



**Breathing Space Scheme
R3 response
January 2019**

ABOUT R3

1. R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession.
2. Our members work across the spectrum of the profession, from the global legal and accountancy firms through to smaller, local practices. Our members have direct experience of insolvencies and their impact on individuals and businesses across the UK.
3. The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps individuals deal with problem debt.
4. We have focused this response on those questions and themes in the consultation where we can provide answers based on our members' expertise, including their experience of dealing with individuals in significant financial distress.
5. R3 would be delighted to meet Treasury officials to discuss the points raised below in greater detail. If you would like to meet us or if you have any other queries, please contact R3's Public Affairs Manager, James Jeffreys, at james.jeffreys@r3.org.uk or on 020 7566 4220.

Overview

6. R3 welcomes the Government's commitment to introducing a breathing space for individuals in problem debt. As we stated in our response to the Government's earlier call for evidence, a breathing space would ensure people who are experiencing financial distress are able to seek advice in an environment free from creditor pressure, and would help individuals to enter a debt 'exit strategy' appropriate to their situation.
7. In our members' experience, problem debt can be exacerbated when individuals do not seek advice about the options available to them, or feel pressured into entering the first available debt solution as a means of preventing further creditor pressure. These factors are not conducive to individuals ending up in debt solutions which are appropriate to their situation. When the 'wrong' debt solution is used, both the individual in debt and their creditors are less likely to see an optimal outcome.
8. In our call for evidence response, we emphasised the importance of a breathing space which balances the needs of indebted individuals and their creditors, not all of whom will be large

or sophisticated financial institutions. Subject to some further changes, we feel that the breathing space proposed by the Government achieves this balance.

9. However, R3 remains unconvinced of the merits of introducing a Statutory Debt Repayment Plan as currently proposed by the Government. There is insufficient detail provided in the consultation from which to form a clear opinion as to the desirability or effectiveness of introducing a new procedure.
10. It is also unclear whether the new repayment plan is intended to be a 'repayment scheme' or an additional statutory insolvency procedure falling under the 1986 Insolvency Act, and it is unclear where the new plan would sit in the current regulatory framework: would the FCA, currently responsible for regulating the debt management plan market, also have a role in regulating the new statutory debt repayment plan?
11. Further, it is unclear whether the new plan would be more attractive than existing debt relief or repayment provisions, while the administrative cost of creating a new framework would be considerable. There is already an established, skilled and regulated market for providing debt management services.

Eligibility

Q1. Do you agree with the eligibility criteria for entering breathing space, including the 12 month limit?

12. The basic eligibility criteria of the breathing space are broadly sound. They are light touch, which will ensure the breathing space is accessible to all who need it.
13. We support the proposed requirement that an individual be in 'problem debt' before being granted access to breathing space. However, we disagree that breathing space should be inaccessible where 'it is clear' an individual needs and is able to enter an appropriate insolvency procedure immediately: there will be situations where a breathing space would be useful as a prelude to an insolvency procedure. For example, it may be obvious that an individual would benefit from an IVA, but entry into an IVA can take some time. Using a breathing space as a quick and cheap alternative to an IVA interim order (a court order halting creditor enforcement ahead of an IVA being agreed) is an attractive option and would save time and cost for the courts and the insolvency process itself.
14. In the consultation document, the Government lists two examples of individuals who may not be granted access to a breathing space on the basis that they are not in 'problem debt' (an individual who might simply be in need of budgeting advice, or an individual who may benefit from and be able to access an appropriate insolvency procedure). Before a breathing space is introduced, it might be useful if the Government were to provide further guidance on what exactly constitutes 'problem debt'.
15. We agree that individuals should be limited to one breathing space every 12 months. This should provide an element of protection for creditors and others from abuse of the process. Additionally, if an individual is in genuine need of continuous breathing space, it may be that a statutory insolvency procedure – rather than more breathing space – is required.
16. We strongly disagree with the proposal that insolvency practitioners should only be able to act as a source of qualifying debt advice if they are FCA authorised.

17. As we have previously discussed with Treasury officials and others, insolvency practitioners are trained, licensed and regulated to provide advice about problem debts. The constraints imposed by the FCA authorisation regime for regulated consumer credit activities cause problems for people in financial difficulty and the insolvency profession.
18. Insolvency practitioners are heavily regulated and monitored when it comes to providing debt advice: they are subject to regular oversight from the UK's Recognised Professional Bodies, which are in turn regulated by the government Insolvency Service. Insolvency practitioners are trained to advise on the whole range of debt solutions, including both statutory insolvency procedures and non-statutory options.
19. The profession's role in, and track record of, providing debt advice led to licensed insolvency practitioners being granted an exemption from the FCA's consumer credit authorisation framework when it was introduced in 2014. The exemption stated that insolvency practitioners do not require FCA authorisation to provide debt advice and information about possible debt relief solutions in situations where they are appointed to act in a statutory insolvency procedure or where 'there is reasonable contemplation of an appointment as an insolvency practitioner'.
20. However, contrary to what was originally proposed, the Government and FCA have adopted a narrow interpretation of this exemption. Under this interpretation, when providing pre-insolvency advice, the exemption for insolvency practitioners ends as soon as it becomes apparent that they are no longer in 'reasonable contemplation' of an appointment to a statutory insolvency procedure.
21. This interpretation is harmful to individuals with problem debt. When approaching an insolvency practitioner for advice, it is rarely obvious at the outset that an individual needs to enter a statutory insolvency procedure, and so any advice from a non-FCA authorised insolvency practitioner will be incomplete or may lead to the individual being turned away before advice is provided.
22. Similarly, there are cases where an individual may, at the outset, appear to be a candidate for an insolvency procedure but where it turns out an insolvency procedure is not needed. At this point, where there are consumer debts, a non-FCA authorised insolvency practitioner would have to cease providing advice immediately, and the individual in need of advice will be forced to go elsewhere.
23. One common problem insolvency practitioners encounter in their work is that individuals do not always seek advice when they should; turning people away once they have taken the decision to seek advice should therefore be avoided where possible. Once turned away, it may be some time before an individual is identified by another source of advice as being a candidate for an insolvency procedure (and then redirected back to an insolvency practitioner), while others may simply be discouraged from seeking further advice.
24. Effective, professional, qualified advice is needed to increase the chances of someone ending up in the most appropriate debt solution for their situation. Unfortunately, people in debt do not always have access to professional, qualified advice. An R3 survey of 2,045 British adults, carried out by ComRes in February 2017, found that people are more likely to have approached friends and family for personal finance advice than a qualified advisor. While 69% of British adults said they have approached friends and family for advice about

personal finances, 45% of British adults said they have never spoken to a bank for personal finance advice, 48% had never spoken to non-government money advice bodies, 60% had never spoken to a professional financial advisor, and 64% had never spoken to government-backed money advice bodies¹. The current FCA authorisation framework, which limits the availability of professional, qualified advice, risks raising the height of the hurdle between individuals in problem debt and effective debt relief.

25. The Government's interpretation of the authorisation exemption is also harmful to insolvency practitioners and the provision of debt advice in the UK. The requirement that insolvency practitioners obtain FCA authorisation in addition to their existing insolvency licence creates a system of dual-regulation of insolvency practitioners. For smaller firms, in particular, this system has created an intolerable cost and regulatory burden; some of R3's members from smaller firms have ceased personal insolvency work because they cannot afford the substantial cost of FCA compliance. This removes choice for individuals in need of debt advice and makes it harder for the advice sector to offer the bespoke debt solutions in which smaller firms have historically specialised.
26. The introduction of breathing space is likely to put additional pressure on the debt advice sector's resources: the new tool may lead to an increased number of enquiries, while administering the breathing space will increase costs for debt advisors. One simple way of both spreading this burden and improving the accessibility of debt advice in the UK would be to revise the existing exemption from FCA authorisation for licensed insolvency practitioners.
27. Given the above, and that, as per paragraphs 17-18, insolvency practitioners are trained, licensed, and regulated to provide advice about problem debts, insolvency practitioners should be included as a qualifying source of debt advice for breathing space eligibility.

Creditor objections

Q2. Do you think there should be a formal mechanism to allow creditors to object to a debtor's entry into a breathing space, given the protections already outlined above? How could any such mechanism be best designed to minimise administrative burden?

28. Creditors must always be given a chance to protect their interests, particularly when there is a risk that the breathing space process is being abused and a creditor is being treated unfairly.
29. However, we do not believe there is a need for a new formal mechanism to be designed which creditors can use to object to a breathing space. The protections outlined in the Government's consultation, including the fact that a breathing space is reasonably short, overseen by a qualified debt advisor, and limited to one per person per year, should prevent creditors from significant harm.
30. Not having the option for an administrative challenge mechanism would keep the process simple, and would reduce the administrative burden on advisors overseeing a breathing space.

¹ ComRes interviewed 2,045 British adults online between the 1st and 2nd February 2017. The data has been weighted to be representative of all British adults by age, gender, region and socio-economic grade. ComRes is a member of the British Polling Council and abides by its rules. Full data tables are available at www.comresglobal.com

31. Instead, creditors seeking to continue enforcement action or to continue charging fees related to debts should be given the option of challenging a breathing space in court. This would impose a high threshold for creditor challenges and would ensure challenges to breathing spaces are made for legitimate reasons.

Mental health alternative access mechanism

Q3. Do you agree with the outline of the alternative access mechanism for individuals in mental health crisis care?

Q4. Although it will be important for a professional assessment to be made of an individual's condition, do you agree that other third parties (e.g. carers) should be permitted to use that professional assessment to make a referral to a debt advice agency on an individual's behalf?

32. R3 supports the principle that there is alternative access to the breathing space for those 'receiving NHS treatment for a mental health crisis either at a psychiatric in-patient setting or in the community'. It is also reasonable that those people in this particular situation should have access to an 'open-ended' breathing space. Further, we agree that third parties (e.g. carers) should be able to make a referral to a debt advice agency on an individual's behalf. It is right that those experiencing a mental health crisis should qualify for additional support.
33. However, further clarification is needed from the Government before R3 can offer full support for the proposals. While the definition of 'psychiatric in-patient treatment' is reasonably clear, it is not clear what 'in the community' NHS treatment for a mental health crisis constitutes. The Government must be explicit about what this means.
34. As above, R3 agrees that there needs to be an alternative access mechanism for those with serious mental health challenges, but the bar for alternative access must not be set too low. For example, R3's members have expressed concern that a GP visit may constitute 'in the community treatment'. R3 members feel that GPs would not necessarily be the best 'gatekeeper' for the alternative access mechanism given their own resource and time pressures: GPs may only have a short time with patients available, and therefore may either certify entry into the alternative access mechanism without careful consideration of the implications of doing so, or, instead, may be unwilling to certify entry into something they have not had a chance to consider fully (or which they may consider to be outside of their remit).
35. R3 members would be more comfortable with a definition of 'in the community' care which involves regular, ongoing care for an individual with serious mental health issues. The alternative access mechanism – and an open-ended breathing space – must be reserved for those with very serious, long-term mental health challenges.
36. Balancing a higher bar for the alternative access mechanism is the fact that the 'ordinary' breathing space remains available to all, including those experiencing a mental health crisis but who are not already receiving NHS treatment; indeed, given the delays involved in seeking and receiving NHS treatment, it may be quicker for an individual experiencing a mental health crisis to access the breathing space through a debt advice provider than it would be for them to access breathing space via the alternative access mechanism.

37. It is important that those on a waiting list for NHS mental health treatment be informed of the availability of breathing space, and any government literature should include contact details of debt advisors who specialise in working with vulnerable people. The Government should also consider introducing a mechanism whereby a 'standard' breathing space can be converted into a 'alternative access' breathing space once an individual already in a breathing space is able to access NHS treatment.

Notifying creditors of entry into breathing space

Q5. Do you agree with the proposed method of administering entrance into breathing space? Do you agree with the proposed role for the Insolvency Service? What kind of functionality should the Insolvency Service's notification mechanism include?

38. R3 supports the proposed method of administering the breathing space.
39. In addition to what is proposed, we believe it is important that creditors have the option of informing the Insolvency Service or debt advisor that they are a creditor of an individual subject to a breathing space. This would help ensure that creditors not listed by an individual (whether intentionally or otherwise) are kept up to date with the progress of the breathing space.
40. One detail which is not entirely clear in the consultation document is whether or not the Insolvency Service would charge for administering the breathing space, and how much any charge would be. While the scheme would have to be paid for, there is a risk that a charge could act as a barrier to access if set at the wrong level, while, without an increase in the Insolvency Service's funding, a free service might have a detrimental impact on the Insolvency Service's other areas of work.

Q6. Do you think there should be an oversight role to ensure creditor compliance with breathing space? If so, how should this oversight role operate?

41. As outlined in paragraphs 68-71, the simplest means of ensuring creditor compliance with the breathing space is for the individual in the breathing space to report breaches to their debt advisor. It would be helpful if the debt advisor had a pathway for reporting these breaches to a regulator, although the identity of the regulator may depend on the nature of the breach and the type of creditor in breach.

Q7. Do you think the register holding details of debtors in the breathing space should be fully public, accessible to relevant debt advice agencies and creditors or just accessible to the Insolvency Service?

42. R3 agrees with the Government's proposal that the breathing space register be public.
43. However, as outlined in paragraph 67, there is a danger that an open register might be used as a means of lead generation by debt advice firms who may then contact those in a breathing space to offer them a debt solution which might not be in the individual's interest. We would recommend that the unsolicited advertising of any financial product or debt solution to those in a breathing space should be banned. This is particularly important for vulnerable individuals.

Excluded debts

Q8. Do you agree with the proposed approach for excluding certain debts from the protections of breathing space?

Q9. Do you think there are other debts, such as those in regulated credit agreements, or certain types of benefits, that should be excluded?

44. While we understand the rationale for aligning the debts excluded from breathing space with those debts excluded from statutory insolvency procedures, we disagree with this approach: all debts should be covered by the limits that breathing space would put on enforcement action.
45. Importantly, we also disagree with the Government's proposal that certain ongoing liabilities be excluded from the protections of breathing space (section 4.4).
46. The purpose of the breathing space is to give an individual time and space to seek advice about their debts and consider their options. If some debts are still enforceable during the breathing space, the indebted individual would not be effectively protected from creditor pressure and may end up making a decision about how to deal with their debts having been influenced by this pressure. It may be that an individual needs to enter a breathing space because of financial problems – and expected financial problems – caused by the debts listed in sections 4.2 and 4.4 of the consultation.
47. Given the protections built into breathing space, including, in particular, its short length, it is unlikely that creditors could be significantly 'harmed' by temporarily halting the enforceability of the debts listed in sections 4.2 and 4.4.
48. While including all debts within the breathing space may mean some individuals use the tool to pre-empt the repayment of a debt, any delay in repayment or in the creditor's ability to enforce their debt would last for a maximum of just 60 days. At the end of the breathing space, the debt would become enforceable again, while the individual would have received advice on how best to deal with this debt.
49. That said, we believe debt advisors should encourage those in a breathing space to continue to make payments towards the ongoing liabilities listed in section 4.4 where possible.

Business debts in the breathing space

Q10. Do you agree with the treatment of sole traders in breathing space? In particular: Do you agree with the proposed eligibility criteria and protections for sole traders in breathing space? What would be the most appropriate way of distinguishing between business and personal debts for these purposes?

50. R3 welcomes the Government's proposal that business debts be included within the scope of breathing space.
51. However, we strongly disagree with the Government's proposal to exclude from breathing space any sole trader who exceeds the VAT threshold (currently a turnover of £85,000).

52. This approach would lead to unfair and inconsistent treatment of individuals with problem debt. For example, a non-sole trader with debts of £100,000 would qualify for the breathing space, but a VAT registered sole trader with debts of £10,000 would not qualify. The use of VAT status as a qualifying criterion is illogical and arbitrary.
53. Some members have commented that VAT registered sole traders are precisely the type of individual who might benefit from the breathing space: the breathing space could be used to devise and propose an IVA, an insolvency procedure originally designed to be used by sole traders.
54. There should be no distinction between personal and business debts for sole traders in the breathing space. Sole traders are personally liable for their business debts, so drawing a distinction between personal and business debts would be difficult and unnecessary.

Interest, fees, and charges

Q11. Do you agree with the proposed treatment of interest, fees, and charges in breathing space?

55. We disagree with the proposed treatment of interest, fees, and charges. While fees and charges relating to the non-payment of debts should be paused during the breathing space, interest should continue to accrue on what is owed.
56. This is partly due to practical considerations for smaller creditors: it could be time consuming and costly for creditors to pause and then continue interest calculations. For smaller creditors (i.e. those which are not large financial institutions), these costs would be disproportionate.
57. Given the breathing space will only last a short period of time, it's unlikely that the continued accrual of interest would add significantly to an individual's debt burden.
58. However, creditors should be given flexibility here and should be given the option to stop charging interest for the duration of the breathing space should they wish to.

Collections, recovery action, and creditor compliance

Q12. Do you agree with the treatment of collections and recovery action during breathing space? Should any other forms of collections and recovery action be explicitly included in the protections? How can any practical issues arising from preventing these collection and recovery actions be best mitigated?

Q13. How should creditor compliance with the scheme be monitored?

59. We broadly agree with the Government's proposals regarding the treatment of collections and recovery action during the breathing space.
60. We understand the rationale behind the Government's proposal that applications for money claims or orders do not have to be withdrawn as a result of a breathing space (section 4.8). However, any money orders which are made by the court during a breathing space should not be enforceable until the end of an individual's breathing space.

61. Noticeably, the Government's proposal makes no reference to how breathing space would interact with a creditor's bankruptcy petition. This omission needs to be addressed. R3 recommends that any outstanding creditors' bankruptcy petitions be stayed until the end of a breathing space and that there be a bar on any new creditor bankruptcy petitions for the duration of the breathing space.
62. In our members' experience, the bankruptcies which run least smoothly are those where an individual has been made bankrupt by a creditor and has had little access to third party advice about their situation, how they can comply with the bankruptcy order, and what the consequences of non-compliance would be. In these scenarios, the chances of non-compliance by the bankrupt individual increase, potentially adding significant costs to a bankruptcy and adding to the disruption the process will cause for the bankrupt individual and their creditors.
63. To help resolve these issues, R3 previously called for S.273 of the 1986 Insolvency Act to be extended from debtor-petitioned bankruptcies to creditor-petitioned bankruptcies. S.273 IA1986 allows the court to refer an individual petitioning for their bankruptcy to an insolvency practitioner, so that the insolvency practitioner can assess whether a voluntary arrangement might be a better option for the individual. Indebted individuals need to be in an insolvency procedure appropriate to their situation: bankruptcy may simply not be suitable for someone subject to a creditor's bankruptcy petition and there must be an opportunity for the individual to consider their options with the help of a qualified professional. While it is important that creditors have the option of petitioning for an individual's bankruptcy, this can prevent people from ending up in a debt solution appropriate to their situation. This can lead to worse outcomes for both an indebted individual and their creditors. R3 also suggested that, as well as being expanded to creditor-petitioned bankruptcies, S.273 be expanded so that advice could be provided on any debt relief procedure.
64. The introduction of a breathing space would be an opportunity to address the above issue. Individuals facing creditor action, including a bankruptcy petition, should be informed by the creditor of the existence of breathing space. If an individual is facing a creditor's bankruptcy petition and has *not* been informed about the availability of breathing space by their creditor, the court should be allowed to postpone a petition hearing until the individual has been informed about breathing space, and has been given the opportunity to apply for the process (the court may itself choose to inform the individual about breathing space). If the individual were to enter a breathing space, the petition hearing should be postponed pending the outcome of the process. While this may happen in practice once breathing space is introduced, it would be important to include this in statute to ensure consistency.
65. This change would need to be considered carefully in order to protect the use of bankruptcy as a means to tackle fraud and to quickly take control of an individual's assets when they are at risk of being put beyond creditors' reach. Access to breathing space might not be appropriate in these circumstances, and the court may need the ability to exercise discretion about when it will and will not refer individuals facing a bankruptcy petition for breathing space.
66. As well as the above, it is important that the Government's bankruptcy adjudicator process also informs individuals applying for their own bankruptcy about the existence of breathing space. At present there is a risk that people can use this service and enter bankruptcy without first seeking advice about their options.

67. One other proposal where we would disagree with the Government is the suggestion that creditors be allowed to continue to advertise to individuals in a breathing space. We do not think it would be appropriate for creditors to continue to send marketing materials directly to people in a breathing space, or to market directly to them by other means. This ban should extend to the unsolicited targeted marketing of financial products or debt solutions to an individual in a breathing space, whether its source is a creditor or not. This ban would cover phone calls, emails, or letters. In our members' experience, serious existing financial problems do not necessarily stop people from taking on additional debt, particularly when the individual in debt is a vulnerable person. Additionally, our members have expressed concern that the breathing space register might be used as a marketing tool for companies seeking to sell 'debt solutions' which might not be in the best interest of the individual in the breathing space. An advertising ban would prevent this.
68. The simplest way to check creditor compliance would be to rely on reports by the individual in the breathing space; reports should be made to the debt advisor. The debt advisor should also be given scope to record instances of creditors breaching the breathing space without receiving a report from the indebted individual.
69. The advisor should have the power to contact the creditors in breach of the breathing space and request that they cease their actions.
70. Individuals should be informed by their debt advisor at the outset of the breathing space that they can report any contact or attempts at enforcement action to the advisor.
71. One area not addressed by the Government's consultation is what would happen to creditors in breach of the breathing space. It may help if there were a regulatory authority to which the advisor could report breaches. Penalties for those creditors found to be in breach of the breathing space would also act as an incentive for creditors to abide by the breathing space.

Breathing space length

Q14. Do you agree with the proposed length of breathing space? Do you have any other comments on the operation of the check?

72. Having originally supported a 28-day breathing space and then supported the Government's earlier six-week breathing space, we support the revised 60-day proposal and understand the Government's rationale for the new length. We support the introduction of a 30-day check.
73. However, it is important that the length of the breathing space does not continue to increase as the Government further develops this policy. Breathing space must achieve a balance between the individual in debt and their creditors, and a 'short' breathing space is an important means of minimising the 'harm' a breathing space might cause for creditors.
74. The longer a breathing space lasts, the longer it will take for an individual to resolve their debts, the harder it will be for an individual to remain eligible for the breathing space proposed in the consultation (because they may be unable to continue to meet ongoing liabilities), and the more risk there is for creditors: an individual's financial position may worsen as a breathing space progresses, putting creditors in a worse position than they were

at the start of the process. R3 has been clear throughout the development of this policy that a breathing space should be a means of access to one of the many debt solutions already available, and it should not be an 'end' in and of itself.

75. A 60-day breathing space is at the limit of what the insolvency profession and creditors would find acceptable.

76. The Government's proposal does not appear to include scope for an extension to the breathing space (except in those circumstances covered by the mental health exemptions): it may be necessary to include the possibility of an extension in circumstances where additional time is needed to put in place the debt solution devised during the breathing space. For example, additional time beyond the 60-day mark may be needed for creditors to vote on a proposed IVA.

Mental Health Alternative Access Mechanism

Q15. Do you consider that this protection is appropriate for individuals in mental health crisis? Should there be any further protection for individuals who have accessed breathing space in this way?

77. See paragraphs 32-37 (in response to questions 3 and 4).

Other

Additional creditor protection

78. One issue not addressed in the Government's consultation proposal is the risk for creditors that individuals may use a breathing space as an opportunity to put assets beyond creditors' reach. This would cause a problem for creditors where a breathing space was followed, for example, by a bankruptcy. If the breathing space had been used by an individual to dispose of assets, this would worsen the position of creditors. While a trustee in bankruptcy may take steps to retrieve some of these sold, transferred, gifted or hidden assets, this process can be expensive and success is not guaranteed.

79. One solution may be a blanket ban on selling any assets without the permission of the debt advisor overseeing the breathing space. The Government should provide guidelines on the type of asset sales the debt advisor can approve.

The wider framework

80. It is important that the breathing space is fully aligned with the existing regulatory frameworks covering the provision of debt advice and creditors' relationships with those in debt (in particular, the FCA's regulations covering creditor forbearance).

81. As with the Statutory Debt Repayment Plan, it's important that the Government is clear on whether the breathing space is part of the insolvency framework, or whether it sits elsewhere in the UK's debt and insolvency landscape.

STATUTORY DEBT REPAYMENT PLAN

Eligibility criteria

Q16. Do you agree with the eligibility criteria for entering a plan? In particular, do you agree that plans lasting for a maximum of ten years is an appropriate timeframe for debt repayment?

Q17. Do you agree with the proposed criteria for creditors to object to the plan? Are there any other criteria that you feel would be appropriate?

Q18. Do you agree with the proposed fair and reasonable test? In particular: Do you agree that 14 days is an appropriate timeframe for creditors to object to a proposed plan? Following an Insolvency Service decision that a plan is fair and reasonable, do you think that creditors and debtors should be able to make any further objection if they feel the Insolvency Service's decision is incorrect? If so, how should an objection mechanism work to minimise disruption and administrative burden for parties involved in the plan?

82. As set out in our response to the call for evidence published in October 2017, we do not believe that there is a clear justification for the introduction of a Statutory Debt Repayment Scheme (SDRP) – the scope of individuals likely to benefit from a SDRP is narrow, given the existing personal insolvency options available.
83. It is also unclear what the prospective SDRP would offer that would be more attractive than existing insolvency procedures. For example, it is difficult to understand why an individual would opt for a ten-year SDRP with no debt forgiveness when they could enter a five-year IVA which *does* involve debt forgiveness.
84. There may, however, be a small body of people who cannot enter a Debt Relief Order (DRO) because they have a property, who also do not have the disposable income to undertake an IVA, but who can afford to maintain their property, for whom repaying all of their debts over a ten year period under a SDRP may be a preferable solution to entering bankruptcy. However, we believe that the number of individuals likely to benefit from the SDRP is very small and for this reason, we do not believe that an emphatic case has been made for the introduction of the SDRP, particularly given the costs of introducing a new administrative framework.
85. We do not take issue with the proposed terms for creditor objections to a SDRP in the first instance. However, given that the proposal would bind creditors into a decision, R3 does have very strong concerns about the prospects of having a 'fair and reasonable' test being carried out by the Insolvency Service, should creditors reject a proposal. Such an arrangement would effectively remove creditors' views from the equation, without any further opportunity for a vote or other method of allowing creditors to exercise their rights, and represents a significant encroachment into judicial decision making. The courts would be better placed to adjudicate on creditor challenges.
86. The Insolvency Service is not necessarily well-placed to judge what is 'fair and reasonable'. It does not currently have the resource or expertise to be able to conduct a large number of 'fair and reasonable' tests in an effective manner. It is also highly unlikely that the Insolvency Service would be able to know the circumstances of those creditors it decides against in a SDRP proposal – while larger creditors such as banks will be able to absorb the cost implied by being bound by an SDRP, many smaller creditors are likely to find themselves both more

exposed and less able to devote resources to engaging with the process. As such, it will be difficult for the Insolvency Service to have (or to acquire) enough information to be able to adjudicate what is fair and reasonable for all of those involved.

Debts excluded from the protections

Q19: Do you agree with the debts included within a plan? Should any other debts be excluded, or excludable on request?

87. The rationale for leaving some debts outside of the SDRP, effectively giving them super-priority status over those debts that are prioritised within the SDRP, is unclear, particularly when the intention of the SDRP is to pay all debts in full.

88. By contrast, it is understandable why some debts are excluded from procedures which *do* involve debt forgiveness (for example, the exclusion of student debts, fines, or child maintenance from bankruptcy). Exclusion is required where there is a chance that debt relief provisions could be abused; this is not the case in a procedure which involves repayment in full.

89. That said, an element of prioritisation of debt repayment within the SDRP would be helpful as a means of providing protection to an individual in debt in the event of the 'failure' of their SDRP. R3 would suggest that only those debts which threaten the housing situation of the indebted individual and their immediate family (if applicable), such as housing debts or utilities, should be prioritised.

Treatment of interest, fees and charges within the plan

Q20: Do you agree with the proposed treatment of interest, fees and charges within the plan?

90. We are not opposed to the proposed treatment of interest, fees and charges within the plan. That said, given that the SDRP allows for the repayment of debts in full, there is an argument that interest should continue to be paid. Creditor organisations' views should be taken into account here.

Treatment of collections and recovery action during the plan

Q21: Do you agree with the proposed protections within a plan? Are there any unintended consequences that could arise from providing these protections to debtors?

Q22: How do you think creditor compliance with the scheme's protections can be best monitored? Should creditors who fail to comply face any additional sanction?

91. We take no particular view on the proposed protections within a plan.

Model for prioritisation

Q23: Do you agree that some debts should be prioritised for repayment in the plan? If so, do you agree with the debts that the government proposes to prioritise, and the method of prioritisation?

92. As noted in paragraphs 87 - 89, we believe that all debts should be included within the plan, with only those debts which threaten the housing situation of the indebted individual and their immediate family (if applicable) being prioritised.
93. The consultation proposes to prioritise a number of debts based on “existing debt advice best practice”, including hire purchase debts. We do not believe that there is a clear rationale for prioritising hire purchase debts under the plan given they are not prioritised in other insolvency procedures. Given the importance of the other proposed priority debts to the housing situation of an indebted individual and their family (if applicable), we would suggest that hire purchase debts should not be prioritised.
94. Further clarification is required in relation to the proposed minimum payment for creditors. The consultation document states that, “each creditor (both priority and non-priority) would receive a minimum payment of 5% of a debtor’s total monthly plan payment”. It is unclear whether this should in fact refer to each *category* of creditor, given the obvious problem of having a minimum 5% payment to each creditor in a situation where there are more than 20 creditors.

Flexibilities included within a plan

Q24: Do you agree with the two key plan flexibilities outlined above? Should the plan offer any other flexibility that would help to make it sustainable over time?

Q25: Do you have any specific comments about how these flexibilities should work? In particular, how do you think a severe, temporary, financial shock should be defined?

95. The SDRP’s proposed maximum duration of ten years is a considerable length of time, during which an indebted individual’s circumstances may change significantly. As such, we believe it is appropriate to have annual reviews built into the plan.
96. We are broadly relaxed with the proposed flexibilities being included in the plan, given that creditors will be given the opportunity to object to the proposed terms of a plan in the first instance. We do not, however, see the need for further creditor approval of a temporary break, as there is a strong need to keep the plan affordable and manageable. Most IVAs will build in a three month payment holiday option and so we would support a similar mechanism, up to the six months proposed in the consultation, under the SDRP, without the need for creditor approval.

Requirements for continuing to be eligible for the plan

Q26: Do you agree with the requirements for continued eligibility for the plan?

97. We take no particular view on the requirements for continued eligibility for the plan.

An alternative option for payment distribution

Q27: Should the plan’s funding mechanism system be based on taking a share of creditors’ monthly repayments?

Q28: How should payment distribution be done? Should it be offered by an individual's debt advice agency, if they have appropriate handling client money permissions, or by the Insolvency Service, or is there any other model that the government should consider for payment distribution in the plan?

98. In principle, we are content for the plan's funding mechanism to be based on taking a share of creditors' monthly repayments.
99. However, any payment distribution model would need to be fully scoped out and costed before we could form an opinion on whether this would be an appropriate funding mechanism. There is insufficient detail in the current proposal to form a judgement at this point.
100. It is worth noting that a payment distribution mechanism of the size and scale required to support the SDRP would be a significant undertaking for any organisation. As far as we are aware, such a system would not necessarily sit comfortably with the current set-up and resources of the Insolvency Service.

Credit referencing

Q29: Do you have views on how breathing space and plan should be reflected on a debtor's credit file?

101. We are relatively relaxed about how the breathing space and plan should be reflected on a debtor's credit file.
102. However, given the potential maximum duration of the SDRP, and that all debts will in that time have been paid in full, we do believe that it could be considered excessive for the plan to be maintained in the debtor's credit file after it has finished. We would suggest that it should stay on the file for the duration of the plan, but should be lifted once the plan is concluded.

8.6 Territorial scope of the scheme

Q30: Do you agree with the proposed territorial scope of the scheme?

103. We agree with the proposed territorial scope of the scheme.

Other

104. It's important for the SDRP to be aligned with the existing regulatory framework, particularly the FCA's existing regulation of debt repayment plans.
105. An important question for the Government to resolve, and one which will have a bearing on where the SDRP sits within the regulatory framework, is whether the SDRP is deemed to be a 'repayment scheme' or an insolvency procedure.