

Debt Relief Orders and Pensions: IPA Response to Insolvency Service Consultation

1. General

(1) It is not clear from the Consultation Paper why approved pension arrangements, excluded from a bankrupt's estate by the Welfare Reform and Pensions Act 1999, should also not have been excluded for the purpose of determining the total value of the property of a debtor seeking a Debt Relief Order (DRO).

(2) It would have been helpful to consideration of the Options had there been some commentary on the different treatments in essentially the same debt relief/rehabilitation procedures, and why it was not considered appropriate to define inclusions/exclusions of assets, fraudulent disposals, etc in the same way as for bankruptcy – what they are worth for the purpose of “qualifying” for a DRO or what the “remedies” might be are separate issues.

(3) The Paper also does not canvas the issue of the debtor commuting all or part of his/her entitlement to a lump sum which, for someone owing not more than £15,000, might represent a worthwhile dividend for his/her creditors.

2. Summary

(1) Future pension entitlements in relation to approved arrangements should be excluded in DROs except to the present extent that where a pension comes into payment during the DRO moratorium it is taken into account in determining the debtor's surplus income.

(2) If The Service concludes that there has to be some (further) limitation on exclusion (and it might hopefully accompany that with an explanation of the different policy bases for DROs and bankruptcy), then that limitation should be at a present asset value of not less than £10,000 accessible within a period not exceeding five years - and arguably that period should be shorter consistent with The Service's concern about entitlements coming into payment “soon”.

(3) But any limitation on exclusion moves DROs away from being a simple procedure, and increases costs for debtors/intermediaries/The Service/pension providers without necessarily delivering any actual benefits – something which would be inconsistent with the present government's stated intention of reducing regulation and the costs which go with it.

(4) And to get around the possibility of pension providers looking to introduce forfeiture provisions, it would be necessary to extend the “no forfeiture on bankruptcy” provision of the Welfare Reform and Pensions Act 1999 to DROs.

3 [Question 1]. The IPA does not hold information about the incidence of debtors, who would otherwise have met the criteria for a DRO, being denied access because of their having future entitlements; and it is therefore not able itself to express any view on the scale of the “problem”. However, proceeding on the basis that such a “problem” has been evidenced by debt advice organisations...

4. It is difficult to entirely follow the particular concern about “...[ensuring] that the interests of creditors are taken into account where it is known that the debtor will soon have an improvement to his/her financial circumstances”. Aside from the question of whether five or ten years might be regarded as “soon”, do The Service/debt advice organisations have some evidence that debtors with substantial future entitlements but with other assets not exceeding £300 and surplus income not exceeding £50 a month have been seeking to escape debts of not more than £15,000 through applying for a DRO? But -

- If only the debtor did have the funds to petition for his/her own bankruptcy, his/her future entitlements would be excluded and the creditors would have no interest in them.
- If the pension came into payment beyond a bankrupt's discharge, generally after not more than one year, then seemingly it would not be taken into account in calculating anything that he/she

might have to pay under an income payments order/agreement for the benefit of his/her creditors.

5. The example quoted – of a pension that would pay £1.72p per month – would certainly not interest anyone, whether it was excluded or not. But to the extent that creditors' interests in pensions are recognised, then where a pension is in payment at the time of a bankruptcy order it is taken into account for the purpose of the trustee considering whether to seek an income payments order/agreement; and where a pension is in payment at the time a debtor applies for a DRO, it is taken into account in calculating whether his/her surplus income exceeds £50 a month. So pensions in payment are treated on the same basis for bankruptcy and in the DRO procedure; but entitlements payable in the future are not?

6. Where a bankrupt has been making contributions to either an approved or unapproved pension arrangement which are considered to have unfairly prejudiced his/her creditors, then there are provisions enabling the trustee to seek recovery. The Paper raises under Option 4 the possibility of a similar provision being introduced in relation to the DRO procedure; but then readily - too readily it seems – dismisses it on the basis that “there will not be the same detailed investigation in...a DRO”. Yet there are provisions for the prosecution of DRO debtors for false representations and omissions; for concealment or falsification of documents; for fraudulent disposal of property; and for fraudulently dealing with property obtained on credit. And of course there are wide-ranging powers for the OR to revoke or for him to seek revocation by the court of a DRO. All that would rather more than suggest, if excessive contributions is an issue exercising The Service in relation to the DRO procedure, that it should be feasible to frame provisions which would enable action in some form or another to be taken in those few cases where there is indeed the possibility that an otherwise penniless debtor is trying to use it (the procedure) to keep an enhanced arrangement out of the hands of his/her creditors: quite what is required obviously depends on what conclusion The Service reaches on the exclusion of future entitlements.

7 [Questions 2/9]: The basis for valuation of future entitlements should presumably be based on a standard formulation used by the pension industry?

8 [Questions 3/4]. Any time period is arbitrary: entitlements are taken into account for the period that the debtor is subject to a DRO moratorium, normally one year but which may be extended; **and** it would take his/her surplus income over £50 a month. It is unclear why entitlements beyond the period of the DRO should also be taken into account – cf bankruptcy [see paras 4 and 5].

9 [Question 5]. The IPA view is that future entitlements in relation to approved pensions should be excluded from the calculation of a debtor's assets for the purposes of a DRO.

10 [Questions 6-8]. If a debtor effectively has no income and no assets, and no funds to petition for his/her own bankruptcy, what is he/she supposed to do? More importantly in the context of the concern expressed in the Paper about creditors, how are their interests served in the case of a debtor aged 51 who can access his/her pension of a present value of £1,000, £5,000 or even £10,000 in four or nine years time – what can they expect to get by way of return on their debt? According to the information provided in the Impact Assessment [page 6], a pension with a current value of £10,000 would provide, at best, an income of less than £10 a week. Is it sensible to maintain, assuming it became payable in four years or nine years, that somehow its exclusion in a DRO would really be to the detriment of creditors?

11 [Question 10]. Consistent with the provision in relation to bankruptcy, exclusion should be limited to approved pension arrangements and unapproved pensions otherwise excluded by Secretary of State regulations.

12 [Question 11]. None by preference. But if The Service still has sufficient concerns that somehow the DRO procedure might be misused/abused by debtors with significant pension entitlements, then the IPA suggests that there should be a combined financial/time cap - a present value of £10,000 payable within not more than five years of the debtor applying for a DRO.

13 [Questions 12/13]. (1) As the Paper points out, anything which requires the approved intermediary, through whom the debtor's application for a DRO has to be made, to make enquiries about issues such as the present value of future entitlements and when they can first be accessed incurs time costs but for which no reference is made to payment. Exclusion altogether of approved arrangements would require only confirmation of that fact.

(2) DRO documentation available to debtors should make it crystal clear (the website documentation currently does not make it clear at all) that

- any arrangement should be fully disclosed;
- (if it is to be the case) the value of the arrangement will be taken into account in calculating their assets and income; and
- (in any case) no DRO can be made without providing the intermediary/OR with a current statement from the provider as to whether the arrangement is approved by HMRC, the present asset value, the earliest access date and the amounts payable.

(3) The intermediary would, in forwarding the application to the OR, say whether he/she had been provided with such a statement by the debtor.

(4) Absence any, or any sufficient, documentation, it would be a straightforward matter for the OR to check whether the arrangement was approved and, if it is to be the case, its present asset value, etc alongside the other verification checks which he carries out on receipt of a DRO application.

14 [Question 14 – Impact Assessment]. It is surprising that The Service has not included in the Impact Assessment the costings/benefits of excluding approved arrangements altogether. The argument [page 6] is that the DRO procedure is aimed at the most vulnerable. Is it therefore posited that someone with a pension payable at some future date but otherwise with assets not exceeding £300 and surplus income not exceeding £50 a month is somehow not vulnerable and does not continue to be (to use the Minister's Foreword) "trapped in debt because they have nothing to offer their creditors and cannot afford bankruptcy"? The case studies [page 5] clearly show that the consequence of an inability today to offer creditors anything other than token payments is that a debtor will continue "to experience pressure from creditors...and will require continued support from the advice sector" – presumably at the expense of the public purse, or...? It is further posited that "a blanket exclusion of pension rights as an asset in a DRO *might* put significant funds out of the reach of creditors"; but isn't that the effect of a bankruptcy order? In short, it remains difficult to see – there is no substantial argument advanced - why there should be a difference in treatment between DRO and bankruptcy exclusions. That the DRO procedure is more straightforward and less costly for the debtor would seem to be a less than compelling argument for different treatments.

15 [Question 14 – Impact Assessment]. The Ethnicity, Age and Gender Impact Test asserts that there are no disproportionate effects based on differing sex. Is that correct? Or is it more likely that the current non-exclusion of arrangements does, and the proposed limited exclusion would, disproportionately impact on males who may well have had longer periods of continuous employment from which their entitlements are funded than females: it would certainly have been useful to have seen some exploration of the issue – both case studies were (or happen to be) males; it is noted that 63% of approved applicants were female; but [page 4] there is no breakdown of those who were excluded only because of their future entitlements.

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