



RESPONSE FROM THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS' (R3) SCOTTISH TECHNICAL COMMITTEE

Protected Trust Deed Consultation – 2019

INTRODUCTION

1. R3, the Association of Business Recovery Professionals, is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. It promotes best practice for professionals working with financially troubled individuals and businesses. It has UK-wide representation and debates key issues facing the profession. Most insolvency practitioners (IPs) operating in Scotland are members.
2. R3 appreciates the opportunity to submit its views in response to the Scottish Government's consultation on Proposals for Changes to Protected Trust Deeds. We shall be pleased to discuss in further detail with the Scottish Government any of the matters raised within this response.

Consultation overview

3. This consultation document refers to two previous DAS consultations and the previous PTD consultation on which these proposed changes are predicated. We understand that a further consultation on sequestration will be published shortly. We would respectfully suggest that changes to the PTD process cannot be made in isolation with no comparative consideration of the alternative procedures available to an individual debtor, and the interaction of sequestration, PTDs, DAS and debt management plans. We would suggest therefore that a holistic review of the purpose of each solution is required before further detailed change to specific procedures is pursued. We would support a discussion on whether PTDs continue to provide a distinct solution from sequestration.

Debtor's dwelling house/family home

4. We would also urge the Scottish Government to consider the role of the debtor's family home/dwelling house property in personal insolvency processes. This review is long overdue.

Credit unions

5. The consultation seeks at stages to address the stake of credit unions in bankruptcy generally, both in terms of the level of their returns and their voice as a smaller, local creditor. The principle of *pari passu* is long established in insolvency – creditors are treated equally in their class - as is the ability of the majority of creditors to be able to vote down the minority. We would respectfully suggest that the Scottish Government consider separately the specific requirements of the credit unions and their ability to raise or vary interest rates, to allow them to compete with commercial lenders.

Regulatory environment

6. The consultation recognises that insolvency practitioners are licensed by RPBs, and subject to the supervision of the AiB while acting as trustees, and the Financial Conduct Authority has a regulatory role in DAS provision. An IP may offer PTD as a solution, but if not registered with the FCA, may not offer DAS. We would respectfully suggest that some of the issues surrounding PTDs stem from this regulatory division. We recognise that this is a reserved matter, but we would be happy to support the Scottish Government in any discussions surrounding this matter with FCA or the UK Government.

Mis-selling of PTDs

7. We are concerned that the measures set out in this consultation attempt to address specific, targeted concerns with PTDs, and most are linked in some way to the granting of protection. This in no way addresses the granting of a trust deed (whether protected or not) may not be the appropriate solution and there appears to be no attempt to codify penalties or set out remedies for mis-selling of PTDs and how to remove a debtor from a clearly inappropriate PTD and onto a DAS. A trust deed is a binding contract on signature, and simply declining to protect it does not address the issues raised in the consultation.
8. This schedule should be read in conjunction with our formal consultation response.

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Chair of R3's Scottish Technical Committee
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19 April 2019

1 CONSIDERING IF A PTD IS THE BEST OPTION.

Question 1(a): Do you agree that protection should be refused where the full debt in a trust deed could be repaid in 60 months, through the debtor's contributions?

Yes (but see note below)

Question 1(b): If you answered no to Q1(a), what do you consider an appropriate timescale?

The question should be framed as to *whether a debtor can enter a trust deed* as an insolvency process, where their contributions over an extended period is greater than the debt level, rather than whether it should become *protected* in these circumstances. The trust deed is a binding contract once signed, regardless of the level and duration of contributions it anticipates.

Under current statute, where a trust deed fails to become protected, then the debtor's only remedy is to apply for sequestration. It does not currently allow the debtor to apply for a DAS on non-protection.

This provision also anticipates state intervention in deciding the "correct" solution for an individual. That does not support individual choice.

2 PAYMENT OF DEBTOR'S CONTRIBUTION - REGULATION 8

Question 2(a): Do you agree that a trust deed should not be eligible for protection where the value of contributions over its extended period is equal to or greater than the level of debt present when it was granted?

(Protected trust deeds are typically extended to allow payments to be made in lieu of property equity.)

Yes (but see note below)

Question 2(b): If you answered no to Q2(a), why not?

The question should also have been framed as to whether a debtor can enter a trust deed as an insolvency process, where their contributions over an extended period is greater than the debt level, rather than whether it should become protected in these circumstances. Under current statute, where a trust deed fails to become protected, then the debtor's remedy is to apply for sequestration, and it does not currently allow the debtor to apply for a DAS on non-protection.

This provision also anticipates state intervention in deciding the "correct" solution for an individual. That does not support individual choice.

3 MINIMUM DEBT LEVEL – REGULATION 4

Question 3(a): Do you think that the minimum debt level allowed in a PTD should be increased from £5,000?

No

R3 is of the opinion that the current entry threshold of £5,000 is sufficient – it is necessarily higher than the £3,000 entry level to sequestration, but low enough that debtors at the lower end of the debt spectrum may still enter a PTD and obtain debt relief, where appropriate.

4 REMUNERATION PAYABLE TO TRUSTEE UNDER PROTECTED TRUST DEED – REGULATION 23

Question 4(a): Do you agree that category one and two disbursements should be included in the fixed fee?

Category 2 disbursements only

Question 4(b): If you answered no to Question 4(a), why not?

In all insolvency proceedings the remuneration, costs and outlays (disbursements) of an IP are subject to the approval of creditors: either directly, by creditors' representatives (e.g. commissioners or committees) or third parties (e.g. Court or the AiB).

Statement of Insolvency Practice 9 (SIP 9) categorises disbursements as Category 1 - those that are paid to an independent third party (for example property valuation provided by a local surveyor) and Category 2 - those that are paid to the office holder or an associated party (for example property valuation provided by an in-house surveyor). The categorisation is based on who provided the service, not what the service was.

To aid transparency, office holders are specifically required to set out in detail and seek approval for Category 2 expenses to be paid to their firm, or associates, in the same way that remuneration requires specific approval. The categorisation of expenses in this way was introduced to prevent IPs disguising remuneration as outlays, and it seems against the spirit of SIP 9 to combine Category 2 disbursements into the fixed fee. The proposal to include all disbursements of any category in the fixed fee element addresses neither of the stated intentions in the consultation: transparency and reduction of costs.

Creditors, and the AiB in PTDs, already have the right to object to the level of category 1 and 2 outlays, in the protection process, and throughout the duration of the PTD. The consultation document recognises that a trust deed is a contractual agreement between a debtor, trustee and creditors, and the creditors can set the price. The involvement of the creditor agents effectively regulates the market price. If the price is to be set so low as to prohibit IP firms from providing PTDs, then there will be further concentration of PTDs in the volume providers, as the only operators large enough to provide the service at a price dictated by the AiB, rather than set by the market.

However, recognising that there are concerns as to the practices of some firms and their manipulation of category 2 expenses, we support the proposal that they are combined into the fixed fee. We can see no justification for the Category 1 expenses to an independent third party to be so combined.

5 VOTING PROCEDURE IN PTD SECTION 170 (2) OF THE BANKRUPTCY (SCOTLAND) ACT 2016

Question 5(a): Should the voting system for PTDs be restructured where a trust deed would only be protected if out of the creditors who have voted those who own 75 % of the value of debt have actively accepted the terms of the trust deed?

No

Question 5(b): If you answered no to Question 5(a), what should the terms be?

We have answered no, but for reasons stated herewith, believe that even if introduced, a move to active support of a trust deed's terms will not amplify the voice of the smaller creditors.

Creditor agents are, as recognised in the consultation, actively engaged in the existing protection process, and will object to the terms of a trust deed where they deem that appropriate. If the protection process changes to seek active consent, then the creditor agents will participate to ensure that protection is achieved (measured against their internal commercial criteria and taking into account their responsibilities to treat the customer fairly). The voice of the smaller or local creditor considered in the consultation will not be heard in these revised circumstances, much as they are not heard in the current process. Accordingly, it seems unnecessary to change the existing voting criteria or process, at a cost to commercial creditors and the profession, to provide an outcome that will be broadly similar to the one we now employ.

If however, we assume creditors did not actively engage in the protection process, this would introduce a greater level of uncertainty for the debtor. One small creditor could prevent an individual entering a trust deed and obtaining debt relief. We cannot see that this is the intention of the proposed changes.

In all insolvency procedures, the wishes of the majority of creditors are sought. This ensures that a small creditor cannot sway the outcome to the detriment of the majority or use the various rights of appeal or challenge in the legislation to pursue a grievance.

In light of the above, the grounds for change have not been adequately made.

If however Scottish Government is minded to introduce these proposals, then the proposed requirement to file a claim within 120 days should be altered, and creditors wishing to actively object to or accept the terms of the trust deed should submit their claim in *conjunction with their vote*.

The 120-day deadline for the submission of a claim is an arbitrary timescale and should not otherwise be introduced.

Question 5(c): Do you believe that AiB should be given general powers to refuse the protection of a trust deed?

No

The consultation document sets out in detail why no amendments to the legislation should be made in respect of the AiB's powers to refuse the protection of a trust deed.

Question 5(d): If you answered yes to Question 5(c) should these general powers to refuse the protection of a trust deed only be introduced if the creditor voting procedure does not change?

Yes ☐ No ☐

Question 5(e): If no creditors respond to the trust deed proposal do you agree that the trust deed should become automatically protected?

Yes

While automatic protection where the creditors do not respond seems at odds with the proposal for active consent, we do consider that financially distressed and vulnerable individuals should not be denied access to appropriate debt relief due simply to creditors being indifferent to the proposed trust deed.

It should also be noted that deemed consent has been introduced as a principal under the new Scottish corporate insolvency rules, bringing it in line with existing PTD provisions.



Scottish Government
Riaghaltas na h-Alba
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Scottish Government Proposals for Changes to Protected Trust Deeds

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- ☐ Individual
☒ Organisation

Full name or organisation's name

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The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- ☒ Publish response with name
☐ Publish response only (without name)
☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

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

☒ Yes

☐ No