



**Law
Commission**
Reforming the law

Enforcement of Family Financial Orders

Executive Summary

Consultation Paper No 219 (Summary)

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GLOSSARY AND ABBREVIATIONS

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

“Attachment of earnings order”: an order addressed to the debtor’s employer that requires a certain sum to be paid to the court out of the debtor’s regular wages; that money is then forwarded to the creditor.

“Charging order”: an order that secures the debt against an asset of the debtor, usually land, so that when that asset is sold, the creditor may recover the money owed.

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

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

“Coercive (methods of enforcement)”: methods of enforcement that put pressure on a debtor to pay or meet their obligation.

“Consolidate (legislation)”: to replace several statutes or parts of statutes with one comprehensive statute.

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

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

“Execute (documents)”: to complete documents, including signing them, so that they take effect.

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

“Financial statement”: evidence about the financial circumstances of the person making the statement, to be provided in a standard form.

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

¹ Civil Procedure Rules 1998, SI 1998 No 3132.

² Family Procedure Rules 2010, SI 2010 No 2955.

“General enforcement application”: an application by the creditor for the court to choose the most appropriate method of enforcement after inquiring into the debtor’s financial circumstances. It is formally called an “application for an order for such method of enforcement as the court may consider appropriate” and is found in the Family Procedure Rules at rule 33.3(2).

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

“Legislation that is not in force”: legislation that has been passed by Parliament and received royal assent but has not yet been brought into effect.

“Mediation”: a form of ADR where the parties are supported in considering the issues and reaching agreement by a neutral third party.

“Order to obtain information”: an order requiring the debtor to attend court to provide information for the purpose of enabling the creditor to enforce an order against him or her.

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

“Privilege against self incrimination”: a general right of individuals to not be forced to give any evidence that might incriminate them in ongoing or potential criminal proceedings.

“Third party debt order”: an order addressed to a third party who owes money to the debtor, such as a bank holding an account in the debtor’s name, that requires the third party to pay that money to the creditor instead of to the debtor.

“Unless order”: an order that certain steps will or will not be taken in proceedings dependent on the debtor complying with a particular order. For example a **“Hadkinson order”**, which precludes a debtor who is in breach of a court order from being able to make representations to the court until he or she has taken certain steps to comply with the order.

“Writ ne exeat regno”: an order restraining an individual from leaving the jurisdiction.

ENFORCEMENT OF FAMILY FINANCIAL ORDERS

EXECUTIVE SUMMARY

OUR PROJECT AND ITS OBJECTIVES

Enforcement and family financial orders

- 1 Our project is about the enforcement of court orders for the payment of money, or the transfer of property, between family members, which we call “family financial orders”. It is not about how much people should have to pay; it is about how to ensure that payment is made once a court order is in place.
- 2 Family financial orders are most likely to arise on the ending of marriage or civil partnership, which almost always requires some financial re-organisation between the two adults involved. A court order will be made where the parties have been unable to agree on how their finances should be organised and a judge has had to make the decision. An order should also be made where the parties have been able to agree; a court order not only records the agreement but also, and most importantly, enables enforcement if necessary.
- 3 In cases where the parents cannot agree between themselves, the payment of child maintenance is largely administered by the Child Maintenance Service. Payments due in that way are not the subject of court orders and so are outside the scope of our project. However, in certain circumstances parents (whether married or not) will be ordered to make payments for the benefit of a child, and enforcement of those orders does fall within this project.
- 4 Enforcement is an often overlooked area of the law, especially in family proceedings. Once the litigation is at an end or agreement has been reached and the court order is made, there is a tendency for people to think that the process is all over and the matter is finished. Of course, that should be the case; the parties should comply with their obligations and be able to move on with their lives. But sometimes, for any number of reasons, people do not comply and then the rights and benefits secured under the order become practically meaningless unless there is an effective way of enforcing them. For family financial orders, the law of enforcement can be essential for ensuring that people receive what they are due.
- 5 Family financial orders can take many forms, and can include orders for periodical payments, orders for one-off payments and orders for the transfer or sale of property. The variety of orders that may be made and the need to address the individual circumstances of each family means that the system of enforcement needs to be flexible and provide a range of options for creditors and for the courts.

- 6 In our Consultation Paper we consider possible reforms to existing methods of enforcement to make them more effective. We also consider the introduction of new methods, in particular tools for obtaining information about the debtor's finances and coercive methods to target the debtor who can pay but refuses to pay. We look at the legislative framework of the current system and ask whether the structure of the legislation, or the rules of court, could be improved. We are aware that some of the difficulties surrounding enforcement arise due to a lack of information and understanding about the system; we consider what can be done to assist practitioners and the judiciary, to better inform the public and to help people who use the court system without legal representation ("litigants in person").

Enforcement in the family law context

- 7 Much of the law of enforcement that applies to family financial orders applies equally to the enforcement of other civil orders (for example, for the payment of debt or damages), though there are some differences. Our project considers enforcement only in the family context. We think that different considerations arise in family law that make it desirable to consider this area separately. Some of the provisional proposals that we make stem from reforms that already appear in legislation, but are not yet in force. The legislation was designed to apply to the enforcement of all civil orders, but we think that some of the reforms would be particularly useful for the enforcement of family financial orders and should be brought into force for that purpose.
- 8 The potential impact of non-payment of family financial orders makes them different from other civil debts such as money owed to a business. They are usually designed to provide financial support for the creditor and any children in his or her care; non-payment by the debtor means those needs are not met and has the potential to cause real hardship. Unlike other civil debts, family financial orders are made bearing in mind the debtor's ability to pay. A further consideration in the family context is that some orders may endure for a long time, for example orders for periodical payments. As the parties' circumstances change, either may apply to vary the order. The potential for the debtor's liability to change is an important consideration when thinking about enforcement – there may be no point in a creditor bringing costly enforcement proceedings if the circumstances mean that the order will be varied.
- 9 In addition, there are many emotions at play in family proceedings, which may not feature, or may not feature so prominently, in other civil proceedings. These emotions can influence the reasons for non-payment by debtors, the action or inaction taken by creditors, and the direction and progress of enforcement proceedings. Often the creditor and debtor will have an on-going relationship as parents to their children; misconceived or ineffective enforcement litigation can do great damage to that relationship. Care needs to be taken, therefore, to ensure that both parties have the necessary information to make good choices about enforcement and that if proceedings are started they are fair, and as efficient and effective as possible.

An effective system of enforcement

- 10 The topic of enforcement of family financial orders was recommended to us as a project by the Family Law Bar Association in 2010. It described the law of enforcement as “hopelessly complex and procedurally tortuous” and argued that the current system is ineffective. That Association has not been a lone voice in making that argument; there is a general feeling amongst those involved in family law that the current system of enforcement does not achieve its aims.
- 11 We have considered what the aims of an effective system of enforcement should be. We think that an effective system is one which produces compliance with a court order in a way that is fair to both parties. To ensure that a fair balance is struck, there is a need to distinguish between the debtor who “won’t pay” and the debtor who “can’t pay” and to treat them differently. Our questions and the provisional proposals that we make are written with these considerations very much in mind.
- 12 In respect of debtors who will not pay, the system needs to equip creditors with the information and tools they need to stand the best chance of recovering what they are owed. That may mean bypassing the debtor and obtaining the money or property directly in another way, or it may mean putting pressure on the debtor to comply. For those debtors who cannot pay, the system needs to ensure that they will not be punished for involuntary non-compliance; the new coercive methods of enforcement that we propose have safeguards to protect those who genuinely cannot pay (despite the fact that the order was originally judged to be within their means – perhaps because of a change in circumstances). In addition, we recommend introducing a free-standing power for judges to remit (that is, to cancel) arrears of periodical payments. At present, the court can only do this where there is an application to vary the order, which does not assist a debtor who does not seek to vary but was unable to meet the order for a certain period of time, perhaps due to unemployment.

INFORMATION AND ACTION

Information about the system

- 13 It is important that the law of enforcement is accessible and understandable to both legal professionals and litigants in person. It is desirable that all creditors and debtors have a good understanding of the options available to them and of the rules which govern the proceedings, but for those acting without legal representation such an understanding is essential. The recent changes to legal aid for private family law proceedings mean that more people than ever will choose to, or have to, act by themselves in enforcement proceedings.

Rules and legislation

- 14 The rules governing enforcement are found in statutes and in family and civil rules of court; they are not all in one place. We are aware that there is some desire for a single piece of legislation and a single set of procedural rules capturing all of the relevant law. On balance, we do not, at this stage of the project, think that there is a pressing need to consolidate legislation in this area – there are relatively few statutes that apply as most of the law governing enforcement is within the rules of court. The statutes that do apply, apply generally across civil proceedings and therefore any consolidation is likely to go beyond the enforcement of family financial orders and beyond the boundaries of our project. However, we do ask for views as to whether the need to refer to both the Family Procedure Rules and the Civil Procedure Rules, and occasionally to older rules of court, gives rise to problems; we consider whether a comprehensive set of family procedure rules would improve the situation.

Information for litigants in person and the public

- 15 Information for litigants in person and the public in general needs to explain the rules and legislation in a way which is understandable to a non-expert audience. There are some resources available both in print and electronically, for example Her Majesty's Courts and Tribunals Service ("HMCTS") publish a leaflet (Form EX327) setting out the options available to a creditor if a maintenance order is not being paid. However, the guidance is not comprehensive and it is not easy for creditors to find the relevant guidance if they do not know the name of the leaflet or its form number. There may not always be court staff who are available to assist. Aside from the leaflet relating to unpaid maintenance orders, most of the information available from the courts is not specific to family law and makes use of the legal terms used in other civil proceedings, which can cause confusion.
- 16 Overall, we think that the provision of information by Government could be improved. We consider whether guidance about enforcement should be issued to both parties at the time the original order is made, and propose that any published information be available in both electronic and paper format.
- 17 While comprehensive written guidance will help, advice in person is likely to be the preferred option for most litigants. The courts in California employ lawyers who act as "family law facilitators" and all courts have a self-help centre with lawyers who can provide free legal help. There is no lawyer-client relationship – the lawyer works for the court and is there to assist and give advice to both parties. We suggest that consideration is given to supporting a similar scheme here. The provision of legal advice to both parties should mean that enforcement proceedings run more smoothly, or it may mean that the parties are able to avoid court proceedings altogether.

Guidance and training for legal professionals

- 18 We understand that many legal practitioners are rarely instructed in enforcement matters and that the number of enforcement cases varies between courts, meaning that some judges only deal with enforcement infrequently. We think it is important that enforcement is not overlooked in practitioners' training and continuing professional development, and we ask for views as to what might be done to improve this issue. We consider the idea of appointing a judge in each court, or each family court area, with particular responsibility for overseeing enforcement.

Information about the debtor

- 19 Enforcement is much more likely to be successful if the creditor has reliable information about the debtor and his or her financial circumstances. A creditor who knows something about the debtor's job, property and bank accounts is more likely to be able to target enforcement at existing and accessible assets. The family creditor is often at an advantage compared to other civil creditors as the nature of the relationship between the parties, and the disclosure requirements in family financial proceedings, mean that the family creditor is likely to have some knowledge of the debtor's circumstances. However, if, for example, enforcement is sought a long time after the end of the parties' relationship or the financial proceedings, then the creditor may not have enough information to make informed decisions.

Current law

- 20 At present, a creditor who lacks information about the debtor's circumstances has two options available: an order to obtain information or a general enforcement application. The latter puts the choice of the method of enforcement in the hands of the court and as a necessary first step the debtor is required to attend court, produce documents and answer questions. The order to obtain information requires the same of the debtor, but without the court taking responsibility for imposing a method of enforcement; it is an information-gathering exercise only. The general enforcement application is relatively new and we ask for views as to how it is working in practice and whether it could be improved; we ask the same questions in respect of the order to obtain information. The difficulty with both of these methods is that they rely on the debtor to engage with the process and to provide the information.

Information requests and information orders

- 21 To improve the provision of information, we consider two legal tools that bypass the debtor: information requests and information orders. Both are contained in the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") but neither is currently in force. We ask for views as to whether the orders should be brought into force to be used in relation to family financial orders. In their current form, information requests would be addressed to Government departments or to Her Majesty's Revenue and Customs ("HMRC") and could seek the debtor's full name, date of birth, address, national insurance number and other information to be set out in, as yet un-made, regulations. If the request were directed to HMRC it could also request information about the debtor's employment. Information orders would be aimed at private organisations such as financial institutions or credit agencies, and could seek information about a debtor's bank or building

society accounts.

- 22 In their current form, the rules governing information requests and information orders do not envisage the information that is obtained being disclosed to the creditor. The rules foresee the court making use of the information to assist the creditor and facilitate enforcement. We ask for views on whether, in the family law context, the information could or should be disclosed to the creditor. On the one hand, this intrudes on the privacy of the debtor and offends the idea of the parties moving on and living separate lives, which is an aspiration of the law in this area. On the other hand, it may be the most effective use of the information and family law creditors are likely to already have some knowledge of the debtor's personal circumstances.

A financial statement

- 23 In addition to considering information requests and information orders, we propose that on every application for enforcement the debtor should be required to complete a financial statement. At present, only in a general enforcement application and on an application for an attachment of earnings order is the debtor required to provide any financial information at the outset of the proceedings. The statement we propose would provide a snapshot of the debtor's circumstances, which, if accurate, should facilitate the proceedings. The statement would also provide an opportunity for the debtor who really cannot pay to make his or her position known.

Enforcement by the court

- 24 A creditor who decides to enforce an order has to choose the best way to do so. Where an order is for periodical payments, one option open to the creditor is to ask the court to enforce the order on his or her behalf. Before the creation of the single Family Court, a periodical payments order made in the High Court or the county court could be registered in the magistrates' court for collection and, if necessary, enforcement. Although there is now no provision for the registration of orders in a magistrates' court, there is a power to order that periodical payments must be paid into the Family Court, and if they are not paid the creditor can request that the court takes proceedings to enforce the order.
- 25 We do not know how often the power to direct that payments be made into court, and the subsequent option of enforcement by the court, is used, and we have limited information about how it operates in practice. We think there may be little awareness that this is an option available to the creditor. We ask for views on this system of enforcement by the court and whether it could be improved or extended. At present, the facility is available only for the collection and enforcement of periodical payments.
- 26 As mentioned above, the general application for enforcement asks the court to choose the best method of enforcement following an inquiry into the debtor's financial circumstances. If working well, this should be a very useful tool for creditors who lack information about the debtor, or about the options for enforcement, and in particular for creditors acting without any professional legal assistance. Through our consultation we hope to gain a better understanding of how this method of enforcement is working in practice and what, if any, difficulties are arising.

Case management and the courts' powers

- 27 Effective case management and good use of the courts' powers both at the time the original order is made and on any application for enforcement can maximise the chances of compliance with the order. At the time of an enforcement application, the creditor is likely to be suffering from the negative financial effects of the debtor's non-compliance and may not have the resources for more than one shot at enforcement. As a result, case management needs to be robust.
- 28 We consider whether enforcement applications should be reserved to particular judges who have experience in enforcement, or to the judge who made the original order. We do not make proposals to reform the rules for distribution of business between judges, because these rules only recently came into force,¹ but we welcome views on the issue. We consider the case management tools of "unless orders" and "Hadkinson orders" for ensuring that debtors constructively engage with proceedings, and we ask whether there is anything more that could be done by the use of the courts' existing powers.
- 29 A more proactive approach at the time of making the original order may mean that issues of enforcement do not later arise, or that difficulties are resolved by the terms of the original order. We consider some of the steps that might be taken by the court to assist future enforcement, for example making an immediate or suspended attachment of earnings order to recover periodical payments, making explicit provision for interest to accrue on unpaid debts, or making provision for a district judge to execute necessary documents if a party fails to do so. These powers are all currently available; a cultural change to encourage courts and practitioners to think more about ensuring compliance at an early stage may be as helpful as law reform.

Alternative dispute resolution

- 30 The merits of (and the difficulties with) alternative dispute resolution ("ADR") are well known – we consider the utility of ADR in the context of enforcement. An applicant in family financial proceedings must show that he or she has considered the suitability of mediation before making an application to court for a financial order. There is no similar requirement for an applicant beginning enforcement proceedings and we think that is right. Many cases of enforcement will not be suitable for mediation (or any other kind of formal ADR) – enforcement proceedings, by their very nature, are likely to involve entrenched positions. However, there may be some cases, especially those where the underlying order is subject to variation, where encouraging the parties to attend mediation could help. At present, the court can make an order requiring the parties to consider methods of ADR for resolving the case and warning them of the potential costs consequences of unreasonably refusing to do so. We consider whether a further power would be useful: should the court be able to adjourn enforcement proceedings without the parties' consent with the intention that they make use of ADR? We ask for views.

¹ The rules came into force on 22 April 2014.

GETTING THE MONEY

Improving existing methods of enforcement

- 31 Most methods of enforcement are aimed at achieving the direct payment of money or transfer of property in a way which bypasses the debtor. This will only work if the creditor or the court has the necessary information to decide whether the debtor has the means to comply with the order (is the debtor a "won't pay" or a "can't pay" debtor?) and if so, where to target enforcement. Once that information is in place the methods of enforcement available need to be as efficient and effective as possible.

Third party debt orders

- 32 A third party debt order can be a useful enforcement tool when the creditor knows that a third party owes money to the debtor – the third party could be an individual or an organisation, including a bank or building society, and in that case the debt will be the funds in the debtor's account. In those circumstances the creditor can apply for an order directing the third party to pay the debt to the creditor rather than to the debtor. We consider a range of options for improving this facility, including:

- (a) streamlining the application procedure;
- (b) enabling third party debt orders to apply to joint accounts; and
- (c) introducing periodical third party debt orders.

STREAMLINING

- 33 A third party debt order is made in two stages; first an interim order and then a final order. An interim order is usually considered without any court hearing and if the order is made then the debt owed by the third party to the debtor is frozen and the third party must not make any payments to or on behalf of the debtor from that frozen debt. Following the making of an interim order, the debtor and the third party (and the creditor in certain circumstances) have the opportunity to make representations and file evidence before the final hearing, when a judge will consider whether to make a final order. If a final order is made then the third party must pay the debt (either in part or in full) to the creditor.

- 34 We provisionally propose that this process be streamlined so that a final order is made without a court hearing unless any objection is raised by the debtor or third party following receipt of the interim order. It is thought that streamlining could lead to faster payment and save court time; members of the judiciary consulted as part of a Government consultation into civil justice in 2012² took the view that judicial consideration was only necessary at the interim stage and that most final hearings were administrative in nature. Provision for the streamlining of third party debt orders is contained in the 2007 Act but is not in force. The rules provide that an interim order is made by a judge and a final order by a court clerk. We appreciate that third party debt orders can give rise to financial difficulties for the debtor and so any streamlined process would need to ensure that the debtor and the third party were aware of their opportunity to make representations and request a hearing if necessary.

JOINT ACCOUNTS

- 35 At present, third party debt orders addressed to banks or building societies can apply only to accounts held in the debtor's sole name;³ this means that debtors can shield funds from enforcement by placing them in joint accounts. There are obvious difficulties in extending the reach of third party debt orders to joint accounts, in terms of fairness both to the other account holder(s) and to the third party bank or building society who will owe duties to all of the account holders. However, we feel that it is a gap in the current law that needs to be considered.⁴
- 36 Any such development would have to protect the other joint account holder so as to ensure that only the debtor's money is taken to pay the debt. An obvious starting point would be that 50% of the joint account should be deemed to belong to the non-debtor and be protected from the order; but of course both parties and the joint account holder would have the opportunity to show that the starting point was wrong.
- 37 We ask for views as to whether third party debt orders should be extended to joint accounts, and if so whether any streamlined process (as discussed above) should apply. Even if joint accounts were not subject to third party debt orders, we ask whether banks or building societies should be obliged to disclose the existence of joint accounts when served with an interim order; currently that obligation extends only to accounts in the debtor's sole name.

² Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: a consultation on reforming civil justice in England and Wales: the government response (2012) Cm 8274.

³ Unless both joint account holders are debtors of the creditor in relation to the same debt.

⁴ There is a power in legislation (s 32E(2)(b) of the Child Support Act 1991) not yet in force, for the Child Maintenance Service to make orders against joint accounts when enforcing assessments for child support using the equivalent of third party debt orders.

PERIODICAL ORDERS

- 38 We consider the introduction of periodical third party debt orders. We envisage such orders being used where a debtor is periodically owed money by a third party, for example for work done by the debtor as a contractor, or where the debtor periodically owes money to the creditor, for example under a periodical payments order. At present, third party debt orders are only effective where the debt owed by the third party to the debtor is already in existence, so that, for example, money coming into the debtor's bank account after the order is made is not caught by the order. A periodical third party debt order would allow the creditor to recover such funds as and when they become owing to the debtor, without any further application.
- 39 A periodical third party debt order would also enable a creditor to enforce a periodical payments order, or an order for a lump sum by instalments, without having to make a new application every time a periodical payment, or instalment, was due. Such an order could take effect against a capital sum owed by a third party to the debtor and "bite" periodically.
- 40 We consider whether, to safeguard the debtor, there should be a minimum protected balance below which a debtor's funds could not be depleted by a third party debt order. In addition, we discuss whether there should be an obligation on banks and building societies served with a third party debt order to disclose statements from the debtor's accounts. We ask for views on both of these points.

Charging orders

- 41 Charging orders are amongst the most frequently used methods to enforce civil debts. They do not achieve immediate payment of the money owed, but instead give the debtor the right to recover what is owed when the property which is charged with the debt is sold. Having obtained a charging order, the creditor can seek to speed up recovery of the debt by applying for an order for sale.
- 42 Like third party debt orders, charging orders are made in two stages; interim and final. The interim order is considered without a hearing, and if an order is made at that stage then a hearing is listed to consider whether the order should be made final. The rules allow for any person objecting to the making of a final order to submit evidence prior to the hearing. The 2007 Act introduced a streamlined procedure for charging orders, but the relevant provisions have not been brought into force. The idea is the same as that for third party debt orders: an interim order would be made final without the need for a hearing, unless any objections were raised. In a reversal of the situation for third party debt orders, the rules, as currently drafted, provide that the interim order is made by a court clerk and the final order by a judge. We provisionally propose that the provisions for the streamlining of charging orders be brought into force in relation to family financial orders.
- 43 The assets over which a charging order may be made are land, funds in court and certain securities including Government stock, shares, and units in unit trusts. We consider whether charging orders should be extended to apply to other assets, while bearing in mind that the effectiveness of charging orders depends upon the ability to register the charge; it is therefore not easy to extend the operation of charging orders to assets that have no system of registration.

Attachment of earnings orders

- 44 Attachment of earnings orders are most often used to enforce periodical payments. They can only operate against a debtor who is in employment. The order is addressed directly to the employer who makes a periodical deduction from the debtor's earnings and pays the money into court for onward distribution to the creditor. There can be difficulties when a debtor changes employment: the order lapses when employment ceases with the employer to whom the order was addressed; the order does not revive unless and until it is re-directed by the court to a different (or back to the previous) employer.
- 45 There is a duty on the debtor to provide information about changes of employment, but a debtor who does not wish to pay may not comply with that duty.⁵ We consider the introduction of a tracking system, which would enable the court to request information about the debtor's employment from HMRC. Provision for a tracking system is made in the 2007 Act but is not in force. The rules provide for the court to make a request where the debtor has not volunteered the information and the creditor is not able to provide it. The rules do not provide for the information to be released to the creditor. We ask for views about the introduction of a tracking system and whether the information obtained should be disclosed to the creditor.
- 46 We also consider whether there should be a duty on the court to re-direct orders; at present the court "may" do so. It is likely that the reason for not re-directing any order would be a lack of information about the debtor's new employment; if a tracking system were introduced it should make re-direction easier. We also discuss the idea of a national register of attachment of earnings orders, which may assist creditors, family and otherwise, in determining whether an attachment of earnings order is a good option for enforcement – it is unlikely to be a good option if there are already other such orders in place.

Execution of documents

- 47 The court has power to execute documents on behalf of an un-cooperative debtor. This can be the most effective way to enforce certain orders, for example the transfer of a property. However, the power only applies where the debtor has been ordered to sign a document and has refused or neglected to do so, or where the debtor cannot, after reasonable inquiry, be found. We ask for views as to whether there is any need for change to these conditions, or whether any other reform is needed in this area.

⁵ There is also a duty on the employer to whom the order is addressed to notify the court if and when the debtor's employment comes to an end.

Pensions

- 48 During family financial proceedings, the court has power to make orders against pensions held by the parties. At present, the court has no such powers on an enforcement application. We consider whether those powers should be made available to the court at the enforcement stage. We do not think that the court should have powers beyond those available in the financial proceedings, but we do think that the ability to make the same orders on enforcement may be useful. There are restrictions against multiple orders being made against the same pension in financial proceedings, and we question whether the same restrictions should apply on enforcement.
- 49 The recognition of family financial orders made in other countries is outside the scope of our project, but we do consider one discrete point: we understand that there is a difficulty with giving effect to a foreign pension order that operates against an English pension. English pension providers are usually not prepared to recognise a foreign order; they will only comply with orders made by English courts. However, the parties may have difficulty in obtaining an English pension order because the English court will have no power to make one if neither party is domiciled or habitually resident in this jurisdiction.
- 50 We provisionally propose an amendment to existing legislation so as to enable the English courts to make an order to reflect a foreign order that seeks to operate against an English pension arrangement. We ask for views about that proposal and whether the jurisdiction should be limited, perhaps only to making pension orders or orders to the value of the pension in this jurisdiction.

NEW COERCIVE MEASURES

- 51 Sometimes it is not possible to bypass the debtor and achieve direct payment or the direct transfer of property. Sometimes the only way to enforce an order is to force the debtor to comply. We think that there is scope, beyond the existing measures, for pressure to be brought to bear on those debtors who can pay but are choosing not to pay.
- 52 The only existing coercive measure available for use by creditors is the judgment summons. That is an application for the debtor's imprisonment (or suspended imprisonment) on the basis that the debtor has the means to pay and has refused or neglected to do so. Because a potential sanction is imprisonment of up to six weeks,⁶ the proceedings are considered to be criminal and so a creditor must prove his or her case to the criminal standard of proof; that is, beyond reasonable doubt. The level of proof required, coupled with the defendant's right to silence and privilege against self-incrimination, means that it can be difficult to bring a successful application for judgment summons and many creditors are deterred from trying. This leaves some creditors feeling that there is nothing they can do to put pressure on the debtor to pay.

⁶ The court does not have to commit the debtor even if the court is satisfied that the debtor has had the means to pay and has refused or neglected to do so. The court may order a new date for payment, or specify a means for payment to be made, or make an attachment of earnings order.

53 We provisionally propose three new coercive orders:⁷

- (a) disqualification from foreign travel;
- (b) disqualification from driving; and
- (c) curfew orders.

54 Our provisional proposals are based on the sanctions being civil and not criminal sanctions for the purposes of the European Convention on Human Rights; as a result they do not require the same standard of proof as is needed on a judgment summons. In our Consultation Paper, we consider the human rights implications and explain why we think that these sanctions are civil. The sanctions are designed to be coercive and not punitive; the threat of these sanctions ought to be enough in many cases to encourage compliance.

55 We provisionally propose that a creditor should be able to apply for these orders and that there should be a power to suspend the orders to allow time for compliance. We do not think it would be right to insist that the creditor has attempted other methods of enforcement before making an application for a coercive order. The circumstances of the case may be such that no other method of enforcement would be likely to work and so such a requirement would be unfair to the creditor and inefficient. However, we do propose that the availability and likely success of other methods be a consideration for the court when determining an application for a coercive order.

Disqualification from foreign travel

56 There are already two methods for preventing a debtor from leaving the jurisdiction (the writ *ne exeat regno* and the passport seizure order) but neither is designed as an enforcement tool. The writ *ne exeat regno* is for use before the making of a final order, not after it,⁸ and the passport seizure order, although it can be made at any time when the court considers it “just and convenient to do so”, must be ancillary to some other application and so cannot be used as a coercive measure in its own right.

57 We think it may be useful for there to be a new power to prevent debtors from travelling outside of the jurisdiction, specifically designed as a method of enforcement. There is provision, not yet in force, for such a power in child maintenance legislation. We propose that courts have the power to make a disqualification from foreign travel order for up to 12 months, in the first instance.

⁷ We are aware of the 2012 Government consultation, Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life, which considered the possibility of introducing disqualification and curfew orders to enforce what are now called child arrangements orders (formerly orders for residence and contact). In its 2013 response to that aspect of the consultation Government stated that it would be premature to legislate to give the court additional enforcement sanctions. However, we take the view that the context of the enforcement of family financial orders is different to that of enforcing child arrangements orders and therefore a different approach may well be justified - not least because we are seeking to provide more effective options than committal to prison for the enforcement of family financial orders.

⁸ The wording of the Debtors Act 1869 at section 6 refers to the order being made “... before final judgment”.

Disqualification from driving

- 58 Child maintenance debtors can be disqualified from driving – though in that context, it is a remedy of last resort as other methods of enforcement must have been attempted first. We think that all family creditors should be able to apply for disqualification from driving. It would, of course, have to be exercised with caution and not used in a way that would unduly impact on the debtor’s ability to earn a living as that would defeat the whole point of the order (that is, of course, true of all of the coercive orders but perhaps most pertinent in relation to disqualification from driving). However, we think that used appropriately, it could be an effective method of influencing “won’t pay” debtors. We provisionally propose that the orders can take effect for up to 12 months, in the first instance.

Curfew orders

- 59 The effect of a curfew order would be to require a person to remain at a place specified in the order, for specified periods of between two and 12 hours in any one day. There would have to be arrangements for electronic tagging. The use of curfew orders (in the same terms) is provided for in child maintenance legislation that is not yet in force. The terms of any curfew order can be such that it does not prevent a debtor from working (indeed it is envisaged that it would usually not do so) and so a curfew order may be more appropriate than either of the disqualification orders. We provisionally propose that courts have the power to make curfew orders for up to six months in the first instance. Curfew orders, like the disqualification orders, would be designed as a method of inducing compliance by those debtors who choose not to pay.

Provisional proposals as to the grounds for making a coercive order

- 60 It would be both pointless and wrong to impose a coercive order on a debtor who cannot pay. Our objective in proposing such orders is to provide a threat that will induce the reluctant debtor to pay. As a first step, therefore, a creditor who brings an application for a coercive order must establish, on the balance of probabilities, that the debtor has the means to pay and has not done so. The court would then have a discretion to make an order if it was in the interests of justice to do so, taking account of all the circumstances of the case including:
- (a) the degree of non-compliance;
 - (b) the other enforcement methods that are available to the creditor and the likely success of those methods;
 - (c) the effect of making the order on the debtor’s ability to earn a living; and
 - (d) the effect of making the order on any dependants of the debtor.
- 61 If the court decided that an order should be made then the court should also take account of all the circumstances in deciding which order to make and on what terms.

- 62 We think a discretionary approach, such as the one outlined above, is the right approach to ensure that a fair balance is struck between the interests of the creditor and the interests of the debtor, and is necessary to ensure that the sanctions are used in a coercive and not punitive way. We ask for views on the introduction of new coercive orders and the approach to the making of those orders that we propose.

COSTS

- 63 The issue of legal costs in family proceedings, perhaps like enforcement, is often an afterthought. However, it is an important issue, especially in enforcement where the creditor will have to balance the costs of any application against the chances of recovering what they are owed, and consider the likelihood of recovering any of his or her costs from the debtor. The general rule as to costs in enforcement proceedings is that the court may make any costs orders that it thinks just. The rules governing costs are contained in the Family Procedure Rules and the Civil Procedure Rules and require cross-referencing between the two.
- 64 We discuss a potential confusion in respect of “fixed costs” that may arise from the interrelationship between the two sets of procedural rules and invite views generally on whether any reform in this area would be useful.

RESPONDING TO OUR CONSULTATION PAPER

- 65 We published our Consultation Paper on 11 March 2015 – copies are available to download free of charge from our website:
http://lawcommission.justice.gov.uk/consultations/enforcement_family_financial_orders.htm. We seek responses to the Consultation Paper by 11 July 2015:
- (a) by email to propertyandtrust@lawcommission.gsi.gov.uk
 - (b) by post to: Rebecca Huxford, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne’s Gate, London, SW1H 9AG
- 66 We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000.
- 67 If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the Data Protection Act 1998.