

**EXPLANATORY MEMORANDUM TO**  
**THE TAKING CONTROL OF GOODS (FEES) REGULATIONS 2014**

**2014 No. 1**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 These Regulations supplement the system established by Part 3 of the Tribunals, Courts and Enforcement Act 2007 (“the TCEA 2007”) by making detailed provision for the recovery of the fees and disbursements which can be recovered from the debtor, by an enforcement agent, when carrying out enforcement-related services in accordance with the scheme established in Schedule 12 to the TCEA 2007 and the Taking Control of Goods Regulations 2013.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 This Statutory Instrument will introduce a completely new fee structure for the recovery of fees and disbursements from a debtor. It will replace the disparate and confusing fee structures which are currently in place and which vary according to debt type.
- 3.2 The fees set out in the Schedule are based on figures originally proposed in an independent report<sup>1</sup> in 2009. The fees contained within that report were set for implementation in April 2012 and therefore the fees contained in the Schedule have been uplifted, where necessary, to account for subsequent inflation. The Schedule reflects the uplift based on the change in the Consumer Price Index (CPI) from April 2012 to September 2013. The calculations have been rounded to the nearest £5.
- 3.3 It is the Department’s intention to review, annually, the fees set out in the Schedule. This will take place following the publication of the CPI figure for each September. The April 2012 fees and CPI figure will be used as the baseline each year. The baseline fees will be uplifted with reference to the most recent September CPI figure. The calculation will then be rounded to the nearest £5.
- 3.4 The Department maintains its policy that “vulnerable person” should not be defined in these Regulations (see regulation 12), as was the case for the Taking Control of Goods

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<sup>1</sup> *Enforcement Fee Structure Review: Proposal for a new Enforcement Fee Structure and analysis of the issues and options*, Alex Dehayen, 2009. Available at <https://consult.justice.gov.uk/digital-communications/transforming-bailiff-action>

Regulations 2013<sup>2</sup>. This issue was specifically consulted upon as part of the “Transforming Bailiff Action<sup>3</sup>” consultation, and 55% of respondents were opposed to such a definition. Respondents considered that attempts to define “vulnerable” (for example by reference to a list) would be overly rigid, catching some cases unnecessarily and failing to capture others. Vulnerability was seen as a potentially fluid state, so that some people might be constantly vulnerable (for example due to a permanent lack of mental capacity) but others temporarily so (for example, suffering mental illness for a short period of time). The chosen solution is therefore to retain flexibility by not seeking to define “vulnerable”, but to ensure that mandatory training for certificated enforcement agents includes specific approved training on identifying and dealing appropriately with vulnerable persons. National Standards for Enforcement Agents will also be re-issued providing minimum standards on matters not the subject of Rules or Regulations.

- 3.5 This instrument provides vulnerable debtors with the opportunity to seek further advice, in line with responses to the “Transforming Bailiff Action” consultation, before incurring the enforcement fee. Responses suggested that a vulnerable debtor may be incapable of understanding or engaging with the process in the early stages and so should be given the chance to seek advice when the enforcement agent is on their doorstep and has identified them as vulnerable. While the enforcement agent will not be prevented from taking control of goods (thereby fulfilling obligations to the creditor), failure to provide a debtor with this opportunity before they proceed to actually remove the goods will mean they risk their enforcement stage fee. This will provide an incentive for the enforcement agent to ensure a vulnerable debtor is able to get advice; will allow the debtor to address their debt and protect the creditor’s right to recover what is owed to them. Guidance will be issued on best practice regarding the timing and type of advice a debtor should be allowed to seek.

#### **4. Legislative Context**

- 4.1 Part 3 of, and Schedule 12 to, the TCEA 2007 replace the existing laws relating to the seizure and sale of goods for most purposes, and the existing law of rent distress, with a unified procedure to be followed by enforcement agents. Paragraph 62 of Schedule 12 to the TCEA 2007 allows for a new fee structure to be created in Regulations, setting out the fees and disbursements that are recoverable from the debtor in respect of the enforcement-related services that are incurred when following this procedure.
- 4.2 This is the second of three statutory instruments which will be implemented under Part 3 of the TCEA 2007. The first set of Regulations, the Taking Control of Goods Regulations 2013<sup>4</sup>, were laid in July 2013 and set out the procedure enforcement agents must follow when taking control of goods. The third set of Regulations, to be made under section

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<sup>2</sup> Explanatory Memorandum, The Taking Control of Goods Regulations 2013, <http://www.legislation.gov.uk/ukxi/2013/1894/memorandum/contents>

<sup>3</sup> *Transforming Bailiff Action: How we will provide more protection against aggressive bailiffs and encourage more flexibility in bailiff collections*, Consultation Paper CP5/2012, February 2012, available at: <https://consult.justice.gov.uk/digital-communications/transforming-bailiff-action>

<sup>4</sup> <http://www.legislation.gov.uk/ukxi/2013/1894/made>

64(2) of the TCEA 2007 will set out the certification process and the conditions to which the issue of certificates to enforcement agents will be subject. The Department intends to lay the certification Regulations early in 2014.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The various fee structures applicable to enforcement by taking control of goods do not provide adequate remuneration for all aspects of the work carried out by enforcement agents. There is, therefore, an inherent incentive for enforcement agents to engage in, and charge for, unnecessary enforcement activities or to rapidly escalate enforcement action. The current availability of discretionary fee arrangements has also provided incentives for unscrupulous behaviour. Such arrangements allow the enforcement agent to charge “reasonable costs”, which are not specified in advance and are not clearly defined, making these charges prone to abuse. With little clarity and transparency to these fee structures, it is difficult for debtors to check whether they have been charged the correct fees and to challenge these if they have not. As a result of these factors, there have long been calls to introduce a transparent fee structure, relevant to all debt types, alongside the introduction of a simplified and transparent enforcement process. This Statutory Instrument will introduce such a fee structure.

7.2 As with the wider reforms, the provisions contained within this instrument are intended to balance the rights of the debtor and the rights of the creditor. The fee structure is based on a core set of activities taken from Schedule 12 of the TCEA 2007, which have been grouped into stages to ensure that the enforcement agent is properly recompensed for the work undertaken. It supports the concept of early compliance and greater proportionality by providing the debtor with the opportunity to make payment or enter into an agreed payment plan at the compliance stage. Fixed amounts have been attributed to each stage with an additional percentage fee added to larger debts which can cost more to enforce.

7.3 While the fee structure applies across debt streams, there are two separate fee levels – one for High Court Enforcement and one for non-High Court Enforcement, with the High Court level containing higher fees. This reflects the findings in the 2009 independent report<sup>5</sup> that High Court Enforcement has a higher cost base due to the personal responsibility of a High Court Enforcement Officer (who has writs addressed directly to them) and the fact that they enforce higher value debts. The personal liability of the High

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<sup>5</sup> *Enforcement Fee Structure Review: Proposal for a new Enforcement Fee Structure and analysis of the issues and options*, Alex Dehayen, 2009. Available at <https://consult.justice.gov.uk/digital-communications/transforming-bailiff-action>

Court Enforcement Officer has also necessitated the need for High Court enforcement to have first and second enforcement stages with the associated fees. The fee structure for High Court cases also introduces an incentive to enter into, and adhere to, an affordable controlled goods agreement. Unless a debtor pays in full at the compliance stage, the enforcement agent is obliged to visit the debtor in every High Court case in order to take control of goods, thereby triggering the first enforcement stage. If the enforcement agent is then unable to enter into a controlled goods agreement (and has to take control of goods in another manner) or a debtor defaults on a controlled goods agreement, the enforcement agent will be under an obligation to remove goods and therefore the second enforcement stage fee will also apply. For non-High Court debt there is no such obligation and therefore we have introduced an incentive to enter into an agreement without taking control of goods at the (earlier) compliance stage which avoids triggering the enforcement stage with its larger fee.

#### *Consolidation*

7.4 None. These are the first Regulations to be made under this power.

### **8. Consultation outcome**

- 8.1 The “Transforming Bailiff Action” consultation sought views on the proposed fee structure. The consultation, which ran from February 2012 to May 2012, received 254 responses. The majority of respondents to that consultation were in favour of the proposed structure; it was seen to be transparent and weighted to encourage debtors to engage with the process at an earlier stage. However, two elements of the fee structure have been revised following consideration of consultation responses and further work with stakeholder groups.
- 8.2 The threshold at which an additional percentage fee will be added in non-High Court debt has been raised from £1,000 to £1,500. Concerns were raised by both advice sector representatives and public sector creditors that the £1,000 threshold would easily catch many council tax debtors whose average debt is often between £1,000 and £1,500. They argued that this would be disproportionate as it did not necessarily indicate that the debtor possessed high value or specialist assets which would cost more to remove and which the additional percentage fee was designed to cover.
- 8.3 The consultation response stated that in cases where the proceeds of enforcement are less than the amount outstanding, they should be distributed on a pro-rata basis between creditor and enforcement agent (regarding the outstanding debt and the enforcement fees and disbursements respectively). However, it has since been demonstrated that this would cause enforcement agents to operate at a loss for some time before they recovered their fees, undermining the fee structure model by significantly delaying remuneration and preventing the necessary investment in enforcement businesses required to provide a sustainable service. Without this, successful enforcement could potentially decline significantly and enforcement agents may be encouraged to act in an aggressive manner in order to try and recoup the entire debt. It was therefore decided that enforcement agents

should be paid the compliance stage in full first, followed by a pro-rata division of proceeds between enforcement agent and creditor.

## **9. Guidance**

- 9.1 The Regulations will be published by the Stationary Office and will be available on the [www.legislation.gov.uk](http://www.legislation.gov.uk) before they come into force in April 2014. It is the Department's intention to update the National Standards for Enforcement Agents to reflect the changes in the law and to issue best practice guidance. It is the Department's view this will be the most appropriate way to address issues surrounding vulnerability. Updated information will also be available on gov.uk. These updates will be available before the implementation date of April 2014.

## **10. Impact**

- 10.1 An Impact Assessment was carried out to consider the impact of the introduction of the full set of reforms, including those provisions introduced by this Statutory Instrument. This is available at: <https://consult.justice.gov.uk/digital-communications/transforming-bailiff-action>. An Impact Assessment has not been prepared specifically for this instrument.
- 10.2 The impact on business and the voluntary sector is estimated to be an annual average benefit of £5 million. The benefits of savings associated with the ongoing saving of doorstep visits, streamlining of the law, simplification of the system and fewer complaints were calculated to offset the costs such as familiarisation with the new system and ongoing certification and training costs.
- 10.3 The impact on the public sector is expected to be an increase in one-off costs, around £1 million, associated with the amendment to automated processes. There are not expected to be additional net costs.

## **11. Regulating small business**

- 11.1 The legislation affects small business, but is not anticipated to have a detrimental effect.
- 11.2 The Ministry of Justice has not taken any specific steps to minimise the impact of the requirements on firms employing 20 people.

## **12. Monitoring & review**

- 12.1 As set out in the Government's response to the Transforming Bailiff Action consultation, a post-implementation review will take place at one year, three years and if necessary five years after these provisions come into force.

### **13. Contact**

- 13.1 Louise Langston at the Ministry of Justice (Tel: 0203 334 4201 or email: [louise.langston@justice.gsi.gov.uk](mailto:louise.langston@justice.gsi.gov.uk)) can answer any queries regarding the instrument.