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Economy, Energy and Fair Work Committee
The Scottish Parliament
Edinburgh
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Dear Gordon,

Protected Trust Deeds

Thank you for providing the Committee's in depth report following the focussed inquiry into Protected Trust Deeds (PTDs).

I would like to apologise for not responding sooner. You will of course appreciate that the report required to be considered by the Accountant in Bankruptcy's policy team, which, as previously indicated, had been redeployed in its entirety to the Economy Hub within core government to deal with the COVID-19 outbreak. Some of this team have only recently returned.

The Committee's main recommendation is of course that none of this should be considered as separate to the general wider overarching review of the statutory debt solutions, on which we look forward to working with the Committee, as detailed in my previous letter to you. That said, I believe we can make earlier progress on some of the recommendations, and there are others in the report in which I would welcome your further thoughts.

Each of the conclusions and recommendations of the Committee have been considered and are addressed below. For ease of reference, the enumeration from the executive summary has been used in this response.

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

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As you know, I have given the Committee a clear commitment that this will be taken forward; my previous letter to you sets out the next steps we will take as we try to pick up the work inevitably interrupted by the pandemic.

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

The Scottish Government agrees what we see as the Committee's aim here – to make sure that in the event of a failure of a trust deed through no fault of the debtor, the individual must not find themselves in a worse situation than before signing the deed. We need to explore the best ways of doing this – so for example, we need to ensure it remains possible for trust deeds and indeed bankruptcies to be financially viable for the private sector to deliver, and we do not want to create a situation where a series of small payments would create an undue burden for creditors and trustees, increasing the costs of administration.

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

We know that issues arise in only a small number of cases, but that when they do, they can have serious detrimental implications for the debtor. The Scottish Government agrees that it would be appropriate to introduce a right to review by the Accountant, and ultimately an appeal to the Court, for all interested parties upon any decision taken on a debtor's discharge. This would allow for consistency across all statutory debt processes.

We agree that it would be vital that the Accountant in Bankruptcy (AiB) issues clear guidance on the factors that should be taken into account in both the initial decision and any subsequent review and appeal, and believe most of the material for this is already in the public domain, so that it should not take long to pull this together. We recognise that such criteria is important in encouraging greater consistency in the discretion shown to debtors who may have experienced a change in circumstances. This criteria should be developed with fairness to all parties in mind, and we will ask the AiB to consult on draft guidance this side of Christmas.

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

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

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The Scottish Government fully supports these recommendations and I will write to my counterparts in the UK Government to press the case for this. Discussions at official level between AiB staff and the Insolvency Service have already taken place. I am aware that the Insolvency Service are engaging with representatives from the Financial Conduct Authority and the Advertising Standards Agency to discuss these matters, and they have confirmed that they aim to create guidance, by the end of the year, to support the protocol on leads that are generating Individual Voluntary Arrangement (nearest equivalent to PTDs). AiB are being updated on any developments in these areas. I will send a copy of the response received from UK Ministers.

7. The Committee does not doubt that insolvency practitioners follow the statements of insolvency practice and that Protected Trust Deed paperwork includes the necessary information for people in debt to make informed choices. However, the Committee is also convinced by the argument that the offering of free independent money advice is of benefit in bankruptcy and Debt Arrangement Scheme cases and, if applied to Protected Trust Deed cases, would go some way towards addressing the concerns of witnesses during this inquiry.

The Scottish Government agrees that prior to entering a trust deed or any other debt solution, a debtor should be provided with all necessary information and appropriate advice to enable them to make an informed decision that it is the correct statutory debt solution for them.

Insolvency Practitioners are highly regulated and have a professional duty to provide advice and act in the best interests of the debtor and the creditors. Where an Insolvency Practitioner is in breach of their professional ethics, they are liable to investigation and disciplinary action by their recognised professional body. It should therefore be considered whether the issue of poor advice by certain insolvency practitioners would be better addressed through stronger regulation by the recognised professional bodies. We know that UKG are considering next steps on the regulation of the profession, and we expect them to publish proposals this autumn.

We are also deeply conscious of any reforms which may place an additional burden on Scotland's free advice sector, which is already stretched, and which for some time is likely to face considerable challenges dealing with the economic consequences of the COVID-19 pandemic. We also note that many debtors, once they acknowledge that they have debt issues, seek to address these quickly and therefore adding a further requirement to seek additional independent financial advice could cause unwanted delays and unintended consequences.

We believe that we can achieve the Committee's aims here by the way in which we take forward work on the next recommendation, and by looking again at some of the statutory paperwork used in the process – which we agree could be made more easily accessible. That said we will consider the committee's proposition as part of the wider review we are committed to undertaking.

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

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The Scottish Government agrees that debtors must be provided with information which clearly informs them of all of the options open to them; and that the information is presented in such manner that the debtor understands it.

We will look again at how this information can best be presented to ensure it details the outcomes and implications for debtors under each statutory debt solution. As part of this process, AiB will carry out a review of trust deed forms. You will be aware that we have already begun a review of the Debt Advice and Information Pack as part of the ongoing review into diligence.

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

The Scottish Government supports all efforts to ensure that those seeking a resolution to problem debt are provided with the appropriate information and advice to enable them to make an informed decision and access the right solution. We are also conscious of the impact that any reforms make on Scotland's already hard pressed free sector advice organisations and the Committee has raised an important issue with regards to the funding available for this activity.

In 2020-21, the Scottish Government has allocated debt advice levy funding of almost £4 million to support delivery of core services, as well as projects to take forward the actions in our Debt Advice Routemap – published in December 2019. To respond to the predicted impact of COVID-19 on incomes and the ability to repay debt, we are investing an additional £2.4 million from the existing debt advice levy. This funding will support innovative and inventive projects which are targeted at those most affected – including people who have might never before have sought debt advice.

Turning to the question of alternative funding options, including the concept of a general levy paid through our statutory debt solutions. Proposals of this nature would require careful consideration. Whilst it is important to consider all options, we must also ensure that the implications of each are carefully considered following appropriate consultation. We will consider this matter through our wider review.

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

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The Debt Advice and information Pack is intended to achieve precisely what is being asked for here – and we will ensure the refreshed version does so. A draft will be shared with the Committee and key stakeholders before it is finalised.

Although we agree that there is merit in the debtor having time to reconsider and review options, the timing would need to be considered carefully to ensure that there were no unintended consequences. For example, if the cooling off period was to happen before a trust deed is granted, debtors would potentially be left exposed to action by creditors. Similarly, the trust deed is a legal contract that transfers the debtor's assets – so that a cooling off period in the weeks after signing may again fail to achieve the intended goal here. So, whilst the Scottish Government agree that there is merit in considering a cooling off period, further detailed consideration and consultation would be required to ensure that it does not result in unintended consequences or delay protection for debtors. We believe this issue should fall into the generic review, as it may well read across to all the statutory products.

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

We agree, and the Agency has been moving in this direction as concerns over PTDs have grown. As you will know, the Agency undertakes two kinds of work in this area, a formal audit and a case review. A formal audit is a full case check, including compliance with legislative and Statements of Insolvency Practice requirements. Fees are also audited in full to ensure they are consistent with the work completed. The AiB can adjudicate to reduce/amend fees as part of the audit, and the trustee can appeal this to the sheriff.

Such audits have reduced in number since the introduction of the Protected Trust Deeds (Scotland) Regulations 2013 which required the creditors to accede to the trustee's fee prior to the trust deed being protected. The introduction of the 2013 regulations has resulted in mainly pre-2013 cases being submitted for audit while post 2013 cases would generally be considered for a review.

Reviews are undertaken in a similar manner to audits but not as detailed in terms of the fees (as creditors will have acceded to the fees at this stage). The reviews can examine and challenge the outlays claimed by the trustee. There is no cost to any party other than the Agency for such reviews, and it is by increasing numbers here that the Committee's intentions may be met. To illustrate the change in emphasis between audits and reviews - since 2016, AiB has undertaken 66 audits (the majority being pre-2013 cases) and 163 reviews.

In conjunction with reviews, AiB proactively monitors the statutory forms required at each stage of the PTD process. As an example, every Form 3 submitted to protect the trust deed is checked by AiB to ensure a consistency of the evidence which is presented to creditors. Each income and expenditure assessment in the submissions are also scrutinised with any

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issues highlighted as requiring further supporting evidence in order to progress the submission.

AiB's annual report includes detailed information regarding the performance of PTDs. This information is broken down by firm and compares the estimated returns of PTDs against the actual outcomes on their conclusion. The report also compares projected and actual costs and shows the percentage of failed PTDs (those where the PTD was closed without the debtor being discharged).

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

As said in the response to recommendation three, we accept that action must be taken to make sure that when a trust deed fails for no fault of the debtor's, and after the debtor has maintained payments for many months, we need to ensure the debtor does not find themselves back at square one. It should be said that the suggestion here does not necessarily achieve that – as the debtor's payments may not cover the additional costs the creditors will be entitled to add back to any debts that are not discharged. There is also the possibility that private sector firms administering trust deeds may perceive there to be greater risk that their costs will not be met, which they would likely offset by higher charges across their caseload.

I believe there may be better ways of addressing how to reduce the impact on the debtor of the failure of a trust deed – not least by following the recommendations made by the Committee to introduce a right of review and appeal against any refusal to discharge the debts. Again, the issue of the impacts of product failure need to be looked at across all statutory products, so we should ask the generic review to recommend the best approach here.

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

As the Committee notes, the generic review needs to look at how far we have a full range of statutory debt products that cover the circumstances of all those who need debt relief.

You will be aware that in the Coronavirus (Scotland) No 2 Act we increased the minimum debt level at which creditors can petition for an individual's bankruptcy to £10,000 – though that change is for now only temporary. At first sight, there seem attractions to aligning the minimum debt level for PTDs with this threshold for creditor petitions. I would welcome the

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Committee's thoughts on that potential alignment – you will know that our earlier pre-COVID consultations on raising the minimum debt level for PTDs did not produce consensus.

14. Committee members were concerned about the impact on family members of death during a Protected Trust Deed. On the one hand, it seems unfair that creditors who have agreed to be repaid via a Protected Trust Deed should get a windfall as a result of a death. On the other, it is recognised that the current legal framework requires debts to be settled before beneficiaries are entitled to receive anything from a deceased person's estate. The Committee recommends that the Scottish Government looks at whether Protected Trust Deed arrangements strike the appropriate balance in this area as part of its general debt review.

We agree that this is an area that needs to be included in the general review. Any potential changes need to take account of the other statutory debt solutions in place where these events happen, or indeed where debt issues must be addressed and a debt solution is not in place.

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

This is an issue we hope to progress at the earliest opportunity – you will be aware that we have already consulted on it as part of the Bankruptcy and Debt Advice review (and a copy of the analysis of that consultation is included with this letter). I would welcome the Committee's views on what a more appropriate rate might be.

I look forward to working with the Committee both to take these issues forward and on the general review.



JAMIE HEPBURN

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