RESPONSE TO
CALL FOR VIEWS ON
PROTECTED TRUST DEEDS

ECONOMY, ENERGY AND FAIR WORK COMMITTEE
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 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 call for views issued by the Scottish Parliament’s Economy, Energy and Fair Work Committee (the Committee). We shall be pleased to discuss in further detail with the Committee any of the matters raised within this response during the oral evidence session which we have been invited to participate in on 21 January 2020.

Executive summary

5. We welcome the short inquiry being opened by the Committee as this provides an opportunity to focus on specific concerns in relation to Protected Trust Deeds (PTDs) which have been raised during the Committee’s consideration of the Debt Arrangement Scheme (Scotland) Amendment Regulations 2019.

6. We fully agree that individuals should be directed to appropriate debt solutions. What is an appropriate debt solution will depend upon several factors and on individual circumstances. Over recent years there has been a move through legislative amendments to blur the distinction between the various debt solutions. As a result, it is perhaps rare for there to be a clear case where one solution is the ‘most appropriate solution’. It is important therefore to recognise that there is unlikely to be a right or wrong solution, while acknowledging that some may have more positive benefits than others. The objective therefore must be to ensure that individuals are in ‘an appropriate debt solution, balancing the needs of a debtor and the rights of the creditors’.

7. A clear policy decision requires to be taken on whether the direction of travel for debt solutions in Scotland is to be taken down a route where debtors (and to some extent creditors) are forced into particular solutions or whether there is a choice of solutions available to meet the individual circumstances and preferences of individuals. We would support retaining a choice of solutions being available.

8. PTDs form part of a ‘toolkit’ of options (alongside sequestration, the Debt Arrangement Scheme (DAS) and non-statutory remedies), which are available to individuals who face financial difficulties with debt.

9. The landscape of regulation surrounding PTDs in the context of the Committee’s inquiry is complex. It involves:
   - the regulation of debt counselling and debt adjusting as regulated activities overseen by the Financial Conduct Authority;
   - advertising regulated by the Advertising Standards Authority;
   - the conduct of Insolvency Practitioners regulated by the Recognised Professional Bodies
   - the regulation of the Recognised professional Bodies by the Insolvency Service
   - the supervision of trustees and administrative processes of PTDs by the Accountant in Bankruptcy
In recent years, a two-tier personal insolvency market has developed. One tier is operated by volume providers, typically on a highly commercialised basis in a very corporate environment and controlled by persons who are often not IPs or regulated accountants. A second tier is operated under a more traditional model where the appointments are held by IPs within entities which are controlled by IPs and regulated accountants.

The PTD market is dominated by a small number of providers who operate as volume providers. Over 80% of PTDs are administered from within 4 firms.

ICAS acknowledges concern amongst stakeholders surrounding the marketing and promotion of trust deeds. It is less clear that there is evidence of widespread consumer harm as a result of the marketing and advertising of trust deeds.

We are not aware of any empirical evidence which supports the view that PTDs are being ‘mis-sold’. There is no single agreed definition of mis-selling however a dictionary definition is “the act of selling something that is not suitable for the person who buys it.” Against a background where there is unlikely to be a single solution that is ‘the right one’, mis-selling is difficult to evaluate.

The insolvency profession, in conjunction with the Insolvency Service, have been working in recent months to respond to the changes in the structure of the personal insolvency market. This has included changes to the monitoring regime for volume providers, changes to the Code of Ethics applicable to insolvency practitioners and changes to Statements of Insolvency Practice.

We would support further discussion with the FCA and UK Government surrounding the authorisation requirements in respect of the regulated consumer credit activities of debt counselling and debt adjusting. We believe there is a requirement to extend the insolvency exemption for these regulated activities when carried out by insolvency practitioners beyond the current exemption which restricts the exemption to where the insolvency practitioner is acting in reasonable contemplation of an appointment.

We welcome the opportunities to consider what may be appropriate steps to reform the PTD regime but believe that this should be carried out as part of a wider review of debt solutions in Scotland. We welcome the commitment given by the Minister for Business, Fair Work and Skills during evidence to the Committee on the DAS Regulations to such a review, however, note that no timescale has been given for the review to take place. We would encourage the setting up of an independent review at an early date.

Any such review may include consideration of whether there is a new solution required for consumer debt and a need for greater codification of trust deeds which is currently based on a myriad of common law, trust law, and insolvency law.

Detailed response

Our response to the key questions contained within the call for views are set out in Appendix 1.

30 December 2019

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1. What is your experience of Protected Trust Deeds (PTDs)?

The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 22,000 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.

ICAS's Charter requires it to primarily act in the public interest, and our responses to inquiries such as this 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.

ICAS currently regulates 97 Insolvency Practitioners, 84 of which are based in Scotland.

The most recent Freedom of Information disclosures provided by the Accountant in Bankruptcy (AiB) indicate that almost 80% of PTD's registered between 1 January 2019 and 30 June 2019 are under the management of only four firms (one firm of which has nearly half of the total). Of those, only one is regulated by ICAS (approx. 9% market share), the remainder are regulated by the Insolvency Practitioner Association (IPA). Broadly the IPA regulate trustees in 88% of all PTDs, with ICAS regulating most of the remainder.

2. What are the benefits of PTDs?

In view of the overlap between questions 2 and 3, we have responded to these questions together.

PTDs form part of a 'toolkit' of options (alongside sequestration, the Debt Arrangement Scheme (DAS) and other non-statutory remedies), which are available to debtors who face financial difficulties with debt. It is therefore difficult to consider the benefits and downsides of PTDs in isolation.

PTDs are an important debt solution which provides individuals with a practical way to resolve their personal financial and problem debt difficulties and may be a better solution for them than options such as bankruptcy, which can carry greater obligations and restrictions.

What is an appropriate debt solution for an individual will depend upon individual circumstances and consider a myriad of factors. Over recent years there has been a move through legislative amendments to blur the distinction between the various debt solutions. As a result, it is perhaps rare for there to be a case where one solution could be considered to be the only appropriate solution for an individual’s circumstances.

While recognising that some may have more positive aspects than others, the concept of there being a 'right solution' is flawed as this suggests that there can only be a binary decision. However, when considering the unique circumstances of each person, there is rarely just one possible solution.

For some time ICAS have advocated for a clear policy decision on whether the direction of travel for debt solutions in Scotland is to be taken down a route where debtors (and to some extent creditors) are forced into particular solutions or whether there is a choice of solutions available to meet the individual circumstances and preferences of individuals.

At the moment, our perception is that there is a push from the Scottish Government and AiB to steer individuals towards DAS. While the benefits and suitability of DAS for some individuals are not disputed, any increase in DAS numbers must arise through the provision of good advice and because it is the correct decision for the individuals concerned.

At an evidence session of the Committee on 17 September 2019, Jamie Hepburn MSP, Minister for Business, Fair Work and Skill, stated:

"I do not have the precise figures for the 2017-18 case load, but there were just over 2,000 new DAS cases and nearly 6,000 PTD cases. There is a bit of a disparity there. When we look at the creditor element, the disparity is brought into sharp focus. Just under £35 million was returned to
creditors through the debt arrangement scheme, whereas a lesser sum of around £22 million was returned under protected trust deeds, despite there being nearly three times as many of them."

Such comparisons are entirely simplistic and without any serious analysis of the reasons behind the disparity are unhelpful. The Scottish Government’s view that DAS is not an insolvency solution also renders such comparisons meaningless if a debt management product (DAS) is being compared with a product which is intended to provide debt relief (PTD).

A PTD can be an appropriate solution based on specific individual circumstances. We consider that debtors should continue to have the ability to choose which debt solutions are appropriate to their own circumstances. For example, some individuals may prefer to deal directly with a trustee in a trust deed rather than enter DAS where they would deal with a government agency and payment distributors, particularly where equity in a family home is to be realised. A trust deed may also balance better the rights of creditors in comparison to DAS as they would remain entitled to interest and charges. Typical considerations (or features) when advising individuals with problem debt and the options that may be available to them are set out in Appendix 2.

One of the fundamental drivers behind debt relief being provided within society is to allow individuals to be provided with a ‘second chance’. It is widely recognised and accepted that rehabilitation measures should be swift and no longer than necessary. To force individuals into an unnecessary extended period of debt repayment does not meet these objectives. Entering a PTD has the potential to provide a significant number of individuals with that ‘second chance’.

3. **What downside is there to PTDs?**

   See response to question 2.

4. **Are there issues with the way PTDs are marketed and promoted to debtors? What are they?**

   **Overview**

   It is widely acknowledged that there is a two-tier personal insolvency market in operation. One tier is operated by volume providers, typically on a highly commercialised basis in a very corporate environment and controlled by persons who are often not IPs or regulated accountants. They typically obtain their appointments through large advertising campaigns and third party ‘lead generators’. Volume PTD providers tend to reflect the firms which are volume IVA providers, although the number of PTDs are small in comparison to the number of IVAs within such firms.

   A second tier is operated under a more traditional model where the appointments are held by IPs within entities which are controlled by IPs and regulated accountants.

   As with much of the debt advice and debt solutions arena, the regulatory landscape surrounding advertising and marketing is not straightforward. Responsibility for the regulated activity of debt advice falls within the scope of the Financial Conduct Authority (FCA) who have regulatory responsibility for the regulated activities of debt counselling and debt adjusting. There are limited exclusions from requiring FCA permissions for these regulated activities for Insolvency Practitioners when acting in contemplation of an appointment which falls within section 388 of the Insolvency Act 1986 or when acting as an office holder under such an appointment. Where FCA permissions apply then firms are required to apply the rules of the FCA Handbook (specifically section CONC 3.9) in relation to the promotion of debt counselling and debt adjusting services.

   However, for promotions or advertisements which promote only PTD’s then it is likely that these shall fall under the responsibility of the Advertising Standards Authority who have also issued advice on advertising in this area.

   In our view, it is often not clear in connection with advertising and promotion of PTDs that the advertiser is not an Insolvency Practitioner but what is commonly referred to as a ‘lead generator’. These are firms who will typically carry out advertising and then ingather information from individuals responding on their income and expenditure as well as assets and liabilities to consider their eligibility for debt solutions. They may also provide some debt counselling (advice) of a generic nature which does not fall within the scope of FCA permissions. The individual is
then passed on to an Insolvency Practitioner or their firm (almost exclusively one of the volume providers).

We have consistently raised concerns about the regulation of the lead generator sector in respect of debt counselling activity in discussions with the AiB and the FCA since the responsibility for Consumer Credit moved to the FCA in April 2014. In particular, we are concerned with the ability for debt counselling to fall between a regulated activity and a non-regulated activity when it is promoted as generic advice to individuals who have provided their personal financial information in contemplation of a debt solution.

ICAS acknowledge that there are stakeholder concerns surrounding the marketing and promotion of trust deeds. It is less clear that there is evidence of widespread consumer harm as a result of the marketing and advertising of trust deeds.

**Action**

As the factors affecting PTDs are broadly similar to those affecting IVAs (albeit on a smaller scale by number), the Insolvency Service and the RPBs are working collaboratively to identify effective ways of addressing concerns.

The RPBs take steps to ensure that IPs are suitably qualified, competent, and act in an appropriate matter (e.g. in relation to licensing, monitoring, complaints etc). All these steps contribute to a community of skilled IPs offering appropriate debt solutions, which balance the needs of the individual and the rights of their creditors.

However, as with all systems and processes the landscape changes over time and there is always a need to keep under review whether the current framework remains appropriate or whether amendments are required.

The Insolvency Service, as the oversight regulator of RPBs, issued updated guidance in October 2019 on monitoring volume IVA and PTD providers. This guidance sets out the principles, standards and expected areas of work focus that RPBs should be undertaking in respect of volume providers. Monitoring of Insolvency Practitioners who do not fall within the volume provider regime are monitored in accordance with a Memorandum of Understanding and Principles of monitoring Insolvency Practitioners agreed between the Insolvency Service and the RPBs.

ICAS believes that the current regulatory system promotes best advice on the part of IPs. For example, SIP 3.3 makes it clear that an IP should ensure that the advice, information and explanations provided to a debtor about the options available are such that the debtor can make an informed judgement on which process is appropriate to their circumstances.

The Joint Insolvency Committee (JIC) is responsible for the maintenance, improvement and promotion high standards of insolvency practice amongst regulated members of insolvency profession, including the production of transparent, proportionate, consistent and targeted practice statements and guidance of an ethical, regulatory, or “best practice” nature. It is the Joint Insolvency Committee which produces the Statements of Insolvency Practice (SIPs) which are approved by the RPBs and which Insolvency Practitioners are required to adhere to.

The two most relevant standards which related to PTDs in the context of the Committee’s inquiry are SIP 3.3 (Trust Deeds) and SIP 9 (Payment to Insolvency Office Holders and their Associates).

JIC undertakes a continuous programme of review and during 2019 has been undertaking steps to identify whether there is a need to amend the provisions of those SIPs (and SIP 3.1 which deals with IVAs). Working Groups have been set up to consider amendments to each of these SIPs and it is expected that revised versions of SIP 9 and SIP 3.3 will be issued in the early part of 2020 for consultation.

Changes are also being introduced to a revised insolvency Code of Ethics, expected to be published by 31 January 2020 and to come into effect on 1 May 2020, which will address matters connected to personal and business relationships, the IP as an employee and the use of services other than those provided by the IP. Amendments are also being made to the Code of Ethics to provide greater clarity in relation to the use of advertising and relevant requirements.

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1 SIP 3.3 paragraphs 16-18
Following a campaign by StepChange Debt Charity, which drew attention to the misleading advertisers impersonating reputable debt charities, Google has committed to restricting debt services advertising.

Debt advice adverts via Google are now subject to an application and approval process and promotion of debt advice services will be restricted to IPs and firms who hold FCA authorisation for debt adjusting and debt counselling.

This will target unregulated lead generation firms and third-party intermediaries who sell the leads on to other firms.

Given that the perceived issues extend to a relatively small number of providers, albeit affecting a significant percentage of cases, we consider that more use should be made of existing legislative provisions and that the effectiveness of non-legislative measures which are being undertaken should be kept under review.

The evidence we have is that most IPs are placing individuals into trust deeds appropriately and when it is the most appropriate solution to meet their financial difficulties.

Correctly or wrongly, the very mention of PTDs has become toxic and, in the fog of bad publicity, the important and useful role that they play in the personal insolvency landscape is largely being forgotten.

**Complaints**

Statistical analysis of complaints does not bear out a significant or systemic mis-selling of PTDs as a solution for problem debt.

The Insolvency Service’s [2018 Annual Review of Insolvency Practitioner Regulation](#) shows that only 11 trust deed related complaints were received through the Insolvency Complaints Gateway in 2018, representing only 3% of complaints received (PTDs represent around 5% in number of all insolvency cases across the UK).

The same report indicates that an average of only 14 complaints per year were recorded in relation to PTDs over the last 5 years. In context, there are approximately 25,000 live PTDs in progress suggesting approximately 0.2% of PTDs have any form of complaint lodged.

From 2017 to 2019 ICAS has received only 4 complaints in respect of PTDs. One remains under investigation (received in November 2019), one was withdrawn, and the two other complaints were not upheld. None of the complaints registered related to ‘mis-selling’ of PTD or inappropriate or inadequate advice being given to the debtor resulting in them entering into a PTD when another solution would have been more appropriate.

While complaint numbers cannot be relied upon to provide a full picture, they are a good indicator of the level of dissatisfaction which stakeholders, including debtors, would have with PTDs. If there was substantial mis-selling of PTDs it could reasonably be expected that complaints would be raised and therefore the number of complaints would be much higher.

Further information on how ICAS deals with complaints is available from the [ICAS website](#).

**PTDs v DAS**

It is also worth revisiting the comparison between DAS and PTDs in the context of possible mis-selling. A recent [statistical release](#) by the AiB revealed that the five-year failure rate for DPPs approved under DAS in 2013-14 is 40.7%.

The [Freedom of Information disclosures](#) referred to in our response to question 1 show that from 1 January 2018 to 25 April 2019, the number of PTDs that failed (the trustee was discharged, but not the debtor) during the 4 year trust deed period was 1,656. During the same period 10,057

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2 Table 14 (page 20)
3 icas.com (How to make a complaint against an ICAS Member)
new PTDs were registered. This would suggest an approximate failure rate of 16%. As a comparison the failure rate for IVA's in England and Wales is around 40%.

It is clear that the reality is that PTDs work for the vast majority of people and, of those that fail, a significant proportion will be accounted for by those who wilfully refuse to cooperate with their Trustee and do not meet the terms of the Trust.

For cases where the debtor has been entirely cooperative there should rarely be any barrier to personal discharge as it is clearly inappropriate to refuse this because of extenuating circumstances which prevents payment of agreed contributions (for example an economic shock such as loss of employment or a newly diagnosed mental or physical health condition).

The failure rate does not appear to be reflective of systemic mis-selling or of individuals being placed into the wrong solution as a matter of course and the PTD failure rate compares favourably with DAS.

The AiB admit that the failure of a DAS DPP cannot be portrayed as a positive outcome, but they point out that creditors still benefit from the repayments made up until the revocation. However, while that is true, individuals are left with the balance of liabilities plus reapplied interest. As a result, many may end up in bankruptcy or a PTD regardless.

The statistical release referred to indicates that the mean expected duration of revoked DPPs in 2018-19 was 7 years. The mean actual duration at the time of revocation was 2.4 years. A further freedom of information disclosure reveals that the average debt level of an individual in DAS in 2018 was £16,500. Using that figure for comparative purposes would mean that, on average, an individual is left with £10,843 of debt following a revoked DPP under DAS. This does not factor in DAS fees of up to 10% (in 2018), any missed payments or reapplied interest.

If the individual in question has suffered an economic shock, then that person faces the prospect of a subsequent PTD or bankruptcy to deal with the remaining outstanding debt. That could mean another four years in an insolvency process, and a total of 6.4 years to deal with the problem debt. If no economic shock has been suffered, then it calls into question the appropriateness of DAS as a solution in the first place or points to an issue of non-cooperation and issues were inevitable regardless of the process.

It must be recognised that it is not always straightforward to place people in the right solution for their circumstances and that individuals’ circumstances will change. The likelihood of changes in circumstances presenting themselves is likely to increase over a longer period of time. The number of PTDs do not, of themselves, provide evidence of widespread mis-selling, there are a variety of factors at play.

Simply considering matters from the viewpoint of PTDs being bad and DAS being good is fundamentally very flawed. Wider societal questions need to be considered by the government at a very fundamental level as to whether they consider it appropriate to be more prescriptive over who does and does not have access to debt relief.

5. **Are there incentives for providers to offer PTDs – and, if so, are these appropriate?**

We do not believe that there is any more of an incentive for IPs to offer an individual with debt problems a PTD over other available solutions.

**Lead generators and advertising**

Through large scale and targeted advertising, there is clearly a danger that people are being encouraged to enter debt relief products when they have no requirement to access such a product. On the flip side of that it is bringing debt relief to the attention of those who might otherwise have ‘suffered in silence’ and continued to live with the burden of debt for many years with the resultant impact on health and social inclusion.

There is undoubtedly a practice of using introducer firms to generate potential PTD clients within the volume market. As these firms, and also staff within some volume trust deed providers, are often remunerated on a commission basis, there would appear to be an inherent incentive for a

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4 Individual Voluntary Arrangement outcome statistics Figure 3. (Office of National Statistics)
trust deed to be presented as a viable solution even when other debt solutions may be more appropriate.

However, there is little evidence that debtors are routinely being encouraged into a PTD when another debt solution would be more appropriate. Safeguards are in place through regulation to minimise the risk of this occurring. For example, SIP 3.3 requires certain standards to be adhered to by the Insolvency Practitioner to protect against such occurrences. In particular:

16. In all cases the insolvency practitioner is responsible for ensuring that the debtor has been given appropriate advice.

18. The insolvency practitioner should have procedures in place to ensure that an assessment is made at an appropriate stage of:
   a) whether the debtor is being honest and open and sufficiently co-operative;
   b) the debtor’s understanding of the process, and commitment to it;
   c) the attitude of any key creditors and of the general body of creditors;
   d) whether a Trust Deed is an appropriate solution;…..

20. The insolvency practitioner should be able to demonstrate that appropriate steps have been taken at all stages of the Trust Deed, by maintaining records of:
   a) discussions with the debtor, the information and explanations provided, and options outlined and the advantages and disadvantages to the debtor of each option;
   b) comments made by the debtor, and the debtor’s preferred option;…..

24. The insolvency practitioner or a suitably experienced member of his staff should interview the debtor prior to the Trust Deed being signed.

29. An insolvency practitioner may be approached to give advice on a debtor’s financial difficulties, and the way in which those difficulties might be resolved. The insolvency practitioner should have procedures in place to ensure, taking account of the personal circumstances of the debtor, that:
   a) the role of adviser is explained to the debtor and that at this stage the insolvency practitioner is advising the debtor and acting in the debtor’s interests but in the context of finding a workable solution to the debtor’s financial difficulties;
   b) sufficient information is obtained to make a preliminary assessment of the solutions available and their viability;
   c) it is explained that the debtor will need to co-operate and provide full disclosure. The insolvency practitioner should be able to form a view of whether the debtor has a sufficient understanding of the situation and the consequences, and whether there will be full cooperation in seeking a solution;
   d) when considering possible solutions, account is taken of the impact of each solution on the debtor and on any third parties that may be affected;
   e) the debtor is provided with an explanation of the options available, so that the solution best suited to the debtor’s circumstances can be identified. This information should be confirmed to the debtor in writing.

34. The insolvency practitioner should be satisfied that a debtor has had adequate time to think about the consequences and alternatives before signing a Trust Deed.

Consumer credit regulation

It is important to consider the interaction between IPs and the Financial Conduct Authority (FCA). When consumer credit regulation was transferred to the FCA on 1 April 2014, a regime change took place for IPs. While there was previously an insolvency licence which allowed IPs to conduct a wide range of consumer credit activities, this was replaced by a more limited insolvency exclusion, with any IPs conducting work outside this exclusion potentially needing to consider full FCA authorisation.

The insolvency exclusion allows an IP to conduct debt adjusting, debt counselling, debt administration and debt collecting when formally appointed as an IP under Section 388 of the Insolvency Act 1986, or conduct debt counselling, debt adjusting or credit information services in reasonable contemplation of being appointed under Section 388.
The result of this is that firms without relevant FCA permissions are precluded from providing the full suite of debt solutions which, on a commercial basis, may drive them to favour PTDs as a remedy over DAS.

We consider that the scope of the insolvency exclusion available under FMSA 2000 requires to be extended in such a way that insolvency practitioners can provide the regulated activity of debt counselling irrespective of whether there is reasonable contemplation of an insolvency appointment. We do however recognise that this is not an area over which the Scottish Parliament has the ability to change but would encourage the Scottish Government to discuss with the UK Government the need to amend the legislation, particularly in light of the UK Governments proposals to introduce a statutory debt repayment plan for England and Wales.

**Self-interest**

It should be recognised that elements of self interest threats exist in both commercial and free debt advice sectors. While the self interest threat may manifest itself in different manners and outcomes. For example, a self-interest threat may exist within a commercial organisation to encourage individuals into debt solutions which maximise the commercial return for the debt solution provider. Similarly, a self-interest threat may exist within a free debt advice sector provider to encourage individuals into debt solutions which, for example, are perceived to be less socially detrimental or most in line with the corporate values of the organisation.

It is also important to recognise that it is unreasonable to expect self-interest threats to be eliminated completely and therefore self-interest threats should be managed to a level which could be perceived to be an acceptable level by a reasonably informed third party.

In view of the recent changes brought about by the Debt Arrangement Scheme (Scotland) Amendment Regulations 2019, the self-interest threat has increased for free debt advice sector organisations.

Where an individual enters DAS through a free debt advice organisation Money Adviser, 15% of funds ingathered in a DAS case (levied as part of the new fixed statutory administration fee of 20%) are either to be remitted to the Scottish Government or returned directly to the money advice organisation who placed the individual into DAS.

There is consequently an increased self-interest threat for the free advice sector being incentivised to put clients into DAS, possibly in favour of other solutions which may be more suitable.

The potential for conflicts and incentivisation is always present, the most important thing is how those conflicts are managed. In relation to PTDs ICAS consider that is best done through collaborative working and not through further tinkering with legislation.

6. **Please provide any further comments you wish to provide on PTDs.**

**Licencing requirements**

There is an argument that some of the perceived issues with PTDs can, to some degree, be attributed to the removal of trustee residency requirements under section 7 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. While this was necessary to be compliant with the EU Professional Qualifications Directive, a perhaps unintended consequence was that insolvency firms operating in England and Wales were now able to more readily access the Scottish personal insolvency market, with protected trust deeds in particular seen to be relatively easy to adopt into existing volume provider operations.

Any person who engages in insolvency practice under the Insolvency Act 1986 or Insolvency (Northern Ireland) Order 1989 is required to be authorised for such work by an RPB and to have passed the Joint Insolvency Exam Board (JIEB) exam(s).

Both the corporate and personal JIEB papers sat by prospective Scottish IPs are bespoke to Scotland and recognise that it has distinct procedures such as PTDs and DAS which do not exist in other UK jurisdictions.
There is therefore a risk (albeit in most instances a low risk) that an IP from another UK jurisdiction, who has passed the English personal insolvency JIEB paper, is ill-equipped to provide comprehensive advice in relation to Scottish personal insolvency. While Trust Deeds are often compared with English IVAs, they are a significantly different product.

We consider there is merit in the Insolvency Service and the RPBs investigating further whether restrictions should be placed on Insolvency Practitioners ability to take appointments based on their legal jurisdiction competences in a similar manner to solicitors who are qualified to practice in Scotland, England and Wales or hold dual qualifications.

Credit Unions

It is notable that one of the principal groups of dissenters, and a significant voice for change in relation to PTDs, has been the credit unions in Scotland.

The view of credit unions against trust deeds is a long standing one. The Scottish Government carried out a consultation in 2008 on the impact of PTDs on Credit Unions. In the consultation report Credit Union debts in Trust Deeds Fergus Ewing MSP, Minister for Community Safety concluded “There is little evidence that Credit Unions are disproportionately disadvantaged compared to other creditors.” There is no evidence presented in recent years that we are aware of which demonstrates that this conclusion does not remain appropriate today.

Those representing the credit union sector seek to link difficulties which credit unions have with the marketing and advertising of trust deeds and what they consider to be significant failings with the regulation of trust deeds and by extension to the level of bad debt which credit unions are affected by.

The latest credit union statistics published by the Bank of England indicate no significant change in bad debt for Scottish credit unions between 2014 and 2018. Despite the value of loans increasing by 31% during that period, the level of bad debt provided for remained broadly constant, peaking at 3.6%. The annual level of bad debt charged by credit unions in Scotland on an annual basis again remained broadly consistent at between 1.25% and 1.59%. These levels are substantially lower than recorded for English credit unions where the level of bad debt provided for increased from 5.24% to 6.3% and annual bad debt charges between 2.21% and 2.68%

The same statistics show that between 2014 and 2018, while the value of loans outstanding to Scottish credit unions increased by 31% (7% by number) the value of loan arrears increased by 82% (30% by number). These are broadly comparable with the picture in England over the same period.

At the same time, the number of protected trust deeds registered fell by 11% (from 6,681 in 2013/14 to 5,958 in 2017/18 with a low of 4,437 in 2014/15). The number of trust deeds being protected remains significantly below the peak of PTDs in recent times of 9,188 in 2009/10.

We do not therefore see evidence of a linkage between the number of PTDs (whether as a result of marketing/advertising of these or otherwise) and the level of credit union bad debt in Scotland. To the contrary, we believe that evidence such as the above supports the continued view of the 2008 consultation report of Credit Union debt in trust deeds that “There is little evidence that Credit Unions are disproportionately disadvantaged compared to other creditors.”

Legislative reform

We strongly believe that legislation should only be used to tackle issues where no other remedies are appropriate. Where there are perceived deficiencies in PTDs we believe that these may be capable of being tackled through a combination of voluntary actions from the relevant stakeholders and adaptations to the regulatory framework.

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5 Table 3.2 - Credit union annual statistics – 2018 (Bank of England)
6 Table 3.3 - Credit union annual statistics – 2018 (Bank of England)
7 Table 2.2 - Credit union annual statistics – 2018 (Bank of England)
8 Table 2.3 - Credit union annual statistics – 2018 (Bank of England)
9 Table 3.4 - Credit union annual statistics – 2018 (Bank of England)
Finally, in noting that the Scottish Government and Accountant in Bankruptcy will use responses to this inquiry to inform it approach to reform of PTDs, ICAS would once again stress its concerns over a piecemeal approach being taken to legislative change to debt solutions.

The recent evidence sessions of the Committee resulted in a commitment by Jamie Hepburn, Minister for Business, Fair Work and Skills, to an overarching and wide-ranging review of the personal insolvency landscape in Scotland. Whatever the outcome of this inquiry, ICAS would strongly advocate for wholesale review of debt solutions, as opposed to the amendment of trust deed legislation in isolation.

Issues which might be considered include:

- The need for a new debt solution focussed on consumer debt
- Consideration of the need to provide greater codification of trust deeds which are governed through a hybrid of common law, trust law, and insolvency law.
<table>
<thead>
<tr>
<th>Feature</th>
<th>Informal debt payment plan</th>
<th>DAS</th>
<th>PTD</th>
<th>Sequestration (debtor application)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level of repayments</td>
<td>Negotiated between debtor and creditor(s)</td>
<td>Determined by CFT</td>
<td>Determined by CFT</td>
<td>Determined by CFT</td>
</tr>
<tr>
<td>Interest and charges</td>
<td>By negotiation</td>
<td>Frozen, but able to be reapplied if DAS fails</td>
<td>Claim in PTD</td>
<td>Claim in sequestration</td>
</tr>
<tr>
<td>Creditor agreement</td>
<td>Specific agreement of affected creditors</td>
<td>Fair and reasonable test if one or more creditors object</td>
<td>Not required although creditors may object to trust deed becoming protected (requires majority of creditors in number or 1/3rd in value)</td>
<td>Not required</td>
</tr>
<tr>
<td>Duration</td>
<td>As long as necessary to meet negotiated position</td>
<td>As long as necessary to repay debt in full</td>
<td>4 Years</td>
<td>4 Years</td>
</tr>
<tr>
<td>Debtor discharge from debt</td>
<td>n/a</td>
<td>n/a</td>
<td>In accordance with terms of the trust deed. (Normally on successful completion of trust deed, and may be granted discharge from debt by the trustee where trust deed not successfully completed.)</td>
<td>Full sequestration - 12 months MAP - 6 months (Discharge granted at above periods at discretion of AiB)</td>
</tr>
<tr>
<td>Home</td>
<td>Excluded</td>
<td>Excluded</td>
<td>May be excluded</td>
<td>Vests in trustee</td>
</tr>
<tr>
<td>Acquirenda period</td>
<td>n/a</td>
<td>n/a</td>
<td>4 years</td>
<td>4 years</td>
</tr>
<tr>
<td>Debt level</td>
<td>No minimum or maximum debt level</td>
<td>No minimum or maximum debt level</td>
<td>£5,000 minimum debt level, No maximum debt level</td>
<td>£3,000 minimum debt level, Max £17,000 for MAP otherwise no maximum debt level</td>
</tr>
<tr>
<td>Credit rating</td>
<td>May be recorded on credit file and if done so likely to affect credit rating</td>
<td>Recorded on credit file and likely to affect credit rating</td>
<td>Recorded on credit file and likely to affect credit rating</td>
<td>Recorded on credit file and likely to affect credit rating</td>
</tr>
<tr>
<td>Credit during duration of debt solution</td>
<td>Subject to credit policy of lender</td>
<td>Subject to credit policy of lender</td>
<td>Subject to credit policy of lender</td>
<td>Must not obtain credit of more than £2,000 while an undischarged bankrupt without disclosing bankruptcy to lender.</td>
</tr>
<tr>
<td>Affects employment/directorships/public office</td>
<td>In limited circumstances</td>
<td>In limited circumstances</td>
<td>In limited circumstances</td>
<td>Possibly</td>
</tr>
<tr>
<td>Cost of debt solution approved by</td>
<td>Debtor</td>
<td>Set in statute (20%)</td>
<td>Creditors (AiB also have right of audit)</td>
<td>Creditors (or AiB if no commissioners elected)</td>
</tr>
<tr>
<td>AiB fees (assuming no commissioner)</td>
<td>n/a</td>
<td>2%</td>
<td>£100 pa</td>
<td>£100 pa</td>
</tr>
<tr>
<td>Cost to debtor</td>
<td>Negotiated with DPP provider</td>
<td>Nil (costs of process met by creditors)</td>
<td>Nil (costs of process met by creditors)</td>
<td>Nil (costs of process met by creditors)</td>
</tr>
</tbody>
</table>