StepChange response to the HM Treasury consultation Reforming the Consumer Credit Act 1974

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Introduction

StepChange Debt Charity is a specialist not-for-profit provider of debt advice and debt solutions to people across the UK. In 2022 over half a million people contacted StepChange seeking debt advice or guidance with their problem debt. Over 187,000 people completed a full debt advice session with StepChange's telephone and online advice service.

We welcome the opportunity to respond to this HM Treasury consultation on reforming the Consumer Credit Act. The great majority of StepChange clients will have one or more consumer credit debts. Our research highlights the harm that problem debt can cause and we continue to see a link between the products and practices of consumer credit firms and the production of problem debt. Regulation of the consumer credit market is vital to reducing both households' vulnerability to debt and the harm that problem debt causes.

The FCA has made good progress since taking responsibility for consumer credit, but some long-standing entrenched problems remain. We welcome the introduction of the Consumer Duty as a powerful new tool to address consumer detriment in the credit market but we strongly support retaining key Consumer Credit Act rights and protections to avoid a reduction in consumer protection at exactly the time where high standards of consumer protection are vital.

Question 1: Do you agree with these proposed principles, and do you have views about tensions between them or relative prioritisations?

We broadly agree with the proposed principles with the following additions and observations:

Firstly, we believe the most important principle for this review is the one set out in Article 20 (2) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 (SI2014/366) that the *'matter is whether the repeal (in whole or in part) of provisions of the Consumer Credit Act 1974 would adversely affect the appropriate degree of protection for consumers'*. The five principles set out after paragraph 3.5 of the consultation should be considered as secondary to the objective of not adversely affecting consumer protection.

Proportionality: Here we note that the principle of proportionality is embedded in FCA rule making powers (via section 1B of the FSMA 2000 and the regulatory principles in section 3B of that Act) in a very different way to provisions in the Consumer Credit Act.

Firstly, FCA rules tend to apply at a firm and market-wide level, while many CCA protections focus on the circumstances and protection needs of individual consumers.

Secondly, unlike FCA rule-making powers, the CCA provisions do not have a proportionality assessment per se on use, but some important CCA remedies rest on the court's discretion as to what is just between the parties, which is not the same as a CBA type proportionality assessment.

Therefore HM Treasury will need to carefully consider how a proportionality principle is applied to any transfer of the remaining CCA provisions into the FSMA regime. For instance, the government might consider whether any key CCA rights and protections replicated in the FSMA regime are introduced directly into legislation rather than via FCA rules.

Aligned: As for proportionality, aligning the remaining CCA provisions with FSMA should start from the principle of maintaining consumer protection. Here we agree with the government that 'a tailored approach may be required in specific areas'.

Forward looking: We support the intention to 'future proof' consumer credit regulation where possible, including building in the ability to quickly address new consumer credit products and services (like interest-free Buy Now Pay Later) that might arise in future.

Deliverable: We presume that this principle would mainly apply to areas where moving CCA provisions into FSMA or FCA rules has significant operational consequences, such as the consumer information and notice provisions. Our conversation with credit firms suggests that there is an appetite to start addressing issues with the consumer information and notice provisions quickly, though we agree that getting these important changes right will take both time and care to implement effectively.

Simplified: We broadly agree with simplification as a principle where this helps or improves consumer protection. However simplification should not be pursued as an end in itself in a way that could undermine consumer protection objectives.

We agree that CCA reform offers an excellent opportunity to address the unhelpful, unclear and sometimes frightening language used in some CCA notices and consumer information requirements. However, we would also point out that the complexity of consumer credit product terms and conditions, and of some credit product features, is an area where a focus on simplification through better written terms and conditions and better 'adequate explanations' could benefit consumers.

Question 2: Noting the governments' Net-Zero targets, how can CCA reform remove barriers that may otherwise prevent lenders from being able to offer financing for renewable energy solutions, such as electric vehicles and green home improvements?

We welcome the government's policy focus relating the transition to carbon net-zero and consumer credit regulation. An increasing number of households at all income levels will need to start transitioning to no/low carbon technologies such as electric vehicles, heat pumps, battery storage, home insulation etc. There is a pressing question on how households will be able to make this transition and how policy makers ensure lower income households do not get left behind.

It seems likely that households will need credit to purchase these 'big ticket' items so the need for strong and effective consumer protection for people taking out credit will be unchanged.

A quick literature review highlights some concerns raised by the consumer credit sector on barriers that may prevent lenders from offering credit for renewable energy solutions. For instance, the Finance and Leasing Association calls for reform of the CCA to better reflect *'the nature of new green assets such as electric vehicles'* and to clarify *'whether the current regulatory regime is flexible enough'* to allow financing of renewable energy solutions on a large scale[1]. The Green Finance Institute makes a more specific call for *'revisiting the CCA to address barriers to retrofit lending'* citing '*lender liability under Debtor/Creditor/Supplier (D-C-S) loans'*. It is argued that:

[1] The Finance and Leasing Association: *FINANCING GREEN: FLA RECOMMENDATIONS.* Downloaded 13/03/2023

> *Historically, the industry has incurred significant liabilities for the mis-selling of solar PV by installers in the 2000's, which has made lenders wary of financing any carbon reduction measures[2].*

At paragraph 4.17 onwards of this consultation the government highlights how CCA protections like linked liability protection are *'valued and often utilised by consumers'* and may need to be retained in the regulatory regime or be closely replicated. The FCA Retained Provisions final report noted that connected lender liability protection (in this case Section 75):

> *…provides a strong consumer protection measure that consumers are relatively familiar with, and often use. It can give consumers the confidence to buy from unknown suppliers, or online or from abroad. We also note that that this protection drives business for credit providers…* [Paragraph 5.29 onwards]

So we would question whether scaling back consumer protections such as connected lender liability will be effective in encouraging consumers to seek finance or in ensuring the market outcomes for consumers that the government would want. Here we note both the closing of the *Green Deal Finance Scheme* in 2015 following *'low take-up and concerns about industry standards'*[3] and the terms of reference for the subsequent Bonfield Review that prioritised consumer advice and protection as a means of ensuring that consumers 'get a good quality outcome when choosing to install energy efficiency or renewable energy measures in their homes'[4].

So while there may be some opportunity in this review to reduce barriers to green finance without reducing consumer protection, we would suggest that the government looks to other policy levers to encourage take up of finance and other support for no/low carbon technologies. Here we agree with the Green Finance Institute assessment that *'there is an important need for long-term cooperation across government departments, as well as with industry and local delivery partners'* to support households to take up green technologies. Government guarantees for green lending and grant support for low-income households might be an important part of this mix.

Question 3: Are there any existing definitions or concepts in the CCA which should be updated and clarified when moved to FCA rules?

The FCA Retained Provisions Review final report raised the issue of the definition of 'enforcement' in the CCA and suggested that there may be merit in clarifying meaning in legislation. Here we note that Regulation 7 (7) of the Breathing Space Scheme regulations[5] provides a more comprehensive and useful definition of enforcement in respect of debt recovery than the description of the

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[2] The Green Finance Institute. *Financing home energy security: How the government can catalyse green homes for growth.* https://www.greenfinanceinstitute.co.uk/wp-content/uploads/2022/10/GFI-FINANCING-HOME-ENERGY-SECURITY-1.pdf

[3] *Green Deal Finance Company funding to end.* Government press release 23rd July 2015. https://www.gov.uk/government/news/green-deal-finance-company-funding-to-end

[4] Department of Energy and Climate Change (2015). *Independent Review of Consumer Advice, Protection, Standards and Enforcement*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/465119/150721_Independent_Review_-_short_ToR_-_REV.pdf

[5] The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020; SI2020/1311

McGuffick decision on section 77(4) CCA set out in paragraph 7.49 of the FCA Retained Provisions final report. So we agree with the FCA that fresh legislation could provide more clarity here.

This consultation highlights embedded CCA definitions such as the meaning of credit and the distinction between fixed sum and running account credit that have become blurred by product innovation. We believe a number of points flow from this:

- Firstly, the CCA may contain a number of specific definitions that could be updated or revised as part of this review. Our honest answer now is that we do not have the time and resource for such a close reading of the CCA to provide HM Treasury with a list within the timeframe of this consultation. However, we believe that the FCA Retained Provisions Review provides a detailed examination that should serve as a good starting point and we would welcome the opportunity to explore specific definitions and concepts further in the period leading to any future legislative change.
- Secondly, while there may be a case for updating definitions in legislation, there will always be a possibility of product innovation blurring distinctions. We would argue that the main challenge here is to ensure effective 'innovation governance' to ensure new products and product features do not cause harm for consumers. In the past we have seen hybrid products, like credit card cheques, causing consumers harm that required (in the case of credit card cheques) legislative and rules-based responses. The complex and lengthy process of bringing interest-free Buy Now Pay Later into regulation further illustrates how the current CCA and FSMA regimes may need to be nimbler to respond to new risks of consumer harm.
- Finally, we would urge the government to move carefully in replicating any CCA provisions into new legislation, particularly where judicial interpretations of existing text have helpfully defined the scope of consumer protection (for instance in areas like section 129 Time Orders). Conversely, we agree with the conclusion the FCA reached on the unfair credit relationship provisions[6] that the definition of unfair was deliberately and necessarily kept open ensure the provision would be effective.

Question 4: Are there concepts in the CCA which are not currently defined but which should be?

Please see our response to Question 3

Question 5: Do you believe the business lending scope of the CCA should be changed?

As the consultation paper points out, the £25,000 agreement size limit on CCA regulation was lifted in 2008 but retained for credit taken out for business purposes. Our experience as debt advice providers shows that self-employed people can have a mix of business and personal lending and the distinction between the two can be blurred. People who are self-employed may be borrowing for business purposes but have a personal liability in respect of the debt. They may not be sophisticated consumers and may need the protection of CCA regulation.

[6] Financial Conduct Authority (2019) Review of retained provisions of the Consumer Credit Act: Final report. See paragraph 5.53

Since Q2 2008 the number of UK Self Employment Jobs has increased by 12%, the increase peaking at 26% at Q4 2019 just before the start of the Covid pandemic[7]. So many more people may be borrowing for business purposes and may need the protection of CCA regulation. The suggestion in the consultation paper is that the £25,000 limit may be acting as a barrier to small business lending while leaving an increasing number of borrowers outside of CCA regulatory protection.

So we believe there is an argument for the government to remove or increase the limit at which business borrowing is exempt from FCA regulation. Here we note that £25,000 in Q2 2008 would be worth would be over £37,000 in Jan 2023, so the CCA business purposes limit has also reduced significantly over time in real terms[8].

Question 6: Do you support the conclusion of the Retained Provisions Report that most Information Requirements could be replaced by FCA rules without adversely affecting the appropriate degree of consumer protection, and that it is desirable to do so?

Are there any additional factors the government should consider given the context changes since the report's publication in 2019?

We broadly support the conclusion of the Retained Provisions report that a number of the CCA information provisions can be moved into FCA rules, either wholly or in part. We note that Table 4 at paragraph 6.31 of the FCA Retained Provisions report is quite nuanced on provisions that can be moved into FCA rules and provisions that need to be retained, or partially retained. Table 4 splits the CCA information provisions into three groups:

- Provisions that can be fully replaced.
- Provisions replaceable in part – where the obligation to provide information could be moved to FCA rules but the associated sanctions should stay in legislation.
- Provisions where the notice requirement should stay in primary legislation but the detailed form and content provisions could move to FCA rules.

StepChange strongly supports the FCA view that some parts of the CCA information provisions should remain in legislation as they cannot be replicated in FCA rules without a reduction in consumer protection.

The Retained Provisions report is clear that there can be consumer protection benefits from moving some of the information provisions into FCA rules. The FCA gives a view that:

> *Although we consider that, in general, most provisions in this theme do not impose disproportionate burdens and restrictions when compared to the benefits to consumers, amendments may make information more relevant and readily comprehensible for customers in different situations.* [Retained Provisions report paragraph 6.17]

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[7] https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/timeseries/dyzn/lms

[8] Calculation using Bank of England Inflation Calculator https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator

StepChange's *Mixed Messages* report highlighting debt advice clients' experiences of creditor communications supports this FCA view. We found creditor communications, including some required by the CCA (like default notices), tended to produce a negative emotional response among recipients and could cause people to disengage from seeking help or respond to payment requests by borrowing more. In contrast, people in financial difficulty who felt creditor communications gave them options to deal with their situation or reassured them help was at hand were more likely to seek help from debt advice earlier[9].

The FCA Retained Provisions report is also clear that *'that moving the requirements to the Handbook should not be a 'lift and shift' exercise'* [paragraph 6.20]. We agree with the FCA that this should be an opportunity to review these CCA provisions against consumer information needs and the ongoing need for consumer protection. Here we completely agree with the FCA's position set out in paragraph 6.22 that:

> *Consumer research and testing, and extensive stakeholder engagement, would be important in ensuring that the mode of delivery, timeliness and the form and content of the information requirements were appropriate, with the aim of encouraging customer engagement and contributing to informed decision making.*

The transfer of CCA information provisions, where appropriate, to FCA rules should be a curated process that aligns with the Consumer Duty approach of understanding consumer needs and supporting good consumer outcomes.

We do not believe changes since 2019 create a need to revisit the conclusions of the FCA Retained Provisions report on CCA information provisions. While the Consumer Duty should be powerful in guiding the approach to moving appropriate CCA provisions into FCA regulations, we do not believe the Duty changes the conclusion that some provisions need to be retained fully or partially in legislation.

The Retained Provisions report already highlights that a process of disapplying EU derived law (such as the Consumer Credit Directive) may create opportunities to simplify some complex areas of consumer legislation. For instance paragraphs 6.35 to 6.39 highlight differences between the 1983 and 2010 Agreements Regulations that may be easier to review now than in 2019.

Question 7: In what circumstances is it important that the form, content and timing of pre-contractual and post-contractual information provided to consumers is mandated and prescribed? What are the risks to providing lenders more flexibility in this area?

Please see our response to Question 6 that addresses these points.

Policy makers have long understood the need to require firms to provide consumers with certain specified information is a cornerstone of consumer protection in the credit market. Moving provisions on the form, content and timing of information from the CCA to FCA rules cannot result in a free-for-all where creditors choose what information they send and when they send it.

Indeed it is clear that the FCA CONC rulebook already contains requirements on firms to send consumer information with prescribed content, form and timing. For instance CONC 8 includes

[9] StepChange Debt Charity (2022). *Mixed Messages: Why communications to people in financial difficulty need to offer a clearer, better route to help*

requirements for debt advice / debt management providers to provide specified information to consumers at certain times. These provisions derive from previous Office of Fair Trading good practice guidance rather than CCA provisions. The FCA Mortgage Conduct sourcebook (MCOB) also contains prescribed information requirements, including form and content provisions.

As stated above, we believe the process of moving information provisions from the CCA to FCA rules needs to be a carefully considered and curated process. Understanding the circumstances where the form, content and timing of information is mandated and prescribed is a matter for that process but should retain the CCA approach that some mandating and prescription will be required. This approach would follow from the conclusions of the FCA Retained Provisions report.

The risks of providing lenders with more flexibility in this area are easier to understand – bad practice and consumer harm. Here we note that the notice provisions brought in by the 2006 Consumer Credit Act followed a long and detailed government review of gaps in information requirements and firms' practices that had caused consumer harm. While there may be opportunities for more flexibility for lenders to deliver consumer information, this will need to be exercised carefully and in the context of CCA rights and protections continuing to protect consumers as identified by the FCA in Chapter 5 of the Retained Provisions report. Where more flexibility for firms is appropriate, we would like to see the FCA curate an evidence base of effective practices that ground regulatory expectations in evidence of what supports good consumer outcomes (and what does not).

Question 8: The Consumer Understanding outcome in the Consumer Duty posits that consumers should be given the information they need, at the right time, and presented in a way they can understand it. Does the implementation of this section, and the Consumer Duty more broadly, go some way to substitute the need for prescription in CCA information requirements?

As stated in our response to Question 6, we believe that the Consumer Duty has an important role in guiding the process of transition from CCA provisions to FCA rules. However, we do not believe that the Consumer Duty will replace the need for prescription in FCA rules or the requirements in the remaining information provisions that the Retained Provisions report conclude should be retained in legislation.

StepChange research continues to highlight cases where firms do not appear to be complying with existing FCA rules.

For instance, our January 2022 report *Falling Behind to Keep up* found over 4 million people in financial difficulty using credit to keep up with bills and existing credit commitments.[10] We concluded that poor credit product design and ineffective creditworthiness and affordability assessments were leading consumers to take on products that were not suitable for them and facilitated unaffordable borrowing.

The research set out in our *Mixed Messages* report highlights how consumers in financial difficulty did not always get the help from lenders implied in FCA CONC rules. We believe a key need for the Consumer Duty is to 'raise the bar' on expectations about the outcomes firms deliver for customers under existing FCA rules that, while being prescriptive, are permissive in the flexibility they allow

[10] StepChange (2022) *Falling behind to keep up: the credit safety net and problem debt*

firms to interpret and operationalise. So, while the Consumer Duty should support the transition of some CCA provisions to the FCA rule book, it will not be a substitute for a level of prescription, requirement and sanctions needed to ensure the FCA rules are effective. That might not be quite the same as set out in the current CCA provisions, but the purpose of those CCA requirements should not be disposed of.

Question 9: Given the increasing using of smartphones and other mobile devices to take out credit products how can consumer information be delivered on devices in a way that sufficiently engages consumers whilst ensuring they receive all necessary information?

We warmly welcome the government's focused questioning on how best to ensure that consumer information is effective through digital channels and different digital devices. However this is a very big question that probably needs to be answered, as the FCA suggests, through a process of consumer research and testing.

As a provider of debt advice to financially and otherwise vulnerable clients, we know that people will seek and receive information through a variety of channels, including digitally through devices like smartphones. Indeed, in the first two months of 2023, 76% of clients' website sessions with StepChange were on mobile devises, and a 3:1 ratio between mobile and desktop devices seems the stable status quo.

So we know that providing sometimes complex and detailed information via mobile devices raises a number of technical and policy questions, including: formatting text for different devices; ensuring people can read and navigate through documents; the need for additional support and explanations, possibly through different channels; and the need for digital inclusion (which may be under threat for people seeking debt advice who are struggling to pay phone / broadband bills).

These issues are partly about prescribed text requirements, but also, and perhaps mainly, about the way that firms think about the communication needs of their customers. We would expect these issues to be picked up by the FCA in the transition of CCA information provisions to FCA rules. Here the Consumer Duty understanding and support outcomes should be important in focusing firms' thinking about effective information delivery. However the digital delivery of financial services raises broader questions about consumer protection and financial inclusion that go beyond the scope of this consultation (but will be relevant to the Buy Now Pay Later regulation consultation).

There is a risk that firms' expertise and understanding of the impact of digital design on consumer behaviour is better developed than that of the regulator (and other policy makers). We would like to see the FCA develop an evidence base to strengthen understanding of how digital delivery affects consumer behaviour and what approaches are effective in supporting consumer understanding and informed decision-making. This should inform not only communications, where understanding best in class delivery of essential information via digital devices should underpin rules and guidance, but the wider regulatory agenda, such as the level of friction in digital credit journeys or safeguards against potentially manipulative juxtaposition of credit information/ratings and credit offers within digital comparison tools and apps.

The question also touches on the suitability of elements of the FSMA 2000 framework to a financial services market in which most products are now accessed digitally, most commonly via smartphones. The section 1c 'have regards', including the 'general principle that consumers should take responsibility for their decisions', were formulated in a context in which digital access of

financial services was less well developed and consumer behavioural bias was less well evidenced and understood than is the case now. While initiatives such as the Consumer Duty and associated consumer understanding outcome are adapting the present regulatory framework to be fit for a digital context, the underpinning regulatory framework is in need of fresh examination to ensure it is fit for purpose.

Question 10: Are there any areas where, in your view, consumer protection legislation, rules and/or guidance, outside of the CCA, makes for appropriate levels of consumer protections and mirrors or replicates the effects of the provisions in the CCA?

Here we note the FCA's analysis in Chapter 5 of the Retained Provisions review that consumer protection legislation outside of the CCA does not replicate or fully overlap with the CCA rights and protections. As a result we agree with the FCA's conclusion that:

> *these additional rights and protections, either individually or together, would not be sufficient to maintain an appropriate degree of consumer protection if the relevant CCA provisions were repealed.* [Paragraph 5.16 Retained Provisions report]

Question 11: If other consumer protection legislation, rules and/or guidance, outside of the CCA, falls short of replicating the effect of the provisions in the CCA, where do these gaps exist and how significant are they?

As for our answer to question 10, we broadly agree with the FCAs analysis set out in the Retained Provisions report:

- Financial Ombudsman Service: The FCA highlights the importance of FOS while noting that FOS cannot order the same level of redress that courts can under the CCA; and that FOS cannot rule that an agreement is unenforceable. We also note the FCA analysis that CCA rights apply automatically and can be used as a court defence, which is a particularly important forum for consumer rights. Here we also note that under FCA rules, FOS may dismiss a complaint without considering its merits if *'the subject matter of the complaint is the subject of current court proceedings, unless proceedings are stayed or sisted (by agreement of all parties, or order of the court) so that the matter may be considered by the Financial Ombudsman Service'* [Disp 3.3.4R (9)]. So the jurisdiction of FOS and CCA rights may be mutually exclusive where court action has started.
- Consumer Rights Act: The FCA points out that the Consumer Rights Act does not cover business lending. Also, the Consumer Rights Act only assesses the fairness of individual contract terms, and not the whole of the relationship (unlike the CCA Section 140A-140D unfair credit relationship provisions). The Consumer Rights Act will not necessarily assess the main subject matter of an agreement or look at price. In contrast the unfair credit relationship provisions incorporate the previous CCA extortionate credit provisions that explicitly focus of price issues. Indeed a key policy intention of the unfair credit relationship provisions was to lower the threshold for consumer protection of price and value issues from 'extortionate' to 'unfair'. Removing these CCA provisions would therefore reduce consumer protection.
- The FCA point out that while the important Consumer Protection from Unfair Trading Regulations (CPR's) deliver important consumer protections, the scope is not as broad as CCA provisions like the unfair credit relationship test. The FCA also point out that the CPRs

can create a high 'proof threshold' for consumers to seek relief. In contrast Section 140B (9) includes a deliberate policy decision to put the burden of proof to creditors. So the CPRs do not provide the same level of consumer protection as the CCA.

- The FCA points out that damages under Section 138D FSMA are unlikely to be as extensive as under CCA provisions. Here we note that the Consumer Duty, as a 'principle' does not currently give rise to a right of private action.

Question 12: The FCA's Consumer Duty mandates a consumer support outcome. How does the Consumer Duty interact with the rights and protections provided to consumers in the specific consumer credit regulatory regime, which currently consists of the CCA and FCA rules?

This is a very large and complex question and ahead of the introduction of the Consumer Duty it is difficult to be sure exactly how the Duty will impact on the consumer credit regulatory regime. Our earlier answers highlighted differences between the Consumer Duty and the CCA rights and protections.

Our understanding is that the Consumer Duty will complement and improve the existing consumer credit regime but is not capable of replicating it. The essence of the Consumer Duty is to require firms to look hard at their products and services against the aim of delivering good outcomes for consumers. In this sense the Consumer Duty does not mandate a consumer support outcome in the same way that a CCA provision requires a firm to act in a particular way. Instead the Consumer Duty raises the FCA's expectation that firms will have in place the correct governance, culture, monitoring and appetite to align their products, services, policies and practices to the four key consumer outcomes, including the support outcome.

The Consumer Duty is mainly operating at a firm level and market level and could interact with the consumer credit regulatory regime in powerful ways to improve consumer outcomes. However, it does not support the needs and outcomes of any particular consumer in the same way CCA rights and protections can.

We believe that the way that the FCA oversees the implementation of the Consumer Duty will be crucial and we believe there are some clear 'use cases' in consumer credit where a Consumer Duty approach can help address long standing complex problems in consumer credit markets. For instance:

- We noted earlier that our *Falling behind to keep up* report highlighted the long-standing problem of people becoming trapped in a cycle of unaffordable borrowing to try and keep up with existing credit commitments and household bills. Our research found people using credit in this way were much more likely to experience harm and hardship than other credit users. This problem did not have a single cause, rather being the consequence of a number of factors including poor articulation or FCA creditworthiness and forbearance rules (particularly on early identification of financial difficulties); credit product design that encourages persistent debt; and consumer responses to financial difficulties, including reluctance to seek help because of fears about their credit scores and other impacts.
- Our *Mixed Messages* report highlighted the need for improvements to consumers' financial difficulties journeys to get people to help earlier and reduce the harm associated with longer exposure to serious debt problems without support. We identified both the Consumer Duty

and this CCA review as innovations that could help improve the support people in financial difficulty get from the consumer credit regulatory regime.

In both use cases the Consumer Duty should act as a catalyst and means to improve the consumer credit regulatory regime by requiring firms to trace and address avoidable causes of poor outcomes, bringing a purposeful and holistic 'whole problem' approach to issues that have multiple complex causes. The Consumer Duty does not and should not replace the existing consumer credit regulatory regime (as this would lead to a loss is specificity that could make these problems worse), but it has significant potential to make the consumer credit regulatory regime work much better for consumers.

Question 13: If it is possible to amend the FCA's FSMA rule-making power to enable FCA rules to replicate the effect of rights and protections currently in the CCA, what is you view on the risks and benefits of doing this?

We note that the Retained Provisions report highlights limits to existing FCA rule making powers that prevent CCA provisions being transferred into FCA rules without losing consumer protection. These include:

- Current rule making powers do not generally allow for unenforceability or disentitlement as a result of a rule breach [paragraph 4.22].
- Current rule making powers would not allow replication of the meaning and purpose of CCA rights and protections.
- Under the current rule making powers, the FCA could not make a rule equivalent to Section 56 CCA (antecedent negotiations) that the relationship between a creditor and a credit broker or supplier is, for the purposes of contract law and the law of tort, to be regarded as one of principal and agent.
- Paragraph 6.31, table 4 highlights information requirements that cannot be replicated under current rule making powers without a loss of consumer protection.

At various points in the Retained Provisions report the FCA proposes either moving some parts of CCA provisions into FCA rules and keeping sanctions in legislation or extending FCA rule making powers to allow sanctions such as unenforceability and disentitlement to be possible for a breach of FCA rules.

We see merit in the government working with the FCA and other interested stakeholders to explore this option further. However, we believe that there are some significant risks from transferring legislative rights and protections (including those in primary legislation) to FCA rules, as FCA rules would not have the same force as legislation in court proceedings. As the FCA points out in respect of Time Orders (Section 129 CCA):

> *While repeal without replacement would not necessarily oust the court's powers to intervene in credit agreements, we consider that it would significantly limit the court's ability to intervene in favour of a debtor in financial difficulties.*

We also note that at paragraph 5.13 of the Retained Provisions report the FCA lists the features of consumer protection derived from primary legislation that would not translate to FCA rules. This list is replicated in paragraph 4.24 of this consultation, with the observation that:

If a decision were to be made to move many of the rights and protections to FCA rules, the FCA's rulemaking powers would have to be extended to allow the regulator the ability to do the above." [paragraph 4.25 of this consultation]

However, it is far from clear that even amended FCA rule making powers would allow the regulator to 'do the above' or would give consumers the protection of judicial intervention that the CCA gives them now. As a result, if the government's intent is to bring all consumer credit regulation together in FSMA, we would urge the government to consider transferring CCA protections that cannot be replicated by FCA rules directly into FSMA as primary legislation. This would allow for a re-modelling of FCA rule making powers while keeping the benefits of protections set out in primary legislation.

Question 14: Are there any rights and protections provisions which you feel should not be moved to FCA rules and should remain in legislation? Please provide an explanation of why you hold these views.

Paragraph 4.23 of this consultation highlights that *'there are many rights and protections that could not be replicated using the FCA's current rule-making power'*. Annex 4 of the Retained Provisions report provides a table highlighting rights and protections, replicated in this consultation at annex 1.

Some of these protections (like liked liability protection [S75], unfair credit relationships, time orders, voluntary HP terminations, S56, no increase in interest on default [S93], early settlement and rebates [Ss 94 and 95]) are discussed in this consultation. Some are not, such as S141 that creates the important requirement that CCA agreements may only be enforcement in the County Court and Section 126 that requires a court order to enforce a land mortgage and we understand brings regulated mortgage contracts under the Part 9 judicial control of the CCA.

We believe our answers to previous and subsequent questions set out our reasons why CCA provisions that create specific rights and protections (as opposed to information provisions) cannot be easily replicated in FCA rules. We would be very happy to discuss this further in respect of any specific provision to inform the government's policy thinking. However, space and time prevents a detailed list of reasons for every CCA provision here.

Question 15: Given this, to what extent do time orders provide additional protections to these rules and guidance? What evidence are you aware of that the existence of this right changes firm behaviour and improves consumer outcomes?

Time orders provide significant additional protection for consumers in financial difficulty. As the consultation paper points out Section 129 CCA and related provisions allow the court to rewrite key features of credit agreements where this is just between the parties. This can include reducing payments below contractual payments, freezing default interest and suspending enforcement action.

A time order is different to FCA forbearance rules in a number of ways.

Firstly, FCA forbearance rules and guidance apply to firms and the effectiveness of consumer protection relies on supervision by the FCA to ensure that firms follow the rules and guidance. As the FCA points out in the Retained Provisions report '*The FCA has finite resources and we cannot closely supervise all firms in the market and take action every time an issue is identified*.

Secondly, FCA forbearance rules are fairly permissive in the sense that firms are given discretion on how they apply forbearance. For Instance CONC 7.3.5G provides examples of forbearance including firms *'considering suspending, reducing, waiving or cancelling any further interest or charges'*. Taking these two issues together might help explain why our research finds people in financial difficulty not always getting the help they need from firms.

Our *Mixed Messages* report found that 72% of StepChange clients surveyed said some or all of their creditors had been helpful, but only 18% said that all their creditors had been helpful. 30% said some or all of their creditors had been unhelpful, and people who said their creditors had been unhelpful were more likely to say they had borrowed to deal with payment requests, 38% against 24% of all respondents who said this.

Our research on StepChange clients' experiences of the statutory Breathing Space scheme also highlighted the variable forbearance support from creditors that people in financial difficulty can receive. 4 in 5 respondents said their debts were a heavy burden before seeking advice and 1 in 2 had been worrying about their debts for a year of more before seeking debt advice. A majority of clients who contacted their creditors before advice to say they were struggling received inconsistent levels of creditor forbearance:

- 4 in 5 (80%) of clients who had interest, charges or fees added to their debt said none or only some of their creditors had frozen these.
- 2 in 3 (60%) clients who had experienced doorstep visits (e.g. bailiffs or debt collectors) said none or only some of their creditors had suspended this action.

For clients who needed to negotiate with one or more of their creditors at the end of the statutory Breathing Space period, forbearance remained patchy even through the Breathing Space should have alerted creditors to their financial vulnerability: 52% of these respondents said they had not yet been able to reach agreement on a credit debt, 22% said a consumer credit firm had rejected their payment offer and 15% said a consumer credit firm had asked for an unaffordable repayment. 10% said a consumer credit firm had passed the debt to enforcement[11].

Given this patchy forbearance, a Time Order made by the court can give a financially vulnerable consumer a clear guarantee of forbearance, including an affordable reduced payment and frozen default interest, that the firm is mandated to follow. So we do not think that FCA rules and guidance replicate the protections of a Time Order. That said, it might be the case that FCA rules and guidance could deliver this standard of forbearance, at least for unsecured credit debts, if creditors had much stronger incentives to deliver consistent and effective forbearance.

Time Orders are not generally used for unsecured debts due to the difficulty in applying for relief through a complex legal provision, and people in financially difficulty often have multiple unsecured debts that might require multiple Time Order applications. Perhaps a revised Time Order remedy allowing for forbearance across multiple debts before people fell behind on payments might be more attractive and accessible to consumers struggling with credit repayments. We would urge the government to use this review to consider how the Time Order provisions could be developed to support consumers needing more time to pay on multiple unsecured debts.

[11] StepChange Debt Charity (2022). *One year of Breathing Space: Initial findings from StepChange*

Debt advisors would generally use the Time Order provisions for priority debts secured against an essential asset, for instance a Hire Purchase agreement on a car or a second charge (or even first charge) mortgage. Time Orders will often be used in response to court action by a creditor to recover goods or take possession of a property, so the FCA forbearance rules and guidance will have already broken down as a source of consumer protection.

In the case of a hire purchase agreement the Time Order provisions allow the court to suspend recovery of the goods by the creditor on such terms as appear just to the court. For secured loans, and second charge mortgages in particular, a Time Order gives the court more scope to support borrowers in financial difficulty than the provisions of the Administration of Justice Acts that might otherwise apply. This can include setting loan repayments below the contractual level and extending the loan repayment period where it appears to the court to be just to do so.

Time Order applications may not be common, but they can provide essential support for people in financial difficulty in respect of credit agreements secured against essential assets. As a result we believe that removing the Time Order provisions would result in a significant reduction in consumer protection for the people who need them.

Question 16: What is your view on the usefulness of the right to voluntary termination and its role in protecting consumers? Are there improvements that could be made to the functioning of this right?

We agree with the statement in paragraph 4.28 that the *'right to voluntary termination (Sections 99 and 100) is an important protection for hire-purchase and conditional sale agreements'*, as it can prevent financial difficulties leaving consumers with both a large debt and losing the goods (usually a car) following recovery action by the creditor. As a result we believe removing the voluntary termination provisions would result in a loss of consumer protection.

We believe that improvements can be made to the functioning of this right by improving consumer awareness of the right to voluntary termination. FCA rules could assist here by improving the requirements on lenders to monitor for early signs of financial difficulty and offer appropriate support to consumers, including providing information and explanations on the right to voluntary termination and other options that could help with financial difficulty.

Here we would point out that consumers entering into Bill of Sale agreements to secure 'cash loans' against a car (or other asset) they already own have much lower levels of consumer protection in respect of the contractual rights creditors have to take possession of vehicles. HM Treasury had previously considered introducing new consumer protections for these Bill of Sale loans, which are currently covered by very out-of-date Victorian legislation. This review, and any fresh legislation that flows from it, provides an opportunity to develop a modern and effective consumer protection framework for Bill of Sale lending. Here we also note the importance Section 93A CCA that prohibits summary diligence for debt enforcement in Scotland.

Question 17: To what extent do the FSMA and FOS regimes make the unfair relationship provisions unnecessary? If these provisions are to be kept in legislation, with other rights and protections moving to FCA rules, does this create more complexity and confusion for lenders and borrowers and what will the effect on innovation in the sector be?

Please see our answer to Question 15 on Time Orders for a comparison of CCA rights and protections with the FSMA regime. Similar reasons support the case for retaining the unfair credit relationship provisions.

As noted in our response to Question 11, we broadly agree with the conclusion of the FCA Retained Provisions report at paragraph 5.17 that the *'Financial Ombudsman Service… cannot provide the same level of redress that the courts can under the CCA, neither could it rule that an agreement is unenforceable'*.

Likewise, the Retained Provisions report found that the remedy for a breach of FCA rules:

> *…is unlikely to be the same as the extensive jurisdiction of the court under section 127 of the CCA. This includes the power to reduce the customer's liability (section 127(2)), make a time order rescheduling payments (section 129) or otherwise alter the terms of the agreement in consequence (section 136)*. [Retained Provisions report paragraph 5.20]

As we argued for Time Orders, the unfair credit relationship provisions allow a court to support consumers who are facing court action by a firm. In the absence of the CCA provisions individual consumers would not be able to seek the relief outlined above and firms could more easily benefit from unfair practices.

Here we also note the Supreme Court ruling in the important Plevin case, where the Supreme Court overturned the previous lead case that had held the presence or absence of a regulatory duty under the FCA ICOB Rules as conclusive. The Supreme Court decided that the previous decision was wrong because:

> *The ICOB Rules are hard-edged, imposing a minimum standard of conduct applicable in a wide range of situations and providing for damages in the event of breach, whereas s 140A of the Consumer Credit Act 1974 introduces a broader test of fairness which is a matter for the court's judgment and which potentially takes into account a much wider range of factors. They are asking different questions*[12].

This both amplifies the points made in the Retained Provisions report and highlights how rules made under the FSMA regime can fail to address a serious cause of ongoing consumer detriment in the same way as CCA rights and protections.

Question 18: Would you be supportive of HM Treasury exploring the option of amending FSMA rule-making powers in such a way to enable unenforceability to apply to breaches of FCA rules in a similar manner to how unenforceability applies under the CCA, noting there would not be a role for court action in this scenario?

Our response to Question 13 outlined our broad support for HM Treasury exploring the option of amending FSMA rule making powers in such a way as to enable unenforceability to apply to FCA rules. However, we would urge HM Treasury to consider amending FSMA to include

[12] Supreme Court press summary: Plevin (Respondent) v Paragon Personal Finance Limited (Appellant) [2014] UKSC 61On appeal from [2013] EWCA Civ 1658. https://www.supremecourt.uk/cases/docs/uksc-2014-0037-press-summary.pdf

unenforceability in the primary legislation to retain the possibility that consumers can raise this in court in response to enforcement action by a consumer credit firm.

Question 19: Do you agree that the government should consider the proportionality of sanctions and ensure that they are relative to the consumer harm caused/potentially caused?

We strongly support retention of sanctions such as unenforceability and disentitlement as both a measure that protects consumers and a deterrent incentive to firms against misapplication of information requirements and standards. However, we agree that the government should consider the proportionality of sanctions to ensure they do not create excessive costs of firms relative to the consumer harm caused; with the caveat that the sanctions should have some reasonable deterrent effect to ensure good practice.

Question 20: What types of breaches of CCA rules do you think that sanctions should attach themselves to and why? For example, should the disentitlement sanction be limited to the small sub-set of cases giving rise to unenforceability, where there is the greatest risk of harm?

We have no substantive answer to this question at this time. We would argue that moving to a more conditional sanctions regime needs great care in thinking through how this would ensure continuity of consumer protection (including some retained role for the court) and how the decision that sanctions would or would not apply will be made in practice.

We are not convinced that an approach that would always limit sanctions to a small number of cases with the greatest risk of harm is the right approach. Instead we would ask the government to consider the process of oversight and consideration and the workable criteria that would inform a sanctions decision, rather than creating a hard but difficult to draw line based on scale of possible detriment.

Paragraph 4.40 of this consultation sketches an approach that seems close to this by allowing '*the FCA to apply unenforceability as a sanction for a breach of FCA rules… and then give the FCA and the courts power to allow enforcement if it appears just and equitable*.'

Question 21: How valuable are the CCA provisions that give rise to a criminal offence? (See Annex 2 for list of CCA provisions that give rise to criminal offences)

We note the FCA's conclusions in the Retained Provisions report that in general criminal offences are no longer needed in the FSMA toolkit. However, we agree that these may have deterrent effect and that there are some practices where criminal offices should continue to apply, given the risk and nature of harm they present. So we agree that there is a strong case for retaining the criminal offences for canvassing off trade premises and circulars to minors.

Question 22: Are there are any provisions that are outdated because the practices they pertain to are not used anymore, or would removing some CCA provisions lead to the return of these practices?

We are not aware of any provisions that are outdated and urge the government to carefully consider whether removing CCA provisions would remove an important backstop in a way that creates space for currently controlled bad practice to reappear.

Question 23: What is your view on the merits in increasing the standards of conduct for consumer hire agreements to make them comparable to those for consumer credit?

We would support an approach that increases the standards of consumer hire agreements to align these with standards for consumer credit. As paragraphs 45 and 46 of this consultation point out, consumer hire and consumer credit agreements can be taken out by consumers for similar purposes, raising the possibility of arbitrage if consumer credit firms develop more hire-based products.

Question 24: Should the section 17 provisions which enable exemptions from specific elements of the CCA and CONC continue to exist? What would be the impact of these provisions not applying?

Here we note the discussion in the HM Treasury consultation on Buy Now Pay Later, where the government intends to disapply the Section 17 provisions for regulated BNPL agreements. We agree with the reasoning that exempting an agreement solely by a size limit can create arbitrary regulatory boundaries that could create opportunities for firms to work around regulation. Therefore we agree that the government should consider removing Section 17.

Question 25: How can this reform ensure that firms provide information to consumers which is accessible for a wide range of financial literacy and numeracy levels?

Effective communications about key elements of financial services such as the cost of credit can be difficult. This is not just a matter of levels of financial literacy and numeracy. We note that research commissioned by the FCA into consumer experiences of overdrafts found 'even the most engaged and savvy participants struggling to understand the full cost relating to their overdraft use'.[13] However, this research also found that there were techniques that helped to engage users with the cost of products, such as providing a review of what consumers have spent in the last six months and showing users the cumulative cost of their borrowing. In other words, there are ways to overcome the difficulty of supporting consumers to understand charges, or other facets of products.

The Consumer Duty consumer understanding outcome should help progress firms' approaches to providing information and communications about products that are accessible and meet the purpose for which they are designed. As we have noted, we believe it will be appropriate to maintain some specific requirements about the form, content and timing of some communications and agree with the FCA that the process of moving statutory communications from the CCA to FCA rules or guidance should be structured around using consumer research and testing, and extensive stakeholder engagement, to ensure that communications support consumer understanding, engagement and informed decision-making. In this regard, we would like to see the FCA curate an evidence base of effective practices that ground regulatory expectations in evidence of what works.

One to two per cent of StepChange clients report a development or learning disability (including low numeracy and dyslexia/dyspraxia). This is self-reported data and appears to be slightly lower than the 2-3% UK prevalence reported in wider research. Identifying and understanding consumer vulnerability is central to meeting the needs of this group, which will be varied, from additional

[13] Atticus (2018) *Consumer research on overdrafts*, p. 62

support to understand and manage a product themselves to working with carers who support people to manage money.

Organisations working closely with people with learning disabilities have reported in the past that some banks and firms are good at supporting people with a learning disability but this does not always happen and people do not get information that they can understand or the right support.[14] (We are unaware, however, of research conducted in recent years.) The fact that StepChange has a significant group of clients with learning disabilities is evidence that there is a group of people with learning disabilities in financial difficulty with specific needs for support.

To protect the interests of a (potentially) highly vulnerable group, the statutory and regulatory framework should ensure that consumer vulnerability is embedded in the FSMA and CCA frameworks so as to ensure financial services understand and meet expectations to identify vulnerable characteristics and adapt their products, services and support to meet the needs of individuals so as to support good outcomes. The FCA's vulnerability guidance and Consumer Duty are a potential step forward in this regard. However, it is not clear that this alone is sufficient to address the needs of this group and we would welcome more clear and assertive expectations for consumers whose level of numeracy and literacy could make them particularly vulnerable to poor outcomes.

Question 26: In what ways should this reform ensure that consumers' mental health and wellbeing is supported throughout the consumer credit product lifecycle?

The best way to support consumers' mental health and wellbeing is to ensure that financial products and services do not cause or compound mental health and wellbeing problems. In our recent research looking at safety net borrowing, we found that of over four million people struggling to keep up with bills and using credit to pay for essentials, almost three quarters (71%) reported negative impacts of credit on their health, relationships or ability to work.[15] This is five times the proportion of others who hold credit products (15%). Preventing consumer harms arising from systemic failures of product design and firm conduct is central to reducing negative impacts on mental health and wellbeing.

The Consumer Duty marks an important step forward by incorporating concepts of consumer vulnerability and behavioural bias into statutory FCA rules and guidance. We would expect this to particularly address problems that arise from the close relationship between financial difficulty and mental health problems. Living with financial difficulty causes anxiety, stress and health problems. These factors, in turn, condition the ability to cope and make people more susceptible to poor product design or conduct, such as unaffordable lending, and coping strategies that tend to be harmful, such as borrowing to repay credit. The mismatch between the needs of those who are experiencing financial difficulty and/or mental health problems and the safety of the market for that group leads to poor outcomes.

Our research and that of others shows that the way in which firms engage and communicate with customers is particularly impactful on mental health. We found creditor communications, including those required by the CCA (like default notices) tended to produce a negative emotional response

[14] For example, Dosh Ltd (2014) *Banking rights research project: final report – Access to banking for people with a learning disability*

[15] StepChange (2022) *Falling behind to keep up*

among recipients and could cause people to disengage from seeking help or respond to payment requests by borrowing more. In contrast, people in financial difficulty who felt creditor communications offered them options to deal with their situation, or reassured them help was at hand, were more likely to seek help from debt advice earlier.

We have supported the Money and Mental Health Policy Institute's initiatives to draw attention to poorly design communications and welcome the steps HM Treasury has taken to adapt statutory communications to date and see this review as an opportunity to build on those initiatives. As stated above, we believe the process of moving information provisions from the CCA to FCA rules needs to be a carefully considered and curated process. To support consumers' mental health and wellbeing, this should involve matching better designed communications with more attractive options for those who are struggling.

Question 27: What are the key considerations that the government need to take into account when reforming the CCA to ensure that Sharia compliant loans can be expressly accommodated? Which areas of the CCA are not currently compatible with Islamic Finance, and how could they be amended to accommodate Sharia compliant loans?

We have no comment on this question at this time.

Question 28: If interest rates are prohibited for Islamic Finance products, how does the government ensure that Islamic finance and non-Islamic finance products can be easily compared, given that APR values are used for comparative purposes?

We note that open-ended revolving credit products that appear to present particular difficulties for consumer understanding are not common in Islamic finance, which tends to encompass fixed-term loans and mortgages.

Consumer research shows that consumers want to know what APR means.[16] Just as for non-Islamic products, providing more structured examples of costs related to fixed amounts and terms helps consumers to understand and compare products. Ensuring consumers can easily access and compare such examples would help make comparisons across products (including Islamic products where APR is not used) easier while also supporting consumers to better understand the actual cost of a product.

In a sense, meeting the challenge set out in this question is less a matter of how to provide information about costs for such products (of which there is good evidence) but of ensuring firms take comparable approaches so that consumers can make useful comparisons across products.

Question 29: Are you aware of any implications of our policy approach on people with protected characteristics?

There are overlaps between drivers of financial vulnerability and protected characteristics that mean these reforms are likely to have significant impacts for people with protected characteristics. For example, FCA research found that consumers with a minority characteristic were more likely to use credit or rent deferrals, cash in savings or reduce pension contributions during the early stages of the pandemic.[17] (The FCA also noted significant differences between groups with minority

[16] For example, Jigsaw Research (2014) *Consumer Credit Qualitative Research: Credit Cards & Unauthorised Overdrafts*, p. 29

[17] Robert Cross and Tim Burrell, 'Ethnicity, personal finances and Coronavirus', FCA Insights Blog 21 February 2021

characteristics.) At StepChange, a disproportionate number of our advice clients are women. As such, these reforms are likely to have disproportionate impacts (positive or negative) on certain groups with protected characteristics. In general, we would like policy makers such as HM Treasury and the FCA to elaborate more on how protected characteristics interact with, and may compound, financial difficulty to inform policy making and regulation (as an example, people may be less open about their problems if they have faced discrimination in the past, which may be detrimental to those with low capability or resilience).

Question 30: Do you have any views on how the government can mitigate any disproportionate impacts on protected characteristics?

We note the FCA has developed a MoU with the ECHR to 'effectively and transparently meet their obligations under the Equality Act 2010 and help to protect people in financial services markets'. Building on this agreement, we would like to see HM Treasury work closely with the FCA to consider how protected characteristics may interact with financial or other vulnerabilities and seek to ensure that its proposed reforms lead to no reduction in consumer protection and have positive impacts for those with protected characteristics who are more vulnerable to poor outcomes.

We also note that Fair4All is currently coordinating new research into how ethnicity influences access to financial products and services in the UK (a project in which StepChange is participating). We would also encourage the Treasury and the FCA to pay close attention to the findings of that research.