

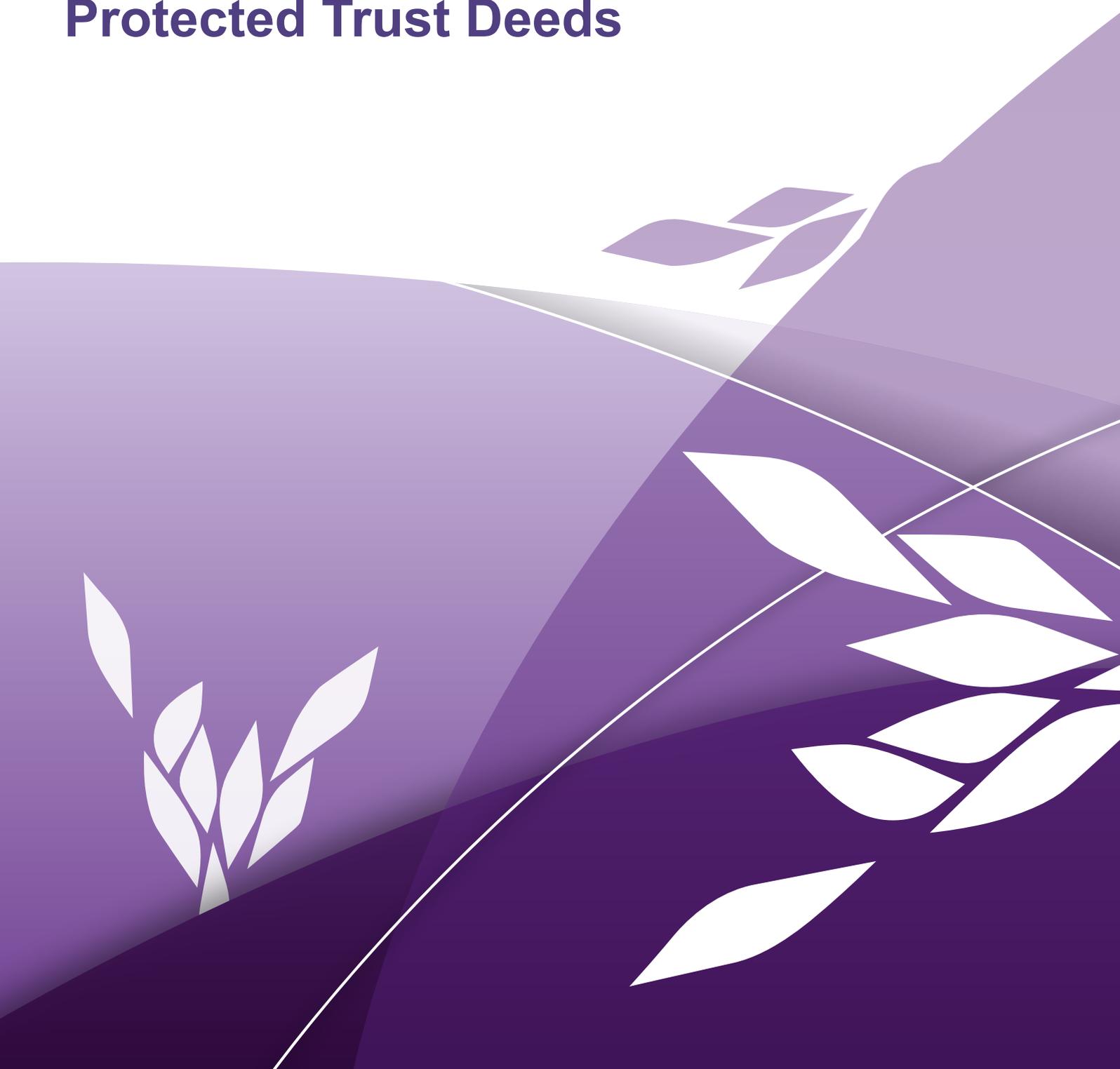


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# **Economy, Energy and Fair Work Committee** **Comataidh Eaconamaidh, Lùth is Obair Chothromach**

## **Protected Trust Deeds**



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# Economy, Energy and Fair Work Committee

Remit: To consider and report on economy and fair work matters falling within the responsibilities of the Cabinet Secretary for Economy, Fair Work and Culture; matters relating to the digital economy within the responsibilities of the Cabinet Secretary for Finance, and matters relating to energy falling within the responsibilities of the Minister for Energy, Connectivity and the Islands.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/economy-committee.aspx>



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# Executive Summary

1. In January 2020, the Economy, Energy and Fair Work Committee conducted a short focused inquiry into Protected Trust Deeds. It should be noted that all evidence was taken before the COVID-19 outbreak and therefore this report does not reflect the likely impact that the pandemic will have on the debt landscape in Scotland. The Committee is aware of concerns about mounting debt as a result of COVID-19 and acknowledges that new approaches may need to be considered across all debt solutions as a consequence. However, the Committee believes its conclusions in relation to Protected Trust Deeds remain relevant. The Committee's conclusions and recommendations are:

2. The Committee welcomes the Scottish Government's commitment to conduct an overarching debt review. The urgent undertaking of this review remains the Committee's primary recommendation and the evidence and conclusions noted in this report should be seen within this context. The Committee expects this review to be undertaken during the current parliamentary session and would welcome confirmation on the timescales for this work.<sup>i</sup>

3. The Committee firmly believes that when entering any debt solution, the debtor's payments should contribute to reducing their debt from the outset. The detriment to the debtor in a failed Protected Trust Deed is too severe and must be addressed.

4. The Committee recommends that the Accountant in Bankruptcy must be required to agree before a trustee can refuse to discharge a debtor in a Protected Trust Deed. The Accountant in Bankruptcy should develop clear criteria, based on fairness to the debtor, which would bring greater consistency in the discretion shown to clients who have experienced a change in circumstances.

5. The Committee notes that the Insolvency Practitioners Association already requires its members to only accept referrals from Financial Conduct Authority regulated lead generators. The Committee notes that the UK Government is expected to introduce a statutory regulation to ensure all insolvency practitioners abide by this practice - although no time scale has been set out. The Committee

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<sup>i</sup> As noted, the Committee's evidence was taken before the COVID-19 outbreak. The Committee acknowledges that COVID-19 has impacted the Scottish Government's planned work in all policy areas and will result in the reassessment of priorities for the remainder of this parliamentary session. However, as debt will become an even bigger issue due to COVID-19, the Committee remains committed to this recommendation and the urgency of this review should this be possible in the context of the response to COVID-19.

welcomes this development and recommends that the Scottish Government works with the UK Government to encourage its implementation.

6. The Committee also recommends that the Scottish Government works with the UK Government to extend Financial Conduct Authority regulation to include "effecting introductions to debt advice." This would require all lead generators to become regulated to operate legally.
7. The Committee does not doubt that insolvency practitioners follow the statements of insolvency practice and that Protected Trust Deed paperwork includes the necessary information for people in debt to make informed choices. However, the Committee is also convinced by the argument that the offering of free independent money advice is of benefit in bankruptcy and Debt Arrangement Scheme cases and, if applied to Protected Trust Deed cases, would go some way towards addressing the concerns of witnesses during this inquiry.
8. Witnesses highlighted the importance of debtor choice and, if the debtor is to have choice, they must be fully informed of all of their options. It is also vital that the debtor understands these options. It is far from clear that this is happening in many cases.
9. The Committee notes the significant increase in funding that would be required if all people experiencing problem debt were to seek independent free money advice before entering any of the three statutory debt solutions. However, it asks the Scottish Government to consider how access to free sector money advisers could be encouraged and built into the process before a debtor signs a Protected Trust Deed. The Committee recommends that different funding options should be explored to enhance the capacity of the free money advice sector, including the use of a levy on money paid through statutory debt options.
10. The Committee notes evidence from the Inverclyde focus group, where participants suggested that information about the benefits and risks of different statutory debt solutions should be given to everyone thinking about entering a Protected Trust Deed. The Committee agrees that a Scottish Government information leaflet which is presented in easily accessible language (in both print and digital formats) and signposts debtors to independent money advisers would be beneficial. The Committee recommends that trustees are required to issue this information leaflet to debtors before signing a Protected Trust Deed. The Committee also recommends that a cooling off period is put in place between receiving the leaflet and signing a Protected Trust Deed, to give debtors time to digest its contents. This would serve a different purpose from the current Debt Advice and Information Package.

11. The Committee understands that creditors and debtors can refer cases to the Accountant in Bankruptcy for audit where there are concerns about the fees charged. However, there is a cost attached to this, which may deter action. The Committee therefore recommends that the Accountant in Bankruptcy increases the number of self-initiated audits it carries out in order to monitor and discourage potential poor practice. The Accountant in Bankruptcy should also publish information about any trends it identifies so that insolvency practitioners, creditors and debtors can make themselves aware of any concerns.
12. As previously noted, the Committee firmly believes that when entering any debt solution, the debtor's payments should contribute to reducing their debt from the outset. The front-loading of fees means that debtors can pay instalments for over two years without paying off any of their debt. Whilst unproblematic in a successful Protected Trust Deed, the detriment to the debtor in a failed Protected Trust Deed is too severe. The Committee recommends that a staged fee payment structure is developed whereby a proportion of each payment goes to the creditors.
13. The Committee recommends that the minimum debt level to enter a Protected Trust Deed is increased to ensure there is more surplus income to repay the debt to creditors. However, Members are conscious that this may force more debtors into bankruptcy. The Committee therefore reiterates the importance of looking at the interaction between all statutory debt solutions via a general debt review. Appropriate options should be available for those who can no longer access a Protected Trust Deed. The Committee recommends that the need for an additional debt solution product should also be considered within the Scottish Government's debt review.
14. Committee members were concerned about the impact on family members of death during a Protected Trust Deed. On the one hand, it seems unfair that creditors who have agreed to be repaid via a Protected Trust Deed should get a windfall as a result of a death. On the other, it is recognised that the current legal framework requires debts to be settled before beneficiaries are entitled to receive anything from a deceased person's estate. The Committee recommends that the Scottish Government looks at whether Protected Trust Deed arrangements strike the appropriate balance in this area as part of its general debt review.
15. Both the consequence of a death on a Protected Trust Deed and the consequences of early settlement are impacted by the statutory interest rate. The Committee believes that the approach of using the longstanding 8% statutory interest level is not appropriate for insolvency cases as it is too high. This should be reviewed in relation to insolvency.

## Membership changes

16. The membership of the Committee changed during the course of this piece of work. Gordon Lindhurst, Jackie Baillie and Jamie Halcro Johnston left the Committee and Michelle Ballantyne, Rhoda Grant and Alison Harris joined the Committee. Michelle Ballantyne became the Committee's Convener on 3 March 2020.

# Introduction

17. There are rising levels of consumer debt in Scotland and growing numbers of people are seeking debt relief. Money Advice Scotland told the Committee that last year around 8,000 people entered a Protected Trust Deed, 150,000 people sought debt advice and beyond that 600,000 adults are considered to be over-indebted in Scotland. <sup>1</sup>
18. There are three statutory debt solutions in Scotland: sequestration (bankruptcy), the Debt Arrangement Scheme and Protected Trust Deeds. It is also possible for an informal arrangement to be negotiated with creditors. The key characteristics of these statutory debt solutions are:
  - Bankruptcy - All of the debtor's assets are managed by a trustee for the benefit of creditors for a four-year period. Contributions from income will also be required, where appropriate. Almost all outstanding debts are written off at the end of the four-year period, allowing the debtor to become debt free.
  - Debt Payment Programme under the Debt Arrangement Scheme - Debtors make payments over an extended period of time to pay off their debts. It can last for any "reasonable" time period, but the average is around seven years. Debts are not written off, so the scheme is only available to those who can repay in full over the length of the scheme.
  - Protected Trust Deed - As with bankruptcy, a debtor's assets are managed by a trustee for the benefit of creditors for a four-year period. Contributions from income will have to be sufficient to pay the trustee's fee and provide a return to creditors. Protected Trust Deeds are seen as offering more flexibility than bankruptcy.
  - Informal debt solutions - Most debtors appear to deal with their debt by negotiating lower repayments with their creditors, although not much is known about this option. These arrangements can be unstable, and do not prevent creditors from taking action to enforce their debts if they think they should be paid more.
19. In 2019, the Committee scrutinised the Debt Arrangement Scheme (Scotland) Regulations which proposed making changes to the Debt Arrangement Scheme through subordinate legislation. During this consideration, the Committee heard concerns about the way that Protected Trust Deeds were being marketed and promoted. Witnesses highlighted concerns about the detrimental impact of Protected Trust Deeds on both debtors and creditors.
20. The Committee agreed to carry out a short inquiry on Protected Trust Deeds. The remit of this piece of work was:
  - ” To ascertain the benefits and disbenefits of Protected Trust Deeds as a viable debt solution in the interests of people in debt and their creditors; and recommend how the Scottish Government and Accountant in Bankruptcy should proceed in any reform of the scheme.

21. The Committee sought the views of people living with debt who have experience of Protected Trust Deeds as well as debt advisers, creditors, regulators and the Accountant in Bankruptcy.

## **Lived experience - Inverclyde Community Hub**

22. As part of this inquiry, Committee members met with four people from the Inverclyde area who have experience of Protected Trust Deeds. Two money advisers from Inverclyde Health and Social Care Partnership also attended. The Committee acknowledges that the experience of the four participants involved cannot be considered as representative of the thousands of Protected Trust Deed cases processed each year in Scotland. However, it was struck by the strength of the evidence heard and the first-hand experience of both the people in debt and their money advisers. This has significantly aided the Committee's understanding of the issues and areas for change. The participants made suggestions on how their experience could have been improved and these will be noted throughout this report.

## Debt review

23. From the outset it is important to note that this inquiry should be viewed within the wider context of the Committee's work on debt, just as Protected Trust Deeds should be viewed within the wider framework of statutory debt solutions.
  24. The Committee has recommended on several occasions that a full review of statutory debt options is essential. The Committee's findings and recommendations in this report do not detract from or diminish the need for this review to be undertaken. Instead they reaffirm that small changes to Protected Trust Deeds could impact other debt solutions or create gaps. The debt landscape must be reviewed as a whole.
  25. The Scottish Government has committed to undertake this review. The Accountant in Bankruptcy confirmed that it was mindful of this commitment and is progressing proposals on individual debt solutions while thinking about how these solutions work together.<sup>2</sup>
  26. In evidence to this inquiry, the Institute of Chartered Accountants of Scotland noted that the timescale for this review has not yet been confirmed. It suggested an independent review should be undertaken at an early date.<sup>3</sup>
27. The Committee welcomes the Scottish Government's commitment to conduct an overarching debt review. The urgent undertaking of this review remains the Committee's primary recommendation and the evidence and conclusions noted in this report should be seen within this context. The Committee expects this review to be undertaken during the current parliamentary session and would welcome confirmation on the timescales for this work.<sup>ii</sup>

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ii As noted in the Executive Summary, the Committee's evidence was taken before the COVID-19 outbreak. The Committee acknowledges that COVID-19 has impacted the Scottish Government's planned work in all policy areas and will result in the reassessment of priorities for the remainder of this parliamentary session. However, as debt will become an even bigger issue due to COVID-19, the Committee remains committed to this recommendation and the urgency of this review should this be possible in the context of the response to COVID-19.

# The Benefits of Protected Trust Deeds

28. There can be no doubt that many people complete Protected Trust Deeds successfully, become debt-free and are afforded a fresh start. The majority of respondents to the Committee's call for views felt that Protected Trust Deeds offered a useful solution to debtors in the right circumstances. Many advantages were highlighted to the Committee: affordable monthly payments, stopping creditor contact, preventing legal action, a percentage of debt write off, protections to the family home and less perceived stigma than bankruptcy. There are some jobs which cannot be held by people who have become bankrupt and Protected Trust Deeds can be particularly useful in these circumstances.
29. Protected Trust Deeds are useful for some people. Last year around 8,000 people entered into Protected Trust Deeds.<sup>4</sup> Although the majority of respondents supported the use of Protected Trust Deeds when appropriate, a number of fundamental concerns were highlighted to the Committee. There was agreement that improvements could and should be made, but less consensus about how these could be made and what they should be.
30. When looking at how well Protected Trust Deeds are operating and any potential changes which should be made there are a range of different interest groups which must be considered. The Accountant in Bankruptcy has consulted on a number of potential reforms in response to ongoing criticisms regarding Protected Trust Deeds and outlined to the Committee the advantages and disadvantages of each proposal in response to these consultations.<sup>5</sup> The Committee considered the interests of the debtors, creditors, money advisers and insolvency practitioners during this inquiry.
31. Whilst the majority of respondents agreed that Protected Trust Deeds were useful in the right circumstances, a small number of respondents to the call for views questioned the overall role that Protected Trust Deeds play in relation to problem debt. Academics from Aberdeen University suggested that it was no longer clear that they provided a better return for creditors than bankruptcy.<sup>6</sup> Others did not go so far as to question their usefulness, but did have concerns that the role of different statutory debt solution has been blurred over the years with legislative changes making it less clear what purpose they serve and where there are gaps.

## Failed Protected Trust Deeds

32. The key concern for the free money advice sector is what happens when a Protected Trust Deed fails. In these cases, the consequences for the debtor are more severe than in any other debt solution.
33. This is because in the Debt Arrangement Scheme and an informal debt solution, debtors will have been contributing towards the repayment of their debts. Thus, they will owe less, even if they do not complete the arrangement. Bankruptcies do not “fail” (although it is possible for a trustee to withhold discharge due to non-co-operation).
34. If a Protected Trust Deed fails in the first two years, it is likely that all the money paid by the debtor will have been used to pay the trustee’s fees. This means that no money has been used to pay off the debt. Where a Protected Trust Deed fails after this point, some money may have been paid to creditors, but it will depend on the particular circumstances. The debtor can find themselves in a situation where they have been making payments, but are no further forward in dealing with their debt.
35. Money Advice Scotland told the Committee:
- ” It is fair to say that, when things go wrong, they go wrong considerably. If I were to mention another financial product whereby somebody could pay £3,000 or £4,000 and find themselves back to square one or worse, you would think that I was talking about a risk investment fund, rather than about a product that was designed to give people debt relief.<sup>7</sup>
36. Averaging the failure rate across the major providers of Protected Trust Deeds would suggest that it is currently in the region of 14% (of all cases since 2008). The Accountant in Bankruptcy’s annual report noted that 1,595 Protected Trust Deeds failed in 2018/19 and 1,743 failed in 2017/18.<sup>8</sup> This has been argued to compare favourably to the Debt Arrangement Scheme. The Institute of Chartered Accountants of Scotland noted that the Debt Arrangement Scheme has a failure rate of 40%.
37. For free sector money advisers, the number of people who experience harm through Protected Trust Deeds was less important than the level of harm experienced. Money Advice Scotland said that it was unsure “how widespread the harm is, but we should be sufficiently concerned by the level of harm when things go wrong and the impact on people in debt”.<sup>9</sup>
38. The Committee was told about cases where the Protected Trust Deed failed and debtors became responsible for paying their debt in full again. Lee Kilgallon (a local authority money adviser) acknowledged that money advisers tend to only see Protected Trust Deeds when they fail which may give a skewed perspective of the scale of the problem. He also said:
- ” However, when we see them fail, we see that they do so very badly. People think that they are going somewhere for help, but they are simply not getting it.

39. The Accountant in Bankruptcy told the Committee that one of its primary concerns is fairness to the debtor. It said:

” Proposals where someone makes 48 monthly payments, 40 of which are simply to cover the costs of the process seem quite hard to defend. <sup>11</sup>

40. The Committee firmly believes that when entering any debt solution, the debtor's payments should contribute to reducing their debt from the outset. The detriment to the debtor in a failed Protected Trust Deed is too severe and must be addressed.

## Why do Protected Trust Deeds fail?

41. There was agreement that a failed Protected Trust Deed was not a good outcome for the debtor or creditor. A key question for the Committee and respondents to the call for views was the cause of Protected Trust Deeds failing. Some argued that they fail because they are mis-sold and adequate advice has not been given at the outset. <sup>12</sup> For others it was due to a change of circumstances for the debtor, which meant that payments could no longer be made. <sup>13</sup> Some respondents argued that insolvency practitioners had different approaches to the discharge process and opinion varied about whether or not a client was co-operating with the trustee.
42. The Committee heard from both the Accountant in Bankruptcy and the insolvency practitioner regulatory bodies that a Protected Trust Deed should only fail (i.e. the debtor is refused discharge from their debts) where the debtor has been non-co-operative. The Accountant in Bankruptcy's guidance and the guidance issued by the professional bodies is clear on this point. The Accountant in Bankruptcy told the Committee that a Protected Trust Deed should not fail because of a genuine change in circumstances. Debtors who find themselves in this situation should be allowed to continue their Protected Trust Deed with a reduced (or no) payment to creditors. <sup>14</sup> However, it would appear there is individual judgement in the degree to which a debtor is co-operating. <sup>15</sup>
43. Some responses to the call for views also highlighted inconsistency in the way insolvency practitioners treat debtors who can no longer pay their Protected Trust Deed contribution. Where a debtor does not contact their insolvency practitioner to explain their situation, it may be treated as non-co-operation. Some insolvency practitioner firms have much higher Protected Trust Deed failure rates than others. <sup>16</sup>
44. Among focus group participants there was agreement that the Protected Trust Deed experience was dependent on the insolvency practitioner. Some were described as patient and flexible, "they took care of things and there were no late fees. They helped recalculate when their wage was being received 4-weekly, but payment was being taken monthly." Others did not feel that was reflective of their experience, where there was no sympathy for circumstances. <sup>17</sup>
45. The Institute of Chartered Accountants of Scotland described "wilful non-compliance" as:

” failure to continue to communicate and failure to provide appropriate information. It is not about not paying; it is when someone is simply not engaging. A person might hide assets or falsify their income or expenditure, but that is less likely these days. <sup>18</sup>

46. KPMG LLP told the Committee:

” It is our position that if a debtor can demonstrate that they “can’t” pay then the Protected Trust Deed should not fail and assuming co-operation from the debtor they will receive their discharge at the end of the Protected Trust Deed term, notwithstanding that the originally projected return to creditors has not been delivered. This is not universally adopted in the profession and change could be considered here. <sup>19</sup>

47. Among focus group participants, there was a sense of desperation about changes in circumstances and misunderstanding about what to do during periods of illness or the loss of employment. All participants highlighted how struggling with debt had impacted on their health. Several had received treatment for depression or anxiety. One participant said that they had struggled to continue to pay towards their Protected Trust Deed for a year after losing their job. They were later advised that they did not need to make payments when their only income was social security benefits, but this was not made clear. <sup>20</sup>

## The discharge process

48. The money advisers who participated in the Committee's focus group highlighted that it is very quick to enter a Protected Trust Deed, but complicated to get out of it. <sup>21</sup>

49. Several money advice respondents called for greater action from the Accountant in Bankruptcy with more involvement in the discharge process. It was felt that where a trustee refused to discharge a debtor, the Accountant in Bankruptcy should be able to review the situation and intervene. Alan McIntosh noted:

” The Accountant in Bankruptcy as a Regulator must be more involved in approving the refusal of a discharge, with a stronger obligation on them to issue directions where necessary, including a direction to set a “nil contribution” order where appropriate. <sup>22</sup>

50. Citizens Advice Scotland called for the Accountant in Bankruptcy to work with their equivalent in England (the Insolvency Service) to create an independent complaints body. Citizens Advice Scotland felt that such a body should be able to discharge the debtor from their debts or restore them to the position they were in before they entered a Protected Trust Deed if it did not believe that the Protected Trust Deed was in the consumer's best interests. The powers needed would be similar to those held by the Financial Ombudsman Service. <sup>23</sup>

51. The Accountant in Bankruptcy noted that the biggest issue behind failure rates is individuals who stop making payments and do not contact the insolvency practitioner. They said that in these circumstances it is "hard to see what alternative

we [the Accountant in Bankruptcy] can put in place unless the individual is prepared to re-engage with the process." <sup>24</sup>

52. However, as highlighted, some witnesses felt that there was individual judgement and discretion regarding the approach to the discharge process. Citizens Advice Scotland said, "there is a level of inconsistency between different insolvency firms and their approach to failure." <sup>25</sup>

53. Alan McIntosh told the Committee:

” ...free sector money advisers do come across significant number of cases where consumers have been refused discharges, through no fault of their own, and as result have seen years of contributions go nowhere to reducing their debts. <sup>26</sup>

54. The Committee recommends that the Accountant in Bankruptcy must be required to agree before a trustee can refuse to discharge a debtor in a Protected Trust Deed. The Accountant in Bankruptcy should develop clear criteria, based on fairness to the debtor, which would bring greater consistency in the discretion shown to clients who have experienced a change in circumstances.

# Regulatory Environment

55. The Financial Conduct Authority is responsible for regulating the provision of financial services in the UK. It regulates most financial products and most forms of financial advice. It sets a range of standards, which focus on treating customers fairly. Free sector money advice organisations must be authorised by the Financial Conduct Authority before they can give money advice.
56. Insolvency practitioners are exempt from requiring Financial Conduct Authority authorisation in certain circumstances.<sup>iii</sup> This means that unlike free sector money advice organisations, insolvency practitioners can advise on bankruptcy and Protected Trust Deeds without being authorised by the Financial Conduct Authority.
57. However, insolvency practitioners are required to be members of a recognised professional regulatory body. The Insolvency Practitioners Association is the regulator covering most of the insolvency practitioners offering Protected Trust Deeds. The Institute of Chartered Accountants of Scotland told the Committee that the Insolvency Practitioners Association regulates trustees in 88% of all Protected Trust Deeds, with the Institute of Chartered Accountants of Scotland regulating most of the remainder.<sup>27</sup>
58. Insolvency practitioners must follow sector-wide guidance. Of particular relevance to Protected Trust Deeds are Statement of Insolvency Practice 3.3 (on trust deeds) and Statement of Insolvency Practice 9 (on payments to insolvency office holders).<sup>28</sup> Each regulatory body also produces an ethics code.
59. The regulatory bodies stated that they have reviewed their processes in relation to concerns about Protected Trust Deeds (and the English equivalent – Individual Voluntary Arrangements). In particular, the Insolvency Practitioners Association is increasing the number of checks on high volume Protected Trust Deed and Individual Voluntary Arrangement providers.<sup>29</sup> The Institute of Chartered Accountants of Scotland told the Committee that the Joint Insolvency Committee undertakes a continuous programme of review and in 2019 has been looking at whether there is a need to amend the Statements of Insolvency Practice. Changes are also being introduced to a revised Insolvency Code of Ethics, which the Institute of Chartered Accountants of Scotland suggested offer greater clarity on the use of advertising.<sup>30</sup>
60. The Institute of Chartered Accountants of Scotland said that minor issues are sometimes uncovered during conduct monitoring and these are set out in insolvency monitoring reports which are published online.<sup>31</sup> Michelle Thorp at The Insolvency Practitioners Association told the Committee:

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<sup>iii</sup> Insolvency practitioners are not covered by Financial Conduct Authority rules when administering a bankruptcy or Protected Trust Deed. They can also act in the initial stages of a bankruptcy or Protected Trust Deed (e.g. gathering information about a potential client) without needing authorisation where they would expect to be appointed to administer the process should it proceed.

” we [the Insolvency Practitioners Association] are not seeing from our monitoring visits significant, endemic and sanctionable issues.<sup>32</sup>

61. The regulation of insolvency practitioners is overseen by the UK Government body the Insolvency Service. Competence to legislate in this area is reserved.
62. The Accountant in Bankruptcy has a supervisory role in relation to how insolvency practitioners administer Scottish statutory debt solutions. It can issue binding directions to insolvency practitioners in individual cases and provides general guidance. The Accountant in Bankruptcy also has the power to audit the accounts of a Protected Trust Deed trustee. However, if this is requested by a debtor or creditor, they must pay a fee.

## Marketing and lead generation

63. A major concern for stakeholders generally and linked to the perceived reasons for Protected Trust Deed failure, is the use of marketing. The Committee was told that online advertising targets people in debt and can direct people towards Protected Trust Deeds when this is not the most appropriate solution for them.
64. It is suggested that a high volume Protected Trust Deed providers buy information about potential customers from “lead generators”. These organisations advertise debt services and get debtors to provide their personal details.
65. It is alleged by Citizens Advice Scotland that insolvency practitioners can pay £1,000 for such a contact <sup>33</sup> (Money Advice Scotland put the figure at £2,000 <sup>34</sup> ). It has been suggested that, once an insolvency practitioner has paid that sort of figure, they will be keen to ensure that the client does end up in a Protected Trust Deed where they can earn fees.
66. Citizens Advice Scotland suggested that Protected Trust Deeds are "relentlessly advertised" on television, radio, billboards, online and via cold calling. It noted that many adverts promise "a government backed scheme that allows people to write off 80% of their debt." <sup>35</sup>
67. The Accountant in Bankruptcy said that when it finds misleading adverts it reports the website to the Advertising Standards Authority and the Financial Conduct Authority. It has had around 50 websites taken down in the last year, but "as soon as you take one website down, another one goes up...it is a bit like playing whack-a-mole." <sup>36</sup>
68. Association of British Credit Unions Ltd told the Committee that it was "astonishing" that given the insolvency regulatory framework "we do not know on whose behalf those 50 websites were operating, or with whom they had relationships". <sup>37</sup> It suggested that:
- ” no agency is holding to account the firms that, I presume, take leads from those lead generators in exchange for money. That is of concern. <sup>38</sup>
69. The Institute of Chartered Accountants of Scotland remain unconvinced that there is any evidence of widespread consumer harm as a result of the marketing and advertising of Protected Trust Deeds. It is also unaware of any empirical evidence which supports the view that they are being "mis-sold". <sup>39</sup> However the Institute of Chartered Accountants of Scotland did note concerns about the regulation of the lead generator sector in respect to debt advice activity. <sup>40</sup>
70. Insolvency practitioners are professionally responsible for ensuring that clients receive advice on all their options and understand the consequences of any decision they make. However, Citizens Advice Scotland noted:

- ” People are particularly susceptible at this point to a partial representation of their options and the offer of 80% debt relief. For that reason consumers must be given accurate and reliable information at this first point of contact, as this is when expectations are set as to what the Protected Trust Deed will achieve. A follow up telephone call or meeting with the insolvency practitioner, or an expectation that the consumer will inform themselves by reading the small print is not an acceptable back up if partial advice and unrealistic expectation have been given early in the process, by an unreliable actor. <sup>41</sup>
71. Many organisations advertise help with debt. However, there is a perception that rather than providing information about all the options, these bodies channel people towards Protected Trust Deeds (or Individual Voluntary Arrangements in England and Wales). Essentially, they collect enough information to establish that someone can qualify for a Protected Trust Deed, then sell the lead to an insolvency practitioner business. Provision of generic debt information does not require Financial Conduct Authority authorisation, which means that these organisations can operate without the need to demonstrate that they are acting in the interests of customers. This may leave an opportunity for poor practice.
72. One anonymous respondent, who worked as an insolvency practitioner said:
- ” Introducers market their services in such a way as to promote Protected Trust Deeds ahead of other debt solutions, which may be more appropriate, and offer a better return to creditors. The staff they employ are set targets and receive bonuses linked to the number of Protected Trust Deeds sold to providers; their business is the sale of Protected Trust Deeds. Given this, it is highly questionable as to whether the advice they provide to debtors is balanced and impartial. <sup>42</sup>
73. In response to the concerns of the free money advice sector about advertising and lead generation, Google has recently stated that it will only take debt advice ads from Financial Conduct Authority regulated businesses, or insolvency practitioners. <sup>43</sup> Similarly, the Insolvency Practitioners Association has changed its requirements to provide that members can only take leads from Financial Conduct Authority regulated businesses. <sup>44</sup>
74. However, some stakeholders argue that the adverts have simply moved to Facebook, Instagram and other online platforms. Inverclyde focus group participants all said that they first heard about Protected Trust Deeds from social media adverts or online searches. <sup>45</sup>
75. Money Advice Trust told us that it wanted "fundamental reforms" so that lead generators cannot state they offer "debt advice" unless they are authorised to do so, cannot make misleading claims about what is on offer and cannot claim to be a charity or to be providing government-supported advice. <sup>46</sup> They called for all lead generators to be required to seek Financial Conduct Authority permission to operate, so that these standards could be enforced. <sup>47</sup>
76. R3 (a professional association for insolvency practitioners) notes that paying for leads used to be banned in Scotland. However, the practice was allowed in England and as a result it was believed to be putting Scottish insolvency practitioners at a

disadvantage. The ban was therefore removed.<sup>48</sup> Some witnesses felt that advertising had benefits as it encouraged people to deal with their debt problem.<sup>49</sup> It was felt that many people with debt problems do not seek advice at an early stage, so anything which reduced the stigma associated with this was positive.

77. KPMG LLP told the Committee that the Insolvency Code of Ethics already sets out that advertising by insolvency practitioners should be “legal, decent, honest and truthful”. KPMG LLP support strong penalties for those whose advertising is found to not abide by these principles.<sup>50</sup>

78. The Committee notes that the Insolvency Practitioners Association already requires its members to only accept referrals from Financial Conduct Authority regulated lead generators. The Committee notes that the UK Government is expected to introduce a statutory regulation to ensure all insolvency practitioners abide by this practice - although no time scale has been set out.<sup>51</sup> The Committee welcomes this development and recommends that the Scottish Government works with the UK Government to encourage its implementation.

79. The Committee also recommends that the Scottish Government works with the UK Government to extend Financial Conduct Authority regulation to include "effecting introductions to debt advice."<sup>52</sup> This would require all lead generators to become regulated to operate legally.

## Money Advice and mis-selling

80. Linked to the marketing of Protected Trust Deeds is ensuring the debtor receives appropriate advice before entering a Protected Trust Deed. A debtor must have received money advice before entering any of the three formal debt solutions, including Protected Trust Deeds. With a Protected Trust Deed this will usually come from an insolvency practitioner (or someone working for them).
81. Responses from money advice organisations and credit unions to the Committee's call for views suggested that some debtors are entering Protected Trust Deeds when this is not the most appropriate debt solution for them. Many respondents questioned whether debtors received full advice on all their options before entering a Protected Trust Deed.<sup>53</sup> Citizens Advice Scotland noted that people were particularly vulnerable to partial information at this stage and they would not necessarily be aware of alternatives themselves.<sup>54</sup>
82. The idea of mis-selling was contentious among respondents. Some felt there was no evidence that Protected Trust Deeds are mis-sold, instead they saw any failure as a result of changed circumstances or non-cooperation. Bob Russell, a money adviser from Falkirk Council disagreed. He told the Committee that all money advisers at Falkirk Council had experience of Protected Trust Deeds that:
- ” should never have existed in the first place because it was neither viable or sustainable and the money was not there to pay it.”<sup>55</sup>
83. Money Advice Scotland also told the Committee that Protected Trust Deeds typically fail because the initial assessment of affordability was unrealistic.<sup>56</sup>
84. HM Revenue and Customs highlighted cases where the debtor's only source of income was state benefits, and others where the household income was made from a low level of earned income supplemented through state benefits. The Committee was told that "neither case can be considered as providing a sound financial basis on which to proceed with the Trust Deed."<sup>57</sup> UK Finance agreed that there must be a "rigorous and robust assessment of the customer's finances to ensure that a sustainable repayment programme can be maintained."<sup>58</sup>
85. Nevertheless, the Accountant in Bankruptcy, insolvency practitioners and Recognised Professional Bodies all suggested that there is no body of evidence to suggest that large numbers of people are being put into inappropriate products and witnesses did not agree on the extent of this problem.<sup>59</sup>
86. Money adviser Alan McIntosh highlighted that some individual providers have had a historic failure rate as high as 88%.<sup>60</sup> However, insolvency practitioner respondents highlighted much lower rates of failure within their firms. The Accountant in Bankruptcy said that he "would be hesitant to reach the conclusion that failures are necessarily a result of mis-selling."<sup>61</sup>
87. Under their professional requirements, insolvency practitioners are personally responsible for ensuring clients are fully advised. The professional regulatory bodies state that they carry out regular monitoring of the quality of advice and

uncover few concerns. The Accountant in Bankruptcy told the Committee that before a Protected Trust Deed is granted, the insolvency practitioner must give advice about the conditions and consequences of entering a Protected Trust Deed; provide advice on alternatives including bankruptcy and the Debt Arrangement Scheme; and supply a copy of the Scottish Government's Debt Advice and information Package (a statutory advice leaflet).<sup>62</sup> This leaflet highlights the consequences when creditors take action to enforce payment of their debts.

88. The Protected Trust Deed clients that Committee members spoke to at its focus group did not generally remember being offered advice on alternatives, although they acknowledged that this may have been covered in telephone calls or small print.<sup>63</sup>
89. The professional regulatory bodies noted that, without further authorisation by the Financial Conduct Authority, insolvency practitioners were not in a position to offer the Debt Arrangement Scheme. It has been suggested that this may result in insolvency practitioners tending to recommend Protected Trust Deeds over other debt options.
90. Carrington Dean noted that of the 40,000 inquiries it takes from consumers, 93% are advised that a Protected Trust Deed is not in their best interests. It said that people are talked through all of their options<sup>64</sup> and described this as a "stringent" process.<sup>65</sup> Carrington Dean is the biggest provider of Protected Trust Deeds in Scotland and is regulated by both the Financial Conduct Authority and the Insolvency Practitioners Association. They are therefore in a position to offer advice on alternative solutions, such as the Debt Arrangement Scheme.<sup>66</sup>
91. The Insolvency Practitioners Association noted in its Volume Provider Regulation Scheme 2019 Benchmark report that during 2020 its focus will be on early failure cases in order to determine if there are any links to the initial advice or other apparent trends, including vulnerability.<sup>67</sup>
92. Some stakeholders were less concerned about whether the advice had been issued either verbally or in writing, but rather questioned the extent to which this had been understood by the person entering into the Protected Trust Deed. The Accountant in Bankruptcy noted:
- ” people who are in debt are quite often vulnerable and frantic, and want something to be done straight away to help them. Do they fully understand what has been discussed before signing? Do they take it in and ask questions about it? The question for us is how far we should go to check that.<sup>68</sup>
93. Money advisers agreed, highlighting that:
- ” A client who feels that they are on the verge of losing everything - their home and their family - will sign up to whatever someone asks them to sign up to.<sup>69</sup>
94. The Inverclyde focus group participants all described the sense of relief that they felt when promised that the debt would disappear completely if they entered a Protected Trust Deed. There would be no more chasing letters, emails and phone calls “everything would be taken care of with one simple payment.” Participants said the insolvency practitioners are “good at what they do and telling you what you want

to hear". They make themselves "sound like heroes". The online adverts have trust pilot reviews and feedback quotes so they look legitimate. <sup>70</sup>

95. The focus group participants suggested that there should be a Scottish Government leaflet issued to everyone entering a statutory debt solution. This would highlight the key benefits and risks in easily accessible language and should be also be available in doctors' surgeries and libraries. The leaflet should be short, include graphics and signpost to independent money advisers for follow-up questions and information. Trustees would be required to issue this leaflet to debtors before signing a Protected Trust Deed. It was felt that the Scottish Government's Debt Advice and Information Package did not cover these matters. <sup>71</sup>

## Debtor choice

96. The Institute of Chartered Accountants of Scotland emphasised the need for debtor choice. It noted that, often, a debtor would have more than one option to deal with their debt problem and suggested policy makers should allow a debtor to exercise choice in this situation. The Institute of Chartered Accountants of Scotland noted it is unlikely for there to be a "right or wrong solution." <sup>72</sup>
97. Creditors are likely to get a greater return if a debtor enters the Debt Arrangement Scheme rather than a Protected Trust Deed. However, many debtors cannot pay their debts in full over a reasonable time, so cannot meet the legal requirements to access the Debt Arrangement Scheme. Bankruptcy may be an alternative for these debtors.
98. Debtors tend to pay back their debts over a longer period of time in the Debt Arrangement Scheme. Insolvency practitioners highlighted that being debt free quicker was an advantage of Protected Trust Deeds for many debtors who could also access the Debt Arrangement Scheme.
99. The Accountant in Bankruptcy has consulted on the possibility of it having a generic power to refuse protection in cases where the Accountant in Bankruptcy does not think that a Protected Trust Deed is the right solution. It said that stakeholders had concerns that this could leave individuals at risk if they have gone through the process of seeking debt advice and think that they have found a solution, only to be told that it is not the right product and they must start again. <sup>73</sup>

## Compulsory independent advice

100. There is already a legal requirement for a debtor to have received money advice before they enter a statutory debt solution. Free sector money advisers can provide this for bankruptcy and the Debt Arrangement Scheme. However, it is usually an insolvency practitioner (or someone who works for them) who provides it for Protected Trust Deeds.
101. Some money advisers called for a requirement for independent, free sector money advisers to offer advice before a Protected Trust Deed could be considered. Given

the sector's role in bankruptcy and the Debt Arrangement Scheme, witnesses questioned why Protected Trust Deeds should be treated differently.<sup>74</sup>

102. However, this raised significant resource questions. The Committee heard from Money Advice Scotland that there was already unmet demand for debt advice.<sup>75</sup> Scottish Government figures suggest that 14% of people in Scotland are in problem debt. Only one fifth of those seek help from the free money advice sector.<sup>76</sup> All of the Committee's focus group participants said that they were previously unaware that they could get free money advice and only became aware by speaking to colleagues, family and friends.<sup>77</sup>
103. Insolvency practitioners highlighted that Protected Trust Deed numbers are currently larger than for other statutory debt solutions and demand is high. It was suggested that free sector agencies would be unable to meet demand if insolvency practitioners stopped acting.<sup>78</sup> Anna Hamilton from Citizens Advice Edinburgh told the Committee that they currently deal with the "mop-up" when Protected Trust Deeds have not completed and offer advice to small numbers of clients who are seeking advice at an early stage, but said "it would be a huge leap for the free advice sector to see everybody who is affected."<sup>79</sup>
104. Additional resource would be required by the free money advice sector if it was to offer advice to everyone seeking to enter a statutory debt solution. Funding to the free money advice sector mainly comes from local authorities and several witnesses highlighted concerns about cuts to funding.<sup>80</sup>
105. A money adviser at the City of Edinburgh Council told the Committee:
- ” when I started 15 years ago, there were 19 full-time money advisers in the advice shop...Until recently, we had three advisers. We recently appointed three new advisers, and it will take six months to a year to get them up to speed...Will we go back to the days of having 19 money advisers? I do not see that happening.<sup>81</sup>
106. The Accountant in Bankruptcy highlighted that if someone wants to see an adviser at their local Citizens Advice Bureau, they may wait several weeks for an appointment. Whereas a Protected Trust Deed company can probably talk to the individual immediately.<sup>82</sup>
107. All focus group participants agreed that independent, free sector money advice was hugely beneficial. They told the Committee that they wished they had known that they could seek advice earlier and thought it would be helpful if there was a requirement to speak to an independent, free sector money adviser before signing-up to any statutory debt solution.<sup>83</sup>

108. The Committee does not doubt that insolvency practitioners follow the statements of insolvency practice and that Protected Trust Deed paperwork includes the necessary information for people in debt to make informed choices. However, the Committee is also convinced by the argument that the offering of free independent money advice is of benefit in bankruptcy and Debt Arrangement

Scheme cases and, if applied to Protected Trust Deed cases, would go some way towards addressing the concerns of witnesses during this inquiry.

109. Witnesses highlighted the importance of debtor choice and, if the debtor is to have choice, they must be fully informed of all of their options. It is also vital that the debtor understands these options. It is far from clear that this is happening in many cases.

110. The Committee notes the significant increase in funding that would be required if all people experiencing problem debt were to seek independent free money advice before entering any of the three statutory debt solutions. However, it asks the Scottish Government to consider how access to free sector money advisers could be encouraged and built into the process before a debtor signs a Protected Trust Deed. The Committee recommends that different funding options should be explored to enhance the capacity of the free money advice sector, including the use of a levy on money paid through statutory debt options.

111. The Committee notes evidence from the Inverclyde focus group, where participants suggested that information about the benefits and risks of different statutory debt solutions should be given to everyone thinking about entering a Protected Trust Deed. The Committee agrees that a Scottish Government information leaflet which is presented in easily accessible language (in both print and digital formats) and signposts debtors to independent money advisers would be beneficial. The Committee recommends that trustees are required to issue this information leaflet to debtors before signing a Protected Trust Deed. The Committee also recommends that a cooling off period is put in place between receiving the leaflet and signing a Protected Trust Deed, to give debtors time to digest its contents. This would serve a different purpose from the current Debt Advice and Information Package.

## Trustee fees

112. Trustees are paid fees for administering a Protected Trust Deed. They are able to charge a one-off fixed fee at the beginning of the process. They can also charge an ongoing percentage (usually 20%) of the money collected to repay debts.
113. Trustees can also recoup "outlays". These are sums paid to third parties for services to the trustee. They would cover things like a house valuation, or fees for legal services. However, it also appears that some trust deeds feature fees for things that may be provided in-house, such as storage, software and management.
114. When Protected Trust Deeds were last reformed in 2013, changes were made to address concerns that fees were too high, unpredictable and not transparent. The hourly rate fee was replaced with a single upfront fee, plus a percentage share of the money raised from the debtor. This was intended to make costs more transparent to creditors and debtors.
115. It has been suggested that, to compensate for their reduced direct fee income, insolvency practitioners are charging out more of their office overheads as outlays. Some creditors question how these sums are calculated and whether they are genuinely incurred.<sup>84</sup> In response to the Committee's call for views, creditors' main concerns were about the level of fees generally, and about an increase in outlays to third parties specifically. The Association of British Credit Unions Ltd cited examples of fees, which included an "anti-money laundering check fee £72; case management fee £150; case management monthly fee £285; courier charges £114; credit search fee £114; 'Echosign' £96; packaged bank account review fee £90; permanent trustee fee £1440; Payment Protection Insurance search fee £360; advertising £35; bond £20; storage costs £300."<sup>85</sup>
116. A constituent who has experienced problems with a Protected Trust Deed shared the original paperwork and case files with the Committee. It was hugely beneficial for the Committee to see the paperwork and understand what information the client received. In this example software fees, Payment Protection Insurance review fees and courier fees were all listed as additional costs to Protected Trust Deed.<sup>86</sup>
117. The Accountant in Bankruptcy also noted this trend, but suggested that there is no hard evidence to suggest that the fees are unjustified or imply "some sort of super-profiteering."<sup>87</sup>
118. Increasing outlay charges is also an issue in Individual Voluntary Arrangements in England and Wales. The Insolvency Service is working with professional regulatory bodies to address it and the Accountant in Bankruptcy reported that it was involved in this work. The Insolvency Practitioners Association suggested that "a more full fixed fee that covers most, if not all, costs has been a positive step in England and Wales under the Individual Voluntary Arrangement model, and it might be right in Scotland."<sup>88</sup> However, the 2013 reforms to Protected Trust Deeds that introduced a fixed fee in Scotland have not stopped outlay or disbursement charges.
119. Capital Credit Union and the Building Society Association were also concerned by increased Accountant in Bankruptcy fees. Capital Credit Union told the Committee

that previously there was no charge to set up a Protected Trust Deed and now the charge is nearly £500 per case.<sup>89</sup>

120. The Accountant in Bankruptcy noted that a proportion of the Protected Trust Deed payment could go to the trustee and a proportion to the creditor. It said that:

” A minimum dividend could be specified, or it could be specified that a fixed percentage of every payment had to go to the creditor, as happens under the debt arrangement scheme. That would be an option.<sup>90</sup>

121. Money advisers and creditors agreed that fees should not be "front loaded". Lee Kilgallon told the Committee that:

” At the very least, a percentage should be put towards the fees, a percentage should be used for creditor payments and a percentage should go towards buying out equity [in a home] in order to address the main concern that most clients have [whether they will lose their house].<sup>91</sup>

122. Others noted that this might be problematic for the trustees. Anna Hamilton, a money adviser at Citizens Advice Edinburgh acknowledged that fees tend to be front loaded as the majority of the work fact finding and establishing the client's position is done during the early stages.<sup>92</sup>

123. The Institute of Chartered Accountants of Scotland told the Committee that "there is a fallacy around the volume of the trust deed fees"; Protected Trust Deeds "tend to have a fixed fee of around £2,500".<sup>93</sup>

124. The Accountant in Bankruptcy highlighted cases where checks on routine annual returns provided by trustees had revealed issues. In one case the trustee had increased their fixed fee in a substantial number of cases. Following investigation, a total sum of £60,760 (over a number of cases) was disallowed as it was found that the trustee had not obtained agreement from the Accountant in Bankruptcy or creditors. In another case, checks on routine trustee returns revealed that a trustee was adding an outlay for death and terminal illness cover in their Protected Trust Deed cases. The fee was put in place to cover the dividend payment to creditors in the event of the debtor's death during the Protected Trust Deed. The Accountant in Bankruptcy instructed the trustee that the fee was not appropriate and that they should no longer charge this fee.<sup>94</sup>

125. The Committee understands that creditors and debtors can refer cases to the Accountant in Bankruptcy for audit where there are concerns about the fees charged. However, there is a cost attached to this, which may deter action. The Committee therefore recommends that the Accountant in Bankruptcy increases the number of self-initiated audits it carries out in order to monitor and discourage potential poor practice. The Accountant in Bankruptcy should also publish information about any trends it identifies so that insolvency practitioners, creditors and debtors can make themselves aware of any concerns.

## Creditors

126. When a debtor enters a Protected Trust Deed, there is also an impact on the creditor. The Credit Unions noted low returns through Protected Trust Deeds and argued that they are particularly vulnerable to default on loans through Protected Trust Deeds. Such defaults must be covered by the profits made by the credit union, thus reducing the services they can provide in the community. Credit unions are smaller than mainstream financial institutions and are limited by legislation as to how much interest they can charge. They argue that this means they cannot absorb bad debt to the same degree as larger institutions.
127. From a creditor perspective, the main disadvantage of Protected Trust Deeds is that a significant part of what the debtor pays goes towards trustee fees. The Accountant in Bankruptcy's response to the Committee highlights some figures for returns to creditors. It notes that, in 2018-19, of the £67 million collected from debtors, £43 million went on fees and £24 million was repaid to creditors.<sup>95</sup> This was in contrast to the Debt Arrangement Scheme, where 78% of the money paid by the debtor was used to repay the debt. ScotWest Credit Union noted that it routinely receives an average of 11% of the outstanding debt in Protected Trust Deeds.<sup>96</sup>
128. The Credit Unions also suggested that their customers often thought they were repaying more money to their creditors than they were. They did not understand how much of what they were paying went on trustee fees.<sup>97</sup>
129. However, some other stakeholders argue that credit unions are suffering as a result of poor lending decisions. It was suggested that they needed to make changes to their business model – for example by making greater provision for bad debt or tightening their lending criteria. Alan McIntosh suggested that the risk to credit unions in the lending market had increased and is nothing to do with personal insolvency.<sup>98</sup>
130. Insolvency practitioner Harper McDermott analysed their Protected Trust Deed case load. It noted debts to credit unions appeared in 13% of their Protected Trust Deeds which represented 1.8% of the debt in their case load. Harper McDermott was of the view that this showed credit unions were not disproportionately affected by Protected Trust Deeds. It highlighted the importance of credit unions conducting thorough affordability checks.<sup>99</sup>
131. The insolvency practitioners also argued that creditors are likely to see better returns from debtors with Protected Trust Deeds than in a bankruptcy, which would be the main alternative for most debtors entering a Protected Trust Deed.
132. Credit unions made a number of proposals in relation to reforming how fees were charged. It was suggested that the up-front fee should be removed so that trustees would receive a proportion of the amount collected from the debtor. This would ensure bulk of repayments went to creditors. It would also give trustees an interest in the on-going affordability and sustainability of the arrangement. However, others suggested that it may mean that it was no longer viable to offer Protected Trust Deeds in a number of situations.

133. As previously noted, the Committee firmly believes that when entering any debt solution, the debtor's payments should contribute to reducing their debt from the outset. The front-loading of fees means that debtors can pay instalments for over two years without paying off any of their debt. Whilst unproblematic in a successful Protected Trust Deed, the detriment to the debtor in a failed Protected Trust Deed is too severe. The Committee recommends that a staged fee payment structure is developed whereby a proportion of each payment goes to the creditors.

## Accountant in Bankruptcy reform proposals

134. The 2013 reforms included a requirement for the minimum debt level to be £5,000 before entering a Protected Trust Deed. This was intended to ensure some money goes to creditors once all fees have been applied.
135. The Accountant in Bankruptcy's most recent consultation proposed the option of increasing this minimum debt level again. In evidence, IC Loans Ltd (a creditor) noted that in the Accountant in Bankruptcy's consultation, 63% of respondents thought that the minimum debt level should be increased.<sup>100</sup>
136. Statistics from the Accountant in Bankruptcy showed that a significant number of Protected Trust Deeds were for relatively low levels of debt. This meant that most of a debtor's payments are still going to the trustee rather than creditors.
137. The Committee explored this issue with witnesses and found problems with the balance between the debt level and the fees charged. Where people have a lower level of debt, fees constitute a larger percentage of the total debt. Examples were given where £4,000 of fees were applied to a debt of £5,000 and compared to examples where the debt was £30,000, but the fees were still £4,000.<sup>101</sup>
138. The Association of British Credit Unions Ltd supported a minimum debt level of at least £10,000.<sup>102</sup> The Accountant in Bankruptcy is also supportive of increasing the minimum debt level. He told the Committee:
- ” my feeling is that, for trust deeds at the minimum debt level, the balance is not right. It is hard to defend a product where almost all the debtor's payments are consumed by fees when, in other options, those payments could have been used to settle the debt.<sup>103</sup>
139. Witnesses also noted that increasing the minimum debt level would reduce the flexibility of Protected Trust Deeds and could force people into bankruptcy. Some witnesses suggested that an additional debt solution may also be required.<sup>104</sup>
140. The Institute of Chartered Accountants of Scotland suggested that there may be a need for a further statutory debt solution focused on consumer debt. Money Advice Scotland suggested the problem lay with “cost of living” debt (borrowing to pay for essentials) among people with little or no disposable income.<sup>105</sup>

141. The Accountant in Bankruptcy highlighted previous work carried out by the Scottish Government's Protected Trust Deeds Working Group in 2009 to "make recommendations for appropriate legislative and non-legislative measures to ensure the Protected Trust Deed process in Scotland was fit for purpose and strikes the best possible balance between the needs of debtors and creditors".<sup>106</sup> It noted that one of recommendations made by the Protected Trust Deed Working Group was to consider whether a simpler model of a Protected Trust Deed is needed. This could be developed for some specific straightforward cases, would reduce costs and possibly make the process available to a wider group of debtors. At this time the consultation showed that the majority of stakeholders disagreed with the proposal for a new product in the belief that there are already a number options available.<sup>107</sup>

142. The Committee recommends that the minimum debt level to enter a Protected Trust Deed is increased to ensure there is more surplus income to repay the debt to creditors. However, Members are conscious that this may force more debtors into bankruptcy. The Committee therefore reiterates the importance of looking at the interaction between all statutory debt solutions via a general debt review. Appropriate options should be available for those who can no longer access a Protected Trust Deed. The Committee recommends that the need for an additional debt solution product should also be considered within the Scottish Government's debt review.

# Early termination of a Protected Trust Deed

143. The Committee was concerned by client case studies where the person who has entered a Protected Trust Deed dies. The consequences of death for a Protected Trust Deed seemed to be little understood by debtors and their families.
144. The agreement between the debtor and creditor which forms the basis of the Protected Trust Deed ends on death. This means that the estate of the deceased debtor becomes liable for payment of all their debts (in full, if sufficient assets are available). In addition to the original sum included in the Protected Trust Deed, creditors are entitled to interest. Insolvency practitioners also charge additional fees for winding up the dead person's estate. If the deceased debtor owned a home, this will often need to be sold to pay the debt.
145. Citizens Advice Scotland told the Committee:
- ” A claim is made on the estate of the dead person. If they had property, for example, the funds from the property would be used to pay the trust deed. The trust deed - plus statutory interest and the insolvency practitioner's fees - would be paid in full. Therefore, the deceased person's estate would potentially have to pay much more than the value of the person's original debt. <sup>108</sup>
146. Money adviser Lee Kilgallon said:
- ” the inherited asset is primarily their family, and only, home. If a person was to die, the family would not only lose their loved one—they would potentially lose their home after the trustee has paid the majority of, if not more than, the sum of the debt. That part of the system requires fundamental change. <sup>109</sup>
147. The Accountant in Bankruptcy noted:
- ” We certainly see many examples of families being unaware of the circumstances of a deceased or other individual. <sup>110</sup>
148. Committee members were concerned about the impact on family members of death during a Protected Trust Deed. On the one hand, it seems unfair that creditors who have agreed to be repaid via a Protected Trust Deed should get a windfall as a result of a death. On the other, it is recognised that the current legal framework requires debts to be settled before beneficiaries are entitled to receive anything from a deceased person's estate. The Committee recommends that the Scottish Government looks at whether Protected Trust Deed arrangements strike the appropriate balance in this area as part of its general debt review.
149. The Committee also heard that if the person in the Protected Trust Deed suddenly had access to extra funds and wanted to pay their debts off, this would also incur significant additional charges. An anonymous respondent told us:

” Figures were around £28K debt between both our trust deeds, with around £8K already paid (we’re half way through at this stage). To settle in full, they were requesting a total of around £38K, which obviously included their fees. This turns out to be nearly £10K MORE than what our original debt cost was. This seems a very excessive fee for settling early.<sup>111</sup>

150. Both the consequence of a death on a Protected Trust Deed and the consequences of early settlement are impacted by the statutory interest rate. The Committee believes that the approach of using the longstanding 8% statutory interest level is not appropriate for insolvency cases as it is too high. This should be reviewed in relation to insolvency.

# Annex A - Minutes of Meetings

## 1st Meeting, Tuesday 14 January 2020

**2. Protected Trust Deeds:** The Committee took evidence from—

Richard Dennis, the Accountant in Bankruptcy and Agency Chief Executive, Kelly Donohoe, Head of Debt Arrangement Scheme and Trust Deeds, and Stacey Dunn, Trust Deed Team Leader, Accountant in Bankruptcy.

Willie Coffey indicated that he is a member of East Ayrshire Credit Union. Richard Lyle indicated that he was a debt collection manager for the Royal Bank of Scotland.

**5. Protected Trust Deeds (in private):** The Committee considered the evidence heard at today's meeting.

## 2nd Meeting, Tuesday 21 January 2020

**2. Protected Trust Deeds:** The Committee took evidence from—

David Hilferty, Deputy Chief Executive, Money Advice Scotland;

Karen Hurst, Policy Officer, Association of British Credit Unions;

Frances McCann, Acting Chief Executive Officer, Scotwest Credit Union;

Carlos Osorio, Director, Director of Debt Recovery, TDX Group Ltd;

Michelle Thorp, Chief Executive Officer, Insolvency Practitioner

Association;

Graeme MacLeod, Head of Operations, Carrington Dean;

David Menzies, Director of Practice, Institute of Chartered Accountants of Scotland;

Iain Fraser, Chair, R3 Scottish Technical Committee.

Willie Coffey indicated that he is a member of East Ayrshire Credit Union. Richard Lyle indicated that he was a debt collection manager for the Royal Bank of Scotland and is a member of a credit union.

**3. Protected Trust Deeds (in private):** The Committee considered the evidence heard at today's meeting.

## 3rd Meeting, Tuesday 28 January 2020

**3. Protected Trust Deeds:** The Committee took evidence from—

Mike Holmyard, Financial Health Policy Manager, Citizens Advice Scotland;

Bob Russell, Debt Advice Officer, Falkirk Council;

Anna Hamilton, Money Advice Manager, Citizens Advice Edinburgh;

Lee Kilgallon, Debt Advisor, City of Edinburgh Council.

**5. Protected Trust Deeds (in private):** The Committee considered the evidence heard at today's meeting.

**12th Meeting, Monday 11 May 2020**

**Protected Trust Deeds (in private):** The Committee considered a draft report, various changes were agreed to, and the Committee agreed to approve the report by correspondence.

# Annex B - Written Evidence

## Written Submissions to the [Call for Views](#)

- [Alan McIntosh](#)
- [Vale of Leven Credit Union](#)
- [UK Credit Unions Ltd](#)
- [West Dunbartonshire Council W4U Team](#)
- [HM Revenue & Customs](#)
- [Mr Ewan Watson, IC Loans Ltd, Creditor Response](#)
- [Citizens Advice Scotland](#)
- [David Meldrum](#)
- [Wylie & Bisset](#)
- [Mark Harper](#)
- [Lynne Johnston](#)
- [Paul McDougall](#)
- [Money Advice Scotland](#)
- [Institute of Chartered Accountants of Scotland](#)
- [Capital Credit Union](#)
- [Money Advice Trust](#)
- [Building Society Association](#)
- [Jacqueline McDonald, Debt Advice Coordinator, Citizens Advice and Rights Fife](#)
- [Eileen Blackburn](#)
- [French Duncan LLP](#)
- [TDX Group Limited](#)
- [Scotwest Credit Union Limited](#)
- [KPMG LLP](#)
- [UK Finance](#)
- [Association of British Credit Unions Ltd](#)
- [Credit Union Trade Associations](#)

- [R3, Association of Business Recovery Professionals](#)
- [Transport Credit Union](#)
- [Accountant in Bankruptcy](#)
- [Harper McDermott Ltd](#)
- [Working Party of the Centre for Scots Law at the University of Aberdeen](#)
- [Carrington Dean](#)
- [Anonymous Submission 1](#)
- [Anonymous Submission 2](#)

#### Supplementary Evidence

- [Accountant in Bankruptcy](#)
- [Institute of Chartered Accountants of Scotland - Insolvency Monitoring Annual Report 2018](#)
- [Money Advice Scotland - Mapping the unmet demand for Debt advice in the UK](#)
- [Accountant in Bankruptcy](#)
- [R3, Association of Business Recovery Professionals](#)
- [Accountant in Bankruptcy](#)
- [Scotwest Credit Union Limited](#)
- [City of Edinburgh Council](#)
- [Citizens Advice Scotland](#)
- [Carrington Dean](#)
- [Wylie & Bisset LLP](#)
- [Anonymous Case Study](#)

# Annex C - Visits and Events

On 21 January, the Committee held a focus group in Inverclyde Community Hub, Greenock.

[Focus Group Note](#)

- 1 EEFW Committee, Official Report, 21 January 2020, col 21
- 2 EEFW Committee, Official Report, 14 January 2020, col 3
- 3 Institute of Chartered Accountants of Scotland, written evidence
- 4 EEFW Committee, Official Report, 21 January 2020, col 2
- 5 Accountant in Bankruptcy, written evidence
- 6 Working Party of the Centre for Scots Law at the University of Aberdeen, written evidence
- 7 EEFW Committee, Official Report, 21 January 2020, col 2
- 8 Accountant in Bankruptcy, written evidence
- 9 EEFW Committee, Official Report, 21 January 2020, col 2
- 10 EEFW Committee, Official Report, 28 January 2020, col 28
- 11 EEFW Committee, Official Report, 14 January 2020, col 3
- 12 EEFW Committee, Official Report, 28 January 2020, col 36
- 13 EEFW Committee, Official Report, 14 January 2020, col 12
- 14 EEFW Committee, Official Report, 14 January 2020, col 24
- 15 Citizens Advice Scotland, written evidence
- 16 Accountant in Bankruptcy Annual Report and Accounts 2016-17, p 100
- 17 Focus group note
- 18 EEFW Committee, Official Report, 21 January 2020, col 42
- 19 KPMG LLP, written evidence
- 20 Focus group note
- 21 Focus group note
- 22 Alan McIntosh, written evidence
- 23 Citizens Advice Scotland, written evidence
- 24 EEFW Committee, Official Report, 14 January 2020, col 12
- 25 Citizens Advice Scotland, written evidence
- 26 Alan McIntosh, written evidence
- 27 Institute of Chartered Accountants of Scotland, written evidence
- 28 Statements of insolvency practice Scotland

- 29 EEFW Committee, Official Report, 21 January 2020, col 45-46
- 30 Institute of Chartered Accountants of Scotland, written evidence
- 31 EEFW Committee, Official Report, 21 January 2020, col 44
- 32 EEFW Committee, Official Report, 21 January 2020, col 45
- 33 Citizens Advice Scotland, written evidence
- 34 Money Advice Scotland, written evidence
- 35 Citizens Advice Scotland, written evidence
- 36 EEFW Committee, Official Report, 14 January 2020, col 9-10
- 37 EEFW Committee, Official Report, 21 January 2020, col 9
- 38 EEFW Committee, Official Report, 21 January 2020, col 9
- 39 Institute of Chartered Accountants of Scotland, written evidence
- 40 Institute of Chartered Accountants of Scotland, written evidence
- 41 Citizens Advice Scotland, written evidence
- 42 Anonymous written evidence 1
- 43 EEFW Committee, Official Report, 14 January 2020, col 10
- 44 EEFW Committee, Official Report, 21 January 2020, col 36-37
- 45 Focus group note
- 46 Money Advice Trust, written evidence
- 47 Money Advice Trust, written evidence
- 48 R3, written evidence
- 49 R3, written evidence
- 50 KPMG LLP, written evidence
- 51 Accountant in Bankruptcy letter to the Committee, 24 January 2020, p 1
- 52 Money Advice Trust, written evidence
- 53 Transport Credit Union, written evidence
- 54 Citizens Advice Scotland, written evidence
- 55 EEFW Committee, Official Report, 28 January 2020, col 29
- 56 Money Advice Scotland, written evidence
- 57 HM Revenue and Customs, written evidence

- 58 UK Finance, written evidence
- 59 EEFW Committee, Official Report, 14 January 2020, col 6
- 60 Alan McIntosh, written evidence
- 61 EEFW Committee, Official Report, 14 January 2020, col 12
- 62 Accountant in Bankruptcy, written evidence
- 63 Focus group note
- 64 Carrington Dean, written evidence
- 65 EEFW Committee, Official Report, 21 January 2020, col 25
- 66 EEFW Committee, Official Report, 28 January 2020, col 39
- 67 Insolvency Practitioners Association Volume Provider Regulation Scheme 2019 Benchmark report, p 31
- 68 EEFW Committee, Official Report, 14 January 2020, col 20
- 69 EEFW Committee, Official Report, 28 January 2020, col 31
- 70 Focus group note
- 71 Focus group note
- 72 Institute of Chartered Accountants of Scotland, written evidence
- 73 EEFW Committee, Official Report, 14 January 2020, col 6
- 74 EEFW Committee, Official Report, 28 January 2020, col 32
- 75 Money Advice Scotland, written evidence
- 76 Scottish Government. (2019) A Debt Advice Routemap for Scotland.
- 77 Focus group note
- 78 EEFW Committee, Official Report, 28 January 2020, col 27
- 79 EEFW Committee, Official Report, 28 January 2020, col 33
- 80 EEFW Committee, Official Report, 28 January 2020, col 27
- 81 EEFW Committee, Official Report, 28 January 2020, col 32
- 82 EEFW Committee, Official Report, 14 January 2020, col 7
- 83 Focus group note
- 84 Capital Credit Union, written evidence
- 85 ABCUL, written evidence

- 86 Anonymous case study
- 87 EEFW Committee, Official Report, 14 January 2020, col 17
- 88 EEFW Committee, Official Report, 21 January 2020, col 43
- 89 Capital Credit Union, written evidence
- 90 EEFW Committee, Official Report, 14 January 2020, col 28
- 91 EEFW Committee, Official Report, 28 January 2020, col 28
- 92 EEFW Committee, Official Report, 28 January 2020, col 29
- 93 EEFW Committee, Official Report, 21 January 2020, col 27
- 94 Accountant in Bankruptcy letter to the Committee, 24 January 2020, p 5
- 95 Accountant in Bankruptcy, written evidence
- 96 ScotWest Credit Union Ltd, written evidence
- 97 Capital Credit Union, written submission
- 98 Alan McIntosh, written evidence
- 99 Harper McDermott, written evidence
- 100 IC Loans Ltd written evidence
- 101 EEFW Committee, Official Report, 21 January 2020, col 5
- 102 EEFW Committee, Official Report, 21 January 2020, col 5
- 103 EEFW Committee, Official Report, 14 January 2020, col 5
- 104 EEFW Committee, Official Report, 21 January 2020, col 47
- 105 EEFW Committee, Official Report, 21 January 2020, col 21
- 106 Accountant in Bankruptcy letter to the Committee, 24 January 2020, p 3-4
- 107 Accountant in Bankruptcy letter to the Committee, 24 January 2020, p 3-4
- 108 EEFW Committee, Official Report, 28 January 2020, col 34
- 109 EEFW Committee, Official Report, 28 January 2020, col 35
- 110 EEFW Committee, Official Report, 14 January 2020, col 21
- 111 Anonymous, written evidence

