

Response to Ministry of Justice consultation on: *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*

Introduction

The Consumer Credit Counselling Service (CCCS) is the UK's largest dedicated debt charity. It has provided completely free debt advice since 1993 and the charity's unique data warehouse contains details of more than 12 million phone calls and current debts of around £24 billion. In 2010, over 417,000 people approached CCCS for help with their unsecured debt problems. Research by the Department for Business, Innovation and Skills (BIS) has found that the demographic profile of CCCS clients is representative of people who seek debt advice from the not-for-profit sector as a whole.¹

CCCS's range of free services includes welfare benefit checks, bankruptcy support and mortgage counselling. The charity's average client has over £22,000 of unsecured debt, leaving them vulnerable to court action and enforcement proceedings.² Therefore we welcome the opportunity to comment on the Ministry of Justice's consultation on solving disputes in the county courts.

Given the services CCCS provides, we are particularly interested in the questions relating to the current voluntary, pre-action protocols, charging orders and the ability of creditors to apply directly to a third party enforcement provider.

1. Pre-action protocols: we agree that the two protocols, on mortgage arrears and renting, should be made mandatory. Our mortgage counselling centre has found the former very effective in protecting homeowners. However, we would appreciate more clarity on exactly how these protocols are to be made mandatory. The charity would stress that any increased costs resulting from mandatory protocols would be likely to have a negative impact on many consumers in financial difficulty.
2. Charging orders: the charity very strongly objects to the proposal to allow creditors to apply for charging orders even where debtors are up-to-date with an instalment order. We believe this will encourage litigation, trap people into properties with negative equity, increase the instances of charging orders being used as a threat to extract money from vulnerable consumers and prevent many indebted people from accessing debt solutions.

¹ Credit, Debt and Financial Difficulty in Britain, 2009/10 (June 2011).

² In 2010, seven percent of CCCS's client counselled by telephone held a County Court Judgment.

3. Ability of creditors to apply directly to a third party enforcement provider: we believe the court should always be involved in moving to enforcement. If creditors were able to bypass the court we fear it could lead to confusion and severe consumer detriment.

Beyond these three issues the charity is keen to comment on the proposed move to carry out more court business via the telephone and online. The charity is an acknowledged leader in the use of telephone and the internet to provide services. In 2010 its world-leading online debt counselling tool, *CCCS Debt Remedy*, helped 130,472 unique users.

CCCS welcome moves by the Ministry of Justice to carry out more court business by telephone or online. In our experience of debt counselling, the relative costs of online (£3) and telephone (£58) advice is far lower than that of face-to-face (£265) without any lowering of quality, with the understanding that the most vulnerable consumers will always benefit from face-to-face advice.

The use of the telephone and internet as default options would help lessen costs for the court and indebted consumers, who often have very little money available each month to cover unexpected expenses. For example, in 2010, CCCS clients in the lowest income group (earning less than £13,500 gross a year) had no budget surplus available at the end of each month once their basic living expenses had been covered.

Nevertheless, it is important to ensure that all consumers, especially the most vulnerable, can access mediation and information on any action being taken against them. We note in our answer to question 24 that ten million people in the UK have no access to the internet.

Throughout this consultation response our central concerns are to prevent increased court costs to consumers and to ensure that they are treated fairly by the system. Consumers can find litigation and the threat of action intimidating and stressful. Recent research by CCCS found that half of those approaching the charity for advice are suffering from severe depression.

We have responded to those consultation questions of most relevance to our work and interests.

Responses to relevant questions

Q22: Do you agree that the behaviours detailed in the Pre-Action Protocol for Rent Arrears, and the Mortgage Pre-Action Protocol, could be made mandatory? If not please explain why.

CCCS believes that the Pre-Action Protocol for Rent Arrears and the Mortgage Pre-Action Protocol, or something similar, should be mandatory. It is generally positive to have engagement pre-court and the charity has found the existing protocols to be effective. As long as the engagement pre-court is not overly complex, full of legal jargon and, crucially, would not result in excessive extra cost for consumers there are very few cases when it would not be helpful.

In the year prior to the introduction of the Mortgage Pre-Action Protocol, the charity's mortgage counselling centre was advising 478 clients per month. By May 2011, as the protocol has been increasingly used, this had fallen to only 115 per month. Nationally, there were 19,329 mortgage possession claims issued in the fourth quarter of 2010, compared to 39,367 in the first quarter of 2008.

However, if pre-action protocols were mandatory, it is crucial that they are enforced rigorously and with the onus on creditors to prove they have actively tried to obtain a solution, using the court only as a final option.

Q23: If your answer to Q22 is yes, should there be different procedures depending on the type of case? Please explain how this should operate.

While we certainly support the proposal in question 22, we would like to reserve judgement as to exactly how a new protocol should look, other than emphasise the need for any procedure to be understandable to all parties and involve a minimum of extra cost.

Q24: What do you consider should be done to encourage more businesses, the legal profession and other organisations in particular to increase their use of electronic channels to issue claims?

It makes sense to move towards increased use of electronic channels in view of reduced costs and improved efficiencies. In terms of debt counselling the relative costs of using an online channel (£3) is far lower than counselling face-to-face (£265) and even over the telephone (£68). It is our experience that clients appreciate being able to access our service at a time which suits them (*CCCS Debt Remedy* is available 24/7) as well as one which is anonymous. Only when an online client gets to the point of agreeing a debt management plan does he or she have to disclose personal details.

Emphasising these advantages, particularly the cost savings, should encourage many more businesses to issue claims online, although it would be difficult to insist that businesses must do it this way.

A postal option needs to be retained for consumers unable to access online services, as according to the online advocacy group Race Online UK around 10 million people in the UK have never had access to the internet.

Q25: Do you agree that the small claims financial threshold of £5,000 should be increased? If not, please explain why.

The £5,000 figure is out of date and should be increased alongside the upper threshold for an administration order. The charity accepts the rationale given in the consultation for this increase:

“83 percent of all defended cases currently allocated to a case management track would fall within limit.”

If the small claims financial threshold is increased the Fast Track threshold should also be increased, to claims under £30,000, with Multi Track cases being limited to £100,000.

Q26: If your answer to Q25 is yes, do you agree that the threshold should be increased to (i) £15,000 or (ii) some other figure (please state with reasons)?

Initially, the £15,000 figure is appropriate, as it is more in line with the current levels of small claims, perhaps increasing to £25,000 in ten years. In future, however, there needs to be a better mechanism for increasing the limit in line with changes. We would propose setting-up a body to review limits every five years.

Q27: Do you agree that the small claims financial threshold for housing disrepair should remain at the current limit of £1,000?

If the small claims limit is increased, then the threshold for housing disrepair needs to be increased to match current costs for repairs. It is currently too low in relation to market prices.

Q28: If your answer to Q27 is no, what should the new threshold be? Please give your reasons.

We propose an increase up to £5,000 to match the current small claim financial threshold and to better reflect current costs for home repairs. Since the last consultation on the small claims financial threshold for housing disrepair in 2008, repair costs for CCCS clients have increased by 26 percent.

Q29: Do you agree that the fast track financial threshold of £25,000 should be increased? If not, please explain why.

We agree for the same reasons as those outlined in answer to question 25. The current level does not reflect current realities. Almost a quarter of the charity's clients currently owe over £30,000 in unsecured debt.

Q30: If your answer to Q29 is yes, what should the new threshold be? Please give your reasons.

The new threshold should be £30,000, increasing to £50,000 within ten years. Our clients with debts higher than £30,000 tend to have a gearing ratio (total unsecured debt to net income) of up to 147 percent – i.e. their unsecured debts are worth 47 percent more than their annual net income. These consumers desperately need their legal issues dealt with speedily to allow them to address further debt problems.

Q31: Do you consider that the CMC's accreditation scheme for mediation providers is sufficient?

We have no issue with the current accreditation process. However, we do note that the CMC itself recognises that:

"In order to keep costs to a minimum, the CMC does not have a large administration. Applicants are therefore advised that applications may take up to four weeks to process although an acknowledgement should be received by return."

CCCS believes that if mediation becomes mandatory and is therefore used far more widely, there would need to be a concurrent increase in the size of the CMC to meet extra demand.

Q33: Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not, please explain why.

We agree there should be automatic mediation in the majority of small claims cases. However, it should not be mandatory to hold a meeting in every case. Those responsible for the mediation process should be able to review the case and decide if a meeting outside of the normal court process is necessary.

If there are good grounds to believe that mediation will not be successful the case should be moved to the next stage.

Here we would re-iterate and emphasise previous comments about costs (see question 23). The average monthly surplus of a CCCS client in 2010, after living expenses, was only £43. Any increased costs relating to mediation could have a very serious effect on the indebted across the UK.

Q34: If the small claims financial threshold is raised (see Q25), do you consider that automatic referral to mediation should apply to all cases up to (i) £15,000, (ii) the old threshold of £5,000 or (iii) some other figure? Please give reasons.

We recommend that automatic mediation should apply to most cases up to £15,000, in line with the new proposed small claims threshold. Within ten years this limit should increase to £25,000, in line with our proposed changes outlined in question 26, and subsequently increase in line with the small claims threshold set by the new oversight body.

Q35: How should small claims mediation be provided? Please explain with reasons.

Initially, small claims mediation should be provided over the telephone, primarily because of the cost benefits involved. It is possible to provide a comparable level of counselling over the telephone, which costs £58 per session, as face-to-face (£265 per session). We agree with the Ministry of Justice that,

"a telephone mediation service – like the model offered by the current small claims mediation service – is viable and popular."

We recommend the efficiency and effectiveness of the mediation service should be monitored (certainly initially) by a respected, independent third sector organisation.

If initial mediation is unsuccessful then there may be value in a face to face meeting, but if it seems unlikely that such a meeting will help, the dispute should proceed to a Court hearing.

Q36: Do you consider that any cases should be exempt from the automatic referral to mediation process?

Mediation should be the default starting point for most disputes/claims, but if there appears to be a complete impasse, which neither an initial telephone call nor a secondary face-to-face meeting are likely to help, moving on to court would probably be the most sensible option.

Whether a case should bypass mediation should be left to the mediation body which should be able to make the decision that the process is exhausted before escalation to Court.

Q37: If your answer to Q36 is yes, what should those exemptions be and why?

All cases under an agreed threshold that do not result in mediation must be assessed on a case by case basis. The decision should be made by the mediation body - no exemption should be granted on the basis of the recommendation of one of the parties in the dispute.

Q38: Do you agree that parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper? Please give reasons.

We agree that parties should be given the opportunity to choose whether their small claims hearing is conducted by telephone or determined on paper due to the arguments and benefits raised in the consultation. For parties, and their legal representatives, to attend court in person *can* mean a considerable additional expense, both in terms of travel and time. The average income of a CCCS client is £22,401, over £3,000 less than the UK average. Many, if not most, do not have surplus money available to take time off work or pay transport costs.

It will be important to ensure that vulnerable people facing a small claims hearing are given enough help to come to an appropriate decision about how the hearing is held. Adequate protection must be in place to ensure that both parties' interests are safeguarded whatever method is used for the hearing.

Q39: Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

Yes

Q40: If your answer to Q39 is yes, please state what might be covered in these sessions, and how they might be delivered (for example by electronic means)?

In the interim stage, before a mandatory settlement stage is introduced, a compulsory mediation information session would increase the likelihood of litigants avoiding court and therefore reduce costs.

These sessions could be delivered either electronically, over the telephone or via the post (provided an adequate method of documentation is agreed). It is vital that both parties have access to the same level of information before making their decision.

Q41: Do you consider that there should be exemptions from the compulsory mediation information sessions?

See answer to question 36.

Q42: If your answer to Q41 is yes, what should those exemptions be and why?

See answer to question 37.

Q45: Do you agree that the provision in the TCE Act to allow creditors to apply for charging orders routinely, even where debtors are paying by instalments and are up to date with them, should be implemented? If not, please explain why.

No, we strongly disagree with this proposal. The court has already made a ruling by issuing a judgment setting out an instalment order and where consumers have met their obligations under this directive it is unfair to allow a creditor to take further action.

We are concerned that if the provision from the TCE Act was implemented, it would encourage more litigation through the court. Potentially someone who has paid a CCJ over the last ten years could have action taken against them.

The increased use of charging orders could have three unintended side-effects:

Firstly, any increase in charging orders may result in a fall in the number of indebted consumers being able to access Individual Voluntary Arrangements (IVAs), which are a vital form of debt relief for many people. Once an unsecured debt is secured against a property it cannot be included in an IVA. Therefore, creditors may seek to secure their debt against a property through a charging order to protect themselves from an IVA. In 2010, six percent of all clients counselled by CCCS were recommended an IVA.

Secondly, charging orders could trap people in negative equity, preventing them from selling their home. Under the provisions of the TCE Act there is no way for the county court to check whether a debtor's property is either in or near negative equity.

Thirdly, charging orders, or the threat of charging orders, can be used to force indebted consumers into paying more than is reasonable to their circumstances. Previous research by the charity Citizens Advice highlighted this effect.³

Q46: Do you agree that there should be a threshold below which a creditor could not enforce a charging order through an order for sale for debts that originally arose under a regulated Consumer Credit Act 1974 agreement? If not, please explain why.

Yes.

Q47: If your answer to Q46 is yes, should the threshold be (i) £1,000, (ii) £5,000, (iii) £10,000, (iv) £15,000, (v) £25,000 or (vi) some other figure (please state with reasons)?

When we were consulted on this previously⁴ we recommended a lower limit of £25,000. We believe that this is still the most sensible figure.

In addition, no creditor should be allowed to apply for a charging order unless there is default on an instalment order itself (as per current legislation). No charging order should be granted where the granting of the order puts the property into negative equity. In cases where a charging order is granted and the property goes into a negative equity, the owner should not be prevented from selling the property even where the sale does not provide any repayment for the debt and effectively removes the security.

Q48: Do you agree that the threshold should be limited to Consumer Credit Act debts? If not, please explain why.

No, the threshold should relate to any debt to ensure a less complicated procedure and thus reduce costs and time.

Q49: Do you agree that fixed tables for the attachment of earnings should be introduced? If not, please explain why.

It is important that any deduction under an attachments of earnings order should be relative to income and not cause further hardship. Until we see an example of how a fixed table, or similar, looks we will reserve judgement on this question.

If a fixed table is to be introduced we recommend that debt counselling charities, such as CCCS or Citizens Advice, should be consulted on its form because of their extensive experience of the relative income and expenditure of indebted consumers. Research by the Bank of England has found that 13 percent of households are spending more than 35 percent of their income on debt repayments. Other government research has found that 18 percent of

³ *Out of order: CAB evidence on the use of charging and orders for sale in debt collection* (June 2009).

⁴ *CCCS response to HM Treasury / Department for Business, Innovation & Skills MANAGING BORROWING AND DEALING WITH DEBT Call for evidence in support of the Consumer Credit and Personal Insolvency Review December 2010*

households with unsecured debt are spending more than one-fifth of their incomes servicing these debts.

If a fixed table is introduced, it should be possible to apply to court to have it amended if either circumstances change or the amount is found to be unrealistic. The income shock that results from people losing their jobs or having their working hours reduced can mean people no longer have the means to repay their debts. Almost half the people who come to CCCS for help are in difficulties because of redundancy or under-employment. For clients receiving Jobseeker's Allowance, expenditure outstrips income by £203 a month.

Q50: Do you agree that there should be a formal mechanism to enable the court to discover a debtor's current employer without having to rely on information furnished by the debtor? If not, please explain why.

Yes, as long as it is always the court driving the decision to discover a debtor's current employer and not the creditor. It is important that the use of this information is restricted only for the immediate limited purpose of the court and is not made publically available.

Q54: Do you agree that the court should be able to obtain information about the debtor that creditors may not otherwise be able to access? If not, please explain why.

Yes, as in question 50. A system should be put in place to ensure that this information is limited to what is pertinent and not misused. Our worry is that the information may aid unscrupulous debt collection agencies (DCAs) who could use the information to bring greater stress to indebted consumers.

Q55: Do you agree that government departments should be able to share information to assist the recovery of unpaid civil debts? If not, please explain why.

Yes. We agree that government departments should be able to share information to assist the recovery of unpaid debts in compliance with Data Protection and providing this information is limited in content, not misused or used in such a way to cause debtors further distress.

Such sharing of information should help to ensure that benefit claimants receive correct and full benefit entitlement.

Q56: Do you have any reservations about information applications, departmental information requests or information orders? If so, what are they?

We have no reservations, as long as they are done through the court or as part of a mediation process. In CCCS's experience, normally by the time it reaches this stage there are very good reasons for the action to be taken. As long as the normal procedure is followed leading up to this time we are happy to support it.

Q57: Do you consider that the authority of the court judgment order should be extended to enable creditors to apply directly to a third party

enforcement provider without further need to apply back to the court for enforcement processes once in possession of a judgment order? If not, please explain why.

No, we strongly believe that the court should always be involved in moving to the next stage of proceedings. This will retain order and structure in the process and prevent confusion.

Further opening up of debt enforcement could have a negative impact on the consumer, leaving them vulnerable to malpractice. CCCS clients often have problems with private bailiffs, including misrepresentation and harassment. For example, recently a client was called repeatedly at work by a Scotland-based debt collection agency, which contravened data protection laws, threatened her colleagues, talked about sending bailiffs around to her office and attaching the debt to her earnings, insisting that no court order was needed.

Q59: Do you agree that all Part 4 enforcement should be administered in the county court? If not, please explain why.

Yes

Q62: Do you agree that the financial limit of £25,000 below which cases cannot be started in the High Court is too low? If not, please explain why.

We agree the £25,000 limit is too low. Over three quarters of CCCS clients owe less than £30,000 in unsecured debt. Leaving the limit below which cases cannot be started in the High Court so low means that many less complex cases take up time that could be more valuably used elsewhere.

Some creditors are using the High Court because enforcement there is deemed to be less restrictive than in county courts. Increasing the limit should prevent this happening.

Q63: If your answer to Q62 is yes, do you consider that the financial limit (other than personal injury claims) should be increased to (i) £100,000 or (ii) some other figure (please state with reasons)?

We believe a £50,000 figure would be more realistic. Only 15 percent of our clients owe more than £40,000, so setting the limit at £50,000 would mean that the number of cases seen by the High Court would be reduced significantly.

Q64: Do you agree that the power to grant freezing orders should be extended to suitably qualified Circuit Judges sitting in the county courts? If not, please explain why.

We have no objection to this proposal. However, we would argue that a freezing order is an extreme measure and therefore should only be granted by judges with the requisite experience and seniority.

Q69: Do you agree that a single county court should be established? If not, please explain why.

We agree, providing a single county court could be established to meet the aim of a) improving the allocation and transfer of cases between court centres and listing of cases for hearing by a judge; b) improving the ability to process more administrative work through business centres; and c) simplifying the task of allocating cases that require judicial intervention to the appropriate courts.

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