

Protected Trust Deeds – Improving The Process

Protected Trust Deeds – Improving The Process

© Crown copyright 2011

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This document is also available from our website at www.scotland.gov.uk.

ISBN: 978-1-78045-406-1

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

Produced for the Scottish Government by APS Group Scotland
DPPAS12026 (10/11)

Published by the Scottish Government, October 2011

Protected Trust Deeds – Improving The Process

Contents

I. Ministerial Foreword

II. Consultation Arrangements

III. Table of Abbreviations

IV. Executive Summary

V. Background

Part 1 Current Trust Deed process

Part 2 The current role of the Accountant in Bankruptcy in Trust Deeds

Part 3 Review of Protected Trust Deeds

Part 4 Debt Action Forum

Part 5 Institute of Chartered Accountants of Scotland Trust Deed Report

Part 6 The Protected Trust Deeds Working Group

VI. Consultation

Part 7 Proposals to improve the Trust Deed Process

Part 8 Proposals which will need legislative change

Part 9 Other proposed changes

Appendix 1 AiB Protected Trust Deed Guidance

Annex A The Scottish Government consultation process

Annex B Consultation Questionnaire

Annex C Respondent's Information Form

I. Ministerial Foreword



Ensuring that the people of Scotland have access to the appropriate debt relief mechanisms is a key priority of the Scottish Government. The recent economic crisis has impacted on many people and this has underlined the need for strong Government intervention.

Protected Trust Deeds are one of a range of measures available to people across Scotland, offering a helpful debt remedy. I want to further strengthen this product to ensure that it is fair to creditors and debtors alike, assisting in the financial rehabilitation of individuals and minimising the impact on the Scottish economy. This consultation builds on the strong focus there has been on Protected Trust Deeds in recent years. It sets out a number of suggestions for improvements to the Protected Trust Deed process in Scotland.

Following the implementation of the Bankruptcy and Diligence etc. (Scotland) Act 2007 a review of Protected Trust Deeds was conducted. This review concluded that modification of the current Protected Trust Deed process was required to extend this debt relief solution to a wider section of the population. This, and further reviews, have also shown that in a significant percentage of Protected Trust Deeds no return is made to creditors.

The Debt Action Forum which met in 2009 considered the suggestion that there may be scope to encourage more use of Protected Trust Deeds as a tool for debtors who can pay back part of what they owe. The group that was set up subsequently, the Protected Trust Deeds Working Group, was established solely to examine the trust deed process and to suggest improvements.

This group, chaired by the Accountant In Bankruptcy, contained representatives of those with an interest in trust deeds, including creditors and insolvency practitioners as well as the money advice sector. It made several recommendations in its Report published in June 2010 and it is on these recommendations, in the main, that this consultation focuses.

This consultation is the first step in a wider look at Protected Trust Deeds, how they fit into the range of debt products in Scotland and the potential for more radical changes. In any debt solution, although account must be taken of a debtor's circumstances, a fair return to creditors is vital.

Recent changes to the Debt Arrangement Scheme (DAS) allow more people to access and benefit from it. I hope that people who can pay back their debts, but over a longer time, access DAS as their first option in taking control of their debt. Increased use of this Scheme where appropriate, rather than Protected Trust Deeds, will lead to improved returns for creditors.

In some cases, however, a Protected Trust Deed is the best option and the proposals contained in this consultation are intended to simplify the Protected Trust Deed process and provide a greater return to creditors. The Scottish Government will review any legislative

changes which are introduced as a result of this consultation twelve months after commencement to ensure that they are producing the desired results.

I invite all interested parties to assist in the further development of the Protected Trust Deed process by giving your views.

A handwritten signature in black ink that reads "Fergus Ewing". The signature is written in a cursive style with a large loop under the letter 'F' and another large loop under the letter 'E'.

Fergus Ewing, MSP
Minister for Energy, Enterprise and Tourism

II. Consultation Arrangements

Protected Trust Deeds – Improving the Process

The Scottish Government is looking make the current trust deed process more efficient and seeks your response to a number of questions to help shape the way trust deeds are administered in future. Your comments should be made by 31 January 2012. **Please send your response with the completed Respondent Information Form (see “Handling your Response” below) to:**

PTDconsultationmailbox@scotland.gsi.gov.uk

Or

PTD Consultation
AiB
1 Pennyburn Road
KILWINNING
KA13 7HY

Any queries can be directed to Sandy McFadyean by telephone on 0300 200 2697 or by e-mail at Alexander.mcfadyean@aib.gsi.gov.uk .

A full list of the consultation questions is contained in Annex B of this document.

We would be grateful if you would use the consultation questionnaire provided or clearly indicate in your response which questions or parts of the consultation paper you are responding to, as this will aid collation of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

The Scottish Government now has an email alert system for consultations <http://register.scotland.gov.uk>. This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). This system complements, but in no way replaces Scottish Government distribution lists. It is designed to allow stakeholders to keep up to date with all Scottish Government consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** ([Annex C](#)) which forms part of the consultation questionnaire as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002. We would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Where respondents have given permission for their response to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library and on the Scottish Government consultation web pages by 13 March 2012. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the SG Library on 0131 244 4552. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

Following the closing date, all responses will be analysed and considered, along with any other available evidence from creditors, debtors insolvency practitioners and other interested parties, to help us develop the trust deed process. We aim to issue a report on this consultation by 24 April 2012. The report will be posted on the websites of both the Scottish Government and the Accountant in Bankruptcy (www.aib.gov.uk). Once this is done we will seek to implement both the necessary guidance and legislation to amend the PTD process.

Comments

If you have any comments about how this consultation exercise has been conducted, please send them to Sandy McFadyean. We welcome your views on any or all of the issues covered by this paper.

III. Table of abbreviations

AiB	Accountant in Bankruptcy
CAS	Citizens Advice Scotland
CCCS	Consumer Credit Counselling Service
CFS	Common Financial Statement
IP	Insolvency Practitioner
DAF	Debt Action Forum
ICAS	Institute of Chartered Accountants of Scotland
IVA	Individual Voluntary Arrangements
PTD	Protected Trust Deed
PTDWG	Protected Trust Deeds Working Group
ROI	Register of Insolvencies

IV. Executive Summary

Trust deeds are a formal voluntary debt solution open to those living in Scotland. Under a trust deed a debtor makes an offer to put what they can afford towards paying as much of their debt as is possible for a fixed term. Where the offer is accepted by creditors, the trust deed becomes protected and is now known as a protected trust deed (PTD). This means that interest on the debts is frozen and creditors cannot pursue their debt further through legal action.

There is a long history of trust deeds as voluntary private agreements between debtors and creditors in Scotland. The most famous example is a trust deed signed by Sir Walter Scott in 1826. In more recent years, however, prior to 2007, stakeholders had raised concerns about PTDs. Among the concerns raised were levels of fees and returns to creditors, which stakeholders felt warranted further examination. Unfortunately, at this time and due to the nature of trust deeds being administered by individual insolvency practitioners, there was limited statistical information available to allow appropriate analysis in these areas.

To remedy this, measures were included in the Bankruptcy & Diligence etc. (Scotland) Act 2007 (BAD Act), which came into force on 1 April 2008, to allow the collection of relevant information. This led to the Accountant in Bankruptcy (AiB) being granted a supervisory role over the administration of PTDs and the introduction of an AiB annual review procedure for all PTDs.

In recent years, we have experienced the deepest global recession in over 50 years. This has increased the profile of debt in Scotland and raised concerns about what measures are being taken to address debt problems. This in turn has led to an examination of Scottish debt solutions, including trust deeds, to ensure they are easy to access and work efficiently, providing the best range of outcomes for those involved.

In 2009 the then Minister for Community Safety, Fergus Ewing MSP, chaired the Debt Action Forum (DAF) which examined information and initiatives on debt relief in Scotland. DAF brought together a varied group of stakeholders with differing perspectives and views. The Forum worked constructively to make recommendations for improvements to debt relief mechanisms. It was from the work of the DAF that the Home Owner and Debtor Protection (Scotland) Act 2010 was developed. This Act, although giving added protections to the home for debtors in bankruptcy and PTDs, does not address the fundamental issues surrounding the treatment of the home in these debt solutions. No consensus on this area could be reached, and it was agreed that a full public consultation would be required in relation to this. Forum members did, however, give their support for a review of the trust deed process that would lead to enhancements for both debtors and creditors. This review was progressed by AiB and led to the Protected Trust Deeds Working Group (PTDWG) being established in 2010 at the request of the Minister.

The PTDWG was chaired by Rosemary Winter-Scott, the Chief Executive of AiB and comprised a cross-section of stakeholders from the advice sector, creditor organisations, insolvency practitioners and AiB officials. Full details of membership can be found here: www.aib.gov.uk/about/protected-trust-deeds-working-group-ptdwg-members. The purpose of the PTDWG was to make recommendations for appropriate legislative and non-legislative measures, to ensure the PTD process in Scotland is fit for purpose and strikes the best possible balance between the needs of debtors and the rights of creditors.

The group sought input both from its members and other interested parties, and examined issues highlighted, including access to PTDs; a lack of consistency of information provided to creditors and debtors in PTDs; costs of trust deeds including trustees' fees; treatment of equity in the debtor's home; consistency in contributions made by debtors and general process changes intended to make the PTD process simpler and more effective. Although equity in the debtors' home was discussed in this group, again the wider issue of how the debtors' home should be treated in PTDs was not included in discussion. This topic will be the subject of a future consultation.

The group, although diverse in its range of interests, engaged constructively and achieved a great deal over the short term of five initial meetings. In general, the group agreed that there was scope for improvement to the PTD process and in its Final Report published in June 2010, made several recommendations.

The purpose of this consultation is to seek views on these recommendations which are intended to:

- make the current trust deed process more efficient,
- ensure the process is fit for purpose, and
- ensure that it strikes the best balance between the needs of debtors and the rights of creditors.

Specifically, proposals in this consultation are intended to standardise processes where possible and to improve the levels of information available, including that to debtors and especially creditors. Some of these proposals could be effected relatively quickly through a change in practice or through secondary legislation. Others, however, would require primary legislation in some cases and may, therefore, be longer term aims.

The proposals requiring a change in practice are:

- Introduction of the AiB Protected Trust Deed Guidance (the Guidance), which seeks to ensure best practice is adopted in all cases. Areas covered in this Guidance include, verification of information, standard documentation, reporting to creditors and changes to trustee fee arrangements. The Guidance also provides information on the intended introduction of a PTD Review Board, and trustee cooperation with this Board.
- Introduction of a standard summary sheet for trust deeds;
- Formal freezing of the equity. This will fix the valuation of the equity in a debtor's property at the time the trust deed is granted;
- Form 4 (trustee's statement of status of a protected trust deed) to be made available to creditors on an annual basis;

The proposals which would require secondary legislation are:

- Removal of the requirement on the trustee to publish a trust deed in the Edinburgh Gazette, and replacement with a requirement on the trustee to publish a trust deed in the Register of Insolvencies;
- Enhancement of the Register of Insolvencies to improve the level of information held and so better inform creditors;
- Inclusion of debtor's date of birth on relevant forms;
- Implementation of standard income and expenditure guidelines for trust deeds by use of Common Financial Statement (CFS) figures or similar;
- Introduction of a fixed timescale for the submission of creditor claims;
- Removal of a trustee's right to accept contributions from a debtor's Social Security Benefits in PTDs; and,
- Amendment of statutory Protected Trust Deed Forms¹.

Longer term proposals which would need a change to primary legislation are:

- Provision for trust deeds that would make an earnings arrestment cease on the date a trust deed becomes protected;
- Introduction of Income Payment Orders in relation to trust deeds;
- Introduction of a simplified PTD product; and
- Amendment of debtor's address requirements on the Register of Insolvencies, which would require a change to the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2002

¹ Schedule 1 to the Protected Trust Deeds (Scotland) Regulations 2008

V. Background

Part 1. Current Trust Deed Process

1. Having taken advice and decided that a trust deed is the appropriate way to deal with their debt, a debtor will meet with an insolvency practitioner (the trustee) who will draw up a trust deed. Only licensed insolvency practitioners² can be trustees in relation to trust deeds.

1.1 Trust deeds are voluntary agreements, granted by a debtor in favour of a trustee under which assets of the debtor are transferred to be administered for the benefit of creditors and the payment of debts. They provide, through realisation of assets or contributions from the debtor's income, for the repayment of part of what is owed to creditors over the course of the trust deed. Trust deeds generally run for a period of 3 years although some may extend to 5 years.

1.2 Once the trustee has collected the information regarding the debtor's financial circumstances and what the debtor can afford to pay towards his debts, he advertises the trust deed in the Edinburgh Gazette and writes to the creditors to propose payment of some of what is owed – a dividend.

1.3 A trust deed can become 'protected' if a sufficient number of creditors do not object to the trust deed protection request and thus are deemed to agree to it. Once protected, the trust deed is binding on all creditors who can usually take no further action to pursue the debt owed providing the debtor complies with the terms of the trust deed. Upon completion of the trust deed the remaining unpaid debt is written off although secured lenders can still rely on their security.

1.4 An ordinary trust deed is not binding on creditors who have not agreed to its terms and they can still decide to pursue their debt; only a PTD is binding on all creditors.

1.5 As a result of the changes introduced by the BAD Act, the Protected Trust Deed (Scotland) Regulations 2008 (2008 Regulations) require trustees to provide additional information, not previously supplied, in respect of trust deeds. They are now required to provide a Statement of the Debtor's Affairs and to complete Form 3, a Statement of Anticipated Realisations from a PTD. Form 3 details the anticipated contributions from the debtor, expected realisations from assets, the estimated cost of administering the PTD and proposed dividend to ordinary creditors.

1.6 The trustee must prepare a statement of his accounts and send a copy to the debtor, each creditor and AiB. Once the trustee fees and outlays have been paid from the money ingathered, the trustee will pay a dividend to creditors, usually at the end of the trust deed.

1.7 When the administration of the trust deed is complete and the trustee has made the final distribution of the estate among the creditors, the trustee may seek his discharge from the creditors who agreed to the trust deed. The trustee will make an application to the creditors and will issue a certificate of discharge to the debtor.

² Section 388(2) of the Insolvency Act 1986

Part 2: The current role of the Accountant in Bankruptcy in Trust Deeds

2. Prior to 1 April 2008 AiB had no statutory supervisory powers in respect of PTDs. AiB was required to register PTDs on the Register of Insolvencies and the trust deed became protected from the date it was recorded in the Register. The discharge of the trustee was also recorded by AiB together with details of the distribution of the estate. In terms of Schedule 5 to the Bankruptcy (Scotland) Act 1985, AiB would carry out an audit of a trustee's accounts only when asked to do so by a debtor, trustee or creditor. The purpose of the audit was to ensure that the fee charged by the insolvency practitioner was reasonable given the amount of time taken to perform their statutory duties, and that the work had been completed by the appropriate person. AiB had, and continues to have, no power to change fee rates. These are commercial rates set by the Insolvency Practitioner and their firm.

2.1 The BAD Act introduced powers for AiB to supervise trustees in PTDs. Under her supervisory function the Accountant may now carry out an audit of the trustee's accounts at any time. This is in addition to any request from a debtor, trustee or creditor to have the trustee accounts audited by AiB. The Act also provided regulation making powers to improve the administration of PTDs and formalise the discharge of debtors.

2.2 The Protected Trust Deed (Scotland) Regulations 2008 were brought into force on 1 April 2008. Prior to this date no specific information was available to AiB in respect of debts included in PTDs, of expected realisations, of proposed dividends to creditors or of fees charged by trustees.

2.3 The trustee is now required to submit Form 3 to AiB which details the anticipated contributions from the debtor, expected realisations from assets, the estimated cost of administering the PTD and proposed dividend to ordinary creditors. Collection of this additional information has allowed the collation and analysis of statistical data which assists in informing decisions on the future requirements for PTDs.

2.4 Thereafter, on an annual basis the trustee must submit Form 4 which details the progress of the trust deed. This enables AiB to monitor the progression of the trust deed; to ensure that the proposals stated on Form 3 are comparable throughout the duration of the trust deed; and where the proposals have changed significantly, provide an explanation for this.

2.5 In accordance with regulation 15 of the 2008 Regulations, AiB now has the authority to issue direction to the trustee regarding the administration of the trust deed. Any such direction may require the trustee to carry out or to refrain from such action as AiB considers necessary for the proper and accountable administration of a protected trust deed, in the interests of trustees, debtors, creditors or the general public.

2.6 Although AiB cannot set or change the fee rates of trustees, it can fix the remuneration payable. It does this by auditing the trustee's accounts to ensure that the time charged is appropriate to the statutory duties carried out. This is determined by examining the case for evidence of work undertaken and time allocated to this work. It also checks that the work has been completed by the appropriate person. If AiB believes that the accounts do not reflect the true work that has been completed, it can reduce the fees paid to the trustee (but not the rate that the IP charges at).

Part 3: Review of Protected Trust Deeds

3. The BAD Act³ introduced modification of provisions relating to PTDs and extended the supervisory functions of AiB to include trustees under PTDs. Prior to 1 April 2008 no specific information was available in respect of debts included in PTDs, of expected realisations, of proposed dividends to creditors or of fees charged by trustees.

3.1 The 2008 Regulations require trustees to provide additional information, not previously supplied, in respect of trust deeds. They are now required to provide a Statement of the Debtor's Affairs and to complete Form 3, a Statement of Anticipated Realisations from a Protected Trust Deed. Form 3 details the anticipated contributions from the debtor, expected realisations from assets, the estimated cost of administering the PTD and proposed dividend to ordinary creditors.

3.2 In accordance with the legislation, a trustee must submit to AiB, at intervals of not more than 12 months beginning with the date the trust deed is granted, a Form 4, which details the estimated dividend payments to creditors. If this amount has varied from the amount projected at the commencement of the PTD (as shown on Form 3) the trustee must give the reason for the change. The trustee must also, at this time, submit a statement of his accounts in administering the trust deed.

3.3 A commitment was made that AiB would carry out an overall review of PTDs following the introduction of the 2008 Regulations. The review would collate information ingathered from the relevant forms on PTDs that were registered after 1 April 2008. Collection of this additional information has allowed AiB to monitor the progress of PTDs, establish trends, and highlight areas of concern.

Initial Review

3.4 The first review to be undertaken, in line with AiB's new powers, examined a representative sample of 1,262 of the 3,825 PTDs registered between 1 April 2008 and 30 September 2008. The review further compared the findings from the sample with estimated outcomes for the year ended 2008/09 and reported outcomes for the year ended 2007/08. The data collected included information on debts, debtor profiles, proposed dividends and anticipated trustee fees and outlays. The review can be found at: <http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000821.pdf>

3.5 The review found that, in respect of the 2008 sample:

- the legislative changes introduced appear to have had no effect on the number of PTDs registered;
- the number of individuals entering a PTD has been fairly consistent over recent years;
- more male than female debtors entered PTDs during the review period;
- at the very outset of trust deeds, (as shown on Form 3), 47% of expected realisations was absorbed by trustee fees and outlays;
- only 53% of money ingathered went to payment of dividends;
- the average total debt included in individual PTDs amounts to £32,652;

³ Section 23 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 amended the Bankruptcy (Scotland) Act 1985

- the average estimated dividend proposed to creditors in individual PTDs is 17 pence in the pound;
- the average anticipated trustee fees and outlays amount to £4,937;
- total debt estimated to be written off for PTDs registered in the year 2008/09 is £205m out of £249.2m of debt included in these PTDs; and
- the additional information trustees are now required to provide to AiB for Protected Trust Deeds is sufficient to allow PTDs to be effectively monitored.

3.6 The review concluded that PTDs can be an effective debt relief mechanism for some people. However it also highlighted the significant percentage (almost half) of debtor contributions that went in fees and outlays, rather than to creditors. Because of this, the review also concluded that further work should be undertaken to develop a simplified procedure to make PTDs more cost effective.

Subsequent review

3.7 A further review of a sample of PTDs submitted to AiB from 1 April 2009 to 30 September 2009, allowed comparisons with the first review undertaken in the corresponding period of the previous year. This Protected Trust Deed Review 2010 can be found at <http://www.aib.gov.uk/publications/protected-trust-deed-review-2010>.

3.8 This sample reinforced the findings of the first. Because a full year had elapsed since legislation allowed AiB to supervise cases, changes to trust deed projected outcomes could be established. The review illustrated a trend, in 823 cases where a Form 4 had been submitted, where the projected cost of the PTDs had increased. It also highlighted a decrease in projected dividends to creditors. In 71 of the 823 cases examined, the projected dividend due to be paid to ordinary creditors reduced to zero.

3.9 The findings of the reviews indicated that there were issues with PTDs which warranted further examination. In particular:

- Cases where the predicted dividend falls – causes and remedies;
- Cases where the predicted trustee's fees increase – causes and remedies;
- Cases where the creditor receives nothing, with only trustee fees being paid; and
- General cost of PTDs.

Part 4: Debt Action Forum

4. As part of the Scottish Government's ongoing commitment to help the people of Scotland obtain debt relief, in 2009, the then Minister for Community Safety, Fergus Ewing, invited representatives of stakeholder groups to join him in a Debt Action Forum (DAF).

4.1 The Forum considered various options currently available to address debt problems; including PTDs. They considered that there may be scope to encourage more use of PTDs as a route for debtors who can pay back some of what they owe. The DAF recognised that, if significant changes were to be made to the PTD process, further consultation would be required. A copy of the DAF final report can be viewed on the AiB website at www.aib.gov.uk.

4.2 The Scottish Government issued the following response to the DAF final report in respect of trust deeds:

"The Scottish Government appreciates there are some issues which must be considered by a wider cross section of interested parties. We acknowledge the importance of building consensus on important and far reaching issues which impact on individuals and businesses in Scotland. We must ensure our debt solutions provide protection from abuse by the unscrupulous yet offer fairness where needed. We must ensure that those who can meet their commitments continue to do so and most importantly we must ensure that people who are struggling to deal with unmanageable debt are protected against the threat of unnecessary homelessness."

4.3 To help protect debtors against unnecessary homelessness the Home Owner and Debtor Protection (Scotland) Act 2010 was developed from recommendations made by DAF. This Act, although giving added protections to the home for debtors in bankruptcy and PTDs, does not address the fundamental issues surrounding the treatment of the home in these debt solutions.

4.4 The treatment of the debtor's home had been discussed at DAF in relation to PTDs and Bankruptcy, also taking into account the new diligence of land attachment. Land attachment was introduced by the BAD Act to replace the outdated diligence of Adjudication for Debt, however this has not yet been commenced. This is because land attachment is controversial, being welcomed by some, but seen by others as a diligence that can make people homeless for very small debts (currently proposed at £3,000). This has been a very contentious issue, especially with the money advice sector who regard the threat of homelessness, particularly for such small debts, as disproportionate.

4.5 It had been intended that the Scottish Government would consult on land attachment prior to its introduction, to ensure the right balance between the interests of debtors and creditors had been established. However, original plans to consult have been expanded to include the wider issues of the treatment of the home in PTDs and bankruptcy following the discussion at DAF, where a paper submitted by Professor George Gretton and John St Clair discussed potentially radical proposals for either the total or partial exclusion of a debtor's family home from bankruptcy and trust deeds as well as from land attachment.

4.6 Work has been, and is still, ongoing to progress consultation in this area.

4.7 At the DAF the Forum members also discussed the availability of on-line access to the Register of Insolvencies, and whether this service should be provided free of charge. Members also considered whether there was a requirement to maintain publication by the trustee of notices relating to PTDs in the Edinburgh Gazette.

4.8 ICAS suggested dropping the requirement on trustees to publish notices relating to PTDs in the Edinburgh Gazette also, otherwise this form of personal insolvency would be at a disadvantage.

4.9 The Scottish Government agreed to remove the requirement for trustees to advertise awards of bankruptcy in the Edinburgh Gazette and to allow interested parties free access to the Register of Insolvencies (ROI). This has now been implemented, with free access to the Register introduced in April 2010 and the requirement for trustees to advertise bankruptcies in the Gazette removed for awards of bankruptcy made on or after 15 November 2010.

4.10 Since proposed at DAF, there has been an intention on the part of the Scottish Government to introduce legislation to remove the requirement that notices relating to trust deeds to be published in the Edinburgh Gazette and replace this with a requirement to put a notice in the ROI. Although a fee would be levied by AiB for the work involved in publishing any notice relating to a trust deed, this would be at a reduced rate in comparison with the Gazette. It is also the intention to improve the service provided by the ROI by having it display information not currently available in the Gazette. This could include, for example, a standard front sheet containing details of the debt and prospective dividend which would assist creditors in their decision on whether to object to the trust deed. It could also include copies of the annual Form 4 provided by trustees, which would allow all interested parties to see how the trust deed is progressing and assist creditors in considering audit requests to AiB.

Part 5: Institute of Chartered Accountants of Scotland Trust Deed Report

5. Simultaneously, whilst being involved in DAF and for a period after, the Institute of Chartered Accountants of Scotland (ICAS) were also examining the trust deed process outwith this forum. Creditors had raised the issues of trustee fees and absence of standard forms with ICAS. To examine these issues, in January 2009 ICAS convened a meeting to discuss the operation of the trust deed system in Scotland. The meeting was attended by a wide spectrum of stakeholders, including representatives from AiB, ICAS policy and monitoring officials, creditors, creditor agents, Her Majesty's Revenue and Customs, large and small multi-disciplinary insolvency practitioners (IP) and trust deed specialists. A working group was appointed to consider the trust deed process in detail and to prepare a report.

5.1 The working group met several times in 2009 and appointed sub groups to consider specific areas. The sub groups reconvened as a working group at a final meeting which was held in January 2010. The recommendations made by the ICAS Trust Deed Working Group were considered by the PTDWG and many of the recommendations were adopted by the group and taken forward in its report.

Part 6: Protected Trust Deeds Working Group

6. To build consensus over changes to the PTD process post DAF, at the request of the then Minister for Community Safety, the Accountant in Bankruptcy, Rosemary Winter-Scott, set up the Protected Trust Deeds Working Group (PTDWG) to review the current PTD process.

6.1 The PTDWG was chaired by Rosemary Winter-Scott and comprised a cross section of stakeholders, including representatives from the advice sector, creditors, insolvency practitioners and AiB officials. Full details of the remit, membership and copies of the papers and minutes of the working group can be found at:
<http://www.aib.gov.uk/about/protected-trust-deeds-working-group>

6.2 The PTDWG sought to make recommendations for a coherent approach, including appropriate legislative and non-legislative measures, to ensure the PTD process in Scotland is fit for purpose and that it strikes the best possible balance between the needs of debtors and the rights of creditors.

6.3 The PTDWG recognised that achieving a balance between the rights and needs of all parties involved in trust deeds is vital. Creditors agree to a trust deed in the expectation that a trustee will deliver a dividend as set out in the trust deed proposal. The needs of the debtor must also be taken into account. The debtor must be fully informed at the outset about what a trust deed means for them, for example the effect on their credit record, the contribution they must pay and what assets the trustee expects to realise. Trust deeds are a voluntary debt solution, based on expectations of outcome between all parties involved. Without clarity and transparency for all parties, the trust deed process may fail.

6.4 To produce recommendations, the PTDWG considered the following issues:

- the Protected Trust Deed process - is it effective and can it be improved?;
- how best to address the creditor's interest – in terms of the return/dividend;
- how best to address the debtor's interest – in terms of the cost, the process, the result;
- the fees – existing evidence, stakeholder concerns and alternative options;
- existing regulation and AiB's supervisory role; and
- the need for change and any options for change.

6.5 In considering these questions the group examined evidence collected from AiB review of PTDs and other relevant analysis undertaken in Scotland to identify the current issues and problems for discussion. This included the ICAS report mentioned in Part 5, which was adopted by the group in the main and evidence from the money advice sector. In considering the best ways of alleviating the current problems, the group considered alternative models for the delivery of PTDs in Scotland which would best serve the needs of both creditors and debtors.

6.6 The PTDWG initially met on five occasions, within a relatively short timescale, between March and June 2010, with the first meeting being held on 10 March 2010. The

group considered a number of papers produced by its members together with comments and papers submitted through the AiB website, which sought to highlight suggestion as to how the PTD process could be made more effective for debtors and creditors. Minutes of the PTDWG and papers for discussion have been published on the AiB website and the final report of the PTDWG, including recommendations, can be accessed at: <http://www.aib.gov.uk/about/ptdwg/ptdwgfinalreport>.

6.7 One of the main recommendations of the PTDWG was that a Trust Deed protocol be introduced. It has been suggested that the trust deed market in Scotland has much in common with Individual Voluntary Arrangements (IVAs) in England. IVAs were introduced in England and Wales in 1986 as an alternative to bankruptcy, for individuals who had assets or income (or both) to repay some of their debt, and generally result in higher returns to creditors than bankruptcy. IVAs, which normally run for 5 years, create a flexible but binding contract between a debtor and his creditors.

6.8 In February 2008 The UK Insolvency Service brokered the IVA protocol between stakeholders to create a voluntary code of conduct to facilitate the efficient handling of straightforward consumer IVAs. The main elements of the protocol are:

- a standardised approach to assessing a debtor's income and expenditure;
- a standardised approach in dealing with a debtor's interest in their home;
- an agreed set of standard terms and conditions;
- a standardised approach for the format of presenting a debtor's IVA proposal to his creditors; and
- greater transparency for each stakeholder.

6.9 Findings from the IVA marketplace have shown a protocol approach to be more inclusive of all stakeholders due to the consultative method of building a set of principles. The protocol provides transparency and flexibility, providing the ability to adapt to changing social and economic circumstances.

6.10 The members of the PTDWG agreed that this approach may be beneficial for PTDs in Scotland, and provide the same benefits as the IVA protocol in England and Wales.

6.11 It is intended that the protocol should deliver benefits for all parties involved in PTDs. Creditors would benefit through increased consistency and improved information throughout term of a trust deed. Faster payment of dividends where possible should also improve the PTD process for creditors. Better advice and information, along with a requirement for complaint handling guidance should improve the trust deed experience for debtors. IPs should also benefit from the agreement to the increased use of their discretion and clarity on roles, while all involved would benefit from clarification of the process.

6.12 The PTDWG were in agreement to the development of a PTD protocol with these aims to be taken forward by a sub group of the PTDWG. AiB oversaw the meeting of this sub group, which consisted of a cross section of stakeholders, during the summer and autumn of 2010. It was agreed that, rather than being named the PTD protocol, the code of behaviour should be referred to as the **AiB Protected Trust Deed Guidance**. This change of name was designed to avoid confusion with the IVA Protocol and also because, unlike the IVA Protocol, the intention was that this guidance should apply to all PTDs.

Consultation

Part 7: Proposals to improve the trust deed process

7. These measures could be introduced without legislation, and as such would be practical measures bound only the agreement of those involved in the PTD process. In order to formalise them, however, legislation could be introduced.

Guidance

7.1 The introduction of a Trust Deed protocol was discussed by the PTDWG. Now named the AiB Protected Trust Deed Guidance (**Appendix 1**), it has been drafted, scrutinised and agreed by the PTDWG sub group. Its purpose is to facilitate a common approach to the efficient handling of all PTDs, ensuring that the process is fit for purpose and that it strikes the best possible balance between the needs of debtors and the rights of creditors. The Guidance recognises that PTDs support a valid Scottish Government policy objective by providing debt relief for debtors in financial difficulty. It also recognises the need for the PTD process to be more transparent and to provide a fair and reasonable return to creditors within an acceptable timescale. This includes the introduction of a clear structure for calculation of trustee fees and new timescales, where appropriate, for payment of dividends.

7.2 It is intended that the Guidance will become the mechanism by which all trust deeds are processed. In any cases where a trust deed has not followed the AiB Protected Trust Deed Guidance, this would have to be highlighted and an explanation provided for creditors as to the reason why.

Question 1. From your perspective, will the Guidance drive the desired changes as set out above?

Question 2. Do you agree that the Guidance strikes the right balance between debtors and creditors?

Question 3. Do you support the application of the Guidance to PTDs generally?

Question 4. If you are an insolvency practitioner, would you envisage that all of the PTDs you administer in future would be in line with the Guidance?

Question 5. If not, what percentage of the PTDs you administer in future would you estimate would struggle to be compliant with all aspects of the AiB Protected Trust Deed Guidance?

Question 6. If not all your cases would be in line with the Guidance, what aspects of the Guidance would you struggle to meet and why?

Question 7. Do you think that the Guidance goes far enough? Should there be a wholly legislative approach to trust deeds, not reliant on the voluntary agreement of those involved?

Question 8. Do you agree that trustees should have some limited discretion in accepting the value of a claim?

Question 9. Do you agree that trustees should seek to make payments to creditors no later than month 18 and at 6 monthly intervals thereafter, subject to sufficient funds being ingathered?

Question 10. From your perspective do the limited controls on fees as set out in the Guidance go far enough, or should AiB have increased powers over the fees that can be claimed in a PTD?

Question 11. Do you agree with the introduction of a PTD Review Board?

Question 12. Do you agree the proposed membership of the PTD Review Board as stated in the Guidance document?

Question 13. If not, what changes would you make?

Register of Insolvencies

7.3 The intention to introduce legislation to remove the requirement for a notice relating to protected trust deeds to be advertised in the Edinburgh Gazette and to replace this requirement with an entry in the ROI was discussed in Part 4. Also discussed was the intention to improve the service given through the ROI by having it display information not currently available in the Gazette.

Question 14. Do you agree that trust deeds should be published in the Register of Insolvencies rather than the Edinburgh Gazette?

Question 15. Would it be useful to have the accessible information regarding trust deeds on the ROI extended to include, for example, the current status of the trust deed and any change to the predicted dividend?

Standard Summary Sheet

7.4 The purpose of the summary sheet is to facilitate the efficient handling of the trust deed proposal by creditors. In completing this sheet which is attached to the front of the trust deed, the trustee is assisting creditors or their appointed agent by compiling the information that is required to make an informed decision on that trust deed. It is also envisaged that by completing this front sheet, a trustee may reduce his own costs by reducing the number of requests for additional information by a creditor or their appointed agent.

7.5 Members of the PTDWG agreed with the recommendation of the ICAS Trust Deed Working Group to introduce a standardised summary front sheet which is compatible with the Turnkey system (an IT system used by many of the major IPs). A prototype standard front sheet is included at Annex B of the Guidance which is attached at **Appendix 1**. The group members considered what additional information is required by the creditors in order for them to make an informed decision on the trust deed.

7.6 The discussion resulted in the following recommendations that the front sheet should:

- a) display details of linked trust deeds, e.g. when both partners in a household have signed a TD, a cross reference process would be helpful as this would identify any combined dividend payable;
- b) provide further information that would assist creditors in deciding on whether or not to accept the trust deed;
- c) detail any up-front fee or 3rd party fee that a trustee has paid before commencing work and that would be attributed to the case;
- d) include where possible details of any fees paid by a debtor prior to commencing a trust deed.

Question 16. Do you agree that a standard front sheet should be introduced for use throughout the industry?

Question 17. If so, do you agree with a – d above as to what it should include?

Question 18. Would it be useful to you for any further information to be captured on the front sheet?

Home Equity

7.7 The issue of home equity was widely debated at the PTDWG. Early versions of the Guidance included de minimis equity levels and prescriptive mechanisms for dealing with the realisation of equity. The final draft includes a provision for equity to be frozen at the point where the debtor grants the trust deed. This affords the debtor a degree of certainty that cannot currently be guaranteed and is in line with Scottish Government policy. The equity freeze is dependant on debtor compliance and is removed if the debtor fails to meet his or her trust deed obligations. In the event that a house sale is necessary, the freeze on equity is also lifted. To formalise the equity freeze it is recognised that an amendment to existing 2008 regulations will be necessary.

Question 19. Do you agree that the equity in a property should be frozen at the date the trust deed is granted?

Question 20. Do you agree that, where it becomes necessary that the property is sold, the freeze on equity is lifted?

Question 21. Do you agree that legislation should be introduced to formalise these proposals regarding the freezing of equity?

7.8 Following lengthy debate by the Guidance sub-group on equity guidance, to further improve transparency a requirement has been incorporated for trustees' equity release plans to be signed by the debtor and trustee then sent to AiB at the beginning of the trust deed administration. Creditors expressed the view that the trustee should seek to realise the available equity as early as possible in the process. Whilst it is recognised that this may not be possible in all cases due to the debtor's circumstances, trustees are referred to AiB's guidance notes which state that steps should be taken as soon as possible to realise or abandon heritage.

Question 22. Do you agree that the trustee should realise any available equity as soon as possible in the trust deed administration?

Question 23. Do you agree that equity realisation plans should be signed by the debtor and trustee then sent to AiB as part of the documents which would allow AiB to register the trust deed as protected?

Common Financial Statement

7.9 The Common Financial Statement (CFS) is a budgeting tool that can be used by advice agencies and other third party organisations to make debt repayment offers to creditors on behalf of clients. It provides a detailed budgeting format to provide an accurate overview of a person's income, expenditure, assets and liabilities.

7.10 The proposal to implement standard income and expenditure guidelines generated much debate amongst the PTDWG members, as it appears that due to the inconsistency in various guidelines currently used, some debtors are being treated differently when it comes to calculating the level of contribution they can pay. Members of the PTDWG were in agreement that the CFS figures should be used by all parties as the maximum figures allowable for the level of contribution debtors can pay under a trust deed. Members agreed this matter required further action. It was proposed that the Guidance sub-group should consider how this could be implemented as standard. It was subsequently agreed by the sub-group that there should be research into the available options for calculating a debtor's income and expenditure before any single mechanism was adopted. This work is ongoing, however it would be useful to gather opinion at this stage as to which, if any, option is supported by stakeholders.

Question 24. Should a single mechanism be employed as industry standard to calculate a debtor's income and expenditure, for example CFS?

Question 25. If yes, should it be the CFS figures that are adopted as industry standard?

Question 26. If you do not agree that the CFS should be used, should some other figures, be used, for example CCCS?

Question 27. Where a decision is made to use a consistent method of calculating excess income, what percentage of a debtor's excess income should be paid to the trustee after the calculation is complete? 100%, 80%, 75% or another figure?

Form 4 Statement of Status of the Protected Trust Deed to creditors

7.11 As described earlier in this document, the Protected Trust Deeds (Scotland) Regulations 2008 currently provide that the trustee must send to AiB a report in the form of Form 4 (Statement of status of a PTD) on an annual basis, beginning with the date the trust deed is granted. This is the statement of status of the PTD showing the current position of the PTD and any change in the projected dividend. The creditors in the PTDWG requested that a copy of the Form 4 should also be sent to them as this would allow them to see how the PTD is progressing. This information would assist them when considering an audit request to AiB.

Question 28. Do you agree that the Form 4 Statement of status of the PTD should be provided to creditors on an annual basis?

Question 29. Should the capacity be developed to have the Form 4 displayed electronically on the ROI, and this form part of the PTD information held on the ROI?

A fixed time scale for the submission of creditor claims

7.12 An insolvency practitioner needs to know the exact amount of debt the debtor owes his creditors in order to calculate the dividend. At present there is no fixed timescale for the submission of creditor claims. To streamline this stage of the PTD process the PTDWG proposed a fixed timescale of 120 days, as is the current timescale in IVAs. The period could start either on granting the trust deed or on publication of the notice of the PTD in the Edinburgh Gazette (or ROI if the requirement to publish a notice in the Gazette is removed). This timescale would be used where creditors have been identified at the outset, or where a creditor comes to light during the term of the trust deed, it could commence from the date they became known to the trustee.

7.13 Where a creditor missed the 120 day timescale, the trustee would have the authority to reject any claim made by the creditor. The creditor would then have the right to appeal the trustee's adjudication. This would be akin to the current legislation for adjudication of claims in bankruptcies.

Question 30. Do you agree that a timescale should be fixed for the submission of claims in a trust deed by creditors?

Question 31. If so, do you agree that 120 days is the correct timescale?

Question 32. If you do not agree, what do you think is a realistic timescale?

Question 33. Should the trustee be able to reject claims where they are submitted late?

Question 34. Should the creditor have the right of appeal where a claim is rejected?

Part 8 : Proposals which will need legislative change

Earnings Arrestment

8. An earnings arrestment is a form of diligence which requires the employer of a debtor to make a deduction from a debtor's net earnings for enforcement of a single debt. The employer is compelled to deduct an amount from the debtor's wages or salary each time these are paid. This continues until all the money owed to the creditor has been paid or until the person leaves that employment or is made bankrupt. There is a limit to the amount which can be deducted and this is dependent on when the debtor is paid and how much the debtor earns.

8.1 In order for an earnings arrestment to be put in place, a creditor must be in possession of a decree (or relevant document of debt) and must have issued the debtor with a Charge for Payment. A Charge for Payment normally allows the debtor 14 days in which to make payment. Upon the expiry of the 14 days the creditor can proceed with enforcement action against the debtor's earnings if the debt remains unpaid. Where the debtor is an individual, creditors must also have provided a Debt Advice and Information Package to the debtor.

8.2 At present PTDs do not invalidate or stop any existing earnings arrestment, which will normally continue to be collected alongside a trust deed. This means that the particular creditor who has acquired an earnings arrestment order will get 100% of their debt repaid, whilst the others will get whatever dividend is calculated after taking the earnings arrestment into account. It should be noted, however, that the particular creditor who has pursued the earnings arrestment has already paid for this, including relevant Court and Sheriff Officer costs to put this in place and should the earnings arrestment cease, they may not recoup the money they have spent taking this action.

8.3 An award of bankruptcy will immediately stop an earnings arrestment⁴. The insolvency practitioners in the PTDWG requested that the provision in the Debtor (Scotland) Act 1987 be extended to provide that as of the date when a trust deed becomes protected an earnings arrestment stops automatically. In doing so this would prevent one creditor from having preference over all other creditors.

8.4 This change would require the amendment of primary legislation.

Question 35. Do you agree that there should be an the extension of the provision for sequestrations in the Debtor (Scotland) Act 1987 to provide that as of the date when a trust deed becomes protected an earnings arrestment stops automatically?

Income Payment Orders

8.5 A PTD is a voluntary arrangement and a debtor is expected to comply with the terms of the arrangement to provide information about assets and liabilities, income and expenditure, to cooperate in the realisation of their estate and to pay contributions.

⁴ Section 72 of the Debtors (Scotland) Act 1987

8.6 Contributions are agreed between the debtor and trustee at the start of the process, and the debtor normally undertakes to pay their trustee from their income for the period of the trust deed (normally 3 years), or a longer period to compensate for any failure to pay for a period during the term of the trust deed. A debtor who unreasonably fails to comply by not paying their contributions is regarded as not having kept to the agreement and thus should not have the benefit of imposing that agreement on creditors. Where the debtor does not pay the contributions agreed, then the trustee has two forms of recourse, a) they can petition for the debtor's bankruptcy, or b) they do not discharge the debtor from their debts.

8.7 Where the debtor has not met with his obligations under the trust deed, or the trustee considers that it would be in the best interest of creditors that an award of sequestration is made, the trustee can petition for the debtor's bankruptcy.

8.8 If the trustee deems discharge from the PTD inappropriate, but does not think bankruptcy is the correct solution either, they must inform the debtor in writing that they do not consider discharge appropriate and state the reasons why. It would not be appropriate to refuse to discharge a debtor because of a change of circumstances which prevents them from continuing to pay contributions. Where the trustee refuses to discharge the debtor, the debtor is not discharged from their debts and creditors are no longer bound by the PTD and can proceed to pursue the debtor for the money they are owed. In this situation, the trustee should notify the creditors that they have refused to discharge the debtor. The debtor has a right of appeal to the Sheriff⁵.

8.9 In bankruptcy, section 32(1) of the Bankruptcy (Scotland) Act 1985, as amended, provides that the debtor's income, other than income arising from estate which is vested in the trustee, belongs to the debtor. However, section 32(2) of that Act allows for the trustee to apply to the sheriff for an Income Payment Order (IPO) requiring the debtor to make a contribution from that income to the trustee. A contribution can be sought for a single amount or for regular payments.

8.10 An IPO under section 32(2) made by a sheriff must detail the period during which it is effective. That period may be after the date of the debtor's discharge but no later than 3 years after the date the order was made.

8.11 One proposal discussed by the PTDWG was for the introduction of IPOs to PTDs. The group welcomed this proposal as there are a small number of debtors who fail to comply with the agreed contribution payments in PTDs. To proceed with this proposal, a change in legislation would also be required.

Question 36. Do you consider that recourse over and above the option to sequestrate the debtor or deny discharge from the PTD should be available to the trustee?

Question 37. Should consideration be given to the introduction of IPOs to PTDs for debtors who fail to comply with the agreed contribution payments?

⁵ Regulation 23(2)(a) of the Protected Trust Deed (Scotland) Regulations 2008

Future PTD product

8.12 At the PTDWG, Citizens Advice Scotland (CAS) stated that their research has indicated that many of their clients are unable to access PTDs as a form of debt relief due to the level of fees involved. Using the figures quoted at the DAF, CAS propose that a simplified trust deed with a maximum duration of 5 years, excluding heritable property, and with a fixed fee of approximately £500 to £700, would make this form of debt relief more accessible to a number of debtors.

8.13 Although some members of the group challenged these figures on the grounds that there are currently statutory fees in the region of £450 to £500 payable to AiB before any administration fees are attributed, group members were generally supportive of setting up a sub group to look at the possibility of introducing a simplified, lower cost, model PTD which would enable more people to access this form of debt relief.

8.14 It was noted by some group members that the introduction of the Certificate for Sequestration may be a route to debt relief for those debtors unable to access the trust deed procedure. Section 9 of the Home Owner and Debtor Protection (Scotland) Act 2010 amends the Bankruptcy (Scotland) Act 1985, by introducing a new route into bankruptcy on the basis of a certificate completed by an authorised person certifying that the debtor is unable to pay debts as they become due. The debtor must demonstrate to their money adviser or insolvency practitioner that they are unable to pay their debts as they become due. The money adviser or insolvency practitioner can then sign the certificate. This new route allows a debtor to apply to AiB to be made bankrupt if they have been granted a certificate for sequestration. It is expected that this new route will allow people access to debt relief who currently are excluded.

8.15 During discussion some group members felt that the group looking at a simplified model PTD should be put in abeyance until after both the introduction of the Certificate for Sequestration and the development of the Guidance as these may remove the need for a simple model PTD.

Question 38. Do you agree that there should be a different product for some specific straightforward cases which would reduce costs and possibly make the process available to a wider group?

Question 39. Under what circumstances would you envisage this product could be used, for example no heritable property, no assets, low number of creditors?

Question 40. What do you consider a realistic charge for such a product would be?

Question 41. Were such a product to be introduced, should there be any extra responsibilities placed on a debtor prior to agreeing, such as an Income Payment Agreement?

Question 42. Were such a product to be introduced, should this be administered by IPs only, AiB only, or should both IPs and AiB be able to be trustee in simplified model PTDs as in bankruptcy currently?

Part 9: Other proposed changes

9. Other changes have been suggested with regard to trust deeds over the recent period. These have come from various stakeholders, including money advisers, insolvency practitioners and AiB.

Debtor's Address

9.1 The Act of Sederunt (Sheriff Court Bankruptcy Rules 2008) states that the address of the debtor at the date the trust deed is granted is the one which must be contained in the ROI. Concerns have been raised that where the debtor is, for example, living in safe accommodation, a woman's refuge or under witness protection and the current address is published, it could be used to trace them. This could put them in danger, from, for example, a violent ex partner. It has been suggested that to resolve this, a former address could be published.

9.2 With a view to making debtor identification easier, the Sheriff Court Rules Council has agreed that the debtor's date of birth can be included in the information held on the ROI. It is intended that this change to the ROI will be made later in this financial year, or in the next.

Question 43. Would a debtor's name and date of birth, along with a former address, be enough information for you to correctly identify the debtor?

Question 44. Do you agree that, in cases where a risk to the debtor can be shown, the debtor's current address should be omitted?

Contributions from Social Security benefits in PTDs

9.3 The AiB guidance notes currently state that no contribution should be sought from benefits but current practice appears to suggest that there are some cases where contributions from benefits are accepted by trustees in PTDs. The explanation given by trustees is that the debtor insists on making contributions from benefits. Section 187(2) of the Social Security Administration Act 1992 provides that every assignment of or charge on benefit as defined; jobseeker's allowance; any income-related benefit; or child benefit and every agreement to assign or charge such benefit shall be void, and on the bankruptcy of the beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors. Trustees argue that the legislation only states that trustees in bankruptcy cannot take contributions from benefits and as PTDs are not mentioned, taking a contribution from someone in a PTD who is a beneficiary of a benefit, while regarded by some as morally dubious, is not prohibited.

9.4 The Guidance states "Where a debtor's **sole** income is derived from benefits or tax credits as laid down in Section 187 (2) of the Social Security Administration Act 1992 Chapter 5 (as amended) or Section 45 (2) of the Tax Credits Act 2002 (as amended), it should **not** be appropriate for an income based PTD to be considered." Thus where a trustee adheres to the Guidance, were this to be agreed by the industry, no contribution from benefits would be taken or allowed to be given by a debtor.

9.5 Where an insolvency practitioner did not agree to adhere to the Guidance, or to AiB guidance notes, no legal challenge could be made unless legislative change was introduced to expressly make it clear that trustees cannot accept a contribution from social security payments to debtors, in PTDs.

Question 45. Do you agree that no contribution should be taken from Social Security benefits where these are a debtor's only income?

Question 46. If the Guidance is agreed, do you consider that this is a sufficient safeguard for the debtor with regard to Social Security benefits?

Question 47. If not, do you think that legislation should be introduced to prohibit trustees from accepting contributions from a debtor's Social Security benefits?

Fact Finding Fees

9.6 In trust deeds, the trustee can claim a payment that has been made to a third party agent for work done on behalf of the trustee. The payment, which is claimed as an expense of the trust deed, is for work to establish the debtor's financial circumstances prior to the granting of the trust deed. A third party agent may, for example, advertise PTDs as a means of debt control, then when contacted by a debtor, confirm their circumstances to establish whether they are eligible to enter a trust deed. If the debtor may be eligible for a trust deed, the third party agent will pass them to an insolvency practitioner. In some cases the third party agent will charge the debtor directly for this service as well as receiving a payment from the trustee.

9.7 The agent must submit an invoice to the trustee, detailing the work they have done, and this can be paid as an outlay from funds in-gathered through the trust deed. Prior to payment, the trustee should be satisfied that the fee charged by the agent is reasonable for the amount and type of work completed and that the work has been completed to an acceptable standard.

9.8 The trustee may also claim time to the trust deed if they believe there is a requirement to verify any of the information provided by the agent. But a fee cannot be charged if the trustee is duplicating work that the agent has completed and has been paid for. The time spent verifying information, however, can add to the cost of the trust deed, increasing fees and reducing dividends to creditors.

9.9 The fees charged by an agent range from £400 to £1200, averaging £800. Added to this, trustees typically charge between 1⁵ and 3 hours to the trust deed to verify the agent's work. This verification is carried out over the range of grades within an insolvency practitioner's staff, so is charged at a variety of levels dependant on which insolvency practitioner is trustee. Both the agent's fees and the charge for verification of the information are charged to the trust deed, reducing the amount that is available for creditors. As stated above, the debtor may also have paid a fee directly to the third party agent.

9.10 This provision to claim a pre-trust deed cost as an outlay of the trustee of a trust deed, does not apply to trustees of sequestrations. The Bankruptcy (Scotland) Act 1985, as amended, makes no provision for work completed prior to the date of bankruptcy and the

appointment of the trustee and this cannot be treated and paid as an outlay of a sequestration.

Question 48. Do you believe it is appropriate for an agent's fact finding fees, that are incurred prior to the granting of a trust deed, to be treated as an outlay of the trust deed?

Question 49. Do you believe it is appropriate that a further charge to the trust deed should be allowed to verify information gathered by a third party agent?

Forms in PTD Regulations

9.11 The statutory forms used in the PTD process can be found at Schedule 1 of Protected Trust Deeds (Scotland) Regulations 2008. These forms have not been reviewed since their introduction in 2008.

9.12 Improvement to these forms to assist in the PTD process could include:

- the addition of the debtor's date of birth to assist creditors in their identification of debtors;
- capturing creditors current addresses to try to improve the trustees of PTDs chances of contacting the creditor at the time a dividend is to be paid and so reduce the amount of PTD consigned funds;
- the inclusion of further information with regard to assets and debts to improve the information provided to creditors;
- the addition of the AiB Reference to improve process for associating the Form with the correct PTD; and
- the inclusion of reversion and consignment figures and preferred and secured creditor debt details for future statistical purposes, to enhance information available to those involved in the PTD process.

Question 50. Do you agree that the PTD Forms contained in the Protected Trust Deeds (Scotland) Regulations 2008 should be reviewed?

Question 51. Are there any particular changes to PTD Forms that you feel would benefit you?

Appendix 1

Protected Trust Deeds – Improving The Process

**Accountant in Bankruptcy
Protected Trust Deed (PTD)
Guidance**

2011

2 October 2011

Table of Contents

1.	Purpose of the Guidance	3
2.	Scope of the Guidance	3
3.	PTD Requirements	4
4.	Transparency	4
5.	Verification of Information Contained in Trust Deed Protection Requests	5
6.	Acceptance of Trust Deed Protection Requests	6
7.	Trustees' Obligations	7
8.	Use of Standard Documentation	8
9.	Home Equity	8
10.	Use of Discretion, Variation and Failure	9
11.	Reporting to Creditors	10
12.	Fees and Dividends	10
13.	Discharge of the Debtor	11
14.	Use of Agent	11
15.	Sale of Debt	12
16.	Cooperation with the PTD Review Board	12

The Accountant in Bankruptcy (AiB) Protected Trust Deed Guidance

1. Purpose of the AiB PTD Guidance

1.1 The purpose of the AiB PTD Guidance (the Guidance) is to facilitate a common approach to the efficient handling of all Protected Trust Deeds (PTDs), ensuring that the process is fit for purpose and strikes the best possible balance between the needs of debtors and the rights of creditors. The Guidance recognises that PTDs support a valid Scottish Government policy objective by providing debt relief for debtors in financial difficulty.

1.2 The Guidance recognises that at the centre of this process there is a debtor, who needs to understand the process and the associated paperwork as well as the impact that a PTD will have on their future access to credit and banking facilities. It also recognises the need for the PTD process to become more transparent and to provide a fair and reasonable return to creditors within an acceptable timescale.

1.3 The efficient operation of the PTD process will be scrutinised and reviewed by AiB and the PTD Review Board. The terms of reference of the Review Board are recorded at [Annex A](#).

2. Scope of the Guidance

2.1 The Guidance provides a standard framework for dealing with PTDs and applies to both Insolvency Practitioners (IPs), when acting as trustees for PTDs, and creditors. Under the terms of the Guidance, trustees and creditors agree to follow the processes and agreed documentation that forms the Guidance. Trustees will adhere to the terms of the Guidance in drawing up the terms of the trust deed and protection request based on the standard documentation with written confirmation that it follows the Guidance. There is an expectation that creditors would generally agree to the protection of a trust deed that conforms with the terms of the Guidance.

2.2 Trustees must make every effort to comply with the Guidance. In exceptional circumstances there may be scenarios where the terms of trust deed do not fully comply with the Guidance. In these circumstances the trustee must provide an explanation to the creditors to detail why they have adopted a different approach.

2.3 The following organisations have been asked to indicate their support for the Guidance process

Drafters Note. Creditor organisations will be contacted prior to publication of the Guidance. The list of creditor organisations will be published on the AiB website.

2.4 The Guidance does not override the regulatory requirements that must be met by all trustees when administering a PTD.

2.5 For the avoidance of doubt, trustee means individuals who are authorised to act as IPs in the United Kingdom by an authorised body. References to creditor in this Guidance refer to both creditors and the agents who vote on their behalf and act in accordance with their instructions in relation to a PTD. Firms are expected to provide their IPs with adequate

support and training to ensure best practice in the administration of PTDs and should seek to ensure that their systems adequately support this process.

2.6 One of the aims of the Guidance is to improve efficiency in the PTD process and to this extent creditors and trustees will avoid the need for the terms of the trust deed protection request to be amended wherever possible. This does not affect the right of creditors to vote for or against the protection request but they are expected to supply reasons supporting their rejection decision.

3. PTD Requirements

3.1 The debtor's individual financial circumstances will be examined to ensure that the most appropriate debt relief or debt management solution is employed in accordance with [SIP 3A \(Scotland\) section 5.7](#). Where a PTD is deemed to be the appropriate option for the debtor, the following requirements must be met:

- The debtor is able to pay a contribution from their income, or income supplied by a third party, for a period of no less than 3 years* to enable payment of their trustee's fees and costs as well as the expected dividend, and/or
- The debtor has assets which can be realised to provide sufficient available funds to both pay the trustee's fees and costs as well as the expected dividend to creditors.
- Where a debtor's **sole** income is derived from benefits or tax credits as laid down in Section 187 of [the Social Security Administration Act 1992 Chapter 5](#) (as amended) or Section 45 of [the Tax Credits Act 2002](#) (as amended), it should not be appropriate for an income based PTD to be considered.

* The contribution period can be less than 3 years if the debtor is able to repay all outstanding debts plus statutory interest within a shorter timescale. This situation may arise due to a windfall or change in the debtor's circumstances.

4. Transparency

4.1 All parties should act openly and disclose all relevant matters; the debtor's date of birth will be included in standard forms as appropriate.

4.2 The trustee's report to creditors must disclose any previous attempts to deal with the debtor's current financial problems (e.g. refinancing, previous PTDs, Debt Payment Plans (including DAS Debt Payment Programmes) in so far as known to the trustee after due enquiry together with a disclosure by the debtor if there were any dealings with the trustee or businesses connected with the trustee and an explanation of why these attempts were unsuccessful. Any payments made by the debtor in relation thereto, must also be disclosed.

4.3 The information that is required to be disclosed in the trustee's report to creditors is detailed in the regulatory guidance provisions of the [Statement of Insolvency Practice 3A \(Scotland\)](#) (SIP3A).

4.4 The trustee will enquire of the debtor as to whether he/she has made any payments in connection with the matters set out in clause 4.2 to any party prior to contacting the trustee's organisation. Unless separately disclosed in accordance with SIP3A, the trustee shall record within his/her report to creditors the amount, date and nature of any such

payments made by the debtor in the last 12 months prior to the granting of the Trust Deed in so far as this information is disclosed to the trustee.

4.5 All parties to this Guidance must publish their processes for dealing with complaints and details of relevant regulatory authorities, in accordance with current requirements. Any complaints must be dealt with in accordance with the published processes.

5 Verification of Information Contained in Trust Deed Protection Requests

5.1 Assets

5.1.1 As required in all prospective PTDs, steps must be taken to ensure that the value of all realisable assets is appropriately reflected in the statement of affairs and notified to creditors. This will require independent evidence of valuation to be obtained in the case of material assets and evidence of any outstanding loan secured against the asset(s).

5.2 Liabilities

5.2.1 The trustee must make best endeavours to obtain full details of all known and potential creditors from the debtor. The trustee must also make best endeavours to obtain up to-date statements and letters or copies of agreements from each creditor prior to the issue of the trust deed protection request should the debtor be unable to provide the information required. Creditors must make best endeavours to ensure that requests for information are dealt with within reasonable timescales.

5.3 Income and Expenditure

5.3.1 Income must be verified by means of 3 months of pay slips (or a suitable equivalent for the self-employed) or bank statements (in the case of weekly pay slips, it is sufficient to check a selection to cover the 3 month period). In the absence of pay slips (e.g. if they have been lost), bank statements must be checked.

5.3.2 Creditors will normally accept income and expenditure statements drawn up by the trustee and verified in accordance with this Guidance, as the basis of a request for protection of the trust deed.

5.3.3 A common expenditure statement will be utilised for all trust deed protection requests. This will include appropriate detail of expenditure. Generally, there should be no deviation from the expenditure guidelines. However, where additional expenditure is necessary, for example due to special dietary requirements or increased heating bills due to caring for elderly relatives or above average work-related travel costs, this must be clearly explained.

5.3.4 If the debtor wishes to continue to pay for exceptional financial commitments, for example, health insurance or payment protection insurance, the protection request must contain a note stating why this is considered to be essential expenditure.

5.3.5 The expenditure elements that require formal verification and justification where appropriate are:

- Secured loan payments – verification by sight of relevant mortgage or bank statements.

- Rent – verification by sight of rent agreement or relevant bank statement entries.
- Council tax – verification by sight of council tax bill or relevant bank statement entries.
- Vehicle Finance – verification by means of relevant HP/Finance agreement and/or Motability documentation. Any vehicle which is reasonably required by the debtor, not exceeding £3,000 in value will be excluded from the trust deed in compliance with the amended Section 11 of the Debt Arrangement and Attachment (Scotland) Act 2002. The amendment is detailed in [Regulation 4 of the Bankruptcy \(Scotland\) Amendment Regulations 2010](#).
- Pension – verification by sight of pension scheme documentation and/or wage slip/pension contribution statement.
- Other financial commitments such as endowment policies, life policies, health insurance and payment protection insurance – verification by reference to appropriate documentation.
- When the best endeavours to obtain the above information have not been successful and the trustee is satisfied that the circumstances are as described by the debtor, a statement from the trustee to this effect will be sufficient.

5.3.6 The trustee's report to creditors will include a statement that the income and expenditure have been verified in accordance with the Guidance and provide details of the means used where the debtor is self-employed.

6. Acceptance of Trust Deed Protection Requests

6.1 Creditors will continue to comply with the regulatory standards and codes of practice to which they are subject in all dealings with the debtor who has requested protection of a trust deed under this Guidance. Furthermore, creditors will co-operate with the trustee in relation to the efficient operation of this Guidance.

6.2 Creditors must take reasonable measures including searching the Register of Insolvencies to avoid offering further credit to debtors known to have a PTD in place, unless this is in justifiable circumstances (e.g. for re-mortgage purposes).

6.3 Where a creditor, or their agent on their behalf, votes against the protection of a trust deed their reason for doing so must be disclosed to the trustee at the earliest possible opportunity. Where the trustee requires more detailed information regarding the decision of the creditor, or their agent, to vote against the protection of a trust deed the creditor will comply with this request.

6.4 By voting in favour of the protection of a trust deed, creditors accept that the trustee has discretion as referred to in section 10 (below) and must not challenge the use of that discretion.

7. Trustees' Obligations

7.1 Advertising

7.1.1 Advertisements and other forms of marketing must be clearly distinguishable as such and have regard to the [OFT Debt Management Guidance](#) and all relevant codes of practice,

in particular to the principles of legality, decency, honesty and truthfulness. Any telemarketing must comply with the codes relevant to that activity and must comply with the relevant Recognised Professional Body's (RPB) guidance.

7.1.2 The trustee must not promote or seek to promote their services, in such a way (e.g. by 'cold calling') or to such an extent as to amount to harassment or in a way that causes fear or distress.

7.1.3 Where a trustee receives work from a third party, the trustee must make best endeavours to confirm that the third party complies with the expected standards of debtor care. The trustee will be responsible for the regular review of these arrangements to ensure that the third party continues to meet the appropriate requirements. Where the trustee becomes aware that incorrect or misleading information has been provided by the third party the trustee must alert the third party to allow this to be rectified. Where the third party refuses to rectify their material, the trustee should cease to accept work from them and report the matter to AiB for further investigation and referral to the relevant authority.

7.2 Advice

7.2.1 When approached by a debtor in financial difficulty, the trustee must ensure the debtor receives appropriate advice in the light of their particular circumstances, leading to a proposed course of action to resolve their debt problem (see paragraph 3.1, above). Full information on the advantages and disadvantages of all available debt resolution processes must be provided e.g. by use of the publication entitled The Debt Advice Information Pack, which must be made available to the debtor by the trustee or can be found on the AiB website at: <http://www.aib.gov.uk/guidance/publications/debtbankruptcy/DAIP>

7.2.2 The trustee must verify that the debtor has received appropriate advice, in the light of their particular circumstances, and make best endeavours to ensure that the debtor understands the implications of the route they are undertaking.

8. Use of Standard Documentation

8.1 The use of standard documentation will streamline the trust deed protection process and enable creditors to quickly identify those cases which deviate from Guidance and have easy access to the key information in the protection request.

8.2 IPs must use the standard summary/front cover sheet ([Annex B](#)) which must be circulated to AiB and all creditors for all trust deed protection requests.

8.3 All documentation must state clearly that the prospective PTD follows the Guidance and that the agreed format documentation has been used. Any variation from the PTD Guidance (for example special dietary requirements, see paragraph 5.3.4) must be clearly identified in all relevant paperwork.

9. Home Equity

9.1 Subject to 9.2 (below) the value of the debtor's share of the equity in their dwelling-house will be frozen at the date the trust deed was granted. This may be revised at any future point prior to the debtor's discharge where the debtor fails to meet his or her PTD obligations.

9.2 Where it proves necessary to sell the debtor's home the equity freeze will cease to have effect so the net proceeds of sale will be paid to the PTD estate.

9.3 The debtor must be provided with a clear written explanation illustrating the net worth of the equity to be released (where applicable) and must be informed that this figure may be re-calculated should he or she fail to meet their PTD obligations.

9.4 Following discussion with the debtor there must be an attempt to release the debtor's net equity in the dwelling-house where practicable. This discussion should occur at the beginning of the PTD administration. The trustee should consider all means at his disposal including the potential for a re-mortgage, use of the Scottish Government Mortgage to Rent Scheme, settlement from a third party or any other method which the trustee considers to be fair and reasonable. The trustee's plans for releasing the equity will be detailed in a statement that will be signed by both parties. The statement will be copied to AiB along with Form 3, or where this is not possible, within 6 months of the protection of the trust deed. Where the debtor is unable to realise sufficient funds to buy out the equity the trustee will extend the term of the PTD where appropriate to allow sufficient funds to be in-gathered.

9.5 At the time the debtor is asked to release the net worth in his/her dwelling-house, the trustee, or a suitable member of his/her staff, must advise the debtor to seek advice from an independent financial adviser. This advice will identify the most appropriate mortgage vehicle and the length of the proposed repayment term.

9.6 For the purpose of the release of net worth, the property shall be valued by an independent professional valuer on an open market basis.

9.7 When dealing with the debtor's dwelling-house, the PTD trustee should refer to Section 6.10 of the Notes for Guidance for Interim and Permanent Trustees published by AiB which can be found at:

<http://www.aib.gov.uk/guidance/DAS/nfgpostapril/notesforguidancepart1to7n>

10. Use of Discretion, Variation and Failure

10.1 The trustee has the discretion to admit claims of £1,000 or less, or claims submitted that do not exceed 110% of the amount stated by the debtor in the trust deed, without the need for additional verification.

10.2 The trustee must ensure that he/she is provided with copies of payslips (or other supporting evidence) every 12 months. The trustee is required to review the debtor's income and expenditure once in every 12 months, using the agreed income and expenditure calculation model. Where appropriate, and at the request of the trustee, the debtor must verify increases in outgoings by providing documentary evidence. The trustee must ensure that appropriate adjustments are made to the contribution level when the debtor's circumstances change. When hire purchase agreements cease during the term of the PTD the IP should re-examine the debtor's income and expenditure to establish whether disposable income has increased thus allowing the income contribution to be enhanced.

10.3 Where the debtor is employed, the debtor must report any overtime, bonus, commission or similar to the trustee if not included in the original surplus calculation. Disclosure to the trustee will be made within 1 month of receipt and the trustee will in-gather an appropriate amount of the surplus income for the benefit of the trust deed estate. Failure to disclose any such overtime, bonus, commission or similar by the debtor may be considered as a contravention of the PTD obligations and the trustee shall notify the creditors in the next Form 4 return together with proposals for how this is to be rectified.

10.4 A debtor who is subject to redundancy whilst in a PTD must:

- Inform his/her trustee within 1 month of notice of redundancy, regardless of whether he/she has received or is to receive any redundancy payment;
- Inform his/her trustee of the amount of any redundancy payment within 1 month;

When dealing with payments made on redundancy, the trustee should refer to Section 6.22 of the Notes for Guidance for Interim and Permanent Trustees issued by the Accountant in Bankruptcy which can be found at:

<http://www.aib.gov.uk/guidance/DAS/nfgpostapril/notesforguidancepart1to7n>.

10.5 At the point new employment is obtained the trustee will review the debtor's contributions and at that point there will be an expectation that any remaining redundancy funds will be paid into the PTD, and the debtor's performance in this regard will be reported to creditors.

10.6 Failure to disclose any such entitlement to redundancy payment will be considered as a contravention of the trust deed obligations.

10.7 A debtor will be allowed one payment break during the term of the PTD at the discretion of the trustee. If the payment break is for a period of up to three months or less, the trust deed will be extended for an appropriate period for the missed payments to be recouped, without reference to creditors. Where there is a payment break of longer than 3 months the IP will advise the creditors and period of the PTD may be extended and/or the

contribution may be adjusted. At the conclusion of an agreed payment break the trustee shall, if necessary, review the position and notify the creditors as appropriate.

10.8 Where the debtor is unable to make contributions and there are no assets that can be realised or equity to be released, the trustee will review the viability of the continuance of the PTD. The PTD may be ended where it is believed that there is no long term prospect of the debtor making future payments. Where this failure has occurred through no fault of the debtor, the trustee may decide that the debt may be written off, subject to Regulation 19 of the [Protected Trust Deed \(Scotland\) Regulations 2008](#), as the debtor could be deemed to have met their obligations.

11. Reporting to Creditors

11.1 A Form 4 must be prepared and sent to creditors by the trustee, which must include details of the debtor's income and expenditure, based on information obtained. Relevant details should be included where there has been a significant or material change. The trustee will be required to verify changes in income levels by inspecting pay slips or P60s. The Form 4 must be sent within 6 weeks of the anniversary of the date the trust deed was granted and each year thereafter for the period the PTD subsists. There remains a statutory requirement to make annual Form 4 returns to AiB.

11.2 The trustee must inform and explain to creditors in the Form 4 if there has been any change to the notified expected final dividend payment of the PTD.

12. Fees and Dividends

12.1 Subject to 12.2, once the initial administration fee is recovered and where sufficient funds have been in-gathered, the trustee must make the first payment to creditors no later than month 18 and at 6 monthly intervals thereafter.

12.2 Where the level of the dividend installment is less than £100, or another amount, agreed by the creditors, the trustee may delay payment until such time as he has recovered sufficient funds to allow a payment of at least £100, or the amount agreed by creditors to be made.

12.3 Remuneration shall be fixed at the outset and the fees payable to the trustee will be on the basis of:

- An initial administration fee to cover the cost of setting up the trust deed; and
- Thereafter regularly monthly fees based on an agreed percentage of contributions and/or asset realisation;

12.4 The remuneration levels must be clearly communicated to the creditors and the debtor.

12.5 Increased remuneration will only be allowed in exceptional circumstances with the express agreement of the majority in value of creditors. The value of creditors is determined by the value of their claims.

12.6 Creditors must make best endeavours to provide a statement of claim (proof of debt) in the form required by the trustee within 120 days of the date of protection.

13. Discharge of the Debtor

13.1 The trustee will discharge the debtor from all of his/her PTD debts and obligations if the trustee is satisfied that the debtor has met, to the best of their ability, their obligations under the PTD and will issue the debtor with a certificate to this effect.

13.2 Prior to discharge of the debtor, the trustee is required to take appropriate action to ensure that any notice of inhibition, relating to the PTD, has either been recalled or expired.

13.3 The trustee must notify creditors if the debtor is, or is not, discharged from their debts and obligations at the end of the PTD.

13.4 If the trustee does not discharge the debtor from their PTD debts, the debtor must be notified of the reason for this in writing and informed that they may appeal this decision to a sheriff.

14. Use of Agents

14.1 It will be the responsibility of creditors to ensure that any agents carrying out instructions or acting on their behalf in relation to a PTD or prospective PTD, do so in accordance with this Guidance and in accordance with applicable regulatory requirements.

14.2 Where a creditor requires communication regarding the debt due or the trust deed protection request to be sent via its agent, the creditor must ensure that details of the appropriate contact are provided to relevant trustee.

14.3 Where a trustee utilises the services of an agent to undertake work either prior to, or after, the granting of the PTD, the trustee must notify creditors and record:

- The name and address of the agent;
- A description of the work done by the agent; and
- The hours and fees charged by the agent.

14.4 The trustee must be able to demonstrate that the work completed by the agent was a requirement for the preparation or administration of the PTD and the cost of the agent's work was not more expensive than if the work had been completed by the trustee or his staff.

15. Sale of Debt

15.1 Where debt is sold when a trust deed protection request has been submitted but before it has been approved, creditors must ensure that the debt buyer is a signatory to the Banking/Lending Code or follows the principles contained in the Banking/Lending Code and complies with the Office of Fair Trading ([OFT Debt Collection Guidance](#)).

15.2 The selling creditor is required to inform the purchaser that the debt is subject to the terms of a PTD, to ensure that the debtor is not pursued by the purchaser for payment of the relevant debt. The purchasing creditor's claim must be supported by a copy of the assignation which demonstrates that it has been intimated to the debtor or the trustee.

15.3 The purchasing creditor must inform the trustee of the revised account number(s).

15.4 The trustee must amend their records of the debt to reflect the new creditor within 30 days of receipt of proof of the assignment or an alternate agreed timeframe.

16. Cooperation with the PTD Review Board

16.1 Only when provided with all relevant information will the PTD Review Board be able to monitor and review the efficient operation or otherwise of the Guidance. Information required for this purpose will be determined by the Review Board. Such information, other than that which is commercially sensitive or which needs to be withheld for reasons of confidentiality, will be provided by trustees and creditors at the request of the Review Board.

16.2 All parties may provide information to the PTD Review Board which will enable it to determine the effectiveness or otherwise of the PTD administration process. Similarly, behaviour which is believed to be unacceptable or contrary to the Guidance may be reported to the Review Board. The Review Board cannot override existing regulatory procedures.

List of Annexes:

1. Referred to in section 1.3

The terms of reference of the PTD Review Board are recorded at [Annex A](#).

2. Referred to in Section 8.2

For all PTDs, IPs must use the standard summary/front cover sheet at [Annex B](#) which must be circulated to AiB and all creditors.

Annex A

**Protected Trust Deed Review Board
Terms of Reference**

- 1. Purpose 45**
- 2. Objectives..... 45**
- 3. Composition..... 45**
- 4. Scope 46**
- 5. Frequency of Meetings..... 46**
- 6. Record Of Meetings, Communication and Consultation 46**
- 7. Quorum / Voting..... 46**
- 8. Evaluation Of The PTD Review Board 46**

1. Purpose

To PTD Review Board will:

- Provide information and guidance to the Accountant in Bankruptcy (AiB) on the administration of Protected Trust Deeds (PTDs);
- Help to identify problems/issues or general areas of concern arising from the administration of PTDs at an early stage; and
- Act as a discussion forum for stakeholders, to ensure that there is an effective conduit for the receipt and dissemination of information concerning PTDs across stakeholder groups and interested parties.

2. Objectives

The key objectives of the PTD Review Board are:

- To work with stakeholders on the Guidance (the Guidance) to ensure that guidance remains up to date and fit for purpose;
- To oversee and review the operation of the PTD process to ensure that it strikes the best possible balance between the needs of debtors and the rights of creditors;
- To communicate and consult, where necessary, on future developments on the Guidance;
- To develop solutions to any identified problems with PTDs;
- To effectively disseminate PTD information to stakeholders; and
- To alert external supervisory bodies (such as the OFT) to issues that affect PTDs but fall within their remit.

3. Composition

The PTD Review Board will be chaired by AiB. Membership will be made up as follows:

Recognised Professional Bodies – Two seats

R3 – One seat

Debt Advice Sector – Two seats

Creditor Organisations – Two seats

Creditor Agent – One seat

PTD bulk provider – One seat

Bulk creditor – One seat

HMRC – One seat

Small practitioner – One seat

Membership, excluding The Chair, The Secretariat and Observer Members shall not exceed 12.

The period for which an organisation sits on the PTD Review Board will normally be 2 years from their first attendance at a meeting. Membership will be by invitation from AiB, unless stated otherwise in [Appendix 1](#), who will seek to ensure that there is appropriate representation from the various groupings involved. AiB may invite other stakeholders to meetings on an ad hoc basis. Others can be invited by the Chair to act as observer members.

The period for which an organisation attends the PTD Review Board as an observer member will normally be 2 years from their first attendance at a meeting. Observer membership will be by invitation from AiB, who will seek to ensure that there is appropriate representation from the various groupings involved.

There will be a maximum of 2 observer members at any time.

4. Scope

This scope of the PTD Review Board is limited to the examination and discussion of issues related to the operation of the Protected Trust Deed process. The PTD Review Board has no role to play in complaint handling or monitoring of insolvency practitioners and will not consider individual complaints.

5. Frequency of Meetings

The first meeting of the PTD Review Board will take place before xx xx 2011. Thereafter, the Committee will meet at least twice per year. AiB will retain the right to alter the frequency of meetings in consultation with stakeholders.

6. Record of Meetings, Communication and Consultation

Agenda and minutes of meetings will be recorded and will be made available on the AiB website. Further miscellaneous updates or actions will be communicated via email to members of the PTD Review Board and posted on the AiB website.

AiB's Policy Development and Compliance Team will perform the secretariat function of the Board.

7. Quorum / Voting

A quorum shall be 6 full members of the PTD Review Board (including nominated substitutes). For the avoidance of doubt the Chair is a full member of the PTD Review Board.

Whilst it is envisaged that decisions and recommendations can be arrived at via consensus, in the event of a vote being required, decisions can be agreed by a simple majority of those full members present (or their nominated substitutes) with the Chair holding a casting vote.

8. Evaluation of the PTD Review Board

The Operation of the Review Board will be evaluated by AiB 12 months after the first meeting and annually thereafter.

Appendix 1

Further Information on the PTD Review Board Membership

- The representation for the Debt Advice Sector will be from Citizens Advice Scotland and Money Advice Scotland.
- The representation for Recognised Professional Bodies will be from ICAS and the IPA.
- The PTD bulk providers (defined as those in the top 5 of PTDs recorded in 2010/11) will be asked to nominate one member to represent their interests
- The BBA will be asked to provide details of two lenders to act as the representatives of creditor organisations.
- Max Recovery will be asked to act as the first “Bulk” creditor representative
- TiX will be approached to act as the representative of creditor agents.
- IIPS will provide details of an IP to act on behalf of “small practitioners” (defined as someone taking less than 50 PTD appointments in a calendar year)

**Annex B
Front Sheet**

Summary Sheet for Trust Deed Protection Proposal

Trust Deed Details

Date of Signing (dd/mm/yyyy)

Linked trust deed?

Objection deadline

Date advertised

Linked applicant's name

Trustee Details

Company Name

Trustee Name

Case reference:

Debtor's Details

Title

Surname

Forenames

Address

Post Code

Date of Birth

Marital Status

Residential Status

Employment Status

Occupation

Number of dependants

Ages of dependants

Creditor Details

See Annex A

Total Unsecured Debt

Total Secured Debt

Projected Realisation

a) Trust Deed Duration (months)

b) Monthly Contribution

c) Total income contribution

d) Equity to be released

e) Other assets released

f) Total realisations (c+d+e)

Fees and outlays

Basic Cost

Vat element

Total

*Initial Set up fee

**10% Administration fee

Outlays & disbursements

Assets realisation cost

g) Total Cost

£6864

*Including fact finding fee where applicable.

**Fee based on a percentage of funds ingathered (f).

Projected Dividend

Available for creditors (f-g)

Dividend

Date of initial dividend payment
(dd/mm/yyyy)

Reasons for Insolvency and details of any non-standard arrangements:

ANNEX A

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically, Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses.

Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g. analysis of response reports) can be accessed at: <http://www.scotland.gov.uk/consultations>

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

ANNEX B

CONSULTATION QUESTIONNAIRE

Protected Trust Deeds – Improving the Process

Part 7: Proposals to improve the trust deed process

Question 1: From your perspective, will the Guidance drive the desired changes as set out above?

Yes No

Question 2: Do you agree that the Guidance strikes the right balance between debtors and creditors?

Yes No

Question 3: Do you support the application of the Guidance to PTDs generally?

Yes No

Question 4: If you are an insolvency practitioner, would you envisage that all of the PTDs you administer in future would be in line with the Guidance?

Yes No

Question 5: If not, what percentage of the PTDs you administer in future would you estimate would struggle to be compliant with all aspects of the Guidance?

Answer _____

Question 6: If not all your cases would be in line with the Guidance, what aspects of the Guidance would you struggle to meet and why?

Answer _____

Question 7: Do you think that the Guidance goes far enough? Should there be a wholly legislative approach to trust deeds, not reliant on the voluntary agreement of those involved?

Goes far enough Legislative approach

Question 8: Do you agree that trustees should have some limited discretion in accepting the value of a claim?

Yes No

Question 9: Do you agree that trustees should seek to make payments to creditors no later than month 18 and at 6 monthly intervals thereafter subject to sufficient funds being ingathered?

Yes No

Question 10: From your perspective do the limited controls on fees as set out in the Guidance go far enough, or should AiB have increased powers over the fees that can be claimed in a PTD?

Controls go far enough Increased powers for AiB

Question 11: Do you agree with the introduction of a PTD Review Board?

Yes No

Question 12: Do you agree the proposed membership of the PTD Review Board as stated in the Guidance document?

Yes No

Question 13: If not, what changes would you make?

Answer _____

Question 14: Do you agree that trust deeds should be advertised in the Register of Insolvencies rather than the Edinburgh Gazette?

Yes No

Question 15: Would it be useful to have the accessible information regarding trust deeds on the ROI extended to include, for example, the current status of the trust deed and any change to the predicted dividend?

Yes No

Question 16: Do you agree that a standard front sheet should be introduced for use throughout the industry?

Yes No

Question 17: If so, do you agree with a – d at **para 17.6** as to what it should include?

Yes No

Question 18: Would it be useful to you for any further information to be captured on the front sheet?

Yes No

Comment _____

Question 19: Do you agree that the equity in a property should be frozen at the date the trust deed is granted?

Yes No

Question 20: Do you agree that, where it becomes necessary that the property is sold, the freeze on equity is lifted?

Yes No

Question 21: Do you agree that legislation should be introduced to formalise these proposals regarding the freezing of equity?

Yes No

Question 22: Do you agree that the trustee should realise any available equity at the beginning of the trust deed administration?

Yes No

Question 23: Do you agree that equity realisation plans should be signed by the debtor and trustee then sent to AiB as part of the documents which would allow AiB to register the trust deed as protected?

Yes No

Question 24: Should a single mechanism be employed as industry standard to calculate a debtor's income and expenditure, for example CFS?

Yes No

Question 25: If yes, should it be the Common Financial Statement (CFS) figures that are adopted as industry standard?

Yes No

Question 26: If you do not agree that the CFS should be used, should some other figures be used, for example CCCS?

Answer _____

Question 27: Where a decision is made to use a consistent method of calculating excess income, what percentage of a debtor's excess income should be paid to the trustee after the calculation is complete?

100% 80% 75% Other Please state _____

Question 28: Do you agree that the Form 4 Statement of Status of the PTD should be provided to creditors on an annual basis?

Yes No

Question 29: Should the capacity be developed to have the Form 4 displayed electronically on the ROI, and this form part of the PTD information held on the ROI?

Yes No

Question 30: Do you agree that a timescale should be fixed for the submission of claims in a trust deed by creditors?

Yes No

Question 31: If so, do you think that 120 days is the correct timescale?

Yes No

Question 32: If you do not agree, what do you think is a realistic timescale?

Answer _____

Question 33: Should the trustee be able to reject claims where they are submitted late?

Yes No

Question 34: Should the creditor have the right of appeal where a claim is rejected?

Yes No

Part 8: Proposals that will need legislative change

Question 35: Do you agree that there should be an the extension of the provision for sequestrations in the Debtor (Scotland) Act 1987 to provide that as of the date when a trust deed becomes protected an earnings arrestment stops automatically

Yes No

Question 36: Do you consider that recourse over and above the option to sequestrate the debtor or deny discharge from the PTD should be available to the trustee?

Yes No

Question 37: Should consideration be given to the introduction of Income Payment Orders (IPOs) to PTDs for debtors who fail to comply with the agreed contribution payments?

Yes No

Question 38: Do you agree that there should be a different product for some specific straightforward cases which would reduce costs and possibly make the process available to a wider group?

Yes No

Question 39: Under what circumstances would you envisage this product could be used, for example no heritable property, no assets, low number of creditors?

Answer _____

Question 40: What do you consider a realistic charge for such a product would be?

Comment _____

Question 41: Were such a product to be introduced, should there be any extra responsibilities placed on a debtor prior to agreeing to this product, such as an Income Payment Agreement?

Yes No

Question 42: Were such a product to be introduced, should this be administered by IPs only, AiB only, or should both IPs and AiB be able to administer such products?

IPs only AiB only IPs and AiB

Part 9: Other Proposed Changes

Question 43: Do you agree that, a debtor's name and date of birth, along with a former address, should be enough information to correctly identify the debtor?

Yes No

Question 44: Do you agree that, in cases where a risk to the debtor can be shown, the debtor's current address should be omitted from the ROI?

Yes No

Question 45: Do you agree that no contribution should be taken from Social Security benefits where these are a debtor's only income?

Yes No

Question 46: If the Guidance is agreed, do you consider that this is a sufficient safeguard for the debtor with regard to Social Security benefits?

Yes No

Question 47: If not, do you think that legislation should be introduced to prohibit trustees from accepting contributions from a debtor's Social Security benefits?

Yes No

Question 48: Do you believe it is appropriate for an agent's fact finding fees, that are incurred prior to the granting of the trust deed, to be treated as an outlay of the trust deed?

Yes No

Question 49: Do you believe it is appropriate that a further charge to the trust deed should be allowed to verify information gathered by a third party agent?

Yes No

Question 50: Do you agree that the PTD Forms contained in the Protected Trust Deeds (Scotland) Regulations 2008 should be reviewed?

Yes No

Question 51: Are there any particular changes to PTD Forms that you feel would benefit you?

Yes No

Comment _____

ANNEX C

Protected Trust Deeds – Improving The Process



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

<input type="text"/>		
Postcode	Phone	Email

3. Permissions - I am responding as...

Individual / Group/Organisation

Please tick as appropriate

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

- (d) 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?

Please tick as appropriate Yes No



© Crown copyright 2011

ISBN: 978-1-78045-406-1

This document is also available on the Scottish Government website:
www.scotland.gov.uk

APS Group Scotland
DPPAS12026 (10/11)

w w w . s c o t l a n d . g o v . u k