Low Incomes Tax Reform Group
A voice for the unrepresented

Enforcement of deduction from accounts (direct recovery of debt (DRD))
Consultation on draft clauses for Finance Bill 2015
Response from the Low Incomes Tax Reform Group (LITRG)

1 Executive summary

1.1 We welcome the genuine openness of the consultative process. We are particularly encouraged by the appeal to the county court against HM Revenue & Customs' (HMRC) refusal of a debtor's objection, and by the clear intention expressed in meetings to exclude vulnerable debtors from DRD by insisting on a face-to-face encounter – or an alternative process in the exceptional cases where face-to-face may be inappropriate – at which the 'vulnerable' can be identified and referred to a specialist unit.

1.2 Nevertheless, it is essential that a framework for the intended safeguards for 'vulnerable' debtors should be set out in primary or secondary legislation, and not left to the explanatory notes. Otherwise the best of policy intentions will have no legal force or effect and that would be a major concern. How to interpret the 'Condition C', ie that HMRC must be "satisfied that the person is aware that the sum is due and payable by the person to the Commissioners", is germane to the whole process of identifying the vulnerable debtor.

1.3 We strongly recommend the whole question of vulnerability – framing a definition of 'vulnerable debtor'; considering how best to identify such persons and how to train HMRC personnel to do so; and exploring ways of explaining to debtors what they owe and discussing options to resolve it, should be the subject of a full consultation involving the voluntary sector. The outcome of the consultation should then be set out in a Code of Practice which should be given statutory underpinning.

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1.4 Describing vulnerability and deciding how to determine whether to exclude persons from DRD on those grounds will be hugely challenging, and HMRC through their Vulnerable Customer Unit will doubtless seek the assistance of specialist and other charities in framing a description. That will take time, but it is crucial that no DRD activity takes place until the description is ready, fully understood and agreed, the Code of Practice published, the field officers fully trained in the legislation and the descriptors of vulnerability and how to react when on the phone to or face-to-face with a vulnerable defaulter. It may be necessary for parts of the legislation to be brought in by statutory instrument when everything is in place.

1.5 We recommend HMRC carry out a full equality impact assessment before these draft clauses are submitted to parliamentary scrutiny.

1.6 We further recommend that the draft legislation should contain a provision for Board/Commissioner authorisation for each exercise of DRD powers. An additional and useful safeguard would be a requirement for HMRC to report publicly each year on (a) the number of applications made for use of DRD and (b) the number of applications granted.

1.7 We make a number of observations about the detail of the clauses. Our comments take no account of any draft regulations which at the time of writing have not yet been seen. When the draft regulations are available we shall be pleased to comment further.

2 About Us

2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.

2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 Introduction

3.1 Like nearly all others who responded to the initial consultation, we were alarmed by the lack of adequate safeguards proposed, in particular the absence of any appeal route to the courts or any judicial body independent of HMRC. Since then we have been greatly encouraged by the genuine openness of the consultative process and have greatly valued the opportunity to discuss our concerns with officials. We are particularly encouraged by the appeal to the county court against HMRC's refusal of a debtor's objection, and by the clear intention expressed in meetings to exclude vulnerable debtors from the process by insisting on a face-to-face or similar encounter at which the 'vulnerable' can be identified and referred to a specialist unit within Debt Management and Banking (DMB).

3.2 The remainder of this response concentrates on how the draft legislation can best provide these protections for the vulnerable. While the draft clauses are entitled 'enforcement by deduction from accounts', the process is also known as 'direct recovery of debt' or 'DRD' and that is the terminology we adopt in this response.

4 Safeguards for the 'vulnerable'

4.1 Despite being assured in discussions with HMRC of their intention to include a range of safeguards to ensure that vulnerable debtors would not be subject to DRD, we are disappointed to find no such safeguards appear in the draft legislation. It is possible that they will appear in the secondary legislation which we have not yet seen, but so far the only reference to it is in the explanatory notes (EN). We regard this as wholly inadequate.

4.2 ***Safeguards must be in the primary legislation, not just in the explanatory notes***

4.2.1 In setting out the statutory safeguards, para 2 of the EN says:

> "One such safeguard is the requirement on HMRC to be satisfied that the debtor is aware they owe HMRC a debt – to meet this requirement HMRC will ensure that every debtor will receive a face-to-face visit from HMRC's agents, before their debts are considered for recovery through DRD. This will provide a further opportunity for HMRC to personally identify the taxpayer and confirm it is their debt; explain to debtors what they owe and discuss options to resolve it; and identify debtors who are in a vulnerable position and offer them the support they need, including removing them from the DRD process."

4.2.2 This statement of intent is all very encouraging; but as is well known, no judge takes account of explanatory notes or looks behind the wording of statute in order to ascertain the intention of Parliament, unless the statutory wording itself is ambiguous or ambivalent. The biggest flaw in the draft legislation is that one looks in vain for any record of the intention to exclude vulnerable debtors from the DRD process. Absent any such record, if faced with a case of a vulnerable debtor subject to DRD, a judge would have to conclude that Parliament had no intention to exclude debtors who were in a vulnerable position from the DRD

process. Unless the primary legislation specifically excludes vulnerable debtors, and defines what is meant by 'vulnerable' (we understood from our discussions with HMRC that the voluntary sector would be consulted on this), we have to assume that vulnerable debtors will be as much at risk of DRD as any tax debtor.

4.3 ***'Condition C' and the nature of vulnerability***

4.3.1 HMRC must be "satisfied that the person is aware that the sum is due and payable by the person to the Commissioners" (Schedule, para 2(3) (condition C)). As this condition is germane to the whole question of vulnerability, and crucial to determining who may and who may not be subject to DRD, we spend a large part of this response considering its scope.

4.3.2 We were given to understand in meetings that an HMRC officer would have a face-to-face meeting with every debtor to test their understanding of the situation each time DRD was contemplated. In the event there is no such specific requirement in the legislation, but that may not be a bad thing. What is vital is that HMRC should take all possible steps to satisfy themselves that the person understands that the debt is due, and that may be no easy task. For example, a confused person could send to HMRC or say on the telephone something that enabled HMRC to say that they were 'satisfied that the person is aware that the sum is due and payable', and a face-to-face meeting – while by no means enabling identification of all vulnerable persons – would at least be a more reliable guide than any more remote means of communication.

4.3.3 On the other hand, it is also important to appreciate the limitations of a face-to-face approach. It may be inappropriate for someone with communication difficulties, for example autism which can manifest itself in behaviour which to an outside observer such as a field force officer can seem rudeness rather than vulnerability. Although autism affects only a small percentage of the population, depression – another condition that can cause communication difficulties – is something from which one-third of the population are likely to suffer at some point in their lives. Stroke victims, too, often experience communication difficulties. Sometimes their vulnerability may become manifest well before any face-to-face visit, in which case they can be excluded from the DRD process at that point. At other times, it may not even be immediately apparent to a trained officer carrying out a field force visit that they are vulnerable in this way; a person may sound coherent and act coherently, and yet suffer from a phobia or delusions which may not appear during the conversation. In such cases, even a face-to-face visit may provide insufficient opportunity to identify the person as vulnerable and in a limited number of cases, face-to-face contact would be contra-indicated by the person's condition.

4.3.4 That DMB already has extensive experience of this kind of vulnerability is clear from the DMB Manual – see, for example, DMBM585185 which sets out how to go about enforcing a debt where the defaulter is living with a mental health problem.

4.3.5 We recommend such issues should be the subject of further consultation with the voluntary sector, perhaps under the umbrella of the Vulnerable Customers' Summit, with a view to (a) framing a definition of 'vulnerable debtor', (b) considering how best to identify such persons

and how to train HMRC personnel to do so, given the difficulties referred to above; and (c) explore ways of "explaining to debtors what they owe and discussing options to resolve it" as envisaged in para 2 of the EN cited above. Once these matters have been fully consulted on, HMRC should then reflect them in a Code of Practice which should be given statutory underpinning, like (for example) the HMRC Charter. Such statutory underpinning could perhaps be achieved by, for example, introducing a fourth Condition D into para 2 of the Schedule ('relevant debt') that would require HMRC to be satisfied that the person was not 'vulnerable' in terms as described in the Code of Practice.

4.4 ***How to define 'vulnerable'***

4.4.1 Once the statutory underpinning is in place, the Code of Practice can be used to set out the parameters of vulnerability for the purpose of identifying those who fit the descriptors and excluding them from the DRD process. It is important to bear in mind that a person may be vulnerable for some purposes and not others, so that a person may be vulnerable in relation to the collection of a tax debt which may not apply in other aspects of their life. For example, an older person with mild dementia may be able to live independently and function adequately within their own environment, but may be badly startled by the unfamiliar, such as the appearance of an official requiring payment of a debt, and react irrationally out of fear and confusion. Similarly, a person may be vulnerable at some times and not at others – a taxpayer may be wholly compliant most of their lives until something happens to upset the equilibrium, such as a life event or the onset of an illness or disability. Such life events might include bereavement, ending of a relationship, redundancy or loss of job, severe illness of close relative, sudden poverty (perhaps brought on by one of the other life events or the loss of a key client or a bad debt if self-employed).

4.4.2 DWP leaflet ESA214 provides guidance for assessing an employment and support allowance (ESA) claimant's capability to work or carry out some work-related function. It is of course true that just because a person is unfit for work that does not make them unfit to pay a tax debt (though if their inability to work has caused them to have a low income, they may be unable to pay for other reasons, and they will still be vulnerable because poor). Equally, having the capacity to work does not necessarily exclude the possibility that they might be vulnerable in other respects (for example, a busy and talented creative artist who nonetheless has a diagnosis of bipolar disorder or schizophrenia). Nevertheless ESA214 may be helpful in describing certain 'mental, cognitive and intellectual function' tests to assess the claimant's learning ability, awareness of everyday hazards, ability to initiate and complete personal action, to cope with change, to get about, to carry out social engagement or to behave appropriately with other people. Some of these may be usefully be applied to tax debtors to see if their vulnerability is such as to put them at a distinct disadvantage were they to be made subject to the DRD process. Or those suffering from a terminal illness, or undergoing certain forms of treatment such as chemotherapy or radiotherapy, may also be classified as vulnerable for this purpose.

4.4.3 Describing vulnerability and deciding how to determine whether to exclude persons from DRD on those grounds will be challenging, and HMRC through their Vulnerable Customer

Unit will doubtless seek the assistance of specialist and other charities in framing a description. That will take time, but it is essential that no DRD activity takes place until the description is ready and agreed, the Code of Practice published, the field officers fully trained in the legislation and the descriptors of vulnerability and how to react when on the phone to or face-to-face with a vulnerable defaulter. It may be necessary for parts of the legislation to be brought in by statutory instrument when everything is in place.

4.5 ***Public Sector Equality Duty***

4.5.1 Finally, but by no means least in importance, the public sector equality duty (PSED) must be satisfied in relation to this, as to any other, policy change. This means in framing policies HMRC as a public authority must have due regard to the need to combat discrimination and promote equality in respect of any taxpayer or tax debtor with protected characteristics, such as (but not confined to) age, disability, etc. This means, in practical terms, that HMRC must have due regard, and carry out any equality impact assessment, before deciding on or implementing the policy – it is not permissible to implement the policy first then carry out the equality impact assessment once it is already in operation.[1]

4.5.2 We recommend HMRC carry out a full equality impact assessment before these draft clauses are submitted to parliamentary scrutiny.

4.6 ***Commissioner/Board oversight***

4.6.1 We were given to understand during discussions that each case of operating DRD would be subject to authorisation at Board or Commissioner level, but – again – that does not appear in the draft legislation. It would be a simple matter to insert such a requirement into the legislation and we recommend that this should be done. An additional and useful safeguard would be a requirement for HMRC to report publicly each year on (a) the number of applications made for use of DRD and (b) the number of applications granted.

5 Detail of the clauses

5.1 ***Regulation-making powers***

5.1.1 Sub-clause (3) (power for regulations to amend, repeal or revoke any enactment whenever passed or made) strikes us as unusually wide, even with the restriction in scope set out in sub-cl (2) to any provision in the Schedule, and the affirmative resolution procedure provided for in sub-cl (5). Our concern is exacerbated by para 17(1) of the Schedule which enables the Commissioners to substitute different amounts for the minimum sum of the relevant debt, and for the safeguarded amount, without restriction. There is no requirement that the Commissioners set a higher amount only – they can go up or down. If the Commissioners set a lower figure, it could seriously undermine two of the assurances which

[1] *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293

were given in the response to consultation – that DRD will not be applied to debts of less than £1,000, and that at least £5,000 must be left in any bank account after DRD has been applied.

5.1.2 Similarly, para 17(2) enables the Commissioners to vary the number of days allowed for (*inter alia*) making objections to the issue of a hold notice. This again was an important safeguard of which much was made in the response to consultation, and if the Commissioners can vary it at will, substituting a longer or shorter time limit than set out in statute, the value of the safeguard is badly eroded. We recognise that the affirmative resolution procedure will apply to any statutory instrument amending primary legislation, but in reality, what is the likelihood of any MP in the governing party voting against such a measure in a debate on delegated legislation?

5.2 ***Identity of debtor and amount of debt***

5.2.1 The bar is set too low for HMRC to be able exercise DRD powers: ". . . if it appears to HMRC that- (a) a person has failed to pay a relevant debt" (paras 3(1), 4(1)). We and Tax Help for Older People see innumerable instances where "it has appeared to HMRC that tax was unpaid" because payments had been allocated incorrectly through HMRC error or taxpayer error in using the wrong payment reference, or allocated to a suspense account because HMRC was unsure where to allocate the payment, or where a tax repayment due to the taxpayer was being ignored. We respectfully suggest some wording along the lines of ". . . if HMRC are satisfied after due enquiry that a person has failed to pay a relevant debt and that there are no tax repayments currently due to the person."

5.3 ***Notices and time limits***

5.3.1 We are very concerned by para 6(3) which gives the deposit-taker five days to notify HMRC that they have carried out the terms of the hold notice, and even more by para 6(6) which imposes no time limit on HMRC notifying the debtor except that it must do so “as soon as reasonably practicable”. Thus the debtor’s account could be frozen for more than a week, probably well over a week depending on how relaxed an interpretation HMRC put on “as soon as reasonably practicable”, before the debtor knows anything about it. This could put a vulnerable debtor in an impossible position as their bank might refuse to honour standing orders, direct debits and other payments during that period, but the debtor will not know why. Moreover, it seems wholly unbalanced that HMRC are the only party not subject to a time limit.

5.3.2 Para 8 allows the deposit-taker to notify the debtor directly, but does not oblige them to do so. We see no reason why, at the very least, the deposit-taker should not be required to send the debtor a notice at the same time as they report to HMRC that they have activated the hold notice. In addition, para 7 allows the deposit-taker five days to activate a notice by HMRC cancelling the hold notice or reducing the amount to be taken from the account, without a word to the debtor. Thus the debtor might in fact be in a position to pay other creditors, but refrain from doing so because they do not know that HMRC have relinquished or reduced their claim. Finally, in para 9, there is no time limit within which HMRC must

consider an objection made by the debtor and notify the debtor of their decision, and all that time the money subject to the hold notice remains frozen in the debtor's account when it could be put to good use in clearing other pressing debts.

5.3.3 The arrangements with regard to time limits, who is subject to them and who is not, and the amount of time that can elapse before the debtor knows anything at all about the sequestration of their account, or the release of their account from sequestration, are seriously deficient. Clearly given the nature and purpose of the procedure the debtor should not be given *advance* notice, but we see no reason why notifying the debtor should be delayed indefinitely.

5.3.4 If a person suffers damage as a result of inappropriate action, there should be provision for a fully effective remedy including the possibility of indemnity costs, otherwise a person could end up being worse off even if they win an action. It is worth bearing in mind that some people might use pay day loans, etc. to cover emergency expenses as a result of not having access to bank accounts.

5.3.5 There remains the question of what the deposit-taker must do if aware that the account holder or a third party is, or may be, vulnerable and what duty should attach to the deposit taker to take account of such vulnerability. The question might arise where, for example, the deposit-taker is aware that the account is operated by a carer on behalf of the taxpayer, or that the account holder is a nominee for a vulnerable third party to whom the funds in the account actually belong. In such cases we propose that the legislation should contain provision for the deposit taker to refuse to accept a hold notice from HMRC, and for HMRC then to seek some other way of recovering the debt from the account holder – perhaps by repeating the DRD process in respect of an account which the account-holder owns beneficially, or by another means of enforcement.

5.4 ***Joint accounts***

5.4.1 Para 5(7) adopts the very crude approach that if an account is joint, it must necessarily be beneficially held in equal shares between all the account holders, so that (in the most common situation) a joint account between two joint account holders is beneficially held as to 50% by the one, and 50% by the other. It ignores situations where an account may be held as to 100% by one joint account holder and 0% by the other, as is commonly the case with nominee accounts or those held by the holder of a power of attorney on behalf of the donor of the power. Given that para 6(2)(c) requires the deposit-taker to furnish such information to HMRC about the other joint account holder as may be prescribed, it may usefully be prescribed that the deposit-taker should tell HMRC in what proportions the beneficial interests in a joint account are held – and, if they do not know, that they should be required to find out before the sequestration takes effect.

5.4.2 With regard to para 8(4), a joint account holder should be able to object against the hold notice on the grounds that the proportion in which the account is held with the other joint account holder is something other than 1/N. Or indeed that none of the money in the joint account belongs to the other joint account holder (ie the debtor).

5.5 ***Special relief***

5.5.1 The draft legislation takes no account of the special relief provided for by TMA 1970, Sch 1AB, para 3A. In short, where a section 28C determination has been made and the time limit for the taxpayer to displace the determination by submitting a self assessment has expired, but the taxpayer believes the tax is not due and HMRC are satisfied that it would be unconscionable to pursue the full amount and that the taxpayer's affairs are now in order, the taxpayer can claim repayment or discharge of any amount agreed to be excessive.

5.6 In order to give effect to special relief, the draft legislation needs to be amended as follows:

- Para 2(5)(b), by defining an "established debt" as one against which there is a right of appeal that has not been exercised within the time limit laid down, does not allow for the possibility that special relief might give the taxpayer the right to claim discharge or repayment of part of the debt, and HMRC the obligation to give effect to the claim.
- Para 8(3), which gives grounds for making an objection against the issue of a hold notice, should include the ground that special relief has been or should be granted in respect of the debt.
- Similarly para 10(5) should include, as one of the grounds on which an appeal can be made to the County Court, that special relief has been or should be granted in respect of the debt.
- Paragraph 23 should enact a provision in TMA 1970, Sch 1AB, para 3A similar in effect to the new TMA 1970, section 28A(4A) so that any DRD action is restricted to the amount of the debt that remains after special relief has been applied.

5.7 ***Appeal to the County Court***

5.7.1 We note there is no appeal against the amount of the debt. This may reflect the current position in that the County Court has no jurisdiction to enquire behind the amount of a tax debt stated on a certificate issued by a Revenue officer, but that is not the case in relation to a tax credit debt (CPR PD7D). Further safeguards are necessary in relation to tax credits overpayments to ensure the current position is maintained and the County Court can still enquire into amount of the debt. This is necessary not only because of the lackadaisical approach HMRC display towards tax credits overpayments (it is not uncommon for HMRC to send a claimant a notice specifying *x* amount overpaid, then a short time later sending out another notice specifying *y* amount as overpaid, then another specifying *z* amount, and so on, so the claimant has absolutely no idea where he or she stands), but also because the lower the income of the claimant (and therefore the more vulnerable the debtor), the higher the award and the higher, also, the potential overpayment.

5.8 ***Exceptional hardship***

5.8.1 It is possible to object against a hold notice or the amount specified in a hold notice on the grounds that it will cause or is causing the person making the objection exceptional hardship. The objector could be the debtor themselves, a joint account holder with the

debtor, or a third party. When receiving such an objection, HMRC should consider whether the hardship so caused is sufficient to make that person 'vulnerable' in the prescribed sense (see paras 4.4 above) and proceed accordingly.

6 Summary of recommendations

1. The whole question of vulnerability – framing a definition of 'vulnerable debtor'; considering how best to identify such persons and how to train HMRC personnel to do so; and exploring ways of explaining to debtors what they owe and discussing options to resolve it, should be the subject of a full consultation involving the voluntary sector. The outcome of the consultation should then be set out in a Code of Practice which should be given statutory underpinning.
2. HMRC should carry out a full equality impact assessment before these draft clauses are submitted to parliamentary scrutiny.
3. The draft legislation should contain a provision for Board/Commissioner authorisation for each exercise of DRD powers. An additional and useful safeguard would be a requirement for HMRC to report publicly each year on (a) the number of applications made for use of DRD and (b) the number of applications granted.

LITRG

4 February 2015