



RESPONSE TO DEBT ARRANGEMENT SCHEME
CONSULTATION 2016

ACCOUNTANT IN BANKRUPTCY

Executive Summary

Introduction

- 1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 21,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.
- 2 ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
- 3 ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.
- 4 ICAS is pleased to have the opportunity to submit its views in response to the Debt Arrangement Scheme Consultation 2016 issued by the Accountant in Bankruptcy. We shall be pleased to discuss in further detail with the Accountant in Bankruptcy any of the matters raised within this response.

Executive summary

- 5 Due to the nature of the Debt Arrangement Scheme (DAS) and the length of time which typical debt payment plans run over, at this particular time it is difficult to find substantive and qualitative evidence in order to assess the impact of the changes made.
- 6 We believe that clarity is required on whether DAS is a debt management procedure or a debt relief procedure. A number of recent amendments, such as the requirements for all debts to be included, the ability to make an offer of composition, contributions to be set at 100% of surplus income, etc., have contributed to a blurring of the circumstances where different procedures are available and appropriate. Appropriate changes should be made to reflect the intention of the procedure.
- 7 Some concerns are expressed in relation to shortcomings of the Common Financial Statement which is used as the CFT. In particular concern is raised in relation to its ability to deal with income which may fluctuate or be irregular. In addition, the subjectivity of expenditure has not resulted in the consistency of application which the CFT was intended to address. It is suggested that an alternative CFT based on a sliding percentage scale of income after deduction of essential household expenditure would address both shortcomings of the Common Financial Statement and reduce the administrative burden on Money Advisors.
- 8 The introduction of business DAS has resulted in negligible uptake. This is largely as a result of the criteria and parameters for a business DAS Debt Payment Programme being too restrictive to be workable in practice. Business DAS has the potential to be an effective debt management procedure contributing to a vibrant Scottish economy and saving jobs. Significant amendment is required to the conditions under which business DAS operates. We call for the removal of the requirement for all debts to be included, modification or removal of the timescale within which a business DAS DPP must be completed and other minor amendments to reduce the burden of information which debtors may require to provide in order that the viability of a DPP can be assessed by the insolvency practitioner.
- 9 The provision of appropriate debt advice to those in financial difficulty is key to a successful financial health service in Scotland. While the DAS Regulations currently cover the qualifications that those operating as Money Advisors must have, qualification alone however is not sufficient to ensure appropriate standards are maintained. In addition to qualification appropriate monitoring as part of a wider regulatory regime must be carried out to ensure that appropriate advice and standards are being maintained. Insolvency Practitioners are highly regulated and monitored with robust complaints and disciplinary procedures available where appropriate. We are of the view that all Money Advisors should be subject to equally robust regulation, of which qualification is only a small part of the regulatory landscape.

10 We are concerned that the limited exclusion provided to insolvency practitioners in respect of debt counselling and debt adjusting under the Financial Services and Markets Act Order 2001 (as amended) is a significant barrier to debtors accessing appropriate debt advice. As a statutory debt management procedure, debt counselling and debt adjusting activities in relation to DAS should also be excluded from being regulated activities where provided by insolvency practitioners and other Money Advisors. We would encourage the Scottish Government to engage as a matter of urgency with HM Treasury and the Financial Conduct Authority with a view to the current exclusion being extended to DAS.

Detailed Comments

11 Our detailed responses to the questions posed within the Consultation document are set out in [Appendix 1](#)

29 April 2015

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Appendix 1 – Responses to questions posed in the Consultation

QUESTIONS

Question 1(a): Should the continuing money adviser's fees for setting up and administering the DPP be disclosed in the DPP proposal?

Yes No

Question 1(b): If you answered no to question 1(a), why not?

Answer: _____

Question 2(a): Has removing the need for two debtors being jointly and severally liable for a debt made it easier for couples to enter a joint DPP?

Yes No

Question 2(b): If you answered no to question 2(a), why not?

Answer: _____

Question 3(a): Is 42 days the correct length of time for a debtor to pay their first agreed payment following the date on which the DPP was approved?

Yes No

Question 3(b): If you answered no to question 3(a), what do you think is the correct period of time to pay their first payment?

Answer: On the basis that the DPP is entered voluntarily by the debtor then the period between approval of the DPP and the first contribution should be as short as possible but with appropriate allowance for practical arrangements to commence payments to be implemented. The previous one-month period was sufficient. It should not be longer than 42 days.

Question 4(a): Do you agree that composition should be available when a debtor has been paying their DPP for a period of 12 years with at least 70% of the total debt having been repaid?

Yes No

Question 4(b): If you answered no to question 4(a), when should composition be available?

Answer: The provision of composition converts DAS from a debt repayment procedure to a debt relief procedure. It is regularly asserted by the AiB and Scottish Government that DAS is not a debt relief procedure. There is a need for absolute clarity in the purpose and intended outcome of DAS. This will assist in ensuring that debtors are appropriately advised which debt procedure is most appropriate to their circumstances.

Composition does not bind creditors who object and as a result there is no general discharge for all creditors.

Question 4(c): Do you agree that the creditor should have 21 days to accept the offer of composition?

Yes No

Question 4(d): If you answered no to question 4(c), how long should a creditor have to accept the offer of composition?

Answer: We do not believe that composition should be available within DAS. If however composition is to remain available then a balance needs to be struck between allowing sufficient time for creditors to respond and the DPP being able to proceed administratively. In larger organisations who are perhaps less familiar with DAS a period of 21 days to respond appears to be a challenge. When considered against the timescale for the first DPP payment to be received (see question 3 above) of 42 days, the period of 21 days to respond to an offer of composition appears inconsistent. We would suggest a closer alignment with perhaps both periods being 1 month.

Question 4(e): Is it appropriate that an offer of composition is deemed to have been accepted by a creditor if AiB does not receive a response from the creditor within 21 days?

Yes No

Question 4(f): If you answered no to question 4(e), why not?

Answer: We do not believe that composition should be available within DAS. However, if composition remains we consider that deemed approval is appropriate where no response is obtained. Please see our response to question 4(d) in respect of the appropriateness of the 21 day timescale.

Question 5(a): Have you encountered any issues with the introduction of the review process?

Yes No

Question 5(b): If you answered yes to question 5(a), what issues have you encountered?

Answer: _____

Question 5(c): Have you identified any improvements that you consider are necessary to the review process?

Yes No

Question 5(d): If you answered yes to question 5(c) what improvements do you consider are necessary?

Answer: _____

Question 5(e): Do you agree that 14 days is the correct length of time to have to submit a request for a review?

Yes No

Question 5(f): If you answered no to question 5(e), what length of time do you consider appropriate for submitting a request for a review?

Answer: _____

Question 6(a): Is up to six months an appropriate timescale for a flexible payment break?

Yes No

Question 6(b): If you answered no to 6(a), what do you think is an appropriate timescale for a flexible payment break period?

Answer: _____

Question 7(a): Is 5 years an appropriate length of time for debts to be repaid through a business DAS?

Yes No

Question 7(b): If you answered no to question 7(a), what timescale would be appropriate?

Answer: We do not consider that there should be a defined restriction on the period under which a business DAS DPP requires to be completed. It is unclear the rationale for a restricted time period under which a DAS DPP should be completed where the debtor is a partnership or other entity as compared to an individual who is a self-employed business person where no time period is specified. Where the proposed DPP is accepted by creditors or is considered 'fair and reasonable' by the DAS Administrator then a time period applied by statute is not appropriate. We would encourage that DAS DPPs should be sustainable and for as short a period as possible in all circumstances.

Question 7(c): Have you encountered any issues concerning business DAS?

Yes No

Question 7(d): If you answered yes to question 7(c), what issues have you encountered?

Answer: Very few applications for business DAS have been made. The requirement for all debt to be included in the DPP together with the statutory period for completion of 5 years are overly restrictive. The 5 year period commences from the date of the application, meaning in practice that the DPP must be completed in a period substantially shorter than 5 years. If the 5 year completion period is to be retained (which we do not support – see our response to question 7(a)) then the 5 year period should commence from approval of the DPP and not from the date of application.

In many cases, businesses may have to incur significant costs providing information in order that the insolvency practitioner may assess the viability of the DPP and make the statement required under Regulation 22A(7)(c)(i) or conclude on an assessment of viability under Regulation 12A(a). Such costs act as a barrier to already financially distressed businesses. In addition, the business will require regular monitoring with enhanced controls needing to be introduced, to allow successful management of the business going forward.

Question 7(e): Have you identified any improvements that you consider are necessary to business DAS?

Yes No

Question 7(f): If you answered yes to question 7(e) what improvements do you consider are necessary?

Answer: We would suggest that the need to include all debts should be removed.

We would suggest that the requirement for the DPP to be completed within a period of 5 years be removed. If such a restriction is to remain, the the 5 year period should commence from approval of the DPP rather than from the date of application.

We would also suggest that consideration should be given to removing the requirement for the money advisor (insolvency practitioner) to conclude on the viability of the DPP or that this should be relaxed to making reasonable enquiries that the DPP is viable, thereby lowering the barrier of proof required in order to make a statement and reducing associated costs for the debtor in providing information in order that the statement may be made.

Question 8(a): Is regulation 6 sufficient to ensure both that there are sufficient DAS advisers and that they are suitably qualified for the purposes of debt counselling and creating a DPP proposal?

Yes No

Question 8(b): If you answered no to question 8(a), why not?

Answer: We agree that the change to Regulation 6 requiring Money Advisor's organisations to have achieved rather than be working towards SNS Level 2 assists in supporting the aim of suitably qualified Money Advisors. Qualification alone however is not sufficient to ensure appropriate standards are maintained by Money Advisors. In addition to qualification appropriate monitoring as part of a wider regulatory regime must be carried out to ensure that appropriate advice and standards are being maintained. We are aware of a number of situations where a debtor has applied for and commenced a DPP which is inappropriate in the circumstances for the debtor and where a debt relief procedure would have been more appropriate. There are of course occasions where debt relief procedures are entered into where a DAS may be more appropriate. Insolvency Practitioners are highly regulated and monitored with robust complaints and disciplinary procedures available where appropriate. We are of the view that all Money Advisors should be subject to equally robust regulation, of which qualification is only a small part of the regulatory landscape.

We are concerned that the limited exclusion provided to insolvency practitioners in respect of debt counselling and debt adjusting under the Financial Services and Markets Act Order 2001 (as amended) is a significant barrier to debtors accessing appropriate debt advice. As a statutory debt management procedure, debt counselling and debt adjusting activities in relation to DAS should also be excluded from being regulated activities where provided by insolvency practitioners and other Money Advisors. We would encourage the Scottish Government to engage as a matter of urgency with HM Treasury and the Financial Conduct Authority with a view to the current exclusion being extended to DAS.

Question 8(c): If you answered no to question 8(a), what changes do you consider are necessary?

Answer: See response to question 8(b)

Question 9(a): Do you agree that the Common Financial Tool should be used to help determine if DAS is the correct product for a debtor?

Yes No

Question 9(b): If you answered no to question 9(a), why not?

Answer: The most appropriate procedure for a debtor should be a recommendation based on a number of factors, of which the amount of monthly surplus income is only one. The CFT is appropriate to be used as part of the information to be gathered from the debtor. The CFT should not however be the driver or primary source of information to base recommendations on. Insolvency Practitioners and other debt advisors are highly experienced and skilled in assessing all factors that may be relevant to the debtor's circumstances and making recommendations on appropriate options. A greater emphasis should be placed on achieving a solution which appropriately balances the outcome for both debtors and creditors.

Question 9(c): Have you encountered any issues with using the Common Financial Tool for DAS?

Yes No

Question 9(d): If you answered yes to question 9(c), what issues have you encountered?

Answer: The Common Financial Statement does not adequately deal with debtors whose income fluctuates on a regular basis. For example, debtors who earn irregular overtime, obtain bonuses, or whose income is commission based. While it may be possible to make an assessment of 'core' (or anticipated minimum amounts to be received) if 100% of surplus income is to be assessed this is not possible on a practical basis.

Where overtime is optional for the debtor, the operation of the CFT requires any overtime earned by the debtor will be contributed in full as surplus income. There is therefore no incentive for the debtor to take advantage of additional hours and as a result there is also a detriment to the creditors. A recognition that there is a mutual benefit between debtor and creditors would be welcomed.

The CFT also is highly subjective in relation to many areas of expenditure, especially in the area of what could be described as 'lifestyle expenditure'. While we agree that any method should allow flexibility to reflect individual's circumstances the degree of flexibility permitted and subjective assessment of individual circumstances undermines the policy of consistency in calculation.

There is anecdotal evidence that debtors are "shopping around" with a view to finding the most advantageous interpretation of the CFT to their circumstances.

To achieve consistency a Common Financial Tool which removes subjectivity is required. This could be achieved through a Common Financial Tool which uses a calculation based on a sliding percentage scale against surplus income calculated after deduction of essential expenditure (housing, utilities, etc.) thereby leaving the debtor the ability to prioritise their lifestyle spend as they consider appropriate to their circumstances.

Question 9(e): Have you identified any improvements that you consider are necessary to the Common Financial Tool for DAS?

Yes No

Question 9(f): If you answered yes to question 9(e), what improvements do you consider are necessary and why?

Answer: Where debt is being repaid in full it is perhaps unnecessary for the full surplus as calculated by the CFT to be applied as the contribution. We would suggest that a degree of flexibility would be appropriate. This could be achieved by setting a deminimus percentage of the calculated surplus which must be applied as the contribution. We would suggest that if such an approach were to be taken that 80% of the surplus would be an appropriate minimum.

To further address the transparency and consistency is application of the Common Financial Tool by removing subjectivity and the administrative burden of evidencing expenditure is required a Common Financial Tool which uses a calculation based on a sliding percentage scale against surplus income calculated after deduction of essential expenditure (housing, utilities, etc.) would be more appropriate.

Question 10(a): Should the Common Financial Tool be used to determine the level of contribution to be made in a DPP?

Yes No

Question 10(b): If you answered no to question 10(a), why not?

Answer:

Question 10(c): If you answered yes to question 10(a), should all excess income be taken as a contribution in a DPP?

Yes No

Question 10(d): If you answered no to question 10(c), why not?

Answer: see response to Question 9(f)

Question 10(e): If you answered no to question 10(c), how should the level of contribution to be made in a DPP be determined?

Answer: see response to question 9(f)

Question 10(f): If you answered no to question 10(c), what proportion of surplus income should be taken as a contribution?

Answer: see response to question 9(f)

Question 11(a): Do you agree that all debts should be included in both a DAS for individuals and a business DAS?

Yes No

Question 11(b): If you answered no to question 11(a), why not?

Answer: The amendment to require the inclusion of all debts encourages debtors to either enter into informal arrangements on a piecemeal basis with creditors or alternatively enter into Debt Management Plans where interest and charges continue.

Debtors are understandably concerned that 'priority debts' such as housing and utilities being included within a DPP results in unfavourable terms being imposed or could lead to security uncertainty. In relation to business DAS (and also individual DAS to a lesser extent) the inclusion of for instance family debt which in many circumstances have no repayment terms, their inclusion is necessary and may indeed jeopardise whether a DPP is viable or not.

We understand that creditors will wish to assess the appropriateness of the proposed DPP and in order to do so they require to understand the full position of the debtor. We would therefore suggest that a more appropriate course of action to requiring the inclusion of all debt would be a requirement that all debt should be declared as part of the proposal but that it would remain at the discretion of the debtor what debts are included as part of the DPP.

Question 11(c): If you answered no to question 11(a), are there specific debts which should be excluded from DAS?

Answer: We do not consider that there are any specific debts which should be excluded from DAS. It is more appropriate for debts to be included or excluded based on the debtor's personal circumstances.

Question 11(d): If you answered no to question 11(a), do you think that debtors should be able to choose which debts to include in DAS?

Answer: Yes. We consider that it is appropriate for debts to be included or excluded based on the debtor's personal circumstances.

Question 12(a): Do you agree that a business DAS proposal should require 2 or more debts to be included in a DPP?

Yes No

Question 12(b): If you answered no to question 12(a), why not?

Answer: _____

Question 12(c): If you answered no to question 12(a), what is the minimum number of debts which should be included in a business DAS proposal?

Answer: _____

Question 13(a): Have you encountered any issues with the variation or revocation of a Business DAS?

Yes No

Question 13(b): If you answered yes to question 13(a), what issues have you encountered?

Answer: _____

Question 13(c): Have you identified any improvements that you consider are necessary to variation and revocation of business DAS?

Yes No

Question 13(d): If you answered yes to question 13(c) what improvements do you consider are necessary?

Answer: _____

Question 14(a): Do you agree that an offer of composition in DAS is not appropriate for a business DAS DPP?

Yes No

DAS is a debt repayment tool and not a debt relief procedure. An offer of composition should not be available under individual or business DAS. If however it is the policy of the Scottish Government to allow debt relief under DAS then the availability of debt relief should be available to individuals and business DAS.

Question 14(b): If you answered no to question 14(a), why not?

Answer: _____

Question 15(a): Should a payment break be available in a Business DAS?

Yes No

Question 15(b): If you answered no to question 15(a), why not?

Answer: Temporary changes to circumstances can apply to persons or entities eligible for business DAS as they can to those in individual DAS. While we would perhaps expect changes to circumstances to be less frequent for business DAS entities nonetheless it may be appropriate for payment breaks to be available. This of course would impact on the time period over which the DPP is completed and the current 5 year limitation for completion may not then be possible where a payment break was invoked. Were payment breaks to be allowed, the restriction on time period to complete would also require to be amended.

Question 16(a): Do you agree that the realisation of a dwelling house or mobile home occupied by a debtor as their sole or main residence should be exempt from discretionary conditions within a DPP?

Yes No

Question 16(b): If you answered no to question 16(a), why not?

Answer: We are firmly of the view that a thorough debate is required on the wider issues of how a debtors dwellinghouse is treated in all insolvency and debt procedures. Issues requiring further consideration include how to measure equity, should there be a de-minimus level before it has to be realised, should the debtor be allowed to retain any part of the equity, what are the criteria for the trustee abandoning the equity, should there be provision for the trustee extending the period for the payment of contributions to allow the debtor to purchase the equity, action required in the event of failure of the trust deed etc.

We would call upon the government to address the issue of equity in all personal insolvency and debt management procedures as a matter of urgency.

Question 17(a): Are the regulations which prevent creditors from giving credit to debtors too restrictive?

Yes No

Question 17(b): If you answered yes to question 17(a), why?

Answer: DAS is a debt repayment procedure and therefore any comparison to sequestration is not appropriate. The provisions in sequestration apply only in relation to the period where the debtor is undischarged, which ordinarily should be after 12 months.

The incurring of debt during the duration of a DAS DPP must impact upon the surplus income as assessed by the CFT as the debt will in most circumstances require a repayment and increased expenditure for the debtor. As a result, it is likely that a variation in the DPP will be required in any case. It therefore seems appropriate that consideration of the variation is carried out prior to the debt being incurred. The remaining circumstances under the DAS Regulations where credit may be provided to debtors are appropriate.

18. ANY ADDITIONAL COMMENTS

Please use the box below for any other comments you may have including any improvements you consider would be beneficial, or anything you feel is not covered in the consultation questions.

RESPONDENT INFORMATION FORM

Please note that this form must be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

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Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

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3. Permissions - I am responding as...

Individual

Please tick as appropriate

Group/Organisation

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

Please return your response to AIB_Policy_Development_Enquiries@gov.scot or to: Erin McCreadie, AiB, 1 Pennyburn Road, Kilwinning, Ayrshire, KA13 6SA by **25 April 2016**.