



HM Treasury Consultation for a “Breathing Space Scheme”

**A Response by
The Chartered Institute of Legal Executives (CILEX)**

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1. Summary of Recommendations

- 1.1. These proposals have great potential for empowering those who are in problem debt, but the proposals will fail unless debt advice agencies are provided with adequate resources. The decisions to not provide any additional funding for the breathing space scheme is likely to create substantial problems in practice. (Para 3.4, 4.30, 5.25)
- 1.2. The proposed reforms should be supplemented with greater efforts in promoting early debt advice. (Para 3.1)
- 1.3. Effective debt recovery requires the interests of both debtors and creditors to be taken into account to promote a 'working together' environment. (Para 3.2)
- 1.4. Proposals should take into consideration the acute impact they could have on smaller creditors. (Para 3.3)
- 1.5. The proposed schemes are ambiguous in scope making it difficult to assess whether reforms are well-balanced and proportionate. A uniform approach for assessing 'problem debt' may be warranted for clarity. (Para 3.5, 4.3, 4.4, 4.7, 5.4)

Breathing Space

- 1.6. The 12-month time limit, and exceptions for the alternative access mechanism, are welcome. However, there may be circumstances in which additional exceptions should be made. (Para 4.1, 4.2, 4.8, 4.9)
- 1.7. Continued eligibility requirements must be capable of safeguarding that debtors are engaging with the breathing space in a productive and meaningful fashion as opposed to as a debt avoidance tactic. (Para 4.5, 4.6, 4.25)
- 1.8. Third parties should be permitted to make referrals to a debt advice agency on a debtor's behalf under the alternative access mechanism. (Para 4.10)
- 1.9. The Insolvency Service is best placed to maintain the centralised notification mechanism, however it should do so in a way that does not cause confusion between breathing space protections and formal insolvency. (Para 4.11 – 4.13)
- 1.10. It may be relevant for there to be an oversight body to ensure creditor compliance, however this may be difficult in the context of smaller creditors. (Para 4.14, 4.15)
- 1.11. Apart from personal injury liabilities, the proposed exceptions for breathing space are largely appropriate. (Para 4.17, 4.18, 4.20)
- 1.12. Eligible debts that had existed but not been identified at the outset of breathing space should be able to be included after the breathing space has already commenced. (Para 4.19)
- 1.13. CILEx provisionally agrees that unincorporated sole traders who do not meet the threshold for VAT registration should be entitled to breathing space. (Para 4.21 – 4.23)
- 1.14. In general, the protections proposed during breathing space (prior to enforcement action having been approved) are appropriate. However, the liabilities imposed where a creditor fails to cease communications during this period should take account of administrative difficulties. (Para 4.24)
- 1.15. The proposed 60-day length of the breathing space may be unfairly balanced in favour of debtors, and members suggest that a 30-day period with possibility to extend would be more appropriate. (Para 4.29, 4.31, 4.32)
- 1.16. It may be worth reassessing the current qualifying criteria for debt relief orders to supplement these reforms. (4.33)

Statutory Debt Repayment Plan

- 1.17. A majority of surveyed members disagreed with the proposed 10-year benchmark suggesting that 6 years may be more appropriate. (Para 5.1, 5.2)
- 1.18. A Standard Financial Statement may be useful in making eligibility assessments, however this needs to be supplemented with evidence. Anecdotal data suggests that such statements are not always reliable. (Para 5.3)
- 1.19. The 14-day timeframe for creditor objection may need to be re-evaluated. (Para 5.5)
- 1.20. Limiting creditor objection to set criteria is practical, although creditors should also be able to object where the nature of the debt is under dispute. (Para 5.6, 5.7)
- 1.21. The 25% threshold for creditor objection in overturning the repayment plan is appropriate, although it may be possible to provide creditors with a chance to object to the Insolvency Service where there are exceptional circumstances. (Para 5.8)
- 1.22. CILEx provisionally welcomes the 10% threshold for objections to variations in the plan. (Para 5.9)
- 1.23. Surveyed members were largely in agreement with the proposed protections afforded under the plan (Para 5.12, 5.13), and with the exceptions listed for the plan, although a few concerns were raised. (Para 5.10, 5.11)
- 1.24. A blanket ban should not be adopted in preventing creditors from retrospectively imposing charges, fees and interests where a debtor prematurely exists the plan through fault. (Para 5.14, 5.24).
- 1.25. An independent and impartial oversight body should be established to secure compliance from both parties to the plan. (Para 5.15, 5.16)
- 1.26. The test for prioritisation is not only practical but rightly accords with natural justice principles. (Para 5.17)
- 1.27. Further consideration should be made into whether hire purchase debt should automatically be considered as a priority, or if this should depend on the nature of the hire purchase. (Para 5.18)
- 1.28. Whilst 5% of the repayment plan for non-priority creditors will generally be fair, there is a concern that quantifying a percentage in this manner may be unrealistic in instances where there are multiple creditors. (Para 5.19)
- 1.29. CILEx welcomes the two key flexibilities within the plan to allow for changes in a debtor's circumstances over the prolonged period. (Para 5.20, 5.21)
- 1.30. There are concerns that not all hire purchase and insurance premiums should amount to 'ongoing liabilities.' (Para 5.22)
- 1.31. Listing hire purchase as both an ongoing liability and priority debt within the repayment plan may be a discrepancy. (Para 5.22)
- 1.32. 'Ongoing liabilities' should extend to cover additional payments including judgement debts and child maintenance. (Para 3.6, 5.22)
- 1.33. The two-stage notification procedure for default should be supplemented with an exception where a debtor repeatedly fails to meet their continuing eligibility requirements within a certain period. (Para 5.23)
- 1.34. General member opinion felt that entry into the proposed schemes should reflect negatively on a debtor's credit file, however where a statutory repayment plan had been paid off or expunged, it was suggested this be changed. (Para 5.26, 5.27)

2. Introduction

- 2.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers. Amongst these around 12,200 specialise in civil litigation and more than 3,200 in private client work.
- 2.2. As it contributes to policy and law reform, CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.
- 2.3. This response includes contributions from some of CILEx's members working in civil litigation and private client work. CILEx liaised with practitioners through its Civil Litigation and Private Client Specialist Reference Groups and conducted a survey of members into the proposals for breathing space and a statutory repayment debt plan. These are expanded in more detail below.

3. General Points

- 3.1. CILEx welcomes the efforts invested into helping debtors take charge of their finances so that they may enter into sustainable debt solutions which would ultimately be of benefit to both the debtor and creditor. Nevertheless, it would be well placed in achieving these objectives, for further efforts to be invested into improving access to early debt advice so that debtors are empowered to identify solutions before their situation escalates to one of 'problem debt.'¹
- 3.2. CILEx stresses the importance of communication and a 'working together' approach for successful results within debt recovery. The proposed schemes for a new breathing space and statutory debt repayment plan need to ensure that they are able to appropriately balance the interests of both debtors and creditors to be effective.
- 3.3. CILEx is wary that the proposals should not overlook the existence of smaller creditors and the impact that these reforms could have on such institutions.²
 - 3.3.1. The proposals shall not only see added administrative and financial burdens on creditors, which could risk the position of smaller institutions within the market, but there are practical problems that might additionally arise within this context. These include, the extent to which smaller institutions are made aware of the schemes (particularly the new breathing space scheme) and the manner in which compliance can be secured where creditors are not currently regulated by the Financial Services and Markets Act 2000.
- 3.4. CILEx cautions that the administrative and resource impact that the proposed schemes are likely to have on creditors, and most notably, debt advice agencies, should not be underestimated.
 - 3.4.1. For instance, in the context of the breathing space proposals, a centralised notification procedure would need to be established for the scheme to operate. This would require development of all the internal processes and interoperability of systems within debt advice agencies to ensure that notification of breathing space occurs in a timely and accurate manner. In addition, investment may be needed into new staffing and technology, as well as updating/creating supplementary training and internal policies (such as general data protection compliance). Accordingly, the issue of funding needs to be carefully thought out to ensure that debt advice agencies are well equipped with the resources they would need to fulfil their new responsibilities. CILEx is not wholly convinced that the proposed funding streams, and lack thereof within the breathing space initiative, would be able to achieve this.
 - 3.4.2. One example of the administrative difficulties and complications that could arise following the introduction of these schemes is what would happen in the case of joint-debts and processing of this information.

¹ See paragraph 4.3 below about CILEx's concerns around the lack of definition for 'problem debt.'

² Member comments included: "*Creditors often incur significant losses in recovering a debt and should be permitted to recover certain reasonable costs. Not all creditors are large institutions with an ability to absorb such costs, and an inability to recover at least some interest and fees, especially for small businesses and sole traders must be taken into consideration.*"

- 3.5. As considered in paragraphs 4.3 and 5.4 below, there is currently some ambiguity around the types of debts that shall fall within the scope of these proposals. As a result, it is difficult to assess whether these reforms are well balanced in the interests of both debtors and creditors, and the degree to which they shall impact debt recovery.
 - 3.5.1. The Government may wish to reassure itself that a streamlined approach is adopted by debt advice agencies in assessing 'problem debt' so that there is greater clarity around eligibility. In doing so, it is noted that the proposed schemes deal with related but distinct issues, and as such care should be taken to ensure that a debtor is not inadvertently excluded where these protections would be beneficial to their circumstances.

4. Breathing Space Proposals

Question 1. Do you agree with the eligibility criteria for entering breathing space, including the 12-month limit?

12-month limit:

- 4.1. Majority of survey respondents (60%) agreed or strongly agreed with the 12-month time limit for entering into breathing space in the standard manner. However, it was cautioned that in situations where a debtor's circumstances have deteriorated dramatically such as illness or unemployment, or vice versa (where they have gained employment or a windfall), then there may be scope to reconsider the length of this limitation.
 - 4.1.1. Survey respondents identified the following circumstances that might warrant exception to the 12-month limit: 1). Serious illness, 2). Bereavement of an immediate family member.
- 4.2. In addition, 71.4% of respondents agreed or strongly agreed with the proposed exception to the 12-month time limit in cases where a debtor has entered into breathing space via the alternative access mechanism with appropriate evidence to demonstrate that the mental health crisis is genuine.
 - 4.2.1. It was suggested that there may also be a need to establish a link between the mental health crisis and its impact on the ability of the debtor to manage their finances for this to apply, although CILEx warns that this should not be overly prescriptive and should take note of the unique ways in which mental health conditions can impact upon a person's life.

Eligibility criteria for entering breathing space:

- 4.3. CILEx is cautious that there is no uniform approach for assessing 'problem debt', which could lead to variances amongst different advice agencies in the criteria used to assess debtors. Eligibility criteria must ensure that it is specific, clear and uniform to prevent any abuse of process and safeguard that debtors receive fair and equal treatment.
 - 4.3.1. A universal approach to assessing 'problem debt' ought to be prescribed by an independent public or regulatory body before these reforms take effect. Given the impact that this could subsequently have on the scope of the scheme

(depending on how wide the interpretation of 'problem debt' is), further engagement with relevant stakeholders may be warranted.

4.3.2. CILEx notes that there is no intention to prescribe specific rules focused on debt or income levels within the eligibility criteria. However, in standardising what constitutes 'problem debt', there may be a need to partially quantify certain indicators. This is essential in providing consistency and a level of certainty amongst debtors, creditors and advice agencies of the extent to which these proposals shall impact them.

4.4. With regards to whether other eligibility criteria should be expected from those entering breathing space via the standard route, some survey respondents did consider that the debtor's debt history (i.e.: whether they are someone who is routinely in debt) ought to be considered. In addition, one member commented: *"If the debt is admitted and the issue relates solely to re-payment levels, [it should be] quer[ried] whether an automatic right to breathing space is the correct approach."*

Continued eligibility criteria:

4.5. In order for the breathing space scheme to achieve its intended policy aim of helping debtors identify and access a positive and sustainable debt solution, debtors need to be encouraged to engage in the scheme in a productive and meaningful fashion. CILEx thereby emphasises that the continued eligibility criteria which requires debtors to 'work with a debt advice agency' should hold the debtor responsible for: 1). Providing full and prompt disclosure of information about their circumstances, 2). Agreeing to work with their creditors in resolving the situation, 3). Acting in good faith, 4). Engaging with relevant parties (i.e.: attempts to contact the debtor should not be unreasonably ignored), 5). Notifying their debt advisor where circumstances have, or are expected to, change.

4.6. Three quarters of respondents agreed or strongly agreed with the continued eligibility criteria for debtors to keep paying their ongoing liabilities. However, 47.6% disagreed with the notion that creditors should have the right to impose interest, fees and charges on 'ongoing liabilities' in all cases; believing this to be a matter that is highly dependent on the nature of the additional payments being charged.

4.6.1. Survey respondents identified the following liabilities which they felt should also constitute 'ongoing liabilities' for the purposes of this scheme: 1). Child maintenance costs, 2). Those payments generally considered as 'priority debts.' Please see paragraph 5.22 below for additional changes that surveyed members put forward for the 'ongoing liabilities' list.

Question 2. 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?

- 4.7. Depending on the definition prescribed to 'problem debt' and the extent to which different indicators are used in assessing it, it may be necessary to provide creditors with a formal mechanism for objection to entry into breathing space.

Question 3. Do you agree with the outline of the alternative access mechanism for individuals in mental health crisis care?

- 4.8. As mentioned in response to question 1 above, 71.4% of respondents agreed or strongly agreed with the proposed exception to the 12-month time limit in cases where a debtor has entered into breathing space via the alternative access mechanism.
- 4.9. Survey respondents did not identify any concerns with the alternative access mechanism as proposed, however did urge that evidence of a mental condition should be provided by a medical professional and should be made available to all creditors and/or their legal representatives as well as the relevant debt advice agency.

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) should be permitted to use that professional assessment to make a referral to a debt advice agency on an individual's behalf?

- 4.10. Just under three quarters of survey respondents agreed that third parties should be permitted to make referrals to a debt advice agency on the debtor's behalf.
- 4.10.1. Survey comments referenced the fact that engaging with relevant third parties in such instances is already standard practice under the Financial Conduct Authority (FCA).

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?

- 4.11. 62.5% of survey respondents agreed that the Insolvency Service would be best positioned to fulfil the role of maintaining the centralised notification mechanism for informing creditors where a debtor has entered into breathing space.
- 4.11.1. Although some concerns were raised that if this mechanism is directly managed under the Insolvency Service as a whole (as opposed to a wholly separate department within the Insolvency Service), then this might cause

confusion in insinuating that the debtor has entered into an actual or formal insolvency when in fact they have not.

- 4.11.2. CILEx therefore cautions that the branding of this system needs to be carefully thought through so that it clearly identifies the notification mechanism as for the purposes of the proposed breathing space scheme; it should not be mistaken as entry of the debtor into any alternative/additional debt protections.
- 4.12. CILEx members responding to the survey identified the following types of functionality that this notification mechanism should have: 1). The ability to file and save copies of all correspondence sent to the debtor (even paper-based communications such as letters), 2). Details of the debtor such as their name, date of birth, address etc., 3). The ability to record when the breathing space commenced and terminated (including where the breathing space terminated early or was extended in the case of entry to the alternative access mechanism for debtors with mental health conditions), 4). Functionalities similar to the Judgments Registry.
- 4.13. In addition to the debtor's personal information, CILEx members responding to the survey identified the following information which ought to be stored within the notification system: 1). The amount of debt, 2). The start and end date of the breathing space, 3). Dates initial sums were borrowed, 4). Details of whether this is the first time the debtor has entered into breathing space or not, 5). Where the debtor had previously entered into breathing space, whether this process failed because the debtor did not meet their continued eligibility requirements.

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?

- 4.14. 53.3% of survey respondents considered that, whilst not certain, there could potentially be a need to establish a scheme by which creditor compliance to the breathing space scheme is monitored.
 - 4.14.1. Suggestions put forward included the involvement of the courts. For instance, it was suggested that: *“if there is a central register, this could be linked to the County Courts. If proceedings [we]re issued against an individual who is in breathing space, [this] could [then] be flagged.”* Nonetheless, it was recognised that involving the courts would require additional investment into resourcing staff and updating systems which may be impractical.³
- 4.15. In addition, CILEx is not fully convinced that an oversight body would be effective in the context of smaller creditors where there are practical difficulties in securing creditor compliance, not least because of the difficulties in raising awareness of their duties under the proposed scheme.

³ CILEx has long considered that under-resourcing within courts is a serious issue which needs to be addressed.

Question 7. Do you think the register holding details of debtors in breathing space should be fully public, accessible to relevant debt advice agencies and creditors or just accessible to the Insolvency Service?

- 4.16. Just over half of all survey respondents felt that the register should be made public so that creditors have the opportunity to make appropriate risk assessments on whether to lend further credit to the debtor or not.
- 4.16.1. CILEx cautions however, that there should be safeguards in place to prevent any sensitive information collected from debtors, from being publicly visible in accordance with General Data Protection Regulations and in recognition of debtors' rights to privacy.

Question 8. Do you agree with the proposed approach for excluding certain debts from the protections of breathing space?

- 4.17. Majority of survey respondents agreed or strongly agreed with excluding the prescribed debts from the application of breathing space; apart from personal injury liabilities which 41.2% of respondents felt should not be excluded.⁴
- 4.18. Just over half of all survey respondents were in further agreement that business debts belonging to an incorporated company should be excluded from the scheme. CILEx recognises that the underlying policy objective of empowering individuals to take control of their own finances by identifying and accessing debt solutions is not applicable in the case of incorporated companies, and that including these types of business debts within the scheme would unduly favour debtors at the expense of creditors.
- 4.19. In addition, majority of survey respondents (47.1%) agreed or strongly agreed that it should be possible for any eligible debts that had existed but not been identified at the outset of breathing space to be included after the breathing space commenced.

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?

- 4.20. Survey respondents identified the following debts that should also be excluded from the proposed breathing space scheme: 1). Judgment debts.

⁴ CILEx understands the first exception listed ("*debts incurred as a result of fraudulent behaviour*") to mean: "*debts incurred as a result of the applicant/debtor's own fraudulent behaviour*", and thereby to be premised on the rationale that those at fault should not be entitled to enjoy such protections.

Question 10. 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?

4.21. As a matter of principle, majority of survey respondents (43.8%) agreed that unincorporated sole traders should be entitled to breathing space. However, a sizeable minority (37.5%) held the dissenting opinion.

4.21.1. CILEx recognises that unincorporated sole traders shall face personal liability for any business debts entered into, and that they will often be running their business on a much smaller scale without the resources and expertise enjoyed by larger counterparts. Indeed, the likelihood of this is guaranteed by the proposed limitations preventing sole traders who meet the threshold for VAT registration from entering the scheme. With this protection in place, eligible sole traders are likely to be facing the same pressures and vulnerabilities in majority of cases as individuals, and it is thus CILEx's provisional view that these debtors should be entitled to breathing space.

4.22. Notwithstanding the eligibility criteria put forward for sole traders, survey respondents did not identify any additional criteria that should be included.

4.23. Survey respondents suggested that the nature of a debt and the contractual evidence that comes with it should be sufficient in distinguishing between business and personal debts for the purposes of breathing space. Where there are any particular difficulties, it was suggested that the court may be deferred to for judgement, or alternatively the oversight regulator (if one is established) could provide guidance.

Question 11. Do you agree with the proposed treatment of interest, fees and charges in breathing space?

Question 12. 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?

4.24. In general, survey respondents tended to agree or strongly agree with majority of the protections proposed for debtors in breathing space prior to enforcement action having been approved (including the ceasing of all interest, fees and charges).

4.24.1. The only exception was with the proposed protection that would prevent creditors from contacting debtors requesting repayment of debts; to which a majority of 58.3% of respondents disagreed or strongly disagreed. As previously

stated, the proposals need to take into account the administrative burdens that breathing space could have on those involved. CILEx is thereby cautious that the liability faced by creditors where they fail to cease all reminder communications of debt repayment during breathing space should acknowledge these practical difficulties and ensure that creditor liabilities remain proportionate in the circumstances.

4.25. In addition, survey comments did highlight some concerns that the application of breathing space could be misused simply as a means in which to evade recovery action given the extent of protections provided. These concerns were further exacerbated by the proposals preventing retrospective imposition of interest, fees and charges where debtors failed to successfully enter into a debt repayment plan (something which a majority of 41.7% of respondents opposed). As a result, survey respondents were not fully convinced that the proposed scheme provides enough incentive to ensure that debtors meaningfully and honestly engage with the procedure.⁵

4.25.1. One survey respondent commented:

“Giving a debtor more time to consider their options is fine so long as the debtor acts on the time given and doesn’t sit there ignoring the issue, which is what most commonly happens. A breathing space should ideally go hand in hand with an obligation to do something and evidence they are seeking advice from an acknowledged and properly regulated provider of debt recovery advice.”

4.26. The above concerns resulted in a near 50/50 split in agreement from survey respondents for the proposed protections where enforcement action had already been approved prior to entering into breathing space. Survey respondents voiced contentions that once enforcement action has commenced, the debtor will likely have been given ample time and opportunity to enter into appropriate debt solutions and repayment plans. As such it was argued that it may not be proportionate to expect creditors to pause enforcement actions at this late stage.

4.26.1. One survey respondent commented:

“This could be beneficial provided the debtor constructively uses the breathing space to seek advice from an approved service provider. [However] by the time a matter gets to enforcement stage, a debtor has normally ignored ordinary requests for repayment, together with the 30-day pre-action protocol compliant letters and the initial court paperwork served on them. A creditor must have some sort of assurance that a debtor will not simply use the time to evade the issues.”

⁵ Member comments included: “My concern would be when dealing with the “Professional non-payers” or “serial phoenixing directors” in allowing them this 60-day breathing space. It would be taken or used in bad faith meaning once recovery action is started, they would have already moved on leaving nowhere to go with respect to pursuing this debt on behalf of a client.”; “The above answers pre-suppose that breathing space is not being used repetitively as a reason to defer or defeat payment. Breathing space is afforded to allow debtors the opportunity to seek (free) debt advice and thereafter engage with creditors with a view to entering affordable repayment plans. Lack of evidence that such advice has been sought should allow the creditor the opportunity to progress a lawful claim.”; “Direct contact should be encouraged to give specific short periods where no contact can be agreed, there is no need for 60 days as standard because the debtors do not use the time wisely to either manage their debts as a whole or begin to save from any income they have.”; “[Breathing space]could be used as a tactic to avoid interest without any real intention of resolving matters.”

4.27. In order to mitigate disruption in ceasing court action, it was suggested that where a debtor requires breathing space they should be compelled to disclose this fact at the Letter Before Action stage rather than wait until court proceedings had already initiated. This would further promote early debt advice by encouraging debtors to consider breathing space earlier rather than later.

Question 13. How should creditor compliance with the scheme be monitored?

4.28. Please see CILEx's response to question 6 above.

Question 14. Do you agree with the proposed length of breathing space? Do you have any other comments on the operation of the check?

4.29. Half of all respondents disagreed or strongly disagreed with the proposed 60-day timeframe.⁶ Survey comments referenced the fact that many debtors are already provided with a 30-day breathing space as an industry expectation under FCA regulations, with some having the ability of a further 30-day extension. It was therefore felt that the proposed timeframe in addition to these existing safeguards would be unfair in leaving creditors unable to collect their debts for many months.⁷

4.29.1. Majority of respondents voiced favour for a 30-day breathing space, believing that this would more appropriately balance the interests of debtors and creditors.⁸

4.29.2. As a compromise one member suggested that "*in order to encourage debtors to resolve their financial circumstances, a 30 + 30 day (if required) process should be adopted not a 60 days breathing space when first applied.*" CILEx considers that this suggestion may be worth considering as a more balanced solution.

4.30. CILEx is particularly concerned that without additional funding for debt advice agencies who shall shoulder a lot of the additional work created by the breathing space scheme, current issues of under resourcing would only be exacerbated.⁹ In turn, debtors attempting to access debt advice during breathing space could face lengthy delays, providing too short a period for them to enter into appropriate debt solutions.

4.30.1. In accounting for this backlog within the advice sector, it may be tempting to lengthen the proposed breathing space period, however CILEx stresses that these proposals must recognise the rights of creditors to reasonably recover debts owed. CILEx therefore urges that the only way for this scheme to be operational within the prescribed length of time, is for there to be adequate

⁶ 37.5% agreed or strongly agreed with the proposed length of 60 days, and 12.5% neither agreed nor disagreed.

⁷ Member comments included:

⁸ Half of all respondents found the proposed 60-day period to be unfairly balanced in favour of debtors.

⁹ Peter Wyman, *The Independent Review of the Funding of Debt Advice*, (January 2018), Foreword: "the major providers of debt advice all told me that demand for advice outstrips their ability to provide it..."

resourcing in place to ensure that debtors can access debt advice efficiently, and that creditors may subsequently recover costs more promptly.

- 4.31. CILEx members responding to the survey identified the following circumstances in which the 60-day period should be capable of being lengthened: 1). If arranging consolidation finance, 2). In cases of severe vulnerability, 3). In cases of severe ill health, 4). Where there are external barriers to seeking debt advice, 5). Where creditors have been found not to cooperate with the process.
- 4.32. CILEx members responding to the survey identified the following circumstances in which the 60-day period should be capable of being shortened: 1). Where the debtor is making no attempts to resolve their problem debt, 2). Where a debt solution has already been entered into as a result of the breathing space, 3). Where there is a risk the debtor may dispose of their assets, 4). Where it is proved that there is no financial hardship, 5). If the debtor is not an individual.
- 4.33. Amongst survey comments was a further suggestion for the qualifying criteria for debt relief orders to be re-assessed; as these orders already provide an effective means by which a reasonable length for protections against creditor action can be determined on an individual assessment of the debtor's circumstances.
 - 4.33.1. Remedying debt relief orders so that they are more widely accessible to debtors would have the benefit of building off existing remedies which are already well known to a wide array of creditors and debt advice agencies.

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?

- 4.34. CILEx has not obtained any comments suggesting that there should be further protections in place for individuals who have accessed breathing space in this way. Survey comments suggested that more notice of mental health issues needs to be taken, however appreciated that industry standards already call for creditors to be sensitive to the specific vulnerabilities of these debtors.

5. Statutory Debt Repayment Plan Proposals

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?

10-Year Timeframe

5.1. Majority of survey respondents disagreed with the proposed period of 10 years as a benchmark for quantifying 'reasonable timeframe' on the grounds that it would be much too long in most cases.¹⁰ One member commented:

"It seems a long time for a creditor to wait for repayment, and similarly seems a long time for a debtor to have a debt plan in place before they can move on."

5.1.1. A fair proportion of survey respondents suggested that a period of 6 years would be more appropriate.

5.2. Members responding to the survey identified the following situations in which there should be an exception to the 10-year timeframe: 1). Where there has been a temporary break in the repayment scheme then this could be added to the end period, 2). Where the debtor's daily expenditure is excessive then the 10-year period may be shortened to incentivise the debtor to more effectively manage their finances, 3). Taking account of the debtor's previous debt history.

Standard Financial Statement

5.3. Whilst CILEx recognises that the Standard Financial Statement may be useful in determining whether a debtor would be able to repay their debts over the proposed 10-year timeframe, it has been brought to our attention that this should be supplemented with evidence to confirm that the statements are actually genuine. CILEx members have articulated problems in practice that these statements are currently susceptible to abuse and inaccuracies which risk a skewed assessment of the debtor's financial situation.¹¹

5.3.1. In addition, it has been queried whether a Standard Financial Statement would be capable of making an accurate account of the debtor's financial circumstances in a future proof way given that the circumstances of the debtor

¹⁰ Member comments included: "10 years allows too much opportunity for a change in situation for either the creditor or debtor, and is unrealistic."; "It should be less than ten years for the majority of debts as business cannot standardly sustain such delay in payments"; "10 years is way too long. Most IVAs [Individual voluntary arrangements] fail so what likelihood is there of these going all the way?";

¹¹ Member comments included: "It is very open to abuse and is a frequent tool to avoid repayment of debt, usually by exaggerating expenditure or not disclosing that expenditure is excessive"; "a statement on its own is wholly inadequate. This is required but needs to be able to be tested where information is challenged"; "A statement on its own is not sufficient, all figures should be supported by written evidence such a bank statements or other appropriate evidence. It is too easy for debtor to put figures in a form that suits what they want the creditor to see but they never provide evidence to back it up. This is not acceptable. If the creditor is not given evidence in support of its content then it should not be valid and the creditor should be able to proceed to recover the debt in the usual way."; "These forms are generally inadequate and very rarely require full evidence to be given to back them up."

may change dramatically over the 10-year period. CILEx welcomes the proposals for there to be annual reviews of the debtor's plan to overcome this issue, and stresses that these should also be conducted in an evidence-based manner.¹²

- 5.3.2. On a purely procedural note, it has been pointed out that in cases where a debtor is self-employed additional information may need to be provided.

Eligibility Criteria for entering a plan

- 5.4. Some members considered that there should be a minimum threshold on the value of debt owed (e.g.: excess of £10,000) before being eligible to enter into a statutory debt repayment plan.

- 5.4.1. CILEx does emphasise that as the repayment plan is intended to be a long-term solution for debt repayment, it stands to reason that the debts owed should be of a sufficient value to warrant a 'long-term' solution. CILEx recognises the pitfalls in making the scheme one that is means tested, however it is necessary that debtors are not provided with a long-term solution where this would be unnecessary or disproportionate. It is thereby suggested that when establishing a uniform approach for assessing 'problem debt', this be taken into consideration.

Question 17. 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?

Question 18. 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?

14-day Timeframe

- 5.5. Member opinion was divisive as to whether a 14-day timeframe would be sufficient. Those who commented suggested that a period of 21 days to a month would be a more realistic timeframe for creditors to voice their objection to a proposed plan.

- 5.5.1. CILEx welcomes reconsideration of this timeframe to ensure that creditors (both big and small) are provided with a practical and fair opportunity to assess the proposed repayment plans.

¹² Member comments included: "Most household incomes where debt is an issue are unpredictable, and therefore to assess whether and how this could stabilise or alter within a period of ten years is not going to be covered off by one Standard Financial Statement. Many items of expenditure are missed on so-called standard forms, and others are downplayed, upgraded or otherwise misrepresented without any evidence whatsoever being provided in support."

Limiting Creditor Objections

- 5.6. Three quarters of respondents agreed with the proposals for limiting creditor objections to a set criterion in acknowledgement that this is already an established method for approaching these matters and would mitigate the risks of lengthy delays in approving the plan. Members further pointed out the role that FCA regulated debt advisors should be playing in safeguarding that the plan is both realistic and proportionate.
- 5.7. Members responding to the survey identified the following criteria upon which creditors should be entitled to object to the proposed plan: 1). Where the plan entitles the debtor to keep any proceeds or windfall gains from the sale of property, 2). Inaccuracies in the nature of the debt (e.g.: if the debt had been incurred fraudulently and should therefore be excluded from the scheme).

25% Threshold for Creditor Objection

- 5.8. Majority of respondents agreed with the proposed threshold of 25% by value of the total debt for overturning the statutory repayment plan. However, a dissenting opinion was that this should be higher at 51% or should be reconsidered where an exceptional circumstance has been claimed by a creditor.
- 5.8.1. A possible solution may be to provide creditors with an ability to apply to the Insolvency Service to conduct a 'fair and reasonable' assessment where, despite there being an objection rate under the 25% threshold, there are exceptional circumstances to be considered.
- 5.8.1.1. 86.7% of respondents agreed with proposals for the Insolvency Service to act as the arbiter of whether a statutory repayment plan is 'fair and reasonable'; provided that sufficient funding is allocated to the Insolvency Service to take on this new role.¹³
- 5.8.1.2. A further 80% of respondents expressed the opinion that debtors and creditors should be able to appeal the decision of the Insolvency Service. It was suggested that: 1). Appeals be made to the county court, 2). A 28-day timeframe be provided for appeal, 3). Appeals should be limited on the basis of certain grounds only, 4). *"Parties should be able to appeal but be warned that if they are not successful they may be liable for the costs thereby incurred [as it is] difficult to say at this stage whether [the] Insolvency service should be able to apply for security for costs."*

10% variation threshold

- 5.9. 60% of survey respondents agreed or strongly agreed that creditors should only be entitled to object to amendments to the statutory debt repayment plan where the amendment proposed will reduce monthly repayments by over 10% in total.

¹³ It was considered that this decision might be better placed at the hands of the judiciary, however conceded that the Insolvency Service already exercises, to some extent, a similar function within bankruptcy cases.

Question 19. Do you agree with the debts included within a plan? Should any other debts be excluded, or excludable on request?

- 5.10. Survey respondents were generally in agreement with the proposed list of exceptions for the statutory debt repayment plan. The only areas of contention regarded social fund loans and student loans.¹⁴
- 5.11. The same proportion of respondents agreed with excluding housing debt for the purposes of the repayment plan as did the proportion that disagreed. CILEx recognises the acute risks that debtors may face if their repayments to landlords or mortgage lenders are not met; this is in light of the added statutory protections that these creditors enjoy, and the nature of the security held against the debt.
- 5.11.1. CILEx provisionally welcomes the approach proposed for labelling mortgage and rent arrears as 'excludable', thus providing flexibility to assess the best and most proportionate course of action in each individual circumstance.

Question 20. Do you agree with the proposed treatment of interest, fees and charges within the plan?

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?

- 5.12. Survey respondents were generally in agreement with the proposed protections during the statutory debt repayment plan.
- 5.12.1. However, respondents were divisive around the issue of whether utility companies should be expected to disconnect or newly install pre-payment meters where the customer continues to pay their ongoing bills and plan payments.
- 5.13. As previously mentioned, further regard needs to be given to the impact that these protections could have on smaller creditors who may not be able to financially absorb the losses incurred under the plan. One member commented:
"10 years is far too long. This could destroy small businesses who will effectively have to give 10 years interest free credit."
- 5.14. In a similar vein to CILEx's response in paragraph 4.25 above, concerns were raised that preventing retrospective imposition of interest, fees and charges where debtors prematurely exit the plan through fault, could risk debtors abusing the process as a means of debt avoidance. 46.2% of respondents thereby disagreed

¹⁴ Regarding social fund loans, 40% of survey respondents agreed or strongly agreed that they should be included as an exception, however 33.4% disagreed or strongly disagreed (with the remaining 26.7% neither agreed nor disagreed). Regarding student loans, 26.7% agreed or strongly agreed that they should be included as an exception, however a greater proportion (33.3%) disagreed or strongly disagreed (with the remaining 40% impartial).

that this should be adopted as a blanket approach, proposing as an alternative that this be judged based on the reasons for exit.¹⁵

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?

- 5.15. Survey responses suggested that this may be best achieved under the auspices of the FCA or through the court service. Nonetheless it was contended that a similar function would be needed to ensure debtor compliance with the repayment plan. Accordingly, CILEx recommends that an independent and impartial oversight body (whether housed within an existing body such as the FCA or not) be set up to secure compliance from both parties to the agreement. This would safeguard that the integrity of the plan is upheld.
- 5.16. Where creditors are found to be non-compliant with the statutory repayment plan, 64% of respondents felt that sanctions should be imposed. CILEx has not obtained any data on what the nature of these sanctions ought to be.

Question 23. 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?

- 5.17. 60% of respondents agreed with the principle of prioritisation for repayment in the plan, however some suggested that a more effective method for managing this would be to establish a separate overriding arrangement and leave the priority repayments out of the original statutory repayment plan. One primary benefit of this suggestion would be that priority repayments continue in the event of default.
- 5.17.1. Majority of respondents agreed with the proposed test based on 'potential for serious detriment'¹⁶ and CILEx considers this approach to be in accordance with natural justice considerations as well as sensible in recognising the impact that would otherwise be had in escalating the seriousness of a debtor's situation where these debts remain unpaid.
- 5.17.1.1. Survey results identified an additional criterion by which the priority of debts could be assessed: based on whether the debt incurred was a necessity.

¹⁵ Member comments included: "It depends on the reason. If a debtor is suddenly made redundant then it is understandable to not charge retrospective interest, but if they have been fired for misconduct, underestimated their ability to pay, or anything within their control, the creditor should certainly be able to charge interest."; "Must be left open given the circumstances. It should be remembered that the creditor may be struggling too, possibly as result of not being paid promptly!!"; "There has to be some incentive to stick with the plan".

¹⁶ One member commented: "Although it may seem unfair to creditors, essential expenditure - housing/taxes/child maintenance should be prioritised as this could adversely affect debtors even further."

- 5.18. Survey respondents generally agreed with the debts proposed for prioritisation; except for hire purchase debt which more than half of all respondents disagreed should be included on the priority list. The Government may wish to further examine whether all hire purchase debt should automatically be prioritised, or whether this should depend on the nature of the hire purchase.
- 5.19. More than half of all respondents agreed that a minimum payment of 5% is fair for non-priority creditors, although CILEx is wary that quantifying a percentage in this manner may be unrealistic in instances where a debtor has many creditors.

Question 24. 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?

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?

- 5.20. CILEx welcomes the proposals for reassessments on an annual basis to account for any changes that would affect the debtor's financial position over the extended period. This will equip the repayment plan with the necessary flexibility to evolve so that the terms of repayment remain proportionate.
- 5.20.1. As stated in paragraph 5.3 above, it is recommended that annual reviews are not solely based on statements provided but on evidence of circumstance too.
- 5.20.2. CILEx notes that the proposals entitle an individual to contact their debt adviser at any point to review the repayment plan. With this in mind, debtors should be encouraged by their debt advisers to maintain communication and notify advisers of any major changes (including where there has been a reduction, or indeed an increase, in their income levels).
- 5.21. The proposition for payment breaks where a debtor has suffered severe, but temporary, financial shock rightly acknowledges the very real chances that changes in circumstance could warrant additional protections for debtors. Approximately three quarters of survey respondents agreed with introducing payment breaks in the interests of natural justice as well as on practical merit.
- 5.21.1. CILEx recognises that an overly prescriptive approach would be unsuitable in defining 'severe, but temporary, financial shock' in appreciation that these circumstances will often be unexpected and may well arise out of an accumulation of factors. Nonetheless, survey respondents identified the following circumstances which could fall within this scope: 1). Significantly reduced/loss of income, 2). Redundancy, 3). Accident or emergency, 4). Debilitating illness, 5). Death in the immediate family, 6). Divorce (depending on the circumstances), 7). Mental health issues, 8). Disability.
- 5.21.2. Likewise, survey responses suggested that the proposed period of 6 months should not be too rigidly prescribed with an ability to vary this period where circumstances require. For instance, it was suggested that the 6-month period should be capable of extension in situations where there is a near-future

employment start date.¹⁷ Other circumstances identified by members in which the 6-month period should be capable of extension included: 1). Severe illness, 2). Incapacity.

Question 26. Do you agree with the requirements for continued eligibility for the plan?

- 5.22. Survey respondents did not fully agree with listing all insurance premiums and hire purchases as 'ongoing liabilities.' With regards to the latter, CILEx would additionally like to point out the discrepancy in listing hire purchase as both an ongoing liability and priority debt within the repayment plan.
- 5.22.1. In addition, it was felt that 'ongoing liabilities' should extend to: 1). Mobile phone service charges (not just landline), 2). Council Tax, 3). Judgment debts, 4). Child Maintenance, 5). Medical insurance and/or prepayment prescriptions for people requiring regular continual medication, 6). Transport costs for the debtor to attend employment, 7). Maintenance costs in line with family proceedings, 8). Essential lease repayments (such as car leases).¹⁸
- 5.23. Just under three quarters of all respondents agreed with the two-stage notification procedure proposed for debtors who fail to meet their continuing eligibility requirements, and 81% agreed that one month is a reasonable default period by which to trigger the procedure.
- 5.23.1. Nevertheless, to ensure that the scheme maintains a balanced approach, it was proposed that where a debtor repeatedly fails to meet their continuing eligibility requirements within a certain period, then this should be capable in and of its own of bringing the plan to an end (e.g.: no more than twice in one year). The alternative could risk debtors stalling payments routinely to evade monthly repayments.
- 5.23.2. CILEx would additionally suggest that the annual reviews conducted into the debtor's financial situation should take note of previous failures to meet the debtor's continuing eligibility requirements. This would help to identify circumstances where the terms of the statutory repayment plan are no longer suitable or receptive to the debtor's needs and should be reassessed.
- 5.24. CILEx cautions that whilst the procedure for handling default needs to be pragmatic and provide debtors with reasonable opportunity to rectify the fault, it is just as essential for creditors to be able to rely on the system to protect their interests

¹⁷ E.g.: if towards the end of the 6-month break it is made clear that the debtor will be commencing employment soon after (say within the next month or so), then it may be possible to extend the repayment break to that stipulated date (irrespective of whether there is any further change in circumstance).

¹⁸ As a minor correction, one member suggested that there should be an 'and/or' between gas and oil/solid fuel, as opposed to the current list which groups gas with electricity and landline phone services, and then separately considers oil/solid fuel.

where debtors have failed to engage properly.¹⁹ As previously proposed,²⁰ CILEx once again endorses that where a debtor prematurely exits the plan through fault, then based on an evaluation of the circumstances, it may be possible for creditors to retrospectively impose interest, fees and charges on the debts owed or for the debtor to face penalties in the form of exit fees.

Question 27. Should the plan's funding mechanism system be based on taking a share of creditors' monthly repayments?

Question 28. 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?

5.25. Survey respondents were provided with two options of funding model for debt advisers for the repayment plan: 1). Sourced as a percentage of debtor monthly plan payments, or 2). derived from the Insolvency Service acting as a payment distributor. 72.3% of respondents favoured the latter approach.

5.25.1. A handful of respondents suggested alternative models including: 1). Payments made by debtor separate to the plan costs, 2). Potential funding contributions from those creditors who operate high interest repayments.

Question 29. Do you have views on how breathing space and plan should be reflected on a debtor's credit file?

5.26. Just under 70% of survey respondents felt that entry into breathing space ought to reflect negatively on a debtor's credit file, although it was suggested that a 60-day breathing space should not be likely to have too much of a bearing on a person's credit rating.

5.26.1. CILEx would add that the bearing of breathing space on a person's credit file will in part be dependent on how 'problem debt' is defined.

5.27. Two thirds of survey respondents felt that entry into a statutory debt repayment plan ought to reflect negatively on a debtor's credit file. Concerns were raised that if it were to reflect positively on their credit rating, this could risk further debts incurring whilst the repayment plan is still operational.²¹

¹⁹ One member commented: "Such a plan needs very strict oversight to ensure that the Creditor is protected from determined debtors The description sounds as though the matter of default is going to be pushed under the carpet and could create an intolerable situation resulting in wide spread distrust and a failure of the scheme."

²⁰ See paragraph 5.11 above, and paragraph 4.25 in relation to breathing space where it was commented that members are not fully convinced that there is enough incentive to ensure debtors meaningfully and honestly engage with the proposed schemes.

²¹ Member comments included: "The credit rating is a tool whereby potential providers of credit can assess an individual's ability to pay. Where a Plan is in place, it would be irresponsible for a debtor to incur further credit for goods or services when they struggle to service the existing level of debt and there has been no material change

5.27.1. It was suggested that once the repayment plan has been paid in full or expunged, it might be appropriate for the reflection on a debtor's credit file to be changed: "...provided they comply with the plan [it] should show positively that they have made these payments on time and in full."

Question 30. Do you agree with the proposed territorial scope of the scheme?

5.28. CILEx has not obtained data on whether the territorial scope of this scheme is appropriate, however as a professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals in both England and Wales, the above comments should be considered to reflect the interests of members across both jurisdictions.

For further details

Should you
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in their financial circumstances.”; “Creditors have the right to know that the individual they are contracting with either may not be able to pay back the money or it could take a number of years to do so outside of the agreed contractual terms.”