



## **Protected? Trusted?**

Is there detriment in the Protected Trust Deed market?



# Contents

---

<b>Executive summary</b>	3
<b>Introduction</b>	6
<b>Background</b>	8
<b>Issues our clients face with PTDs</b>	12
<b>i. Lack of suitability of PTD</b>	12
<b>ii. Partial advice</b>	14
<b>iii. Poor outcomes when people have a change of circumstances</b>	16
<b>Is there detriment in the PTD market?</b>	18
<b>What needs to happen next?</b>	19
<b>Conclusions</b>	20

---

# Executive Summary

---

The purpose of this report is to examine the detriment experienced by clients of Citizens Advice Scotland's network in Protected Trust Deeds (PTDs) and to suggest recommendations to address this. Our interest in this area has been sparked by feedback from CAB advisers about issues with how PTDs are sold and what happens when they go wrong.

Protected Trust Deeds are a debt solution sold by insolvency and accountancy firms to help people deal with problem debt.

They operate in a similar way to a bankruptcy in that there is usually a partial debt write off and assets can be sold or gathered in by the trustee<sup>1</sup> who manages the PTD and acts in the interests of the creditors. They are ideally suited to people with high unmanageable debts, a sustainable disposable income and limited or no assets. They can also suit people who are eligible for bankruptcy but fear the consequences this may have on employment.

Since 2015 PTDs have enjoyed significant quarter upon quarter growth, whilst the other main statutory solutions of bankruptcy and the debt arrangement scheme have remained relatively flat. Concerns have been raised about this and there have been several consultations, a Scottish Parliament inquiry and 2 roundtables with the minister, Jamie Hepburn MSP in the last 18 months.

The PTD market in Scotland is dominated by a few firms, who are mainly members of one regulatory body<sup>2</sup>. The firms are known as "volume providers" based on the amount of work they are handling. The CAB network mainly receives complaints about the volume providers and their approach to:

- a. ensuring that a PTD is suitable
- b. giving appropriate advice on individual circumstances and
- c. dealing with people who have a change of circumstances.

The regulation issue is particularly pertinent as free debt advice providers such as the CAB network are bound to give impartial advice on all relevant debt options under Financial Conduct Authority (FCA) rules. Whereas Insolvency Practitioners (IPs) giving advice in anticipation of being appointed in a PTD have an exemption from the FCA rules, so cannot give regulated advice on the suitability of other debt options, unless their firms choose to be dual regulated by both their regulatory body, and the FCA.

PTDs have a passing similarity to an English debt solution, the Individual Voluntary Arrangement or IVA, which has also seen similar significant growth in numbers in recent years. Both solutions are marketed via cold calling and online advertising, promising government backed debt write offs of 80-90% of debt and concerns have been raised about mis-selling by debt charities and commentators south of the border<sup>3</sup>.

---

<sup>1</sup> The 2010 Home Owner and Debtor Protection (Scotland) Act allows some flexibility in relation to the debtor's main home.

<sup>2</sup> The top providers can be found in the AiB's annual report [https://www.aib.gov.uk/sites/default/files/accountant\\_in\\_bankruptcy\\_annual\\_report\\_and\\_accounts\\_2018-19.pdf](https://www.aib.gov.uk/sites/default/files/accountant_in_bankruptcy_annual_report_and_accounts_2018-19.pdf) (p100)

<sup>3</sup> <http://www.moneyadvicetrustblog.org/2016/08/02/why-the-fca-must-regulate-insolvency-practitioners-and-lead-generators/> and <https://debtcamel.co.uk/re-thinking-ip-regulation/>

Some volume providers also work with lead generators or debt packagers i.e. people who make money from selling leads gathered from cold calling and online inquiries. These leads are worth over a £1,000 per client to the lead generators. Some lead generators are regulated by the FCA and others are not. Some even pose as well known debt charities in their internet advertising. When someone responds to an advert or expresses an interest on a cold call, often they are advised that a PTD is suitable for them, but we have seen enough evidence from our network that this can be based on poor assessments and sometimes shoehorning a client's circumstance to fit the criteria. Self-evidently there is also a conflict of interest in advising a client on their suitability for a PTD, if the lead generator's main source of revenue is from selling referrals for PTDs and we think this is reflected in the poor advice given to some of our network's clients.

The CAB network helps people who have been sold a PTD that wasn't suitable for them or who have had a change of circumstances and have not had a satisfactory outcome from their PTD. The insolvency sector points to low complaint numbers as evidence that PTDs are performing well. However, we have more social policy feedback on PTDs than the official complaint numbers, which would indicate that the complaint system is not working. We also think that the complaint system as it is structured is not straight forward for people to navigate and underestimates people's will to complain when they are facing financial crisis, feel let down by the failure of the PTD to resolve their problems and powerless to take on their trustee, either through fear, despondency and/or lack of knowledge.

## Recommendations

---

We make the following recommendations which we think will address some of the detriment we see in the PTD (and IVA) market:

- > For there to be a ban on the use of lead generators who introduce new business to insolvency practitioners for financial reward, especially if they are unregulated.
- > For all potential consumers of PTDs to receive Financial Conduct Authority authorised debt advice on all of their relevant debt options, to ensure they can make an informed choice on whether a PTD is best for their circumstances. This would not necessarily need to come from the free advice sector. Insolvency firms can choose to be dual regulated.
- > For there to be an independent insolvency complaints body like the Financial Ombudsman Service with powers to cancel a PTD that was not in the consumer's best interests and that can also make decisions on redress where necessary.
- > For there to be a stronger regulatory focus on how firms respond to unforeseen changes of circumstances that make a PTD no longer viable.

# Citizens Alert

---

A West of Scotland CAB reports a client who had searched on Google for StepChange with a view to going bankrupt – she clicked on the first item that was displayed and left a message on the phone number provided. She was phoned back by an IP who implied that they were associates of StepChange (this was not true). The client was reassured that they could help with her bankruptcy and would stop creditors contacting her. She said that they phoned her every day for some time, until she decided to go ahead with the insolvency.

When the adviser looked through the client's paperwork everything stated that she was applying for a PTD. The adviser discussed this with the client who said that by the time she had got the papers she felt pressured because she had spent so much time speaking to people from the company that she felt obligated to them. She feels that she didn't get a chance to read through the paperwork properly because the company phoned to ask if she had returned the paperwork the day after they posted it to her.

At the time of entering the PTD the client was near retirement age had COPD, arthritis and

osteoporosis and was working as a cleaner on minimum wage that varied due to seasonal work. Just over a year into the PTD the client had to quit work due to her ill health. She now receives Employment Support Allowance. The client told the company that it was impossible for her to make her payments as she is no longer working. They have told her that if she doesn't carry on with the payments for the PTD then it will have to be cancelled which means all the creditors will contact her again.

She has also received a statement from her Trustee and was horrified at the level of charges made by the IP. She was upset that she had paid £1300 to her PTD and the creditors hadn't received any money at all.

Given her age and health conditions a PTD was not her best option especially as she had no assets to protect and no other compelling reason to rule out bankruptcy. Had she entered bankruptcy then the change in circumstances would have had no impact on her discharge from her debts.

# Introduction

---

Scotland's Citizens Advice Network empowers people in every corner of Scotland through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

- > In 2018-19, the Citizens Advice Service network helped over 270,000 clients in Scotland and dealt with almost 750,000 advice issues. With support from the network, clients had financial gains of over £131 million and our self-help website Advice in Scotland received approximately 3.7 million page views.
- > The CAS network dealt with 110,439 debt issues and gave advice regarding Protected Trust Deeds on 1,343 occasions.

The Financial Health Policy Team at Citizens Advice Scotland is exploring detriment in a number of policy areas as part of its on-going workplan. Our interest in Protected Trust Deeds (PTDs) was instigated by social policy feedback from our network that some clients were experiencing problems including:

- > Unaffordable PTDs based on flawed financial statements that were designed to fit the profile for a PTD rather than the needs of the client.
- > Poor advice given prior to arranging a PTD which did not give clients the full range of options or even sufficient information about the debts a PTD would deal with.
- > Poor responses from the trustees managing PTDs when people's circumstances changed and they were no longer able to afford what they had agreed to pay.

Our interest in PTDs has also coincided with a number of different bodies carrying out their own reviews. The AiB carried out a consultation which closed in April 2019<sup>4</sup>, the Insolvency Service also carried out a review of the regulation of the regulatory bodies that manage insolvency firms, which closed in October 2019<sup>5</sup>. Finally the Economy, Energy and Fair Work committee of the Scottish Parliament carried out its own inquiry in early 2020<sup>6</sup>. The committee's interest was sparked by calls from credit unions, advice providers and MSPs who had their own concerns about constituent cases. In addition the minister Jamie Hepburn MSP hosted two round tables about PTDs in 2018 and 2019 where there was a robust exchange of views.

The PTD market has come under particular scrutiny because:

- 1 PTDs are sold in greater numbers than any other debt solution in Scotland and their numbers have continuously grown quarter on quarter since 2015<sup>7</sup>.
- 2 The relentless marketing and promotion (especially on social media and online) of PTDs as a debt solution that is government backed and writes off 80 - 90% of people's debts is misleading and the promised write off is often unachievable.
- 3 The severe consequences for some people if they fail to complete a PTD, as the front loading of fees can mean that no debts have been paid off.
- 4 The high levels of fees paid by consumers in protected trust deeds, compared to debt repaid.
- 5 The failure of some smaller credit unions being blamed on having to write off losses from PTDs.

---

<sup>4</sup> <https://www.cas.org.uk/publications/cas-responds-consultation-protected-trust-deeds>

<sup>5</sup> <https://www.cas.org.uk/publications/cas-response-insolvency-services-call-evidence-regulation-insolvency-practitioners>

<sup>6</sup> <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/113650.aspx>

<sup>7</sup> The AiB's annual reports contain statistical information on the numbers of PTDs, DAS and bankruptcy cases. In 2014/15 there were 4,437 PTDs, in the latest year 18/19 there were 7,915 PTDs representing a 78% increase over 4 years.

In this report we explore the detriment arising from the issues that most impact on clients of the CAB service. So we cannot comment on whether the failure of smaller credit unions can be attributed to PTDs, however we are sympathetic to the problems they face. Similarly we note the concerns about fees, however this only impacts on our clients where the PTD fails. Creditors, however, are asked to vote on fees in every PTD and as such this is an area that should be of more relevance to them, as high fees will have an impact on how much they get back from PTDs.

In the next sections we'll give some background to PTDs, we'll examine the issues that affect our clients most, we'll discuss whether there is detriment and finally consider the next steps we think should be looked at.



# Background

---

## What is a PTD?

---

Trust Deeds are one of the oldest debt solutions in Scotland: a well cited example is that Sir Walter Scott entered one when he fell into financial difficulties through bad business investments. PTDs offer people the opportunity to take control of their financial situation and come to a voluntary arrangement with their creditors, usually with an element of debt write off. Like with bankruptcy, assets are at risk and expected to be sold to pay back creditors, although seldom used changes in 2010 legislation<sup>8</sup> allows property to be exempted from the PTD if the creditors are willing and it's the person's main home.

PTDs are offered by accountancy and insolvency firms and operate under a mixture of trust law, insolvency law and legislation. A PTD is usually arranged by an Insolvency Practitioner who will ascertain whether the PTD is appropriate and will prepare the necessary paperwork for approval by creditors. In order to become protected, a trust deed is advertised and creditors notified of the person's intention to grant the trust deed. If the majority of creditors agree or do not reply to the notification after 5 weeks then the trust deed becomes protected and all creditors are bound by it. In other words they cannot take any further legal action of their own against the person in debt.

The PTD is binding on the person and they are expected to make a financial contribution towards their debts for a minimum of 48 months. The only way that they can end a PTD earlier is if they can pay off their debts in full, plus judicial interest of 8% and all the trustee's fees. This

can sometimes happen, for example when the person in debt receives an unexpected windfall like a lottery win or an inheritance. Should they fail to meet their obligations then the trustee (who is responsible for managing the PTD) has 3 options:

- > they can sequestrate (bankrupt) the non-compliant debtor if it is in the creditor's interests,
- > they can write to the creditors to get agreement to discharge the person from their debt, or
- > the trustee could refuse to discharge the person from their debt, but discharge themselves, and this puts the person back at square one owing all their debts again.

Most people who enter a PTD are discharged from their debts after making at least 48 payments.

Firms charge fees for their work that are set by regulation. They are also able to charge for legitimate expenses incurred in managing the case. The average administration cost of a protected trust deed was £6,190 in 2018-19<sup>9</sup>. This must be seen in the context of the often advertised debt write off of 80-90% of debt. For some people in PTDs the debt write off is practically negated by the IP administration costs, especially where the person's debts are just over the minimum debt threshold to enter a PTD of £5,000.

---

<sup>8</sup> Home Owner and Debtor Protection (Scotland) Act 2010

<sup>9</sup> The average administration cost of a protected trust deed that concluded with a dividend payable was £7,242 in 2018-19, whereas the average administration cost of a protected trust deed that concluded with no dividend payable was £2,748.

## Regulation

---

It is important to note that IPs come under different regulation to the rest of the debt advice sector. Debt advice providers like the CAB network provide impartial and independent advice across all the person's relevant debt options and are regulated and monitored by the FCA for this work. IPs are not required to have FCA authorisation if they give advice on insolvency "in reasonable contemplation of that person's appointment as an insolvency practitioner" – in other words if they give advice on bankruptcy and PTDs. IPs are authorised by one of five Recognised Professional Bodies (RPBs) for this work instead<sup>10</sup>. So naturally, if an IP is regulated by an RPB, then this restricts

the advice that they can give about product suitability to insolvency options only.

It should also be noted that insolvency practitioners can offer the option of bankruptcy rather than a PTD, however a bankruptcy is rarely the outcome of any insolvency advice. We know this because the CAB network, local authorities and StepChange are the top three bankruptcy providers in Scotland. IPs tell us that clients prefer PTDs over being bankrupt, however we think this may be overemphasising the risks of bankruptcy and underplaying those in a PTD, which are more lucrative.

---

<sup>10</sup> The 5 RPBs are the Association of Chartered Certified Accountants (ACCA), Chartered Accountants Ireland (CAI) Insolvency Practitioners Association (IPA) Institute of Chartered Accountants in England & Wales (ICAEW) Institute of Chartered Accountants of Scotland (ICAS)



## Why are the numbers so high?

---

The PTD market in Scotland has undergone some change since the financial crash in 2008. Prior to the crash PTDs were often recommended as solutions to debt problems by advisers in the free debt advice sector who would refer clients to local, well known IPs. The crash and following years of austerity led to fewer referrals as many clients no longer had the disposable income to sustain payments to a PTD.

Changes in legislation also undermined the relevance of PTDs to the free advice sector. For example, the Home Owner and Debtor Protection (Scotland) Act (2010) introduced a new form of bankruptcy, certificate of sequestration, which allowed debt advisers to certify that people couldn't afford their debts as they fell due, without having to wait for court action from a creditor. This meant there was an alternative to a PTD for people who wanted to take the initiative to deal with unmanageable debts.

The PTD market remained relatively flat until the Bankruptcy and Debt Advice Scotland Act 2014 came into force in April 2015 which extended the number of repayments in a bankruptcy to 48 months, equal to that set for a PTD in the 2013 Protected Trust Deed regulations. With congruity between the statutory debt options the observer might expect to see similar rates of growth in numbers across all the statutory options, however there has been a significant increase in the numbers of PTDs since 2014/2015 of 78%, whilst the numbers of DAS cases and bankruptcy have stayed relatively flat. This would indicate that the profitability of PTDs over other

debt options is a factor in their relative increase in numbers and would also account for the significant promotion of PTDs as a standalone, cure-all product for dealing with debt.

In the last decade new insolvency firms have also come into the market and seized market share through aggressive advertising and marketing. These firms also operate in the IVA market in England and apply a warehouse style of operation to PTDs, with large numbers being managed at a time. The new firms tend to have less interaction with their clients with eligibility for a PTD being established over the phone and online.

In addition these new players also work with lead generators who provide them with leads from online advertising and cold calling, to convert into PTD appointments. These lead generators operate online and via cold calling, emphasising the offer of a “government sponsored debt write off of 80-90% of debt”. Some lead generators are FCA regulated, others not and with leads worth in excess of £1,000 per client there is a self-evident conflict of interest in the advice given to people about their eligibility for PTDs. Even the FCA regulated part of this market has been subject to warning from the regulator over its activities in 2018<sup>11</sup> (lead generators are referred to as “debt packagers” in the letter).

The growth in volume providers of PTDs also took place against a background of weak regulatory control by some of the RPBs. The largest firms came under the remit of the

---

<sup>11</sup> <https://www.fca.org.uk/publication/correspondence/dear-ceo-fca-expectations-debt-packager-firms.pdf#48>.

Insolvency Practitioners Association (IPA), a UK wide regulatory body which was subject to a critical Insolvency Service report in 2018, which highlighted poor advice being given, a lack of clarity around what was being charged in expenses and poorer complaint handling<sup>12</sup>. The IPA responded in 2019 by tightening up on compliance and regulatory visits, however we have concerns about the damage done when regulation was less demanding on IPs.

The final piece of this picture is how creditors responded to this new market. Many creditors outsource the handling of protected trust deed paperwork (and IVAs) to agents who work on their behalf including The Insolvency Exchange and Watch Portfolio. These agents respond to PTD notifications using set minimum criteria; sometimes a PTD can be granted for a return to creditors as low as 15% of the total value of the debts. Much of this approach is derived from a protocol devised for IVAs in England and Wales. It removes any effective creditor challenge or interest in the individual PTDs and allows the biggest providers to operate effectively at volume, in the knowledge of the fixed parameters that are set by creditors.

With market dominance by a few firms, the activities of lead generators muddying the waters and a swift growth in PTD numbers since 2015, we think it is inevitable that some people will have entered into PTDs who could have been better helped by other debt solutions.

---

<sup>12</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/775650/Monitoring\\_and\\_Regulation\\_of\\_IPs\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775650/Monitoring_and_Regulation_of_IPs_Report.pdf)



# Issues our clients face with PTDs

---

We will be using some of the feedback given to us through social policy returns from the CAB network to illustrate the issues CAB clients have experienced.

We have divided the problems we see into 3 key issues

- i. Lack of suitability of a PTD
- ii. Partial advice
- iii. Poor outcomes when people have a change of circumstances

## Key issue 1: Lack of suitability of a PTD

---

There are people who are unsuitable for a PTD because they are disqualified by legislation e.g. anyone in receipt of state benefits as their only income. Despite these rules, our advisers see cases where the legislation has been flouted.

In the next case, the client has suffered additional stress and needless worry, caused by being put into a PTD which should not have been granted in the first place.

**! Citizens ALERT** An East of Scotland CAB reports a client sought advice from his local bureau on his PTD. He lived alone in a council property, had no assets, debts of around £25,000, he was unemployed and his only income was Universal Credit. He had entered a trust deed two years previously, while he was unemployed. At the time of granting the PTD, the trustee looked at his bank statement and saw a one-off payment of £150 from the client's sister to help him pay a bill. The trustee included this in his regular income in his statement of affairs to justify the PTD being suitable for him. He was now in arrears on his PTD contributions of around £1,000 and was struggling to pay. Because the client's only regular income was benefits, it was clear that a trust deed should never have been granted. The best solution for him was to ask the trustee

to bankrupt him, or to discharge themselves as trustee so he could declare bankruptcy himself. This means the client has had to go back to the start of a new process and has wasted the time since granting the PTD. If the client had been advised correctly at the outset, he could be two years into the bankruptcy process and much closer to re-establishing his financial health.

Here is another case where the source of income should have precluded the client from a PTD, however this particular case may impact on a property owned by the client:

**! Citizens ALERT** A West of Scotland CAB reports a client struggling to pay her PTD after 3 months. She is in receipt of benefits only, however jointly owns a property with her ex-husband. She went into a trust deed with a payment in excess of £300 per month. She has made 3 payments with the help of her family and cannot afford any more. The trustee says they cannot reduce the payments and the PTD has already been extended to 60 months in lieu of equity in her property. She doesn't understand how they arrived at the payment, but she agreed it at the time. She believes she was mis-sold the PTD.

Again because of legislation, some people will not be suitable for a PTD if their disposable income



would allow them to pay off their debt in full (in a DAS) in less than 48 months. In the following case an older client was left confused after contacting a firm who were trying to manipulate his income to make him eligible for a PTD, when he could repay his debts in a shorter time.

### ! Citizens ALERT

An East of Scotland CAB reports a client had approached a fee charging debt firm and a telephone based free debt advice provider. The fee charging firm adviser told the client not to include his private pension payments from overseas in his financial statement and to claim for gas usage in his expenditure, although he wasn't connected to the gas network. The changes proposed by the adviser to his financial statement would show he was eligible to enter into a PTD. When he phoned the free advice provider they arrived at a substantial disposable income when they included all his income and economised on all his outgoings. The disposable income identified was more than his contractual payments to his debts, showing that he could afford to pay them by adjusting his lifestyle. The client was worried that he could have been charged with fraud had he gone into the PTD, misstating his income and expenditure as suggested.

Where a client has been put into an unsuitable PTD they have few options for redress. They can complain, but the complaint must be made to their IP or to their regulatory body. Even if the complaint is found in their favour then the person is more likely to find themselves back at square one with their debts again, rather than discharged with a fresh start. **We think there needs to be a stronger complaints and redress process for clients who find themselves in an unsuitable PTD.**

---

**Where a client  
has been  
put into an  
unsuitable PTD  
they have few  
options for  
redress.**

---



## Key issue 2: Partial advice

---

It is important that people get impartial and independent advice on their debt options when they are at their most vulnerable. However, through cold calling and online advertising people encounter lead generators who have a financial interest in selling PTDs. Consumers may even be under the impression they are getting advice from a debt charity because some lead generators advertise on the internet with similar sounding names, as the Advertising Standards Agency have found<sup>13</sup>.

People need accurate and reliable information at this first point of contact, as this is when expectations are set as to what the PTD will achieve. A follow up telephone call or meeting with the IP, or an expectation that the consumer will inform themselves by reading the small print is not an acceptable back up if partial advice and unrealistic expectations have been given early in the process, by an unreliable actor.

In the following case the advice given by a lead generator did not consider the household circumstances and the fact that most of the debts were in joint names.

**! Citizens ALERT** A North of Scotland CAB reports a client answered an advert, was advised that a trust deed would be a good debt remedy for her and signed up for one which was then protected. She told the company arranging it about her circumstances and was told there would be no further problems if she kept up the agreed payments of £100 a month for 4 years. She did not have a face-to-face interview at any time. She signed the papers alone, with no witness, and returned them to the Insolvency Practitioner

by post. She now realises that her husband is jointly and severally liable for almost all of their debts, so the Trust deed is not going to solve anything other than her liability.

In the next case it should have been made clear to the client that their student loan could not be dealt with under the PTD.

**! Citizens ALERT** An East of Scotland CAB reports a client initially turned to a PTD because of action being threatened for her student loan. She was not told that it could not be included. The Student Loans Company then instigated an earnings arrestment which meant that she could not then afford the PTD payment. The IP is now asking her to make payments and threatening her wages. The client felt pressurised into signing. The paperwork does not specifically say that the student loan was excluded or that the client was advised to this effect. It says, “all” debts must be included, with no further clarification.

For these clients the PTD solution has been mis-sold to them by lead generators, but their rights of redress are limited by the current complaint procedures. They cannot be restored to the position they were in before the PTD and either have to carry on paying the PTD or allow it to “fail”.

There are also questions to be asked of the IPs who accepted these cases. They are responsible for the advice given by the lead generators but despite that neither firm appear to have carried out further checks that the advice that was given by the lead generator was suitable.

---

<sup>13</sup> <https://www.asa.org.uk/rulings/money-tree-media-ltd-A19-563069.html>



Reports from our advice network would also indicate that the IPs themselves are not always giving good advice. In the next case the client was on long term health related benefits so was not eligible for a PTD, however the firm accepted payments from his son, despite there being better debt options available for the client.

**! Citizens ALERT** An East of Scotland CAB reports that a client set up a PTD with a volume provider.

The client has been on ESA and PIP for many years and had no earned income at the time of arranging the PTD. The client's son lived at home and was paying his PTD for him. The client informed the trustee that his son had moved out and was told that they could not accept the client's payments going forward as he is only in receipt of benefit income (which was the case when he set up the PTD). The client's son has paid into the PTD for over a year when a more suitable debt solution for this client could have been offered with no requirement for a contribution at all.

In the next case the IP should have put off a client wanting to enter a PTD just months before she received an equal pay settlement that would have paid off all her debts and left her with spare.

**! Citizens ALERT** A West of Scotland CAB reports a client entered into a PTD with a Glasgow firm in late

2018. She was a worker for the local authority, and it was well known that an equal pay claim was outstanding and imminent. At the start of 2019 the client was notified of her pay award and she received this in the middle of 2019. At this time the client attempted to pay off what

she thought were her outstanding debts to the firm. She was surprised to find out that this did not cover her outstanding liability and she would have to pay much more to cover her debts in full, the statutory interest and the trustee's fees. This would leave her with very little from the equal pay settlement.

The pay award was a foreseeable event. In this case the client should never have been advised to enter a PTD, but under the insolvency complaint procedures she cannot be restored to the position she would have been in prior to granting the PTD. **We think these cases illustrate why a complaints process like that provided by the Financial Ombudsman Service is necessary, which could force insolvency firms to provide redress where they or people acting on their behalf have given poor advice.**

---

**People need accurate and reliable information at this first point of contact, as this is when expectations are set as to what the PTD will achieve.**



## Key issue 3: What happens when people have a change of circumstances?

If someone has a change of circumstances and is unable to complete a PTD then the trustee has the option of “failing” the PTD which means that the person is not discharged and gets all their debts back. The size and scale of failure to discharge is not clear, but we know that at least 1,700 people were affected in 2017/18 and around 1,600 in 2018/19<sup>14</sup>. The financial repercussions for the individual from a failure to be discharged can be significant, especially if they have made substantial progress towards repaying their PTD. If the PTD fails the individual is back at square one, still owing all their debts, **because the payments made up until the change of circumstances are generally used to cover the trustee’s fees, which have a priority over the debt** as the following case study illustrates.

### ! Citizens ALERT

A West of Scotland CAB reports a client signed a trust deed in November 2015 for debts totalling £6,813.

Contributions of £125 a month for 48 months were agreed upon meaning she would repay a total of £6,000; the trustee’s outlays were to be £5,101 leaving less than £1,000 to the debt. The trust deed then failed as she could no longer afford it; by this time, she had paid £2,743 towards it. She has been told that this only covered the trustee’s fees. Effectively she has lost all of the money she paid in with nothing to show for it.

In the next case the trustee took money due to the client and passed on additional charges to her even after they had failed the PTD!

### ! Citizens ALERT

A West of Scotland CAB reports a lone parent who is employed 20 hrs per week

in receipt of tax credits. She had been in a trust deed for 2 years. She could not afford the repayments and her PTD was cancelled. The client had contacted a company for help to get

a tax rebate. They got her a refund of £600. The trustee took this into the PTD and the client has now been contacted to pay the tax rebate firm’s fee. The client advised them to contact the trustee but they declined to pay the fee advising that the client’s account is now closed. The client was awarded a tax rebate, received nothing and on top of that is now liable for the fee. The client wanted help from the CAB to enter bankruptcy for her debts.

The failure of PTDs can have a knock-on impact for other advice services as the case below illustrates. With free debt advice services struggling for funding and to meet demand for advice it is simply unfair and unsustainable that firms who charge for advice offload their difficult cases onto the free sector, instead of offering people other viable options like bankruptcy.

### ! Citizens ALERT

A West of Scotland CAB reports a client entered into a PTD in March 2019 while in

employment for a debt of nearly £8,000 and the PTD was cancelled in December 2019 for non-payment of the required contribution due to loss of paid employment. The creditors were advised of the failed PTD and are back in touch. The client is back to his original debt position but also has new debts so he owes more than ever. The client then came to CAB to assist with applying for his own Bankruptcy. There needs to be an awareness that trustees are working for the creditors not the client’s interests

The insolvency sector contends that if people like those described above had co-operated with their trustee, and had a genuine change of circumstances, then their PTDs should not have failed. However there is currently no monitoring of PTD failures by either RPBs or the AiB and no independent research about why PTDs fail, so we only have the industry’s assurances on this.

**We think more needs to be done to understand reasons for failure.**

<sup>14</sup> The AiB annual reports (<https://www.aib.gov.uk/about-aib/statistics-data/aib-annual-reports-1986-present>) provide some basic detail of the performance of IPs including the % of cases discharged in that year that failed, but no overall numbers are provided. We note that failure rates for some firms have been as high as 88% in the past (see 2015-16, page 96).

The insolvency sector also contends that people can challenge their trustee or complain if they do not agree with their trust deed failing, but in reality this is unlikely to happen for a number of reasons:

- 1 People may not feel they are in any position to enforce their rights because their financial situation has taken a turn for the worse and all their energies are being spent on dealing with the consequences of that, not least the renewed contact from their creditors. For some there will be emotional and mental well-being barriers to escalating their lack of discharge, because the solution they embarked on to resolve a distressing financial situation has in itself become a source of distress.
- 2 If the trustee and undischarged person are at odds with one another on the performance of the PTD and reasons for failure, the person in debt does not have the years of experience and insolvency knowledge to effectively challenge the decision of a trustee. PTDs are a complex debt solution based on trust, common and insolvency law and the person in debt is unlikely to be sufficiently knowledgeable in these areas to be able to effectively uphold their rights.
- 3 They can make a complaint, but where to? The undischarged person has to complain to the trustee first and then they have the option of addressing their complaint to the relevant RPB (one out of five RPBs). But, if their complaint is about the fees then it's the AiB that has to deal with it. There is also the option of a complaints gateway that is hosted by the English Insolvency Service. However the complaints gateway filters complaints and prevented more than 50% of them reaching RPBs in 2018. This is more complex and less transparent than it needs to be and, as outlined in 2, places a lot of responsibility on the debtor to be able

to argue their case against an insolvency professional and their regulator, if there is a disagreement.

- 4 There is a court process but this requires the undischarged person to make a summary application to the sheriff court. This is not a process for the ordinary person to take on lightly and they are unlikely to be able to get lay or legal representation to take the matter forward for them.

We therefore think it would be complacent to assume the lack of challenge to decisions not to discharge are attributable to weaknesses in the undischarged's case or the person's character, because they choose not to enforce their rights. They are easily the least qualified to make the challenge and therefore professional standards need to be in place to protect them and must look beyond whether the trustee simply complied with the rules. It also has to be remembered that people don't make a habit of entering PTDs. This is likely to be a once in a lifetime attempt to deal with debt difficulties. Therefore the process of complaining about discharge needs to be accessible and must take an interventionist rather than adversarial approach to take account of the unequal arms at the disposal of the person in debt and their trustee.

These cases illustrate why we think there needs to be **much stronger monitoring and regulation of the process of discharging people from a PTD and simplification of the complaints process for failed PTDs. The onus should always be on the trustee to demonstrate why the decision not to discharge the debtor is defensible.**



## Is there detriment in the PTD market?

---

Whilst AiB evidence would seem to indicate that most PTDs achieve their aim and help people to attain debt relief, the examples in the previous section show evidence of detriment, and sometimes significant harm experienced by people in the PTD market. These cases are representative of what the CAB network's debt advisers see and have been reported to us.

In mitigation we recognise that some of the issues that we have identified may be historical. We note that increased scrutiny of this market (and the bigger IVA market in England) has led to recent change from within the insolvency sector that may deal with some of the worst excesses.

For example, the Insolvency Practitioners Association has just issued guidance that firms whose business is getting new leads for insolvency firms must be regulated by the FCA. This is a good start but it is too early to say if this will have a positive impact, especially as there is still the issue of whether impartial advice can be offered if the firm's main source of income comes from PTD referrals.

CAS will also be improving our statistical capture of issues relating to PTDs in the next year, so we will be in a better position to assess whether changes like this will help achieve better outcomes for clients.



## What should happen next?

---

Through the significant work we have done on PTDs in 2019/20 our positions have been challenged and tested, not least through robust conversations with representatives from the insolvency sector. These conversations have also identified a key issue which cannot be removed from any discussion on the future of PTDs, namely debt advice funding and advice provision.

The free debt advice sector in Scotland has been in decline since the settlement with local authorities removed ring fenced funding for debt advice. It is therefore no coincidence that in the last few years more Scottish people have entered a PTD than any other solution and it is clearly a profitable activity for insolvency firms. If the Scottish Government got rid of PTDs tomorrow there would be an even greater and unsustainable demand on the free debt advice sector. The sector cannot replicate or replace the work that the commercial firms are currently doing unless the Scottish Government is willing to fund free debt advice, make debt advice provision a statutory function of local authorities and ring fence the funding. This is unlikely, so high volumes of PTDs will continue.

We therefore believe there is a need for some regulatory changes in the PTD market. This would also be in the interests of reputable IPs who want to see the market cleaned up, the worst practices to be tackled and the standing of the industry to be enhanced.

We offer 4 solutions to the issues that we have identified with the PTD market which have a consumer focus at their core:

**1** Ban lead generators. A lot of the poor advice and unsuitable PTDs have originated with lead generators. The AiB tried to remove lead generators from the market in 2013 by changing regulation so that IPs could not add the lead generator fee to the allowed up front expenses in a PTD. We also note that SIP 3.3, which governs how IPs are supposed to manage PTDs, specifically says, “The special nature of insolvency appointments makes the

payment for, or offer of any commission for, or the furnishing of any valuable consideration towards, the introduction of insolvency appointments inappropriate.”<sup>15</sup> We therefore don’t think FCA regulation of lead generation is going far enough. Banning lead generators would fit with the previous regulatory intent and is also likely to deal with the misleading marketing and promotion of PTDs online and through cold calling.

- 2** Require firms to be dual regulated by their own RPBs and the FCA. One of the biggest providers of PTDs in Scotland is dual regulated to advise on PTDs and the DAS scheme and we think this could be a way forward<sup>16</sup>. If the initial advice at the outset comes under FCA regulation, then consumers can have some confidence that the advice they get at the outset is independent and is also in their interests. The FCA’s rules on marketing and promotion would also help tackle the numbers of misleading advertisements found online for PTDs.
- 3** Introduce better consumer protections by putting in place a single insolvency complaints regulator, like the Financial Ombudsman Service, to order redress where things go wrong and provide restitution where there has been significant financial harm. This is because nothing can currently be done to restore someone who was mis-sold a PTD to the point they were at prior to entering the solution, nor can people get financial compensation for poor practice.
- 4** For there to be a stronger regulatory focus on the reasons for failures of PTDs. The onus should always be on the trustee to show in every case why discharge should not have been granted. Where there is disagreement there also needs to be a simplified complaints process to enable people to enforce their rights.

---

<sup>14</sup> [https://www.icas.com/\\_\\_\\_data/assets/pdf\\_file/0005/269933/SIP-3.3-November-2016-updated-BSA-2016-references.pdf](https://www.icas.com/___data/assets/pdf_file/0005/269933/SIP-3.3-November-2016-updated-BSA-2016-references.pdf) that failure rates for some firms have been as high as 88% in the past (see 2015-16, page 96).

<sup>16</sup> Carrington Dean

# Conclusion

---

This report has examined the detriment in the PTD market based on the experience of our CAB network. There has clearly been detriment in some aspects of how the market has been operating to date and therefore we have made recommendations for improvements in regulation, which we hope other stakeholders will agree will improve outcomes for all our clients.

As mentioned at the outset, PTDs are a mixture of common law, trust law and regulation. The gap here is in consumer law and for PTDs to be fit for the future, consumer rights need to be protected, for the sake of fairness and natural justice for the most vulnerable, i.e. people in debt.





By Mike Holmyard

---

[www.cas.org.uk](http://www.cas.org.uk)



@CitAdviceScot



CitizensAdviceScotland

The Scottish Association of Citizens Advice Bureaux -  
Citizens Advice Scotland. Scottish charity (SC016637) and  
company limited by guarantee (89892)

ISSN 2398-6190 (Print)

ISSN 2398-6204 (Electronic)

