**Response on behalf of the Chancery Bar Association**
**To the Call for Evidence of**
**The Civil Justice Council's Enforcement Working Group**

**Response by the Chancery Bar Association**

This response to the CJC's Call for Evidence is made on behalf of the Chancery Bar Association.

The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of some 1,500 members handling the full breadth of Chancery legal work at all levels of seniority, both in London and throughout England and Wales. It is recognized by the Bar Council as a Specialist Bar Association.

Chancery work is that which was traditionally dealt with the Chancery Division of the High Court of Justice but, from 2 October 2017 has been dealt with principally by the Business and Property Courts ("B&PCs"), which sit in London, and in regional centres outside London. The B&PCs attract high profile, complex and, increasingly, international disputes. Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial, property and business law.

As advocates, members are instructed in all courts in England and Wales, as well as abroad. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

The Chancery Bar Association advertised the Call for Evidence to its members via its weekly newsletter. Members may therefore have responded individually. This response has been compiled by a small working group (John Campbell, Justin Perring and Alexander Learmonth KC, all barristers of New Square Chambers) on behalf of the Chancery Bar Association, and does not purport to represent the combined experience of all its members.

Correspondence relating to this response should be directed to admin@chba.org.uk.

As anticipated by the Call for Evidence, we have not felt it possible to respond to every question. The numbers below refer to the numbered questions in the Call for Evidence.

<u>General observation</u>

As a specialist bar association whose members deal predominantly with complex civil cases, we would like to make to the following general observation. There is presently a wide range of enforcement mechanisms open to parties, extending beyond those listed in Annex A to the paper. While those methods in Annex A are very commonly used, for example in high-volume, low-value money claims; claims under mortgages or consumer credit agreements, and while there is no doubt much to be said for improving those processes for creditor and debtor, other less commonly used processes – the appointment of a receiver for example – should not be forgotten about. Our concern is that nothing should be done to limit the court's power with regard to those less common methods of enforcement, which in our experience may provide the solution in unusual cases, for example concerning real property, trusts and estates, of the type encountered in chancery practice.

Experience and awareness of enforcement

1. Charging orders, attachment of earnings, third party debt orders, warrants of control, writs of control, insolvency proceedings, contempt of court proceedings, and freezing orders.

2. Barriers to enforcement generally arise as a result of opacity in a debtor's affairs and a lack of verifiable data. Some clients are also put off by the additional cost of enforcement or tracing agents where they are already owed sums by a debtor who appears to be unable to satisfy them. Anecdotal evidence also suggests that, at least where not represented, parties find the enforcement process and/or options labyrinthine and difficult to understand.

   Although perhaps outside of the scope of this consultation, particular difficulties often arise when a domestic judgment needs to be enforced in another jurisdiction or jurisdictions. This often gives rise to procedural, substantive and practical issues which have not been considered adequately or at all before the enforcement stage, particularly in more modest cases. The complexity of enforcement out of jurisdiction is perhaps illustrated by the Chancery Guide which devotes only two paragraphs to it.

   A statement confirming that a party has considered enforcement (in and out of jurisdiction) when issuing a claim may assist in bringing the issue to the attention of represented and non-represented parties at an early stage.

3. While each case is fact specific, charging orders tend to be more likely to result in some satisfactory payment arrangement or recovery, particularly where they are over a debtor's home or other personal property. The process is generally swift and straightforward and the available defences to an application are limited.

4. Insolvency proceedings are not principally aimed at achieving recovery by the petitioning creditor, viz. they are primarily not a means of debt recovery for the benefit of a particular credit, but rather of certifying a state of affairs and preventing a debtor from obtaining further credit in circumstances where they are already unable to pay their debts as and when they fall due. In many cases, the process is also drawn out, complex, costly and disproportionate to the level of recovery.

5. While a lawyer of professional adviser can, and probably ought to offer an opinion on what is likely to me the most effective in a given case, we do not consider that it is properly the place of the Courts or other actors within the justice system to promote one form of enforcement action over another. It must be the free and unfettered choice of the client based upon the circumstances of the individual case. We also do not believe it to be possible or desirable to provide any hard and fast criteria or guidance by which litigants can be channelled towards a particular route of enforcement.

6. The process of obtaining an order for sale following a charging order and the circumstances in which such relief is available could be better codified. While properly a matter for the exercise of judicial discretion, it would aid both creditors and debtors and provide greater legal certainty if there were codified rules as to the circumstances in which, or the criteria which, a Court is obliged to take into account when determining whether to make an order for sale.

   Contempt of court applications are also often problematic: the Law Commission has described the present law as “unsystematic”, “disordered and unclear”. Practically applications are difficult to succeed on given the standard of proof. It is often unattractive to pursue due to the cost, the number of hearings and right of appeal. Parties are more concerned with compliance going forward than punishing past non-compliance. The Law Commission’s proposal that interim remedies be available on proving the elements of contempt by breach of an order or undertaking on the balance of probabilities seems sensible.

7. No response.

8. No response.

9. No response.

10. No response.

Supply of information about potential judgment debtors

11. It may improve the level of engagement by debtors if those served with claims were clearly warned not only of the Court's power to enter judgment in default of a defence/acknowledgment of service but that, if such a judgment is entered, the burden would then fall upon the defendant to make an application and satisfy the requisite test, to warn what the potential costs consequences might be, and fundamentally that when judgment is entered it can be enforced.

12. No – this would in our view be an unwarranted intrusion on a defendant's affairs. As we see it, it is for the party seeking relief to satisfy themselves by way of due diligence as to the other party's ability to meet a judgment and/or order for costs. There are numerous credit reference agencies and other facilities available to enable putative claimants to make an assessment of the commercial viability of litigation before embarking upon it. We do not see it is the place of the justice system to impose that burden upon the parties, nor are we clear as to what effective sanctions could be applied in the event of non-compliance.

    However, defendants could be encouraged to indicate if they consider that they will be unable to satisfy the claim if proven, as of course that might deter a claimant from 'throwing good money after bad'. And as mentioned above, a claimant having to confirm that enforcement has been considered when issuing might bring that issue to the attention of represented and unrepresented parties at an early stage.

13. If contrary to our view above this were to be ordered, then a simple statement of assets and liabilities and the location of those assets, and any anticipated material changes ought to be sufficient (verified with a statement of truth).

14. We have had only limited experience of orders for questioning.

15. On balance, yes we have found the Part 71 effective. The penal sanctions of non-attendance encourage compliance, though production of documents can be 'hit and miss' in practice.

16. An order to attend Court for questioning could be accompanied by a standard checklist of documents the paying party will be required to produce, together with a warning as to the sanctions for non-compliance.

17. Noting the comments above on contempt of court applications, the current sanction of contempt of court strikes us as a proper and reasonable one, while still giving the court sufficient discretion to determine what sentence or punishment is appropriate in the circumstances.

18. The court might usefully supply any alternative address details it held, and a list of unsatisfied judgments. Beyond that, it is not clear to us what details a court might hold that could be provided to and assist a claimant.

19. No response.

20. No. We see the Court system as there to resolve disputes, not to provide a tracing or data collection service.

21. We are cautious about such a proposal. Such a system might be open to abuse and speculative or disproportionate applications. Nevertheless, we can see benefit in the Court service and the DWP sharing data.

22. No response.

23. This information is already disclosable by judgment debtors. The court can make orders against judgment debtors as required to access this data.

24. No response.

25. No response.

26. No response.

<u>Support for Debtors</u>

27. We am aware that debtors are usually signposted to money advice and/or citizens advice bureau services, national debt-line, and step change.

28. As above.

29. If it is not already provided, debtors should be made aware of the potential avenues of enforcement available to a judgment creditor. This information could be summarised in the response pack.

30. With the increase of use of technology in the Court, those who are not computer literate or who do not have access to such facilities may be vulnerable to action being taken against them simply because they are unable to use the technology. Apart from self-certification, it is difficult to identify those debtors. We do think that the decline in service provision in court offices face-to-face and by telephone impacts these groups disproportionately. We have seen cases where parties have fallen into default simply because they have not been able to use online payment systems or file the correct paperwork online, when they would have been able to do so at a court counter.

31. Information could be disseminated on issue and upon judgment being entered, i.e. (i) and (ii). By the time the matter is with bailiffs or enforcement officers, it seems to us it is too late.

32. Yes. While this would undoubtedly result in some cost to the Court system, it is likely that the current strain on resources caused by the ever-increasing number of litigants in person who are unable to afford or access legal advice vastly outweighs the putative cost of giving timely, proactive advice.

Any proposed improvements

33. In general, we think the system is under resourced at present. The processes themselves work, or at least they would work if they were carried out as designed. The problem is a lack of resources to ensure timely service delivery and communication.

34. No response.

35. I think debtors need to be made aware early of the avenues of enforcement available to creditors and the potential impact these can have. Often debtors have a habit of burying their heads in the sand, or think their problems will be solved by going bankrupt, because

of a lack of understanding and information about the options available and what the implications are.

36. As above.

37. See answer to q.11 above.

38. See answer to q.6 above.

General

39. No response.

40. No response.

For and on behalf of the CHANCERY BAR ASSOCIATION