

Response to MOJ consultation on transforming bailiff action

Comments from Consumer Credit Counselling Service

The Consumer Credit Counselling Service (CCCS) is the UK's largest provider of independent debt advice. In 2011, CCCS helped more than 180,000 distressed borrowers with full counselling sessions, managed over £3.7 billion worth of debt and helped clients repay £289 million, including to local authorities and HMRC.

Over 850 full time employed members of staff helped around 370,000 people with 1.25 million problem debts. The majority of calls to our helpline came as a result of recommendations from lenders.

The charity's ethos is to separate the "can't pays" from the "won't pays". CCCS aims to provide a breathing space, helping those who can put in place affordable repayment plans to clear debt. More than half our clients' payment problems are down to temporary, work-related issues like unemployment and reduced incomes; a further 25 percent arise due to unexpected 'life events' like separation, bereavement or illness.

CCCS introduced non-statutory debt management plans to the UK in 1993 as a charitable response to a clear social need. The DMP is a crucial tool for people experiencing financial strain, enabling those who can to repay debts in a way that is cost-effective, flexible and fair.

CCCS received over 21,500 enquiries relating to bailiff-enforceable debts in 2011 – One in nine clients counselled had council tax arrears, child maintenance arrears or an outstanding magistrates' court fine¹.

Evidence from CCCS counsellors suggests debtors encounter aggressive bailiff behaviour with some regularity. The most frequent problems include:

- Incorrect or illegal levies, for instance on exempt goods
- Fees of disputable or no legality and excessive charges for 'reasonable costs'
- Threatening behaviour, including harassment and intimidation
- Refusing to consider reasonable repayment offers
- Misrepresentation of legal powers with regards to entry

¹ CCCS does not keep separate data on parking fines. Given the vast number of creditors that use bailiffs, it has not been possible to expound on all client debts reaching enforcement.

Q1 Do you agree with the contents of the National Standards? If not, please supply proposals for inclusion or argument against inclusion.

CCCS does not believe the National Standards will be sufficient to protect people in financial difficulties from either undue hardship or unfair practices arising from enforcement by bailiffs.

The content is broadly the same as it has been since 2002. The recent revisions have been minor (with the exception of removing bank holidays from the list of exempted days, ahead of this consultation) and have addressed concerns raised by the bailiff industry, not consumer groups and advice organisations. In the past these standards have not been successful in guaranteeing high standards of business practice and ethics and had have not provided any effective protection for people in financial difficulties.

CCCS believes that the standards particularly suffer from the lack of any emphasis on supporting people in financial difficulties to make affordable and sustainable debt repayments. In its 2003 Effective Enforcement White Paper, the Government had a clear vision of the need to 'protect vulnerable debtors who genuinely cannot pay'. As the policy proposals set out in that White Paper still underpin the issues at hand in this consultation, we believe that this need is still relevant.

However there is nothing in the National Standards that protects people in financial difficulties from bailiff enforcement that could cause financial hardship or make their debt problems harder to deal with.

Here, we note that Section 71 (2) of the County Courts Act 1984 empowers the court to stay or suspend a judgment or order for such time and on such terms as it sees fit where it is satisfied that a party is unable to pay any sum or instalment. This is supported by a fairly clear process for debtors to apply for the protection of the court. Section 88 provides a similar power to stay execution.

But no such protection exists for people facing most, if not all, of the debts collected by private bailiffs. The Tribunal, Courts and Enforcement Act 2007 did not add any new means for people in serious financial difficulties to seek protection specifically from enforcement by private bailiffs. The Government has not implemented the more general Enforcement Restriction Order.

CCCS believes the lack of a clear route to protection for people in financial difficulties is both a significant cause of aggressive bailiff practices and a major flaw in these policy proposals. Indeed, CCCS continues to see cases where people have tried to negotiate affordable and sustainable debt repayments but bailiffs have refused – causing the costs and other detriment associated with enforcement to escalate. For instance:

A 53-year old man told CCCS that he was unable to pay a parking fine of £65. He was told by the bailiff that unless he paid £50 immediately they would take away his car. He said that this was impossible in his current situation but the bailiffs refused to listen to reasonable offers of repayment. Instead, they threatened him with further enforcement action and additional fees totalling £300.

A 26-year old woman from Yorkshire had council tax arrears. A bailiff threatened her with the prospect of prison if she didn't let him into her

home. The woman made several offers of payment but the bailiffs refused them all, stating that they were too low. Despite not levying goods, the bailiff warned our client they would come back to seize all her possessions unless she paid the outstanding amount.

A 26-year old man from London told CCCS that a bailiff threatened him with arrest because he wasn't able to make a payment on his fine. The man was on Jobseekers Allowance but had made consistent payments to the bailiffs, even borrowing off family and friends. Despite this record of making repayments, the bailiff refused to listen to reasonable offers.

Therefore we would urge the Government to amending the National Standards to include the following:

- Financial difficulties should be added to the list of vulnerable situations in the standards;
- The standards should be amended to require bailiffs to accept affordable debt repayments worked out in accordance with recognised budgeting standards (like CCCS budget guidelines or the Common Financial Statement) in a way that takes account of any other debts;
- The standards should be amended to require bailiffs to freeze enforcement action while a debtor is working with an advice agency to deal with debt problems;
- The standards should be amended to require bailiffs to hold, or suspend, enforcement action while agreed repayments are maintained, and to be flexible to any reasonable change in circumstances.

Q2 Do you consider the existing law and the revised National Standards for Enforcement agents is sufficient to address the problems we have identified or do you consider there is still a need for further Government intervention as set out in the remainder of paper?

CCCS does not believe that the existing law and the revised National Standards are sufficient to deal with bailiff problems. The recent revisions to the National Standards are minor and will not address the key reasons why the standards have had so little effect since 2002. Among our concerns is their failure to address situations when people are in financial difficulties; and their lack of independent monitoring, oversight and enforcement.

The same is true for the existing law – the problems with bailiffs identified in the 2003 White Paper still apply today. We believe the analysis set therein is correct, namely that

‘the power to take legal control of goods to enforce a debt... should only be permitted within a regulated structure and with appropriate safeguards’.

However we are concerned that the proposals set out in the consultation seem to fall far short of either a properly regulated structure or an appropriate set of safeguards.

Q3 Do you consider there are any gaps in the range of information available on DirectGov? If so, please supply proposals for inclusion.

CCCS believes the information about bailiffs on DirectGov misses some significant points. For instance:

- There is no information on how to suspend bailiff action where there is a procedure to request this;
- There is no information about walking possession / controlled goods agreements and what signing one of these could mean, in terms of both fees and the bailiff's powers to force re-entry later on;
- It doesn't say anything about not paying amounts you can't afford;
- It doesn't say anything about negotiating affordable repayments – it just says 'if you don't offer to pay you could be taken back to court', which is both potentially frightening and misleading;
- It doesn't say anything about the National Standards and vulnerable situations;
- It says that you can stop the bailiff visiting by offering to pay some of the money you owe, but this is not necessarily true;
- It advises people who experience an illegal attempt at forced entry to call the police. But it does not say that bailiffs may also arrive with the police and does not say that the presence of the police does not change the bailiff's powers.

CCCS would be happy to work with the Ministry of Justice to help develop the content of the DirectGov pages on bailiffs. However, we would also point out that information will only have limited value while consumers have few options to suspend bailiff action on the basis of affordable repayments.

Q4 Do you agree enforcement agents should not be able to use force against a person? If not, please explain why, providing supporting argument and evidence of when it would be useful.

Yes – CCCS strongly agrees. Civil enforcement agents should never be given the power to use force against a person. It is entirely disproportionate and excessively harsh. We welcome the Government's move to ensure these powers are repealed.

Q5 Do you agree there is a need for the court to be satisfied of certain conditions before they authorise the use of reasonable force to gain entry to premises and that the conditions should be prescribed in regulations? If not, please explain why.

Yes. CCCS agrees that a court needs to be satisfied of certain conditions before they authorise the use of reasonable force to gain entry and that conditions should be prescribed in regulations.

Q6 Do you agree with the prescribed conditions set? If not, please supply proposals for inclusion or argument against inclusion.

CCCS agrees with the prescribed conditions set in Regulation 26 to the extent that they do not extend the current powers of forcible entry.

However we do not believe that the prescribed conditions as currently drafted offer adequate safeguards to ensure that people in financial difficulties do not suffer undue hardship or detriment as a result of enforcement by bailiffs. Therefore, we would urge the Government to amend Regulation 26 to include the following points in respect of a warrant authorising forcible entry or re-entry:

- It is not clear in the regulations whether an application to the court would be made on notice to the debtor. CCCS believes it will be important for the debtor to be given notice, so they can make representations to the court;
- The regulations should include a power for the court to suspend or stay the application on terms, or generally where it is satisfied that the debtor is unable to pay the debt because of financial difficulties, or where the court is satisfied that the enforcement would cause the debtor undue hardship or detriment. In other words, the regulations should contain a provision similar to those set out in Section 71 (2) and Section 88 of the County Court Act 1984. The regulations are currently silent on these points, providing no suitable safeguards against the misuse of forcible entry powers;
- The Taking Control of Goods regulations should also be amended to ensure the process for taking control of goods is frozen when a financially vulnerable debtor can show they are seeking advice from a recognised debt advice agency. Stopping enforcement before it begins would provide a safeguard for individuals who want to repay their debts against unnecessarily punitive fees.

In our experience, a debtor may have good reasons for not having made payment towards a debt. After an initial income and expenditure assessment, CCCS clients with a bailiff-enforceable debt have, on average, a monthly budget shortfall of £151. This is a key indicator of ongoing distress and a sign of financial vulnerability (see response to Q28).

CCCS believes that if a financially vulnerable debtor is seeking to resolve their problems with the help of a third party debt adviser, the implication is they are not looking to avoid repayment. It makes no sense for enforcement agents to be called in when the only certain outcome is that bailiff fees will push them further into debt. This would be excessively punitive. Ever more vulnerable people would be forced to turn to unscrupulous lenders for quick money to pay off the bailiffs, ending up in even deeper poverty than they were before.

Instead, CCCS believes financially vulnerable debtors should get the necessary time to come to affordable repayment arrangements with their creditors. If the debtor can produce evidence they are receiving help from an independent debt adviser, the process for taking control of goods should be frozen.

Q7 Do you consider an enforcement agent executing a High Court or county court debt should:

- a) have to apply to the court to use reasonable force if necessary on entry to any business premises; or**
- b) should they have a general power?**

Please explain your reason why, providing supporting argument.

CCCS acknowledges that it is important for the enforcement system to be effective in recovering money from business debtors, particularly where this is owed to small firms or individuals. However, economic conditions are currently difficult for many small businesses in particular and excessive enforcement could perhaps push an otherwise viable business towards insolvency.

Therefore we believe business debtors should have the opportunity to ask the court to suspend a bailiff's application for a warrant to use force to enter. We believe this should be the case whether the bailiff is given a general power or required to make a specific application in respect of a warrant for forcible entry.

Q8 Do you agree there is a need for the court to be satisfied of certain conditions before they authorise the use of reasonable force to gain re-entry to premises and that the conditions should be prescribed in regulations? If not, please explain why.

Yes. CCCS agrees that a court needs to be satisfied of certain conditions before they authorise the use of reasonable force to gain re-entry and that conditions should be prescribed in regulations.

Q9 Do you agree with the prescribed conditions set? If not, please supply proposals for inclusion or argument against inclusion.

Please see our response to question 6.

Q10 Do you consider an enforcement agent should:

- a) have to apply to the court to use reasonable force, if necessary, on re-entry in certain circumstances; or**
- b) should they have a general power?**

Please explain your reason why, providing supporting argument.

CCCS believes enforcement agents should have to apply to a court in order to use reasonable force for re-entry to domestic premises. We oppose the amendment. The Tribunals, Courts and Enforcement Act 2007 requirements on re-entry should be retained.

As stated above (Q6), in our experience, there may be good reasons why a debtor has failed to comply with the payment terms of a controlled goods agreement. However, at present, the debtor has no recourse to the safeguard of a court to suspend a warrant for non-county court debts. A general power for enforcement agents to use reasonable force to re-enter when a controlled goods agreement has been breached appears disproportionate when the debtor is financially vulnerable (see response to Q28). CCCS therefore believes the general power should not be extended.

Q11 Do you agree with the 12 month time limit for taking control of goods? If not, please explain why, providing an alternative period with supporting argument.

CCCS agrees that once a notice of enforcement is served, bailiffs shouldn't have an unlimited time period to execute the debt. Therefore a 12 month limit might be reasonable – with one key proviso.

A 12 month limitation is likely be too short a period for many people to clear an outstanding debt by instalments. So where there is active engagement by the debtor with the bailiff and affordable payments are agreed, the 12 month period should be frozen in like manner to acknowledging a debt or making part payment under the Limitation Act 1980. Otherwise a 12 month time limit will effectively ban affordable repayment plans to clear debts over a longer period. This will build unnecessary conflict into the system by:

- (a) severely restricting the ability of debtors to come to affordable repayment arrangements;
- (b) bringing forward the time when goods can be seized; and
- (c) incentivising high pressure tactics to recover the debt earlier than is affordable.

Q12 Do you agree with the term for the minimum period of notice prior to taking control of goods? If not, please explain why, providing an alternative and supporting argument.

It is right there should be a minimum period of notice prior to the taking control of goods. However, CCCS does not believe a seven day notice period is long enough for all debtors to understand what they need to do to avoid further enforcement action. In particular, this applies for vulnerable people, such as those with learning difficulties, or where there are language barriers.

The consultation document effectively makes this point – vulnerable debtors may not appreciate the seriousness of their position until visited by an enforcement agent:

The “visit by the enforcement agent ...may be the first occasion [a vulnerable] debtor has acknowledged their financial situation”.

Therefore, CCCS believes the minimum notice period for this group of people should be extended by at least 14 days initially. As part of this policy, the Government should look to set a new procedure for bailiffs to follow when evidence of vulnerability comes to light.

Second, CCCS believes the notice period should be longer as a matter of course when there's evidence the debtor is making a genuine effort to develop a repayment plan. In effect, this means evidence of seeking advice should freeze the process of recovery.

These “breathing space” solutions require the MOJ to decide what type of evidence will satisfy creditors that a debtor is actively engaged in efforts to develop a plan to repay debt.

To inform policy, we'd recommend looking at provisions in the Lending Code that concern "breathing space" for debtors. The Code says creditors will freeze the collections process for 30 days when there is evidence a debtor is making efforts to develop an affordable repayment plan. The Code states that such evidence includes the involvement of a debt adviser.

Q13 Do you agree with the modes of entry and re-entry? If not, please explain why.

We agree. CCCS welcomes the Government's move to prohibit enforcement agents from being allowed to access a property through an open window or skylight.

Q14 Do you agree that the enforcement agent should be able to enter premises any day? If not, please propose limits with accompanying argument.

CCCS does not agree with these proposals for three reasons.

Firstly, CCCS believes an enforcement agent should only be able to enter premises on a day when the debtor has a reasonable expectation he/she can get independent debt advice. This may not be possible on public holidays or days that are significant to particular religions or ethnic groups where advice services for members of those communities may not be operating.

Secondly, we note that the CIVEA code of practice cautions against enforcement action on Sundays, Bank Holidays, Good Friday and Christmas Day. The current National Standards also state that enforcement should not normally be undertaken on Sundays, Good Friday or on Christmas day. This is with good reason – on a practical level, it will be virtually impossible to get independent debt advice on any of these days and enforcing on these days is also likely to be highly disruptive of family life.

In addition, we would also ask the Ministry of Justice to consider whether allowing bailiffs to enforce on any day might constitute a form of indirect discrimination. Although the effect of Regulation 13 will presumably be to remove the restriction on enforcement on Sundays, Christmas and Good Friday from the National Standards and possibly the trade association code, it seems unlikely that bailiffs will in practice enforce on these days and Christmas day in particular.

However, bailiffs would be free to enforce on days that are important for the family life of people in other faiths and communities. Unless the Ministry of Justice believes that enforcement by bailiffs is appropriate on days of major importance to family life, removing the current restrictions on days for enforcement merely sidesteps the potential discrimination question rather than dealing with it properly. CCCS does not believe this is an acceptable solution.

Q15 Do you agree with the time limits of 6.00am and 9.00pm for entry in wholly residential premises? If not, please propose alternative limits with accompanying argument.

CCCS has no fundamental objection to this proposal.

Q16 Do you agree that the enforcement agent should be able to take control of goods any day? If not, please propose limits with accompanying argument.

CCCS does not agree with this proposal. Please see our response to Q14.

Q17 Do you agree with the time limits of 6.00am and 9.00pm for taking control of goods? If not, please propose alternative limits with accompanying argument.

CCCS has no fundamental objection to this proposal.

Q18 Do you agree with allowing the enforcement agent to proceed outside the hours limit where the process has already commenced? If not, please explain why.

No. The Government says it wants to clarify the law when it is complex, unclear or confusing. In that vein, it should ensure debtors can have consistent expectations about when enforcement agents will be permitted to take action. This particularly applies with regards to the powers for enforcement agents to use reasonable force.

Q19 Do you agree with the range of exempt goods? If not, please offer proposals for inclusion or argument against inclusion.

CCCS broadly agrees with the range of exempt goods.

Q20 Do you agree that the debtor should be able to authorise another person to enter into a controlled goods agreement? If not, please explain why.

CCCS is concerned that this proposal is open to abuse, as a person without such authority could be coerced into signing a controlled goods agreement as if they did have authority. The regulations do not currently set out any safeguards against such misuse. Therefore, CCCS believes the Government needs to consider both:

- procedures to ensure that any authorisation is genuine and agreed by the debtor; and
- procedures to reverse the consequences of a controlled goods agreement signed by a person that was not authorised by the debtor.

Q21 Do you agree that a person in apparent authority should be able to enter onto a controlled goods agreement? If not, please explain why.

CCCS is concerned this provision could be abused as apparent authority would be determined by the bailiff. Again (see Q20), we would urge the Government to further consider reasonable safeguards on this proposal.

Q22 Can you provide any recent evidence which supports or challenges the approach to empower enforcement agents to secure entire premises?

CCCS has no comment in respect of this question at this time.

Q23 Do you agree with the time limit that a vehicle must remain immobilised before being removed to storage? If not, please explain why, providing an alternative period with supporting argument.

CCCS has no comment in respect of this question at this time.

Q24 Do you agree with the term set for the minimum period before a sale may proceed? If not, please explain why, providing an alternative period with supporting argument.

CCCS has no comment in respect of this question at this time.

Q25 Are there any methods of sale other than private contract, sealed bids or advertisement that should be included in the regulations? If so, please provide full details.

CCCS has no comment in respect of this question at this time.

Q26 Do you agree with the method of dealing with the proceeds of sale? If not, please explain why, providing an alternative with supporting argument.

CCCS has no comment in respect of this question at this time.

Q27 Are there any other circumstances where goods may be deemed as abandoned? If so, please provide details.

CCCS has no comment in respect of this question at this time.

Q28 Do you consider there is a need to define vulnerability in the regulations? If so, please provide a workable definition with supporting argument.

CCCS believes it is essential to define vulnerability in the regulations. The current disparity between the National Standards for Enforcement Agents and ad hoc Service Level Agreements is not good enough. At the very least, CCCS believes the Guidelines should be codified.

We believe that the regulations need to take account of three broad areas of vulnerability:

1) Capacity and understanding

CCCS agrees that debtors who are unable to understand the process, as a result of language barriers, mental capacity or other barriers to comprehension (such as sensory impairments or learning difficulties) should be protected from enforcement and directed instead to appropriate advice and support.

2) People whose health or personal safety could be compromised by enforcement by bailiffs.

The question of vulnerability is not just about whether an individual has difficulty understanding English or is seriously ill, although it is both of these.

In the words of the Law Commission, it is also “the context, the setting or the place” that puts a person at risk². A person with a medical condition may be at risk from it deteriorating in certain stressful circumstances, like attendance by a bailiff, even if normally they can cope.

² Law Commission, *Adult Social Care*, May 2011, p114
http://lawcommission.justice.gov.uk/docs/lc326_adult_social_care.pdf

Therefore we are particularly concerned that the definition of vulnerability in the taking control of goods regulations should take full account of the potential vulnerability of people experiencing mental ill health or physical ill health that could deteriorate under the stress of a bailiff's visit.

3) Financial Vulnerability

Vulnerability is not just about mental or physical capacity – that is, it's not just about whether the debtor is incapable of understanding the situation they face. It can also result from being in a certain situation, notably from being unemployed, which implies *financial vulnerability* may put the debtor at risk.

CCCS clients facing debts capable of enforcement by private bailiffs tend to experience a high level of financial vulnerability even compared to other people seeking advice about financial difficulties. For instance, in 2011 CCCS clients with debts enforceable by private bailiffs had an average monthly budget shortfall of £151 at the time they sought advice. This compares to an average budget surplus of £93 to pay off debts for all CCCS clients. The majority with bailiff-enforceable debts had five or six other debts and needed support and breathing space to get on top of their financial situation. For this group there is a serious risk that enforcement action by bailiffs will only serve to aggravate considerable existing financial stresses or lead to more severe problems.

Therefore we urge the Government to:

- Ensure that the definition of vulnerability includes people who are financially vulnerable.
- Ensure that people seeking help from recognised advice services are classed as vulnerable and protected from enforcement while they are doing so.

Vulnerability – creditor duties

The consultation document fails to put any new requirements on creditors before they decide to bring in bailiffs to enforce a debt. For instance, as things stand, it is not necessary for a local authority to check whether a debtor is vulnerable before passing a debt on to a bailiff.

CCCS believes it is incumbent on creditors to engage bailiffs only where appropriate, which requires better due diligence. The MOJ should mandate creditors to use information they hold to check for *prima facie* evidence of vulnerability. For instance, councils might find that a debtor is in receipt of a disability premium for council tax benefit, which according to the National Standards would make them “potentially vulnerable”.

CCCS believes it is inappropriate for creditors to call in bailiffs to chase debts owed by people who are vulnerable. If a warrant has been issued, it should be called off. Where creditors have erred, it seems unfair that the debtor should be liable to pay the administration stage fee. Instead, the costs for inappropriate referral should reside with the creditor.

CCCS notes that a protocol on the enforcement of council tax arrears has already been developed by the Local Government Association. This helps to ensure better strategies for dealing with vulnerable people and customers requiring more flexible payment options.

Q29 Do you agree with the information required from a landlord for the authorisation of an enforcement agent to take control of goods? If not, please explain why, providing further information you consider should be included.

CCCS has no comment in response to this question.

Q30 Do you agree with the minimum rent period of seven days in arrears? If not, please explain why, providing an alternative and supporting argument.

CCCS has no comment in response to this question.

Q31 Do you agree with the content of the notice to the sub-tenant? If not, please explain why, providing further information you consider should be included.

CCCS has no comment in response to this question.

Q32 Do you agree with the content of the notices and warnings? If not, please offer proposals for inclusion or argument against inclusion.

CCCS does not agree with the content of the draft notices set out in the consultation paper. None of the notices provide clear explanation about the process or what the debtor can do to stop enforcement moving to a later stage. There is also no reference to seeking advice, or to the National Standards.

We do not believe that these notices put debtors in a position to be aware of their rights and responsibilities.

Costs of Enforcement Related Services: General comments in response to Questions 33 – 40

CCCS has some significant concerns about the proposed new fee structure set out in this consultation. These are as follows:

Increase in fees on poor and financially vulnerable households

We are concerned that the new fee structure will result in a significant increase in charges for some of the poorest and most financially vulnerable households. The scenario testing on page 10 of the consultant's report suggests that fees will increase for nearly every category of debt. The exception appears to be fees in respect of bailiff enforcement of magistrates court fines, which are currently covered by statutory protection. For some category of debts, council tax for instance, the fees charged to debtors appear to rise substantially under the new structure. We fail to see how the Government can justify such an increase at a time when many households are dealing with unemployment, declining real incomes and rising essential expenditure.

Excessive increases in profitability for non-high court bailiffs

The executive summary of the Enforcement Fee Structure Review states that the profitability of a 'representative' enforcement agency company will roughly double as a result of the new fee structure. Current profitability is estimated at 8.6 percent, profitability under the new fee structure is estimated at 17 percent. Indeed, the economic analysis also suggests that the level of profitability could be very much higher if director's payments are included. Again, CCCS fails to see how the Government can justify establishing a fee structure that generates increased profits from financially vulnerable households.

Single fee neither fair nor compatible with wider public policy

This level of profitability appears to be in excess of the 'target' profitability of 10 percent. This is perhaps a result of the decision to set the fees for each stage of enforcement at the level of the most expensive debt to enforce. For instance, the analysis on p129 of the fee structure review suggests that RTA is more expensive than council tax enforcement at each stage. On p131 the 'MOJ parameter' acknowledges this point, but states that the single fee point needs to be selected so that the least profitable debt types can be sustainably enforced. This parameter appears to be driving some of the excess profitability projected under the new regime.

The key problem with this approach is that people facing bailiff enforcement for more profitable / less expensive debts (such as council tax) may face fees that are considerably in excess of the cost of debt recovery. Indeed, the profitability testing analysis set out on p139-140 of the fee structure review suggests profitability for council tax will be nearly 35 percent under the Government's proposed fee structure, and nearly 20 percent for an enforcement agent company enforcing only 'core debts' in equal proportions. The Government will be aware that fees charged in respect of recovery and collections for consumer credit and other debts based on contract must not result in disproportionate compensation under the provisions of the Unfair Terms in Consumer Contract Regulations 1999. Of course, these regulations do not apply to enforcement by private bailiffs as there is no contract between the bailiff and the debtor.

But it is precisely because the debtor has no choice over the level of bailiff fees for any particular activity that CCCS believes the Government has a moral duty to apply similar principles to bailiff fees. In which case, the level of the fee for, say, council tax that is over and above the enforcement costs is both unfair and unjustifiable in the context of public policy more generally. As such, we question whether the Ministry of Justice can proceed with a single fee structure set at the level of the most expensive debt type.

Do the level of fees reflect efficiency in lieu of competition?

People in financial difficulties do choose a bailiff or bailiff firm. So there is no competitive pressure from consumers on bailiff fees and costs. Therefore, in setting the level of bailiff fees, the Government must ensure they are not excessive compared to the reasonable costs of enforcement. In considering the costs of enforcement, the Government should also consider the costs of efficient enforcement, given that there is no consumer driven market process to drive efficient pricing. However it is not clear from the fee structure review how (or whether) this key question of efficiency has been taken into account in setting fee levels. Therefore, CCCS would raise the following questions:

- The economic analysis is clear that bailiff firms are experiencing 'mixed fortunes' suggesting a wide range of profitability between different firms. The analysis is also clear that differences in profitability are due to differences in efficiency between firms. But it is not clear how this has been taken into account in assessing the cost base of enforcement activities upon which the new fee levels are based. Were the costs of efficient firms or inefficient firms taken into account or were costs merely averaged out in a way that would give an excess reward to inefficient firms?
- We note that the fee levels for High Court enforcement are very much higher than for non-high court enforcement, but the protected profitability of High

Court enforcement is lower than for the representative EAC. However the costs of enforcement activities given for High Court enforcement are very much higher than for non-high court enforcement. It is not clear that the fee structure review included any independent appraisal of the costs reported by firms – including the very different costs claimed by high court and non-high court firms for similar activities. For instance, the table on p82 lists the cost of receiving payment by credit card as £2.49 for non-high court and £34.68 for high court; the cost of receiving payment by cheque as £2.35 for non-high court as against £42.13 for high court. The result seems to be that people in financial difficulties will be charged very much more for identical activities. This does not look like efficient enforcement.

What are the safeguards to ensure that the fee stages will not be abused?

CCCS broadly supports the concept of a 'compliance stage'. Enabling people in financial difficulties to come to an affordable repayment arrangement without a doorstep visit from a bailiff would be a step forwards. It is also reasonable for bailiff firms to be paid for collections work undertaken before or instead of a doorstep visit. However, in the absence of any requirement on bailiff firms to accept affordable offers, what is to stop a firm from simply refusing offers at compliance stage and moving to the enforcement stage and charging a higher fee? One of the reasons cited for the Government's fee review is evidence of fee abuse under the current system. But the proposed new system does not remove the potential for abuse, indeed it arguably makes abuse easier as people will not be able to complain about fees that are 'in-line' with the statutory scale for specific levels of enforcement activity. Without a clear standard on affordable repayments and independent oversight of firms, the new fee structure may make the problem worse not better.

Q33 Do you agree that the set of core activities in the costs structure cover all of the enforcement activity undertaken regardless of debt type? If not, please explain why, providing an alternative with supporting argument.

Our response to this question is contained in the general comments above.

Q34 Do you agree with the grouping, into stages, of these activities? If not, please explain why, providing an alternative with supporting argument.

Our response to this question is contained in our general comments above. CCCS is particularly concerned to know what safeguards the Government will introduce to ensure that bailiff firms do not move between stages when this is inappropriate. The new fee structure does not seem to clearly remove the incentive to escalate enforcement, particularly as there is no requirement on bailiff firms to accept reasonable offers at compliance stage. Of course responsible firms may do this but these reforms give people in financial difficulty no guarantee.

Q35 Do you agree the activities are grouped correctly? If not, please explain why, providing an alternative with supporting argument.

Our response to this question is included with our general comments above.

Q36 Do you consider there is a need for remission? If so, please offer proposals as to the level of evidence required to prove that mental health has contributed to the lack of engagement.

CCCS strongly agrees that fee remission will be needed to ensure that people facing barriers to engagement with the administration / compliance stage are not

disadvantaged as a result. Such barriers might be a problem for people experiencing mental health problems as the consultation paper points out. But this could also be the case for people with learning difficulties, people with physical disability and sensory disability, people with literacy difficulties and people for whom English is not a first language.

We would also point out that the Equality Act 2010 requires bailiff firms to make reasonable adjustments to ensure that disabled people are not disadvantaged. The Equality Act also outlaws discrimination on the basis of race, defined to include nationality and ethnic origins.

Section 149 of the Equality Act 2010 also places the Ministry of Justice under a duty (the public sector equality duty) to have regard to the need to eliminate discrimination and advance equality of opportunity.

So we would urge MOJ to work with bailiff firms to develop safeguards to ensure that they comply with the Equality Act and people are not disadvantaged by barriers to engagement. This is not reducible to concerns about the evidence people might be required to provide – a second order consideration, which could also breach the Equality Act if the evidence requirements are unreasonable.

Q37 Do you agree that the fixed amounts attributed to each stage are appropriate? If not, please explain why.

CCCS does not believe that the fixed amounts are appropriate – please see our general comments above for more detail.

Q38 Do you agree the percentage costs attributed to the relevant stages are appropriate and the threshold is correctly placed? If not, please explain why, providing an alternative with supporting argument.

CCCS is not certain that the analysis in the fee structure review makes a compelling case for percentage cost additions, particularly in the case of domestic as opposed to commercial enforcement. The review concludes that there is a potential imperfect correlation between debt size and the cost of enforcement. This does not seem to be a good evidence base for these proposals.

Q39 Is there a need for an exceptional costs process? If so, please offer proposals how such a scheme would operate including the thresholds for such a process?

CCCS has no specific comment in response to this question. However the Government will need to consider whether an exceptional costs process could be abused.

Q40 Do you agree with the differences in the costs structure between High Court and non High Court debt? If not, please explain why.

We have addressed this question in our comments above. We do not believe that all of the cost differences can be justified and we are concerned that there does not appear to have been sufficient critical examination of this. For instance, as we pointed out above it is unclear how processing credit card and cheque repayments cost High Court bailiffs so much more than non-high court bailiffs.

In addition, the MOJ has clearly failed to ask whether there should be a limit to the costs payable by people who owe Government debt. This is a critical question for the financially vulnerable. It's entirely conceivable that a person subject to a controlled goods agreement will default on an agreed repayment plan with a HCEA. Without a court backstop requiring bailiffs to listen to reasonable repayment offers, the debtor becomes liable for additional charges on the debt, which have now³ ballooned to £740. These charges appear excessive and disproportionate, especially for smaller debts of perhaps £100 or £200.

CCCS believes the proposed costs structure needs to be fundamentally overhauled in favour of proportionately and fairness. There should be a cap on fees relative to the amount of the original debt – an absolute mark-up to ensure low debts can't be massively inflated. The omission of such a cap is puzzling given the recent work commissioned by the Department for Business, Innovation and Skills to see if there should be a total cost limit for other, consumer debts⁴.

Q41 Do you consider the costs structure will have an adverse effect on recovery of Non Domestic Rates cases? If so, please provide details.

CCS has no comment in response to this question.

Q42 Do you agree with the order for payment of monies on partial payments? If not, please explain why, providing an alternative with supporting argument.

CCCS broadly supports the proposal to pro-rate cost payments. This strikes a balance between incentivising bailiff firms to recover debt while reducing the incentives for aggressive behaviour where bailiffs are only paid after creditors are paid in full.

Q43 Should the costs structure be updated to take account of inflation prior to implementation?

CCCS strongly opposes this suggestion. Recent figures from the Institute for Fiscal Studies projects a real terms fall in household incomes of 7.1 percent between 2009-10 and 2013-14. In these circumstances it would be unreasonable for the Government to consider inflating the bailiffs fees charged to already financially struggling households.

Q44 Should the costs structure be updated annually by indexing to a measure of inflation?

No. CCCS strongly disagrees with the proposal to annually update the fees structure by indexing to a measure of inflation. Families and businesses do not have indexed incomes and we do not need to point out that household finances are stretched and many businesses are under severe pressure. It seems wholly unreasonable for the Government to make bailiff firms a special protected case; particularly as these fees will be paid by financially vulnerable households and firms. We struggle to understand why bailiffs should be guaranteed enhanced profits on the backs of the poorest and most vulnerable households and struggling businesses.

³ Enforcement Stage 2

⁴ *Millions of bank customers to benefit from improved current account measures*, BIS, November 2011
<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=422141&NewsAreaID=2>

Q45 Is three years a suitable timeframe for the costs structure to be comprehensively reviewed and potentially recalibrated? If not, please explain why, providing an alternative with supporting argument.

CCCS broadly agree with this time frame. However we believe that the Government needs to reconsider the basis of any future fee review, as it is not clear this review has struck the right balance between the interests of bailiff firms and the needs of people in financial difficulty.

Q46 Do you consider there are alternative or less regulatory options that would be suitable for enforcement agents? If so, please provide proposals.

CCCS does not believe there is any case for less regulation of bailiffs. The current regime has failed to prevent consumer detriment for many years and so less regulation is not a plausible option.

However the Government might consider whether the costs of the current ineffective certification process might be redirected into a more modern and effective scheme for independent regulation.

While paragraph 161 of the consultation states the Government's belief that the new certification processes will enhance protection for vulnerable debtors, we see no convincing evidence or argument that this will be the case. The certification process is an outmoded and weak safeguard on business conduct: It focuses only on bailiffs, not on firms; relies on individual complaints; sets no standards; has no independent compliance apparatus; and has only a limited range of sanctions. Indeed, CCCS further notes that the current guidance for consumers on complaining to the court carries a cost warning for complainants!

Certification is a failed and outdated system that is well behind regulatory policy in other areas such as debt collection and financial services. Scoping options for a more effective system of regulation should have been the main focus of the Government's consultation if it was really concerned to deliver on its pledge to provide better protection against aggressive bailiff practices.

Q47 Do you agree that the application for a certificate should be made by the enforcement agent at the court local to the area where they will be carrying out the main part of their business? If not, please explain why, providing an alternative with supporting argument.

CCCS has no comment in response to this question.

Q48 Do you agree that the application for a certificate should be dealt with by specialised District Judges? If not, please explain why, providing supporting argument.

CCCS has no comment in response to this question.

Q49 Do you have any comments on either of the proposals submitted by the British Parking Association?

CCCS urges the Government to consider further the case for independent regulation and oversight of the bailiff industry. Here we believe the Government needs to reflect back to the 2003 White Paper that concluded: 'without regulation the impact of these changes would be insufficient'.

CCCS does not believe that the BPA is the right scheme. However we would welcome the opportunity for further discussion with the Government on options for better regulation of the bailiff sector.

Q50 Do you agree the competence criteria is an acceptable level for entry into the profession? If not, please explain why, providing an alternative and supporting argument.

CCCS has no comment in response to this question.

Q51 Do you consider that mandatory training is necessary to ensure an enforcement agent is fit and proper to hold a certificate? If not, please provide alternative proposals.

CCCS believes that mandatory training is a necessary but not sufficient safeguard to guarantee conduct standards, as is well established in other regulatory regimes.

Q52 Do you consider an enforcement agent should undertake any further training or development after the granting of the certificate? If so, please provide proposals.

CCCS has no comment in response to this question.

Q53 Do you agree with our proposals on the complaints handling strategy? If not, please provide alternatives with supporting argument.

CCCS does not believe the Government's complaints handling proposals are a substitute for the system of independent regulation that is required.

The new legal remedies to be commenced are unlikely to have a significant impact on the problem of aggressive bailiff behaviour. The Government's proposals on complaints rest on a courts based system, which has not been particularly effective at encouraging people in financial difficulties to seek redress or relief from bad practices. We have three main points:

First, the complaints procedure fails to connect the behaviour of individual enforcement agents with a mechanism that impacts on bailiff *companies* – as a consequence, there is no incentive for firms to make the necessary changes to working practices.

Second, a courts based system is expensive, cumbersome and an excessively demanding venue for often vulnerable people to complain in. It presupposes a confrontational complaints process that is likely to deter debtors who may still be facing enforcement action from the same bailiff firm.

Third, the threat of inter-party costs from use of the Form 4 Complaints procedure in the county court poses an unacceptable financial risk to a person aggrieved by bailiff misconduct. At the same time, the number of complaints about enforcement agents to the High Court between May 2010 and January 2012 was zero⁵ – for all practical purposes, the system is unusable.

⁵ See <http://www.theyworkforyou.com/wrans/?id=2012-01-23a.87456.h&s=%22certificated+bailiffs%22#g87456.r0>

In addition, we note that discussions between the bailiff trade bodies and the advice sector to produce a new complaints process have stalled after the industry could not agree on the preferred model that emerged from the discussions.

Q54 Do you consider that the jurisdiction order should be amended? If so, please supply details and supporting argument.

CCCS believes that at £600, the threshold for enforcement in the High Court is too low, imposing disproportionate costs and hardship for people who have relatively low debts.

The High Court process is extremely expensive and, on the evidence of the fee structure review, inefficient for small consumer debts.

As such, CCCS believes High Court enforcement should only be used for large or very large debts. We recommend bringing the threshold for High Court enforcement into line with the small claims upper threshold of £5,000. The Government's own report shows enforcement costs for the High Court vastly exceed those for county court enforcement in a number of areas⁶. For instance, it is 16 times more expensive for HCEAs to "set up a case file" than non-High Court bailiffs, and five times more expensive to set up payments by instalments. Although the typical cost to process repayment by credit card or cheque is a modest £2 for non-High Court bailiffs, the costs are given as £34.68 and £42.13 when enforced by HCEOs, that is to say, between 14 and 18 times more expensive. This should militate against the use of HCEAs for anything but larger commercial debts.

Q55 Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

CCCS has no specific comment in response to this question.

Q56 Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

CCCS has no specific comment in response to this question.

Q57 Do you have any evidence of equality impacts that have not been identified within the equality impact assessment? If so, how could they be mitigated?

CCCS has no specific comment in response to this question.

**Consumer Credit Counselling Service
May 2012**

⁶ Enforcement Agents Fee Structure Review, p14