



## **Transforming bailiff action, Ministry of Justice consultation paper CP5/2012**

### **Response by the Low Incomes Tax Reform Group, incorporating comments from the Chartered Institute of Taxation and TaxAid**

#### **1. Introduction**

##### **1.1. *About us***

- 1.1.1. 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.
- 1.1.2. 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.

##### **1.2. *General Comments***

- 1.2.1. LITRG, together with CIOT and TaxAid<sup>1</sup>, welcomes the opportunity to respond to the consultation on providing more protection against aggressive bailiffs and encouraging more flexibility in bailiff collections.

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<sup>1</sup> TaxAid is a charity that helps people on low incomes with tax problems. In the course of their work, they have significant contact with those in tax debt and in particular those with physical and mental health issues.

- 1.2.2. Our response, as indicated above, includes comments from CIOT colleagues and TaxAid. It is based on our respective experiences of the use of bailiffs by HM Revenue & Customs (HMRC) and our work generally on behalf of low income, unrepresented taxpayers.
- 1.2.3. We are generally supportive of the proposals to tackle unnecessary and aggressive bailiff activity and provide clarity. Our concerns are about legal and procedural safeguards for the debtor as well as the rights and responsibilities of all parties. For example, whereas the enforcement agent is to be given the right to apply to the Court for authority to force entry or re-entry<sup>1</sup> there are no similar rights for the debtor to be heard or represented, only to be notified.
- 1.2.4. In particular, many of the experiences we comment on below arise from situations we, our CIOT colleagues, who are Chartered Tax Advisers in practice, and TaxAid have witnessed in relation to poor communication and practices between HMRC and the enforcement agency that have led to unnecessary and unwarranted bailiff activity.
- 1.2.5. Any exercise to transform bailiff action does need to consider the role of the creditor in relation to unnecessary and aggressive visits where poor judgments regarding debts have been made, appeals and disputes are outstanding and enforcements agents have not been kept up to date with developments in the case.
- 1.2.6. Taking HMRC as the example, the point has been raised (particularly by our CIOT colleagues) that more work should be done on identifying groups of debtors, as merely sending in the bailiffs is not always the right solution. Any creditor should view sending in the bailiffs as a last resort for those who really 'won't pay'.
- 1.2.7. We note that HMRC itself exercises powers similar to bailiffs with regard to distraint action but without the need for sanction by the Court. Such action can have disproportionate impact particularly for the 'sole trader' self-employed. We consider that restrictions relating to bailiff conduct in the taking away of goods, and exempt goods in particular, should also apply to distraint action.
- 1.2.8. We have only responded to questions with relevance to matters in which LITRG, CIOT and TaxAid, have relevant knowledge through our work.

## **2. Specific responses to questions**

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

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<sup>1</sup> Paras 20-22, Schedule 12, TCEA 2007

- 2.1.1. We believe that the National Standards may not fully set out the duties under the Equality Act 2010 where these fall on creditors which are public sector bodies. The body itself remains liable under the general equality duty where one of its functions is carried out by an external supplier. This would be of particular concern where a debtor falls into a group covered by any of the protected characteristics as defined in the Equality Act 2010.
- 2.1.2. We are also concerned that bailiffs are visiting without either creditors or enforcement agencies effectively communicating current details of the debt and actions taken by the debtor. National Standards should be clearer about the responsibilities of both creditors and enforcement agencies to ensure they have up to date information. This is exacerbated in the case of creditors such as HMRC that are large organisations where there is sometimes a disconnect between the debt management unit, which may deal with an enforcement agency, and the unit that is responsible for agreeing the amount of the debt with the debtor.
- 2.2. ***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?***
- 2.2.1. We believe that there is still a need for further Government intervention to ensure debtors are aware of the limitation on bailiffs' powers at the point when the bailiffs visit.
- 2.3. ***Q3 Do you consider there are any gaps in the range of information available on DirectGov? If so, please supply proposals for inclusion.***
- 2.3.1. Amongst the people who are visited by bailiffs, there may be those who actually run their business from home or are homeworkers. Bailiffs are not allowed to take away items which are necessary for that business and this information should be included.
- 2.3.2. Directgov information on bailiffs gives a specific link for debts due to HMRC, which states that 'essential' tools of the trade are excluded. In practice, the very narrow interpretation of 'necessary' tools in the context of HMRC distraint means this can be misleading: self-employed people in particular not infrequently find themselves put in a position where they cannot work as a result of HMRC distraint action.
- 2.3.3. No details are given on DirectGov of the times during which a bailiff may visit a debtor.
- 2.3.4. It should also be noted that information should also be available to debtors in a format other than online – for example, in hard copy at the time of enforcement activity. Debtors who do not have the wherewithal to access professional representation may need to understand HMRC's and bailiffs' debt enforcement powers and their own rights, but this information being available online will be of little use to them if their computer has itself been removed by a bailiff. Indeed, we question further whether it is acceptable for bailiffs acting on behalf of HMRC to remove computers, which quite probably contain personal information.

2.4. ***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.***

2.4.1. Yes.

2.5. ***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.***

2.5.1. Yes.

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

2.6.1. In the light of evidence from our CIOT colleagues who are dealing with the situation in practice, we believe that the Court should be satisfied that the 'sum outstanding' is an amount not currently in dispute or under appeal; that there are no arrangements in place with, or under consideration by, the creditor for the settlement of the money; and that the figure presented to the Court represents the currently outstanding amount.

2.6.2. Additionally the Court should be satisfied that the premises are the place of business of the debtor and not the registered office which may be situated in a professional firm offering such service.

2.7. ***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.***

2.7.1. Para 47 refers to 'domestic' premises when explaining the safeguard to restrict the power to commercial premises. 'Domestic' is not defined and elsewhere in the consultation document there is reference to 'wholly residential' and 'not wholly residential'.

2.7.2. In the light of our comment at 2.3.1 above we would seek clarification on premises where a bailiff may apply to use reasonable force in order to gain entry. Our view is that force should never be used to gain entry to residential premises to enforce a tax debt.

2.8. ***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.***

2.8.1. Yes.

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

2.9.1. Please note out response to Q6 above.

2.10. ***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.***

2.10.1. Yes to (a). Again we believe the debtor should have certain safeguards to ensure that where reasonable force is to be used then a Court is satisfied regarding the 'sum outstanding' as outlined in 2.6.1 above, and that the personal and financial circumstances of the debtor are taken into account along with any other relevant factors.

2.11. ***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.***

2.11.1. We would agree that the option for the enforcement agent to take control of the good should be time limited.

2.12. ***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.***

2.12.1. Whilst we would not disagree with this we are concerned to note that neither this nor any of the draft written notices has any indication regarding the availability of alternative formats for people with disabilities; nor is any indication given of a text-based telephone helpline for people with impaired speech or hearing. Ensuring accessibility of communications and services is a basic equality duty and should form part of their design.

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

2.13.1. No. We do not see why any change should be made to the existing restrictions and should in fact be capable of being extended to ensure that enforcement agents are mindful of religious dates.

2.13.2. The document states that any form of regulation would prove unworkable, but the equality impact assessment indicates that enforcement officers would need to consider the evidence they would need to gather if the reforms were implemented. There is no mention of any possible impact of the change to the current rules when considering religion. These statements are confusing.

2.14. ***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.***

2.14.1. We are concerned that the relevant paragraphs in the regulations make no reference to not entering premises in connection with those in vulnerable situations. Reference to adherence to National Standards should be made in this regard.

2.14.2. For an initial visit where the exact circumstances of the debtor are not known, visits further restricted to during daylight hours only would be appropriate.

2.15. ***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.***

2.15.1. See our answer to Q14 above.

2.16. ***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.***

2.16.1. See our answer to Q15 above.

2.17. ***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.***

2.17.1. There does need to be some time limit over the hours an enforcement agent should remain on the premises outside the normal hours limit particularly if it is a residential property.

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

2.18.1. The range of goods at 4(a) seems widely drawn and appears intended to prevent individuals being deprived of their means of livelihood. However, the goods are defined as those 'necessary for use personally by the debtor' in their trade, employment etc. It is important that 'necessary' should not be narrowly interpreted, resulting in cases such as those currently seen where HMRC distrains on a van used by a jobbing gardener in a rural area, making it impossible for him to earn a living. This current very restricted interpretation of 'necessary' tools of the trade by HMRC, and the exclusion of such items from distraint action only in exceptional cases (DMBM655150<sup>1</sup>), can throw people out of work.

2.18.2. We do not believe that the test under 4(d) will necessarily cover all specially adapted vehicles for use by disabled people. The blue badge is not awarded to all those who might drive an adapted vehicle, there are examples of those with restricted upper body mobility which is not considered severe enough to pass the 'severe mobility' test but who do need an

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<sup>1</sup> See <http://www.hmrc.gov.uk/manuals/dmbmanual/dmbm655150.htm>

adapted car in order to drive. Indeed this is currently recognised by HMRC in a concession relating to company cars used by the disabled.

2.18.3. One of the automatic passports to a blue badge is receipt of the higher mobility rate of disability living allowance. Looking ahead, this allowance is due to be replaced by a personal independence payment where different criteria will be used in assessing eligibility. Accordingly, some who are now entitled to the blue badge may no longer get this automatic passport.

2.18.4. Therefore, in addition to the blue badge test, there should be a further test that any specially adapted vehicle should be exempt where it is used either by or for the benefit of a disabled person in the household or business.

2.19. ***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.***

2.19.1. Para 102 indicates that the protection for the debtor is to provide that an enforcement agent must sell or dispose of controlled goods for the best price. A greater safeguard for the debtor would be if he had some right of appeal or access to Court to apply for an alternative method of sale if he feels that the enforcement agent is not doing his best.

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

2.20.1. Yes. Any definition needs to include the current disability definition and any others who are at risk of being harmed physically or emotionally.

2.20.2. In the proposals nearly all references to vulnerable people are in respect of the actions of the enforcement agency. It is clear though from the National Standards document that creditors must also recognise their responsibilities.

2.20.3. TaxAid also would suggest that rather more is needed here than any definition of vulnerability where HMRC debts are involved. They have said:

‘HMRC may already be on notice that the debtor is vulnerable but this information may not have been properly shared within the Department let alone with the external agents it appoints – in this instance enforcement agents. We feel that – possibly separate to this consultation – there should be a clear obligation on HMRC to share this information when it is clear this has been communicated to HMRC in the context of debt collection action (and data protection issues are not breached). Similarly it may well be that HMRC has already been supplied with medical evidence of health issues and the debtor should not have to be distressed further by duplicating such provision and supplying it to the enforcement agent.

We also have a concern that the issue of vulnerability is limited to the debtor only. Where goods are to be seized to recover HMRC debts we feel that, as a public body, HMRC has a duty to consider other members of the household who may be vulnerable. We have seen instances of very adverse impact on the mental health of other household members when distraint action has been initiated. In collecting taxes HMRC is carrying out a public function within the meaning of the Equality Act 2010. It is arguable that the requirement of this legislation to make reasonable adjustments to take account of disability can extend to members of the same household.

In direct response to Q28 we would agree that a definition might prove too prescriptive but would suggest that the Ministry of Justice provide guidance/examples of vulnerability with particular regard for fluctuating conditions and mental health. Such guidance/examples could be used in the training of enforcement agents and also the judiciary insofar as their involvement in the process may require consideration of this issue.'

**2.21. *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.***

2.21.1. We would agree that in any case where the debtor does not have capacity to engage remission should apply. We believe that the Office of Fair Trading is currently also looking at indicators for where there are mental capacity limitations.

2.21.2. In addition, we believe the proposals should consider whether it is appropriate to compensate debtors who have been inappropriately dealt by the creditor or enforcement agency. For example, if their actions have failed to take into account a debtor's possible lack of mental capacity (mental health problems often being linked to, or exacerbated by, debt problems).

**2.22. *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.***

2.22.1. Our colleagues at TaxAid recommend that basic training should include guidance on what constitutes vulnerable particularly in the context of mental health problems and their suggestion in response to Q28 that the Ministry of Justice provide examples is in part intended with this training in mind. We note that the BPA does mention such instances, but without use of examples too much is left to the personal experience and judgment of the enforcement agent, who may be quite unfamiliar in particular with mental health issues and how these may impact on the capacity of a debtor to deal with financial and administrative procedures. Equally some informed training may enable the enforcement agent better to judge if a debtor is falsely trying to avoid enforcement action by claiming such a condition.



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

- 2.23.1. We are concerned to note in para 181 that the bespoke complaints process will be 'openly available online'. Given the data detailed in the impact assessment on those households which are over-represented as debtors, e.g. those with a disability, online may well not be an option open to them. Indeed LITRG's new report<sup>1</sup> indicates that digital exclusion is certainly more prevalent amongst poorer groups within society, or those who may be socially/financially excluded – one example being many people with disabilities.
- 2.23.2. While an online system may be efficient and suitable for many debtors, other more accessible ways need to be found so that all debtors can understand and use the complaints process – particularly if we consider that the debtor's computer might have itself been removed by the bailiff.
- 2.23.3. TaxAid have also commented that where HMRC debts are concerned, there should be a clear route for complaint within HMRC itself about the activities of enforcement agents working to recover HMRC debts.

2.24. ***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.***

***and***

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

- 2.24.1. As indicated in the general comments section of this response above, we believe that the objective of clarification of the law will only result in a simpler and more streamlined process if the role and responsibilities of the creditor in dealing with the enforcement office is also examined.
- 2.24.2. ***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?***
- 2.24.3. We believe further work needs to be undertaken on the possible equality impacts arising from the removal of the restriction on the days premises may be entered.

LITRG

14 May 2012

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<sup>1</sup> [http://www.litrg.org.uk/Resources/LITRG/Documents/2012/05/digital\\_exclusion\\_-\\_litrg\\_report.pdf](http://www.litrg.org.uk/Resources/LITRG/Documents/2012/05/digital_exclusion_-_litrg_report.pdf)