

# The Protected Trust Deeds (Miscellaneous Amendment) (Scotland) Regulations 2024



Date of paper: 31 May 2024

## ICAS paper for Economy and Fair Work Committee

### Introduction and background

The Protected Trust Deeds (Miscellaneous Amendment) (Scotland) Regulations 2024 (“the Regulations”) have been laid as draft Regulations with a commencement date of 1 July 2024, subject to the approval of the Scottish Parliament under the affirmative procedure.

The [Policy Note](#) which accompanies the Regulations states that the purpose of the Regulations is to “bring forward stakeholder-led recommendations to introduce improvements to the current Protected Trust Deed (PTD) process.”

The Accountant in Bankruptcy (“AiB”) shared a draft copy of the Regulations with ICAS and other stakeholders on 22 December 2023. ICAS provided extensive comments on that draft on 16 January 2024, both in general terms and in relation to specific provisions. A further draft was shared on 12 February 2024 and ICAS responded with further comments on 14 February 2024.

### ICAS concerns

As the stated purpose explicitly states that the Regulations bring forward stakeholder led recommendations, we wish to ensure that the Committee considering the Regulations are aware that aspects of the Regulations do not have unanimous support of stakeholders. This is particularly important as the section on Consultation within the Policy Note (specifically paragraph 11) fails to set out the outcome of consultations.

As part of our feedback to the AiB, we set out that we do not believe that the provisions within the Regulations, which broadly import many of the measures introduced by the PTD Protocol, are appropriate for inclusion in legislation. We consequently oppose this measure and take this opportunity to set out our concerns to the committee prior to their consideration of the Regulations and taking evidence from the Scottish Government during the Committee’s meeting on 5 June 2024 .

### Better regulation

We do not believe that the Regulations meet the Scottish Government’s ‘Better Regulation’ agenda. Specifically, the requirements for regulation to be proportionate and targeted only where needed.

There is clear evidence from the operation of the PTD Protocol that many of the concerns the Regulations seek to address are unjustified. As an example, Regulation 5 will introduce, legislatively, a new procedure to apply to the AiB for agreement to refuse to discharge a debtor from a trust deed. This process is already included within the PTD protocol.

This provision has been introduced due to concerns that debtors were frequently being refused discharge inappropriately due to circumstances beyond their control (such as a loss of employment) as opposed to non-cooperation with their trustees. However, evidence has never been produced to justify those concerns. At the last meeting of the AiB’s PTD Standing Committee, it was confirmed that 732 applications to refuse debtors discharges had been received and all 732 were approved. This does not support the suggestion that there is inappropriate refusal of debtor discharges at any scale sufficient to warrant legislative intervention.

In addition, the provisions of the PTD protocol were incorporated into [revised SIP 3.3](#), effective from 1 November 2023. Statements of Insolvency Practice (‘SIPs’) set principles and key compliance standards with which Insolvency Practitioners **must** comply. They are issued to Insolvency Practitioners under procedures agreed between the authorising bodies acting through the Joint Insolvency Committee. Failure to observe the principles and/or maintain the standards set out in a SIP is a matter that may be considered by a practitioner’s regulatory authority for the purposes of disciplinary or regulatory action in accordance with that authority’s membership and disciplinary rules.

The AiB was represented on the SIP 3.3 working group and was fully aware from its involvement in that group that SIP 3.3 was being revised with the expectation that the revised SIP 3.3 would negate the need to have a separate Protocol or the need for legislation. These measures have been adopted and strengthened the PTD regulatory regime by the profession on a voluntary basis meaning that legislative intervention is disproportionate and unnecessary.

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We note that, in considering comments on earlier drafts of the Regulations, our representations that equivalent provisions in SIP 3.3 rendered the need to include in legislation were accepted and resulted in these aspects being removed from the Regulations laid.

## Market distortion and consumer choice

There are further concerns that legislative interference and burdensome procedural requirements impacting trust deeds distort the market. This leads to a concentration of PTD providers to a small number. In turn, this gives rise to undue risk in the market and for consumers. Current figures provided by the AiB show that around 90% of live PTDs in Scotland are administered by only 4 firms, with 2 firms alone accounting for a 70% share of the market. Any further contraction in this marketplace, which may be the result of the further regulatory burden, is extremely undesirable and risks harm for consumers.

In general terms, the more that changes of this nature are put into legislation, the more restrictive it is to adapt to changing market conditions. The COVID pandemic and cost of living crisis experienced in recent years have reinforced the unpredictable nature of the economy. It is therefore more desirable to work with the sector to introduce voluntary measures which can be adapted in a more efficient manner than through legislative intervention.

Some of the specific provisions proposed by the Regulations are also disproportionate to small practitioners and those who only undertake PTDs occasionally.

For example, regulation 4, which will amend section 176(1) of the Bankruptcy (Scotland) Act 2016 requiring dividends payable to creditors at month 12 and quarterly thereafter. This is a disproportionate measure for smaller practitioners and those who may act in a PTD on a non-volume basis. The current legislation does not prevent a dividend being made by volume providers earlier than stated in legislation. The existing legislative position was introduced in 2013 after [extensive consultation](#). Nothing substantive has changed in this regard.

The revised SIP 3.3 referred to above was also amended in relation to the timing of dividend payments. This already requires payment of dividends from month 12 and quarterly thereafter, but importantly provides a qualification to take account of the non-volume sector, requiring such dividends to be paid 'where practicable'.

The Accountant in Bankruptcy has voiced concerns previously about the diminishing pool of experienced and knowledgeable personal insolvency providers within Scotland and the threat that this causes to an effective insolvency regime. It is somewhat surprising therefore to see further legislative provisions being sought to be introduced which will have the potential to exasperate this position without an otherwise clear and evidenced based benefit in doing so.

## Conclusion

As it is not possible to amend the Regulations through the parliamentary process, we would ask the Committee to consider whether the Regulations should be approved by the Scottish Parliament or whether the Committee should recommend that the Regulations should not be approved as currently drafted. We would encourage the Scottish Government to bring forward amended Regulations which are proportionate in their response to actual and evidenced needs of legislation and which do not have the potential to cause detriment to consumer choice and effectiveness of Scottish statutory debt relief procedures.

## Further information

Please contact ICAS if you would like to discuss these matters further: