Ministry of JUSTICE

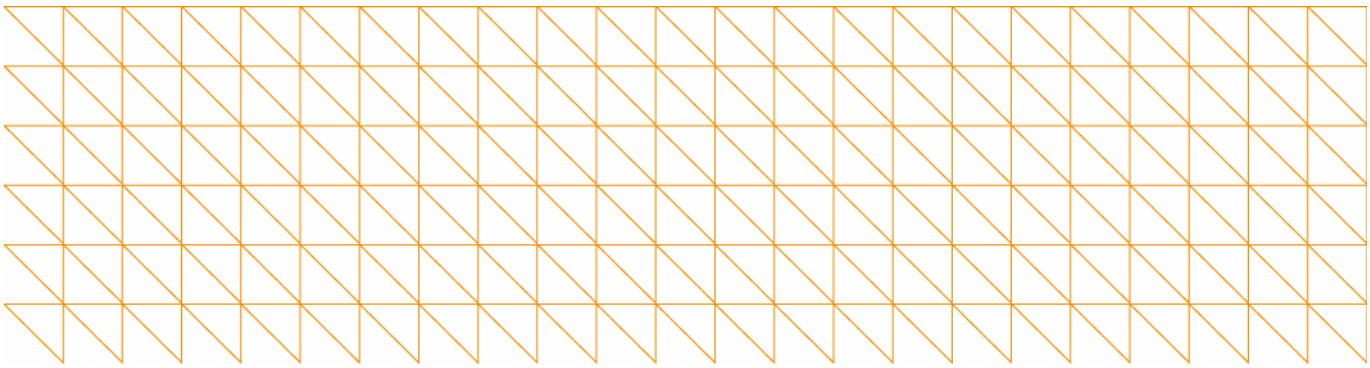
HER MAJESTY'S COURTS SERVICE hmcs

The debt claim process: helping people in debt to engage with the problem

Response to Consultation

CP(R) 22/07

13/06/08



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The debt claim process: helping people in debt to engage with the problem

Response to consultation carried out by Her Majesty's Courts Service, part of the Ministry of Justice. This information is also available on the Ministry of Justice website at www.justice.gov.uk

Contents

Introduction

This document is the post-consultation report for the consultation paper, 'The debt claim process: helping people in debt to engage with the problem'.

It covers:

- the background to the report;
- a summary of the responses to the report;
- responses to the specific questions raised in the report; and
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Philomena Daniels** at the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

Alternative format versions of this publication can be requested from the Civil Law & Justice Division on 0207 210 8602
Email: philomena.daniels@hmcourts-service.gsi.gov.uk

Background

The consultation paper ‘The debt claim process: helping people in debt to engage with the problem’ was published on 5 September 2007. It invited comments on options for encouraging debtor engagement and possible streamlining of procedures for dealing with non-defended debt claims.

Summary of responses

1. We received a total of 25 responses (representing around 8% of the papers distributed).

2. Of these, 24 replied to the questions asked and one organisation provided general comments which, although extremely helpful and informative, were too general to be included in this summary of responses to specific questions.

3. For clarity when reporting the results, respondents were grouped by their interest into four groups. These were:

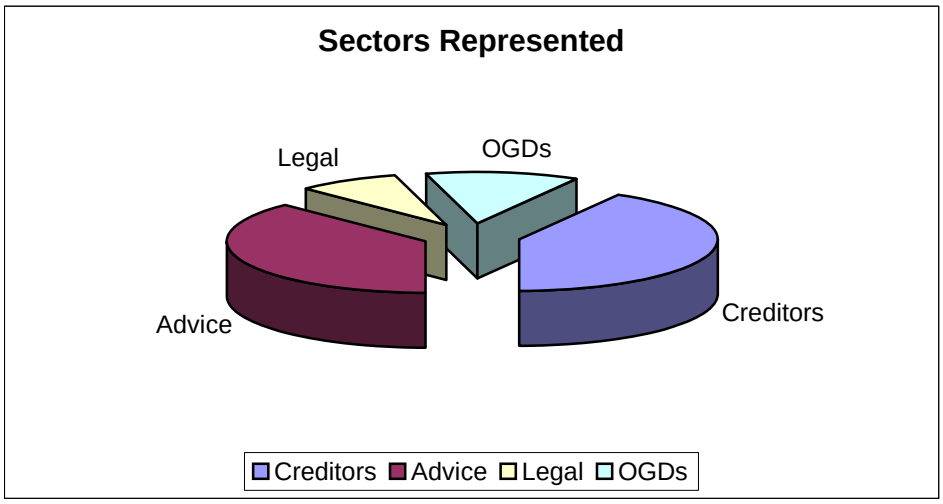
The credit sector	10 respondents including 2 responses from individuals, but which were clearly written from a creditor's perspective and representative bodies;
The advice sector	9 respondents including a charity;
The legal sector	2 respondents
Other government bodies (OGDs)	3 respondents

4. A full list of respondents is at Annex A.

5. We are grateful to all who took the time to respond.

6. Figure 1 below highlights the sectors that responded to the questions.

Figure 1



7. The paper asked 22 questions. However, questions 7 - 14 (inclusive) were directed specifically at creditors only, while questions 15 and 16 were directed specifically at the advice sector only. As a result, we have only reported the responses from these sectors to these questions.

8. The paper contained questions on the following 5 areas:

- Option 1 - do nothing;
- Option 2 - the introduction and operation of the Pre-Action Notice (PAN);
- Option 3 - strengthening of the current Civil Procedure Rules (CPR) requirements;
- Option 4 - the introduction of a debtor protocol; and
- Option 5 - the introduction of a Claims Payment Order (CPO).

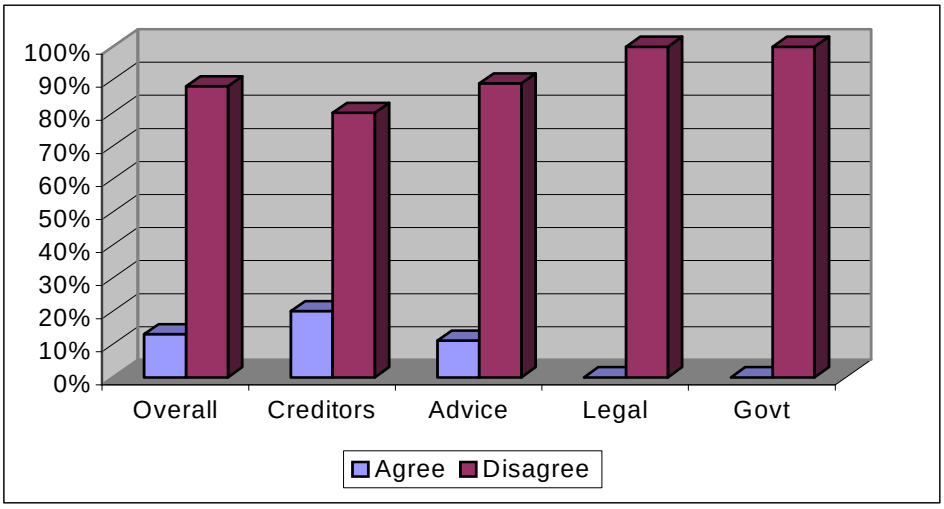
9. Responses were evaluated for the level of support/opposition for the proposals and to take account of alternative or complementary suggestions that could be incorporated into the work to increase debtor engagement.

10. The responses we received were broadly supportive of the proposal to do something to increase debtor engagement and assist the over-indebted.

Responses to specific questions

1. Do you believe that the Government should adopt a 'do nothing' approach? If so please explain.

11. We received 24 responses. Overall 88% were opposed to the government adopting a 'do nothing approach'. As the chart below shows, the vast majority in each sector shared this view.



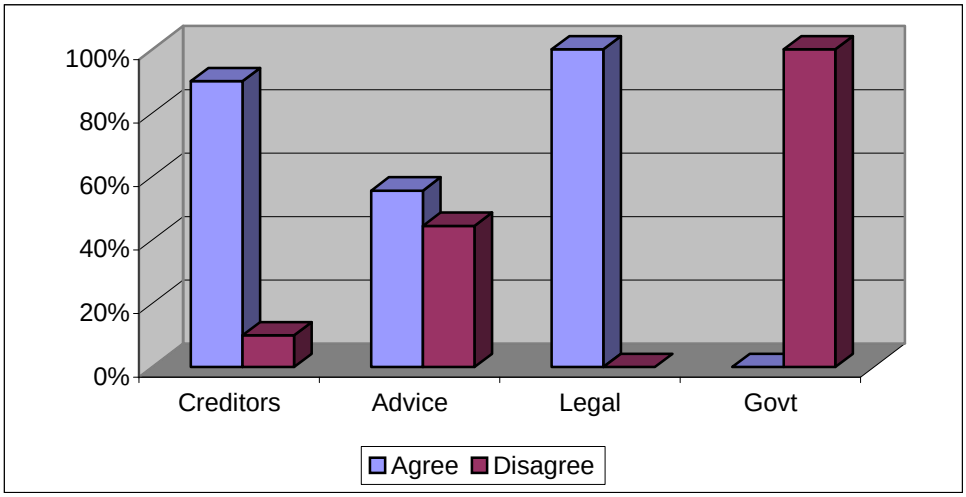
12. Some respondents pointed out that doing nothing does not necessarily mean that nothing is currently being done by the Government. Work on increasing debtor engagement was underway in other areas, although some felt that this could be improved.

13. One respondent stated that the Government should not encourage debtors, either passively or actively, to take on unaffordable financial commitment.

2. Do you agree that because of the results of the pilot the PAN should not be introduced on a mandatory basis? If you disagree please confirm why?

14. There were 24 responses. 67% agreed that the PAN should not be introduced on a mandatory basis because of the inconclusive results of the pilot.

15. The chart below shows that there were differences of opinion about this. It also shows that 33% favoured the introduction of the PAN. They felt that a standard form of notice would assist debtors and help advisers to establish the stage the claims process had reached.



16. Some respondents felt that even if the PAN was not introduced on a mandatory basis, some of its key elements should be prescribed as part of pre-action requirements and as a pre-requisite for any application of a claims payment order. Some recommended uniformity in the print style, font, etc.

17. Some debt advice bodies expressed disappointment at the result of the PAN pilot. They felt that the introduction of PAN would be worthwhile, stating that:

> "not adopting PAN is like throwing the baby out with the bath water."

18. The general feeling was not to adopt PAN on a mandatory basis but to include its key elements in the form of specified pre action requirements in order to standardise practice.

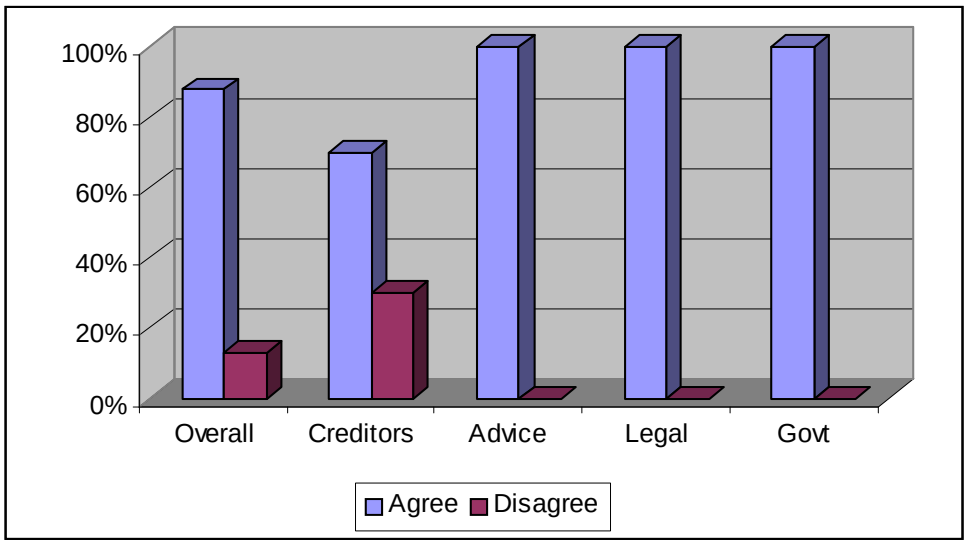
3. Can you estimate the costs including training costs of altering your systems to accommodate the PAN?

19. We received 19 replies (70% of creditors, 55% of the advice sector and 50% of OGDs). Respondents from the creditor sector felt that the cost of implementing the PAN would range from 'minimal' to '£1m'.

20. Respondents from the advice sector indicated that the cost of implementation would range from £1m - £4m, while OGDs felt that it would be minimal.

4. Do you think that the requirement for a pre-action letter should apply in all debt claims (strengthening the current provision that it should be 'normal')?

21. We received 24 replies. 88% thought that the requirement for a pre-action letter should apply in all debt claims.



22. As shown by the chart there was strong support from all sectors for this option, with advice providers virtually unanimous in their support.

23. Dickinson Dees (solicitors) commented:

    [The pre-action letter]

    > "Yes. It puts a debtor and their advisors on notice that a claim is to be made, and offers an opportunity for them to contact the creditor to discuss, or alternatively to seek advice from an appropriate source."

24. Other solicitors, banks and utility companies supported this view.

25. Citizen's Advice (CA) commented:

    > "Citizens Advice believes that creditors should be required to send a pre-action letter for all debt claims. Debtors should not be surprised by court action and should be given sufficient time to seek advice on both legal remedies and making repayments. Although it would be reasonable to expect creditors to give such notice as a matter of good practice and in compliance with section four of the current practice direction on protocols, CAB evidence highlights cases where creditors have not done so."

26. Advice UK commented:

    > "We strongly support strengthening the existing pre-action requirements to include a specific requirement to send a pre-action letter that includes mandatory standardised information. The requirement for a pre-action letter to be supplied in all cases involving prospective debt claims should apply in all debt claims. We cannot identify any reason to allow any exceptions to this."

27. Advice UK referred to the Scottish system where creditors are obliged to issue a statutory "Dealing with Debt" pack.

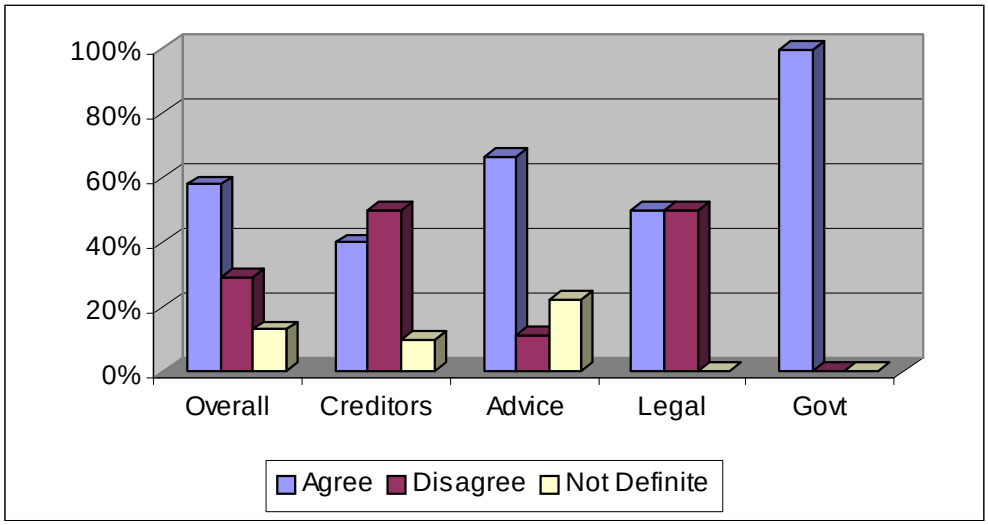
28. However, not all were in favour. For example, the Civil Court Users Association (CCUA) commented:

> "We feel strongly that a letter before action is already sent as Creditors in the main wish to avoid the expense of litigation. Our members feel that a prescriptive pre-action letter is unnecessary and would not solve any perceived problems with claims being made against Debtors who have no knowledge of the issue nor would it do any more to secure engagement by a debtor."

29. Rethink (a mental health charity) felt that it was crucial that those with mental health problems were sign-posted to sources of appropriate, independent support. In their view many advice bodies do not necessarily have expertise on mental health issues.

5. Should the contents of such a letter be prescribed and should they go beyond the general requirements set out in the pre-action protocol Practice Directions?

30. We received 24 responses. Overall 59% were in favour of the contents of the letter being prescribed while 29% felt that a prescriptive pre-action letter was unnecessary. 13% did not give definite answers.



31. Views were more mixed on whether the contents of the letter should be prescribed. However, most seemed to agree that the letters should have a minimum content but felt that this should not be prescriptive.

32. Dickinson Dees (solicitors) commented:

> "Yes, there should be a prescribed form like those used for a Statutory Demand. It may also be helpful for a debtor to have sight of a statement of account setting out simply and clearly what is being claimed. However, if a letter or notice is too long in content, the likelihood is it will go unread."

33. Their comments on the length of the letter are in line with comments that have been previously made to us by advice providers. It also corresponds with the findings of the Exeter University study.

34. The CCUA took a different view and commented:

> "Not rigidly so, we feel any prescriptive element should be kept to an absolute minimum, like in paragraph 62 and it should not need to be on a solicitor's letterhead. Variables of types of letters are required based on the type of debt etc."

35. Others were not keen on the content being prescriptive. Severn Trent (a Utility Company) had concerns about potential impacts on cashflow and commented:

> "There doesn't appear to be any demonstrable evidence to support a prescribed notice approach. Debtor engagement seems to be more apparent when there is a change to the look of the notice i.e. HMCS branded envelope, rather than the content of the notice.
>
> "We would also be concerned if there was a prescribed timescale between notice and debtor engagement, particularly where advice is sought through independent sources e.g. CAB etc. This could have a significant impact on creditor cashflow."

36. Advice providers suggested different approaches to this issue but the majority felt that there should be cost sanctions imposed when creditors did not comply with a Practice Direction, failed to allow debtors time to obtain advice (when told that was the intention) or proceeded despite attempts to settle.

37. Advice UK commented:

> "We strongly support the notion that the contents of the letter should be in a prescribed form, and suggest that the existing PAN wording is a good model to adopt. However, we do not feel that the general pre-action protocol is currently adequate to provide sufficient guidance on what is acceptable behaviour in debt claims. We believe that there should be a debt pre-action protocol, of which this notice would form a central part, and which would lay down specific requirements on what creditors must do before action can be taken. There should be set time limits for each step."

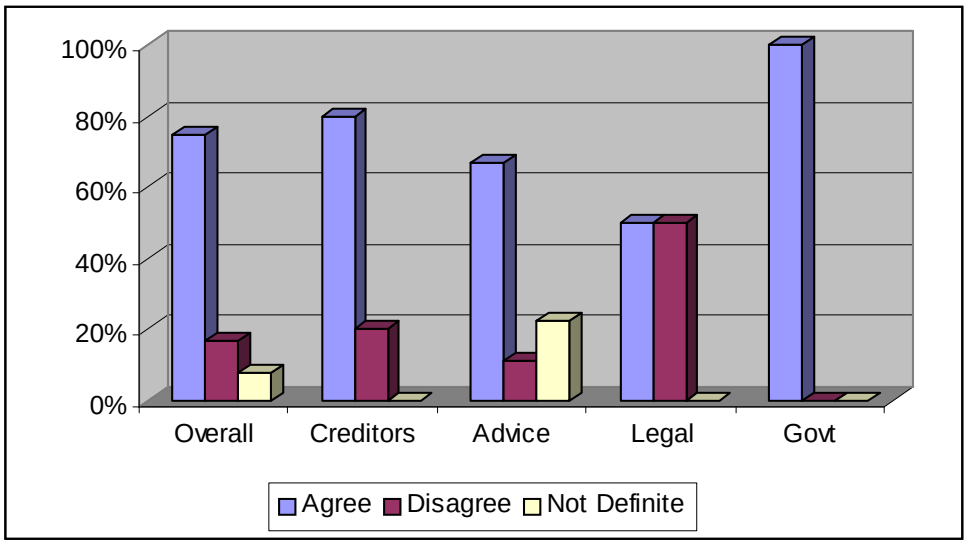
38. However, CA commented:

> "Citizens Advice does not believe that the form and content of the pre action letter need necessarily be tightly prescribed. However we believe that the practice direction on protocols should be amended to include reference to the specific circumstances of a potential debt claim. This might include:
>
> - details of the claim as currently required;
> - details urging the debtor to engage with the creditor pointing out the benefits of this;
> - details of the sort of offer the creditor would be prepared to accept by way of instalment repayments towards the debt. If the creditor subscribes to a code that requires them to accept repayment instalments worked out by an accepted method, the pre court letter should give brief details of this method (for instance acceptance of an offer made using the common financial statement);
> - the letter should signpost to providers of independent free money advice, as did the PAN. The letter might also be more positive than the PAN in briefly highlighting the benefits of advice (rather than merely the negative consequences of further court action);
> - the letter should also briefly highlight how protection might be available for the debtor from the court;
> - the letter should make clear that court action is not inevitable as currently required in section 4.2 of the protocol."

"Citizens Advice believes that these 'content provisions' should probably be introduced as good practice requirements for creditors to consider rather than prescribed terms to be included in all letters."

6. Should there be a requirement for unregulated creditors or those not operating under a recognised code of practice to confirm in their particulars of claim that a pre-action letter had been sent and no acceptable response had been received?

39. There were 24 responses. 75% agreed, 17% disagreed and 8% did not give a definite answer.



40. Concerns were voiced by some about how different creditors would be recognised by the court. Some respondents also held the view that in most cases debtors would be unaware of whether a creditor was regulated or unregulated.

41. APACS commented:

> "We believe that it is appropriate to provide a degree of consistency in all credit and debt related matters. Consistency of approach is appropriate to minimise confusion for the consumer who may be in receipt of correspondence from more than one creditor."

42. Severn Trent and the CCUA supported this view but CCUA questioned how regulated and unregulated creditors would be identified.

43. Money Advice Trust stated that:

> "There should be a requirement for all creditors, whether regulated or not, to confirm in the particulars of claim that they have sent a pre-action letter. We cannot envisage any justification for creating a two-tier system for creditors. This would be confusing both for the credit industry and for defendants in a court case.
>
> "A defendant will often have no idea whether their lender is regulated or operating under a code of practice."

44. Both the Association of Her Majesty's District Judges (the Association) and the Office of Fair Trading (OFT) provided single responses to questions 4 - 6.

45. The Association commented:

> "We think that there is a strong case for making a pre-action letter a requirement in all debt claim cases where the debtor is an individual. We do not think such a requirement would be appropriate where the debtor is a company or a firm (although a short pre-action letter making a final demand should of course remain the norm in those cases). We think the contents of a fuller letter to individuals should be those set out in paragraphs 62 and 63 of the Consultation Paper. The contents should be prescribed in the sense that they should be included in a Protocol, so that failure to include them would give the court a reason to exercise its discretion with regard to costs.

"With regard to Question 6, we think on balance that there is some value in requiring a statement in the claim form that a letter before action complying with the protocol had been sent with no acceptable response, but we see no reason why it should not apply to all Claimants. It will not always be obvious whether a particular Claimant was a regulated creditor or was operating under a recognised code of practice. We would expect the regulations or code of practice applying to include the proposed requirements in any event, so that it should cause no difficulty for all Claimants to comply."

46. OFT stated:

"We agree that the requirement for a pre-action letter should apply in all debt claims. We also agree that the contents of such a letter should be prescribed, and should go beyond the general requirements set out in the Practice Directions.

"In particular, the letter should include specified details of advice providers and the consequences of litigation. It should emphasise the importance of the debtor (or a representative) responding to the letter, and taking certain steps to avert court action. It should highlight the importance of acting quickly, and the deadline for response.

"We agree that a minimum period of 14 days should be allowed for response. This corresponds to the minimum period that must elapse following service of a default notice under the Consumer Credit Act before the creditor can take any of the steps specified in section 87. This period was increased from 7 to 14 days by the Consumer Credit Act 2006, with effect from 1 October 2006.

"We agree that if the debtor decides to seek advice, and informs the creditor of this, the creditor should allow sufficient time for this to happen. We agree that failure to do so should impact on the creditor's ability to recover the costs of court action.

"We agree that the creditor should be required to confirm, in the particulars of claim, the steps taken pre-issue and the outcome. In particular, that a pre-action letter was sent (and the date of this), whether a response was received (and if so what this involved), whether an offer of payment was made (and in what terms), and why this was considered to be unacceptable. Again, failure to do so should impact on the creditor's ability to recover the costs of any subsequent court action.

> "In our view this should apply in all cases, irrespective of whether the creditor operates under a recognised code of practice or is otherwise regulated (whether under the Consumer Credit Act or otherwise). The creditor should confirm the steps that were taken and the outcome. In the case of agreements regulated under the Consumer Credit Act, this would include the date of the default notice and whether and in what terms a response was received from or on behalf of the debtor."

7. If you normally send a letter to the debtor what period do you normally allow between issuing a final notice and commencing court action?

47. We received 8 responses (80% of creditors). Responses ranged between 5-18 days with a majority quoting 7 days.

8. Does your organisation operate under a code of practice and does this cover debt recovery practices/pre action behaviour?

48. All creditors responded. 90% stated that their organisations operated under a code of practice which included pre action behaviour.

9. Is your code of practice mandatory and who is responsible for its monitoring/regulation?

49. Again all creditors responded. 80% stated that their codes of practices were mandatory and regulated by such organisations as the Financial Services Authority (FSA) and the Banking Codes Standard Board (BCSB).

10. How many notices (in numbers) do you send to the debtor before you commence legal action?

50. All creditors responded. The responses varied between 1 and more than 10 letters. One respondent gave figures of 7 letters and 94 attempted telephone calls.

11. Are debtors encouraged to engage with a view to finding acceptable settlements and are they provided with details of advice providers?

51. All creditors responded, stating that debtors are encouraged to engage with a view to finding acceptable settlements and were provided with details of advice providers.

12. If so, please list the advice providers specified.

52. The vast majority said CA. Others included the Consumer Credit Counselling Service (CCCS), Money Advice Trust (MAT), National Debtline (NDL) and Neighbourhood Offices and Social Services.

13. How soon after the final warning is action usually commenced?

53. Responses stated that between 7 and 28 days was allowed before the commencement of legal action.

14. Is the process restarted in situations where agreement is reached but not complied with?

54. All creditors responded. 60% confirmed that the process was re-started where agreements were not complied with. 30% said that it was not and 10% did not give a definite answer.

15. Do you agree that creditors including those that are regulated and those operating under codes behave reasonably?

55. All of the advice sector replied. 78% did not agree that creditors behave reasonably. Most felt that creditors were generally unwilling to negotiate preferring to obtain judgment.

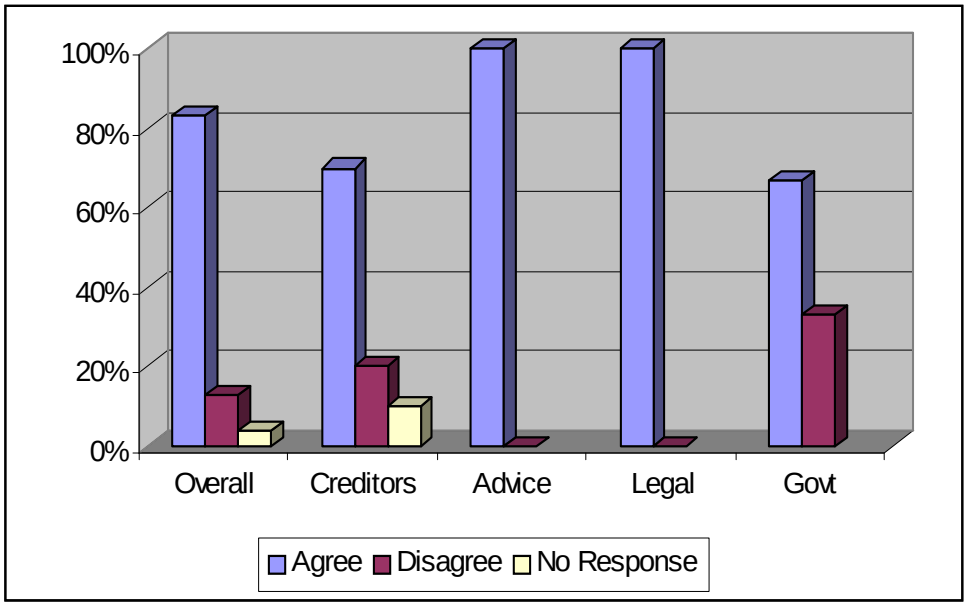
16. If not do you have evidence to support your view? If so please provide details.

56. 67% said that they had evidence to support their views.

57. Various examples and case studies were given by respondents. They stated that the unreasonable behaviour by creditors is a serious and wide scale problem, and that some creditors are ‘’serial offenders”. One respondent stated that they have collected approximately 70 cases of misbehaviour by one collection agency alone. They also emphasised that membership of a trade body does not necessarily guarantee good behaviour.

17. Do you agree that a debtor protocol is impractical? If not, why not?

58. We received 23 replies. 83% agreed that a debtor protocol was impractical largely due to concerns about awareness and the cost of sanctions for not complying would affect the most vulnerable people in society. Debtors with language, literacy and mental health problems would be most likely not to follow the protocol.

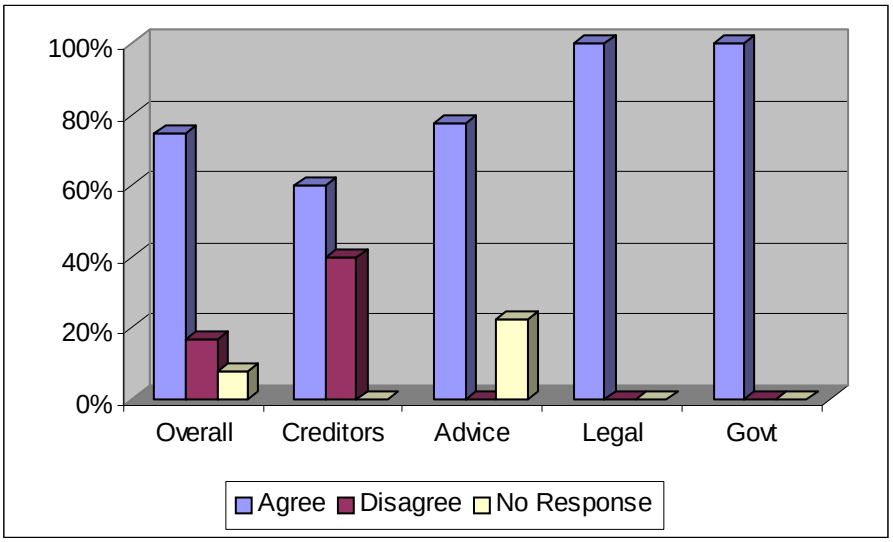


59. It was also suggested that there are many other reasons why debtors may be reluctant to engage in negotiations with the creditors. These include previous discussions which have broken down, creditors' expectations that the debtor should pay a higher amount, or debtors finding it difficult to face up to and deal with their problems. We were told for example, that many debtors get to the stage where they are not able to open their letters without the support of an adviser.

60. However, of the 13% of respondents who disagreed, one respondent offered a personal view that a debtor protocol was a good idea, and that reasonable debtor action should be expected. They argued that the Government's aim should be to instil in the debtor, respect for Her Majesty's Court Service (HMCS) and for the law.

18. Do you agree that an additional cost penalty would be disproportionate?

61. We received 22 responses. 75% agreed that additional cost penalty would be disproportionate and that this would do nothing but increase debtors' over-indebtedness. 17% were in favour of imposing additional cost penalty on the debtor.



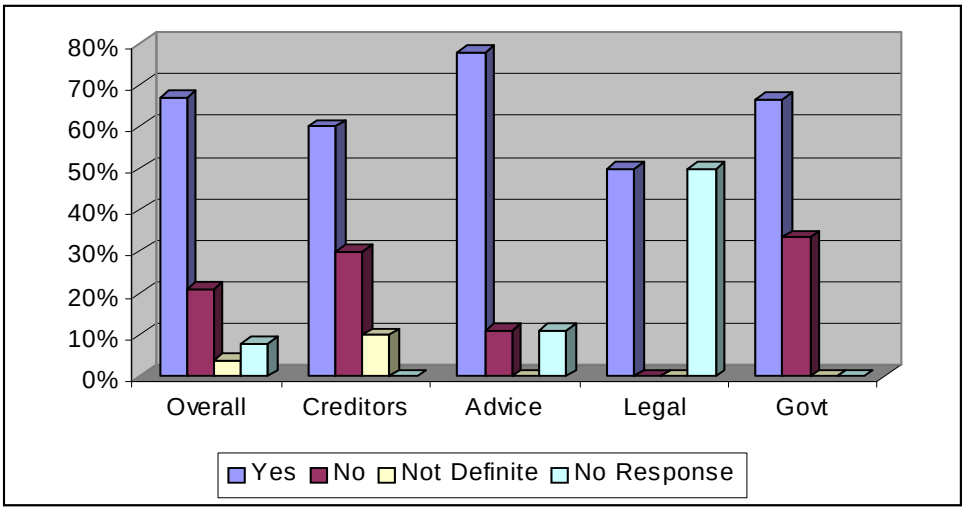
62. One creditor felt that this would lead to increased costs for HMCS. This would ultimately impact on creditors as higher court fees.

63. Advice providers felt that imposing a cost penalty for non-compliance may be disproportionate. Anecdotal evidence suggested that malicious refusals by debtors to engage with their creditors were minimal. It was felt that a more common reason for failing to engage was that debtors felt unable to cope and 'buried their head in the sand'.

64. Those who supported the debtor protocol stated that an additional cost penalty would not necessarily be disproportionate as its suitability would vary from debtor to debtor depending on their circumstances.

19. Are there any other incentives or sanctions that could be introduced to improve debtor engagement?

65. We received 22 replies. 67% felt that other incentives/schemes could be introduced to improve debtor engagement.



66. Various suggestions were made including incentives such as reduction of debts where agreement was reached or an attendance by the debtor on a Government funded financial management course. One suggested a reduction of court fees on the basis that judicial time and resources would not be employed, while another suggested a reduction in penalty charges where the debtor has been prompt in either acting or responding

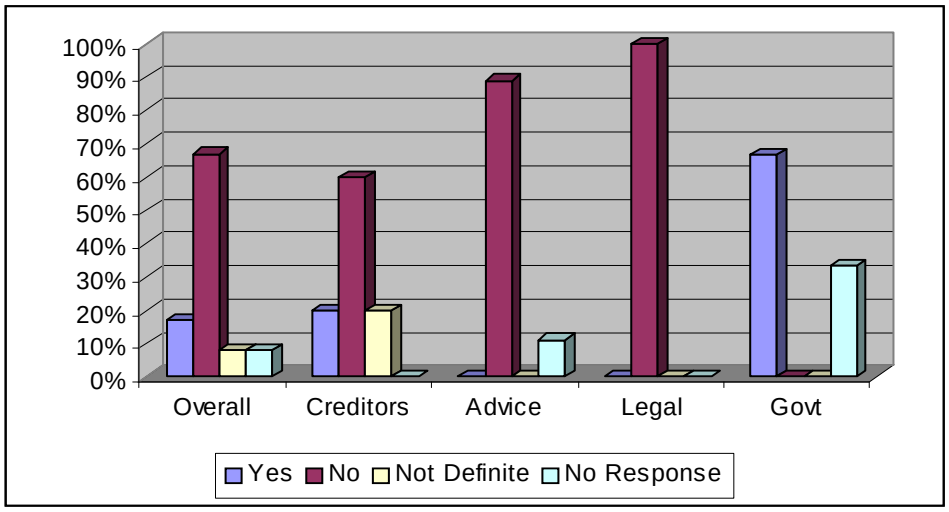
67. CCCS suggested that where debtors phone, creditors offer to put them through to independent advisors, or include separate and well-targeted details about where to go for help on the letter, along the lines of “call this number now if you want free independent advice”. They also suggested that staff could be trained to say at the end of every call “do you need help, I can put you through to a charity which is completely independent of us.”

68. The CCUA suggested that financial management courses to be mandatory.

69. One individual respondent suggested 'bringing the debtor to court for contempt to explain when a court's order was ignored.'

20. Do you believe that the CPO concept should be introduced and if so what benefits do you envisage?

70. There were 22 responses. 67% opposed the introduction of a CPO. 17% supported the suggestion and 8% did not give a definite answer.



71. Respondents from the advice and legal sectors strongly opposed the introduction of a CPO. They felt that such a "fast track to enforcement" process would disproportionately affect those who are hardest to reach because they are the people least able to deal with their debts. They also took the view that it was vital for HMCS to retain the function of looking at the cases before formal orders were made.

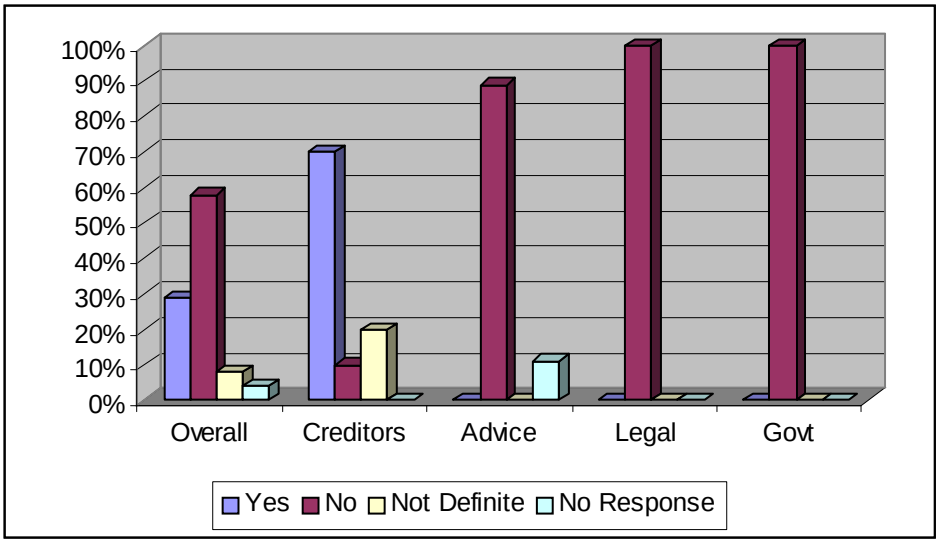
72. Respondents opposed to the introduction of the CPO also felt that it would lead to significant system changes, additional costs and confusion as both current system and the new CPO system would need to run in tandem.

21. Can you give an estimate of the costs of implementation for your organisation?

73. None of the respondents was able to estimate costs with any accuracy for various reasons. Some felt that costing would need to be undertaken in relation to claim, judgment and interest charges, along with any system change requirements. They stated that there would need to be a pilot involving appropriate stakeholders before estimates could be made.

22. Do you agree that the safeguards are sufficient? Please give details if you do not.

74. We received 23 responses. Overall 29% thought that the safeguards were sufficient. 58% disagreed and 8% did not give a definite answer.



Conclusion and next steps

75. We acknowledge that legislation and other schemes are, at least to some extent, currently addressing the problems of, and caused by, over-indebtedness. However, it is clear that the general feeling is that more needs to be done to try to increase debtor engagement and to ensure that information about sources of advice is provided.

76. Most respondents agreed that, due to the inconclusive results of the PAN pilot, the PAN should not be come mandatory. However, there was sufficient support to suggest that:

    - a requirement for creditors to issue a letter before action containing prescribed information about how debts could be paid and advice sources;

    - creditors should allow sufficient time for advice to be obtained, where appropriate; and

    - confirmation of pre-action behaviour should be included in the particulars of claim.

77. We will therefore urge the Civil Justice Council to take account of these findings when considering possible changes to the current Practice Direction on pre-action behaviour.

78. There was insufficient support or benefits identified to warrant the introduction of a debtor protocol or the Claims Payments Order.

Consultation Co-ordinator contact details

If you have any complaints or comments about the **consultation process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 1326 or email her at consultation@justice.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

Green & Co on behalf of the Royal Bank of Scotland Plc

DRS Legal Services In Debt Recovery and High Court and County Court Agency

Severn Trent Water

Alliance & Leicester

Dickinson Dees LLP, Debt Recovery/Costs Collection

APACs

British Bankers Association

Finance & Leasing Association (FLA)

Jeremy Sutcliffe

Institute of Credit Management

Blackfriars Advice Centre

Advice UK

Advice Centre, Harlow, Essex

Citizens Advice

Consumer Credit Counselling Service

Money Advice Trust

Think Money Limited

Office of Fair Trading

Hertfordshire County Council

Civil Courts Users Association

Judiciary (District Judge, Bournemouth)

Civil Justice Council

Sheffield combined Court Centre (HMCS)

Liverpool Civil & Family Courts (HMCS)

Her Majesty’s Court Service

Rethink