

## ECONOMY, ENERGY AND FAIR WORK COMMITTEE

### ENERGY INQUIRY

#### SUBMISSION FROM MIKE HOLMYARD, FINANCIAL HEALTH POLICY MANAGER CITIZENS ADVICE SCOTLAND

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### **Protected Trust Deeds**

CAS welcomes the Economy, Energy and Fair Work inquiry into Protected Trust Deeds (PTDs). In 2019 we made a number of calls for changes to be made to PTDs through our response to the AiB Consultation<sup>1</sup> and the Insolvency Service's call for evidence on Insolvency Practitioners<sup>2</sup>.

We would like to see the committee act on several issues that need addressed with PTDs, particularly:

- The severe consequences of being unable to complete a PTD and it "failing", i.e. people losing all the money paid in to the PTD, being no further forward with their debts, being abandoned by their trustees (who still take their fees), and then having to enter into another debt solution which extends the period of time they are under financial stress. Other debt options do not have such severe consequences when they fail.
- The increased inherent risks of PTDs failing because of how some firms market and promote them. In this respect we are particularly concerned by the activities of some unregulated firms who generate debt leads that are then sold on to insolvency firms. We think the incentives are all wrong here.
- The general lack of consumer rights and protections for people in a PTD when things go wrong.

To deal with these issues CAS would recommend the committee considers:

- Much stronger regulation of the process of discharging people from a PTD, with the priority being on discharge where a PTD fails due to an unforeseen change of circumstances that makes the PTD no longer affordable. If the change of circumstances is permanent then we think discharge should be automatic, unless a creditor objects, in which case a fair and reasonable test could be applied to the objection (like happens with DAS). This could be achieved by a new process where

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<sup>1</sup> <https://www.cas.org.uk/publications/cas-responds-consultation-protected-trust-deeds>

<sup>2</sup> <https://www.cas.org.uk/publications/cas-response-insolvency-services-call-evidence-regulation-insolvency-practitioners>

agreement has to be sought from the AiB before “failing” a PTD and refusing discharge.

- The AiB working with the regulatory bodies that govern insolvency firms to have an outright ban on IPs accepting leads from unregulated lead generators or debt packaging firms.
- The AiB working with their equivalent in England (the Insolvency Service) to create an independent complaints body with powers to discharge or cancel a PTD that was not in the consumer’s best interests and that can make decisions on redress where necessary.

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

Our bureau network provides free, impartial and independent advice on all debt solutions and our bureaux are regulated by the Financial Conduct Authority (FCA). Our network is differently regulated to Insolvency Practitioners (IPs) who 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”. IPs are authorised by one of five Recognised Professional Bodies (RPBs) for this work instead. In bureaux less than 5% of clients chose a PTD after an explanation of all their appropriate options. PTDs sold by IPs on the other hand have been the dominant debt solution in Scotland since 2015. To be sure we would have little to be concerned about if people always achieved a successful outcome from every PTD, but our advisers tell us that on at least a monthly basis they come across people whose PTD has failed or which doesn’t appear to have been appropriate for them in the first place, and who are now worse off than when they started. At this point they often need the assistance of a CAB to find an alternative option and this is why we have an interest in reforming PTDs.

### **2. What are the benefits of PTDs?**

CAS believes PTDs have a place within the range of debt solutions available in Scotland and they are particularly suitable for people whose employment would be impacted by bankruptcy<sup>3</sup>. Most PTDS clearly achieve their goal and help people to achieve debt relief. But we do not think they are the panacea for all people in debt, as their enthusiastic marketing and promotion would have you believe. The continued year on year increase in PTD numbers gives us cause for concern that people are being shoehorned into PTDs who could just as easily be helped by a DAS or Certificate for Sequestration, which may also be less risky for them if they have a change of circumstances.

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

Apart from the issues around how PTDs are promoted and marketed (which we discuss later) we think there are two significant problems:

- a) The consequences for people when a PTD fails.
- b) The lack of consumer rights for people who are sold an unsuitable PTD

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<sup>3</sup> People working in the financial, accounting, legal and retail sectors, amongst others, can be subject to disciplinary procedures for becoming bankrupt.

## (a) The consequences of failed PTDs

If someone has a change of circumstances and is unable to complete the PTD then the trustee has the option of discharging them from their debts, or “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 1700 people were affected in 2017/18 and around 1600 in 2018/19.<sup>4</sup> The financial repercussions for the individual of a failure to be discharged are 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 used to cover the trustee’s fees, which have a priority over the debt.** It should be noted that both DAS and bankruptcy provide better outcomes for “failures” that are due to a change in circumstances. In a DAS 78% or 90% of the person’s payment will have been paid directly to their creditor, every time a payment is made, and even if the DAS fails they will have made progress towards paying their debt. In a bankruptcy payments can and will be reduced to nothing if the change of circumstances merits it, and the person’s discharge from their debt is unaffected. Case studies 1, 4 and 7 in appendix 1 demonstrate the kind of detriment our network sees arising from PTD failure.

We also believe there is a level of inconsistency between different insolvency firms and their approach to failure. We are told smaller (by case volume) IPs are more likely to consider the reasons for non-payment and discharge a person who has been impacted by circumstances beyond their control. Whereas, more often than not, larger firms (by case volume) appear to have a blanket posture of not discharging people. We therefore think that there needs to be more consistency of outcomes for people who can no longer pay their PTD and that there should be a stronger connection between the fortunes of IPs and people in PTDs. We believe that there needs to be much stronger regulation of the process of discharging people from a PTD, with the priority being on discharge where a PTD fails due to an unforeseen change of circumstances that makes the PTD no longer viable. If the change of circumstances is permanent then we think discharge should be automatic, unless a creditor objects, in which case a fair and reasonable test could be applied to the objection (like happens with DAS). This could be done by creating a new process where an IP must seek approval from the AiB before “failing” a PTD and refusing discharge.

## (b) Consumer rights

The AiB and RPBs say that complaint numbers are low and from this they conclude that PTDs work well. We do not entirely agree with this conclusion. It must be recognised that when things go wrong most people will be focused on trying to deal with their debt problems and complaining may be the last thing on their mind in a crisis. In addition, the process of making a complaint appears to be difficult with people needing to complain to their IP and then to one of 5 RPBs if they are not happy; however if the complaint is about IP fees then it has to go to the AiB who can audit the fees charged. There is a web portal ostensibly to

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<sup>4</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 (2015-16, see page 96).

help consumers to make complaints<sup>5</sup>, but the portal is hosted on the Insolvency Service website, the English equivalent of the AiB, and there is no reference to the portal on either the AiB or Scottish Government's websites<sup>6</sup>. Furthermore the .gov page that refers to the portal does not make clear that PTDs are in scope. Data from the portal shows that in 2018, UK wide, around 20% of complaints were rejected outright and another 33% were asked for further information but didn't provide it, so these complaints never reached the RPBs for investigation. We are concerned at this level of gatekeeping at the first hurdle because we do not think it encourages engagement with the IP complaint system. We think this may help to explain why the official complaint statistics are as low as they are.

The Insolvency Service has also highlighted poor complaint handling in some firms and RPBs<sup>7</sup>. Anecdotally we are told that complaints take a long time to be considered and are invariably decided in favour of the IP. Also, we only know of one case where the AiB has investigated a case and instructed an IP that the PTD was inappropriate. We therefore think a genuinely independent complaints process, managed by one body, with the power to either discharge the debtor from their debts or restore them to where they were before they started the PTD (not unlike the Financial Ombudsman's powers) is vital to give consumers confidence in the PTD complaint process. The Insolvency Service is currently consulting on the regulation of IPs and the AiB should explore with them the possibility of a single complaints body focused around consumer rights and not compliance and processes, as the current RPB complaint system does.

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

Yes. They are relentlessly advertised by IPs and lead generators and marketed on television, radio, billboards, online and via cold calling, with little reference to other appropriate solutions. The biggest hook in the advertising is the promise of "a government backed scheme that allows people to write off 80% of their debt". As case study 1 in appendix 1 shows, this selling point does not take account of the significant fees that are also paid in a PTD, which for some people means they pay back nearly as much as their debt anyway, getting very little actual debt relief.

As well as generating their own business some IPs also work with firms that supply them with leads for people in debt and the FCA refers to these lead generators as "debt packagers". We draw the committee's attention to the October 2018 letter from the Director of Supervision at the FCA to debt packagers that promote and pursue leads for IVAs and PTDs, expressing serious concerns about their marketing and promotion and demanding that they put their house in order<sup>8</sup>. Unfortunately not all these firms are FCA regulated so this letter will not have had the desired impact across the whole sector.

<sup>5</sup> <https://www.insolvencydirect.bis.gov.uk/ExternalOnlineForms/InsolvencyPractitionerComplaint.aspx>

<sup>6</sup> As at 18 December 2019

<sup>7</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)

<sup>8</sup> <https://www.fca.org.uk/publication/correspondence/dear-ceo-fca-expectations-debt-packager-firms.pdf>

Where a PTD is sold off the back of a lead generator's referral, RPBs have confirmed to us that the IP is responsible for the information given by the lead generator to the consumer. We do not think this gives sufficient protection because some lead generators are neither directly regulated by either the FCA or an RPB, and the consumer is unlikely to be aware of the potential conflict of interest arising from being advised by an individual that stands to gain from the PTD lead. They may even be under the impression they are getting genuine impartial advice from a debt charity as some lead generators advertise on the internet with similar sounding names to national debt charities, as the Advertising Standards Agency have found<sup>9</sup> (see appendix 2 for internet screen prints of unregulated lead generators posing as National Debtline and StepChange which are legitimate and regulated charities).

From a consumer point of view there are huge risks from being presented partial or misleading information from an unregulated adviser when people are at their most vulnerable and the pressure of their debt situation is at its greatest. **People are particularly susceptible at this point to a partial representation of their options and the offer of 80% debt relief. For that reason consumers must be given accurate and reliable information at this first point of contact, as this is when expectations are set as to what the 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. Case studies 2-4 in appendix 1 are examples of poor advice given.

This is not uniquely a Scottish issue. The same concerns about partial advice and perverse incentives are present in the IVA market in England and Wales<sup>10</sup>. We therefore think that there is enough evidence here pointing to the need for better regulation of the advice given at the outset of the process by lead generators and for FCA regulation of **all** debt packaging firms that sell leads. We note that the Insolvency Practitioners Association, one of the 5 RPBs, now requires "introducers to be regulated if they are to have a relationship with a Scheme IP or their firm"<sup>11</sup>. We would suggest that this should be the blanket policy across all RPBs. We think giving consumers the confidence of FCA regulated advice and a complaint process to the Financial Ombudsman would improve the advice given at the outset of the insolvency process, which in turn should drive higher quality and more sustainable PTDs. This can be achieved by the AIB working with the 5 RPBS to insist that IPs only use leads that come via FCA regulated firms, thus removing the influence of unregulated poor advice from the market.

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

There are incentives for debt packaging firms (lead generators) who sell leads to IPs. We understand that these leads are worth over £1,000 per client. We think there is a self –

<sup>9</sup> <https://www.asa.org.uk/rulings/money-tree-media-ltd-A19-563069.html>

<sup>10</sup> <http://www.moneyadvice-trust.org/SiteCollectionDocuments/Policy%20consultation%20responses/Unilateral%20responses/Money%20Advice%20Trust%20response%20to%20Insolvency%20Service%20Regulation%20of%20Insolvency%20Practitioners%20consultation%20paper.pdf>

<sup>11</sup> Letter to Jamie Hepburn 13 December 2019

evident danger of partial advice from lead generators, especially those that are unregulated, if generating PTD leads is their most profitable activity. Case studies 4 – 7 demonstrate how incentives can drive the options offered, even when a PTD would not be the most suitable option.

However we also need to point to the obvious flaw in the process of IPs themselves giving advice on debtor's options, namely that often a PTD is the option for which they receive the highest remuneration (especially compared with DAS or sequestration). In addition, in some IP firms staff at the first point of contact will be commission driven to convert consumer enquiries into PTDs. As has been proved in the wider financial services sector, wherever commission and payment structures provide financial incentives, inappropriate recommendations can follow. We therefore think that incentives are an issue in the PTD sector and there needs to be greater regulatory vigilance by RPBs and the AiB around how PTDs are sold.

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

Mr Hepburn's letter of 4 December 2019 reflects the AiB opinion that there is no consensus on what needs to change in the PTD market. We do not agree that consensus is needed if a market does not provide enough consumer protection and regulators are unwilling or unable to provide assurance to consumers. Without more safeguards we think that PTDs place some people in debt at risk of financial detriment, for long periods of time, with all the knock on impacts that could have on health, work, living standards and family. We think it is possible for the AiB and regulators to make changes that could make a big difference to vulnerable people in debt and this would fit well the Scottish Government's intention of improving consumer rights in Scotland, not least through the creation of Consumer Scotland.

### **Appendix 1 – case studies from our CABx**

1. 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. This meant she would repay £6,000, leaving very little after covering the trustee's outlays of £5,101. 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.

2. 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.

3. 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 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.

4. An East of Scotland CAB reports an elderly client no longer able to work due to ill health who was party to a PTD. He has had to give up work because of ill health and is unable to maintain payments. He has 3 debts, 2 non priority of approximately £10,000 and the other is a £20,000 overpayment of Disability Living Allowance owed to the DWP which was included in the PTD. This overpayment will still be payable after the end of the Trust Deed, even if he had been able to maintain repayments, as the client had made a fraudulent benefit claim. The client is Polish and needs an interpreter and he either did not understand or was wrongly advised that he would be discharged from the DWP debt. The client is still left with all £30,000 of debt due to the failure of the PTD.

5. A West of Scotland CAB reports a client sought help with debt online and signed up to a protected trust deed. He could not afford this, which has now left him in rent arrears and risking losing his home.

6. An East of Scotland CAB reports a client visited a CAB to discuss the best route for paying off her debts. She and her partner were joint owners of a house valued at £200k in which they had around £140k equity. The client had £30k of debts in her own name. She could afford managing this while in work with an income, but no longer had this. She had contacted several debt management companies, all of which recommended her setting up a trust deed. It seemed that commercial advisers were pushing her towards a PTD without a clear explanation of what is involved.

7. 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 granted a trust deed two years previously to a high volume provider, 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 sequester 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.

## Appendix 2

Home | Scottish Debt Help | Free Scottish online debt advice | Scottish Citizens Debt Help | National Debtlines

national-debtlines.org/debt/citizens-advice-scotland.php?utm\_source=bing&utm\_medium=cpc&utm\_term=debt%20advice%20scotland&utm\_campaign=New%20Scotland%20-81NG&msclkid=685e8b032...

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Unregulated lead generator posing as National Debtline, a legitimate debt charity. By-line also refers to “Scottish Citizens Debt Advice” which could be confused with the Scottish CAB service. The advert also gives an unreasonable expectation of a 90% debt write off but doesn’t mention the substantial fees for a PTD.

stepchanges.com

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