

Insolvency Practitioners' Association

Response to the H M Treasury Consultation Paper “Breathing Space Scheme: A Policy Proposal”

About the IPA

The Insolvency Practitioners Association (IPA) is a membership body recognised in statute for the purposes of authorising Insolvency Practitioners (IPs) under the Insolvency Act 1986 and Insolvency (Northern Ireland) Order 1989. It is the only Recognised Professional Body (RPB) to be solely involved in insolvency and for over fifty years the IPA is proud to have been at the forefront of developments and reform within the insolvency profession.

The IPA has approaching 2,000 members, of whom approximately 600 are Licensed Insolvency Practitioners. Additionally, the IPA now regulates IPs authorised by the ACCA under a collaboration agreement effective from 1 January 2017.

The IPA's IPs are subject to a robust regulatory regime, applied by the IPA's dedicated regulation teams carrying out complaints handling, monitoring and inspection functions.

The IPA has a longstanding and continuing commitment to improving standards in all areas of insolvency (and related) work. It was the first of the recognised bodies to introduce insolvency-specific ethics guidance for IPs, and the IPA continues to be a leading voice on insolvency matters such as the development of professional standards, widening access to insolvency knowledge and understanding, and encouraging those involved in insolvency case administration and insolvency-related work to acquire and maintain appropriate levels of competence and skills.

The comments and opinions expressed below represent the views of the IPA's Secretariat, and are not intended to reflect the opinion of each individual and firm member of the IPA. Our comments in this response are based primarily on our role as an RPB.

We set out below our responses to the specific questions within the Consultation Paper. Further enquiries should be addressed to:

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Introduction

The IPA welcomes the opportunity to comment on H M Treasury's two policy proposals:

1. to introduce a 'Breathing Space' (BS) aimed to assist individuals who have problem debt by providing them with a period of protection from creditor recovery action during which they can seek debt advice, and
2. to introduce a Statutory Debt Repayment Plan (SDRP) to provide individuals, who are able to repay their debts, but only over an extended period of time, with a mechanism to do so within a framework that protects them from creditor recovery action

The Consultation Paper acknowledges that many individuals with 'problem debts' do not seek advice early but may struggle for a year or two before doing so. It therefore aims to accelerate that step by providing the incentive of protection from creditors but on condition that they seek advice. This is commendable but should be balanced against any disincentives such as potential long term effects of having sought a breathing space on the individual's future ability to obtain credit.

There is evidence that individuals who have obtained advice are more likely to adopt a debt solution and, having done so to see it through. It is, however, important that both the process for obtaining the advice and the debt solution are accessible, flexible and not seen as too formal or restrictive. They should be equally available so that people advised to enter a SDRP can do so easily within a reasonable period of time and SDRP providers are in a position to offer advice to individuals who might be suitable to enter such a plan. To facilitate this the funding model adopted could include a fixed element derived from an FCA levy relating to the advice element, and variable element derived from a percentage charge on contributions paid into the SDRP. In the absence of any public funding the funding levels would need to be set sufficiently high to meet the costs of giving advice in those cases which do not result in a subsequent SDRP.

We consider that the access to a Breathing Space, the provision of advice and the SDRP itself should be free to the debtor at the point of service to avoid cost being a barrier to entry and individuals paying for advice that is available free of charge elsewhere. The funding model will need to be set to provide adequate resources to the service providers to enable this.

Once entered into we consider that a SDRP should have some flexibility at the discretion of the SDRP provider so, for example, the ability to miss or delay one or two contributions now and again would probably be more useful to debtors than being able to take a payment break for six months. This is because their finances tend to be unstable and they have few if any resources to meet unexpected expenses or adverse circumstances but are likely to be able to pay their debts if allowed more, but not an indefinite, amount of time.

We see the SDRP as a way of overcoming some of the disadvantages of Debt Management Plans, namely that interest and charges can continue to run, creditors may still take recovery action and providers are not necessarily regulated.

Overall we see the policy proposal as constructive as it offers creditor protection to individuals with problem debt at a relatively early stage to allow them to take advice to formulate a debt solution and adds a new procedure to the range of statutory insolvency options which will be a proportionate response to the circumstances and intentions of many people with debt problems.

We would respond to the questions raised in the consultation paper as follows:

Question	Response
Question 1	
<p>Do you agree with the eligibility criteria for entering a breathing space, including the 12 month period?</p>	<p>Yes - a limit of one BS within any 12 months is sensible to avoid abuse of the process.</p> <p>We foresee a tension between the apparent intention to enable a Breathing Space (BS) to be obtained before a full enquiry into the financial circumstances of the applicant is undertaken (which is positive) and the requirement to assess suitability, which in itself, may have long term consequences, before such an enquiry is made.</p> <p>It may be necessary to issue guidance on the extent of the enquiries to be made before 'suitability' can be determined.</p>
Question 2	
<p>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?</p>	<p>No – we consider the assessment of 'suitability' should provide an adequate safeguard. The FCA would be able to examine cases where creditors alleged that the BS was not appropriate as a potential regulatory breach.</p> <p>Otherwise, to deal with any objections there would need to be an administrative process in place to receive and process such objections.</p> <p>There would also need to be a time limit for objections to add certainty to the process.</p> <p>These would add an unnecessary administrative burden to the process.</p> <p>Furthermore objecting creditors would presumably want to follow a more formal debt recovery procedure. This prospect might discourage individuals who might benefit from applying for a BS.</p>

Question 3	
Do you agree with the outline of the alternative access mechanism for individuals in mental health crisis care?	Yes - Individuals suffering a mental health crisis do need additional protections and a mechanism to engage them which is not dependent on their own actions.
Question 4	
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) be permitted to use that professional assessment to make a referral to a debt advice agency on an individual's behalf?	<p>The number of individuals falling into this category may be relatively small, but they are particularly vulnerable so enabling health care professionals and other, to be defined, third parties to act on their behalf in such circumstances is welcome.</p> <p>It should be recognized that such third parties will not have all the information regarding the individual's affairs and so mechanisms to inform subsequently identified creditors and to continue to support the individuals once the mental health crisis or the BS are over will be needed.</p> <p>The Single Financial Guidance Body (SFGB) may be the appropriate organization to maintain a database of BS applications made via the alternative access procedure accessible to healthcare and associated professionals, to facilitate the provision of debt advice in these cases.</p>
Question 5	
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?	<p>This is a problematic area as although the BS centres on debt advice the protection against creditor action it offers is substantially the same as that offered under other formal insolvency procedures and the Insolvency Service already maintains the Personal Insolvency Register and already has systems in place to notify creditors of insolvency proceedings.</p> <p>The Functionality of the system should include a register of individuals subject to a BS, a link to Credit Reference Agencies (CRA) to facilitate creditor identification and a means for the subject to add and correct creditor details. The system could also generate creditor notifications and record any responses received.</p> <p>It would be desirable for the system to be able to exchange information directly with advice provider systems to avoid errors and rekeying</p>

	costs.
Question 6	
Do you think there should be an oversight role to ensure creditor compliance with breathing space? If so, how should this oversight role operate?	<p>Yes – the behavior of creditors should be subject to oversight, particularly in the initial period after the introduction of a BS</p> <p>The role could be performed by the administrators of the BS Register as they will be aware of the creditors involved and when they were issued with notification of the BS.</p> <p>Further consultation will be needed on what action the oversight body can take if it transpires that creditors are not complying with the BS protections.</p>
Question 7	
Do you think the register holding details of debtors in a breathing space should be fully public, accessible to relevant debt advice agencies and creditors or just accessible to the Insolvency Service?	<p>We consider that the register of BS debtors should not be fully public in order to provide the debtors with protection from unsolicited marketing activity and to avoid the disincentive effect such access might have on those seeking a BS.</p> <p>Access limited to regulated debt advisors, CRAs, financial institutions and central and local government agencies may be sufficient to make the Register effective but be subject to review once it is established.</p>
Question 8	
Do you agree with the proposed approach for excluding certain debts from the protections of breathing space?	Yes – it is important that the treatment of different types of debt is consistent with other personal insolvency procedures to avoid distorting the demand for a BS as an alternative, albeit temporary, to other debt solutions.
Question 9	
Do you think there are other debts, such as those in regulated credit agreements, or certain types of benefits, that should be excluded?	No – As in question 8, it is important that the different personal debt solutions operate in a consistent way.
Question 10	
Do you agree with the treatment of sole traders in breathing space? In particular:	

<ul style="list-style-type: none"> Do you agree with the proposed eligibility criteria and protections for sole traders in breathing space? 	<p>Yes – as the personal and business finances of unincorporated sole traders are often intertwined and it would not be cost effective to disentangle them for BS purposes. Symmetrically creditors may regard the debtor as personally liable for their business debts and it is therefore reasonable for them to be subject to the same constraints as personal creditors.</p>
<ul style="list-style-type: none"> What would be the most appropriate way of distinguishing between business and personal debts for these purposes? 	<p>This would not be necessary if both business and personal debts were included in the BS.</p>
<p>Question 11</p>	
<p>Do you agree with the proposed treatment of interest, fees and charges in breathing space?</p>	<p>Yes – Suspending additional default fees and charges may be more significant than suspending normal interest charges.</p> <p>It is important that the proposal does not permit such additional charges to be levied retrospectively if the BS is not followed by a debt solution as they could constitute a significant financial shock to the debtor and be a disincentive to entering the process in the first place.</p>
<p>Question 12</p>	
<p>Do you agree with the treatment of collections 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 collections and recovery actions be best mitigated?</p>	<p>Yes – a key benefit of entering a BS to the debtor will be the relief from immediate creditor pressure to allow space in which to make an informed decision.</p>

Question 13	
How should creditor compliance with the scheme be monitored?	<p>The Register Administrator could maintain records of creditor non-compliance as provided by the debtor or debt advisor involved.</p> <p>As mentioned in Question 6 Further consultation will be needed on what action the oversight body can take if it transpires that creditors are not complying with the BS protections.</p>
Question 14	
Do you agree with the proposed length of breathing space? Do you have any other comments on the operation of the check?	<p>The proposed 60 day length for the BS appears sufficient to enable the debtor to receive and consider advice and act on it without being too prejudicial to creditors.</p> <p>We would, however, hesitate to require a 30 day check as it introduces an additional administrative process and may act to prevent individuals in particularly dire but short term difficulties from having the full 60 days to address their problem debts. The exception to this view would be where the debtor totally fails to engage with the advice process once the BS has started.</p>
Question 15	
Do you consider that this protection is appropriate for individuals in mental health crisis? Should there be any further protections for individuals who have accessed breathing space in this way?	Yes – as suggested in Question 4 an additional database for the use of healthcare professionals to facilitate the provision of debt advice to such debtors would provide additional support.
Question 16	
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?	Yes – the maximum length should be more than adequate, any longer would suggest that repayment in full is not actually a realistic prospect and an alternative insolvency solution might be more appropriate.
Question 17	
Do you agree with the proposed criteria for creditors to object to the plan? Are there any other criteria you feel would be appropriate?	Yes – the creditors should have an opportunity to reject the SDRP and use the alternative remedies available to them. Their behavior will be moderated by the Insolvency Service applying a 'Fair and reasonable' test on a consistent and transparent basis.

Question 18	
Do you agree with the design of the proposed fair and reasonable test? In particular:	
<ul style="list-style-type: none"> Do you agree that 14 days is an appropriate timeframe for creditors to object to a proposed plan? 	Yes – the proposed period is reasonable but would introduce some uncertainty into the process. On the basis that Debt Management Plans (DMPs) are seldom rejected it is unlikely that debt advisors would suggest SDRPs that would be likely to be rejected hence the SDRP could have immediate effect and the 14 period could be treated as an appeal period in which creditors can overturn it.
<ul style="list-style-type: none"> 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? 	No - as a further appeals process would introduce more uncertainty into the process
Question 19	
Do you agree with the debts included within a plan? Should any other debts be excluded, or excludable on request?	Yes – however, certain ongoing payments the whole of which becomes due if arrears arise, such as council tax, should be apportioned between arrears before the SDRP was approved, treated as a debt within the Plan and the future liabilities treated as ongoing payments.
Question 20	
Do you agree with the proposed treatment of interest, fees and charges within the plan?	Yes
Question 21	
Do you agree with the proposed protections within a plan? Are there any unintended consequences that could arise from providing these protections to debtors?	Yes – we have not identified any unintended consequences

Question 22	
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?	<p>Any non-compliance by creditors could be reported to the body that oversees compliance with the BS scheme.</p> <p>Any sanction could take the form of compensation payable to the debtor on the basis that they will have suffered the distress and inconvenience of the creditor's non-compliance.</p>
Question 23	
Do you agree that some debts should be prioritised for repayments within the plan? If so, do you agree with the debts that the government proposes to prioritise, and the method of prioritisation?	<p>There are established debt advice protocols (as described in, for example, the CPAG "Debt Advice Handbook" which advisers should use in line with established industry practice.</p> <p>Creditors would have an opportunity to object to the prioritisation using the "fair and reasonable" criteria at the start of a new SDRP.</p>
Question 24	
Do you agree with the two key plan flexibilities outlined? Should the plan offer any other flexibility that would help to make them sustainable over time?	<p>Yes – however, the ability to defer from one to three regular contributions on an occasional but infrequent basis as and when necessary (to be determined by the debt advisor) would provide greater flexibility than a longer payment break. Such flexibility is, in our view, likely to make the SDRP more durable as it will more easily accommodate short term 'emergencies' such as unexpected repair bills.</p>
Question 25	
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?	<p>The criteria for a severe, temporary, financial shock could be set in terms of the likely impact on the debtor's ability to make contributions at all, for, say, a period of four months or more. This would allow some adjustment to be considered before the maximum six month payment break contemplated in the proposal was necessary. Examples are loss of employment or sickness reducing income.</p> <p>The decision to have a payment break should be at the discretion of the debt advisor, but subject to appeal by creditors to the Insolvency Service under the 'fair and reasonable' test.</p>

Question 26	
Do you agree with the requirements for continued eligibility for the plan?	<p>The debtor should continue to engage with the SDRP and communicate with the debt advisor when there are any changes in their circumstances as well as cooperating with the annual review.</p> <p>Because, however, debtors in a SDRP are unlikely to have resilience to deal with what might appear to be minor financial shocks the criteria for failing a SDRP should not be too strict. We understand that people in DMPs typically miss 10% of payments during the term of a DMP but still complete it. Accordingly we would suggest a rolling average assessment of payments might provide a suitable yardstick for assessing continued eligibility for the SDRP.</p>
Question 27	
Should the plan's funding mechanism system be based on taking a share of creditors' monthly repayments?	<p>For the BS and SDRP to be successful the funding needs to be sufficient to meet the costs both of the debt advice and the SDRP. Although they are separate schemes the service providers are likely to be the same and so, to avoid cross subsidization between cases which lead to a SDRP and hence the receipt of contributions, and those where the BS advice is not followed by a SDRP it may be appropriate to have an explicit contribution from major creditors such as financial institutions and/or from an FCA or SFGB levy.</p> <p>The main source of funding is, however, likely to be a deduction from amounts that would otherwise be distributed to creditors.</p>
Question 28	
How should payment distribution in the plan 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?	Given that there are well developed and regulated payment distribution systems already in place in debt advice organizations that also manage debt solutions and within the Insolvency Service it seems unnecessary to introduce another provider of this service.

Question 29	
Do you have views on how a breathing space and plan should be reflected on a debtor's credit file?	The fact that a debtor has sought a BS is a positive in that it shows they are aware of their financial difficulties and taking steps to address them. Those steps may lead to a SDRP or an alternative debt solution. This suggests that the Bs information should only be on credit files for a limited period, whilst it is current so enquirers are aware of it and the protections in place, and shortly thereafter when details of the subsequent arrangements are in place. Details of any SDRP should be retained on the file for the duration of the plan and include the intended completion date so that enquirers can weigh the information appropriately.
Question 30	
Do you agree with the proposed territorial scope of the scheme?	Yes – but with a view to extending the schemes or similar arrangements into Northern Ireland.