

POLICY NOTE

THE DEBT ARRANGEMENT SCHEME (SCOTLAND) AMENDMENT REGULATIONS 2013

SSI 2013/225

1. The above instrument will, if approved, be made in exercise of the powers conferred by sections 2(3)(d), 4(5), 5(4), 6(1), 7 and 62(2) of the Debt Arrangement and Attachment (Scotland) Act 2002 (The “2002 Act”). This instrument is subject to the affirmative procedure.

Background

2. The purpose of the Debt Arrangement Scheme (DAS) is to provide a facility for the orderly repayment principally of multiple debts.
3. The policy objectives of the DAS are to:-
 - Enable people to resolve serious debt problems in a dignified way;
 - Reduce the need for creditors to take legal action to recover their debts;
 - Extend the benefit of money advice to those people who have a particular need for it;
 - Improve the quality of money advice, through training and accrediting money advisers; and
 - Minimise the impact of bad debt on both debtors and creditors.
4. DAS is a powerful tool capable of helping many people. It allows people who are unable to pay their debts as they fall due, but who have a reasonable level of surplus income after meeting their basic needs, to pay those debts over a longer period and helps them to manage their way out of serious debt problems, giving them the potential to start over when their debts are dealt with.
5. Debtors can apply for approval of a DAS debt payment programme (DPP). A programme will be approved on behalf of the Scottish Ministers by the DAS Administrator, whose functions are carried out by the Accountant in Bankruptcy (AiB) by order. Approval is subject to all the creditors agreeing or where the DAS Administrator considers that the programme is otherwise fair and reasonable. The creditors are unable to petition to sequester the debtor or use diligence (seize and sell assets) against them once a programme is approved and this immunity remains throughout the course of the programme.
6. If the programme is approved the debtor no longer needs to make individual payments to each creditor. Instead, a single payment is made to an approved payments distributor who divides that payment between the debtor’s creditors on a pro-rata basis. The costs of this are met by charging the creditors a capped administration fee deducted from that payment. The creditors benefit from reduced administrative, legal and recovery costs and increased certainty of payment. The recording of the programme and some of the administration costs are covered by the public purse.

7. The debtor in a DPP is protected from the risk of losing their home provided that they continue to pay their mortgage payments, in contrast to bankruptcy or a trust deed where ownership of all land and buildings passes to the trustee for the benefit of creditors.
8. DAS is one of a range of debt tools, both formal and informal. However, not every person with debt problems either needs to use DAS or is suitable for it. For that reason anyone considering DAS must first be given advice from an approved money adviser. In those cases where DAS is suitable, the adviser can assist the debtor to apply for approval of a DPP.
9. Changes to DAS were introduced in June 2007 as part of the Bankruptcy and Diligence etc. (Scotland) Act 2007. These froze interest and charges on debts included in a DPP on the date of approval. The take up of DAS increased as a direct result of these changes.
10. Following a public consultation on DAS in 2009, it was found that while the uptake of DAS had increased, barriers still remained with access to the Scheme. Further changes to the Scheme were introduced on 1 July 2011, via the Debt Arrangement Scheme (Scotland) Regulations 2011. The main changes can be summarised as follows:-
 - Widening the money advice gateway so that more people and organisations can be approved to offer DAS, ensuring that people across Scotland are able to benefit from the Scheme;
 - Removing the administrative burden from free sector money advisers – Accountant in Bankruptcy (AiB), the DAS Administrator, is now responsible for the ongoing administration, in cases proposed by free sector money advisers, following an application for a DPP;
 - The ability for people with a single debt to apply;
 - The ability for couples who are jointly and severally liable for a debt to apply for a joint DPP;
 - The ability for debtors to apply for a payment holiday of 6 months for debtors to adapt to temporary income shocks;
 - The creation of a panel of 4 approved payments distributors who are responsible for collecting and distributing payments to creditors; and
 - A 2% fee collected from each DPP, payable to AiB, to cover the application cost
11. Table 1 shows the uptake of DAS year on year since its first full financial year in 2005/06.

Year	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
No of DPPs	149	134	442	386	1,417	1,910	3,319

2012 DAS Review

12. In November 2012, AiB published a review of the Debt Arrangement Scheme:-

<http://www.aib.gov.uk/publications/debt-arrangement-scheme-review-2012>).

13. The review found that :-

- The market for DAS continued to grow at a rapid rate, and represented a significant fraction of the market when compared with numbers of bankruptcies and protected trust deeds;
- DAS remained a flexible solution for a broad range of debtors due to its lack of restrictions on the duration, value of debt or repayment amounts in any DPP;
- The trend over the review period was largely (but not exclusively) towards younger debtors taking out shorter duration DPPs in order to repay smaller amounts of total debt;
- Take up of joint application DPPs had proven strong, making up almost a fifth of DPPs in the review period and more than a quarter of the total debt. Joint application DPPs tended to be significantly longer, for a larger total debt, for on average slightly older debtors;
- Take up of single debt DPPs had been limited;
- Analysis of the geographic spread of DAS take-up showed that, at sheriffdom level, take up was broadly similar across most areas;
- At the smaller and more specific level of Local Authority areas, however, it was clear that there were still disparities in the rate of take up that may not have been seen at sheriffdom level. Factors such as money adviser engagement and availability of advisers may have helped to explain this, although differing microeconomic factors and debtor demographics would also have played a role; and
- Private sector led DPPs dominated the market, accounting for the majority of DPPs.

Bankruptcy Law Reform

14. The instrument forms part of a larger body of work on bankruptcy law reform. The Scottish Government held a consultation on Bankruptcy Law Reform between 24 February and 18 May 2012, which sought views on its proposals to develop a service for debt advice, debt management and debt relief that is fit for the 21st Century. The service aims to harness the efforts of the Accountant in Bankruptcy (AiB), insolvency practitioners (IPs), the money advice sector more generally and creditors under the following key principles:

- Fair and just processes of debt advice, debt relief and debt management are available to the people of Scotland.
- Those debtors who can pay should pay their debts, whilst acknowledging the wide range of circumstances and events that contribute towards financial difficulty and insolvency for both individuals and businesses.
- The best return for creditors is secured by ensuring that the rights and needs of those in debt are balanced with the rights and needs of creditors and businesses.

15. The consultation, responses and Government response can be found on the AiB website:-

<http://www.aib.gov.uk/guidance/publications/consultations-and-reviews/bankruptcy-law-reform/bankruptcy-law-reform>.

Summary of Policy Proposals

16. Based on the outcomes of the consultation and feedback from DAS workshops held during 2012, AiB have developed DAS policy in several key areas and, in addition to other more minor amendments, the instrument makes provision for the following principal changes:-

- To freeze the amount of debt owed on the date at which the DPP is applied for by a debtor;
- To clarify when the DAS Administrator may correct accidental errors;
- To make it clear that the continuing money adviser's fee for setting up and administering the DPP is excluded from the DPP;
- To make clear that payments distributors provide a service on behalf of the debtor;
- To clarify that the maximum amount which can be charged by payments distributors as an administration fee is inclusive of any VAT incurred;
- To remove the requirement that the two debtors in a joint DPP have a joint and severally liable debt included in the programme;
- To make clear that where a creditor has sold on a debt incorporated in the DPP, they must notify the DAS Administrator that they have assigned the rights and provide details of the assignee;
- To re-introduce an element of composition (i.e. circumstances in which creditors can agree to discharge the debtor in return for part settlement by the debtor) into DAS. Where a debtor has been making payments to their DPP for a period of 12 years (excluding any payment breaks) and has repaid at least 70% of the total debt outstanding when the DPP was approved, they would be eligible;
- To introduce a review process within AiB which will enable the DAS Administrator to reconsider decisions; and
- To amend the Regulations to allow for a flexible payment break of up to 6 months rather than a fixed period of 6 months.

17. It is intended that, subject to Parliamentary approval, this instrument will make these changes by amendment to the Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges (Scotland) Regulations 2011 and the Debt Arrangement Scheme (Scotland) Regulations 2011 ("the DAS Regulations").

Specific Provisions

18. The following are the specific changes which the Regulations will make to deliver the reforms identified by consultation and stakeholders' feedback:-

Freezing the amount of debt owed

19. The instrument fixes the date that determines the amount of debt owed, as the date on which a debtor applies for a DPP, which is subsequently approved. This is the date on which the application is received by the DAS Administrator from the money adviser acting on behalf of the debtor. The policy intent behind this provision is, in relation to the enforcement of debt under the terms of the DAS, to try to help alleviate the burden of debt on individuals in Scotland.

20. Correction of accidental errors

21. The instrument makes it clear that the DAS Administrator can correct accidental errors made by the DAS Administrator under the Regulations. The power is time limited to 28 days after the error and cannot be exercised if an application for review has been made.

Continuing money adviser's fee

22. The instrument amends regulation 3 (“Interpretation: debt”) of the 2011 Regulations, to make it clear that the continuing money adviser’s fee for setting up and administering the DPP cannot be included in the DPP. Changes are also made to ensure it is treated as a continuing liability, so should be paid during the course of the programme.

Approval of a money adviser

23. Approval of money advisers is extended to allow an individual to be eligible to apply for approval if they work for an organisation which is working towards Scottish National Standards (SNS) for Information and Advice Provision at Type 2 level or above (further information about the Scottish National Standards can be found at www.scotland.gov.uk).

Functions and duty of a payment distributor

24. The instrument makes it clear that the payment distributor is acting on behalf of the debtor and explicitly provides that the maximum amount which can be charged by payments distributors as an administration fee, is inclusive of any VAT which may be incurred. The policy intention behind this provision is to clarify that payment distribution is performed on behalf of debtors (rather than creditors) and that fees are charged against debtor contributions. This ensures that creditors continue to receive a minimum of 90% of the debt due.

Joint and severally liable debt

25. The instrument removes the requirement that the two debtors in a joint DPP must be jointly and severally liable for a debt before a programme can be approved. This will allow more joint programmes to be approved where couples have debts and wish them to be included in a joint DPP.

Consent of creditors

26. The instrument amends regulation 23 (“Consent of creditors”), to remove the requirement to send the request for consent to the creditor by ‘first class recorded delivery post’ as this is no longer necessary.

Assignment by creditor

27. Regulation 23 is also amended to clarify that if a creditor has ‘sold on’ a debt the period of 21 days to respond to the application for a DPP still applies.

28. In addition a requirement is added for a creditor who has ‘sold on’ a debt which is included in the DPP, to immediately, notify the DAS Administrator.

Creditor’s authorised representative

29. The instrument adds new regulation, by inserting regulation 23A into the 2011 Regulations, to enable a creditor’s authorised representative to be able to respond on behalf of a creditor to a DPP application. The instrument also makes provision to require the representative to provide evidence of authority to act and for the creditor to notify the DAS Administrator if the representative no longer acts for the creditor.

First agreed payment

30. The instrument amends regulation 27 (“Standard conditions”), in order to allow the debtor up to 42 days, instead of one month, to pay their first agreed payment following the date on which the DPP was approved.

Offsetting due to PPI claims

31. There have been a number of occasions recently where PPI claims have resulted in creditors off-setting compensation due to a debtor against outstanding debt in the DPP. Currently, there may in some cases be no provision in the DAS Regulations which would allow for variation of the DPP, to reflect any such offsetting - unless the creditor agrees the variation with the debtor. This has been found to be difficult on the basis that often debtors want to keep the compensation themselves.

32. The instrument, therefore, allows the DAS Administrator to propose a variation of the DPP where a creditor has off-set a sum or part of a sum due. More generally, the instrument also amends the notification provisions regulation 39 and 44 of the DAS Regulations. ,

Flexible payment break

33. Stakeholders have found that 6 months is sometimes too long for a debtor to defer payments and that a more flexible approach is required. The instrument, therefore, amends regulation 37 (“Grounds for variation”) of the DAS Regulations to allow for a flexible time period of up to 6 months rather than a fixed period of only 6 months.

Revocation of DPPs

34. The instrument amends regulation 40 (“revocation on sequestration or protected trust deed”) of the DAS Regulations to also give the DAS Administrator grounds to revoke a DPP, where the debtor is made bankrupt under a creditor petition, and the notification of the petition was issued prior to the approval of an application for a DPP.

35. The instrument introduces a new regulation 40A (“death of a debtor”) to give the DAS Administrator grounds to revoke a DPP, where the debtor is deceased.

36. The instrument also amends the grounds for revocation set out in regulation 42(1)(c) of the DAS Regulations, in order to provide that the DPP can be revoked where the a debtor

fails to make a payment and an amount is due to be paid which is the same amount as would be payable in a 2 month period.

Re-introducing composition into DAS

37. When it was launched in 2004, DAS included provision which allowed the debtor, on agreement with a creditor, to discharge his or her liability to repay a sum due and have their liability to repay interest waived. This option is referred to as “composition”. There was an option to attach two conditions to composition which were that the sum due was paid in full and that payment was made over an agreed period. In practice, composition was rarely, if ever used, as the necessary agreement needed to be made before the DPP was approved.
38. The instrument re-introduces a composition element into DAS. Where a debtor has been paying their DPP for a period of 12 years (excluding any payment breaks) and has repaid at least 70% of the total debt outstanding when the DPP was approved, composition can be considered.
39. The DAS administrator or continuing money adviser will then make an offer of composition to creditors and they will have 21 days to accept the offer (if there is no response a creditor will be deemed to have accepted). With the agreement of each of the creditors, the whole outstanding debt and any interest and charges would be written off.
40. Where there is not full agreement, the debts due to the creditors who have not consented will remain in the DPP, which will be varied accordingly.

Introducing a review process

41. The instrument introduces a new review process which will enable decisions made by the DAS Administrator to be reviewed by it, where they can at present be appealed on a point of law. This includes decisions which result in rejection or approval of an application, and decisions made in the variation and revocation of a DPP. Introducing a review process will reduce the burden on courts and make the process easier for those who are affected by decisions of the DAS Administrator.
42. The review would be undertaken by the DAS Administrator on the receipt of a request in writing from a debtor, a money adviser (or continuing money adviser) on behalf of the debtor, or a creditor. The request for review will have to be made within 14 days of the decision being made. Requests for a review should state the reason for the request, along with the name and address of the person making the request and the case number of the DPP.
43. The right of appeal to the sheriff on a point of law will remain, but will only be available after the review process has been exhausted. There is provision for suspension of the effect of decisions where necessary.

Consultation

44. The proposed changes to DAS were consulted on as part of the wider “Bankruptcy Law Reform” consultation which launched in February of 2012. The consultation closed on 18 May 2012 and a report summarising the responses was published on the Scottish Government’s web pages on 28 August 2012. The Scottish Government response to the consultation was published on 1 November 2012, and an update on Bankruptcy Law Reform was published on 28 February 2013. These consultation documents are available on the AiB website, here: <http://www.aib.gov.uk/guidance/publications/consultations-and-reviews/bankruptcy-law-reform/bankruptcy-law-reform>.
45. In addition to the above events which were generally related to the Bankruptcy Law Reform a number of DAS specific events were held in Glasgow, Inverness and Edinburgh in Autumn of 2012 and further events in Glasgow, Dundee and Edinburgh in March/April 2013. These DAS specific events featured key representatives from a wide range of stakeholder groups, including those from the money advice, payments distribution and creditor sectors.
46. The workshops were intended to provide an overview of the proposed key changes to the Scheme and to assess initial feedback on the likely impact of the Regulations. Feedback from each of those sessions was generally supportive with some individuals providing written support for widening access and adding transparency to the payments distribution process. Delegates were also provided with details of a contact within Scottish Government who they could liaise with for further details or updates on progress.
47. AiB have also worked separately with senior delegates from Money Advice Scotland and Citizens Advice Scotland, representatives from the Money Advice Training, Resources, Information and Consultancy Services and Social Inclusion colleagues in smaller groups throughout the development of the new DAS Regulations.
48. AiB staff also invited representatives from all the current payments distributors to a meeting in order to discuss changes to this part of the DAS process.
49. A full list of those consulted and who agreed to the release of this information is attached to the consultation report published on the Scottish Government website.

Impact Assessments

50. An equality impact assessment has been completed on the detailed changes to the DAS Scheme, in the instrument. As DAS is currently available and the proposed changes increase access to debtors, no equality impact issues arise in respect of these legislative changes.

Financial Effects

51. A Business and Regulatory Impact Assessment (BRIA) has been completed and will be published when the Regulations are laid before the Parliament.

The Accountant in Bankruptcy on behalf of the Scottish Government

20 May 2013