enforcement agents. Despite the anecdotal nature of much of the evidence offered by Citizens Advice, the range of current fees does offer scope for exploitation.
231. The existing scales and structures have led to claims that initial activity is done for nothing in some debt stream areas, with the suggestion that in some cases, enforcement agents actually pay creditors to take on their warrants. The agent's costs for unsuccessful work then have to be covered through fees charged and met by those debtors who do pay. The current situation also makes it easier for unscrupulous agents to deceive debtors as to the actual costs they are likely to face, as different fees are applicable in each of the debt stream areas.
232. Furthermore, since there is no uniform regulation of enforcement agents, standards are perceived to have been driven down to the level criticised in *Undue Distress*. An absence of effective control has led to a situation where disreputable enforcement agents rely on exploitation and manipulation of fees to attain profitability. Economic analysis and market-based research indicates that profitability for enforcement agencies is constrained by the current fee structure.<sup>41</sup>

## Structure

233. Primary legislation will grant the Lord Chancellor the power to set fees for enforcement agents in England and Wales following advice and recommendations put forward by the regulatory body. Legislation will also grant the regulatory body the power to conduct research into market conditions in order to inform the recommendations made to the Lord Chancellor. Any recommendations made by the regulatory body must be consonant with the overriding principles mentioned here.
234. In line with these principles we suggest that a future fee structure should be based on the following sequential components:
- an up-front fee;
  - fixed fees for specific activities and events generated by the enforcement process;
  - variable fees for specific activities and events generated by the enforcement process.

## Up-front Fee

235. Our economic analysis suggests that two key elements make an impact on the profitability and probability of enforcement – an up-front fee and improved information, respectively. We have taken these into account in recommending the introduction of an up-front fee and suggesting what that up-front fee should cover. However, we recognise that the only factor that directly improves recovery rates is more and better information given to enforcement agents. We believe that requiring creditors to pay an up-front fee to initiate enforcement activity will encourage them to improve, to the best of their ability, the accuracy of the information they provide to the enforcement agent. The issue of increased access to information for creditors and enforcement agents where debtors prove recalcitrant is addressed in Chapter 3.
236. An up-front fee marks a significant shift away from the ethics and mechanics of the existing fee structure and will require attitudinal and practical changes to the way enforcement is approached, managed and undertaken,

<sup>41</sup> *The Second Report of the Advisory Group on Enforcement Service Delivery* (August 2002); Arkady Granik, *Market Evaluation of the Delivery of Enforcement Services* (LCD, 2002)

both by creditors and enforcement agents. The concept of the up-front fee has received widespread support from those within the enforcement profession. Stakeholders both within and outside Government recognise that a situation in which debtors who do pay subsidise enforcement against those who do not and should not be sustained. Our economic analysis of the market indicates that this can be achieved by the introduction of an up-front fee, payable by the creditor in all circumstances, and recoverable from the debtor when enforcement is successful.

237. Accordingly, the Advisory Group put forward three options for an up-front fee:
- i. a fixed fee;
  - ii. a negotiable fee within a bandwidth, with a fixed floor and ceiling; and
  - iii. a matrix of (i) and (ii).
238. It is proposed that the regulatory body will make final recommendations on fees, including the type and possible limits of the up-front fee. We are not yet in a position to determine the parameters within which it can meet the needs of those enforcing in the market as a whole, or within the sectors representing the various debt streams. This issue will require further and ongoing economic research by the Regulator.

**Question 1: In order to establish an evidence base to inform the future regulator, we seek views on:**

- i) which of the three up-front fee options would be preferable?**
- ii) whether the same type of up-front fee should apply to all debt stream areas?**
- iii) if a fixed fee were introduced, at what level should it be set?**
- iv) where upper and lower limits are set, what should those limits be?**

239. The Government's preferred option at this stage is a negotiable fee within a bandwidth, with a fixed floor and a ceiling for debts below a value threshold to be determined by regulation (for debts above this threshold, see paragraphs 264-265 below). We believe that this offers the best blueprint for effective enforcement, in that a floor provides a minimum return for the enforcement agent and a ceiling offers sufficient protection to the debtor, from whom the fee will be recovered when enforcement is successful. A bandwidth provides scope for negotiation prior to contractual arrangements between creditor and enforcement agent. Unlike a system with a fixed up-front fee, this will offer the freedom necessary to recognise the different recovery rates in different debt stream areas and the special circumstances pertaining to bulk issue creditors. A negotiable fee within a bandwidth will also recognise and accommodate the enforcement agent's professional status and ability to negotiate a contract that reflects the service offered by those operating in a competitive but regulated market.
240. The reasonable cost of nugatory work undertaken in good faith should be funded legitimately within the enforcement process. The level of the up-front fee within the bandwidth should be sufficient to ensure creditors embark only on appropriate and proportionate warrant enforcement action, and to act as an incentive to issue warrants with the best available information enabling enforcement agents to operate effectively.
241. We are aware that, where the creditor and the agent are part of the same organisation, as is the case with some public sector creditors, the new fee structure will need to accommodate that configuration. The principles of consistency, transparency and fair reward will still apply, but the concept of a variable negotiable up-front fee cannot – an organisation cannot negotiate and contract with itself. However, we believe that, in order to ensure that the costs of non-payment will be the same no matter who enforces, the amount of a distinct up-front fee, set at a level that neither favours nor disadvantages public sector creditors and their debtors, should be added to the debt owed under the warrant, and recovered directly from the debtor when enforcement is successful.

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242. We are also aware that the introduction of an up-front fee may impact differently on different sectors of the enforcement market, and could result in fewer warrants being issued, both overall and in individual debt stream areas.

The aim of the Enforcement Review is to build an enforcement system in which the most appropriate form of enforcement is used, whether or not that is a warrant of execution and that, when chosen, enforcement proceeds on the best possible information, efficiently and effectively.

### Up-front Fee: Components

243. The up-front fee will cover the take-up of a case by an enforcement agent and the setting up of a case file, and constitute a financial recognition that the creditor is paying for the use of licensed and reputable enforcement staff. It will also cover initial action/s or investigation/s by the enforcement agent, and may lead to a probability report being supplied by the agent to the creditor indicating the likelihood of debt recovery. The extent and nature of services provided by the agent in return for the up-front fee should be the subject of negotiations between the creditor and the agent, within the bounds of contractual propriety and any recommendations issued by the regulatory body.
244. The work involved in producing a status report may vary according to the circumstances and the nature of the business, and should be determined in the contractual arrangements between the enforcement agent and the creditor prior to the agent taking on the case. It could indicate such matters as whether the address is correct and whether there is visual evidence of assets likely to meet the debt, thereby establishing a baseline level of probability of enforcement from which the creditor may decide whether and how to continue enforcement action. The recommendation that a status report should be produced should not, however, constrain contractual arrangements between creditor and agent where it is agreed that such a report is unnecessary.
245. The up-front fee will cover any activities that occur prior to the production of the initial report, including some of the activities that are itemised below and that would otherwise attract a separate fee. If the creditor and the enforcement agent agree that the up-front fee shall cover a set number of visits or letters or other modes of enquiry (such as telephone contact) then they shall not be charged separately. However, any events occurring after the production of the status report, or at a point agreed between creditor and agent, will fall within stage two of the charging regime and be dealt with as outlined below.
246. We suggest that the up-front fee should cover the production by the enforcement agent of a status report on the probability of enforcement (when such an arrangement is agreed between creditor and agent), although this should not preclude initial contact between the agent and the debtor leading to an arrangement for payment to be made or to payment in full. If the first visit between the agent and the debtor results in an agreement to pay, the amount recoverable should be the amount owed under the judgment plus the up-front fee. If payment is to proceed by instalments, the amount recoverable should be the amount owed under the judgment, plus the up-front fee and the fee attaching to an instalment repayment scheme (see paragraphs 262-263 below).
247. Secondary legislation should make clear that whenever it is agreed that the debt should be repaid to the enforcement agent, either in full or by instalments, the amount to be recovered should include all the fees incurred up to that point. The minimum amount to be recovered will therefore include the amount of the debt plus the amount of the up-front fee; the maximum will depend upon the point in the process at which the debtor agrees to pay in full or starts to pay by instalments. In accordance with the requirements set out in enforcement agent law, notice to the debtor of the charges likely to be incurred should be provided by the enforcement agent at key points during the enforcement process.
248. Currently problems are caused if the debtor offers to repay the debt directly to the creditor after the warrant has been handed to the enforcement agent, as the enforcement agent may have undertaken work for which he may charge a legitimate fee. If, however, the creditor does accept

payment from the debtor after issuing the warrant, they should be able to recover the amount of the up-front fee (which they will already have paid to the enforcement agent) in addition to the judgment debt. The enforcement agent will be entitled to retain the up-front fee. If payment is offered direct to the creditor after the point at which the agent has performed activities that attract either a fixed or a variable fee, the amount owed includes those fees. How other fees legitimately incurred by the agent should be dealt with will be a matter of contract.

249. We envisage that the influence of the regulatory authority and the relevant professional bodies will provide sufficient safeguards to ensure that enforcement agents and creditors are acting within the spirit and the letter of their agreed arrangements.

Our proposals for fee reforms, in particular the introduction of an up-front fee, recognise the professional status of enforcement agents under a new regulatory regime.

## Fixed Fees

250. Following the up-front fee (and any initial action/s and report that it covers), we propose that there should be a series of fixed fees chargeable for discrete actions common across all types of enforcement business, should enforcement action continue. As with all fees, these will be recoverable from the debtor upon successful enforcement, i.e. when payment is being made by the debtor in a manner deemed acceptable by the creditor and as set out in enforcement agent law.
251. The concept of fixed fees is based on the principles of transparency and consistency. It is our belief that, wherever possible, as many components of the fees structure should be made known to the debtor at the earliest stage of enforcement, so that they will be aware of the consequences of their refusal to pay. It is also our belief that enforcement agents should receive payment for the work they have actually undertaken, and that payment should relate to provable activities legitimately undertaken in pursuit of enforcement. Common activities should incur

common charges, and there should be transparency and consistency in the fee regime pertaining to warrant enforcement generally.

252. Following the up-front fee, fixed fees will attach to activities occurring up to and including the point of taking legal control of goods after entry (which includes the practices previously known as levy, seizure, impounding, walking and close possession) as defined in a single piece of enforcement agent law. These activities will include letters delivered by post, visits, and the act of taking legal control of goods. If a letter is delivered by hand at the time of the visit, this should not be chargeable as a letter, only the fee attaching to a visit will be chargeable.
253. We also propose that a fixed fee should attach to the act of 'making enquiries,' up to and including the point of taking legal control of goods after entry, where this is not covered by the contractual arrangements made between the creditor and the enforcement agent as part of the up-front fee.
254. It will be up to the regulator to advise the Lord Chancellor as to the amount of each fixed fee, and to recommend the number of times it can be charged in any individual case.

## Variable Fees

255. Following the act of taking legal control of the goods, we propose that fees for subsequent activities shall not be fixed but shall not include charges to cover hourly attendance rates by enforcement agents. As with the fixed fees detailed above, the likely range of variable fees for these activities shall be clearly conveyed to the debtor at the earliest stage in the enforcement process, and be monitored by a future regulatory body.
256. The following actions, as specified in enforcement agent law, should attract a variable fee: removal and storage. The fees for these activities need to be variable because there is no meaningful way in which to define or predetermine the amount that can be charged for them, as the activities themselves involve variables related to the location of the debtor, the size and value of the assets, and the costs of professional services.

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257. As prescribed in enforcement agent law, payment of the debt by the debtor cannot be made while the act of removal takes place. For the purposes of charging for removal, and determining the point at which payment may not take place, removal is defined as starting when the agent is on the doorstep with the stated intention to remove the goods, and has the necessary equipment so to do.
258. In addition, the actions related to appraisal and auction/sale which are legally permitted by the Lord Chancellor may also be chargeable by the enforcement agent and should attract a variable fee, on the basis of the reasons outlined above.
259. We are aware that charging for removal and abortive removal has been an area that has been open to abuse by unscrupulous agents, front-loading variable charges under the heading of 'reasonable costs' to ensure profitability. We are concerned to ensure adequate protection for the debtor, who should not be faced with unreasonable and unpredictable charges. Accordingly, we propose that abortive attempts to remove goods should not attract fixed fees, and that any variable fee which attaches to them should only be invoked if the claim for fees for abortive removal occurs after the taking of legal control. It should be up to the regulator to indicate the number of times a fee can be charged in this instance.
260. We believe that effective regulation, which may include recommendations to the Lord Chancellor or a Code of Practice setting out the parameters within which variable fees may sit, and active monitoring of the charges made by enforcement agents, will minimise both the incentive and the scope for such abuse. Furthermore, the regulatory body should require that records of and receipts for the costs of and charges for all actions attracting a variable fee should be supplied to the debtor, kept by the enforcement agent for up to six years, and made available to any future regulator within that period.
261. It will be up to the regulator to advise the Lord Chancellor as to the limits within which variable fees may be charged, and to recommend the number of times they can be charged in any individual case.

### Payment by Instalments

262. We propose that the law should be changed to provide all licensed enforcement agents with the capability to offer the debtor the option of repayment by instalments, or to accept an offer by the debtor to pay by instalments, if such an action is agreed by the creditor. The enforcement agent will not be obliged or compelled to make or accept such an offer unless at the behest of the creditor. In such circumstances, the amount to be repaid will be the debt, the fees incurred up to the point at which the offer is made, and the fee attaching to payment by instalments. In this context, enforcement agents will not be acting as proxy debt collectors, but offering or accepting from the debtor a repayment plan which takes account of their financial situation as well as the needs of the creditor.
263. If the offer or acceptance of a repayment plan is made after the enforcement agent has taken legal control of the goods, the longest that any instalment plan can last will be 12 months, as this reflects the position in enforcement agent law where taking legal control will last for a maximum of 12 months. If the offer or acceptance of a repayment plan is made before the agent has taken legal control of the goods, the warrant should remain live until the debt and the associated fees have been paid in full. If the arrangement to pay by instalments breaks down, the agent should execute the warrant for the full amount of the debt.

### Enforcing Large Debts

264. We recognise that, while a uniform fee scale may be appropriate for the majority of cases, it may not adequately reflect the expertise and investment required to enforce against large debts. There is therefore a need for the up-front fee attaching to the enforcement of large debts, the amount of which exceeds a threshold to be determined by the regulator, to be calculated independently from the bandwidth put forward earlier in this section. We propose that in circumstances where the debt exceeds this threshold, the up-front fee should either be negotiable between the creditor and the enforcement agent, or proceed on a percentage basis relating to the amount of the debt above the threshold plus a basic minimum up-front fee.

265. We are concerned to ensure that the expertise required to enforce high value judgments, and to maintain a business capable of doing so, is reflected in the remuneration paid to undertake that enforcement. The principle of access to justice in enforcing a court judgment should apply equally at both ends of the debt spectrum – i.e., in relation to large as well as small debts. We see the need to maintain an enforcement system that does not push a creditor out of the enforcement market because a fixed fee scale would render it unprofitable for their judgment to be enforced.

### Notice

266. As set out in enforcement agent law, debtors must be given written notice, by the enforcement agent or the creditor, that enforcement may follow and of the forms of enforcement that may be adopted, as well as the consequences of enforcement agent action, the costs involved and the complaints procedures available. This is the point at which notification of the cost of the debt plus the up-front fee will be made known to the debtor, as well as the range of fixed and variable fees that could follow, should payment not be made.
267. Further notice will need to be provided to the debtor at the point of entry to the premises and prior to starting to take legal control of the goods. Notice of the actual fees incurred up to this point, and an indication of the range of future fees to be incurred, will be provided to the debtor in accordance with this requirement in enforcement agent law.

### Repayment by the Debtor

268. As set out in enforcement agent law, the enforcement action should cease if the debtor pays the amount owed and the costs either before the enforcement agent takes legal control of the goods, or at any time before sale save during the process of taking legal control or removing goods from the premises. In these circumstances the fees owed that will constitute the enforcement agents' costs will be the up-front fee, plus the fixed fees for letter/s and visit/s in the case of enforcement action ceasing before the taking of legal control, or in the second scenario, the

up-front fee, plus the fixed fees incurred up to and including that for taking legal control, plus the variable fees attaching to whatever activities have taken place prior to sale. At both stages all fees should be recovered first from any payment or proceeds of sale.

269. Enforcement agent law also proposes that if the debt is paid before entry the enforcement agent should not be able to proceed or to claim any fees. As mentioned above, if the creditor has accepted payment from the debtor but failed to inform the enforcement agent, then the up-front fee which has already been received by the agent will be permitted to be retained by the agent. This will be deemed to cover the actions undertaken by the enforcement agent prior to the point of entry.

### Recall of Warrants

270. Ideally, it should be clearly stated in contract that the creditor should not accept payment directly from the debtor once they have handed the matter over to the enforcement agent. If a warrant is recalled by the creditor once it has been handed to the enforcement agent, the up-front fee that has been accepted by the enforcement agent should be retained by him.

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## APPENDIX Summary of Advisory Group's Recommendations on Fees

1. There should be an up-front fee, payable by the creditor, to initiate warrant enforcement action.<sup>42</sup> Such a fee will apply across all enforcement sectors and all types of debt. There are three potential models for such a fee:
  - i. fixed fee;
  - ii. negotiable fee within a bandwidth (with a fixed floor and ceiling);
  - iii. a matrix of the two.
2. The up-front fee should cover the following elements:
  - i. take-up of a case by an enforcement agent;
  - ii. the setting up of a file;
  - iii. the use of licensed and reputable enforcement staff;
  - iv. initial action(s) or investigation(s), which may lead to the provision of a probability report to be supplied by the agent to the creditor indicating the likelihood of debt recovery.
3. The up-front fee should be recovered from the debtor when enforcement is successful.
4. Following the up-front fee and initial action and report that it covers, if enforcement action continues, there are a range of activities that may be undertaken by the enforcement agent, for which fixed fees shall be charged, common across all types of enforcement business for the following actions:
  - enquiries;
  - letter;
  - visit;
  - securing goods (including levy, seizure, walking and close possession).

The sequence and frequency of these following activities will, subject to the law and regulation, be a matter to be determined between creditor and enforcement agent.

A future regulatory body will have relevant powers to ensure that abuses do not occur, but the necessary flexibility to enable professional enforcement agents to exercise their own best judgement according to the circumstances of the case will be critical.

5. Fees for the following activities shall not be fixed and shall not include charges to cover hourly attendance rates by enforcement agents. Fees for these activities shall be clearly conveyed to the debtor at the earliest stage in the enforcement process, and be monitored by a future regulatory body:
  - removal;
  - storage;
  - valuation;
  - auction.
6. There shall be no fixed 'abortive removal visit' fee.
7. Enforcement agents should be able to charge a fee for establishing and administering a repayment plan. This fee, which should be proportionate to the size of the debt, is to be recoverable from the debtor.
8. The fees for enforcing a judgment for a large amount, which exceeds a threshold to be determined by the regulator, shall be negotiable, between the creditor and the enforcement agent. One possibility is as a commission at a percentage rate.
9. Any future Regulatory Body charged with the responsibility of advising the Lord Chancellor on a detailed fee structure should have the necessary investigative powers to obtain any relevant information they require from those providing enforcement services.
10. Based on the information currently available to us, we are minded to recommend that these fee principles should apply to those enforcing civil and criminal warrants.

<sup>42</sup> Our principles apply across the following areas of warrant enforcement: High and county courts, magistrates' courts, road traffic penalties, local and national taxes and duties, maintenance and child support

Chapter Three

# Data Disclosure Orders



# Data Disclosure Orders

*The key principles of the Enforcement Review can best be met by improving the quality and quantity of information available on which to base informed and responsible decisions about enforcement. More and better information will allow enforcement efforts to be targeted towards the procedure that is most likely to produce results for the creditor and make it possible to identify, at an earlier stage, debtors who do not have the resources with which to pay the debt.*

## Introduction

271. This chapter sets out the arguments and legislative changes necessary for the proposed introduction of a new court procedure to obtain access to information to assist with the enforcement of judgments – the Data Disclosure Order (DDO).
272. The Green Paper consulted on a two-stage procedure determining access to information, the first being available to the regulated enforcement agent and the second being an expansion of the current court-based Order to Obtain Information from Judgment Debtors (previously the Oral Examination procedure). The Green Paper considered access to information in the context of proposals to regulate enforcement agents, and sought views on a number of sanctions governing access to, and use of information by, enforcement agents.
273. Most of those who responded to the Green Paper favoured the concept of the DDO and the proposals have been further developed with assistance from the DDO Working Group, whose membership is drawn from Government Departments, creditor organisations, the advice sector and the judiciary.
274. Although not an enforcement method itself, the DDO will seek information on the judgment debtor who has failed to respond to the judgment or comply with court-based methods of enforcement. Information will be sought from relevant third parties in both the public and private sectors,

to help the creditor make an informed choice about how to enforce a judgment. The DDO is similar in principle to the Order to Seek Information from the Judgment Debtor but will not rely on the attendance or compliance of the debtor at a court hearing.

## The Legal Position

275. The Office of the Information Commissioner has been consulted and, recognising that the proposed procedures seek to strike an appropriate balance between the legitimate interests of creditors and proper respect for the privacy rights of individuals, has confirmed they see no reason why the process should lead to contraventions of the Data Protection Act 1998. The DDO, being an order of the court, places a clear legal obligation on the parties to disclose information. The Data Protection Act states that disclosure may be made without contravention of the Act where required by law, including an order of the court. The DDO therefore raises no difficulties with data protection.
276. We have also considered the DDO in the context of ECHR. Article 8 of the ECHR establishes the right to privacy; however, it is a qualified right, and the DDO operates under one of the justifications for an interference, in this case the rights of the creditor. The test to be met under Article 8 is therefore one of proportionality. To be proportionate, disclosure should be limited to the minimum required. The relevant and/or the minimum information to be disclosed and what goes beyond it will be made clear in legislation,

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rules and practice directions, as will the evidence required to necessitate judicial intervention. Measures will be put in place to minimise the danger of abuse by creditors, those acting on their behalf, or the third parties who are to supply the information. Finally, the debtor will have the right to apply to the court to set aside either the judgment or the DDO at any point, thereby ensuring that the process is open to legitimate challenge.

## Data Disclosure Order Proposal

### (i) The Application Process

277. The DDO will be an order of the court, applied for by the creditor or, in limited circumstances, by a licensed enforcement agent who is acting on the creditor's behalf. It will operate as outlined below. (See also Flowcharts A, B & C)

### The Comprehensive DDO

278. The creditor may apply to the court for a DDO by completing a Court Service DDO application form, lodging the fee, indicating the original case number, and meeting evidentiary and timing requirements in any of the following scenarios, which shall be set out in legislation:

- **Following a forthwith default judgment:** the DDO may be applied for simultaneously with the application for the forthwith default judgment. The DDO may then be granted immediately following the issue of the default judgment;
- **Following a default judgment:** the DDO may be applied for at any point after the issue of the default judgment;
- **Following wilful non-compliance with the Order to Seek Information from the Judgment Debtor:** if the debtor has not responded to this Order the creditor may apply for a DDO as an alternative to initiating the committal process; if the debtor is wilfully non-compliant at the hearing, the creditor may request or the Judge may order a DDO;

- **Following default on an Instalment Order:** after the first instance of default notice must be given to the debtor that further non-compliance may result in an application for a DDO; if, thereafter, the next instalment is defaulted on, provided the creditor supplies evidence, by a statement of truth, that the debtor is two instalments in arrears and due notice has been given, a DDO may be applied for;
- **Following an unsuccessful Third Party Debt Order (TPDO):** if an application for a TPDO fails, the creditor may apply for a DDO using as evidence the original judgment and notice of the failure of the TPDO;
- **Following an unsuccessful Attachment of Earnings Order (AEO):** if an application for an AEO fails, the creditor may apply for a DDO using as evidence the original judgment and notice of the failure of the AEO;
- **By application on notice to a District Judge:** creditors who have an enforceable title, such as a High Court writ or a Tribunal award, which may be enforced through the County Court.

The DDO will provide a viable alternative to the committal process in circumstances where the judgment debtor proves wilfully non-compliant with an Order to Obtain Information from the Judgment Debtor.

279. Primary legislation should also make provision for other forms of enforceable title to be added to this list.

### The Partial DDO

280. Once enforcement agencies and their agents are regulated, we expect the regulatory body to issue licences to obtain and process information. These licences will be available to enforcement agents who have fulfilled the necessary criteria (to be determined by the regulatory body); they will then be able to apply for a partial DDO, tied specifically to the address of the debtor, in the following circumstances:

- **Following an ineffective Warrant for Taking Legal Control of Goods:** application for a partial DDO may be made by a licensed enforcement agent acting on behalf of the creditor, provided evidence that the warrant is ineffective is supplied to the court;
  - **Following wilful non-compliance with a Warrant for Taking Legal Control of Goods:** application for a partial DDO may be made by a licensed enforcement agent acting on behalf of the creditor, provided they supply evidence, by a statement of truth, that the debtor is wilfully non-compliant with the warrant.
281. An application for a DDO following a default judgment will not proceed if there is any evidence on the court file to rebut the presumption of successful service by first class post. The DDO would not be available to the creditor if, by the time the application is received, there is evidence on the court file of non-service of claim. If there is such evidence on the file, the court will return the DDO fee to the creditor and notify them that service has not been successful and that an application for a DDO has been rejected.
282. What constitutes wilful non-compliance will be set out in secondary legislation, and may be supported by guidance issued by the regulatory body. If there are any doubts of the extent and validity of the supporting evidence supplied in options detailed in paragraph 278 and both options detailed in paragraph 280, court staff will refer the matter to a District Judge for determination.
- (ii) The Form**
283. The DDO form sent out by court staff will contain information on the debtor taken from the judgment form including name, address, and an identifier number that relates to that particular judgment/DDO and, where possible, telephone number, National Insurance number, and date of birth. The bottom of the sheet will have the address of the court at which the application was made and to which the completed forms should be returned.
284. Third parties should have a tick box at the top of their sheet, indicating or confirming which body they are. Each sheet should then have a series of question and answer boxes, requesting information relevant to future enforcement, e.g. name, address, details on employment and bank accounts. A draft form may be found at **Form A**.<sup>43</sup>
285. The option of 'New Address' (contained in box C of the draft form) should be ticked if the address supplied by the court is held on the Department for Work and Pensions (DWP) computer system as an old address for the person named on the form. The debtor's new address should then be recorded on the DDO form.
286. The option of 'Variant Address' (contained in box C of the draft form) should be ticked if the DWP computer system holds an address that is not an exact match with that supplied by the court but bears a substantial likeness. The different address recorded on the form will therefore be that of a person with very similar identity and locational details.
287. If either of these boxes is ticked the DDO should be referred to the District Judge for determination (see below).
288. Box F, relating to bank account details, should only be completed by private sector third parties. We do not envisage, at this stage, seeking such details from government departments or their agencies.
- (iii) Processing**
289. Once the DDO application, the appropriate fee and the necessary supporting evidence have been received by court staff, and they are satisfied that the application may proceed, they will log the application on to the Court Service's electronic case management system (currently CaseMan). If the application requires judicial determination it will be passed to a District Judge and, if granted, then logged onto the system in a similar manner. If the application is rejected, the creditor will be notified and the fee refunded.
290. Once it has been logged, the system will record the DDO as an event, and link in to the existing diary management system, which will flag up when the DDO was issued and generate triggered warnings for subsequent events in the processing path, e.g. return dates for information from

<sup>43</sup> These forms are included for illustrative purposes only. The details of the DDO form will be worked out more fully through further discussions with Court Service and the third parties from whom information will be sought

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third parties. At present it is not envisaged that the forms for a DDO will be generated by the court's IT system, nor will the subsequent information interchange be conducted electronically with all third parties. Instead, the DDO forms will be taken from pre-printed pads issued to each court, bearing address and contact details for the court in question, and information will be interchanged manually on paper forms. However, depending on the volume of DDOs issued in the future, it may become viable to have an IT-generated system, in terms of issue, management and response.

291. A copy of the form will be sent by Court Service staff to those of the third parties from whom information will be sought in a manual format. Where the DDO proceeds manually, paper copies of the form will be sent to a predetermined central point for each organisation, who will process the form in accordance with an agreed protocol and Code of Practice. Any relevant information, or notification that no information has been found, will be copied on to the form and returned to the originating court within the agreed timeframe.
292. When the forms have been returned to the court by all the third parties, the designated Court Service officer will assess the information retrieved. If there is a nil return from all sources, the court will send notification to the creditor or licensed enforcement agent to this effect. If information has been received, Court Service officers will retain it and inform the creditor or the licensed enforcement agent that information is available for any or all of the enforcement processes and will be released to them upon application for the relevant mode of enforcement. As mentioned above, if either of the boxes relating to new or variant addresses is ticked, court staff should refer all documents held in relation to the DDO to the District Judge for determination on whether the process should continue.

#### **(iv) Third Parties**

293. The third parties from which information will be sought have been selected because they hold information that will enable subsequent enforcement action. It is proposed that legislation will provide for gateways between the county

courts and DWP, Inland Revenue, financial institutions, and credit reference agencies in the first instance, and make provision for further bodies to be designated in future, should circumstances warrant it.

294. The DDO will proceed by pre-determined pathways, the details of which are set out below. Whether the DDO proceeds through all of the stages will be an option available to the creditor in limited circumstances. In cases where the licensed enforcement agent applies for the DDO, the pathway will be restricted to ascertaining address details from DWP to enable the warrant of execution to be reissued.
295. If the DDO arises from a creditor application, the court will send the DDO form to a central processing point at DWP and contact the credit reference agency through an electronic link. DWP's Central Fine Defaulter's Unit (CFDU) already processes applications for up-to-date information on fine defaulters' whereabouts from Magistrates' Courts Committees (MCCs) under the package of measures introduced when the responsibility for warrant execution was transferred from the police to MCCs. We propose to expand the capabilities of the existing unit, rather than introduce a new unit dedicated to processing DDOs, as this offers the best use of resources within the justice system and DWP, and concentrates the existing expertise. We propose that staff at CFDU will access DWP's Departmental Central Index (DCI) which holds information on whether people are claiming benefits, what benefits they are claiming, and what address they are claiming from.
296. If the DDO arises from an application by a licensed enforcement agent, the DDO will only be sent to DWP. Once the DWP's search of their index has been completed this is the point at which the search for information will cease, and the DDO will be returned to the court of origin.
297. If the DDO arises from an application by a creditor, once the form has been processed by DWP, and if a National Insurance Number has been obtained during that search, the CFDU will pass on the DDO to Inland Revenue to seek information from them on employer details. This will enable a future AEO application, should that be the creditor's choice. CFDU will send a request to Inland Revenue for data, which shall be processed by Inland Revenue in

accordance with an agreed protocol and Code of Practice. Only information relating to a debtor's employer will be sought from Inland Revenue. Once that information or a nil return has been provided by Inland Revenue, the completed DDO will be returned to the court of origin.

298. The DDO will also seek information on the debtor's financial assets – a bank or building society account – in order to facilitate a Third Party Debt Order, should that be the creditor's eventual choice of enforcement action. There are two possible pathways for obtaining this information.
299. The first is to contact the financial institutions directly, with Court Service establishing an agreed contact with all of the banks and building societies on an individual basis. While it would be desirable for the DDO to be sent to a central point for handling, the British Bankers Association (BBA) indicates that this is not possible, given that the main banks hold only around 60-70% of all accounts, with smaller banks, building societies and Internet banking companies comprising the remainder of the market share. The possibility of establishing email contact is also being considered in this context.
300. Such a process would be both costly and time-consuming. Furthermore, targeting all the financial institutions (the BBA estimates there are currently between 40 and 50 players) would result in nil returns in approximately 98% of cases, which could undermine confidence in and compliance with the process, as the DDO could be seen as an order to conduct a fruitless search.
301. The second method of accessing financial institutions is to create a conduit to banks and building societies through credit reference agencies.
302. Credit reference agencies hold a significant amount of personal data. Whilst the State has moved tentatively towards increased data sharing over the last 20 years, credit reference agencies have accrued a vast archive on the movements, habits and financial history of individual citizens. In recent times, their business has become increasingly intertwined with public sector service delivery.<sup>44</sup>
303. Credit reference agencies hold the following forms of information which are pertinent to the DDO: name and date of birth of those who reside at a particular property, as well as financial information held in a 'pool' on behalf of the high street banks and other financial institutions. Credit reference agencies therefore seem best placed to provide the financial information required by the DDO. However, it should be noted that since their records are focused on financial products of a credit-based nature, records on current accounts remain incomplete. One major credit reference agency estimates that they have current account information in 50% – 90% of their files.
304. Credit reference agencies could process the DDO by establishing a form of IT link to the courts, either by secure web access or an ISDN line. The credit reference agency could then respond to a request for information on those financial institutions with which the debtor has a relationship, collating all the information and returning it to the court (electronically), so that the court can then send the DDO to a select and targeted group of banks and/or building societies. The degree of information that could be provided, down to branch and account details, varies between the companies.
305. If this path were taken, the cost would be substantially reduced, with a one-off infrastructure and system cost for all courts plus minimal search costs for each DDO hit.

### Release of information

306. If information is returned to the court, the court staff will alert the creditor or the enforcement agent of the existence of the information. They will not release the information directly to the creditor. This is to limit the improper use of the information and to ensure that the information obtained for the purpose of enforcement is so used, thereby upholding the principles of the Data Protection Act.
307. Notice of the result of the DDO should be sent to the creditor or the licensed enforcement agent in a form indicating which enforcement options could be facilitated by the DDO, should the creditor decide to apply for them. A draft form may be found at **Form B**.

<sup>44</sup> For example, different credit reference agencies have contracts with the Cabinet Office to supply the digital certificate authentication technology for the Government Gateway, the Department for Work and Pensions in order to supply information as part of the Social Security Fraud Act, and Inland Revenue to provide a link for pursuing fraud, tax evasion and for the recovery of debt

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308. If the creditor decides, on the basis of the DDO, that they wish to pursue further enforcement action, they should make application to the court indicating the desired enforcement option and lodging the appropriate fee. Court staff will then transfer the information obtained from the DDO onto the relevant enforcement forms and process them as they would if the creditor had made the application in person.
309. Alternatively, if there is a nil return, the creditor or licensed enforcement agent should be informed that the DDO did not discover any information to enable enforcement to be undertaken. In such circumstances the DDO application fee shall be retained by the court.

### Safeguards: Notice to the Judgment Debtor

310. Both the claim form (N1) sent to the debtor, and the judgment form (N30) will bear a notice indicating that failure to respond may result in the creditor applying for a DDO. The debtor will therefore have received notice of the potential consequences of inaction and non-compliance with an order of the court. Court Service will be responsible for modifying existing forms to contain this notice.
311. It will also be the duty of third parties from whom information is sought to notify those who provide personal details to them in the first instance, that in the case of non-compliance with an order or judgment of the court, their information may be accessed by a DDO and used for enforcement action.

### Safeguards: Access Information

312. Those third parties from whom data will be sought will need to comply with the requirement of the Data Protection Act in relation to standards of data quality and accuracy.

313. Information obtained by the DDO will be kept by the Court Service for a maximum of three months, in order to ensure that there is sufficient evidence to meet claims by the creditor as to receipt of the information. After the prescribed period it will be destroyed.
314. As stated in the Green Paper, where information is passed to licensed enforcement agents, they will be subject to strict regulation and control. They will be subject to penalties for misuse of such information, with prosecutions to take place under civil enforcement legislation or the Codes of Practice established by it rather than Data Protection legislation. A regulatory structure governing the activities of enforcement agents should have inspecting and monitoring powers, with clear penalties and complaints provisions, to ensure data protection compliance by enforcement agents.
315. Clearly drafted Codes of Practice will govern the handling and supply of information sought by the DDO.

### Costs and Remuneration of Third Parties

316. We estimate the costs for a full DDO to be in the region of £100-£150, with a partial DDO available to the licensed enforcement agent being in the region of £75, which reflect the costs incurred by those third parties supplying the information. We envisage that those third party costs will be met by a transfer of funds. The costs of subsequent enforcement action undertaken on the basis of the information gained from the DDO will not be affected by the charges related to the DDO process. It is proposed that the creditor will pay the costs of the DDO at the point of application, but this will be recoverable from the judgment debtor when enforcement is successful.

# Form A

**A** Do your records contain any information on the person named above?

**NO**  Please return this form to the Court address at the bottom of this sheet.

**YES**  Please complete the following questions, where appropriate, and then return this form to the Court address at the bottom of this sheet.

**B** When were your records last updated or verified?

.....

**C** Do your records indicate that the person named above currently resides at the address supplied by the court?

**YES**  **NO**

If **NO**, do you hold a

New address for the person named above

Variant address for the person named above

Please provide details:

Please provide details:

.....  
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 .....

.....  
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 .....  
 .....  
 .....  
 .....

If possible, please also indicate the following:

Date of Birth: .....

National Insurance Number: .....

**D** Please indicate if your records show that the person is

Employed

On Income-related Benefit

Neither

**E** If employed, please provide most recent employment details, including name and address of employer:

.....

**F** Do your records indicate whether the person holds a bank or building society account?

**YES**  **NO**

If yes, please provide branch and, where possible, account details:

# 3 Form B

The DDO (number XXX) indicates that information is available to enable the following enforcement options to be undertaken in relation to the judgment against (xxxxx):

Warrant of Execution

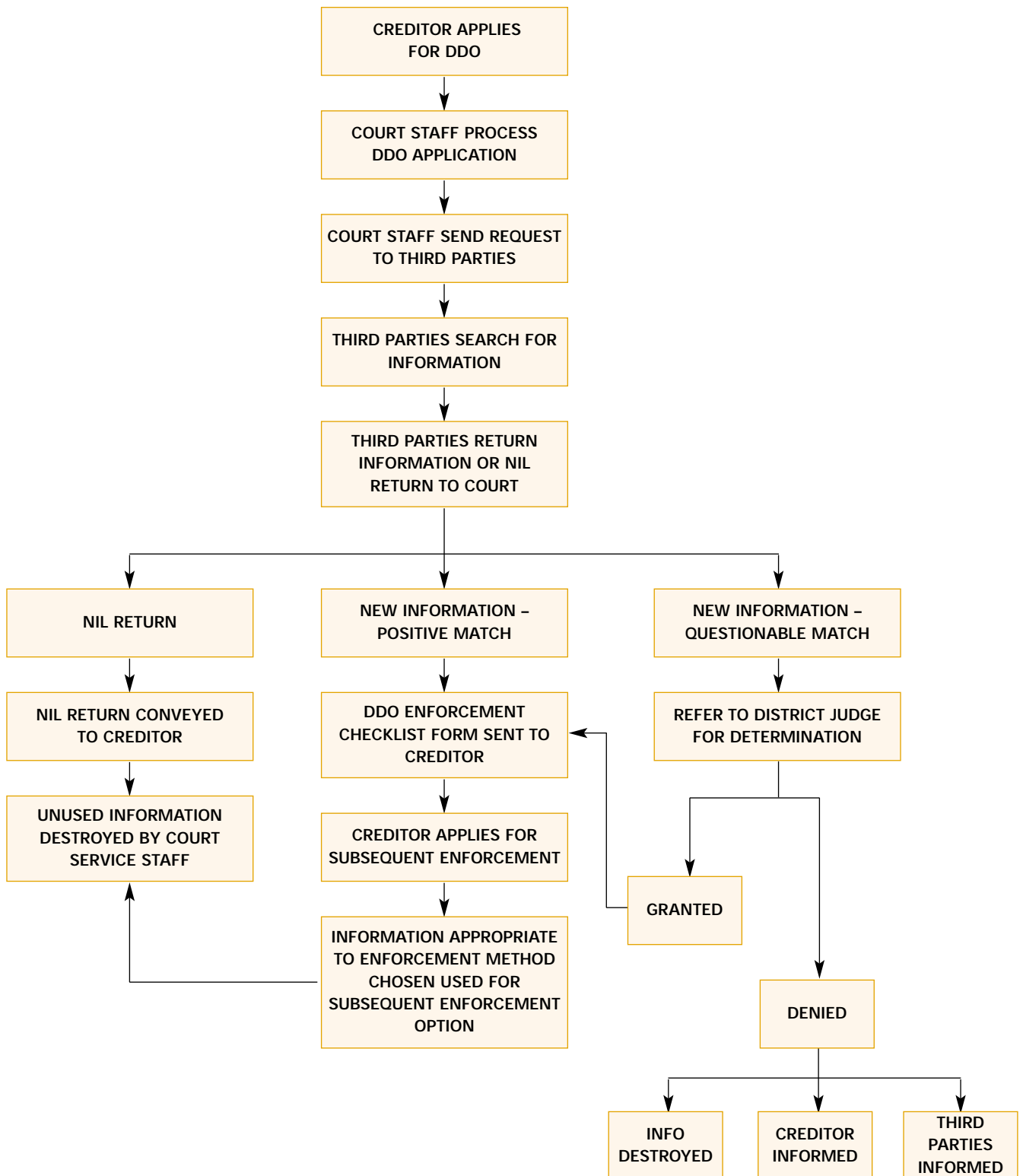
Third Party Debt Order

Attachment of Earnings Order

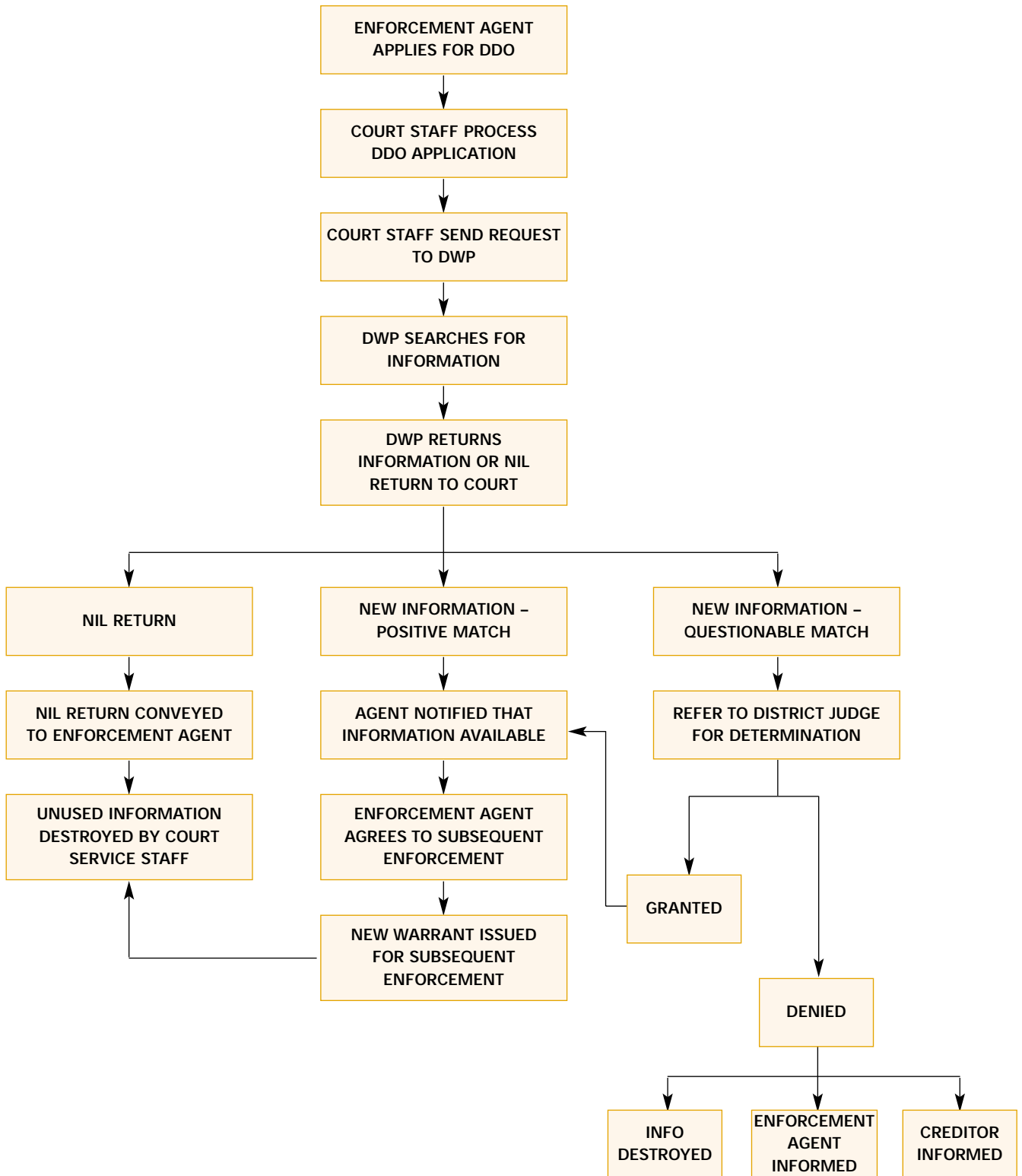
Relevant information will be released to you upon application for one of these enforcement options.

*Application for any enforcement option does not guarantee successful enforcement.*

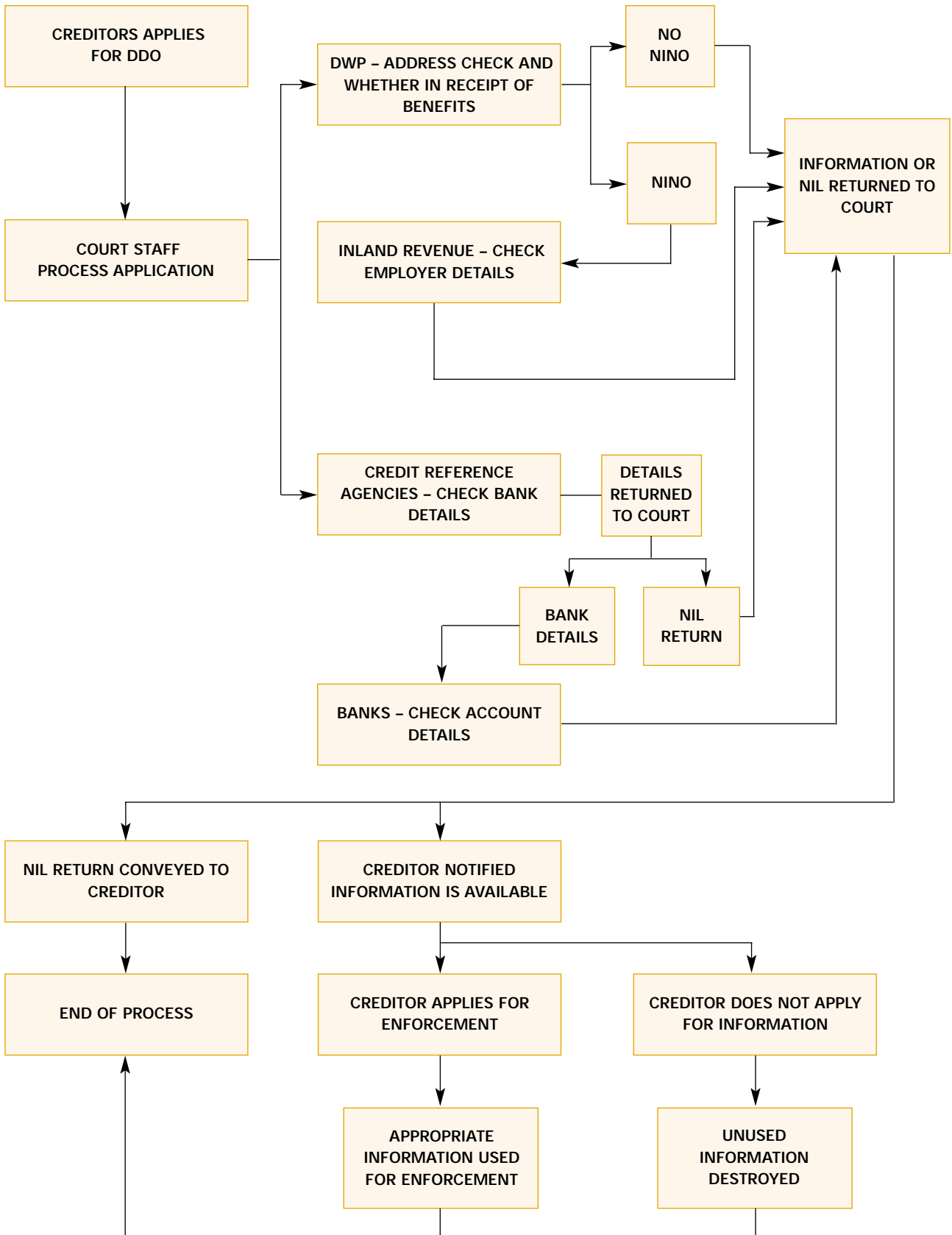
## Flow Chart A



# 3 Flow Chart B



# Flow Chart C





Chapter Four

Other Court-Based  
Enforcement  
Methods



# Section One Attachment of Earnings Orders

## Introduction

317. An Attachment of Earnings Order (AEO) allows a creditor to secure payment of a debt by ordering the debtor's employer to make regular deductions from a debtor's salary, until the debt is paid in full. The outstanding debt must be over £50 and deductions can be made from earnings, pensions and Statutory Sick Pay, but only after tax and National Insurance contributions have been made. Benefits and tax credits are exempt from an AEO. An AEO is not available if the debtor is self-employed.
318. In the county court, AEOs are the second most used enforcement procedure following warrants of execution. In 2001, for debt cases, 77,876 applications were filed, which led to the making of 42,011 orders and 30,461 suspended orders.<sup>45</sup> Other AEO processes are in use for council tax collection, Scottish debt recovery and Student Loans. The Child Support Agency (CSA) operates Deductions from Earnings Orders (DEOs) which are a similar process for Child Support payments.

An important aim of the Review is to ensure that distress is not used indiscriminately or disproportionately. If the debtor is in employment, AEOs provide a viable and effective alternative; they allow the debt to be repaid over a period of time, which is less likely to cause the debtor hardship, and may reduce the likelihood of over indebtedness.

319. The First Phase of the Enforcement Review made two recommendations to enhance the county court AEO process:

- To introduce a fixed deduction system to calculate the amount the debtor pays per pay period, by instructing the employer to deduct an amount as prescribed in a deduction table (fixed tables).
- To enable the tracking of debtors with an existing AEO when they change employment.

## The Existing Process

320. Courts rely on the debtor's completion of a means form (N56) to calculate a Protected Earnings Rate (PER) and a Normal Deduction Rate (NDR). Our consultation identified that this often leads to unnecessary delay; some debtors do not return the means form when asked to do so. If it is not returned after 14 days, the court bailiff must serve the documents personally on the debtor and this may require several visits to the debtor's address before service can be effected.
321. Consultation and subsequent work by the expert panel questioned the reliability of the information supplied by the debtors, as in most cases the court does not verify this.<sup>46</sup> This may work either in the debtor's favour, to secure a low repayment rate; or in the creditor's favour, if the debtor underestimates or omits some of their expenditure and a high repayment rate is set.

## Research on the existing County Court Attachment of Earnings process

322. A sample of all AEOs issued from May 2001 to May 2002 indicated that the average time taken from the filing of an application to the making of a suspended order was 7.56

<sup>45</sup> A proportion of suspended orders will be converted to full orders as a result of non-compliance. Our sample (paragraph 323) identified that 28% of suspended orders were made into full orders

<sup>46</sup> The First Phase of the Enforcement Review set up four expert panels whose membership was drawn from across the whole range of interest groups to generate ideas, solutions to the perceived problems and develop proposals. The membership of the panel responsible for Attachment of Earnings, Charging Orders and Garnishee Orders comprised: Jill Collins, Court Manager, Woolwich County Court; Ruth Dixon, Debt and Insolvency Manager, Travell Horner & Partners, Solicitors; Caroline Harmer, Legal Training Consultant; William Lewis, Head of Legal Support, Recoveries, Barclays Bank; Nick Pearson, National Money Advice Co-ordinator, Federation of Independent Advice Centres; and the following attended one meeting each: Roger Denman, Treasurer's Department, London Borough of Greenwich; and Mike Nicholas, Publishing Manager, Butterworths Tolley

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weeks, and from application to the making of a full order, 11.60 weeks.

323. We also sought to establish how effective the existing process is and to ascertain data such as the average debt, income and outgoings of existing cases. A sample of almost 1,000 completed N56 forms, (statement of means completed by defendants) spread through ten different county courts was completed. The courts were chosen based on size, location and region so that the sample was representative. Below is a summary of some of the additional issues of the current process, mostly relating to the use of a means form:

#### *Failings of the current procedure from the Creditor's perspective*

- **The stated incomes and expenditures are not verified.** The current procedure relies on the debtor completing the form accurately and fully.
- **Changes to either income or expenditure are not accounted for.** Future pay rises, promotions and bonuses are not considered once a deduction rate has been set. As most orders last for several years, such changes may have a significant impact.
- **Lack of consistency.** Our sampling exercise identified variations on what was considered a reasonable allowance by the court. As the creditor cannot easily estimate the repayment amount prior to the court's assessment, it is more difficult to consider offers from the debtor prior to the AE application.

#### *Failings of the current procedure from the Debtor's perspective*

- **Detailed information required.** A lack of accuracy when completing the N56 form may result in the debtor or court believing there is more money than is actually available. An omitted expense of £50 a month may result in between £25 and £33 a month more being inappropriately deducted and a household struggling to manage. Some debtors may be reluctant to raise their objections or break the terms of the order in case their employer becomes involved.

- **Changes in Pay.** If the difference in the PER and NDR is substantial, deductions will continue even if the debtor reduces their working hours or receives a pay reduction.
- **Time-consuming.** To complete the N56 form accurately and fully, the debtor must spend a significant amount of time on its completion. This may also require others in the household to be available to ensure their financial commitments are included and documents such as old bills may be required.
- **Unaffordable offers made.** The threat of an AEO being forwarded to an employer may lead to some debtors making high offers of payment to secure a suspended order. This may lead to offers that cannot be sustained over a prolonged period of time, and lead to hardship or further debt.
- **Difficult to quantify expenses.** Our sampling exercise identified a number of cases where for key expenditure items such as housekeeping, comments like 'unknown' and 'whatever is left over' were used on the means form. In these cases the court may consider these as a nil entry or underestimate their true value. In addition, irregular or unpredictable costs such as car servicing and children's incidental costs may not be accounted for or fully estimated.
- **Inconclusive Means form.** While the current form is detailed, it does not ask for some costs such as telephone bills. Many households now have mobile phone costs and/or Internet costs, which may add up to a significant amount. While the form does have a box for 'other items', unless prompted, some debtors may omit such expenses.
- **Financial planning.** Some people who are in debt find it difficult to estimate expenditure and plan their finances. Our sample identified a number of cases where the debtor had paid a company to complete the N56 form and manage their debts. In our view debtors would benefit from a straightforward approach that reduced the perceived need for such assistance.

- **No incentive to budget.** A debtor who reduces their outgoings when completing the N56 will not greatly benefit from making savings. The greater the expenditure the lower the repayments are likely to be.
- **A partner's salary and other household incomes are included in the current calculation.** This is unfair to others in the household who may not have incurred the debt.
- **Disallowed or reduced expenditure.** In many cases, either the court officer or Judge reviewing the case locally decides what are necessary expenses and how much should be allowed or disallowed. This may lead to regional variations and make the deduction rates less consistent.

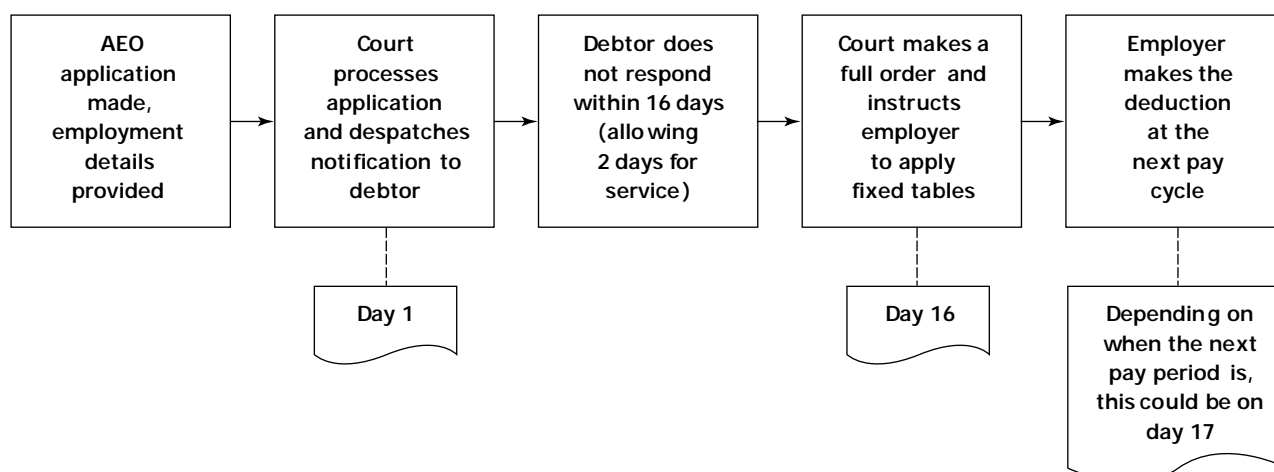
### Fixed Tables – A new process

324. The changes proposed will only affect the county court AEO process. This will require making minor amendments to the Attachment of Earnings Act 1971 through primary legislation, as this currently states an order must specify the NDR and PER. The new fixed table process will be set out in secondary legislation and prescribed in procedural rules. Set out below are the basic principles of the process at this stage, and we will continue to formulate the details in conjunction with stakeholders and other interested parties.

### The Fixed Table procedure

325. The proposed fixed table process removes the need for a means form to be completed; once the court has made an order, the employer would be instructed to apply the deduction rate specified in the tables. Currently, the time from application to the making of an order takes an average 7.56 weeks, and for a Surplus Order, 11.60 weeks if the debtor fails to respond; with fixed tables, the process can be reduced to just over 14 days.
326. Various formulas were considered such as linking the deduction rate to the size of the debt but concluded that a court AEO procedure should continue to be based on the debtor's ability to make repayments. Although fixed tables provide a minimal amount of information on which to set the deduction rate, this is sufficient for the purposes of deduction rates in civil debt recovery as broad assumptions on average expenditure can be made.
327. Fixed tables are already used for council tax in England and Wales. During 2001/02 at least 316,587 council tax AEOs were made.<sup>47</sup> Fixed Tables are used in Scotland for civil debt recovery, and though these tables have far more salary ranges than the council tax system, the percentage deductions are very similar.

Diagram A. From application to full order



<sup>47</sup> Not all local authorities provide this statistical information.

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**Table A.** Council Tax Tables for debtors paid monthly

Monthly Net Pay	Council Tax Table
Not Exceeding £220	0%
£220 to £400	3%
£400 to £540	5%
£540 to £660	7%
£660 to £1040	12%
£1040 to £1480	17%
Exceeding £1480	17% for first £1480, 50% thereafter

328. By using the information provided in the sampling exercise (paragraph 323), we conducted a comparison exercise by applying the Council Tax Table to existing cases. This identified that using the net pay of existing cases, the council tax deduction rates led to far higher repayments for many debtors. The main reasons for council tax debts being set at a higher rate, are:

- council tax is a local tax and therefore has a higher priority;

- council tax debt arrears are based on debts accrued in one tax year and therefore repayment has to be made over a short period, 12-18 months, to ensure arrears for the following year are not built up;
- creditors in the county court may have made a decision to lend the debt.

329. We therefore created two fixed tables with lower deduction rates than the Council Tax Tables, shown below:

**Table B.** Two Examples of Possible County Court Tables.

Please note: Tables X and Y are only experimental tables, proposals for the final tables have yet to be made. It is proposed that the power to set them would be in primary legislation with subsequent secondary legislation to determine the rates. The final rates will be set on advice of the working group (see paragraph 354).

Monthly Net Pay	New Table X	New Table Y	Council Tax Table
Not Exceeding £220	0%	0%	0%
£220 to £400	3%	2%	3%
£400 to £540	5%	4%	5%
£540 to £660	7%	6%	7%
£660 to £1040	9%	8%	12%
£1040 to £1480	11%	10%	17%
Exceeding £1480	11% for first £1480, 30% thereafter	12%	17% for first £1480, 50% thereafter

330. Using the two experimental tables, we have been able to make further comparisons. These have helped to address and disprove a concern expressed by some debt advice groups in their response to the original consultation, that the most vulnerable would be worse off through fixed tables. Table C shows that most debtors in the three lowest salary bands would pay less using fixed tables.
331. These tables prevent a deduction being made if the monthly net pay is below £220 a month. It may be argued that this is a change from the existing position as the court can currently make a deduction on a very low income. Our view, however, is that under the current process a deduction is unlikely to be made as the PER is likely to be exceeded on such a low salary. By preventing a deduction rate below £220, the court will be safeguarding the income of those on low salaries, though they may make payments if they wish under a suspended order.
332. Overall, it is unlikely creditors will receive lower repayments using fixed tables. Table D demonstrates that the two experimental tables would on average result in a slight increase and Table E shows that those in the higher salary ranges are likely to pay more than at present.

**Table C.** Pay ranges of sampled cases and how many would pay less using the Council Tax and experimental tables.

Monthly Net Pay	Sampled cases within this pay range	Percentage that would pay less using Council Tax	Number that would pay less using Table X	Number that would pay less using Table Y
Not Exceeding £220	17	17	17	17
£220 to £400	77	64	64	70
£400 to £540	81	52	52	65
£540 to £660	106	45	45	55
£660 to £1040	435	84	138	151
£1040 to £1480	156	10	33	35
Exceeding £1480	52	1	6	9
Total	924*	273	355	402

\*924 out of 961 had sufficient information for this exercise.

**Table D.** Average amount paid under each procedure.

	Net Pay from sample	Current Procedure*	Council Tax	Table X	Table Y
Average	£841	£67	£114	£81	£71

\*This figure was obtained using either the debtor's offer or the rate set by the court, whichever was the higher.

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**Table E.** Average deduction per pay range.

Net Pay per month from sample	Average salary within pay range	Number within this pay range	Present Procedure	Table X	Table Y	Council Tax
Not Exceeding £220	£138.36	17	£26.71	£0	£0	£0
£220 to £400	£327.30	77	£35.10	£9.82	£6.55	£9.82
£400 to £540	£473.65	81	£47.33	£23.68	£18.95	£23.68
£540 to £660	£603.66	106	£45.74	£42.26	£36.22	£42.26
£660 to £1040	£839.93	435	£67.51	£75.59	£67.19	£100.79
£1040 to £1480	£1195.35	156	£82.33	£131.49	£119.54	£203.21
Exceeding £1480	£1840.96	52	£147.56	£271.09	£220.92	£432.08

## Review Process

333. Careful consideration will be given to the deduction rates, but the expenditure of some households will be far greater or lower than estimated in the fixed tables. Therefore creditors or debtors who can prove the fixed table deduction rates fall well above or below what can be afforded will be able to apply to the court for a review. This would protect the most vulnerable and be fairer.
334. We have yet to finalise the details of the review process but can set out some of the principles being considered. It is likely to be a paper-based application in the first instance and will probably be considered by an officer of the court. The grounds for a debtor's application for a review will be based on the principle that the fixed table rates would cause financial hardship to a household. It is envisaged that the court will require some verification of incomes and expenditures to undertake an assessment and prevent the indiscriminate use of reviews.
335. In cases where a creditor makes an application for a review, again we believe there will have to be safeguards to prevent unfounded applications. It is likely that a creditor's application will only be considered on certain grounds, such as sufficient reason to believe a debtor has another income, such as income from rental properties. Unlike a debtor's application the income of others within the household will not be considered. This is on the basis

that the debt is the sole responsibility of the debtor to repay.

336. Following a review, any party will be able to apply for an appeal hearing before a District Judge, though we believe the grounds of an appeal will have to be limited to ensure that the appeal process is not abused. During the life of an order, a review may be applied for at any time, though again we may restrict the grounds for repeated applications on the basis that circumstances will have to have changed.

## Payments following a Review

337. A key argument for fixed tables is to reduce the administrative burden on employers by removing the need for the employer to input and regularly check the NDR and PER rates set to each individual case. In addition, for those employers with automated payroll systems, fixed tables enable the process to be automated once the initial data is inputted.
338. For this reason, it is preferable to only request employers to apply deductions in line with the fixed tables. If an employer were to be asked to administer a deduction above or below the fixed table rates, the burden upon them would be substantially increased, as payroll systems would have to operate another AEO process. The

procedure would then be more burdensome than the existing one and implementation and compliance costs to business may then outweigh the overall benefits of fixed tables.

### Reduced Payments following a review

339. We therefore propose that if the court makes a reduced payment order following a review, the order is suspended and if defaulted on, a full order is made and the fixed table deduction rates applied.

### Increased repayments following a review

340. Though we estimate the number of cases where a review leads to an increased repayment rate will be relatively low (see paragraph 335), an increased repayment order does have additional difficulties.
341. The order following the review will, as with reduced repayments, result in a suspended order being made. The difficulty is how the court encourages payment under a suspended order, as repayments will be lower than if a full order is made. For this reason, it would be helpful to have your views on how this may be done without increasing the burden placed on employers.
342. One possible option is that a penalty could be imposed following non-payment of a suspended order. This would then be added to the debt so that the full order using fixed tables would run until the new amount was repaid. The primary aim of the penalty would be to produce an incentive for the debtor to make repayments under a suspended order and not to provide creditors with additional payments.

**Question 2 – A penalty, added to the debt, would be a suitable way of enforcing compliance with a suspended order, which increases repayments above the fixed table rates. Yes or No? If your answer is ‘no’ please state why, and, if possible, provide an alternative.**

### Suspended Orders

343. Currently a debtor may apply to the court for a Suspended Order to permit payments to be made direct to the creditor, without the need for an order to be sent to the employer. For debtors who do not wish their employer to know about their judgment debt this is an important device. Suspended Orders also prevent the employer being burdened by administering an AEO.
344. Another advantage of a Suspended Order is that it may assist in the debt being paid off quicker and result in the debtor making savings, because under a full order, the employer may take £1 per pay period to compensate for administering an AEO. If the debtor is paid weekly this will amount to £52 a year and may become a substantial sum if the AEO is in place for several years.
345. Our sampling exercise identified that 28% of Suspended Orders were turned into full orders because payments were not maintained. The sample looked at AEOs made within the last two years, so this figure may now be higher. One reason for this is that some debtors may make high repayment offers that cannot be sustained. So, we propose that Suspended Orders remain available and be automatically granted when first requested by a debtor. We will also look at how to make debtors more aware of the benefits of Suspended Orders and how to make them easier to comply with. One suggestion is that creditors state how they would like to receive payments when making an application. If they choose payment through a bank account and provide details, then a standing order can be arranged. This would be more efficient for the debtor and creditor.

### Consultation with Business

346. To establish the opinions of employers on fixed tables, we conducted a consultation exercise with businesses. Firstly, a letter explaining our proposals along with a questionnaire requesting views was cascaded to local chambers of commerce. Secondly, to target those responsible for payroll administration, the letter and questionnaire were published in several payroll organisation magazines and websites. Responses indicated that 95% of employers favoured the introduction of fixed tables over the current AEO procedure.

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**Table F.** Responses from Chamber of Commerce and payroll organisations

Responses	Number	Percentage
Strongly in favour of introducing fixed tables	48	30.97
In favour	100	64.52
Against	6	3.87
Strongly against	1	0.64
<b>Total Responses</b>	<b>155</b>	<b>—</b>
<b>Total for fixed tables</b>	<b>148</b>	<b>95.48</b>

347. Our discussions with payroll organisations identified the need for the process to be simple to operate for employers, so that their burden is kept to a minimum. One problem with the existing process is that it requires regular checking to ensure the PER rate has not been exceeded once a deduction has been made.

348. It was established that the fixed tables used for council tax AEOs are considered relatively simple to operate for employers and as these are already widely used, many payroll staff are likely to be familiar with the process, and so will require little if any additional training to implement our tables. Another benefit of using fixed tables is that payroll systems capable of making automatic deductions will require fewer changes than for a totally new process. These factors should keep implementation and compliance costs as low as possible.

349. The overall result is that, over time, the burden on employers will be reduced, as there will be two very similar AEO procedures operating.

### Multiple AEOs

350. Current arrangements for multiple county court AEOs are that a party to the action must apply to the court, or the court may upon its own motion order the debts to become consolidated. The result of this is that each creditor is paid a percentage of the money received when the court has received sufficient funds to enable a payment. This is, however, subject to the court reviewing the PER and NDR, and these may be changed to account for multiple debts.

351. Using fixed tables, we remain of the view that employers can only be asked to implement one set of deduction rates and therefore multiple cases must be subject to the same deductions as in single cases. It is our view that upon the court being made aware of a second AEO, the court will automatically consider consolidation and all parties, including employers, will be given an opportunity to object. On receipt of an objection, the matter will go before a District Judge for consideration and in default of a response, a consolidation order will be made. Any decision would have the same avenues of appeal as currently exist.

352. The consolidation process would operate in a similar way as it does now and once the employer pays the money to the court, the payments are distributed to the various creditors. We propose that the court apportion the payments in line with the size of the debts. An example of how deductions for multiple cases could work:

- Debt 1 = £5,000 as a percentage of the whole debt – 83.33%
- Debt 2 = £1,000 as a percentage of the whole debt – 16.66%
- Combined Debt = £6,000 – 100%
- Monthly deduction = £100; debt 1 receives £83.33, debt 2 receives £16.66

353. A review process will also be available for multiple AEO cases. The details of how this would be operated by the courts is still to be agreed, and it is likely that the Court

Service will, as at present, take a percentage of the money received to cover the additional administrative costs of dealing with multiple AEOs.

## Further Work

354. As part of our continued policy development on multiple AEOs we will work closely with colleagues responsible for the review of Administration Orders. To assist with the further work required to finalise the details of fixed tables, we have established a working group, made up of creditor and debtor support groups, judiciary and payroll bodies. The group will consider possible deductions rates, the criteria for a review process and other technicalities of the procedure.
355. We will also continue to work with stakeholder groups and consider their views as we finalise the details of the process and continue to work with other Government Departments such as the Office of the Deputy Prime Minister (ODPM), who have responsibility for Council Tax Tables.
356. Discussions with Payroll Organisations have identified areas in which we may assist employers in implementing fixed tables. It is our intention to update the existing employer handbook and to provide this on the Internet. We will also be exploring the possibility of producing a calculator on the Internet so employers with access will be able to calculate the regional deductions.

AEOs are an effective enforcement tool and offer a more socially acceptable enforcement option to distress, as they allow the debt to be repaid over a period of time, based on the debtor's ability to repay. The First Phase of the Review identified that the existing procedure has weaknesses and our subsequent work supports this conclusion. It has also enabled us to conclude that the introduction of fixed tables would lead to the following benefits to the AEO process:

- **Faster** – because the Court will no longer require a means form;

- **Fairer** – in most cases the deduction rate will be based solely on the debtor's income and therefore everyone will be treated equally;
- **Transparent** – as all parties will be able to see the proposed deduction rates from the outset;
- **Consistent** – as there will no longer be regional variations on what expenditure is or is not allowed; and
- **User-Friendly** – all users, including employers, will have a simplified process.

## TRACKING

### Introduction

357. The First Phase of the Enforcement Review identified that creditors find it difficult to track debtors who change employment when an AEO is in place. Consequently, some AEOs may be unsuccessful in recovering the whole debt or subject to significant delay if the debtor changes employment and fails to provide new employment details. A weakness in the existing procedure is that it relies on the debtor to provide employment details. There may be a number of reasons why a debtor is not forthcoming with this information; the effect is that the procedure is less effective.
358. The First Phase explored options for obtaining information to assist with enforcement; the proposed Data Disclosure Order would enable the court to obtain information following judgment. This could include obtaining employment details where creditors do not already have these but does not include obtaining new employment details once an AEO is in place.
359. Currently, if a debtor changes employment during the life of an order, the court will request the debtor to provide their new employment details under section 15 of the Attachment of Earnings Act 1971. Section 23 of this Act makes it an offence to fail to comply with Section 15, punishable by a fine or up to 14 days imprisonment. However this is rarely used and has little effect.

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360. Creditors are often left to obtain the debtor's new employment details themselves, and this may be costly, time-consuming or impossible. There is a risk that such enquiries will be intrusive on the debtor's privacy, as the court has no control over how information is obtained. If the creditor obtains new details, the order may be re-instated and re-directed to the new employer to make the appropriate deductions. If the creditor cannot obtain this information, the order remains adjourned and the creditor must either choose another method of enforcement or decide not to pursue the debt further.
361. The Review looked at how courts can track debtors who change employment and fail to inform the court or creditor when an AEO is in operation. Inland Revenue (IR) employee records are the most reliable source of information to enable tracking and we have held detailed discussions with IR in relation to the establishment of a data-sharing gateway. This proposal requires primary legislation, as at present Inland Revenue confidentiality legislation prevents them from providing this information.
362. Our discussions also included the Department for Work and Pensions (DWP), responsible for Child Support, and ODPM, responsible for council tax collection. Both departments support our work as they have similar difficulties in tracking debtors who change employment. While LCD has begun to explore this with the Inland Revenue, significant further work would be needed to explore whether it was possible to extend this to cover the AEOs issued by CSA and the many local authorities.
363. A high-level feasibility study has already been undertaken, to consider how such a link between existing court and IR systems may work based on existing systems. The study has indicated that a computerised link is possible and that the set up costs are likely to be in the region of £500k at current prices.
- the debtor's new employment details. The tracking mechanism will only be operated following non-compliance by a debtor and if the creditor has no new details.
365. The tracking process requires that a gateway be created allowing IR to share information with the courts. We envisage a computerised link, so that once an AEO fails due to a change in employment, the court will be able to locate the new work address and re-direct the order. The information would only state the debtor's new work address and be used solely to enable the court to re-direct the AEO to the new employer. Information would not be released to the creditor.
366. Further work, which may include consultation, on the possible usage and unit price costs of a tracking process, will have to be completed. At this time, it is envisaged that the costs will ultimately be borne by the debtor. The debtor will be informed of his responsibility at every stage of the AEO process and therefore the additional costs involved with tracking can be avoided by the debtor simply providing the information when first requested to do so.

In order for the AEO procedure to offer a viable alternative to distress the court must have an effective method for ensuring orders are complied with. By creating a tracking system, it is likely that more AEOs will be successful in obtaining repayment of the whole judgment debt. By using IR records, the courts will have the most reliable source of employee details available to enable tracking to work. Any concerns about data sharing are more than balanced by the need for proportionate, controlled and appropriate use of information, solely for ensuring enforcement of a court order following wilful non-compliance by a debtor.

## The Procedure

364. Before any tracking procedure commences, the debtor will be asked to provide the information voluntarily within a prescribed period. At the same time, the creditor will be told why payments have stopped and asked if they have

## Section Two Charging Orders

### Introduction

367. A charging order is a means of securing a debt by placing a charge onto the debtor's immovable property, particularly a house or land, although it can also be used against shares. A charging order also allows a creditor to apply subsequently to the court for an order for sale. Charging orders therefore provide a means by which a creditor can gain access to any equity a debtor holds in a property.
368. Because charging orders need to be legally registered against a property, they are more complex and specialised than some other forms of enforcement. This is likely to remain the case – the Review has identified no significant means by which the charging order procedure should be changed. Registration against the property will therefore remain an essential feature of the process. It is our conclusion that the existing procedure works well in the main. Our recommendations are therefore of a procedural nature, to help the system run more smoothly.

### Proposals

369. Our proposals can be summarised as follows:
- That enforcement by way of charging order should be made available in cases in which the debtor is not in arrears with an instalment order.
  - That debtors who are the subject of a charging order, who have been keeping to the terms of an instalment order and who believe they would be unduly prejudiced against when selling their property, can ask the court to look at their circumstances and consider whether the charging order should be removed to allow the sale to take place.
  - That the Lord Chancellor be given, in primary legislation, the power to set, by way of secondary legislation, financial and/or procedural limits for enforcement by

way of charging order or order for sale in the future, should circumstances necessitate.

- That orders for sale be retained.

### Specific proposals

*1. That enforcement by way of charging order should be made available in cases in which the debtor is not in arrears with an instalment order.*

370. At present, the court cannot make a charging order when payments due under an instalment order are not in arrears. When making an application for a charging order, the creditor must specify that the whole or any part of an instalment (or instalments) due remains unpaid.
371. It leaves a major loophole that allows debtors with large judgment debts, paying off their debt in small instalments which are not reviewed regularly if the debtor's circumstances change, to benefit from the sale of a property without paying off the debt. The debtor thereby obtains a capital sum and is under no obligation to make any payments towards the judgment debt. However, if a charging order is in place, this provides the creditor with some security that the proceeds of the sale would go towards paying off the judgment debt. Although the debtor if he became aware of the sale could apply to the court for a review of the instalment order, the money from the sale could already have been disposed of and an opportunity to settle the debt more quickly would have been lost.
372. Most respondents to our consultation agreed that charging orders should be made available in cases in which the debtor is not in arrears with an instalment order, and that creditors should have the right to seek a charging order even if no arrears exist under the judgment order. They felt that the charging order provides a degree of security for payment of what would otherwise be an unsecured debt, albeit one subject to a county court judgment. It is this

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long-term security that encourages creditors to accept instalment arrangements spreading payments over a number of months, or even years, in the knowledge that their position is secure. Such an arrangement should have benefits all round.

373. It should result in debtors making reasonable yet affordable offers, because creditors are more likely to accept them if they will have access to security to back it up. It would avoid the current situation where creditors are forced to press for a forthwith judgment to enable them to get a charging order in place before beginning the lengthy negotiation process involved to obtain an instalment order.
374. Our research indicates that charging orders are used most often as a form of long-term security for a judgment debt. From a sample of 800 Charging Order cases of one major creditor, in only one was an application for an Order for Sale made (which was unsuccessful). In the overwhelming majority of instances, once the security of a charging order has been obtained, creditors (including major financial institutions and lenders) are more willing to accept long-term 'time to pay' agreements to clear the judgment debt, knowing that their position is secure. Without such security, creditors are often left with no option but to consider other methods of enforcement, such as warrants of execution or even bankruptcy, to the greater detriment of vulnerable debtors, whose home and personal property is at greater risk.
375. It is, of course, important that this 'security' should not be enforced by way of an order for sale until considerable arrears have accrued. All enforcement action must be proportionate to the size of the debt involved, and reflect the circumstances of the individual case. This is particularly so with charging orders, especially if the property is the family home. Judges will always bear in mind the full circumstances of the case, before granting an Order for Sale. For example, if the debtor is in a position to sell the family home, pay off the judgment creditor and still be able to adequately rehouse himself and his family to an acceptable standard. We are including a provision that an application for an Order for Sale cannot be made when a creditor is up to date with payments under an instalment order. We are also considering whether the subsequent

Rules of Court should provide that applications for a Charging Order Absolute or an Order for Sale be heard in the debtor's home court.

**Question 3 – Should the application for a Charging Order Absolute or Order for Sale be heard in the debtor's home court?**

376. A debtor who is following the orders of the court in paying his or her instalments in full and on time should not, and will not, face the prospect of losing their home to an order for sale. We previously took the view, supported by our legal advice, that existing judicial discretion is sufficient to prevent this happening. This opinion was endorsed by respondents to the First Phase, and subsequently in our consultations with representatives of the finance industry and the judiciary. We believe, however, that with the extra safeguards we are putting into place we have made adequate provision to protect vulnerable debtors in all foreseeable circumstances.
- 2. That debtors who are the subject of a charging order, who have been keeping to the terms of an instalment order and who believe they would be unduly prejudiced against when selling their property, can ask the court to look at their circumstances and consider whether the charging order should be removed to allow the sale to take place.*
377. It is important to ensure that debtors are not unable to move house if they need to, for example because of a change of job. The loss of the entire equity in a property could prevent the debtor from purchasing a new property, or from finding sufficient funds for a deposit on a rented property. This seems unduly harsh.
378. We therefore propose, that debtors who have kept to the terms of an instalment order and believe they would be unduly prejudiced when selling their property if the charging order remained in place, should be able to ask the court to consider whether it should be removed before the sale. The debtor's payment record already forms part of the judge's deliberations in charging order cases, and it is highly unlikely that a judge would force an order for sale when the debtor has kept up with their instalment order

payments, except in the most extreme circumstances. The court could, at the same time, review the instalment order, and consider whether payments should be increased to take account of the change in circumstances.

*3. That the Lord Chancellor be given the power to set financial and/or procedural limits for enforcement by way of charging order or order for sale in the future, should circumstances necessitate.*

379. The Review seeks adequate safeguards for vulnerable debtors, with regard to charging orders and orders for sale. Members of the debt advice sector suggested the introduction of a lower limit on the size of debt for which a charging order or an order for sale could be sought. There were also calls for debts arising from credit agreements under the Consumer Credit Act 1974 to be exempted from enforcement by way of charging orders and orders for sale. The Review must balance the interests of the creditor with those of the debtor and his family. Similarly the judge needs some discretion when considering an application.
380. However, responsible creditors who are owed money and have gained valid judgments through the county court must retain the right to enforce that judgment by the most appropriate means.
381. It is clear from our discussions with the British Banking Association and the Finance and Leasing Association that the vast majority of financial institutions and their trade organisations are committed to sensible lending and enforcement practises. On the whole, they make use of charging orders as a way of securing their position, but do not resort to the use of orders for sale except in extreme circumstances. There are many reasons for this, which are outlined below.
382. Firstly, there is the existing judicial discretion. Lenders believe that judges make great use of their discretionary powers, and avoid granting orders for sale except in the most extreme circumstances.
383. Secondly, many lenders have already adopted a policy of minimum debt levels below which they do not pursue debtors by way of charging order. There are several reasons for this.
384. It is felt by many within the financial sector that judges, quite rightly, will exercise their discretionary powers and not even consider granting an order for sale for small sums. It is also felt that for small debts the charging order procedure is a bit of a 'sledgehammer' approach when there are other enforcement methods available that can work just as well, and is therefore just not a rational way to approach the problem. The cost of a successful charging order and order for sale (in terms of lawyers time etc. rather than the application fees payable) is not justified for such relatively small sums. Anecdotal evidence indicates that the 'High Street Banks' place a strong emphasis on retaining a good reputation. The potential damage from adverse press or television coverage for inappropriately pursuing an order for sale, e.g. on a property with children, elderly, infirm or disabled persons resident, would be detrimental.
385. In our view, at present there is no need to introduce any such limits, financial or procedural, on enforcement by way of charging order. We believe that denying responsible creditors the right to enforce in this manner will not solve the problems identified by the debt advice sector. Instead, they can be more effectively dealt with by tightening up on licensing procedures as part of the DTI's review of the Consumer Credit Act.
386. However, it is possible that in the future, further reviews or evaluation may indicate that such limits have become necessary. Therefore, we plan to provide the Lord Chancellor with the means to act swiftly to introduce such limits if the situation requires. It is proposed that the Lord Chancellor should be granted, by way of primary legislation, the right to impose, by way of secondary legislation, financial and/or procedural limits for enforcement by way of charging order in the future, should circumstances necessitate. It is envisaged that this method will be used, for example, to implement the provision that an Order for Sale cannot be applied for if a debtor is up to date with their instalment order payments. Indeed, we have been advised that this may well be the best way of achieving this. But it could also be used to place, for example, minimum financial limits below which a creditor could not apply for a charging order or order for sale.

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387. It is hoped that such powers would never have to be used in this way, and that by working in conjunction with responsible lenders, they will make the necessary internal reforms of their processes that would mean such a step is unnecessary. We will continue to liaise closely with both the British Banking Association and the Finance and Leasing Association on this matter. As part of the evaluating and monitoring procedure of this policy we will be looking at the use of charging orders and orders for sale.

*4. That orders for sale be retained.*

388. Orders for sale are used particularly against debtors who have a large debt but few assets other than equity in property, or against debtors who just flatly refuse to pay when all other forms of enforcement available have been exhausted. Their use is, as we have seen, strictly controlled by the court, who have an obligation to consider the position of the creditor and compare that to the detriment caused to the debtor by the loss of his home. Some debtor organisations have called for the abolition of orders for sale. We have carefully considered this suggestion, and have concluded that such a step is not appropriate. Abolition of orders for sale would allow debtors living in expensive properties, and who have run up large debts, to avoid paying those debts whilst continuing to remain comfortably accommodated.

389. The existence of the order for sale also helps avoid situations where creditors may otherwise have no other option than to proceed with bankruptcy, which of course could lead to the judgment debtor losing much more than just his home. Removal of this enforcement option may well lead to an increase in the use of bankruptcy proceedings. Whilst creditors should retain the right to enforce their judgments by the most appropriate method, vulnerable debtors should be afforded adequate protection wherever possible. The Government has exhibited its commitment to this ideal through its proposed changes to bankruptcy procedures, with the express aim of helping debtors to get back on their feet.

390. We have concluded, in the light of all the evidence available to us, that the court has adequate discretion to refuse orders for sale if they would be unduly oppressive to a vulnerable debtor, and that orders for sale should be retained as part of the civil enforcement system.

## Existing safeguards

391. Our current proposals form part of a comprehensive package of safeguards providing protection to vulnerable debtors, we believe these ensure that existing judicial discretion is a sufficient safeguard for vulnerable debtors.

*Sections 1(5) and 3(1) Charging Order Act 1979*

392. These sections establish that a charging order may be made either absolutely or subject to conditions, and that decision as to whether to make a charging order is discretionary.

*Section 71(2) County Court Act 1984*

393. This section establishes that any judgment or order of the court (including charging orders or orders for sale) may, at the discretion of the court, be stayed or suspended on such terms as the court thinks fit, such as, for example, payment by instalments.

*Section 15(1) Trusts of Land and Appointment of Trustees Act 1996*

394. Charging orders where a debtor has a shared interest in a property rather than outright sole ownership of the property as a whole are taken under this Act. The creditor must apply under section 14 for an order for the co-owners to sell in order to realise the debtor's interest in the property. However, section 15 states that the court must have regard for the following when determining any such application:

- the intentions of the person or persons (if any) who created the trust;
- the purposes for which the property subject to the trust is held;
- the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home; and
- the interests of any secured creditor of any beneficiary.

**'Mesher' type orders**

395. A 'Mesher' order is the name given to a particular type of order made in charging order cases, so called because it was first used in the case of *Mesher vs. Mesher and Hall 1980*. In this case a Charging Order Absolute was granted, but with the proviso that it could not be enforced as long as there was a minor resident at the property concerned. The use of such orders was confirmed by a ruling in the case of *Harman vs. Glencross 1986*.

**Royal Bank of Scotland vs. Etridge 2001**

396. This case established the precedent that, where a joint loan has been taken out by, for example, a husband and wife, with a jointly owned property as collateral, such as the matrimonial home, then it is incumbent on the lender to explain to both lenders at the time of signing the potential consequences of default. In this case it was ruled that one party had signed the forms without being informed by the lender of the possible consequences of non-compliance with the terms of the loan. Therefore the Royal Bank of Scotland did not have the legal right to enforce by way of charging order against the property.

**Bank of Ireland Home Mortgages vs. Bell 2001**

397. This case effectively established the circumstances in which an order for sale would be granted, even if the defendant claimed that the property concerned was the family home. Here, the equity available on the property was sufficient to pay off the judgment creditor and all other interested parties, including the defendant's ex-wife's beneficial share, and still leave enough money to adequately rehouse the defendant and his son, who as he was over 18 and not in full-time education was not considered a minor. The application for an order for sale was therefore granted, even though the defendant claimed it was the 'family home'.

**Consumer Credit Act 1974**

398. Some commentators have already argued that in passing the Consumer Credit Act 1974, Parliament has conceded that it considers it appropriate to confer greater legal protection upon borrowers under regulated agreements than upon other borrowers and general debtors. Certainly there exists within the terms of the Consumer Credit Act sections that refer to 'Time Orders' and 'extortionate credit bargains'.

**The 'Civil Bench Book'**

399. The '*Civil Bench Book*', produced by the Judicial Studies Board, gives guidance to judges as to the conduct of hearing the various types of enforcement application. Section 11.6 concerns itself with the conduct of charging order applications. This section refers to the need to consider that everyone has the right to respect for his or her private and family life and home – there must be no interference by a public authority with the exercise of this right, except such as is in accordance with the law. It makes it explicit that, as a consequence, the judge has a duty to ensure that all steps taken in charging order cases have followed the correct procedures, and that the defendant is afforded a fair hearing. The section in the '*Civil Bench Book*' on charging orders was expanded in August 2002, to give further guidance on the use of judicial discretion in charging order cases and includes examples of relevant previous cases.

400. As well as the examples above, a further safeguard recommended by the First Phase was implemented in March 2002. This built upon the 'discretion' outlined in section 1(5)(b) of the Charging Order Act 1979, which stated that the judge must consider evidence as to whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order. It is now incumbent upon the judgment creditor, when applying for an order for sale, to name all known creditors and existing charge holders and beneficiaries. If the judge feels that these other creditors will be unduly prejudiced against, he is to refuse the application for an order for sale.

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## Review of the Consumer Credit Act 1974

401. DTI is reviewing the Consumer Credit Act 1974 (CCA). This fits with the Review's work on charging orders in two ways. Firstly, some in the debt advice sector call for CCA-regulated debts to be made exempt from enforcement by way of charging order (because it is seen as a back-door way for lenders to effectively secure what was originally an unsecured debt). Secondly, lenders who are responsible for the CCA debts that make up a large proportion of charging order cases have to be licensed under the terms of the CCA.
402. It remains the Government's position that responsible creditors who are owed money and have gained valid judgments through the county court should have the right to enforce that judgment by the most appropriate means available. Government does not believe that denying responsible creditors access to charging orders will solve the problems that the debt advice sector has identified. In our view it is by tightening up the licensing procedure, and by tackling the unscrupulous lenders at source, ensuring they are not able to gain a licence that many of the problems identified by the debt advice sector will be solved. LCD and DTI continue to liaise closely on the planned reforms of the Consumer Credit Act 1974, as outlined previously in Chapter One. This is particularly the case with regard to proposals to change existing legislation to ensure greater use of the 'time order' provisions, and to ensure that the availability of these provisions is better and more widely promoted.

## Why are we not restricting access to Charging Orders?

403. There have been representations from some in the debt advice sector who seek to exclude or restrict charging orders as a means of enforcing a judgment debt, particularly with regard to CCA-regulated debts. The policy reasons for not doing so have already been covered – but there are also sound economic reasons for this decision.

404. Firstly, one of the factors behind the current economic buoyancy of this country is the ready availability of unsecured credit at relatively low interest rates. Lenders are willing to grant loans on fairly easy terms because they know that if the worst comes to the worst, they always have the option of enforcing any judgment debt by way of charging order to secure their position. If this were not the case, they have indicated that they would have to seriously rethink their lending policies. They would either move towards lending on a secured basis only; or they would substantially raise interest rates on unsecured lending to make provision for the increased number of 'bad debts' that they would be unable to effectively pursue. Many people would as a result find their access to credit severely restricted, if not cut off altogether; and those with access to credit would be paying higher interest to compensate for, and effectively subsidise, defaulters.
405. Secondly, such a restriction would almost certainly lead to an increased use of bankruptcy proceedings for enforcement. In many cases, bankruptcy would become the only means of enforcement left available to lenders. In such cases, the loss of any property, such as the family home, becomes virtually automatic rather than discretionary. Our research has revealed that over recent years there has been a rise in the number of 'consumer' bankruptcies, and in 2000 'consumer' bankruptcies began to outstrip 'business' bankruptcies for the first time. We would not wish to exacerbate such a situation.

## Research on the use of Charging Orders

406. Our statistical research was carried out in two stages. The first involved approaching 22 County Courts, selected to represent a cross section of the country geographically but also courts which records showed had dealt with a large number of Charging Order applications. From those courts, we obtained details of 1,408 Charging Order applications made in the period January – June 2001. We analysed the case details to provide data regarding debt size, creditor and debtor types, the major users of Charging Orders as a method of enforcement and the number of cases that go forward for an Order for Sale. (In this sample, four cases

[0.3%] went forward for an Order for Sale.) This enabled us to identify, for example, that at the lower end of the financial spectrum, Charging Orders are just as likely to be used by individual litigants in person as by financial institutions.

407. The second stage involved spending time at a county court, collating details of cases involving one major creditor organisation. We analysed the case details to provide data regarding the outcomes of these cases and the further actions taken, debtor types and size of debt, and identify any other trends apparent.
408. During our research into the use of charging orders, meetings were also held with representatives of the following organisations: the British Banking Association, the Finance and Leasing Association, the Money Advice Association, Citizens Advice, the Association of District Judges and Court Service. There have also been statistical compilation exercises involving Citizens Advice and the Insolvency Service. We thank them all for their continued help.

## 4

## Section Three

# Third Party Debt Orders

### Introduction

409. This section explains why Government is not planning to proceed with one of the proposals from the First Phase of the Enforcement Review, namely that joint accounts should be subject to attachment under Third Party Debt Orders (TPDOs) (previously known as Garnishee Orders).<sup>48</sup> TPDOs are a method of enforcement used by creditors to secure the payment of an outstanding judgment debt by freezing then seizing money owed or payable by a third party to the debtor in order to pay the judgment debt.

410. The initial proposal to attach joint accounts arose from a belief that debtors could transfer funds into joint accounts to protect them from seizure by a creditor through a Third Party Debt Order (TPDO). Current law holds that a joint account, even if owned by a husband and wife, cannot be attached under such an order if the debt is owed by one spouse. Any changes to this position would require primary legislation.<sup>49</sup> Phase One proposed such a legislative change as it was thought that this would provide access to business accounts, many of which are joint accounts.

411. Three main issues arose and were considered at length during our reappraisal of this proposal:

- defining joint accounts;
- allocating ownership of funds in joint accounts; and
- addressing the rights of 'innocent' third parties to joint accounts.

### Defining Joint Accounts

412. A joint account is defined in law as a debt that is owed (by the bank) jointly to the account holders. However, a precise

detailed statutory definition would be required to remove legislative ambiguity and limit the application of the law to appropriate joint accounts to be captured by TPDOs.

Without such a definition, the category 'joint account' could include any account with more than one party to it, so partnership accounts, accounts where another is authorised to act as an agent, and trustee accounts could be considered to be joint accounts. It would be problematic if, and it was clearly not intended that, such accounts should be captured by TPDOs.

413. It is also difficult to define accounts by their use. Although it was the intention that business partnerships should be captured by attaching joint accounts, in practice this would prove difficult. Business accounts are often registered in the trading name of the company so the account would not be held in the name of the partners themselves. Any search conducted by the bank for the account holder's name with this kind of account would prove unsuccessful. It is also often the case that with large partnerships not all of the partners will be on the bank mandate. It would be difficult, if not impossible, for the bank to locate these accounts when searching their records.

414. Even if business partnership accounts were easily identifiable, they give rise to particular problems related to the nature of the judgment debt. Although partners are jointly liable for debts owed by the firm, any debts accrued when not acting in the usual course of business are not jointly owned by the other partners. Including a partnership account in a statutory definition could give rise to challenges by the other account holders, who should not be subjected to loss of business funds for other purposes. Partnership accounts, therefore, could not realistically be included in a statutory definition that would be effective in practice.

<sup>48</sup> The order was renamed under changes introduced by the Civil Procedure (Amendment No.4) Rules 2001, which came into force on 25 March 2002

<sup>49</sup> The legal position regarding joint accounts stems from the case of *Beasley v Roney* in 1891, which establishes that '*the debt owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to the judgment debtor alone, and that where it is only due to him jointly with another it cannot be attached*'. The current legal position confirming this approach was stated in the case of *Hirschon v Evans* [1983] 3 ALL ER 491 by the Court of Appeal

415. Recent changes to the Civil Procedure Rules add further procedural difficulties to attempts to attach joint accounts. The rules require banks to undertake a search for any other related accounts held in the name of the debtor. If this were extended to joint accounts, existing systems would not always be able to find a joint account with only the name of one partner. Such operational difficulties substantially affect the success of the scheme, especially for business accounts where the partnership names would often be unknown to the creditor.
416. Conversely, legislation would need to address the situation where multiple accounts were identified, in order to tackle the issue of priority. If a bank were to find itself with several accounts in the name of the debtor, they could be faced with the choice of attaching one large joint account or attaching several small single accounts. Whichever approach were to be taken, there would be significant cost involved and extra procedures necessary for the proposal to function successfully. This would impose financial and administrative burdens, thereby complicating a system that the Review intends to simplify.
417. Any definition of a joint account, for practical and operational reasons, is likely to entail the exclusion of trustee and business accounts. There is a definite risk with the latter, therefore, that the effect would be felt not by the business sector as intended, but by domestic debtors. This is contrary to the intention of the policy recommendation and is likely to have a differential impact on couples.

### ***Allocating Ownership of Funds in Joint Accounts***

418. It was proposed that any attachment of joint accounts should be subject to a 50% maximum attachment (proportionately less if more than two account holders), to ensure a minimum level of protection for the other account holder/s. Further consultation with financial institutions reveals that they would be unable to determine precisely the proportions of an account belonging to each of the account holders. Legislation would be needed to establish a formula to allocate the proportion of an account that belonged to each of the account holders. Such a legislative provision should be clear and unambiguous, otherwise the financial institutions would be accountable for all decisions made estimating the proportions held by each account holder. This would place the financial institutions in a contentious and unacceptable position.
419. The amount in the account could be divided by the number of account holders, with each account holder being allocated an equal proportion of the funds. The banks and building societies would be responsible for making this calculation since the court would not be aware of the contents of the mandate, nor the exact number of account holders. For such a procedure to address ECHR concerns, there should be a mechanism for appeal by the other account holder/s.
420. However, the proposal is still problematic. Proving the exact amount of funds owned by individual parties to an account is extremely difficult, as statement records do not necessarily indicate ownership of the funds. Any legislation would require detailed rules addressing all of the issues and could generate complex and lengthy procedures in the courts. The costs would either have to be built into the price of a TPDO or borne by the courts. This would be contrary to the aim of the Review in seeking to simplify the civil enforcement process and increasing access to justice.

### ***Addressing the Rights of 'Innocent' Third Parties***

421. Although the TPDO applies to the funds owned by only one of the joint account holders, the other account holders – the 'innocent' third parties to the account – need to be notified of the order. Such notice would be necessary, firstly so that they could have the option to challenge the deemed proportion of ownership, and secondly so that they would be aware that the account had been frozen and the reasons for this action.
422. Notice could be given by one of two methods. Either the court could send two forms to the bank: a notice to inform the other account holders, and the interim TPDO itself. Once the bank had established there were sufficient funds they would inform the other account holders by sending a copy of the notice to each of them. This could place a

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significant administrative and financial burden on the bank where multiple account holders were involved. Alternatively, the bank could notify the court of the names and addresses of the account holders and the court could then send out notifications to the other account holders. The court would not be able to send out the notification at the same time as sending the order to the bank as they would not yet have received the names and addresses of the other account holders. In this instance the court would first send the bank an interim order and an order for information concerning the names and addresses of the other account holders. The bank would then act upon the interim order and inform the court of the names and addresses of other account holders. Finally, the court would write to the account holders informing them of the TPDO.

423. Both options impose financial and administrative burdens on the courts and the financial institutions and further complicate a system and an enforcement method that the Review is intended to simplify and streamline. The increased cost involved in notifying the other account holders would also have to be built into the cost of applying for a TPDO, making it an expensive and less desirable enforcement option.
424. There are further potential problems with the proposal in relation to notice. It is proposed that the other account holder/s be informed when the court is informed of the details of the contents of the account, i.e. at the stage of the interim order. This could be considered a breach of the debtor's right to privacy with regard to his or her personal information. The issuing of an interim order does not guarantee the issuing of a final order, and it may be the case that the final order is not actually made. The other account holder would then have been made aware of private details concerning the debtor's accounts where it was not necessary to do so for the payment of the debt. This could potentially give rise to ECHR concerns.
425. Freezing a joint account for the period between an interim and a final TPDO also gives rise to difficulties. There are two possible options available to the financial institutions in relation to freezing the account. The bank may freeze just the proportion of the account allocated as belonging to the debtor, therefore allowing the other account

holder/s to continue accessing their proportion of the account. However, financial institutions may be technically unable to do this, and even if they could they would require extensive guidance on the process of freezing a proportion of the account and what actions could follow the freezing, for example determining withdrawal rights against the remaining balance. Depending on the nature of the mandate there may be nothing to stop any of the account holders taking out the rest of the money in the account and therefore ignoring the allocations made by the court.

426. The other account holder/s may also suffer at the hands of the unscrupulous debtor once the debtor's proportion of the account money has been frozen. There is nothing to prevent the debtor removing further money from the account despite the possibility of their proportion of the funds having been removed to pay off the debt. Unless transactions require authorisation by all account holders, the other account holder/s may be susceptible to abuse of the account by the debtor.
427. The second and more viable option, therefore, would be for the financial institution to freeze the whole account, then take out the money covering the amount in question from the proportion of the account which has been allocated to the debtor and place it in a separate account. The other account holder will therefore be denied access to their money for a period of up to a month through no fault of their own. Although hardship funds may be made available, similar to those available to the debtor, thereby introducing further hearings to the process, it remains an unsatisfactory situation for the innocent account holder/s.

## Conclusion

428. The policy proposal as a whole is therefore contrary to the aims and objectives of the Enforcement Review. It imposes significant burdens on the courts and the financial institutions and, rather than simplifying the enforcement process, creates an over-complicated procedure.
429. In addition, even if the proposal were introduced and all procedural obstacles overcome, it would still be possible for debtors to evade TPDOs even though they may have

sufficient funds. A debtor could easily transfer funds into an account held in the name of someone else thus preventing their name being connected with the account when the bank undertakes their search. This is something that legislation cannot address.

430. In the light of the arguments set out above, the benefits of introducing a policy to attach joint accounts under TPDOs would be disproportionate to the range of operational, cost and policy difficulties which would impact on debtors, creditors and third parties alike.

# 4

## Summary of Questions

We would welcome responses to the following questions set out in this paper:

Question 1: In order to establish an evidence base to inform the future regulator, we seek views on:

- i) which of the three up-front fee options would be preferable?
- ii) whether the same type of up-front fee should apply to all debt stream areas?
- iii) If a fixed fee were introduced, at what level should it be set?
- iv) where upper and lower limits are set, what should those limits be?

Question 2: A penalty, added to the debt, would be a suitable way of enforcing compliance with a suspended order, which increases repayments above the fixed table rates. Yes or No? If your answer is 'no' please state why, and, if possible, provide an alternative.

Question 3: Should the application for a Charging Order Absolute or Order for Sale be heard in the debtor's home court?

Name:

Organisation:

Address:

If you are a representative groups please give a summary of the people and organisations you represent.

Please send your completed response to:

David Ilic

Civil Justice Division

Lord Chancellor's Department

Room 3.23 Selborne House

54-60 Victoria Street, London SW1E 6QW

[enforcewp.response@lcd.gsi.gov.uk](mailto:enforcewp.response@lcd.gsi.gov.uk)

# Annex 1

## Partial Regulatory Impact Assessment



# Annex 1 Partial Regulatory Impact Assessment

## OVERARCHING REGULATORY IMPACT ASSESSMENT

### Effective Enforcement

#### Introduction

1. This Regulatory Impact Assessment (RIA) supports the *White Paper Effective Enforcement*. The White Paper contains proposals covering:
  - structures for a regulatory regime and remuneration of all warrant enforcement agents;
  - enforcement agent law, including modifications to Distress for Rent;
  - the introduction of a new method to enable effective enforcement, the Data Disclosure Order (DDO); and
  - improvements to court-based enforcement methods for civil debt recovery (Charging Orders and Attachment of Earnings Orders).
2. Individual RIAs have been produced for each of the areas of the proposals and are annexed. This section provides an overall assessment of the regulatory impact of the proposals.

### Issue and Objective

#### Issue

3. Effective enforcement is crucial to both the criminal and civil justice systems. People ordered to pay a court judgment, criminal penalties and compensation awards, or to comply with the terms of a community sentence, have little or no incentive to do so if they know there is no effective means of enforcing it.

4. Under the existing arrangements, following a judgment after a payment has not been received a creditor may apply to the court to enforce the judgment. The creditor will decide which of the following enforcement methods they favour: attachment of earnings, charging order, third party debt orders, judgment summons or warrants of execution. The most common enforcement method is the warrant of execution, which has a very low success rate in terms of debt recovery; during 2001 only 50% of warrants executed were successful, the main reason for this being inaccurate or insufficient information on the debtor. The existing arrangements for enforcement agents are a mix between state-employed bailiffs and those employed in the private sector, some of whom are certificated through a court procedure, others who are not. There is limited regulation of enforcement agents through the certification process and contracts with Magistrates' Courts Committees. This means that there is no clear complaints procedure for debtors to complain about the actions of enforcement agents, and has led to abuses of the system such as that outlined in *Undue Distress*.<sup>50</sup> Unless there is prompt and efficient enforcement, the authority of the courts, the deterrent value of penalties, and public confidence in the justice system are all undermined. An adequate regulatory mechanism and appropriate methods for service delivery for both public and private sector enforcement agents are needed to enable straightforward and effective warrant enforcement, whilst offering protection to vulnerable debtors who are genuinely unable to pay. This package of legislative proposals aims to provide information for, and improvements to, court-based methods of civil debt and commercial rent arrears recovery and a single regulatory regime, law, and fee structure for warrant enforcement agents. It sets these in the wider context, including the European dimension, proposals to reform the Consumer Credit Act, ongoing work to tackle overindebtedness and relevant research.

<sup>50</sup> Citizens Advice (formerly National Association and Citizens Advice Bureaux) report *Undue Distress: CAB clients' experience of bailiffs* May 2000

### Objectives

5. The objectives of the main parts of the White Paper are as follows:

### Regulatory regime

6. The aim of regulation, through a statutory body, is to ensure that warrant enforcement is carried out appropriately, effectively and fairly in relation to both debtors and creditors. In accordance with the broadened remit of the Enforcement Review, announced by the Lord Chancellor on 6 March 2001, the Authority will regulate all public and private enforcement services. Therefore our principles apply across the following areas of warrant enforcement: High and county courts, magistrates' courts, parking charges, local and national taxes and duties, maintenance and child support. It will aim to maintain and raise standards across the profession, and promote best practice, fostering public confidence and creating a level playing field across the industry.

### Enforcement Agent law

7. The objective is to introduce a single piece of legislation to replace existing bailiff law. This piece of legislation will set out clearly the powers for effective enforcement on behalf of creditors and standardise the powers, responsibilities and conduct of enforcement agencies. The aim is partly to codify existing practices and harmonise the law. The new legislation is not intended to dilute the powers of any enforcement agents but to retain the powers that they currently have, whilst allowing other types of agents to obtain those powers once they meet minimum requirements, thus eventually resulting in a unification of powers. It is felt that clarification of enforcement agent law will help to achieve one of the underlying objectives of the Enforcement Review, to make enforcement more straightforward and understandable. Additionally, clarification aims to ensure that debtors receive fairer treatment from enforcement agents and are not subject to the sort of oppressive activities outlined in *Undue Distress*, by ensuring all parties have greater knowledge of their rights.

### Distress for rent

8. Currently landlords are permitted to enter a property without a court order in order to seize goods to secure payment of rent arrears. There has been concern expressed that distress for rent might breach the right to a fair trial, the right to respect for privacy and family life, and the right to quiet enjoyment of possessions, and could therefore be challenged under the Human Rights Act 1998 (HRA). The aim is therefore to secure methods of rent recovery which are both efficient and strengthen compatibility with the HRA through the modification or abolition of distress for rent.

### Fees

9. The objective is to include in the primary legislation a power for the Lord Chancellor to set fees for enforcement agents in England and Wales in order to achieve the aim of ensuring enforcement agents receive fair remuneration for enforcement activity carried out and thus reduce the incentive for them to abuse the fee structure (for example by charging for visits which did not take place). By ensuring enforcement agents receive a fair return for enforcement work carried out, fee reform also aims to reduce the degree of oppression and hardship faced by debtors and end the situation whereby debtors who pay cover costs of enforcement actions against all debtors.

### Data Disclosure Orders

10. The objective of the Data Disclosure Order (DDO) is to offer a court-based mechanism that will provide creditors with access to relevant information on judgment debtors in order to inform their choice of enforcement method (thereby enabling them to undertake appropriate enforcement action against those who fail to respond to or comply with the enforcement process). Improving the information fed into the warrant enforcement system should also lead to increased effectiveness of this particular enforcement method, as well as the effectiveness of enforcement overall, since the Report of the First Phase of the Enforcement Review identified improved information as the key to effective enforcement.

### Attachment of Earnings

11. An Attachment of Earnings Order (AEO) allows a creditor to secure payment of a debt by ordering the debtor's employer to make regular deductions from the debtor's salary, until the debt is paid in full. The First Phase consultation identified that the current process may be subject to unnecessary delay since it relies on the debtor's completion of a means form (N56) to calculate a Protected Earnings Rate (PER) and a Normal Deduction Rate (NDR), and some debtors do not return the means form when first requested to do so. The First Phase consultation also identified that creditors find it difficult to track debtors who change employment whilst an AEO is in place, leading to some AEOs failing to recover the whole debt or being subject to significant delay. Therefore, the objective is to reduce delays in the current civil debt procedure, increase its effectiveness and make it clearer to understand and operate for users through the use of fixed tables to calculate amount payable, and tracking orders to locate the new employment details of debtors who change employment whilst an AEO is in place.

### Charging Orders

12. A charging order is a means of securing a debt by placing a charge onto the debtor's immovable property, particularly a house or land, although it can also be used against shares. We propose to make procedural changes to the Charging Order process to help the system run more smoothly. This includes making a charging order available in cases in which the debtor is not in arrears with an instalment order.
13. We are also introducing an extra safeguard which will allow debtors who are the subject of a charging order under certain circumstances to ask the court to consider whether the charging order should be removed.

### Risk Assessment

14. The current enforcement profession is fragmented, with some individuals operating outside of any structures and some evidence of threats and intimidation being used

against vulnerable people in their own homes. This has been supported by the report *Undue Distress*. If abuse of the system such as that identified in the report and by the Advisory Group on Enforcement Service Delivery continues, then there is a risk of continued hardship being felt by debtors. Potentially, the confusion arising out of various pieces of case law and legislation could lead to a number of risks including: legal uncertainty, leading to lack of confidence in the justice system; and inadvertent over- or under-charging by enforcement agents because they are unsure of the charges. The range of current fee structures offers scope for exploitation as debtors are unaware of which fees are applicable.

15. Whilst the introduction of a single piece of enforcement agent law and a revision of the fee structure will address some of the areas of malpractice, without increased regulation the impact of these changes would be diminished.
16. There is also a risk associated with continued low levels of debt recovery. It is estimated that there is currently £600 million worth of unpaid post-judgment debt per annum. Without increased access to information there is a risk of current levels of arrears persisting or rising, which carries a general threat to the integrity of the Civil Justice System, and may also lead to a general reluctance on the part of creditors to pursue debts through the courts if this method is perceived to be unsuccessful. Without increased access to information and the changes to attachment of earnings there are two similar risks but with potentially different effects. Creditors will continue to use the easiest rather than the most appropriate enforcement method, and debtors who are able to pay but seek to avoid paying will continue to evade their responsibilities.
17. Maintaining the status quo also carries the risk of possible future challenge by the ECHR. In particular, the process of distress is especially vulnerable to ECHR challenge due to the relatively broad discretion that can be exercised in the administration of most forms of distress. The possibility of such a challenge carries a great cost, in terms of the actual costs of defending the challenge, the possibly high levels of compensation payable if a challenge is successful and the major cost to the integrity of both the LCD and the

Government. It is therefore desirable to remove uncertainties in the law and to clarify the grounds upon which distress can be levied. Change to the law is necessary and desirable to ensure greater equity and fairness to both landlords and tenants.

- 18. Risk assessments for each of the proposals are included in the individual RIAs.

**Quantification of the issue**

- 19. A statutory body will be regulating all enforcement services in the private and public sectors. We have been unable to obtain accurate figures for the number of enforcement agents and agencies. The RIA for Fees Reform contains tables that show figures that have been obtained and offer an indication of what we believe to be a reasonable estimate of those currently operating in the market. As such, there will be approximately 2,500 enforcement agents from the private sector applying for licences, and 900 enforcement agents in the public sector. Approximately 150 enforcement agencies in the private

sector will be obliged to apply for approval as authorised service providers. There are six trade associations that we envisage will apply for accreditation as professional organisations that work with enforcement agents.

- 20. The debt streams covered include taxes, VAT and other duties, child support debts, council tax arrears, non-domestic rates, and road traffic and criminal fines. It has been estimated there is £600 million worth of unpaid post-judgment debt per annum.

**Options**

- 21. The measures modernise the existing legislation, structures and principles. All the main options relating to each of the proposals were considered and are set out in the individual RIAs for each proposal.

**Costs and Benefits**

- 22. The costs and benefits for the options of each proposal are addressed in the individual RIAs. The tables below summarise the costs and benefits.

No change	
Costs	Benefits
<p><b>Distress for rent</b></p> <ul style="list-style-type: none"> <li>• Tenants have insufficient opportunity for challenge and landlords can operate it unfairly</li> <li>• Possible challenge under ECHR, leading to costs involved with defending a challenge, possible compensation payable under successful challenge and cost to integrity of LCD/Government</li> <li>• Tenants often do not get a fair price for goods removed and sold, meaning that it takes longer for them to clear arrears. Currently £3.2m worth of debt is collected through sale of debtors' goods</li> <li>• There is greater incentive for abuse of the system by enforcement agents who rely on a fee for taking legal control of goods</li> </ul>	<ul style="list-style-type: none"> <li>• Distress for rent is a quick and effective remedy for collection of rent arrears. Currently some £167m worth of debt (93% of warrants) are successfully collected. It is also an effective deterrent, as shown by the fact that 91% of warrants lead to collection of the debt without the need for seizure or sale of debtor's goods</li> <li>• Benefits to the economy – existence of this enforcement procedure encourages the renting of properties, especially in the lower rent regime</li> <li>• Remedy is an efficient and cost-effective means of credit control, reducing the owner's risk, thus enabling owners to make property available at more advantageous terms to tenants, to the benefit of the wider economy</li> <li>• Landlords, tenants and enforcement agents are familiar with the present system, therefore will not need training on learning new system</li> </ul>

**No change (continued)**

Costs	Benefits
<p><b>Fees Reform</b></p> <ul style="list-style-type: none"> <li>Private sector enforcement agents will continue to incur losses associated with incurring costs on all enforcement actions taken but receive fees only on successful enforcement</li> <li>Debtors from whom fees are recoverable will continue to subsidise the cost of enforcement action against those who don't pay</li> <li>The wide range of fees and charges within each debt stream will remain, leading to confusion amongst debtors over charges payable and possible exploitation by enforcement agents</li> </ul>	<ul style="list-style-type: none"> <li>There will be no additional training costs associated with familiarising enforcement agents, tenants, creditors and the voluntary sector of the new fees chargeable</li> </ul>
<p><b>Data Disclosure Orders</b></p> <ul style="list-style-type: none"> <li>Creditors will continue to suffer significant losses on unrecovered debt where enforcement has been unsuccessful due to lack of information. Currently £600m of unpaid post-judgment debt and 50% of warrants of execution found to be unenforceable (197,300). 43% (85,830) of these unenforceable warrants were due to incorrect address details</li> <li>If status quo continues, the credibility of the Civil Justice system will be undermined</li> </ul>	<ul style="list-style-type: none"> <li>No further retraining costs required for the judiciary, enforcement agents and advice sector workers</li> <li>No additional regulatory burden constraining how businesses operate with regard to obtaining information on individuals, apart from pre-existing Data Protection and Human Rights legislation</li> </ul>
<p><b>Enforcement Agent Law</b></p> <ul style="list-style-type: none"> <li>Continued costs to voluntary and charitable organisations of dealing with debtors who have been subject to oppressive actions by enforcement agents – Citizens Advice reported 900 such complaints between 1998 – 2000</li> <li>Continued negative publicity of enforcement agents due to lack of clarity of enforcement agent law and costs associated with this in terms of reputation of enforcement agencies</li> <li>Cost to the courts of dealing with complaints against enforcement agents – we are in the process of conducting a trawl of the courts to establish number of cases dealt with and the associated costs</li> </ul>	<ul style="list-style-type: none"> <li>Judiciary, barristers, solicitors, the voluntary sector and enforcement agents are familiar with the system. There would be no extra costs to business if the status quo was maintained</li> </ul>

**No change (continued)**

Costs	Benefits
<p><b>AEOs Fixed Tables</b></p> <ul style="list-style-type: none"> <li>• If delays involved with AEOs continue, may lead to a reduction in the use of such orders, and increased use of less effective methods of enforcement such as warrants of execution. This may result in a lower rate of debt collection</li> <li>• Creditors will continue to experience delays from the making of an application to the setting up of deductions, and consequently will have to wait longer in order to receive full payment of their debt with possible consequence of short-term cash flow problems</li> </ul>	<ul style="list-style-type: none"> <li>• Firms are familiar with existing process and will not have to incur retraining costs to familiarise payroll staff with the new system or any other additional implementation costs associated with fixed tables</li> </ul>
<p><b>Tracking orders for AEOs</b></p> <ul style="list-style-type: none"> <li>• Continuing cost to creditors who are unable to recover debts owed to them when a debtor changes employment and does not inform the court. It is not known what level of debt this is associated with</li> <li>• Those creditors who choose to try and trace debtor's employment details once the court has lost contact with them will continue to incur costs of doing this</li> </ul>	<ul style="list-style-type: none"> <li>• There will be no additional implementation costs to businesses, charities and voluntary organisations</li> </ul>
<p><b>Regulatory Body</b></p> <ul style="list-style-type: none"> <li>• Continuing costs to voluntary organisations of dealing with complaints by debtors against oppressive action by enforcement agents</li> </ul>	<ul style="list-style-type: none"> <li>• Status quo would remain, therefore would be no additional costs on businesses</li> <li>• Firms who abide by the rules will not be undercut by those who rely on oppressive behaviour to enforce</li> </ul>

## Other proposals considered

Costs	Benefits
<p><b>Distress for rent</b> <b>Option 2 – Abolition</b></p> <ul style="list-style-type: none"> <li>• Costs to landlords of court actions = £12.85m recoverable from tenants who pay – recovery rate through court action is 34.9%, therefore court cost paid by landlord = £8.4m</li> <li>• Costs to tenants who pay = £4.47m – this is a second order cost as it is a transfer from landlords to tenants</li> </ul>	<ul style="list-style-type: none"> <li>• Annual saving to debtors of not paying £4m enforcement agents fees – this is a transfer benefit from enforcement agents to tenants</li> <li>• Business tenants will have access to established court procedures, and they could challenge the actions of harsh landlords</li> <li>• Other creditors on a more level playing field with commercial landlords for the recovery of debts owed than under the existing regime. Will be a transfer benefit, which would redistribute the rent arrears collected by commercial landlords to other creditors</li> <li>• Eliminates risk of challenge under ECHR, which would incur major cost to integrity of LCD/Government in addition to cost of possible compensation payable on successful challenge</li> </ul>
<p><b>Regulatory Body</b> <b>Option 2 – Regulation through separate commission</b></p> <ul style="list-style-type: none"> <li>• Set up costs of NDPB = £1m</li> <li>• Ongoing running cost = £1.46m per annum, recoverable through fees charged to enforcement agents and firms</li> <li>• Cost to enforcement agents of applying for licence = £1.5m per annum</li> <li>• Cost to enforcement firms = £750 per annum</li> </ul>	<ul style="list-style-type: none"> <li>• Effective curtailing of oppressive activities of unscrupulous enforcement agents by imposing appropriate penalties, such as a fine or licence revocation, for misbehaviour and ensuring that all enforcement agents are licensed and meet the licence criteria. As we are unable to quantify the level of unscrupulous activity we are unable to estimate the reduction on change</li> <li>• Those in debt, who are often among the most vulnerable and socially excluded, would have protection and better information about their rights and advice about coping with their responsibilities</li> <li>• Raising of standards within the industry, which should lead to more effective enforcement</li> <li>• Enforcement agents who abide by the rules will not be able to be undercut by those who rely on oppressive behaviour against the debtor</li> </ul>

Recommended options	
Costs	Benefits
<p><b>General</b></p> <p>One-off retraining costs arising from informing various parties about changes to the system. These are common across all the proposals, and it has not been possible to disaggregate costs for individual proposals. Costs include:</p> <ul style="list-style-type: none"> <li>• Court Service staff = £57,600</li> <li>• Enforcement Agents = £1.7m</li> <li>• Debt advice sector training = one day. Training is funded by Royal Bank of Scotland who contribute £1.5m over two years – proportion of this which will attribute to training on new legislation is unknown</li> </ul>	
<p><b>Distress for rent</b></p> <p><b>Option 3 – Modification</b></p> <ul style="list-style-type: none"> <li>• Cost to landlords of sending letter to business tenants = £0.3m per annum</li> <li>• One-off retraining cost for enforcement agents = £0.3m</li> <li>• Landlords may resort to other methods such as forfeiture</li> </ul>	<ul style="list-style-type: none"> <li>• Amendment of the remedy would stop any successful challenges for ECHR purposes, thereby no effect on the integrity and reputation of LCD/Government. Also a saving of potential (unquantifiable) claims for compensation if there was a successful challenge</li> <li>• Greater certainty about law regarding distress for rent, leading to potential cost saving of fewer complaints to courts, enforcement firms &amp; professional bodies, and voluntary sector</li> <li>• Tenants will be given advance notice and more opportunity to challenge distress for rent</li> <li>• It will only cover rent, so landlords will not be able to use it to recover additional variable charges</li> </ul>

## Recommended options (*continued*)

Costs	Benefits
<p><b>Fees Reform</b></p> <ul style="list-style-type: none"> <li>• Burden on creditor of up-front fee, especially if debt is subsequently unrecoverable. This is a transfer from creditors to enforcement agents, who will receive this fee for enforcement work carried out. Impossible to quantify cost prior to setting of fees by Regulatory body</li> <li>• Enforcement agents would now be responsible for notifying the debtor of the fees they will incur if they fail to pay the amount owing – estimated at around £11.4m per annum across the industry as a whole</li> <li>• One-off retraining costs, see above</li> <li>• NVQ costs for enforcement agents, the costs of which will be borne by the Security Industry Training Organisation (SITO)</li> </ul>	<ul style="list-style-type: none"> <li>• The up-front fee will ensure enforcement agents receive remuneration for work undertaken, regardless of the eventual success of the warrant</li> <li>• Minimisation of the degree of fruitless enforcement activity, the costs of which have hitherto been borne by agents, agencies, and debtors who do pay</li> <li>• Debtors will be aware of their potential liabilities, benefiting from the uniformity and clarity of a single fee structure</li> <li>• A greater degree of certainty and control for agents and agencies, as they will be able to work with set figures and negotiate for contracts with a firmer notion of the minimum level of return they can expect</li> </ul>
<p><b>Data Disclosure Orders</b></p> <ul style="list-style-type: none"> <li>• Creditors pay up-front DDO fee (£75-£200 per DDO), which is recoverable upon successful enforcement</li> </ul> <p>The following outline costs are one-off implementation costs:</p> <ul style="list-style-type: none"> <li>• Intra-Government Data Sharing: Court Service Costs: £500,000</li> <li>• Inland Revenue Costs: £500,000 initial outlay, £500,000 support costs over the next five years</li> <li>• Credit Reference Agency Data Sharing costs: £100,000-£500,000</li> <li>• One-off training costs (see above)</li> </ul>	<ul style="list-style-type: none"> <li>• Significant net financial benefit for creditors, as there is £600m worth of unpaid post-judgment debt per annum. A 1% increase in recovery will yield £6m per annum</li> </ul>
<p><b>Enforcement Agent Law</b></p> <p>Costs are all implementation costs and consist of one-off training costs covered above in addition to costs of publicising new legislation – £2,000</p>	<ul style="list-style-type: none"> <li>• Reduction in number of cases at court disputing enforcement actions – saving of time and money</li> <li>• Reduction in number of complaints to enforcement agents, professional bodies and the voluntary sector due to increased clarity of enforcement agent law</li> <li>• Clearer legislation, leading to decreased training costs for enforcement agents in the future</li> <li>• Assurance that legislation is ECHR compliant, thus saving costs from possible future challenges</li> </ul>

**Recommended options (continued)**

Costs	Benefits
<p><b>AEOs Fixed Tables</b></p> <p>Costs associated with fixed tables are all implementation costs and consist of:</p> <ul style="list-style-type: none"> <li>• Changes to employers payroll systems if they have staff with a new AEO</li> <li>• Training costs for payroll staff</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction in the delay from application to the setting up of payments</li> <li>• Creditors receiving more consistent payments</li> <li>• Greater transparency for all users</li> <li>• Easier to operate AEO procedure for employers and also greater uniformity with council tax calculation, resulting in cost saving of not having to learn two systems</li> <li>• Reduced administration of AEO for court staff</li> </ul>
<p><b>AEOs Tracking</b></p> <p>Costs associated with fixed tables are all implementation and running costs to LCD/Court Service:</p> <ul style="list-style-type: none"> <li>• Creating a tracking process estimated at £0.5m</li> <li>• Running costs estimated at £0.5m over three years</li> </ul>	<ul style="list-style-type: none"> <li>• Increased effectiveness of the AEO procedure as more orders will be enforceable</li> <li>• Improvement in court user confidence through increased use of the AEO process</li> </ul>
<p><b>Regulatory Body</b>  <b>Option 3 – Regulation through the Security Industry Authority</b></p> <ul style="list-style-type: none"> <li>• Regulation through the Security Industry Authority (SIA) would invoke fewer additional financial burdens, as many of the staff, buildings, systems and structures will already be in place, and the cost will be borne by sectors that are already to be regulated by the Authority</li> <li>• Will be additional costs to the Authority if it were to regulate enforcement services, namely: staff costs, expenses for Expert Committee on Enforcement Services and Complaints Board, and additional costs for processing applications and accommodation which we estimate will be £326,000</li> </ul>	<ul style="list-style-type: none"> <li>• Debtors benefit from regulated enforcement system with access to complaints system – therefore reducing hardship on debtors from abuses of current system; cost saving to courts, enforcement agents, professional bodies and voluntary sector from dealing with complaints</li> <li>• Creditors have better information about, and access to, licensed and professionally qualified enforcement agents, which may lead to more successful debt recovery</li> <li>• Enforcement agents who comply with the system are not undercut by those acting in an unscrupulous manner</li> </ul>

### Competition Assessment

- The establishment of a regulatory body with the powers to ensure that warrant enforcement is carried out by licensed enforcement agents, changing the principles by which fees are charged, and DDOs could have an effect on competition within the industry.
- The enforcement industry consists of a number of different market segments, which consist of High court and county court warrants, magistrates' courts fines, parking charges, local and national taxes and duties, maintenance and child support. Each debt stream has its own characteristics in terms of the nature of competition, number of firms operating and the nature of competition. Based on a snapshot of the industry as at the beginning of 2002, it is estimated that there are generally three firms dominating each debt stream, holding a combined market share of at least 50%. The leading firm will generally hold a market share of at least 20%, indicating a high level of concentration across the industry as a whole. It is estimated that across the enforcement industry as a whole, there are eight leading firms who dominate.
- Regulation of the enforcement industry by a regulatory body under both options 2 and 3 will mean that enforcement firms and enforcement agents will need to be licensed in order to operate within the industry. However, the anticipated level of the licence fees is sufficiently low that it is considered unlikely to significantly affect either the number of individual enforcement agents or the number of agencies operating in the market. The increase in costs will not represent any significant increase in barriers to entry.
- Enforcement agencies who choose to cover the cost of licence fees for individual agents employed by them may potentially face significant new costs, especially if they recruit a large number of agents. However, such costs would be proportionate to the size of firms involved and would nonetheless represent a very small part of agencies' total costs of retaining the enforcement agents employed by them.
- The main effect of changing the fee principles is that fewer warrants may be issued due to the obligation of creditors to pay an up-front fee on warrants issued. This may consequently lead to fewer firms operating in the industry due to a reduction in the workload. The costs of firms are unlikely to be affected directly, although the proposal may indirectly raise the average costs for firms as the fixed costs will be spread over fewer units of output. The fee proposal aims to provide a fair reward to enforcement firms for the work that they do, and so it is anticipated that this will ensure that firms achieve a reasonable return, as well as ensuring that debtors who pay do not subsidise enforcement against those who don't pay. Furthermore, improvements in the systems for fee setting and fee bidding may increase competition between firms where they compete. At present around half of enforcement warrants are unenforceable, due either to incorrect address details or because enforcers are not sufficiently incentivised by the current fee structure to strive for maximum recovery. Improvements in the charging structure should promote competition on the recovery rate, and should also ensure that enforcement agents are delivering closer to maximum efficiency for recovery. We are seeking further information on the likely fee levels, which will allow us to predict with greater accuracy the likely scale of the impact on competition of the proposals.
- Access to increased and improved information by the creditor, as a result of information sharing with other government departments and financial institutions, facilitated by the DDO, is unlikely to affect directly the cost structure of enforcement agents, since creditors rather than enforcement firms will bear the burden of paying fees for DDOs. It is not, therefore, anticipated that the regulation will impose a substantially greater cost burden on some firms than others, or impact disproportionately on new firms looking to enter the market. The proposal may however result in a reduction in the workload of enforcement agents, since creditors will have greater access to data on debtors and so may choose alternative enforcement methods than warrants of execution. A reduction in

warrants may lead to a reduction in the number of enforcement firms operating in the industry, although this may be offset somewhat by the fact that greater access to up-to-date information on the debtor is likely to improve the collection rate of warrants of execution by enforcement firms and hence an efficiency improvement per case.

- The proposals for modification of distress for rent are not expected to have a significant impact on competition for enforcement agents executing these warrants. Option 1 would mean retaining the use of distress for rent without modifications, therefore maintaining the status quo, and so would not result in any change to existing levels of competition or market structure. Option 2 would abolish the use of distress for rent and create additional court costs of £12.85 million for commercial landlords (although it is estimated that £4.5 million of this will be successfully recovered from business tenants). However, it is not felt that this additional cost will have a significant impact on competition within the commercial property sector, which comprises of many different markets according to the size and location of the properties. Abolition of distress for rent would also result in a loss of fees for enforcement agents of around £4 million. It is estimated that fees from distress for rent account for between 4-20% of agents' income depending on their speciality. At present, it is estimated that there are approximately six firms executing the majority of the estimated 60,000 distress for rent warrants, and none of these firms specialise exclusively in distress for rent warrants. It is not clear that abolition of distress for rent will significantly affect competition within the wider market in which agents compete for work.
- Option 3 would mean that distress for rent is retained as an enforcement method but in a modified form. This would result in a one-off additional training cost to enforcement agents of familiarising themselves with the new rules. It is not felt that this one-off cost will have any significant impact upon competition between enforcement agents, nor impose any significant barriers to entry into the market.

- It is not felt that the proposals for rationalisation of enforcement agent law, to introduce fixed tables for AEOs, or to introduce a tracking procedure for AEOs, will have any competition implications. Whilst rationalisation of enforcement agent law will incur one-off training costs for solicitors, barristers and enforcement agents of £500 per head to familiarise themselves with the new legislation, this is not felt to be sufficient to alter the number of players within the affected markets, nor to represent any significant increase to barriers to entry. Proposals to introduce a tracking procedure for AEOs where the debtor changes employment details will only impose costs on those creditors who choose to use this new procedure to track debtors, and so it is not felt this will have any competitive implications. The introduction of fixed tables for AEOs will only impose costs on those businesses who administer AEOs and it is not felt that these costs will be sufficient to have any impacts on competition.
- In general, some of the proposals may have impacts upon competition, mainly within the enforcement industry, primarily in terms of a possible reduction in workload. The proposals will also impose some additional costs on enforcement firms, however these are not felt to be sufficient to alter the nature of competition within the industry or to impose any barriers to entry for potential entrants. It is felt that the possible costs arising from fewer warrants issued will be offset by a greater success rate in recovering debt, which in turn will lead to a better return for enforcement agents on their enforcement actions carried out and greater fairness for debtors and creditors.

### *Issues of Equity and Fairness*

23. The proposals address issues of fairness but also ensure that a balance is struck between the needs of the debtor, creditor, enforcement agent and the court. In particular the reforms will address situations where debtors are facing oppression from enforcement agents and facing mounting levels of debt. The fees reform will result in some kind of

redistribution to enforcement agents in the form of up-front fees that creditors will have to pay, therefore removing the current situation where debtors who pay are subsidising those who don't. Distress for rent reforms will have a positive impact on residential tenants as it will no longer apply and business tenants will receive prior warning of action being taken.

### Impact on Small Business

24. There are currently approximately 150 firms that employ certificated enforcement agents in the private sector. Some of these employ a small number of agents. Regulation through a statutory body will result in extra costs on small businesses as they will be required to obtain approval as an enforcement agency. The proposals outlined may have an impact on small businesses who operate as enforcement agents, since they will impose additional costs on them (although enforcement firms will bear these costs, not just those which are small businesses). However, as discussed in the competition assessment above, these additional costs are not significant in the context of the overall costs of enforcement, and small businesses will benefit from the greater success rate of warrants likely to accrue from clearer enforcement agent law and improved access to information, in addition to receiving up-front fees to cover costs of all enforcement work carried out. Furthermore, the new legislation will encourage the membership of a professional body, which will give them access to formal training.
25. Small businesses who are creditors will incur additional costs if they choose to make use of better information through the use of both DDOs and tracking orders for AEOs. However, these additional costs will be offset by the likelihood of improved debt collection, meaning that small businesses who are creditors will benefit from being able to recover a larger proportion of outstanding debt. The Small Business Service commented that the new legislation will assist small businesses who are unable to settle their debts but will also help businesses to collect debts which are owed to them.

### Consultation

26. A Green Paper *Towards Effective Enforcement: a single piece of bailiff law and a regulatory structure for enforcement* was published in July 2001. The post-consultation report was published in May 2002. The responses showed overwhelming support for the need to rationalise, clarify and codify enforcement agent law. Several other consultation papers have been published which are related to the introduction of a single piece of enforcement agent law. *An Independent Review of Bailiff Law* was completed by Professor Beatson, which was published in July 2000. In the responses to Professor Beatson's Consultation Paper 86% of respondents, from a wide variety of sectors, supported the introduction of a single piece of enforcement agent law. In May 2001 LCD published a consultation paper on Distress for Rent and the responses to this consultation were published in May 2002. Both fee principles and the potential components of a fee structure were subject to further consultation. Many of the proposals for reform which comprise the basis of the new fee structure were first mooted in the Second Report of the Advisory Group on Enforcement Service Delivery, published in August 2002. Their Report was produced following extensive consultation and analysis, including an early discussion paper, *Warrant Enforcement: Towards a New Fee Structure*, which was submitted to a range of individuals and organisations active in the enforcement sector and discussed at a Stakeholders' Meeting in June 2002. The views of a range of creditors, debtors, and enforcement agents from the public and private sectors fed into the final Report.<sup>51</sup> The Report itself was also subject to further responses from stakeholders, whose views, both in writing and through soundings taken at major enforcement conferences, have fed into the final proposals put forward in the White Paper. The First Phase of the Enforcement Review received overwhelming support for the proposal to introduce fixed tables.
27. A separate consultation was conducted with employers, through the Chamber of Commerce (on advice from the Small Business Service) and through payroll organisations. The results showed that out of 155 responses, 148 were in favour of the proposed change. The results of our consultation are shown in the Attachment of Earnings RIA.

<sup>51</sup> The Report was also informed by a market research into the size, composition and behavioural characteristics of the private sector warrant enforcement market (*Market Evaluation of the Delivery of Enforcement Services*, by Arkady Granik, January 2002), and further analysis by LCD Economics Branch (*Warrant Enforcement: Towards a New Fee Structure*, LCD, Economics Branch, July 2002)

### *Securing Compliance*

28. Under primary legislation, it will be an offence for enforcement agents and agencies to operate without a licence or approval respectively. A person who operates as a service provider without approval, or holds himself out as approved when he is not so registered as approved, shall be liable to imprisonment and/or a fine. The Authority's Inspectorate will carry out spot checks on businesses to ensure that the new requirements are being complied with.
29. The responsibility for securing and monitoring some of enforcement agents' compliance with the new fees structure, enforcement agent law and data sharing will reside with the regulatory body. The powers enabling the regulatory body to undertake this role will be set out in primary legislation. The court will have some responsibility for securing compliance for enforcement agent law and data sharing. The Information Commissioner will also have some responsibility for securing and monitoring compliance with the data sharing aspects of the DDO.

### *Monitoring and Evaluation*

30. As an NDPB, a regulatory framework through a separate Commission or through the SIA will be subject to quinquennial reviews, in line with Cabinet Office guidance. The reviews will evaluate the effectiveness of regulation, whether regulation is still required and whether it could be achieved through a more cost-effective means.

### *Contact point:*

Anne Marie Harrington  
Civil Justice Division  
Lord Chancellor's Department  
Room 3.23 Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW  
anmarie.harrington@lcd.gsi.gov.uk

## Regulation of Enforcement Services

### *Issue and Objective*

31. There is a general consensus that there is a need for the regulation of enforcement services in England and Wales. The Partial Regulatory Impact Assessment in the Green Paper considered the options of no change, court-based regulation, self-regulation and statutory regulation. The Green Paper assessed that in the absence of regulation there are insufficient sanctions to prevent oppressive behaviour by unscrupulous enforcement agents. Most respondents to the Green Paper favoured statutory regulation by way of a Commission. LCD has identified a statutory body whose functions and responsibilities have broad synergies with the stated intentions for the regulation of enforcement services: the Security Industry Authority (SIA). The SIA is being set up by the Home Office to regulate and license security operatives in the private sector including wheel clampers and private investigators. This RIA will therefore consider three options:
  - i. No change;
  - ii. Regulation through a separate Enforcement Services Commission;
  - iii. Regulation through the SIA.
32. The aim of regulation, through a statutory body, is to ensure that warrant enforcement is carried out appropriately, effectively and fairly in relation to both debtors and creditors. In accordance with the broadened remit of the Enforcement Review, announced by the Lord Chancellor on 6 March 2001, the Authority will regulate all public and private enforcement services. Therefore our principles apply across the following areas of warrant enforcement: High and county courts, magistrates' courts, parking charges, local and national taxes and duties, maintenance and child support. It will aim to maintain and raise standards across the profession, and promote best practice, fostering public confidence and creating a level playing field across the industry.

33. A regulatory body would regulate the public and private enforcement profession by:
- licensing enforcement agents;
  - approving enforcement agencies;
  - accrediting the functions of professional organisations including handling complaints, administering training and qualifications, and providing advice;
  - making recommendations to the Lord Chancellor on fees and legislative change;
  - issuing a Code of Practice; and
  - overseeing a complaints scheme and establishing a Complaints Board.

### Risk Assessment

34. The current enforcement profession is fragmented, with some individuals operating outside of any structures and some evidence of threats and intimidation being used against vulnerable people in their own homes. We do not have statistical information on the scale of the problem. Anecdotal evidence is contained in the report *Undue Distress*. Whilst the introduction of a single piece of enforcement agent law and a revision of the fee structure will address some of the areas of malpractice, without increased regulation the impact of these changes would be diminished. It has been suggested by the advice sector that the full scale of the issues are not apparent as debtors are not aware of their rights. The voluntary sector are responsible for advising debtors of their rights and are therefore paying the price. Ineffective and oppressive enforcement of debt by unscrupulous agents exacerbate the problems of escalating debt and social exclusion.

### Quantification of the Issue

35. A statutory body will be regulating all enforcement services in the private and public sectors. We have been unable to obtain accurate figures for the number of enforcement agents and agencies. The RIA for Fees Reform contains tables that show figures that have been obtained and offer

an indication of what we believe to be a reasonable estimate of those currently operating in the market. As such, there will be approximately 2,500 enforcement agents from the private sector applying for licences, and 900 enforcement agents in the public sector. Approximately 150 enforcement agencies in the private sector will be obliged to apply for approval as authorised service providers. There are six trade associations that we envisage will apply for accreditation as professional organisations that work with enforcement agents.

### Options

36. As described above, we have identified three options which we will consider in this RIA:

**Option 1 – No change.** This option was considered in the Green Paper, and respondents were resolutely against it as an outcome.

**Option 2 – Regulation through a separate Commission.** This option was considered in the Green Paper and gained support from a range of stakeholders as detailed in the Post-Consultation Report.

**Option 3 – Regulation through the SIA.**

### Benefits

#### Option 1 (No change)

37. The status quo would remain, therefore there would be no extra cost to business. The enforcement agents are familiar with the current system and have developed working practices to deal with the number of warrants issued. A table setting out a breakdown of the estimate of 2,277,959 warrants per annum is set out in the Impact Assessment for fees reform. We are unable to ascertain how much debt is covered by these warrants, but as an indication the current level of debt recovered in 1999 in county courts was £46 million of £196 million.

### Option 2 (Commission)

38. A separate Commission to regulate enforcement services would ensure that all enforcement agents, as officers of the court, would be required to balance their duties to the court, the creditor and the debtor. A regulatory body will embrace enforcement services in the public and private sectors, applying uniform standards and sharing best practice, ensuring a level playing field across the profession. Under a regulatory framework, enforcement agents and service providers will raise standards and operate on a professional level through:
- authorised training and qualifications;
  - a regulated complaints scheme;
  - guidance in a published Code of Practice; and
  - transparency through a register that will be available to the public.
39. The oppressive activities of unscrupulous enforcement agents could be effectively curtailed by imposing appropriate penalties, such as a fine or licence revocation, for misbehaviour and ensuring that all enforcement agents are licensed and meet the licence criteria. As we are unable to quantify the level of unscrupulous activity we are unable to estimate the reduction on change.
40. Those in debt, who are often among the most vulnerable and socially excluded, would have protection and better information about their rights and advice about coping with their responsibilities.

### Option 3 (Regulation through SIA)

41. Regulation through the SIA would achieve the same benefits as Option 2, namely that debtors would benefit from a regulated system where there is a proper complaints procedure to guard against unscrupulous activity, creditors will have access to licensed enforcement agents, and enforcement agents who do not abuse the system are not undercut by those acting in an unscrupulous manner.

## Costs

### Option 1 (No change)

42. This option would incur no costs to debtors or creditors. There would, however, be a continuing cost to voluntary and charitable organisations, as there is widespread concern that the present unregulated system allows the unscrupulous to exploit the vulnerable, as identified by Citizens Advice.

### Option 2 (Commission)

43. Regulation through an Enforcement Services Commission would incur costs through the establishment and running of a new NDPB. As such they are likely to be:
- set up costs of £1 million;
  - staff costs of £887,500 per annum;
  - accommodation costs of £250,000 per annum;
  - other recurring costs including ongoing IT, research, support services, travel and subsistence, marketing, publicity and recruitment of £325,000 per annum.
44. Total estimated cost for regulation through Enforcement Services Commission of **£1,460,000** plus one-off set up costs of £1 million.

### Costs on Business

45. It is proposed that a separate Commission will be self-financing. Therefore, the costs will be shared between the approximate 3,000 enforcement agents that will apply for a licence – at a licence fee of £500 each, giving a total of £1.5 million. Enforcement agencies will also be obliged to pay for approvals, which we estimate would need to cost £750 each. Businesses may wish to pay for the licence of employees but they will not be obliged to do so.

### Option 3 (Regulation through SIA)

46. Regulation through the SIA would invoke fewer additional financial burdens, as many of the staff, buildings, systems and structures will already be in place, and the cost will be borne by a combination of those sectors that are already to be regulated by the Authority and by the Enforcement Services sector.
47. There will also be additional costs to the Authority if it were to regulate enforcement services. There are necessarily tentative at this stage but indicative figures are as follows:
  - staff costs of £177,000 per annum;
  - expenses for the Expert Committee on the Enforcement Services of £39,000;
  - expenses for the Complaints Board of £39,000;
  - additional costs for processing applications and built in criminal record checks of £35,000; and
  - additional accommodation costs of £36,000.
48. Total estimated additional cost for regulation through SIA of £326,000.

### Costs on individual agents

49. All enforcement agents will be required to obtain a licence. The SIA is developing proposals for a uniform licence fee across all sectors. The licence fees will be cheaper, as the cost of additional functions to the SIA would be cheaper than a separate Commission. The licence fee for enforcement agents would need to be set on the basis that it recovered both an appropriate share of the SIA's core costs and the additional costs to the Authority of regulating this sector.
50. Individual agents will also have to undergo training to the required standard, acquire the appropriate qualifications and obtain adequate insurance. All of these costs will be taken into account when the fee scales and charges are developed, based on the recommendations of the regulatory body. The costs will be explored further when the level of training and insurance has been decided.

### Costs on business

51. Authorised service providers will also be required to pay a fee to the regulatory body. The actual fee will need to be explored fully with the SIA. The cost will be explored further when the regime has been developed further.

### Costs on any charities

52. The debt advice sector will be encouraged to foster a close relationship with the regulatory body. Debt advisors will need to undertake training on the new procedures for a regulated enforcement profession. The specific cost will be explored further when the level of training has been decided.

### Costs to courts

53. Under a new regulatory regime, the county court will no longer have to administer the certification process. Direct regulatory control of enforcement agents is not a part of the core business of the courts or the judiciary. Judges' core skills lie in adjudication, not administrative tasks. These skills are a scarce resource. The appeal route for non-granting of licences, approvals and accreditation will be through the magistrates' courts, and then the normal routes of appeal will apply.

### Competition Assessment

54. The establishment of a regulatory body with the powers to ensure that warrant enforcement is carried out by licensed enforcement agents, whether introduced by means of either Option 1 or Option 2, should not have a significant effect on competition within the enforcement industry.
55. The enforcement industry consists of a number of different market segments, which consist of High Court and county court warrants, magistrates' court fines, parking charges, local and national taxes and duties, maintenance and child support. Each debt stream has its own characteristics in terms of the nature of competition, number of firms operating and the nature of competition. Based on a snapshot of the industry as at the beginning of 2002, it is

estimated that there are generally three firms with larger market shares within each debt stream, holding a combined market share of at least 50%. The leading firms generally hold a market share of at least 20%, indicating a high level of concentration across the industry as a whole.

56. Under the regulatory schemes proposed by both Option 1 and Option 2, licence fees would be payable by individual enforcement agents and by enforcement agencies. However, the anticipated level of such licence fees is sufficiently low that it is considered unlikely to significantly affect either the number of individual enforcement agents, or the number of agencies, operating in the market. The increase in costs would not represent any significant increase in barriers to entry.
57. If enforcement agencies choose to cover the cost of the licence fees for the individual enforcement agents employed by them, this could potentially create significant new costs for those employing large numbers of enforcement agents. However, such costs would be proportionate to the size of the firms involved and would, nevertheless, represent a very small part of agencies' total costs of retaining the enforcement agents employed by them.

### **Impact on small business**

58. There are currently approximately 150 firms that employ certificated enforcement agents in the private sector. Some of these employ a small number of agents. Regulation through a statutory body will incur extra costs on small businesses as they will be required to obtain approval as an enforcement agency.

### **Consultation**

59. Options 1 and 2 were submitted for public consultation in the Green Paper *Towards Effective Enforcement* (July 2001) and the responses were published in the post consultation report (May 2002). The overwhelming majority of respondents favoured the statutory regulation of enforcement services in the form of a Commission. Since the consultation, policy officials have identified the possibility for regulation through the SIA, which would carry out the same functions as a statutory Commission

through an existing NDPB. Officials have proceeded with informal consultations with the enforcement industry on the possibility of regulation through the SIA. The industry has been supportive of the proposals, in the light of cheaper fees for licences, approvals and accreditations.

### **Securing Compliance**

60. Under primary legislation, it will be an offence for enforcement agents and agencies to operate without a licence or approval respectively. A person who operates as a service provider without approval, or holds himself out as approved when he is not so registered as approved, shall be liable to imprisonment and/or a fine. The Authority's Inspectorate will carry out spot checks on businesses to ensure that the new requirements are being complied with.

### **Monitoring and Evaluation**

61. As an NDPB, a regulatory framework through a separate Commission or through the SIA will be subject to quinquennial reviews, in line with Cabinet Office guidance. The reviews will evaluate the effectiveness of regulation, whether regulation is still required and whether it could be achieved through a more cost-effective means.

## **Enforcement Agent Law**

### **Issue and Objective**

62. The activities of enforcement agents are governed by a combination of common law and statute law. There are currently nine different forms of distress undertaken by distrainers on behalf of county courts, High Court and magistrates' courts, landlords, local authorities (council tax, non-domestic rates and road traffic penalties), Customs and Excise, Inland Revenue and Child Support Agency. The current law is antiquated, diverse and complex and it is therefore a prime candidate for rationalisation.
63. There have been several reviews of enforcement procedures which have resulted in minor changes (in 1992 and 1999). The need for wholesale reform of the law was identified by Professor Beatson's Independent Review

(2000) and was supported by 86% of the respondents to his consultation. Subsequent consultations during the Enforcement Review, across all sectors involved in enforcement, have agreed upon the need for the introduction of a single piece of enforcement agent law. There is overwhelming consensus that simplification and clarification of the law is necessary. This can best be achieved through legislation.

64. The objective is to introduce a single piece of legislation for enforcement agents to replace existing bailiff law. This piece of legislation will set out clearly the powers for effective enforcement on behalf of creditors and standardise the powers, responsibilities and conduct of enforcement agencies. The aim is partly to codify existing practices and harmonise the law. The new legislation is not intended to dilute the powers of any enforcement agents but to retain the powers that they currently have, whilst allowing other types of agents to obtain those powers once they meet minimum requirements, thus eventually resulting in a unification of powers.

### Risk Assessment

65. Potentially, the confusion arising out of various pieces of case law and legislation could lead to a number of risks:

- legal uncertainty, leading to lack of confidence in the justice system;
- inadvertent over- or under-charging by enforcement agents because they are unsure of the charges. This issue was highlighted by the report *Undue Distress*, in which one of the main causes of complaint from debtors was overcharging by enforcement agents;
- abuse of debtors by unscrupulous enforcement agents who rely on debtors' ignorance in order to exploit/threaten them, again as highlighted in the Citizens Advice report. Some 900 complaints were made to Citizens Advice in the period from January 1998 to January 2000, covering both complaints over fees and complaints over the other actions of enforcement agents;

- complaints made to both courts and enforcement agencies. Common complaints received by the two main enforcement agents associations include allegations of threatening behaviour, incorrect addresses and uncertainty over whether particular goods can be seized. In the year 2001, these two main Associations received a combined total of 141 complaints. However, the current lack of clarity over enforcement law means that many people are not aware of the circumstances in which they should make a complaint. Therefore, an accurate figure for the dissatisfaction of debtors with enforcement procedures is not obtainable;
- if we continue with the current situation, court time will be used up by complaints cases where it is open to interpretation whether the action of the enforcement agent was illegal or not. The Court Service has explained that there are no figures available for the number of complaints received by the courts about enforcement agents. However, a sample trawl will be undertaken to try to ascertain how many complaints about enforcement action are received;
- the process of distress as it stands could be open to ECHR challenge. The relatively broad discretion that can be exercised in the administration of most forms of distress makes its exercise vulnerable to such a challenge. It is therefore desirable to remove uncertainties in the law and to clarify the grounds upon which distress can be levied;
- enforcement agents are currently subjected to negative publicity and criticism due to the lack of clarity over legal and illegal behaviour, and this is likely to escalate if the level of debt in this country continues to increase.

66. The single piece of enforcement law addresses these risks in conjunction with a regulatory body and the reform of the fees structure.

**Quantification of the issue**

67. The new law will affect all those who undertake taking legal control of goods. We have been unable to obtain accurate figures for the number of enforcement agents. The RIA for Fees Reform contains tables that show figures that have been obtained and offer an indication of what we believe to be a reasonable estimate of those currently operating in the market, which is approximately 4,000 individuals. It will also affect all of those who have enforcement action taken against them. Enforcement action through taking legal control of goods is used significantly more than any other enforcement method. The table below sets out the number of enforcement proceedings for debt by different methods and types of debt.

Enforcement Action taken in the year 2000-2001	
Warrants of execution against goods issued in the county court	394,611
Writs of fi-fa (fieri facias) in the High Court	53,248
Inland Revenue Collection	250,000
Inland Revenue (distress warrants issued by the magistrates' courts)	20,000
Distress for Rent (approximately)	60,000
Local Authorities – Council Tax	1,175,147
Local Authorities – NNDR	131,012

**Source: Judicial Statistics 2001, Inland Revenue, ESA Survey, Revenue Collection Statistics 2000-2001**

68. From these tables it is clear that taking legal control of goods is regularly used by the courts. Currently, different enforcement agents have separate rules governing their particular actions which often leads to confusion, particularly for debtors. Therefore the clarification and codification of the existing case law into a single piece of legislation is going to have a significant and positive impact on a large number of people.

**Options**

- No change.
- Enforcement Agent law.

**Benefits**

**No change**

69. The main benefit of the current system is that the judiciary, barristers, solicitors, the voluntary sector and enforcement agents are familiar with the system. There would be no extra costs to business if the status quo was maintained.

**Enforcement Agent law**

70. Currently, the law is open to interpretation and largely based on case law. This means that disputes frequently take place and these can be expensive and time-consuming. Having a single piece of enforcement law with all legislation relating to enforcement action set out in one place would greatly reduce the number of court cases which query the law on enforcement action, although there may be an initial increase in complaints. As set out in the Risk Assessment, the Court Service has explained that there are no figures available for the number of complaints received by the courts about enforcement agents. However, a sample trawl will be undertaken to try to obtain these figures.

71. The new legislation will also decrease the number of complaints which are made directly to the Enforcement Agencies or their Associations. The Association of Civil Enforcement Agencies (ACEA) provided some statistics outlining the number of complaints they receive on an annual basis. However, their figures are not representative of the number of complaints made, as debtors will first complain to the enforcement agent and then only to the association if they do not receive a satisfactory outcome. ACEA indicated that they received 75 official complaints in the year 2001. The Enforcement Services Association, as with the ACEA, only receives complaints that are redirected to them by their members. They reported 66 complaints during 2001 and received 56 complaints between January and the end of October 2002. LCD regularly receives complaints from members of the public. Between January and the end of October 2002 LCD had received 12 complaints directly from members of the public, and a further eight complaints from MPs on behalf of their constituents.

72. By simplifying and harmonising the legislation much court time would be saved and the legislation would be significantly simpler to understand for all parties concerned. There will also be increased clarity for the debtor and the enforcement agent in relation to illegal and irregular behaviour. This should result in less complaints against enforcement agents and greater public confidence in the system. By ensuring that enforcement agents abide by the new legislation, they will as a result appear less threatening to the public and there will be an improvement in the public image of enforcement agents. The new legislation will bring about increased regulation of enforcement agents which will make the new law easier for enforcement agents to comply with, benefiting both the agent and the debtor. It will also make the training of enforcement agents simpler and less time-consuming, thus reducing the costs to the enforcement agencies in the long term.

## Costs

### *No change*

73. There would be a continuing cost to voluntary and charitable organisations, as there is widespread concern that the present unregulated system allows the unscrupulous to exploit the vulnerable. Citizens Advice received nearly 900 reports of cases where clients experienced problems with enforcement agents between January 1998 and January 2000, as highlighted in the Risk Assessment. Allegations included the use of intimidation, abusive and threatening behaviour, and exceeding legal powers. Information provided by the two major enforcement agents associations indicate that complaints cover several areas of enforcement including over-charging, the types of goods seized and incorrect information, as well as allegations of threatening behaviour.

74. At present, enforcement agents have been portrayed in a negative light and have been subject to much negative publicity. This has much to do with the lack of clarity in enforcement law, where there is a lack of understanding as to what actions enforcement agents are able to take and

the fees that they can charge. As indicated in the Risk Assessment, a cost of continuing with the present system will be that enforcement agents will continue to be subject to negative publicity and criticism, and this could escalate if the level of debt in this country continues to increase.

### *Enforcement Agent law*

75. By introducing a new piece of enforcement agent law set out in one place costs will be incurred in the private and voluntary sectors, primarily in relation to training and education. Solicitors, barristers and members of the judiciary will need to be well informed about the new regulations. Court Service estimates that the costs of retraining their staff will be £57,600, including the training of their 600 enforcement agents. Retraining of other enforcement agents will also be necessary to guarantee that they are all aware of the new regulations and that they abide by them from the implementation date. There are approximately 2,500 enforcement agents who will be applying for licences to undertake enforcement work, all of whom will need to be trained in the new legislation. There will be a further 900 applicants likely to come from public sector enforcement agents.<sup>52</sup> Training of these agents will take two days and will cost £250 per day, resulting in an overall cost of approximately £1,700,000. The Security Industry Training Organisation (SITO) is introducing an NVQ for Enforcement Agents and therefore any changes to this will be borne by SITO. Their costs will include the retraining of the NVQ tutors and the reproduction of teaching materials incorporating the changes to the legislation. We are investigating the actual costs which will be incurred by SITO as a result of the new legislation. The publicity and training costs cover all the new proposals relating to enforcement agents. It has not been possible to disaggregate the figures to provide an estimate for the publicity for each of the legislative changes.

76. The voluntary sector will also need to be informed and re-educated to make certain that they are prepared to offer accurate and appropriate advice following the implementation of the new legislation. Citizens Advice and the Federation of Independent Advice Centres estimate that there are 10,000 volunteers working in the area of

<sup>52</sup> See paragraph 105.

debt advice who would need to be informed of the changes. This would involve amending their current training courses and re-educating those already providing advice in the area of debt enforcement. It is estimated that the organised training will last for one day. All training is free to the volunteers and is funded by the Royal Bank of Scotland, who are the sponsors of the Federation of Independent Advice Centres contributing £1.5 million over two years. We are unable to separate the cost of training

for each of the legislative changes. The new legislation will also need to be publicised to ensure that the general public are fully aware of their rights, and therefore the costs of this increased publicity will need to be met. It is likely that leaflets will be produced which can then be distributed to the general public. We estimate that 3,000 leaflets will need to be printed and distributed resulting in a provisional cost of £2,000.

## Summary

Costs of enforcement agent law	Benefits of enforcement agent law
<p>Costs associated with the enforcement agent law are all implementation costs and consist of:</p> <ul style="list-style-type: none"> <li>• Training costs for legal profession</li> <li>• One-off training costs for Court Service – £57,600</li> <li>• One-off training costs for enforcement agents – £1,700,000</li> <li>• Costs to SITO for re-training</li> <li>• Training costs for voluntary sector – one day of training, funded by Royal Bank of Scotland</li> <li>• One-off costs of publicising new legislation – £2,000</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction in number of disputes in the courts – saving time and money</li> <li>• Less complaints to Associations and LCD</li> <li>• Improved public image of enforcement agents</li> <li>• Increased clarity for the public, enforcement agents and creditors</li> <li>• Clearer legislation leading to decreased training costs for enforcement agents in the future</li> <li>• Unification of powers for all enforcement agents</li> <li>• Assurance that legislation is ECHR compliant</li> </ul>
Cost of no change	Benefits of no change
<ul style="list-style-type: none"> <li>• Continuing costs to voluntary sector helping debtors understand the complexity of the system</li> <li>• Exploitation of the vulnerable by unscrupulous enforcement agents</li> <li>• Continuing costs to courts dealing with complaints</li> <li>• Continuing complaints to enforcement associations and LCD</li> <li>• Continuing negative publicity and lack of trust of enforcement agents</li> <li>• Possible challenges on ECHR grounds</li> </ul>	<ul style="list-style-type: none"> <li>• No increased costs for retraining of legal profession, enforcement agents and voluntary sector</li> <li>• Most working in the area of enforcement are somewhat familiar with the current legislation</li> </ul>

### Competition Assessment

77. We do not expect that either the retention of the existing law (Option 1) or rationalising it as a single piece of legislation (Option 2) will have a significant impact on competition. The proposals under Option 2 seek to eliminate legal uncertainty and prevent inadvertent or deliberate over- or under-charging by enforcement agencies. Whilst improved clarity over the charges made by enforcement agencies may reduce the profits of some agencies, albeit slightly, this is not expected to affect competition in the enforcement agent market.
78. Although there will be training costs for solicitors, barristers and enforcement agents, who will need to be familiarised with the new legislation, these are anticipated to be one-off costs of £500 per head. These costs are not considered sufficient to alter the numbers of players in the affected markets, nor to represent any significant barriers to entry.

### Impact on small business

79. There may be a significant impact on small enforcement firms, but the new legislation will encourage the membership of a professional body which will give them access to formal training. The Small Business Service commented that the new legislation will assist small businesses who are unable to settle their debts but will also help businesses to collect debts which are owed to them.

### Consultation

80. A Green Paper *Towards Effective Enforcement: a single piece of bailiff law and a regulatory structure for enforcement* was published in July 2001. The post-consultation report was published in May 2002. Responses were received from members of the judiciary, governing bodies of the legal profession, enforcement agents and their trade organisations, money advice groups, Government Departments and other interested parties. The responses showed overwhelming support for the need to rationalise, clarify and codify the law. Several other

consultation papers have been published which are related to the introduction of a single piece of bailiff law. An Independent Review of Bailiff Law was completed by Professor Beatson, which was published in July 2000. In the responses to Professor Beatson's Consultation Paper, 86% of respondents, from a wide variety of sectors, supported the introduction of a single piece of enforcement agent law. In May 2001 LCD published a consultation paper on Distress for Rent, and the responses to this consultation were published in May 2002.

### Securing compliance

81. Compliance with the new legislation will be secured through the regulatory body and through the courts. Debtors will be able to make complaints to the regulatory body in instances of irregular action. The regulatory body will then have the power to revoke the licence of the enforcement agent involved or award compensation. Similarly, in cases of illegal action, the debtor will be able to complain to the court and may be awarded damages.

### Monitoring and Evaluation

82. Securing and monitoring compliance with, and evaluating the effectiveness of, the single piece of enforcement agent law will be a role for the regulatory body for enforcement. The powers enabling them to undertake this role will be set out in primary legislation.

### Distress for rent reforms

#### Issue and Objective

83. In broad terms, distress for rent permits landlords to enter a property without a court order in order to seize goods in lieu of rent arrears. In 1991, the Law Commission recommended the abolition of the practice of distress for rent when improvements to the Court Service made the other remedies available to landlords effective alternatives to distress. Concern has been expressed that distress for rent might breach the right to a fair trial, the right to respect for privacy and family life, and the right to quiet

enjoyment of possessions and could therefore be challenged under the Human Rights Act 1998 (HRA).

84. The objective is to secure methods of rent recovery which are both efficient and strengthen compatibility with the HRA through the modification or abolition of distress for rent.

### Risk Assessment

85. LCD accepts that there are defects in the current law in the context of a modern rights-based society. Change to the law is necessary and desirable to ensure greater equity and fairness to both landlords and tenants.
86. The HRA came into force just over two years ago and there have been no direct challenges to distress for rent (that LCD are aware of). However, both the Law Commission's Report *Landlord and Tenant Distress for Rent* (1991) and Professor Beatson's Report acknowledged that there existed many problems with the remedy. There has also been speculation in the enforcement profession's media that distress for rent may breach some of the ECHR articles. LCD acknowledges that there may be a need to make some changes and it would be useful to do so through any forthcoming general enforcement legislation. If there were to be a successful ECHR challenge, there would be a potential (currently unquantifiable) number of compensation claims. In addition the integrity and reputation of LCD and the Government would be affected.
87. Currently, tenants against whom this remedy is used do not receive fair treatment when compared to many other types of debtor who have a chance to defend themselves in court if they wish, and therefore may have little chance to challenge the landlord's claim.
88. There will be potential continued loss to tenants whose goods are removed and sold (at relatively low prices). Following a survey by the Enforcement Services Association (ESA) the last known figure is that £3.2 million worth of rent arrears (in a 12 month period) were cleared in this way.<sup>53</sup> It is likely the goods were worth substantially more than this.

89. In addition there will be changes to the fee system as part of the Enforcement Review. Currently, the fee system continues to be open to abuse as the agents often rely on the tenant paying their fees and the landlord is not required to pay the agent to undertake the work.
90. Potentially, the loss from lack of clarity in the extensive common law for distress for rent (as it is for enforcement agent law) can be outlined as follows:
- legal uncertainty leading to lack of confidence in the justice system;
  - over and under charging by enforcement agents;
  - continuing complaints about enforcement agents' behaviour (as outlined in the Citizens Advice report);
  - complaints to courts and professional agencies such as ACEA and ESA;
  - continued introduction of common law as cases go to court to try and get the law clarified.

### Quantification of the issue

91. Distress for rent is a self-help remedy, used by landlords on almost exclusively commercial properties. Its use in residential properties is, according to informal soundings of landlords and enforcement agents, very limited. The ESA's survey and information received from the British Property Federation and other commercial companies, indicates there are at least 22,000 procedures each year, of which just over 20,000 are successful. LCD estimated (in 1993) that the figure could be as high as 170,000 procedures.
92. In the absence of any firm evidence concerning the frequency of the use of distress against business tenants, and having regard to the age of the previous estimate and the ESA survey, we have assumed that there may be 60,000 procedures a year, of which an estimated 56,000 result in the successful collection of debt (this includes 1,200 cases resulting in the removal and sale of debtors' goods). These procedures have a typical value of £3,000. This market could be worth about £180 million a year, of which around £167 million is successfully collected.

<sup>53</sup> A survey was conducted by the Certificated Bailiffs Association (now Enforcement Services Association) in October 2000 to inform the Regulatory Impact Assessment

93. There are an estimated total of 684,000 commercial tenancies in England and Wales. Of these, an estimated 121,000 tenancies (18% of the total) were in rent arrears, based on an LCD survey of landlords. Taking the average amount of rent arrears as £3,000 (based on ESA survey) this suggests that the total level of rent arrears is approximately £363 million. Twenty property companies responded to the questionnaire. Fifteen respondents

provided information broadly in the format requested but not all provided details in all categories. Four respondents comments were couched in a manner as to make them unsuitable for the purpose of statistical analysis. One respondent provided useful figures, but not in a compatible format, therefore these figures have been analysed separately.

### Table Summarising Responses to Landlords Questionnaire

Figures for 12 Months to December 2000	
Question	Answer
Number of tenancies with rent arrears (13 companies responded to this question)	121,000
Percentage of tenancies with rent arrears (14 companies responded to this question)	17.7% of total commercial tenancies
Total amount of rent arrears by value of total rental income (12 companies responded to this question)	£363m
Total percentage by value of total rental income (14 companies responded to this question)	8% of total rent income
15 companies responded to the following questions in a suitable style for analytical purposes	
Percentages and amount of arrears successfully recovered	45% successfully recovered £163m
• without recourse to agents, the use of distress or court action	43% of arrears successfully recovered £71m
• where agents successfully recovered the arrears without needing to take goods	12.5% of arrears successfully recovered £20.4m
• through taking legal control of and sale of goods	0.87% of arrears successfully recovered £1.4m
• through debt recovery procedures in the courts	1% of arrears successfully recovered £1.8m

94. Distress for rent is used by both large and small landlords/property companies. Through face to face discussions, landlords of all sizes have said that they make use of this system. Examples ranged from railway arches at £10/week, just to make sure they are occupied, to large property companies who have used it against major high street chains.
95. It is also possible that some of these figures are repetitions of those earlier supplied by the ESA. The ESA did not supply individual company names in their response, and it is possible that the enforcement agent companies who supplied the figures could have been employed by the company British Property Federation (BPF). However this is unlikely as BPF stated the average amount of arrears collected without recourse to enforcement agents was £27 million. There are further limitations in the figures on the percentage of arrears successfully recovered. There were only three respondents to this question and therefore it makes it difficult to use as a comparison with other figures.
96. As distress for rent is used almost exclusively by commercial landlords and business tenants, most of the costs and benefits arising out of any proposals for change will be transfers between the two sectors, i.e. the cost to landlord will be to the benefit of the tenant. It is proposed that an up-front fee to undertake enforcement action will be collected by the enforcement agent (to be collected from the tenant, any refund due to the landlord). We believe this would be the single most effective way to discourage exploitation by landlords and bring greater simplicity and clarity in the law for all.

### Options

97. Whilst it is accepted that there are defects in the current law, and that retaining the status quo is not a viable option, we should acknowledge that the current remedy is quick and effective for landlords and does not require a court procedure.

- **Option 1 – No Change** The market is possibly worth a minimum of £167 million per annum on debt collected successfully. Distress is also beneficial to the economy in that it encourages renting of properties, particularly in the lower rent regime, encouraging enterprise.
- **Option 2 – Abolish the practice of distress for rent in both residential and commercial property without creating a replacement.** Landlords would be expected to use methods and court procedures which other creditors use to recover debt.
- **Option 3 – Distress for rent retained and modified to improve ECHR compliance.** Primary legislation might, amongst other things, impose a new obligation on commercial landlords to notify business tenants of what action may be undertaken if they do not pay their rent arrears.

### Issues of equity and fairness

98. The practice of distress for rent allows recovery of rent arrears by landlords, without prior warning of the consequences of non-payment of rent, subject to a number of provisions. It allows landlords to seize goods on tenants' premises without regard to the claims of other creditors not precluding the effect of certain third party acts such as bankruptcy or compulsory winding up. This mechanism has historically been conferred to landlords since 1689.
99. A modified procedure would mean that tenants would receive warning of an intention to carry out distress, and that residential tenants no longer face distress action. The modified procedure would allow a transfer of benefits from enforcement agents to tenants.

## Benefits

### *Option 1 – No change*

100. The present system as it stands confers a number of benefits to landlords in terms of collecting rent arrears:

- The system is a quick and effective procedure; at present out of 60,000 procedures carried out, 56,000 are successful in collecting rent arrears. Distress for rent acts as a deterrent to tenants from non-payment of rent;
- Distress for rent overcomes the disadvantage that commercial landlords face compared to other creditors, in that they are unable to discontinue supply of their services;
- Distress for rent allows commercial tenancies to rent to marginal business tenants and marginal properties, which reduces risks for owners of letting premises, and they can therefore offer them on more advantageous terms;
- Landlords, tenants and enforcement agents are familiar with the present system and so they will not need to learn about any new procedures.

### *Option 2 – Abolish the practice of distress for rent in both residential and commercial property without creating a replacement*

101. If the practice of distress for rent were abolished, then recovery of rent arrears would be placed on the same footing as the recovery of other debts. Such an approach would confer the following benefits:

- Business tenants would no longer have legal control of their goods taken immediately and without warning, and could continue to use or trade them. It is probable that the business tenant would receive a better price for his goods than the valuation placed on them by the landlord, possibly enabling the tenant to clear their rent arrears;

- Business tenants would receive fairer treatment in the case of exploitation by the landlord by having access to established court procedures, and they could challenge the actions of harsh landlords;
- Other creditors would be on a more level playing field with commercial landlords for the recovery of debts owed than under the existing regime. This would give rise to a transfer benefit which would redistribute the rent arrears collected by commercial landlords to other creditors. Currently, £164 million of rent arrears are recovered through distress for rent procedures without the need for seizure and sale of goods, and a further £3.6 million is collected through the removal and sale of goods. We have used ESA figures here, as opposed to enforcement agent recovery figures, as they are a more accurate reflection of enforcement agents' distress for rent actions;
- There is also a saving of potential (unquantifiable) claims for compensation if there was a successful challenge.

### *Option 3 – Distress for rent retained and modified to improve ECHR compliance*

102. It is not intended to retain distress for rent for residential purposes but there is a case for treating commercial properties differently. Firstly, according to some landlords and enforcement agents, the remedy is rarely used in residential tenancies. Secondly, during consultation, it was suggested that where distress is currently being used in residential situations, it is illegal or has been done in an inappropriate manner. Abolition in the residential sector would clarify that this should never take place in a residential property.

103. However, legislation for a modified remedy for commercial properties would improve access to justice by making procedures clear to both commercial landlords and business tenants. Retaining but modifying distress for rent would allow many of the social and economic benefits which arise from the current remedy, as outlined under Option 1.

104. Potentially, further benefits which would accrue from greater clarity in the law for distress for rent can be outlined as follows:
- legal certainty, leading to greater confidence in justice system;
  - responsible fee charging by enforcement agents;
  - less complaints about enforcement agents' behaviour, as outlined in the Citizens Advice report;
  - less complaints to courts and professional agencies such as ACEA and ESA;
  - less cases going to court to try and get the law clarified (i.e. less common law being introduced);
  - opportunity for tenants to challenge distress before it takes place;
  - the continued availability of distress enables landlords to dispense with other forms of security.
105. Amendment of the remedy would stop any successful challenges for ECHR purposes, thereby ensuring no adverse effect on the integrity and reputation of LCD/Government. In addition, there is a saving of potential (unquantifiable) claims for compensation if there was a successful challenge.

## Costs

### *Option 1 – No change*

106. There will be a number of general costs accruing from maintaining the present system:
- concern has been expressed that distress for rent might breach the right to a fair trial, the right to respect for privacy and family life, and the right to quiet enjoyment of possessions and could therefore be challenged under the HRA;
  - distress for rent is felt to be a disproportionate remedy, especially in lower rent residential premises;

- tenants often do not get a fair price for goods that are removed and sold – at present £3.2 million worth of debt is collected through sale of debtors' goods;
- the enforcement agent who relies on a fee for taking legal control of goods has more incentive to abuse the system.

### *Option 2 – Abolish the practice of distress for rent in both residential and commercial property without creating a replacement*

107. The key to understanding the additional costs is the relative effectiveness of the threat, of which we have no quantifiable measure. Information from the ESA survey shows that 91% of distress for rent warrants debtors paid without the need for seizure of goods, indicating that the threat of using distress is very effective, although there is no similar indication of the impact of the threat of court action. If court action did prove to be less of a deterrent, the following effects will be borne by the landlord:

#### **Costs to landlords (We are unable to estimate these in terms of probable ranges of outcomes)**

- A higher proportion of rent arrears (and therefore loss of interest);
- Repossession fees;
- Increased costs of vetting business tenants and therefore extended time to lease or re-lease properties (loss of income);
- Small business landlords in particular suffering severe cash flow problems due to delay in payment of arrears;
- ESA figures suggest £167 million rent debt is successfully collected from business tenants per annum. Commercial landlords would retain the ability, in some form, to recover rent arrears without having to resort to potentially lengthy and costly court procedures;

- Distress for rent overcomes the disadvantages that commercial landlords face against other commercial creditors who are able to discontinue supply of services or goods;
- Distress for rent is successful. It is particularly effective as a deterrent against late payment, particularly in the retail sector. Under the current procedure less than 2% of distress for rent cases (estimated value £3.6 million) result in the removal and sale of the tenant's goods. There appears to be a high success rate of approximately 91% (although there is a grey area of 5-6%, where it has not been completely successful, for example when goods have been abandoned). This indicates that the distress for rent remedy is considerably more successful than the 34.9% of successful claims made through the court in the form of judgment debts;
- Distress for rent, because it is successful in collecting rent arrears, appears to allow commercial landlords to rent to both marginal business tenants (e.g. those with poor credit histories) and marginal properties (e.g. railway arches); abolition would give a lower occupation rate. There would be revenue lost on loss of marginal properties; and to the property market more generally. It is therefore of benefit to the economy, in that it encourages landlords to rent premises, thereby boosting the property market;
- As a successful and swift procedure, rent arrears do not accrue as they do whilst court procedures are ongoing, and court and solicitors fees and length of time to go to court do not arise;
- Distress for rent is regarded as an effective deterrent in that it acts as a warning to other business tenants to ensure their rent is paid regularly and on time.

### **Costs to commercial landlords of court action**

108. The costs of seeking arrears through the courts would fall to commercial landlords. Fixed court costs are £80 (for a debt of £500-£1,000) or £115 (for a debt of £1,000-£5,000) for issuing proceedings, plus £45 for issuing a warrant. The ESA survey indicated that the average distress for rent

claim is £3,000 and therefore we are assuming that most claims will cost £115. We assume that most claims (87%) will not proceed to full hearing.<sup>54</sup> If the claim is challenged the costs begin to rise. The average length of hearing is expected to be between one and two hours. Although in theory costs will be recoverable from tenants, if debt is not paid this cost remains with the landlord. We have also assumed that most commercial landlords would wish to use the small claims procedure to recover debt, although some landlords might wait until arrears reach a higher threshold.

109. Assuming that 52,200 proceedings (87% of 60,000) do not proceed to full hearings, and that these are worth on average £3,000, the cost of these claims would be about £6 million. The remaining 13% (7,800 cases) would proceed to full defended hearings and this would cost approximately £6.8 million.<sup>55</sup> This means that the additional court costs for commercial landlords would be approximately £12.8 million. This is the total additional cost to commercial landlords since under distress for rent they do not incur enforcement agent's fees, as these are currently charged to those tenants who are successfully enforced against.
110. This would be the cost before any warrants are issued. If 2% (1,200 cases) of the 60,000 cases remain unpaid and so have additional warrants issued at £45 per warrant, the additional cost would be £50,000. This gives the total cost from additional court hearings of £12.854 million. This will be payable by the landlord initially but will be recoverable from business tenants who pay. It appears that 34.9% of court hearings result in the successful recovery of debt, which indicates that the costs to landlords of additional court hearings is £8.4 million.
111. If distress for rent were abolished, in certain cases, insolvency proceedings would be used. In company cases, the petitioning creditor would have to pay £650 petition costs (£500 to the Official Receiver and £150 to cover court costs). In bankruptcy cases, the petitioning creditor would have to pay £450 (£300 deposit and £150 court fee). The costs for insolvency proceedings may outweigh the costs of a distress for rent action (£76 charge on a £3,000 debt).

<sup>54</sup> Proxy: According to 1999 figures for money claims issued, provided by the Court Service, 476,152 judgments were entered in default and 297,453 filed for defence, of which only 101,826 went to a full hearing

<sup>55</sup> Assumes 7,800 claims proceed to full hearing which last on average no longer than two hours. Solicitor's costs are estimated at £240. Additional court costs would be an allocation fee of £80, a hearing fee of £200 and fixed trial costs of £350 giving costs of £870 for a full defended hearing. Total cost = 7,800 x £870 = £6.79 million

### Costs to business tenants

112. As with landlords, the additional costs to business tenants of abolition would be the costs of court procedures minus the costs they would incur under distress for rent procedures. The typical value of rent arrears is assumed to be £3,000. Under the distress for rent procedures the tenant is currently liable for the debt plus a maximum of £76 (for a debt of £3,000) – if legal control of goods is actually taken (plus 45 pence a day if goods taken by agreement). If goods are not taken, the enforcement agents can only charge the £76 as a maximum for reasonable costs and charges. In some cases landlords might use forfeiture rather than pursue rent arrears through the courts.

113. The minimum cost under the alternative procedures will normally be £115 (for arrears of £3,000) plus £45 for the issue of the warrant if debt is still not paid – minimum £160. The costs of court action including warrants issued (£6.0544 million) would fall to commercial landlords in the first instance but would be recoverable from business tenants.<sup>56</sup> This does not include any other costs such as solicitors' fees which the commercial landlord might seek to be awarded or the distress charges to the business tenant. As mentioned earlier, the costs of a full defended hearing are estimated to be in the region of £6.8 million. This would mean that, as mentioned earlier, the total cost of additional court hearings would be £12.854 million, payable by landlords in the first instance and recoverable from tenants who pay. Of course, this cost depends on the proportion of tenants who actually pay after court hearings have taken place. It appears that 34.9% of court hearings result in the successful recovery of the debt, indicating a cost to business tenants of £4.47 million which is a transfer cost from landlords to tenants out of the total cost of court action.

114. Other costs could be:

- tenants would have the opportunity to challenge distress before it took place. The availability of distress enables landlords to dispense with other forms of security (such as rent deposits);

- under a modified procedure business tenants may have a right to bring proceedings before the court;
- the cost to the business tenant in enforcement agent fees would be lower than that of court costs;
- the low levels of rents at the bottom end of the market are maintained;
- distress for rent is a discrete procedure which does not involve any third parties such as employers or bank staff. There is therefore no damage to the tenant's credit rating, through the recording of judgment debts.

### Costs to Enforcement Agents

115. ESA figures indicate that the removal of distress for rent procedures would result in a loss of around £4 million in fees to enforcement agents. However, the loss of fees for enforcement agents will be a transfer benefit to business tenants, who will no longer face the burden of the £4 million fees from distress for rent actions.

116. There are unlikely to be wider social economic consequences. In the Partial RIA we estimated that fees from distress for rent may account for between 4% and 20% of an agent's income, depending on their speciality. If distress for rent were abolished, agents would continue to undertake a wide range of work. This work includes council tax and traffic fines collections, magistrates' court fines, debt collection, and repossession of goods.

117. Only four enforcement agencies responded to the question on fees as a total proportion of their business. As a proportion of their total business, distress for rent income was between 1.3% and 30%; on average this is 14%. Three respondents said this amounted to £260,000 in fees.

### Costs to courts

118. If distress for rent were abolished, the remaining methods of recovering debt would be money judgments, and, in certain cases, using the insolvency procedure. It is possible that this would lead to 60,000 new claims and nearly 8,000 full hearings. This would not entail any new

<sup>56</sup> Costs of court action (60,000 x £115) = £6.9 million. Assuming 2% of 60,000 warrants issued would remain unpaid then additional costs (1,200 x £45) = £0.054 million would arise

forms or procedures and the costs of additional hearings would be borne by commercial landlords.

### **Option 3 – Distress for Rent retained and modified.**

119. Compliance costs of a revised procedure are likely to be low.

### **Commercial landlords**

120. Many of the suggested amendments are already features which many commercial landlords already undertake. A revised procedure ought to remain as effective as the existing procedure, and preliminary consultation with landlords suggests they believe that the proposed revisions would achieve that.
121. In any event suggested changes, such as giving prior notice to the business tenant, will only run to the cost of issuing a letter. We estimate that the costs of issuing such a letter would be less than £5 per action, or less than £0.3 million to the commercial landlord sector.
122. All companies are currently required to use a certificated bailiff. No additional cost arises from this requirement, although it is possible that any increased costs for enforcement agents might be passed onto commercial landlords.

### **Enforcement Agents**

123. Retraining costs to enforcement agents (exemptions list, implementation of new rules) should be minimal – less than half a day. We have assumed that one-off costs will be £150 a head for the current 2,149 certificated bailiffs, approximately £0.32 million.

### **Competition Assessment**

124. We do not expect that any of the options will have a significant impact on competition.

125. Option 1, retaining the use of distress for rent warrants, would maintain the status quo and would not therefore result in any change to existing levels of competition or market structure.
126. Option 2 would abolish the use of distress for rent warrants and create additional court costs for commercial landlords in the region of £12.854 million, resulting in a loss of around £4 million in fees to enforcement agents.
127. The commercial property sector comprises many different markets according to the size and location of the properties. It is unlikely, however, that implementation of this proposal would have any significant effect on competition within any of these markets.
128. The fees from distress for rent were estimated as accounting for between 4% and 20% of an agent's income, depending on their speciality. At present, it is estimated that there are 60,000 distress for rent warrants and industry estimates indicate that there are approximately six firms who execute the majority of these. Since none of these firms specialise exclusively in distress for rent warrants, it is not clear that the abolition of the distress for rent warrant segment would significantly affect competition within the wider market in which agents compete across a range of work.
129. Option 3, retaining the existing use of distress for rent warrants with some amendments, would result in additional staff training costs for enforcement agencies to familiarise themselves with the new rules. This should constitute a one-off cost and would be unlikely to have a significant disproportionate impact on smaller firms or on new firms looking to enter the market. It is not anticipated that this would be likely to have a significant effect on competition.

### **Impact on Small Business**

130. As a self-help remedy there are no known figures for landlords undertaking distress themselves. For unincorporated landlords of business tenancies they will in future need to employ an agent to undertake distress for rent. The payment of an agent's fees vary greatly as some agents charge landlords, others take all of their payment from the tenant – therefore this is a bit of an unknown quantity.

131. Whilst an amended regime should introduce greater protection of tenants, there is still the possibility that the use of distress for rent on small businesses may still cause 'disproportionate loss' through the actions of distress, possibly resulting in business failure of the tenant.

134. If landlords/enforcement agents abuse the system, tenants, as at present, will be able to go to the courts to remedy the situation.

135. LCD could consider monitoring rent claims in the courts and whether or not they rise.

**Consultation**

132. In May 2001 LCD published Enforcement Review Consultation Paper 5: *Distress for Rent*. The responses to this consultation were published in May 2002. The responses showed that 79.6% of respondents favoured the retention of distress for rent procedures in commercial tenancies. Only a small number of respondents were in favour of total abolition. Account was also taken of the responses to the Green Paper and related issues on a single piece of enforcement law.

**Monitoring and Evaluation**

136. We are currently exploring the best method of how to monitor rent claims before and after the introduction of legislation with Court Service. ESA has also agreed to work with LCD to undertake a survey of its members as to the extent of the use of distress for rent, amount of money involved, fees collected etc. before the new legislation is introduced and a similar survey of the Commercial Rent Arrears Recovery after legislation.

**Securing Compliance**

133. The property industry, if they feel the new regulations are not working, will turn to the court to pursue their cases. If the system continues to be straightforward, with tighter regulation of enforcement agent behaviour and tenant safeguards, compliance should not be a problem.

**Summary of Costs and Benefits of Options 1 and 2**

- denotes transfer cost or benefit

Option 1 (No Change)	
Costs	Benefits
<p>There will be a number of general costs accruing from maintaining the present system:</p> <ul style="list-style-type: none"> <li>• Concern has been expressed that distress for rent might breach the right to a fair trial, right to respect for privacy and family life and right to quiet enjoyment of possessions, and could therefore be challenged under the Human Rights Act 1998</li> <li>• Distress for rent is felt to be a disproportionate remedy, especially in residential premises</li> <li>• Tenants often do not get a fair price for goods that are removed and sold – at present £3.2m worth of debts are collected through sale of debtors' goods</li> <li>• The enforcement agent who relies on a fee for taking goods has more incentive to abuse the system</li> </ul>	<ul style="list-style-type: none"> <li>• Quick and effective remedy for collection of arrears – £167m worth of debt (93% of warrants) are successfully collected. The deterrence effect is also important – 91% of distress for rent warrants lead to collection of debt without need to seize or sell goods</li> <li>• Benefits to the economy – encourages the renting of properties, especially in the lower rent regime</li> </ul>

## Option 2 (Abolition)

	Implementation costs		Policy costs		Benefits	
	First year (£m)	Subsequent years (£m)	First year (£m)	Subsequent years (£m)	First year (£m)	Subsequent years (£m)
Landlord	–	–	Cost of court action to landlord – 8.4 <sup>(1)</sup>	8.4 <sup>(1)</sup>	–	–
Tenant	–	–	Cost of court action to tenants who pay court fees – 4.47 <sup>(2)</sup>	4.47 <sup>(2)</sup>	Cost saving from not paying agent fees 4.00 <sup>(3)</sup>	4.00 <sup>(3)</sup>
Enforcement Agent	–	–	Loss of fees 4.00 <sup>(3)</sup>	4.00 <sup>(3)</sup>	–	–
Court Service	–	–	0	0	0	0
<b>Total</b>	<b>0</b>	<b>0</b>	<b>16.97</b>	<b>16.85</b>	<b>4.0</b>	<b>4.0</b>

(1) Total cost of court action minus cost recovered from tenants  
(2) Total cost of court action multiplied by proportion of tenants who pay  
(3) Note this is not an additional cost, it will be transferred to tenants as a benefit because they will no longer have to pay agent's fees

## Option 3 (Distress for Rent retained and modified)

	Implementation costs		Policy costs		Benefits	
	First year (£m)	Subsequent years (£m)	First year (£m)	Subsequent years (£m)	First year (£m)	Subsequent years (£m)
Landlord	0	0	Cost of sending letters 0.3	0.3	0	0
Tenant	–	–	–	–	–	–
Enforcement Agent	Retraining costs 0.3	0	–	–	–	–
Court Service	–	–	–	–	–	–
<b>Total</b>	<b>0.3</b>	<b>0</b>	<b>0.3</b>	<b>0.3</b>	<b>0</b>	<b>0</b>

## Fees Reforms

### Issue and Objective

137. We propose to include in primary legislation the power for the Lord Chancellor to set fees for enforcement agents in England and Wales, following advice and recommendations put forward by the regulatory body. Legislation will also grant the regulatory body the power to conduct research into market conditions in order to inform their recommendations to the Lord Chancellor. We are therefore not in a position to state actual figures for future fees, or the parameters within which those actual figures may fall. Any recommendations made by the regulatory body must be consistent with the overriding fee principles set out in Chapter Two of the White Paper: transparency, consistency, proportionality, the need to minimise fruitless activity and the need to promote a sustainable response.
138. Since our proposals for legislative change are limited to an enabling power, this RIA considers the impact of the model fee structure explored in Chapter Two. Our concern has been to devise a fee structure that adequately and fairly rewards agents in public and private sectors for the work they actually do, encourages prompt payment by the debtor, ensures that debtors who pay do not subsidise enforcement against those who do not, and is sensitive to those debtors who do not have the resources to pay. The fee structure should incorporate safeguards against malpractice and exploitation, be supported and monitored by regulation and reflect the legal position as enshrined in a single piece of enforcement agent law.

### Risk Assessment

139. Abuse of the fee structure by, predominantly, unregulated private sector enforcement agents has been identified as a source of concern by Citizens Advice. Their report does not provide actual figures, nor does it give any indication of the extent of losses from the types of abuse it describes; the evidence it includes is anecdotal. We are therefore unable to quantify the frequency of abuse, or the extent of losses deriving from it. We have identified this gap in the evidence base and are developing research proposals to address it.

140. The range of current fee structures enables enforcement work to be done for nothing in some debt stream areas, in that enforcement agents who take on cases from creditors which they are unable to enforce and receive fees for, do not receive any remuneration from those creditors. Fruitless enforcement activity is taking place because creditors are aware that they do not have to pay agents to undertake enforcement action that may not be effective. The extent of fruitless action is not known. The Advisory Group on Enforcement Service Delivery has also recognised that this is a risk, while acknowledging the anecdotal nature of the evidence in this area.
141. The range of fee structures also offers scope for exploitation as debtors are unaware of which fees are applicable in each of the debt stream areas. An example of the varying fee structures is the varying charges across different debt streams for taking legal control of goods (currently called levying distress). The activity in connection with council tax collection attracts a fee of £20, whilst in connection with child support arrears it attracts a fee of £12.50, and for road traffic offences the fee is £25.
142. Furthermore, since there is no uniform regulation of enforcement agents, standards are perceived to have been driven down to the level criticised in the Citizens Advice report and led to a situation where disreputable enforcement agents can rely on exploitation and manipulation of fees to attain profitability. Economic analysis and market-based research indicates that profitability for enforcement agencies is constrained by the current fee structure.<sup>57</sup>

### Quantification of the Issue

143. All those agents and agencies enforcing warrants are affected by the proposed changes to the fees structure. It has proved impossible to obtain accurate figures for the number of enforcement agents and agencies enforcing civil warrants and criminal penalties. The following tables contain those figures that have been obtained and offer an indication of what we believe, from discussion with those in the industry, to be a reasonable estimate of those currently operating in the market.

<sup>57</sup> *The Second Report of the Advisory Group on Enforcement Service Delivery* (August 2002); Arkady Granik, *Market Evaluation of the Delivery of Enforcement Services* (LCD, 2002)

### Enforcement Agencies

Firms	
With Certificated Bailiffs	145
Firms that have no Certificated Bailiffs	4
<b>VERIFIABLE TOTAL</b>	<b>149</b>
<b>ESTIMATED TOTAL</b>	<b>150</b>

### Enforcement Agents

Individuals	
Certificated Bailiffs	1,569
County Court Bailiffs	641
Local Authorities' own Bailiffs	75
Sheriffs' Officers & Under Sheriffs that are not certificated bailiffs	139
Bailiffs employed by Sheriffs' Officers & Under Sheriffs	0
AEAs and CEOs	170
Inland Revenue Bailiffs/Enforcers	50
<b>VERIFIED TOTAL</b>	<b>2,644</b>
<b>ESTIMATED TOTAL</b>	<b>3,000 – 4,000</b>

144. The number of warrants issued also helps to determine the parameters of the potential impact of the changes to the fee structure. These figures, which are again estimates and, in some cases, taken from different calendar years, indicate the number of warrants which are likely to attract fees under the new system. Under the proposals all warrants, not just those that are issued in the County and High Courts, will be subject to an up-front fee, payable by the creditor but recoverable from the debtor when enforcement is successful.

### Warrants

Type of warrant issued	No. per annum (approx)
County Court Warrants of Execution (2001)	394,611
High Court Writs of Fi-fa (2001)	53,248
Inland Revenue (via Magistrates' Courts) (2000)	12,500
Magistrates Courts Fines (2001)	569,400
Road Traffic Act Offences (2001)	407,700
Council Tax (2000/1)	779,000
Non-Domestic Rates (2000/1)	61,500
<b>Estimated total number of warrants p.a.</b>	<b>2,277,959</b>

145. We are unable to ascertain how much debt is covered by these warrants but as an indication the current levels of debt recovered in 1999 in county courts was £46 million of £196 million.

### Consultation

146. Following the recommendations of Professor Beatson in his *Independent Review of Bailiff Law* (June 2000), it was decided to seek views on the wider range of proposals on a regulatory framework and powers, before directly addressing the detail of fee scales. The Green Paper therefore consulted on fee principles to be set out in primary legislation, with the powers to enable the regulator, after consultation, to propose clear fee scales to be set out in secondary legislation by the Lord Chancellor. The proposal to establish fee principles in primary legislation was generally supported across the range of respondents; however, very few respondents commented directly on the fee principles themselves. Full details of the responses to the Green Paper may be found in the post-consultation report (May 2002).

147. Both fee principles and the potential components of a fee structure were subject to further consultation. Many of the proposals for reform which comprise the basis of the new fee structure were first mooted in the *Second Report of the Advisory Group on Enforcement Service Delivery*, published in August 2002. Their Report was produced following extensive consultation and analysis, including an early discussion paper, *Warrant Enforcement: Towards a New Fee Structure*, which was submitted to a range of individuals and organisations active in the enforcement sector, and discussed at a Stakeholders' Meeting in June 2002. The views of a range of creditors, debtors, and enforcement agents from the public and private sectors fed into the final Report. The Report itself was also subject to further responses from stakeholders, whose views, both in writing and through soundings taken at major enforcement conferences, have fed into the final proposals put forward in the White Paper.

### Options

148. As indicated above, although no specific options on fees were consulted upon at the Green Paper stage, there is consensus that changes to and regulation of the existing fee structure are essential. However, because of the nature of the proposals (i.e. that some of the charges attaching to the specific fee proposals will be set by the Lord Chancellor subject to advice from a future regulatory body, informed by future analysis of the market), it has proved impossible to provide a detailed breakdown of the actual impact of the proposals.

149. The options considered in this RIA are therefore:

- no change; or,
- a new fee structure, applicable across all debt stream areas, recommended by the regulatory body on the basis of economic analysis. We are recommending a tripartite structure of up-front fee, fixed fees and variable fees, but the exact nature of the future fee structure, and the individual charges within it, will be determined by the regulatory body.

150. The range of current fee structures is set out at Annex C of the Green Paper, *Towards Effective Enforcement*. Each of the debt stream areas has its own fee structure, some components of which are fixed, some of which proceed on the basis of a percentage of the debt being enforced, and some under the heading of 'reasonable costs'. For example, the Child Support Agency charges 10p per day for walking possession, under Council Tax regulations this costs £10, under the Road Traffic Act this is 50p each day for the first 14 days and 5p per day after that.

## Cost/Benefit Analysis

### Benefits

#### Option 1: No Change

151. Those creditors who currently have warrant enforcement work undertaken for them free of charge or who, in some cases, receive a fee from the enforcement agent or agency to undertake enforcement work, will continue to receive a service at no cost to themselves or their organisation.
152. Enforcement firms, Court Service and debt advice organisations would not have to incur costs for retraining staff on the new fee structure.

#### Option 2: New Fee Structure

153. The benefits arising from the changes to the fee structure will be both material and qualitative. The introduction of an up-front fee will ensure that enforcement agents receive remuneration for work undertaken, regardless of their eventual success in enforcing the warrant. It will also minimise the degree of fruitless enforcement activity that is currently being undertaken, the costs of which are borne by agents, agencies and debtors who do pay, as creditors will now have an incentive to issue warrants with the best available information to enable enforcement agents to operate effectively. Evidence in this area is anecdotal so both the risks and the associated benefits are unquantified at present.

154. Where fixed fees are introduced, across the board, for specific activities and events this may result in an increase in charges relating to these events as set out under some parts of the current fee regime. There may be, therefore, benefits to those agents who had hitherto been able to charge a lower or variable rate for what has now become a fixed cost activity. The actual benefits cannot be determined until the regulator sets the figures for enforcement fees. Because the regulatory body will make its recommendations on the basis of an economic analysis of the market as it stands at the time, i.e. in the future, we are currently unable to estimate the ranges within which fees and charges may fall.
155. There will also be a greater degree of certainty and control for agents and agencies, as they will be able to work with set figures and be able to negotiate for contracts and conduct enforcement business with a firmer notion of the minimum level of return they may expect.
156. Debtors will also benefit from the uniformity and clarity of a single fee structure pertaining to warrant enforcement. They will be able to know, at each point during the enforcement process, what fees and charges they have incurred thus far, and will incur in future should they continue to delay or evade payment of the original amount owing. The new fee structure also includes a repayment by instalments option, which will also offer benefits to those debtors who are unable to pay a lump sum, but may be able to pay in full over time. There is no way of assessing the proportion of debtors that are small businesses.

## Costs

### Option 1: No Change

157. There will be a continuing financial cost to those private sector enforcement agents and agencies undertaking warrant enforcement work for free or paying to undertake work which proves unsuccessful. They will continue to bear the cost of work done in attempting to enforce warrants which eventually prove unenforceable, and for which, therefore, no payment will be received from the debtor. Using the collection of council tax arrears as an

example, there were approximately 780,000 warrants issued in 2000/01, of which industry estimates indicate that between 34-62% resulted in successful collection. This meant that whilst enforcement agents incurred costs on all of the warrants executed, they only generated revenue from a maximum of 62% of warrants. It is impossible to quantify actual costs.

158. Those debtors from whom fees are recoverable will continue, to varying extents, to subsidise the cost of enforcement against those who do not pay. There is no way of assessing the proportion of these that will be small business debtors.
159. Apart from quantitative material costs there will be ongoing qualitative costs. These costs attach both to the reputation of enforcement agents generally, who are perceived to be exploiting the existing fee system to ensure profitability, and to the public perception of justice in so far as the fees for enforcement are part of the civil justice system.

### Option 2: New Fee Structure

160. In all instances the fees will be recovered from the debtor where enforcement is successful. If enforcement is unsuccessful the creditor will bear the cost of the up-front fee. This introduces a new burden for those enforcing outside of the County and High Court system. To the extent that the up-front fee will be negotiable, with a fixed floor and ceiling to be determined by the regulator, the cost will not fall evenly across all creditors or debtors, and may change for those enforcing through the High and County courts. And, as High Court enforcement is conducted by private sector enforcement agents, any reduction to their current up-front fee may result in costs to their businesses.
161. The introduction of fixed fees may result in a reduction in charges relating to these events as set out under the current fee regimes. There may be, therefore, costs to those who had hitherto been able to charge a higher or variable rate for what has now become a fixed cost activity. The actual costs cannot be determined until the regulator sets the figures for enforcement fees. Because the regulatory body will make its recommendations on the

basis of an economic analysis of the market as it stands at the time, i.e. in the future, we are currently unable to estimate the ranges within which fees and charges may fall.

162. There may also be costs to those firms running businesses associated with the enforcement process – such as removals, storage, valuing and auctioning goods – whose freedom to charge may be constrained by upper limits placed on them by the regulatory body for enforcement. The actual costs cannot be determined until the regulator sets the figures for enforcement fees. Because the regulatory body will make its recommendations on the basis of an economic analysis of the market as it stands at the time, i.e. in the future, we are currently unable to estimate the ranges within which fees and charges may fall.
163. Enforcement agents will be responsible for notifying the debtor, at the earliest possible stage, of the fees that they may be charged should they fail to pay the amounts owing. Agents and agencies will therefore incur costs generated by providing the appropriate documentation to debtors. One industry estimate indicates that the cost of providing such documentation would be slightly less than £5 per action. On the basis of the general number of warrants issued (as detailed in the table above) this cost is estimated at £11,389,795 per annum across the industry as a whole. We are currently unable to break this figure down to allocate costs across the various firms operating in the enforcement sector. All fees charged by an agent for enforcing a judgment debt, including a letter fee, will be recoverable from debtors upon successful enforcement.
164. There will also be one-off costs related to training enforcement agents and advice sector organisations to become familiar with the new fees and charges, publicising those changes to the fee structure, and publicising the appeal routes should debtors feel that they have been unfairly charged. The cost estimates referred to below cover all aspects of the new legislation which apply to the actions of enforcement agents and the advice sector; costs arising directly from the training related specifically to fees will therefore be a proportion of the total cost.
165. Court Service estimates that the costs of retraining its staff will be £57,600 including the training of its 600 enforcement agents. There are approximately 2,500 enforcement agents who will be applying for licences to undertake enforcement work, all of whom will need to be trained in the new procedures. There will be a further 900 applicants likely to come from public sector enforcement agents. Training of these agents will take two days and will cost £250 per day, resulting in an overall cost of approximately £1,700,000. The Security Industry Training Organisation (SITO) is introducing an NVQ for Enforcement Agents and therefore any changes to this will be borne by SITO.
166. Citizens Advice and Federation of Independent Advice Centres estimate that there are 10,000 volunteers working in the area of debt advice who would need to be informed of the changes. This would involve amending their current training courses and re-educating those already providing advice in the area of debt enforcement. It is estimated that the organised training will last for one day. This training is free to the volunteers and is funded by the Royal Bank of Scotland, who are the sponsors of the Federation of Independent Advice Centres contributing £1.5 million over two years.

## Summary

### Option 1: No change

Costs	Benefits
<ul style="list-style-type: none"> <li>• Private sector enforcement agents who undertake warrant enforcement work for free, or pay to undertake work that proves unsuccessful will continue to incur a financial cost</li> <li>• Debtors from whom fees are recoverable will continue to subsidise the cost of enforcement against those who do not pay</li> <li>• The reputation of enforcement agents generally will continue to suffer, as they are perceived to be exploiting the existing fee system to ensure profitability, and the reputation of the justice system will be similarly affected, in so far as the fees for enforcement are part of the civil justice system</li> <li>• The potential for debtors to be confused and/or unaware of their potential liabilities remains</li> </ul>	<ul style="list-style-type: none"> <li>• Creditors who currently have warrant enforcement work undertaken free of charge or who receive a fee, will continue to receive this service</li> <li>• No additional training costs</li> </ul>

### Option 2: New Fee Structure

Costs	Benefits
<ul style="list-style-type: none"> <li>• If the enforcement action is unsuccessful, the creditor will bear the cost of the up-front fee</li> <li>• Fixed fees may result in lower charges and costs payable to those agents who have been able to charge a higher or variable rate for what has become a fixed cost activity</li> <li>• Costs for firms running businesses associated with the enforcement process, e.g. removals, storage, where new parameters for charging are introduced</li> <li>• Enforcement agents would now be responsible for notifying the debtor of the fees they will incur if they fail to pay the amount owing – estimated at £11,389,795 across the industry as a whole</li> </ul>	<ul style="list-style-type: none"> <li>• The up-front fee will ensure enforcement agents receive remuneration for work undertaken, regardless of the eventual success of the warrant</li> <li>• Minimisation of the degree of fruitless enforcement activity, the costs of which have been hitherto borne by agents, agencies, and debtors who do pay</li> <li>• Fixed fees may mean an increase in the income of enforcement agents who have hitherto charged a lower or variable rate for certain activities</li> <li>• A greater degree of certainty and control for agents and agencies, as they will be able to work with set figures, and negotiate for contracts with a firmer notion of the minimum level of return they can expect</li> <li>• Debtors will be aware of their potential liabilities, benefiting from the uniformity and clarity of a single fee structure</li> </ul>

**Option 2: New Fee Structure (continued)**

Costs	Benefits
<ul style="list-style-type: none"> <li>• Training costs for enforcement agent and advice sector workers. The cost estimates below cover all aspects of the new legislation which apply to enforcement agents and the advice sector; it has not been possible to disaggregate these figures to provide an estimate of the training costs particular to the new fee regime:                             <ul style="list-style-type: none"> <li>– Court Service staff retraining costs: £57,600</li> <li>– Training for 3,400 additional enforcement agents. This is expected to take two days, and will cost £250 per day, an overall cost of £1,700,000</li> <li>– NVQ for enforcement agents, the costs of which will be borne by SITO</li> <li>– Training costs for 10,000 volunteers working in the area of debt advice. One-day courses for all volunteers costing £1.5 million over two years, funded by the Royal Bank of Scotland. This is the amount currently contributed by the Royal Bank of Scotland towards training debt advice workers. It is not known how much extra will be required to cover the new proposals</li> </ul> </li> </ul>	

**Competition Assessment**

167. The proposal to include in primary legislation the power for the Lord Chancellor to set fees for enforcement agencies in England and Wales could have a significant impact on competition within the enforcement industry. However, it is difficult to assess with any certainty the scale of the impact of the reforms prior to the fee levels being set by the regulatory body.
168. Across the enforcement industry there are a number of different market segments, including High Court and county court warrants, magistrates' court fines, road traffic penalties, local and national taxes and duties, maintenance and child support, each with different characteristics in terms of the nature of competition, number of firms and level of market concentration. We have been unable accurately to identify the number of firms operating in

each of these markets and we would welcome further information on this.

169. There are, however, some general trends common across the industry. Based on a snapshot of the industry as at the beginning of 2002, it is estimated that the largest three firms in each market segment that makes up the enforcement industry, together have at least 50% market share. The leading firm generally holds a market share of at least 20%, indicating a high level of concentration within the industry as a whole.
170. The main effect of changing the fee principles is that fewer warrants may be issued, due to the creditors having to pay an up-front fee. This may result in a reduction in the workload of enforcement agents within the industry. This may have the consequence of leading to a reduction in the numbers of the enforcement firms operating within the

industry, thus further increasing the level of concentration. The proposal is not likely to directly affect the costs of enforcement firms, but if the proposal results in fewer warrants being issued then this may indirectly increase firms average costs, as their fixed costs will be spread over fewer units of output.

171. However, the proposal aims to provide a fair reward to enforcement firms for the work they do, and so it is anticipated that this will ensure that firms achieve a reasonable return. Improvements in the systems for fee setting and fee bidding may increase competition between firms where they compete. At present a significant number of warrants are unenforceable. This may be due to incorrect address details but may also be because enforcers are not sufficiently incentivised by the current charging structure to strive for maximum recovery. Improvements in the charging structure should promote competition on recovery rates, particularly when this is tied to improvements in the availability of information on debtors. This should ensure that enforcement agents are delivering closer to their maximum efficiency for recovery. The reforms should also ensure that debtors who do pay do not subsidise enforcement against those who do not, again making the firm more efficient.
172. The proposed fee reforms are intended to redistribute the cost of unsuccessful enforcement action from enforcement agents and debtors to creditors and debtors. The proposals aim to tackle the current situation in which debtors who do pay subsidise enforcement action against those who do not.
173. It is not anticipated that the proposal to change the principles by which fees are charged will place a disproportionate cost burden on small firms or on new entrants to the market. We are seeking further information on the likely fee levels which would be set for enforcement agents, which will enable us to predict with greater accuracy the scale of the impact on competition. In the meantime, we would welcome views from stakeholders on the proposals.

### **Impact on Small Business**

174. The proposals for fee reforms may affect small businesses, as creditors, debtors and employers of enforcement agents. Until the regulatory body makes final recommendations on fee structures and individual amounts to be charged within those structures, there is no way of assessing the impact of the reforms upon small businesses.
175. This RIA was submitted to the Small Business Service for comment, along with the rest of the proposals for reform detailed in the White Paper. No specific comments were received on the impact of the fee proposals.

### **Securing Compliance, Monitoring and Evaluation**

176. As proposed in the Green Paper and recommended in the Second Report of the Advisory Group on Enforcement Service Delivery, securing and monitoring compliance with and evaluating the effectiveness of the new fees structure will be a role for the regulatory body for enforcement on an ongoing basis. The powers enabling them to undertake this role will be set out in primary legislation.

## **Data Disclosure Order proposal**

### **Issue and objective**

177. The First Phase of the Enforcement Review concluded that the single most important mechanism in improving the enforcement of court judgments was improving the information available to creditors about debtors. Under the present system, large amounts of debt are written off post-judgment. The most common enforcement method is the warrant of execution, which requires only the name and address of the judgment debtor, yet these are very ineffective. During 2001, warrants of execution made up approximately 85% of total enforcement actions in the county court. 197,300 (50%) of these were unenforceable, and of these, 85,830 (43.5%) were unenforceable due to incorrect address details.<sup>58</sup> The current system relies on the compliance of debtors to provide correct information.

<sup>58</sup> Report of the Advisory Group on Enforcement Service Delivery December 2001

178. By comparison, 22,098 charging orders (4.8%), 4,139 third party debt orders (previously garnishees) (0.89%) and 42,011 (9.08%) attachment of earnings orders were issued, all of which require more information to proceed.<sup>59</sup> Despite the fact that the overall numbers for warrants of execution have declined over recent years, the disproportionate amount of warrants of execution issued compared to other enforcement methods has remained constant. This, plus the views of creditors and creditor organisations provided during consultation, suggests that creditors have limited information on which to base their enforcement decisions. There is currently no available data on the comparative success rates in terms of recovery across the different enforcement methods. We have identified this gap in the evidence base and are considering developing research proposals to address it.
179. The objective of the Data Disclosure Order (DDO) is to offer a court-based mechanism that will provide creditors with access to relevant information on judgment debtors in order to inform their choice of enforcement method (thereby enabling them to undertake appropriate enforcement action against those who fail to respond to, or comply with, the enforcement process). Improving the information fed into the warrant enforcement system should also lead to increased effectiveness of this particular enforcement method.

### Risk Assessment

180. When judgments are not effectively enforced, creditors do not receive either the money they have been awarded, or the degree of service they are entitled to expect from the civil justice system. Estimates suggest there is £600 million worth of unpaid post-judgment debt per annum.<sup>60</sup> Further, the enforcement industry loses time and money attempting to enforce warrants that have been issued with incorrect information. Industry estimates suggest that the average cost of an enforcement agent visit is £10 per case, so if 85,830 warrants were unenforceable due to incorrect address details, this indicates a potential loss to the enforcement agent industry of £858,300. Without increased access to information, debtors who refuse to pay, when they can pay, will continue to evade their responsibilities,

safe in the knowledge that their details will not be accessible. Additionally, creditors will continue to use the easiest enforcement method rather than the most appropriate.

### Quantification of the Issue

181. The only figures available are those on debts that are actually pursued through the courts. There may be considerably more debt that is not pursued because of a perception that it would not be worthwhile to do so. It has been estimated there is £600 million worth of unpaid post-judgment debt per annum. Accordingly, a 1% improvement in recovery will result in an additional £6 million recovered. Research indicates that 30% of successful claimants received no part of their sum awarded to them, several months after the judgment.<sup>61</sup> Although detailed overall figures are difficult to obtain, it is estimated that at least half a million judgments remained unpaid in 1998.

### Consultation

182. The Green Paper, *Towards Effective Enforcement*, consulted on a two-stage procedure determining access to information, the first stage being available to the regulated enforcement agent, and the second being an expansion of the current court-based oral examination procedure. Most respondents to the Green Paper commented on the broad topic of access to, and the value of, information in enforcement. The majority of respondents who commented on this point (45 of 71, 63%) offered direct or implied support for the concept of information sharing to enable more effective enforcement. Full details of the responses to the Green Paper may be found in the Post-Consultation Report (May 2002).
183. The proposals analysed in this RIA were developed through further consultation, both with the Data Disclosure Order Working Group and colleagues in other Government Departments.

<sup>59</sup> Judicial Statistics 2001

<sup>60</sup> *Report of the First Phase of the Enforcement Review*, Page 1, published July 2000

<sup>61</sup> *Monitoring the Rise of the Small Claims Limit*, John Baldwin, University of Birmingham; LCD Research Series 1/97

## Options

184. The options considered in this RIA are:

- No change;
- The DDO: a court-based mechanism that will provide creditors with relevant information on judgment debtors, in order for creditors to undertake appropriate enforcement action against those who fail to respond to or comply with the enforcement process. We intend to secure data sharing gateways with the following organisations:
  - Department for Work and Pensions (DWP);
  - Inland Revenue (IR);
  - Financial Institutions: banks and building societies;
  - Credit Reference Agencies.

## Cost/Benefit Analysis

### Costs

#### Option 1: No Change:

- Creditors continue to suffer significant losses on unrecovered debts where enforcement has failed through lack of information. In 2001, 197,300 warrants of execution were found to be unenforceable;
- The credibility of the justice system is undermined as judgments are seen as increasingly unenforceable.

#### Option 2: Data Sharing between government departments and third party private sector organisations:

- Creditors will be expected to pay a fee for the DDO application. Initial soundings with the third parties from whom information will be sought and those who will be processing the DDO (DWP, IR, financial institutions, and Court Service) indicate this will fall within the range of £75 – £200. If a partial DDO (costing £75) were

sought for each of the 85,830 warrants that were issued with incorrect address details, the potential cost would be £6,437,250.

- The creditor will pay this up-front; however, if the judgment is enforced successfully, the cost of the DDO will be recovered from the debtor in addition to the amount of the judgment debt. Third party financial organisations will incur the costs for the administration of the DDO information search. The British Bankers Association has stated that they estimate the cost of responding to a DDO as £25 per query. As this is a totally new procedure we have no indication of how many queries are expected, and therefore what the total cost will be. However, financial institutions will be reimbursed for their costs whether or not the subsequent enforcement action is successful. Therefore the risk they shoulder is significantly less than the creditors. The institutions likely to be targeted for information in the DDO scheme are to be banks and building societies.
- Data sharing gateways are proposed between three government departments: DWP, IR, and LCD (specifically Court Service). Costs for intra-government data sharing are only approximations, however Court Service estimates that initial start-up costs for the DDO handling procedure would be in the region of £500,000. Inland Revenue has done some high level costing of a similar proposal for tracking attachment of earnings orders when individuals move between employers. Based on existing systems IR suggests costs are likely to be in the region of £500,000 for development and capital outlay, with ongoing support costs over five years in the region of £500,000 at current prices. Figures for the DWP/Magistrates' Courts address checking facility indicate that the unit cost of each request for address information (comparable to the Partial DDO) is £1.21, including staffing and equipment costs, based on 165,000 requests per annum.
- Credit Reference Agencies may also be targeted by the DDO. This will enable the search of bank and building society records to be targeted effectively, as CRAs hold extensive financial records. This will ensure that the

cost of the standard DDO is kept competitive. Two of the leading CRAs have indicated that they can provide a dedicated, court-based system to handle DDO enquiries for between £100,000 and £500,000, depending on the complexity of the proposed system. Search costs are expected to be £1 per search, and the application fee, combined with the search fee is expected to be pence, rather than pounds.

- There are significant risks involved with third parties producing information that is not clear and accessible. Unclear information, which is then transferred to a creditor, replicates the problems associated with the existing enforcement arrangement. Judgments end up being difficult to enforce due to a lack of accurate information, which in turn creates a reliance on warrants of execution as the predominant method of enforcement.
- Additional costs for financial institutions include training costs for data handlers and the cost of publicising the new regulatory framework regarding the release of information to bank account holders. These costs are unknown at present.
- By introducing a new court-based procedure, the DDO policy, costs will be incurred in the private and voluntary sectors, primarily in relation to training and education. Members of the judiciary will need to be well informed about the new procedures. Court Service estimates that the costs of retraining its staff will be £57,600 including the training of its 600 enforcement agents. Retraining of other enforcement agents will also be necessary to guarantee that they are all aware of the new regulations and that they abide by them from the implementation date. There are approximately 2,500 enforcement agents who will be applying for licenses to undertake enforcement work, all of whom will need to be trained in the new procedures. There will be a further 900 applicants likely to come from Public Sector enforcement agents. Training of these agents will take two days and will cost £250 per day, resulting in an overall cost of approximately £1,700,000. The Security Industry Training Organisation (SITO) is introducing an NVQ for Enforcement Agents

and therefore any changes to this will be borne by SITO. The cost estimates referred to above cover all aspects of the new legislation which apply to the actions of enforcement agents and the judiciary. It has not been possible to disaggregate these figures to provide an estimate of the training costs for this particular legislative change.

- The voluntary sector will also need to be informed and re-educated to make certain that they are prepared to offer accurate and appropriate advice following the implementation of the new legislation. Citizens Advice and Federation of Independent Advice Centres estimate that there are 10,000 volunteers working in the area of debt advice who would need to be informed of the changes. This would involve amending their current training courses and re-educating those already providing advice in the area of debt enforcement. It is estimated that the organised training will last for one day. This training is free to the volunteers and is funded by the Royal Bank of Scotland, who are the sponsors of the Federation of Independent Advice Centres contributing £1.5 million over two years. This is the amount currently contributed towards training debt advice workers by the Royal Bank of Scotland. It is not known how much extra will be required to cover the new proposals. The new legislation will also need to be publicised to ensure that the general public are fully aware of their rights and therefore the costs of this increased publicity will need to be met. These publicity and training costs cover all the new proposals relating to enforcement agents. It has not been possible to disaggregate the figures to provide an estimate for the publicity costs for this particular legislative change.

## Benefits

### *Option 1: No Change:*

- Creditors are not required to pay up-front fees for information from courts (i.e. the DDO). They are able to continue with their own arrangements in seeking information to enable them to undertake enforcement.
- There is no additional regulatory burden constraining how businesses operate with regard to obtaining information on individuals, apart from pre-existing Data Protection and Human Rights legislation.
- No retraining costs for the judiciary, enforcement agents and advice sector workers.

### *Option 2: Data Sharing between government departments and third party private sector organisations:*

- There will be a net financial benefit to creditors, as they will be able to begin recovering the £600 million worth of unpaid post-judgment debt per annum. A one per cent improvement in payment rate will yield £6 million per annum in benefit. This will be enabled through the use of alternative methods of enforcement, e.g. attachment of earnings, third party debt orders, and by making the most common form of enforcement – the warrant of execution – work effectively. These benefits substantially outweigh the cost of utilising the DDO system and having to pay the up-front fee which will be recoverable upon successful enforcement.
- As a new procedure it is impossible to quantify the benefits offered by the DDO. However, a similar, more limited scheme, put in place under the transfer of warrant arrangements for Magistrates' Courts Committees (MCCs), indicates there are substantial benefits to be gained:
  - 394,600 warrants of execution were issued in 2001. 197,300 (50%) of these were unenforceable. Of these, 85,830 (43.5%) were unenforceable due to incorrect address details. Based on statistics from the

MCC/DWP arrangement through which the Magistrates' Courts can query DWP data to verify address information, 56% of information requests produced new address details. Applying this to the number of civil court warrants unenforceable due to incorrect address details, this means that 42,850 of unenforceable warrants are likely to get new address details. Therefore, creditors can justifiably hold the expectation that the action will be significantly more effective under the DDO regime than previously.

- Access to more appropriate and effective methods of enforcement will, in turn, lead to increased confidence in the justice system, creating the potential for greater use of the courts to settle and enforce debt issues.
- The DDO may also generate a deterrent effect, which should result in greater voluntary provision of information by debtors prior to enforcement. There is potential here to reduce the workload on county courts at the enforcement stage of the civil justice system.

## Summary

Costs of Data Sharing	Benefits of Data Sharing
<ul style="list-style-type: none"> <li>• Creditors pay up-front DDO fee (£75-£200), which is recoverable upon successful enforcement</li> <li>• Intra-Government Data Sharing: Court Service Costs: £500,000</li> <li>• Inland Revenue Costs: £500,000 initial outlay, £500,000 support costs over the next five years</li> <li>• Credit Reference Agency Data Sharing Costs: £100,000-£500,000</li> <li>• One-off training costs (NB these costs relate to all the new proposals, we are unable to break down the specific training costs that attribute to this particular proposal):</li> <li>• Court Service: £57,600 Enforcement Agents: £1.7m Voluntary Advice Sector: £1.5m</li> </ul>	<ul style="list-style-type: none"> <li>• Creditors will have more effective means to recover the debt they are entitled to</li> <li>• Significant net financial benefit for creditors, as there is £600m worth of unpaid post-judgment debt per annum. A 1% increase in recovery will yield £6m</li> </ul>
Costs of No Change	Benefits of No Change
<ul style="list-style-type: none"> <li>• There is currently £600m worth of unpaid post-judgment debt per annum. Additionally:                         <ul style="list-style-type: none"> <li>– 30% of successful claimants receive no part of the sum rewarded to them several months after the judgment</li> <li>– The credibility and legitimacy of the judicial system is undermined if the status quo continues</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• No additional legislative or financial burden on creditors if they require access to information</li> <li>• No additional training costs for the judiciary, enforcement agents or advice sector workers</li> </ul>

## Competition Assessment

185. We believe that the proposal for data sharing between Government departments and third party private organisations (Option 2) may have a significant impact on competition in the markets that make up the enforcement industry. That would occur if the take up of the DDO resulted in an increased use of alternative enforcement methods, and there was a subsequent reduction in the number of warrants being passed to enforcement agents.
186. The enforcement industry is made up of a number of different markets, related to the different debt streams, with varying degrees of competition and concentration in

each. The fact that there are a number of different markets within the industry and that different enforcement agents and agencies have the greater market shares in each, makes it difficult to provide an overall picture of how the enforcement industry functions.

187. There are, however, some general trends that are common across the various markets. Each market generally has three leading firms who together hold about 50% of the market share. There is a large firm in each market, which holds a market share of at least 20%. This indicates that there is a high level of concentration across the enforcement industry.

188. Access to increased and improved information by the creditor, facilitated by the DDO, is unlikely directly to affect the cost structure of enforcement agents. This conclusion arises because creditors, rather than enforcement firms, will bear the burden of paying fees for DDOs. It is not therefore anticipated that the regulation will impose a substantially greater cost burden on some firms than others, or impact disproportionately on new firms looking to enter the market.
189. The proposals may, however, result in a reduction in the workload of enforcement agents. This is because creditors will have improved access to data on debtors, thereby leading to greater use of alternative measures like Third Party Debt Orders, which may then result in fewer warrants of execution being passed onto enforcement agents. With fewer warrants being passed on, there could be a reduction in the number of enforcement firms operating within the industry. However, greater access to up-to-date information on debtors who are subject to warrants of execution is likely to lead to an improvement in the collection rate of debts by enforcement firms and hence an efficiency improvement per case, which may offset the loss from fewer warrants.
190. At this stage, and in the absence of further information, we believe that the proposals under Option 2 may have an impact on competition which may result in some or all of the markets which comprise the debt enforcement industry becoming highly concentrated. In seeking to ascertain the scale of the impact, we would welcome views from stakeholders.
- they will have access to the most appropriate enforcement action in the circumstances, enabling them to recover a greater proportion of money owed. The massive imbalance towards warrants of execution set against their current lack of effectiveness implies that access to more effective forms of enforcement will produce a net financial benefit for the creditor.
192. There is a potential cost to private sector enforcement agents if the existence and use of the DDO achieves the aim of more appropriate enforcement. If fewer warrants of execution are issued, thanks to the increased circulation of accurate information within the enforcement system, there will be a diminished need for enforcement agents. This cost is unquantifiable.
193. This RIA was submitted to the Small Business Service for comment, along with the rest of the proposals for reform detailed in the White Paper. No specific comments were received on the impact of the DDO proposals.

### **Securing Compliance**

194. Organisations that intend to handle the personal data released by the DDO procedure will need to be compliant with the following institutions and regulatory structures:
- Data Protection Act (DPA) (especially information handlers in the Court);
  - The legislation governing the introduction and operation of the DDO;
  - Regulatory Body for enforcement. The powers of this body in relation to enforcement agents will be established in primary legislation.

### **Impact on Small Business**

191. Creditors, many of whom will be small businesses, will bear the up-front cost, and a significant proportion of the risk, involved with making a DDO application. The DDO fee is anticipated to be between £75 and £200, depending on the scope and detail of the enquiry for information undertaken. Although small business creditors will incur costs in the short term:
- they will be able to recover their costs of the enforcement action enabled by the DDO if it is successful;

### **Monitoring and Evaluation**

195. The following organisations and institutions will be involved in the monitoring and evaluation of the DDO policy on an ongoing basis:
- Parliament/Select Committees;

- Regulatory Body. The powers enabling this body to regulate enforcement agents will be established in primary legislation;
- Information Commissioner (DPA compliance).

## County Court Attachment of Earnings Orders – Fixed Tables

### Issue and Objective

196. An Attachment of Earnings Order (AEO) allows a creditor to secure payment of a debt by ordering the debtor's employer to make regular deductions from a debtor's salary, until the debt is paid in full. The outstanding debt must be over £50 and deductions can be made from earnings, pensions and Statutory Sick Pay, but only after tax and National Insurance contributions have been made. Benefits and tax credits are exempt from an AEO. An AEO is not available if the debtor is self-employed.
197. We propose changing the way county court AEOs are calculated by introducing a fixed deduction system to calculate the amount the debtor pays per pay period. This change will mean employers are instructed to deduct an amount as prescribed in a deduction table (fixed table). This process is already in use for council tax AEOs and for civil debt recovery in Scotland.
198. The existing process relies on the debtor's completion of a means form (N56) to calculate a Protected Earnings Rate (PER) and a Normal Deduction Rate (NDR). The First Phase consultation identified that this often leads to unnecessary delay, as some debtors do not return the means form when first requested to do so. If the means form is not returned after 14 days, the court bailiff is required to serve the documents personally on the debtor and this may require several visits to the debtor's address before service can be effected.
199. For an employer, the current process causes difficulties as they are required to check that the PER has not been exceeded following the making of each deduction, and this places an extra burden and responsibility upon them.
200. To resolve such problems, the First Phase of the Enforcement Review proposed the introduction of fixed tables to calculate deductions. This would reduce delays in the current civil debt enforcement procedure, increase its effectiveness, and make it clearer to understand and operate for users. The fixed tables we propose using will be similar to those already used for council tax AEOs.

### Risk Assessment

201. As mentioned above, the requirement for debtors to complete a means form under the current system can result in long delays from the time that an AEO is applied for to the making of a full or suspended order. A sample of all AEOs issued from May 2001 to May 2002 indicated that the average time from the filing of an application to the making of a suspended order took 7.56 weeks, and from application to the making of a full order, 11.60 weeks. In cases where the court receives no response from the debtor, we estimate the time taken will be reduced to 16 working days. This reduction in time is likely to make a significant impact on reducing the overall times of 7.56 and 11.60 weeks. The credibility of the civil justice system is threatened if AEOs are not able to be effectively enforced and creditors may choose inappropriate enforcement methods.
202. At present, if the debtor fails to submit a means form in time, it can take several months for the order to begin, whereas with fixed tables the process can be reduced to just over 14 days, because once the order has been made the employer will be instructed to apply the deduction rate as specified in the tables.
203. There is a risk that if there continues to be delays in the AEO process, that there may be a reduction in the use of these orders made in favour of less effective methods of enforcement, such as warrants of execution. Furthermore, delays to the process will place a burden on the creditor, who will have to wait longer to recover debts owed. Though it is difficult to quantify the total cost to businesses, it is our intention to approach some large creditors to provide an estimate.

204. There is also a risk arising from employers having to check the PER after each deduction. If the PER has been exceeded, and the employer does not detect this, then this may lead to the debtor having to repay more than they are able to do, and may lead to either hardship or further debts being incurred by the debtor. As many debtors may not inform the court or their employer that they are experiencing financial hardship, it is not possible to quantify how often this happens. Fixed tables would eliminate this risk, as there will not be a PER.
205. The fact that the means forms are not verified, often omit important information regarding the debtor's expenditure and do not account for changes to debtor's pay, can mean that debtors either pay too much and so fall into hardship, or that creditors have to wait longer for repayment of their debt.

### Quantification of the issue

206. There were 42,011 full AEOs made in 2001 and 30,461 suspended orders for civil debt recovery in the county court. With the exception of those employed in the Armed Forces and Merchant Navy, potentially any employer may receive an order if an AEO is made against a member of their staff. An AEO cannot be made if the debtor is self-employed.
207. There are approximately 1.5 million employers in the UK, employing 23 million people. Of those, 1.45 million employers have less than 50 employees and about 1 million have between one and four employees.<sup>62</sup> The larger the employer the more likely they are to receive an AEO due to increased probabilities, but this is offset by the fact that the larger employers are likely to have lower compliance costs than an employer with one to four employees.<sup>63</sup>
208. To assist in putting the number of county court AEOs issued each year in perspective, we can compare these figures to those for other AEO procedures. In 2001/02, 316,587 council tax AEOs were issued; in Scotland, for civil debt recovery in 2000, 92,899 arrestments of earnings were made.<sup>64</sup> Marks & Spencer have estimated they currently have 69 county court AEOs, 232 council tax AEOs, 50 Child Support Orders and 64 Scottish Court orders in operation.

### Options

- **Option 1 – No change.** If the proposal to introduce fixed tables is not implemented, the current procedure will remain in place.
- **Option 2 – Introduction of fixed tables to replace the existing AEO process.**

### Benefits

#### Option 1

209. Firms are familiar with the existing process and will not have to incur retraining costs to familiarise payroll staff with the new system or any other additional implementation costs associated with fixed tables.

#### Option 2

210. The proposed change will speed up the time it takes from applying for an AEO to the making of a full order. In cases where no response is received from the debtor, the process will take just over 14 working days. This is because the court will no longer have to wait for the debtor to supply a means form. Users of the new AEO procedure will be able to easily calculate the deduction rates at an early stage. The levels of payment to creditors will be more consistent and will account for changes in the debtor's salary, such as pay rises, bonuses and overtime payments.
211. A sampling exercise carried out comparing the amount of debt repaid on a monthly basis under the current system and the amount which may be paid using fixed tables, indicated that more would be paid under the fixed table process. Therefore, it is estimated that creditors will benefit from a greater monthly repayment of debt, and hence they will be able to recover their debt quicker under the fixed table process. The exercise also indicated that there will be a reduced repayment burden for those on lower incomes under the fixed table system, thus reducing the hardship suffered by debtors on lower incomes having to make repayments beyond their means. It must be emphasised, however, that the final tables have not as yet been

<sup>62</sup> *Review of Payroll Services*, Patrick Carter, November 2001

<sup>63</sup> The research of the Bath Report into Tax Compliance Costs for Employers on PAYE and National Insurance in 1995-96 concluded that compliance costs fell disproportionately on small business: £288 per employee for employers of one to four employees, and a little more than £5 for employers of more than 5,000 employees

<sup>64</sup> Not all local authorities provide this statistical information

determined, and so the tables used in the exercise may not be an accurate reflection of what the final tables will be.

212. Employers will be able to calculate deductions using the fixed tables, as they already do so for council tax. This will remove the need to ensure that the PER set by the court has not been exceeded following a deduction. Businesses will also have one less AEO process to be familiar with as from the employer's perspective, the process will be almost identical to the one already used for council tax. As part of our research work with payroll groups, we will attempt to quantify the potential savings.
213. Court users, which will include a range of businesses, will benefit from the changes, as the existing AEO process will be more effective. This will enable greater success in recovering debts and provide a more viable alternative to the most used method of enforcement, the issuing of warrants.

### Costs

#### Option 1

214. If there continues to be delays involved with AEOs, then this may lead to a reduction in the use of such orders, and increased use of less effective methods of enforcement such as warrants of execution. This may result in a lower rate of debt collection. Creditors will continue to experience delays from the making of an application to the setting up of deductions, and consequently will have to wait longer in order to receive full payment of their debt. It threatens the confidence in the civil justice system.

#### Option 2

215. There will be setting up costs for those businesses that have staff with an AEO made following the introduction of fixed tables. Quantification of the implementation costs for businesses is not possible as there are numerous variable factors to consider, such as the type of payroll system operated by each individual. We have, however, been able to obtain estimated figures for one large employer, Marks & Spencer. Their estimated implementation costs for

changes to payroll software including staffing costs are £3,100, and they currently have 60,000 employees.

216. The implementation costs for Marks & Spencer are likely to be at the higher end as they have an in-house computerised payroll system. Many businesses that use payroll software packages will be able to obtain an update from their software provider at no extra cost, though the manufacturer may have to pass on any additional costs in subscription fees or product prices.
217. Some employers also outsource their payroll to a bureau so they will not be required to make changes to their systems, though the payroll bureau will. The costs to the bureau will be related to staff training/awareness and possible software updates, though these may be provided at no extra cost by the manufacturer. Our research with payroll groups will attempt to estimate these costs.
218. Because we have agreed to base our fixed tables on those already commonly used for council tax, the need for employers to make substantial changes and retrain staff should be minimal. Additional training costs are difficult to quantify, as the level of training will depend on the user's knowledge of AEO procedures. By way of example, Marks & Spencer do not envisage any further training will be necessary.
219. If the introduction of fixed tables proves to be very successful in terms of greater levels of debt recovery and reducing the delays in the process, then it is anticipated that there will be an increase in the use of AEOs. This will place a cost on employers who are responsible for administering these orders, although they will continue to be able to deduct £1 per pay period when an AEO deduction is made to cover this cost.

## Summary

Costs of fixed tables	Benefits of fixed tables
<p>Costs associated with fixed tables are all implementation costs and consist of:</p> <ul style="list-style-type: none"> <li>• Changes to employers payroll systems if they have staff with a new AEO</li> <li>• Training costs for payroll staff</li> </ul>	<p>Reduction in the delay from application to the setting up of payments</p> <ul style="list-style-type: none"> <li>• Creditors receiving more consistent payments</li> <li>• Greater transparency for all users</li> <li>• Greater uniformity of AEO procedures for employers</li> <li>• Easier-to-operate AEO procedure for employers</li> <li>• Reduced administration of AEO for court staff</li> </ul>
Costs of No Change	Benefits of No Change
<ul style="list-style-type: none"> <li>• Employers will continue to have to operate two completely different AEO procedures for county court debt and council tax</li> <li>• Creditors will continue to experience delays from the making of an application to the setting up of deductions</li> <li>• Creditors and debtors will continue to receive inconsistent repayment orders</li> </ul>	<ul style="list-style-type: none"> <li>• Those employers with automated payroll systems will not be required to make changes</li> </ul>

### Devolution

220. The proposed changes will cover county court AEOs made in England and Wales. Scotland and the Channel Isles have separate procedures in place.

### Competition Assessment

221. The proposals are either to retain the current method for calculating AEOs (Option 1) or to introduce a fixed deduction system to calculate the amount the debtor pays per pay period using a fixed table (Option 2). Neither option would have an impact on competition and will not create any significant costs for businesses.

### Impact on small business

222. The introduction of fixed tables should not immediately increase the existing likelihood of a small business receiving an AEO. If, however, the changes improve the effectiveness of the procedure, the use of AEOs may increase over time, as more court users choose the process over other enforcement methods. Any such increase will, however, be balanced against the decline of civil debt work in recent years.<sup>65</sup>

<sup>65</sup> In 2001 the number of claims issued in the county court fell by 7% and in the Queen's Bench Division of the High Court by almost 20% – Judicial Statistics 2001

**Consultation**

- 223. The First Phase of the Enforcement Review received overwhelming support for the proposal to introduce fixed tables.
- 224. A separate consultation was conducted with employers, through the Chamber of Commerce (on advice from the

Small Business Service) and through payroll organisations. The results showed that out of 155 responses, 148 were in favour of the proposed change. The results of our consultation are shown in table 1. Table 2 provides a breakdown of these figures according to the number of employees per business.

**Table 1.** Responses from Chamber of Commerce and payroll organisations

	Number	Percentage
Strongly in favour of introducing fixed tables	48	30.97
In favour	100	64.52
Against	6	3.87
Strongly against	1	0.64
<b>Total Responses</b>	<b>155</b>	<b>—</b>
<b>Total for fixed tables</b>	<b>148</b>	<b>95.48</b>

**Table 2.** Responses by the number of employees per business

No. of employees	1-50	51-100	101-250	250-500	501+
Strongly in favour	7	2	10	7	26
In favour	8	11	15	20	43
Against	1			1	3
Strongly Against			1		
Total per No. of employees	16	13	26	28	72
Percentage of responses by No. of employees	10.32%	8.39%	16.77%	18.06%	46.45%

### **Securing Compliance**

225. Court Service currently produces a handbook for employers, which offers guidance on how to administer any type of AEO. Our discussions with payroll organisations identified that this guidance is considered extremely useful and valued by those that have to operate AEOs. It is our intention to update the handbook for employers, whilst also exploring other ways in which this guidance can be provided and made more accessible.
226. One suggestion is that we provide the guidance on the Internet, and in addition, possibly provide an Internet calculator so that those employers without payroll systems can work out the deduction rates. The creation of such a facility will be dependent on set up and maintenance costs, and further work will be necessary to establish the possible usage of such a service.

### **Monitoring and Evaluation**

227. LCD will conduct monitoring as part of the policy review process.
228. Organisations, which represent employers, and more specifically payroll staff, will be asked for feedback. A working group made up of stakeholders, including payroll organisations, has already been established and their views will be sought regularly, following implementation.

### **Summary**

229. The proposed changes will bring improvements to civil court enforcement and assist in increasing the effective enforcement of judgment debts. Employers with staff who have an AEO against them will be required to operate a procedure which they have expressed they prefer and find easier to operate. By modelling the new process on one already commonly used, employers will have one less process to be familiar with.

## **County Court Attachment of Earnings Orders – Tracking**

### **Issue and Objective**

230. The First Phase of the Enforcement Review identified that creditors find it difficult to track debtors who change employment whilst an Attachment of Earnings Order (AEO) is in place. Consequently, some AEOs may be unsuccessful in recovering the whole debt or subject to significant delay if the debtor changes employment and fails to provide new employment details.
231. Currently, when a debtor changes employment during the life of an order, the court will ask them to provide their new employment details under section 15 of the Attachment of Earnings Act 1971. Section 23 of this Act makes it an offence to fail to comply with section 15, punishable by a fine or up to 14 days imprisonment. The First Phase of the Enforcement Review, however, established that this is rarely used and has little effect.
232. The First Phase therefore recommended the creation of a tracking process, using Inland Revenue employee records to locate the new employment details of a debtor that changes employment whilst an AEO is still in place.

### **Risk Assessment**

233. If the present system continues, there is a risk that the use of AEOs as a method of enforcement will be undermined, and less effective enforcement methods may be chosen such as warrants of execution. There is also a risk to the creditor of not being able to collect debts which are owed to them, as well as incurring costs associated with trying to trace the debtor's new employment details themselves.

### Quantification of the issue

234. There were 42,011 AEOs for civil debt recovery in the county court in 2001.
235. We have not been able to quantify how many attachment of earnings fail or are delayed due to the debtor changing employment as Court Service do not currently hold this information. Responses to the First Phase did identify that this was a concern to creditors and resulted in reducing their confidence of the AEO process. Fifty-three of 67 responses were in favour of a tracking procedure. We will be approaching some large creditors to attempt to quantify the cost to them of failed or delayed AEOs due to the debtor changing employment.
236. The Office of the Deputy Prime Minister and the Child Support Agency have also stated they have an interest in tracking as they have identified a clear benefit to their AEO procedures. In 2001/02 at least 316,587 council tax AEOs were issued.

### Options

- **Option 1 – No change.**
- **Option 2 – Introducing a tracking procedure.**

### Benefits

#### Option 1

237. There will be no additional implementation costs to businesses, charities and voluntary organisations.
238. The setting up and running costs of a tracking procedure to LCD would not be undertaken.

#### Option 2

239. Court users will be provided with, if they choose, a more effective AEO procedure. This will result in higher levels of debt recovery and reduce the amount of unpaid debts. If the tracking process proves to be successful in tracing debtors who change employment whilst an AEO is in

place, this will strengthen the credibility of AEOs as an enforcement procedure, and so may lead to greater use of AEOs as opposed to other enforcement methods. This may result in greater recovery of unpaid debts.

### Costs

#### Option 1

240. There will be a continuing cost to creditors who are unable to recover debts owed to them when a debtor changes employment and does not inform the court. It is not known what level of debt this is associated with. Those creditors who choose to try and trace debtors' employment details once the court has lost contact with them, will continue to incur costs of doing this.

#### Option 2

241. LCD/Court Service will pay for the implementation costs of tracking. If other Government Departments wish to use the procedure, they may share these costs.
242. We have already undertaken a high-level feasibility study, which considers how such a link between existing court and Inland Revenue systems may work based on existing systems. The study has indicated that a computerised link is possible and that the set up costs are likely to be in the region of £500,000 at current prices.

## Summary

Costs of tracking	Benefits of fixed tables
<p>Costs associated with fixed tables are all implementation and running costs to LCD/Court Service:</p> <ul style="list-style-type: none"> <li>• Creating a tracking process, estimated at £500k</li> <li>• Running costs, estimated at £500k over three years</li> </ul>	<ul style="list-style-type: none"> <li>• Increased effectiveness of the AEO procedure</li> <li>• Improvement in court user confidence of enforcement process</li> <li>• Greater debt recovery</li> </ul>
Costs of No Change	Benefits of No Change
<ul style="list-style-type: none"> <li>• Cost of non-recovered debt following the failure of an AEO when a debtor changes employment and does not inform the court</li> </ul>	<ul style="list-style-type: none"> <li>• Set up costs to LCD/Court Service would not be incurred</li> </ul>

### Devolution

243. The proposed changes will cover county court AEOs made in England and Wales. Scotland and the Channel Isles have separate procedures in place.

### Competition Assessment

244. The proposals are either to retain the existing AEOs in their current form, or to introduce a tracking procedure to locate the new employment details of a debtor who changes employment whilst an AEO is in place. Neither option will have an impact on competition and will not create any costs for businesses.

### Impact on small business

245. AEO tracking will not directly impact on small business. Small businesses as court users will benefit if they choose to enforce a judgment by way of an AEO.

### Consultation

246. The First Phase of the Enforcement Review received overwhelming support for the proposal of tracking. Fifty-three of 67 responses were in favour and the majority of those against were from debt advice groups.

### Securing compliance

247. There will be no requirement to secure compliance.

### Monitoring and evaluation

248. The use of tracking will be monitored and reviewed as part of our evaluation process. Evaluation work will be conducted by LCD to establish the use and effectiveness of tracking.

### Summary

249. The proposed changes will bring improvements to civil court enforcement and assist in increasing the effective enforcement of judgment debts.

## Charging Orders

### *Issue and Objective*

250. The First Phase of the Enforcement Review identified the need for changes to the charging order process. A charging order is a means of securing a debt by placing a charge onto the debtor's immovable property, particularly a house or land, although it can also be used against shares. We propose to make procedural changes to the charging order process to help the system run more smoothly.

251. The changes will include:

- Making a charging order available in cases in which the debtor is not in arrears with an instalment order;
- Enabling a debtor to make an application to the court to remove a charging order in certain circumstances;
- Including a power for the Lord Chancellor to set financial and/or procedural limits on charging orders.

252. These changes will have no financial impact on business, charities or individuals.

# Annex 2

## Terms of Reference



# Annex 2 Terms of Reference

The Lord Chancellor announced the Review of Enforcement in March 1998:

- to examine the present methods available for enforcement of county court and High Court judgments, to assess their effectiveness, identify the reasons for any ineffectiveness, to identify what changes would be necessary to enhance the effectiveness of the current methods of enforcement; and to make costed recommendations;
- to examine the information, advice and assistance currently available to creditors and debtors, to identify what changes would be necessary to enhance the effectiveness of the current methods of enforcement; and to make costed recommendations;
- to review the powers of bailiffs (county court and private sector) to determine what changes to their powers would be needed to enhance the effective enforcement of civil court judgments and to increase uniformity; and to make costed recommendations;
- to consider what amendment is needed for the successful implementation of section 13 of the Courts and Legal Services Act 1990; and to make costed recommendations;
- to consider whether, and if so how, the present power to distrain for rent should be abolished (as recommended by the Law Commission); and to make costed recommendations.

## *Phase Two of the Review*

The second phase of the review commenced in June 2000:

- to identify, in the light of the amended procedures and revised powers of bailiffs, the type of agent(s) or form of agency which should be responsible for carrying out those enforcement procedures; and to make costed recommendations;
- to implement those recommendations accepted by the Lord Chancellor (including a unified set of Rules of Court for enforcement);
- to gather the necessary data to make comparisons between the current and revised methods of enforcement and to evaluate the effectiveness of the project.

## *Broadened scope of the Review*

On 6 March 2001, the Lord Chancellor announced a broadened scope for Phase Two of the Review, to look at structures for, and regulation of, civil enforcement agents generally, not just those within the High Court and county courts. The Government has been considering whether a new structure for, and regulation of, warrant enforcement agents in the civil courts could be extended to provide a common system across **all** enforcement including parking charges, fines, breaches of community sentences, local and national taxes and duties, maintenance and child support.



# Annex 3

## Glossary



# Annex 3 Glossary

**Abandonment:** If an enforcement agent fails to maintain possession of the goods, they are then 'abandoned'. Failing to remain in possession of the goods, the enforcement agent loses any right to return and remove them. Any abandonment, however urgent and necessary, must be satisfactorily accounted for if the enforcement agent is to retain the rights.

**Certificated Enforcement Agent:** Private enforcement agents who may enforce commercial rent recovery (previously known as distress for rent), road traffic penalties or council tax must be in receipt of a certificate, granted under the Law of Distress Amendment Act 1888, as amended by the Law of Distress Amendment Act 1895. This is granted by a county court judge, who must be satisfied that the bailiff is a 'fit and proper person' to hold such a certificate.

**Close possession:** Where the debtor signs an agreement which allows the enforcement agent to stay on the premises with the goods until payment is made or the goods are removed for sale.

**Conversion:** This means that there has been a wrongful act of interference that deprives the owner of rights over their goods. So wrongfully taking goods into possession is conversion.

**Common Law:** Law as laid down in decisions of courts rather than by statute.

**Commercial Rent Recovery:** The name that will be replacing 'Distress for Rent'.

**County Court bailiff:** County court bailiffs are civil servants employed by the Court Service. Their duties include warrants of execution for debts that have arisen as a result of a county court judgment.

**Creditor:** A person/organisation to whom money is owed.

**Damages:** Money claimed by a claimant from a defendant as compensation for harm done or money awarded by a court as compensation to a claimant.

**Data Disclosure Order:** Court-based, post-judgment mechanism for the compulsory disclosure of information on the judgment debtor by third parties from the public and private sectors.

**Debtor:** A person who owes a sum of money – this may be a judgment debt or a criminal financial penalty which is in default, or a liability order.

**Distrain/Distrain/Distress:** To seize goods to pay for debts. Taking someone's goods to pay for debts.

**Enforcement:** This term refers to all actions used to obtain payment of a judgment debt, parking charges, magistrates' courts fines and penalties, local and national taxes and duties, commercial rent recovery, maintenance and child support which has not been paid voluntarily.

**Enforcement Agent (Bailiff):** Someone who is responsible for the enforcement of court orders (warrants of arrest, distress and execution). Included are all those employed in the public and private sectors, bailiffs, sheriffs' officers and distrainers.

**Execution:** The carrying out of a court order or the terms of a contract. Specifically, the seizure and sale of goods belonging to a debtor under the order or judgment of a civil court. It can also be used as a verb, e.g. 'the execution of a distress warrant'.

**ECHR:** The European Convention on Human Rights.

**Illegal action:** An enforcement action will be illegal if it was wrongful from the outset. This will occur if the enforcement agent did not have the right to distrain, or if he or she committed a wrongful act at the beginning of the levy which invalidated the subsequent proceedings.

**Impounding:** This is the process by which bailiffs obtain legal control over the goods which they have seized. In other words, the process of impounding gives the bailiff the power to return to the premises, remove and sell the goods. Goods could be

impounded by immediate removal, by securing on the premises in a suitable place, or by leaving a bailiff in 'close possession' of the goods – i.e. on the premises. However, by far the most common method of impounding is 'walking possession'.

**Irregular action:** An enforcement action will be irregular if the levy was carried out correctly but the distrainer subsequently does something unlawful.

**Levy:** This word levy is generally used to refer to the process whereby a debtor's goods are seized and impounded; strictly, it comprehends the whole process of enforcement up to and including sale.

**Replevin:** Action brought to recover possession of goods which have been seized, in an illegal levy of distress; and subsequently to prove that the seizure was illegal.

**Rescous/Rescue:** This refers to an interference with goods that have been seized but not impounded.

**Seizure:** For practical purposes this term describes the seizure of goods by listing on an inventory and by taking walking possession.

**Third Party Debt Order:** Method of enforcement used by creditors to secure the payment of an outstanding judgment debt by freezing, then seizing money owed by a third party to the debtor in order to pay the judgment debt. The debts targeted are usually within institutions such as banks and building societies.

**Walking Possession:** Where the debtor signs an agreement which allows the goods to stay on the premises without supervision until payment or the goods are removed for sale.

**Warrant:** As in 'Warrant of distress', 'warrant of execution' – the authorisation which allows bailiffs to carry out the processes of distress or execution. This includes writ of execution.

As set out in the Warrant Enforcement Law Chapter, one of the aims of the new legislation is to replace the old fashioned language that relates to enforcement law. Therefore words such as distress, distraint, execute and walking possession will no longer be used. **Taking legal control of the goods** will replace these words.

Annex 4

# The Consultation Process



# Annex 4 The Consultation Process

- Enforcement Review Consultation Paper 1: *How can the enforcement of civil court judgments be made more effective?* June 1998. No reference number. Published by the Lord Chancellor's Department (LCD).
- Enforcement Review Consultation Paper 2: *Key principles for a new system of enforcement in the civil courts.* May 1999. Reference number: CP6/99. Published by LCD.
- Enforcement Review Consultation Paper 3: *Attachment of Earnings Orders, Charging Orders and Garnishee Orders.* October 1999. Reference number: CP 9/99. Published by LCD.
- Enforcement Review Consultation Paper 4: *Warrants and Writs, Oral Examinations and Judgment Summons.* January 2000. Reference number: CP 10/99. Published by LCD.
- Professor J Beatson QC, University of Cambridge Centre for Public Law, *Independent Review of Bailiff Law.* June 2000. No reference number. Published by LCD.
- *Report of the First Phase of the Enforcement Review.* July 2000. No reference number. Published by LCD.
- Enforcement Review Consultation Paper 5: *Distress for Rent.* May 2001. Reference number: CP 6/01. Published by LCD.
- *Towards Effective Enforcement: A single piece of bailiff law and a regulatory structure for enforcement.* Green Paper, July 2001. Reference number: ISBN 0-10-150962-6. Published by The Stationery Office Ltd.
- *Report of the Advisory Group on Enforcement Service Delivery.* December 2001. No reference number. Published by LCD.
- *Effective Enforcement: National Standards for Enforcement Agents.* April 2002. No reference number. Published by LCD.
- *Distress for Rent – Response to consultation.* April 2002. Reference number CP(R)13/01. Published by LCD.
- *Towards Effective Enforcement: A single piece of bailiff law and a regulatory structure for enforcement – Response to consultation.* May 2002. Reference number: CP(R) 00/02. Published by LCD.
- *Second Report of the Advisory Group on Enforcement Service Delivery – Warrant Enforcement: Towards a new Fee Structure.* August 2002. No reference number. Published by LCD.
- *Report of the Lord Chancellor's Advisory Group on Enforcement Service Delivery – High Court Enforcement: The Compelling Need for Change.* August 2002. No reference number. Published by LCD.