Consumer Bankruptcy Law Reform in Scotland, England and Wales

by

Donna McKenzie Skene[*] and *Adrian Walters*[†]

I. INTRODUCTION

Like their counterparts in other countries, policymakers in the United Kingdom are paying increasing attention to the phenomenon of consumer bankruptcy.[1] In macroeconomic terms, the last decade has been one of historically

---

∗ Senior Lecturer, School of Law, University of Aberdeen (UK).

† Geldards Professor of Corporate and Insolvency Law, Nottingham Law School, Nottingham Trent University (UK). This article is based on a paper given at the INSOL Academics' Group Meeting held at Scottsdale, Arizona, May 2006. We thank the following from whom we have benefited greatly during its preparation: David Brown, Pat Boyden, Irene Hardill, Jason Kilborn, Mike Norris, Charles Tabb, Jay Westbrook and the participants in the INSOL Academics' Group Meeting. The usual disclaimers apply. We also acknowledge the support of the British Academy in contributing to Donna's travel expenses for attending the meeting.

In this article the following abbreviations are used in text and footnotes:

AIB	Accountant in Bankruptcy.
BD(S) Bill	Bankruptcy and Diligence etc (Scotland) Bill.
BRO/BRU	A bankruptcy restrictions order or undertaking under IA 1986 § 281A and Schedule 4A.
B(S)A 1985	Bankruptcy (Scotland) Act 1985.
CCAO	A county court administration order under Part VI of the County Courts Act 1984 (England and Wales).
Choice of Paths	DCA, A CHOICE OF PATHS—BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT, CP 23/04 (2004).
Cork Report	INSOLVENCY LAW AND PRACTICE, REPORT OF THE INSOLVENCY LAW REVIEW COMMITTEE, CMND. 8558 (1982) (chaired by Sir Kenneth Cork).
DAS	The debt arrangement scheme established by Part I of the DAA(S)A 2002.
DAA(S)A 2002	Debt Arrangement and Attachment (Scotland) Act 2002.
DAS Regulations	The Debt Arrangement Scheme (Scotland) Regulations 2004, S.S.I. 2004/468 as amended.
Debt Relief	SCOTTISH EXECUTIVE, REPORT OF THE WORKING GROUP ON DEBT RELIEF (2005).
DCA	Department of Constitutional Affairs
DMA	An unregulated debt management arrangement (England and Wales).
DPP	A debt payment programme entered into under the DAS.
DRO	Debt relief order.
DTI	Department of Trade and Industry.
EA 2002	Enterprise Act 2002.
ECC	The Enterprise and Culture Committee of the Scottish Parliament.

low inflation, low interest rates and high employment. As the recession of the early-1990s became a distant memory, UK consumers went on a long spending spree aided and abetted by a rapid expansion in credit availability and a booming housing market. Aggregate household debt in the UK recently went past the £1 trillion mark for the first time.[2] Seen in this light, it is perhaps not surprising that there has been a significant rise in the absolute numbers of debtors seeking relief through formal insolvency proceedings and other less formal means. This has been accompanied by a

Fresh Start	INSOLVENCY SERVICE, BANKRUPTCY: A FRESH START—A CONSULTATION ON POSSIBLE REFORM TO THE LAW RELATING TO PERSONAL INSOLVENCY IN ENGLAND AND WALES (2000).
FTVA	A fast-track voluntary arrangement under IA 1986 §§ 263A—G.
IA 1986	Insolvency Act 1986.
ICAS	Institute of Chartered Accountants of Scotland.
IP	Licensed insolvency practitioner.
IPO	An income payments order in bankruptcy under IA 1986 § 310 (England and Wales).
IPA	An income payments agreement in bankruptcy under IA 1986 § 310A (England and Wales).
Improving IVAs	INSOLVENCY SERVICE, IMPROVING INDIVIDUAL VOLUNTARY ARRANGEMENTS (2005).
IR 1986	Insolvency Rules 1986 S.I. 1986/1925 (as subsequently amended).
IVA	An individual voluntary arrangement under Part VIII of IA 1986.
Modern Approach	SCOTTISH EXECUTIVE, PERSONAL BANKRUPTCY REFORM IN SCOTLAND: A MODERN APPROACH (2003).
Modernising Bankruptcy	SCOTTISH EXECUTIVE, MODERNISING BANKRUPTCY AND DILIGENCE IN SCOTLAND: DRAFT BILL AND CONSULTATION (2004).
NINA Consultation	INSOLVENCY SERVICE, RELIEF FOR THE INDEBTED—AN ALTERNATIVE TO BANKRUPTCY? (2005).
NINAs/NINA debtors	Debtors with no assets and no income.
OR	Official Receiver.
Protected Trust Deeds	SCOTTISH EXECUTIVE, PROTECTED TRUST DEEDS: A BETTER DEAL—CONSULTATION ON DRAFT REGULATIONS (2006).
PTD	A protected trust deed under B(S)A 1985.
Second Chance	DTI, PRODUCTIVITY AND ENTERPRISE: INSOLVENCY—A SECOND CHANCE, CM. 5234 (2001).
SIVA	Simple individual voluntary arrangement (proposed in *Improving IVAs*).
Stage 1 Report	ECC STAGE 1 REPORT ON THE BD(S) BILL (17 May 2006)

[1] The United Kingdom is made up of three separate jurisdictions or law districts: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. On the constitutional relationship between England and Wales and Scotland, the two jurisdictions considered in this article, *see* Part II.

[2] According to the Bank of England's Statistical Release for December 2005, aggregate personal debt stood at £1,157.5 billion of which £962.5 billion was secured on a dwelling and £192.3 billion was unsecured: *see* http://www.bankofengland.co.uk/statistics/li/2005/dec/lendind.pdf. Aggregate household debt has grown from c.40% of aggregate annual household income in 1980 to c.140% of aggregate annual household income in 2005, a significant increase in the aggregate debt burden. For data on the distribution of the debt burden *see* Orla May, Merxe Tudela and Garry Young, *British household indebtedness and financial stress: a household level picture*, BANK OF ENGLAND QUARTERLY BULLETIN (Winter 2004) *available at* http://www.bankofengland.co.uk/publications/quarterlybulletin/qb040401.pdf; PRICEWATERHOUSECOOPERS, PRECIOUS PLASTIC 2006 – CONSUMER CREDIT IN THE UK *available at* http://www.pwc.com/uk/eng/main/home/index.html.

shift in the demographic profile of insolvency, with consumer debtors now comprising around 70% of total debtors who seek formal debt relief in England and Wales and around 90%, applying the same measure in Scotland. Although we have some way to go to match the United States, judged by our own standards, we are experiencing something approaching a consumer bankruptcy boom.[3]

The policy response to rising levels of consumer debt and financial distress has two aspects. The first aspect is an ongoing attempt by government to develop preventative strategies aimed at limiting consumer over-indebtedness. These strategies emphasize responsible lending, debt advice and financial education.[4] The second aspect — which forms the subject matter of this article — is a series of current reform proposals that seek to modernize the insolvency laws of Scotland, England and Wales with a view to aligning the law more closely with the needs of over-indebted consumers who can no longer manage their debt burdens. It has long been recognized that the laws of the two jurisdictions need to be updated to keep step with the rapid expansion of consumer credit and debt.[5] Until now, this has not been matched by any

---

[3] *See* Appendix. For arguments that economic variables such as deregulation of credit markets, consumer credit expansion and rising consumer debt burdens have been the principal drivers behind increases in bankruptcy filing rates in the United States, *see*, *e.g.*, Jagdeep S. Bhandari & Lawrence A. Weiss, *The Increasing Bankruptcy Filing Rate: An Historical Analysis*, 67 AM. BANKR. L.J. 1 (1993); Paul C. Bishop, *A Time Series Model of the US Personal Bankruptcy Rate*, BANK TRENDS (No. 98-01) *available at* http://www.fdic.gov/bank/analytical/bank/bt_9801.pdf; Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate*, BANK TRENDS (No. 98-05) *available at* http://www.fdic.gov/bank/analytical/bank/bt_9805.pdf; Robert M. Lawless, *The Relationship Between Nonbusiness Bankruptcy Filings and Various Basic Measures of Consumer Debt*, *available at* http://www.law.unlv.edu/faculty/rlawless/busbkr/filings.htm; David A. Moss and Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311 (1999); Teresa A. Sullivan, Elizabeth Warren and Jay L. Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STANFORD L.R. 101 (2006); Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079 (1998). Similar explanations of rising filing rates in the UK have gained a measure of official acceptance: *see* BANK OF ENGLAND FINANCIAL STABILITY REVIEW (Jun. 2005), *available at* http://www.bankofengland.co.uk/publications/fsr/2005/fsrfull0506.pdf *at* 17-19.

[4] *See* DTI, FAIR, CLEAR AND COMPETITIVE: THE CONSUMER CREDIT MARKET IN THE 21st CENTURY, CM. 6040 (2003), *available at* http://www.dti.gov.uk/ccp/topics1/pdf1/creditwp.pdf, especially ch. 5 and Annex C; DTI, TACKLING OVER-INDEBTEDNESS ACTION PLAN 2004, *available at* http://www.dti.gov.uk/ccp/topics1/pdf1/overdebt0704.pdf; DTI, TACKLING OVER-INDEBTEDNESS ANNUAL REPORT 2005, available at http://www.dti.gov.uk/ccp/topics1/pdf1/overdebt0705.pdf; FINANCIAL SERVICES AUTHORITY, TOWARDS A NATIONAL STRATEGY FOR FINANCIAL CAPABILITY (2003), *available at* http://www.fsa.gov.uk/pubs/other/financial_capability.pdf. On the role of the Financial Services Authority in promoting financial education and awareness *see generally* http://www.fsa.gov.uk/financial_capability/.

[5] *See*, *Cork Report*, ch. 1 (especially paragraphs 10-16, 21-25) and ch. 6; *Second Chance*, paragraphs 1.45-1.48. *See also* the following extract from the INSOLVENCY SERVICE ANNUAL REPORT & ACCOUNTS 2004-2005: "Our insolvency framework has to recognise and support the changing structure of the UK economy and…the way in which individuals use credit…The phenomenon of

concrete or systematic attempt to "consumerize" insolvency law despite increasing consumer usage of the bankruptcy system. In England and Wales, the most recent reform of the bankruptcy regime, implemented by the Enterprise Act 2002, was premised on a "fresh start" policy fashioned principally with entrepreneurial business debtors in mind.[6] To date, the debt arrangement scheme — a formal debt rescheduling mechanism introduced in Scotland by the Debt Arrangement and Attachment (Scotland) Act 2002 — is the only legal institution that has been designed primarily to address the problems of modern consumer debtors.[7] The proposals for further reform now under active consideration in Scotland, England and Wales aim to redress the balance.

The overarching objective of the current reform proposals is the creation in both jurisdictions of an integrated legal framework of debt management and relief designed to provide a range of options capable of meeting the needs of all debtors whatever their financial circumstances. Underpinning these emerging legal frameworks is the principle that debtors with means (whether income, assets or some combination of the two) should be required to make at least some contribution towards payment of their debts. This "can pay, should pay" principle reflects a long prevailing policy consensus that debt relief, involving some element of debt write-off, should come at a price which, in the case of salaried debtors, should include a contribution from future income.[8] As we will see, it is increasingly accepted that consumer debtors who have *nothing* to offer their creditors should not be denied access to some form of bankruptcy relief. Thus, the flip-side of "can pay, should pay" — that those who *cannot* pay should not be required to pay — now carries considerable weight in policy terms.

The purpose of this article is to outline and assess the legal frameworks of debt management and relief that are being shaped by the current reform process. In so

---

greatly expanded consumer credit is now a worldwide one that insolvency systems have increasingly to take into account."

[6] *See* Part III.A. Similar reforms in substance and rationale are currently being implemented in Scotland: *see* Part V.B.

[7] *See further* Part III.B.

[8] *Fresh Start*, paragraphs 7.5-7.13; *Second Chance*, paragraph 1.20; *NINA Consultation*, paragraphs 3-4; *Modern Approach*, paragraphs 5.14-5.18; *Modernising Bankruptcy*, paragraphs 5.3, 5.23-5.28; *Protected Trust Deeds*, paragraphs 3.22-3.26. The idea that debtors who can afford it should pay something to their creditors may be thought relatively uncontroversial and is embedded within bankruptcy systems around the globe. However, its implementation in practice can be controversial depending on the precise mechanisms adopted as the introduction in the United States of means-tested access to Chapter 7 and *de facto* imposition of mandatory payment plans on ineligible debtors by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amply illustrates.

doing, we hope to add to the picture that bankruptcy scholars have already painted of emerging consumer bankruptcy systems in a range of jurisdictions across the globe[9] and thereby to contribute to a process of "cross-systemic learning".[10] While much has been done to develop comprehensive consumer-oriented systems in Scotland, England and Wales, we contend that there are outstanding issues of *scope* and *suitability* in both jurisdictions which still need to be addressed. The question of scope has two aspects. The first is concerned with whether the emerging legal frameworks are sufficiently comprehensive to accommodate the needs of all debtors, whatever the size of their indebtedness, and whatever their profile in terms of available assets and income. In other words, the focus is on whether there are *gaps* in coverage: groups of debtors who may slip through the net. The second is concerned with *overlaps* in coverage — that is the extent to which a given debtor may have a choice of more than one route to remedy over-indebtedness (albeit a choice mediated through intermediaries or other mechanisms) — and the extent to which such choices are framed to avoid the creation of incentives that may undermine the integrity of the overall system. Whereas the question of scope is directed at the comprehensiveness and coherence of the system as a whole, the question of suitability is concerned with whether the various legal institutions that make up the system are individually fit for purpose.

After a brief account of the constitutional relationship between England and Wales and Scotland, the article divides into the following parts. Part III outlines the systems in place at the time of writing in both jurisdictions and the various options for debt management and/or debt relief that are currently available. Part IV critiques the existing systems from the perspective of the consumer debtor in terms of scope and suitability and explores the drivers behind the current reform efforts. Parts V and VI outline and evaluate the proposed reforms, again in terms of scope and suitability. Part VII concludes.

---

[9] *See* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE (Johanna Niemi-Kiesiläinen et al., eds., Oxford and Portland, Oregon: Hart Publishing, 2003). *See also* Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 NW. J. INT'L. L. & BUS. 257 (2004); *La Responsabilisation de l'Economie: What the United States Can Learn From the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619 (2005).

[10] Kilborn, *Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 AM. BANKR. INST. L.R. 69, 70 (2006).

II. CONSTITUTIONAL POSITION

Notwithstanding that Scotland is part of the UK, it retains its own separate legal system. Following the coming into force of the Scotland Act 1998, it once again has its own Parliament, whose legislative competence is determined by the 1998 Act. In broad terms, the 1998 Act provides that the ability to legislate on certain specified matters is reserved to the UK Parliament, while the ability to legislate on all other Scottish matters is devolved to the Scottish Parliament. The 1998 Act also specifically provides that nothing in it affects the right of the UK Parliament to legislate on devolved matters[11] and, indeed, it may be more convenient for legislation to be passed by the UK Parliament than for the Scottish Parliament to enact separate legislation for Scotland. However, a convention has evolved whereby the UK Parliament will not generally legislate on devolved matters without the consent of the Scottish Parliament. Where appropriate, such consent is given by the Scottish Parliament passing a "Sewel motion" in the relevant terms.

In terms of insolvency law, corporate insolvency law is in most respects the same or similar in the two jurisdictions while non-corporate insolvency (or bankruptcy) law remains distinct.[12] This is reflected in the terms of the 1998 Act, with the majority of corporate insolvency law being reserved to the Westminster Parliament while the majority of bankruptcy law is devolved to the Scottish Parliament. In proposing the current reforms to Scottish bankruptcy law, however, the Scottish Executive identified as one of the drivers for change the recent reforms to bankruptcy law in England and Wales and one of the main policy considerations behind the proposed introduction of similar reforms in Scotland has been the need to maintain a level playing field between the two jurisdictions.[13] There does, therefore,

---

[11] Scotland Act 1998 § 28(7).

[12] In this context, corporate insolvency law means that part of insolvency law relating to companies and limited liability partnerships (to which a modified version of the law relating to companies is applied), while non-corporate insolvency (or bankruptcy) law means that part of insolvency law relating to debtors other than companies and limited liability partnerships. Bankruptcy law in both jurisdictions is capable of embracing non-corporate business debtors as well as consumer debtors. Indeed, much of the material discussed in this article reflects the transitioning of systems designed predominantly for business debtors to accommodate consumer debtors who are now the major users.

[13] *See*, *Modern Approach*, paragraph 4.4. The emphasis there was on maintaining a level playing field for *business*, since the EA 2002 reforms, as noted above, were fashioned principally with entrepreneurial business debtors in mind. The same argument could equally well apply, however, in a consumer context.

remain an element of commonality of purpose in the field of personal insolvency despite devolution.

III. THE CURRENT SYSTEMS FOR CONSUMER DEBT MANAGEMENT AND RELIEF IN ENGLAND AND WALES AND SCOTLAND

A. ENGLAND AND WALES

1. *Bankruptcy*

The ultimate formal response to personal insolvency in England and Wales is bankruptcy under Part IX of the Insolvency Act 1986. The High Court or a relevant county court can make a bankruptcy order in prescribed circumstances on the petition of either the debtor or a hostile creditor.[14] Debtors filing for bankruptcy must lodge a statement of affairs with the court demonstrating an inability to pay their debts,[15] a much less onerous threshold than the pre-conditions for sequestration in Scotland (discussed below). All bankruptcies are administered, at least on an interim basis, by an official receiver who is a state official employed by the Insolvency Service, an executive agency of the Department of Trade and Industry.[16] A trustee in bankruptcy from the private sector can be appointed by the creditors or the Secretary of State for Trade and Industry to succeed the OR.[17] This will usually only happen if there are

[14] IA 1986 §§ 264-268, 272, 373-374; IR 1986 §§ 6.9, 6.40-6.42. The forms are available online from http://www.insolvency.gov.uk and the procedure is largely administrative as there is rarely any need for a full hearing in the case of a debtor's petition. There is facility (commonly used) for the court to make the bankruptcy order on the same day that the debtor files the forms: *see* IR 1986 § 6.42(2). There are specially adapted bankruptcy regimes for dealing with the insolvent estates of deceased persons and insolvent partnerships.

[15] IA 1986 § 272; IR 1986 § 6.41.

[16] IA 1986 § 287. There are 39 ORs based at various locations in England and Wales. Each OR is attached to a particular court or courts. For details *see* http://www.insolvency.gov.uk. Although they are state officials employed by the Insolvency Service, ORs carry out their statutory functions under IA 1986 as independent office-holders rather than as servants of the Crown: *see*, *In re* Minotaur Data Systems Ltd., [1999] 1 W.L.R. 1129. They are also officers of the courts to which they are attached: *see*, *In re* Pantmaenog Timber Co. Ltd., [2004] 1 A.C. 158, [43]. For the origins, history and functions of the official receiver system, first established by the Bankruptcy Act 1883, *see*, *Cork Report*, paragraphs 49-53 and ch. 14; V MARKHAM LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT AND COMPANY WINDING-UP IN NINETEENTH CENTURY ENGLAND (Oxford, Clarendon Press, 1995), ch. 5.

[17] IA 1986 §§ 292-296. The OR remains the trustee of first and last resort: *see* IA 1986 § 300.

sufficient assets in the estate to make the appointment worthwhile or if there are matters worthy of further investigation and possible challenge by means of trustee avoiding powers. A trustee in bankruptcy must be a licensed insolvency practitioner and, as such, is a member of a regulated body of insolvency professionals. Most IPs who act as trustees are accountants.[18]

In common with comparable regimes in other jurisdictions, bankruptcy is a debt relief tool. It amounts to a form of statutory composition designed to balance the interests of debtors and creditors. The debtor is required to surrender non-exempt assets (including assets acquired while bankrupt)[19] in and towards payment of her debts and may be ordered to make contributions from surplus income for up to a maximum of three years under the terms of an income payments order or income payments agreement.[20] The debtor must also submit to an initial investigation carried out by the OR and co-operate fully with both the OR and any subsequently appointed trustee.[21] As a *quid pro quo*, the debtor obtains discharge of her "bankruptcy debts", meaning the debts or liabilities to which she was subject at the commencement of bankruptcy.[22] The discharge is generous. "Bankruptcy debts" are broadly defined and the categories of non-dischargeable debt are strictly limited.[23]

---

[18] As is the case in Canada: *see* Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy*, 74 AM. BANKR. L.J. 399 (2000). The licensing framework for IPs is set out in IA 1986, Part XIII. For background *see*, *Cork Report*, ch. 15.

[19] IA 1986 §§ 283, 307-308A. Exempt assets are limited to tools of trade and items necessary for satisfying the basic domestic needs of the bankrupt and her family. While there is no homestead exemption in English law as such, the bankrupt's interest in a dwelling house automatically ceases to be comprised in the bankruptcy estate at the end of three years from the commencement of the bankruptcy case: *see* IA 1986 § 283A. This provision is designed to encourage trustees to deal with interests in land expeditiously rather than keep cases open indefinitely after the debtor has been discharged in the hope of cashing out the interest at the top of a rising market. Future pension rights are also excluded from the bankruptcy estate: *see* Welfare Reform and Pensions Act 1999 § 11 reversing *In re* Landau [1998] Ch. 223.

[20] IA 1986 §§ 310-310A. Income payments can only be demanded if they do not reduce the income of the bankrupt below what appears to be necessary for meeting the reasonable domestic needs of the bankrupt and her family. In practice, it falls to the ORs and, ultimately, the court to determine what expenses can be deducted in calculating surplus income under the "reasonable domestic needs" test. Pension contributions up to a prescribed level must be taken into account: *see* IA 1986 §§ 310(2), (8). For further information on how the income payments regime is administered in practice *see* INSOLVENCY SERVICE TECHNICAL MANUAL, ch. 31.7 and CASE HELP MANUAL, *available at* http://www.insolvency.gov.uk/freedomofinformation/index.htm.

[21] IA 1986 §§ 291, 333.

[22] IA 1986 §§ 281, 382.

[23] *Id.*, § 281(3)-(8). Non-dischargeable debts include criminal penalties, debts arising from fraud or fraudulent breach of trust, debts arising under a court order made in family proceedings (such as alimony or child support payments) and student loans. In contrast to the position under Chapter 7 of the Bankruptcy Code, there is no bar on repeat filing as such (although this may trigger an application for post-bankruptcy restrictions in a subsequent bankruptcy). Reaffirmation of discharged debts is regulated by the common law doctrine of consideration.

Reforms of the bankruptcy regime introduced by EA 2002 have led to a further loosening of discharge policy. With effect from 1 April 2004, section 279 of IA 1986 provides for automatic discharge of debts no later than one year after the commencement of the bankruptcy case, a reduction from the previous period of three years. Discharge can be obtained earlier than one year if the OR considers that investigation of the debtor's conduct and affairs is unnecessary or concluded and files a notice with the court to that effect. The EA 2002 reforms were intended principally to reduce the stigma of bankruptcy for entrepreneurial business debtors. The main policy objective was to encourage honest but failed entrepreneurs to re-engage in entrepreneurial risk-taking through the provision of a quick and comprehensive discharge coupled with a wholesale reduction in the plethora of legal restrictions to which undischarged bankrupts were previously subjected on public interest grounds.[24] However, it was not intended that bankruptcy should become a "soft touch". The income payment provisions were clarified to reinforce the "can pay, should pay" principle by providing scope for surplus income to be captured both before and after discharge for up to a maximum of three years. With a view to greater cost-effectiveness, provision was also made for binding income payments agreements to be reached between the debtor and the OR/trustee without the need for a consent order from the court.[25] In addition, a new system of post-bankruptcy restrictions was introduced, modelled on the UK's Company Directors' Disqualification Act, which aims to penalize dishonest or irresponsible debtors who, by reason of their past misconduct, are deemed unworthy of a full "fresh start".[26] A debtor subject to post-bankruptcy restrictions is prohibited from acting in various capacities (such as a company director or an IP) and from obtaining credit above a prescribed amount (currently £500) without disclosing her status. Bankruptcy restrictions can be

---

[24] For further discussion of the underlying policy in official sources *see*, *Fresh Start* and *Second Chance*. For academic commentary, *see* DAVID MILMAN, PERSONAL INSOLVENCY LAW, REGULATION AND POLICY (Aldershot: Ashgate Publishing, 2005); Iain Ramsay, *Bankruptcy in Transition: The Case of England and Wales* in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 9; Adrian Walters, *Personal Insolvency Law After the Enterprise Act: An Appraisal*, 5 JOURNAL of CORPORATE LAW STUDIES 65.

[25] *Second Chance*, paragraph 1.20; IA 1986 §§ 310-310A. For preliminary indications that these provisions have led to an increase in aggregate income capture *see* INSOLVENCY SERVICE, EVALUATION OF CONTRIBUTIONS FROM INCOME BY BANKRUPTS — SECOND INTERIM EVALUATION REPORT (Mar. 2006), *available at* http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/reform.htm.

[26] *See*, *Fresh Start* from paragraph 7.14; *Second Chance* from paragraph 1.25; Donna W McKenzie Skene, *Morally Bankrupt? Apportioning Blame in Bankruptcy*, [2004] JOURNAL OF BUSINESS LAW 171; ADRIAN WALTERS & MALCOLM DAVIS-WHITE Q.C., DIRECTORS' DISQUALIFICATION AND BANKRUPTCY RESTRICTIONS (London: Sweet and Maxwell, 2005); Walters, *supra* note 24.

imposed by the court (BROs) or by the Secretary of State with the consent of the debtor (BRUs) for between two and fifteen years. The imposition of bankruptcy restrictions for debtor misconduct does not affect discharge.[27] However, it is a matter of public record of which the credit reference agencies are expected to take note. The system is designed to enable lenders to differentiate between culpable debtors and non-culpable debtors and therefore improve the quality of information available to the credit markets.[28]

The extent to which the EA 2002 reforms represent a substantial liberalization of the bankruptcy regime is a controversial question. The government insists that the combination of the income capture and bankruptcy restrictions aspects, together with the publicity accorded to bankruptcy orders through advertisement,[29] still make bankruptcy a "tough" option. However, the consensus among IPs is that most bankrupts now get an "easy ride" to a swift and generous discharge. If this is so, we might expect to see debtors choosing bankruptcy over other debt solutions in ever increasing numbers. Yet, while aggregate numbers of formal insolvencies have certainly increased since EA 2002 came into force, bankruptcy's *share* of that increase relative to individual voluntary arrangements — the formal alternative to bankruptcy provided for by IA 1986 — has marginally declined. One possible explanation for this is the role of IPs who have made a business out of selling IVAs to consumer debtors, a point considered further below.

Despite the orientation of the reforms towards entrepreneurial business debtors, access to bankruptcy is not restricted to those debtors. Consumer debtors can avail themselves of bankruptcy relief on the same terms — submission to a preliminary investigation by the OR, surrender of non-exempt assets and (where appropriate) payment of up to three years' worth of contributions from surplus income — as long as they are prepared to run a limited risk of suffering potentially irreparable damage to their credit histories should they fall foul of bankruptcy restrictions. For

---

[27] The only ground for suspending discharge is where the debtor has failed or is failing to comply with her statutory obligations to the OR and/or to her trustee: *see* IA 1986 § 279(3)-(4). There are no grounds for absolute denial of discharge. The old regime in the Bankruptcy Acts of 1883 and 1914 — discussed in Douglass G. Boshkoff, *Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69 (1982) — under which the courts had the power to refuse or condition discharge on grounds of misconduct has long since been swept away.

[28] Walters, *supra* note 24. *See further* INSOLVENCY SERVICE, EVALUATION OF BANKRUPTCY RESTRICTIONS ORDERS — SECOND INTERIM EVALUATION REPORT, *available at* http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/reform.htm.

[29] IR 1986 § 6.46(2).

consumer debtors who have few or no non-exempt assets and no surplus income, bankruptcy appears to be a rational option. In pure economic terms, those debtors have much to gain (a quick discharge) and not a great deal to lose.[30] The same may also be true of debtors whose assets are limited, but who have surplus income, because income payments in bankruptcy cannot stretch beyond three years, whereas creditors tend to demand a five-year payment plan in an IVA (see below). The main barrier to entry is the cost of filing for bankruptcy. As well as the court fee (currently £150), the debtor must also pay a deposit of £325 to cover the OR's costs.[31]

2. *Individual Voluntary Arrangements*

The main formal alternative to bankruptcy available to debtors is an IVA under Part VIII of IA 1986. The origins of the IVA can be traced back to the early-nineteenth century when dissatisfaction among creditors with the inefficiency of the bankruptcy system as a debt recovery mechanism led to the introduction of a form of binding statutory composition[32] the subsequent evolution of which culminated a century later in the enactment of the composition and scheme of arrangement provisions in the Bankruptcy Acts of 1883 and 1914 and the Deeds of Arrangement Act of 1914.[33] An IVA is a binding consensual arrangement entered into by the debtor and her creditors on terms set out in a proposal drawn up with the assistance of an IP ("the nominee"). To take effect as an IVA, in excess of 75% of the creditors by value must vote to approve the proposal at a creditors' meeting summoned to consider it.[34] The proposal must be "…for a composition in satisfaction of [the debtor's] debts or a scheme of arrangement of his affairs."[35] Within the boundaries of this statutory

[30] Figure 3 in the Appendix demonstrates the rise in consumer bankruptcy filings relative to filings by business debtors in recent years. In 1999 filing rates were running at roughly 50:50. In 2004 over 70% of debtors declared bankrupt were consumer debtors. According to the available evidence, the majority of consumer bankruptcies are no asset cases that return nothing to creditors: *see*, *e.g.*, MICHAEL GREEN, INDIVIDUAL VOLUNTARY ARRANGEMENTS, OVER-INDEBTEDNESS AND THE INSOLVENCY REGIME (NOV. 2002), a study commissioned by the Insolvency Service.

[31] IA 1986 § 415; Insolvency Proceedings (Fees) Order 2004 S.I. 2004/593 as amended by the Insolvency Proceedings (Fees) (Amendment) Order 2006 S.I. 2006/251; IR 1986 § 6.42(1). For background, *see also* R. v. Lord Chancellor, ex parte Lightfoot, [2000] Q.B. 597.

[32] 6 Geo. IV, c. 16 (1825) (Lord Eldon's Act).

[33] For historical background *see further* MARKHAM LESTER, *supra* note 16 and *Cork Report*, chs. 2 and 7.

[34] IA 1986 §§ 257-258; IR 1986 § 5.23.

[35] IA 1986 § 253(1). The contents of the proposal are prescribed: *see* IR 1986 § 5.3. The proposal must be accompanied by a statement of affairs: *see* IR 1986 §§ 5.5, 5.17(3). The IVA is roughly equivalent to a payment plan under Chapter 13 of the Bankruptcy Code. Note, however, that assets as

language there is considerable latitude. In theory, the debtor can agree to contribute assets[36] or surplus income or a combination of both towards the payment of her debts. In practice, the precise terms of the IVA will depend on what the creditors are prepared to accept. There is scope for the creditors to demand modifications to the proposal before approving it.[37] Where the debtor is a salaried homeowner, it is common for creditors to seek surplus income contributions of three to five years and a lump sum contribution out of the equity in the property (if any). Where the debtor has surplus income but no assets she will need to offer sufficient contributions from surplus income to convince creditors, who commonly insist on a minimum dividend level, to approve the arrangement. IVAs almost invariably provide for debt composition and a discharge on successful completion which means that, in practice, they are a source of debt relief.

Once approved by the requisite majority, an IVA binds all creditors who were entitled to vote, regardless of whether or not they attended the creditors' meeting and regardless of how they voted.[38] The IP who acted as nominee and assisted the debtor in preparing the proposal prior to the creditors' meeting becomes the "supervisor" of the approved IVA.[39] The supervisor is responsible for overseeing the implementation of the IVA and ensuring that the debtor complies with its terms.

In return for complying with the terms of an IVA for its duration, debtors will usually obtain a discharge from all unsecured debts that were outstanding at the commencement of the IVA while avoiding the greater publicity and perceived stigma associated with bankruptcy. For creditors, an IVA offers the prospect of better returns than bankruptcy as recovery rates for IVAs are consistently higher than the nominal recovery rates for bankruptcy.[40] It is important that payment terms are set at realistic

---

well as income can be captured in an IVA and that there is no rigid dividing line between IVAs and bankruptcy as there is between Chapter 7 and Chapter 13 because income and assets can be captured in both regimes. The protected trust deed in Scotland (*see infra* Part III.B.2) is also a rough Chapter 13 equivalent. Again, however, it is capable of capturing both assets and income.

[36] Which, in contrast to bankruptcy, do not automatically vest in the IP/trustee.

[37] *Id.*, § 258(2)-(5).

[38] *Id.*, § 260. An IVA is a contract given statutory force so that it binds dissenting creditors. For an illustration of the contractual nature of IVAs *see*, *e.g.*, Welburn v. Dibb Lupton Broomhead, [2003] B.P.I.R. 768.

[39] IA 1986 § 263.

[40] For historic evidence *see* Keith Pond, The *Individual Voluntary Arrangement Experience*, [1995] JOURNAL OF BUSINESS LAW 118 and *An Insolvent Decade: The Changing Nature of the IVA 1987-1997*, SSRN Working Paper Series *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=139556. *See also* GREEN, *supra* note 30. In theory, the costs of an IVA should be lower than the costs of bankruptcy as (i) there are no OR's costs and (ii) the IP's role in administering an approved IVA is less onerous than that of a trustee in

and affordable levels because, should the debtor default, she is exposed to a bankruptcy order on the basis of her inability to meet the liabilities contracted under the IVA.[41] There is no formal statutory mechanism for varying the terms of an approved IVA should the debtor's circumstances change. The court therefore has no power to vary the terms[42] where, for example, the debtor can no longer afford the monthly payments or her finances improve so that she is in a position to make a single payment discharging all the outstanding monthly payments in one go. In keeping with the contractual nature of the IVA, its terms can be varied with the unanimous agreement of the creditors.[43] However, a mechanism providing for the approval of variations by a majority of the creditors can be, and commonly is, included in the proposal.[44]

The court has a limited supervisory role in relation to IVAs.[45] The key player is the IVA nominee and supervisor who must be an IP.[46] IVAs are the subject of regulatory, as well as court, oversight. Under their professional rules, IPs who act as nominees must satisfy themselves that debtors who decide to propose an IVA have received appropriate advice and that all the available options (including bankruptcy) have been fully explored.[47] The nominee must also file a report with the court indicating whether the proposal has a reasonable prospect of being approved and implemented[48] and notify the court of the outcome of the creditors' meeting.[49]

IVAs are commonly proposed as a means of avoiding bankruptcy. However, it is also possible for an undischarged bankrupt to propose an IVA with a view to

---

bankruptcy. However, the cost-effectiveness of IVAs has been questioned in cases where debt levels are relatively low because all IVAs involve a fixed level of unavoidable cost: *see* Parts IV.A. and V.A.

[41] IA 1986 § 264(1)(c). The terms of the IVA will usually require the supervisor to file for the debtor's bankruptcy in the event of default.

[42] Raja v. Rubin, [2000] Ch. 274.

[43] *In re* Alpha Lighting Ltd., [1997] B.P.I.R. 341.

[44] STEVEN A. FRIEZE, PERSONAL INSOLVENCY — LAW AND PRACTICE (London: Sweet and Maxwell, 2004), 27-037.

[45] *Id.*, §§ 256A(3), 259, 262, 263(3)-(5). The court's involvement is greater if the debtor applies for a stay under section 253 pending the holding of the creditors' meeting. However, a debtor is no longer obliged to apply for a stay following amendment of Part VIII of IA 1986 by the Insolvency Act 2000. An approved IVA is subject to a limited right of challenge (usually at the suit of dissentient creditors) under section 262.

[46] IA 1986 §§ 388(2)(c), 389. There is scope in section 389A for persons outside the IP profession to be authorized to act as nominee and supervisor. However, to date, this power has not been exercised and the provision of IVAs therefore remains a professional monopoly, a matter that has provoked concern among other non-IP providers of debt advice.

[47] STATEMENT OF INSOLVENCY PRACTICE 3 (E & W), paragraph 3.3. The debtor must be provided with a copy of the booklet "Is a Voluntary Arrangement right for me?" produced by the Association of Business Recovery Professionals (R3) and confirm in writing that she has read and understood it.

[48] *Id.*, §§ 256(1)(a), 256A(3)(a).

[49] *Id.*, § 259.

having her bankruptcy annulled.[50] A further innovation introduced by EA 2002 is a fast-track IVA procedure administered exclusively by the OR.[51] Fast-track voluntary arrangements can only be proposed by undischarged bankrupts. They provide a means by which the OR can channel debtors who have surplus income out of bankruptcy. In an attempt to keep costs to a minimum, the procedure for FTVAs is considerably more streamlined than that outlined above for IVAs. A creditors' meeting is not required. Creditors simply vote for or against the proposal on the form provided and return it to the OR within a prescribed period. There is no scope for creditors to modify the proposal. It is put to the vote on a "take it or leave it" basis.

Like bankruptcy, IVAs (including FTVAs) are open to both business and consumer debtors. The costs of the IP for acting as nominee and supervisor in relation to an IVA are met from the proceeds of the arrangement. There are generally no court fees or deposits to pay upfront.[52] Statistical evidence suggests that the popularity of IVAs has been increasing since the late-1990s. In 1998, roughly 20% of individuals who entered formal insolvency proceedings went into IVAs, whereas in 2005 the figure had risen to 30%.[53] Moreover, recent research carried out by the accountancy firm PricewaterhouseCoopers has demonstrated that consumer debtors are now the principal users of the IVA.[54] Much of this popularity can be attributed to so-called IVA "factories". These are firms of IPs which aggressively market IVAs as a debt solution through various media and solicit debtors to contact them via free phone numbers or over the internet.[55]

---

[50] *Id.*, § 261.

[51] IA 1986 §§ 263A-G. For background *see*, *Fresh Start*, paragraphs 7.11-7.13; *Second Chance*, paragraphs 1.42-1.44. There have been very few FTVAs to date. For further background *see*, INSOLVENCY SERVICE, EVALUATION OF INDIVIDUAL VOLUNTARY ARRANGEMENTS — SECOND INTERIM EVALUATION REPORT (Mar. 2006), *available at* http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/reform.htm.

[52] Though in an FTVA there are fees of £335 comprising the OR's fee for acting as nominee and a registration fee: *see* the Insolvency Service's leaflet on FTVAs at http://www.insolvency.gov.uk/guidanceleaflets/ftva/ftva.htm.

[53] *See further*, Appendix, Figures 1-1a. Nearly twice as many debtors entered IVAs in 2005 than did in 2004.

[54] LIVING ON TICK: THE 21st CENTURY DEBTOR (2006) *available at* http://www.pwc.com/uk/eng/about/svcs/brs/PwC-IVAReport.pdf. PwC's data derives from approximately 6,500 IVA proposals made during the period July to November 2005. The overwhelming majority of debtors in the sample were consumer debtors. The evidence shows that the typical debtor in an IVA is likely to be someone under forty of either gender, with credit card and personal loan debts of around £40,000, living in rented accommodation and earning less than £30,000 per annum.

[55] *See*, *e.g.*, http://www.debtsolver.co.uk/; http://www.debtfreedirect.co.uk/home.php; http://www.debt-advice-online.com/. A number of these factories have acquired a stock market listing.

3. *County Court Administration Orders*

The county court administration order procedure offers a limited means of dealing with debt problems outside the bankruptcy system.[56] As originally conceived the procedure was designed to facilitate the recovery of small debts while protecting the debtor from creditor harassment (which despite the effective abolition of imprisonment for debt in 1869 included the possibility of committal to imprisonment for non-payment of judgment debts until 1970).[57] To qualify for access to the procedure, the debtor's total indebtedness must not exceed the current county court limit of £5,000[58] and must include at least one judgment debt. Qualifying debtors who wish to apply for a CCAO must file a request in the county court for the district in which they reside or carry on business setting out details of their assets, income, living expenses and debts. A court officer then considers whether the debtor has sufficient means to pay the debts listed in the request in full by instalments within a reasonable period of time. If the court officer decides that payment in full by instalments over time is feasible, she determines the amount and frequency of the payments to be made and notifies the debtor and the creditors listed in the request of the proposed repayment terms. Where no objection is received within a prescribed period, the court officer may make a CCAO in the terms proposed. If, however, the debtor or a creditor files an objection or the court officer considers that the debtor has insufficient means to make full payment by instalments within a reasonable time, the matter must be referred to a district judge.

A CCAO provides the debtor with protection from the creditors specified in the request and listed in a schedule to the order. No enforcement action can be taken against the person or property of the debtor in respect of a scheduled debt without the permission of the court.[59] Similarly, bankruptcy proceedings cannot be commenced against the debtor in respect of a scheduled debt without the permission of the court.[60]

[56] County Courts Act 1984, Part VI; County Court Rules, Order 39.

[57] The original provision was Bankruptcy Act 1883 § 122. For historical background and critique, *see*, *Cork Report*, paragraphs 68-73, 151-165, 276-280. *See also* Ramsay, *supra* note 24, pp 212-213.

[58] Though a CCAO will not automatically be invalidated should it turn out that the indebtedness exceeds £5,000: *see* County Courts Act 1984 § 112(5).

[59] *Id.*, § 114. There are limited exceptions in sections 115-116 permitting execution against goods and distress for rent in controlled circumstances.

[60] *Id.*, § 112(4).

If the debtor fails to make payments in accordance with the terms of a CCAO, the court may revoke it.[61]

CCAOs are essentially a court-based debt management solution designed to provide relatively small debtors who have some income but limited assets with respite from enforcement coupled with rescheduling and consolidation of their debts. To some extent, they are analogous to a debt payment programme entered into under the Scottish debt arrangement scheme described below. However, as a matter of law, it appears that CCAOs can also be used to provide some measure of debt relief. Section 112(6) of the County Courts Act 1984 states that a CCAO "may provide for the payment of the debts of the debtor by instalments or otherwise, and either in full or to such extent as appears practicable to the court under the circumstances of the case". Section 117 further provides that where the amounts received under the order are sufficient to cover costs and "to pay each creditor scheduled to the order *to the extent provided by the order*",[62] the debtor will be discharged from the scheduled debts. Thus, if the CCAO provides for payment in part under section 112(6) and the debtor complies with the terms of the order, the effect of section 117 is to discharge the remaining balance of the scheduled debts. A CCAO can therefore operate as a form of statutory composition in respect of the scheduled debts.[63] Empirical research has confirmed that CCAOs are used for debt relief as well as debt management purposes though this is subject to variations in local legal culture.[64] However, repayment programmes under CCAOs have a low completion rate[65] with the result that, in practice, few debtors are discharged by this means.

---

[61] IA 1986 § 429; County Court Rules, Order 39, Rule 13A. On revocation, the debtor is left exposed to enforcement action by her creditors and is made subject to a range of disqualifications under the Company Directors' Disqualification Act 1986 and other legislation: *see* WALTERS & DAVIS-WHITE, *supra* note 26, ch. 14.

[62] Emphasis added.

[63] Some doubt has arisen because an express power to make a CCAO with a "composition provision" was inserted as section 112B of the County Courts Act by the Courts and Legal Services Act 1990 § 13(5). Even though this power has never been brought into force, it prompts the argument that its enactment would have been unnecessary had the existing provisions allowed for debt composition. The counter-argument (which we prefer) is that section 112B merely clarifies the scope of the court's power under section 112(6). We consider the wording of section 112(6) to be tolerably clear especially when read alongside section 117.

[64] *See* ELAINE KEMPSON & SHARON COLLARD, MANAGING MULTIPLE DEBTS — EXPERIENCES OF COUNTY COURT ADMINISTRATION ORDERS AMONG DEBTORS, CREDITORS AND ADVISORS (DCA Research Series 1/04, Jul. 2004).

[65] *Id.*

4. *Debt Management Arrangements*

Debt management arrangements provide a further, more informal, response to debt problems independent of the bankruptcy system. While debtors can negotiate DMAs themselves, they commonly arise after the debtor has sought debt advice from the voluntary sector or a private sector debt management company.[66] DMAs are a debt management tool for debtors who have a regular source of surplus income. The debts are rescheduled and, where a provider is involved, consolidated into a single monthly payment which the provider then distributes among the creditors. DMAs usually provide for repayment in full over time or repayment on the terms of the DMA until such time as the debtor has sufficient resources to meet the repayments as originally contracted. Costs vary according to the provider. Some providers pass their costs onto the creditors while others charge the debtor but spread the cost over the lifetime of the arrangement.[67]

DMAs may have advantages for some debtors, such as homeowners, as they can be entered into without assets having to be surrendered. However, compared with the other options described above, DMAs suffer from several disadvantages. They are not legally binding and so do not stay individual collection efforts. They provide hardly any scope for debt relief and, unless creditors can be persuaded to waive it, interest will continue to run on the amount of the principal debts outstanding when the debtor entered into the arrangement. This contrasts with the position in bankruptcy and under an IVA or CCAO where debts (and any accrued interest) are frozen at the point that the procedure commences. Depending on levels of indebtedness and surplus income, DMAs may need to run for many years and can therefore become a treadmill. Finally, DMAs are largely unregulated. The OR has no involvement and there is no requirement for a DMA provider to be an IP. Despite these disadvantages, DMAs are popular with debtors. This popularity is probably attributable to high-profile advertising.

---

[66] *See further* Ramsay, *supra* note 24.

[67] To illustrate, say that Debtor needs to pay £200 per month for five years to pay off her debts and the DMA provider's costs are 10% of the total repayments (£1,200). If the creditors bear the cost (as is the case with DMAs offered by the Consumer Credit Counselling Service, a charity funded by the credit industry: *see* http://www.cccs.co.uk), the provider will distribute the proceeds to creditors net of the 10% but this will be treated as payment in full. If Debtor is required to pay the costs, the repayment term would need to be extended by a further six months to cover the costs and return one hundred pence in the pound to creditors.

B. SCOTLAND

1. *Sequestration*

The ultimate formal response to personal insolvency in Scotland, and the equivalent of bankruptcy in England and Wales, is sequestration under the Bankruptcy (Scotland) Act 1985.[68] The relevant sheriff court or the Court of Session may award sequestration in prescribed circumstances on the petition of the debtor, a qualified creditor[69] or a trustee acting under a trust deed for creditors.[70] In contrast to the minimal eligibility requirements for a debtor petition in England and Wales, a debtor may petition for her own sequestration only where she (i) has the concurrence of a qualified creditor[71] or (ii) satisfies a number of other requirements,[72] including a requirement that she is *either* apparently insolvent[73] *or* has granted a trust deed for creditors which has not become protected. In practice, obtaining the concurrence of a qualified creditor is rare and most debtors wishing to petition for sequestration therefore seek to meet the alternative requirements for a debtor petition. Many

---

[68] Sequestration is also the ultimate formal response to the insolvency of deceased individuals, partnerships (including limited partnerships and dissolved partnerships but not limited liability partnerships, which are treated for insolvency purposes in the same way as insolvent companies), trusts and other corporate and unincorporated bodies. We are concerned here, however, with living individuals only.

[69] That is, a creditor or creditors owed at least £1,500: *see* B(S)A 1985 § 5(4).

[70] Trust deeds for creditors are discussed further below. There are prescribed forms for sequestration petitions in the Sheriff Court — *see* the Act of Sederunt (Sheriff Court Bankruptcy Rules) 1996, S.I. 1996/2507 — but not for sequestration petitions in the Court of Session, which are simply in the normal form.

[71] B(S)A 1985 § 5(2).

[72] B(S)A 1985 § 5(2), (2B).

[73] This concept was introduced by B(S)A 1985 § 7 which sets out the following ways, reminiscent of the now generally outmoded concept of "acts of bankruptcy", in which a debtor may become apparently insolvent: (i) sequestration in Scotland or bankruptcy elsewhere in the UK; (ii) the debtor giving written notice of inability to pay debts in the ordinary course of business; (iii) signing a trust deed for creditors (whether it becomes a protected trust deed or not); (iv) service of a charge for payment, and expiry of the days of charge with no payment being made; (v) attachment, attempt to attach or other seizure of moveable property under a summary warrant, and no payment being made; (vi) a decree of adjudication for payment or in security; (vii) sale of effects under a sequestration for rent; (viii) a receiving order being made in England and Wales; (ix) revocation of a debt payment programme made under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 where any debt being paid under the programme is constituted by a decree or document of debt as defined by that Act; (x) a statutory demand being served for a liquid debt of not less than £750 and no response being given; and (xi) the debtor being subject to "main" insolvency proceedings in another European Union state. Critically in this context, apparent insolvency counting for the purpose of allowing a debtor to petition for her own sequestration is not established merely by the debtor giving written notice of inability to pay debts in the ordinary course of business or signing a trust deed for creditors. Debtors are therefore precluded from establishing apparent insolvency for this purpose by their own actions.

debtors cannot do so, however, because they cannot demonstrate apparent insolvency and have not granted a trust deed which has failed to become protected.

All sequestrations are administered initially by an interim trustee appointed by the court who may be either an IP or the Accountant in Bankruptcy, a public official employed by the Scottish Executive agency, also known as the Accountant in Bankruptcy, who has functions in relation to non-corporate insolvencies that are, in certain respects, similar to those of the OR in England and Wales.[74] In practice, the AIB is now appointed as interim trustee in more than 90% of cases.[75] The interim trustee is then replaced by a permanent trustee elected by the creditors or appointed by the court who, again, may be either an IP or the AIB. As in England and Wales, an IP will generally only accept appointment as interim or permanent trustee if there are sufficient assets in the debtor's estate to make this worthwhile.

Like bankruptcy in England and Wales and the equivalent regimes in other jurisdictions, sequestration is a debt relief tool. The debtor is required to surrender all non-exempt assets[76] belonging to her at the date of sequestration,[77] or acquired by her after the date of sequestration but before the date of discharge,[78] and may also be ordered to make a contribution from income up to the date of her discharge.[79] The

[74] Under B(S)A 1985, the AIB has certain supervisory and record-keeping functions in relation to non-corporate insolvency in Scotland and may also administer sequestrations. Unlike the OR in England and Wales, however, the AIB has no role to play in corporate insolvencies apart from being the recipient of certain notices. The proposed reforms, if enacted, would extend the role of the AIB in relation to non-corporate insolvencies in a number of important respects, a point taken up below.

[75] For the year to 31 March 2005, the latest for which figures are available, the AIB was appointed interim trustee in 91% of cases: *see* ACCOUNTANT IN BANKRUPTCY'S ANNUAL REPORT 2004-2005 at 31.

[76] The list of exempt assets has gradually been extended over time and includes items reasonably required to meet the basic domestic needs of the debtor and her family as well as tools of trade and a car (in both cases subject to a prescribed limit, currently £1,000): *see* B(S)A 1985 § 33(1)(a) and (aa) which import certain exemptions from diligence contained in the DAA(S)A 2002. In most cases, the debtor's pension will also be excluded: *see* Welfare Reform and Pensions Act 1999 §§ 11 and 12 as applied to Scotland by section 13 of that Act and the Occupational and Personal Pension Schemes (Bankruptcy) (No. 2) Regulations 2002, S.I. 2002/836. There is no homestead exemption in Scots law and *Modern Approach* confirmed this policy at paragraph 7.1, although the issue of homelessness as a possible consequence of sequestration has been raised by the Enterprise and Culture Committee of the Scottish Parliament in its Stage 1 Report with a recommendation that the Scottish Executive ensures that its proposals are consistent with its policies on tackling homelessness: *see*, *Stage 1 Report*, paragraph 62. There is also no provision equivalent to IA 1986 § 283A (automatic revesting of debtor's interest in dwelling house after three years) in Scotland, although the Bankruptcy and Diligence (Scotland) Bill seeks to introduce a similar provision for the same reasons. For a detailed discussion of what is comprised in the debtor's estate, *see* Donna W McKenzie Skene, *Whose Estate Is It Anyway? The Debtor's Estate On Sequestration,* 2005 Juridical Review 311.

[77] B(S)A 1986 § 31(1).

[78] B(S)A 1985 § 32(6).

[79] B(S)A 1985 § 32(2). The sub-section provides for payment of any income in excess of that which the court considers suitable for the debtor's own aliment and any "relevant obligations" *i.e.,* aliment,

debtor's affairs are subject to investigation[80] and she is obliged to co-operate fully in the sequestration even after discharge.[81] In return, the debtor obtains a discharge of all debts and obligations for which she was liable at the date of sequestration, subject to limited exceptions only.[82] At present, unless discharge is deferred by the court on cause shown, a debtor is discharged automatically three years after the date of sequestration.[83] Alternatively, the debtor may obtain a discharge at any time after the date of sequestration if an offer of composition is accepted following the procedure set out in section 56 and Schedule 4 of B(S)A 1985. This, however, occurs only rarely in practice.[84]

It is now proposed to reform sequestration along similar lines to the EA 2002 reforms of the bankruptcy regime in England and Wales. This is discussed further in Part V.B. below.

2. *Trust Deeds for Creditors*

The main alternative to sequestration available to debtors is a trust deed for creditors. This is broadly equivalent to an IVA in England and Wales, albeit structurally very different. A trust deed is a voluntary deed granted by a debtor, which conveys specified assets and, usually, income to a named trustee to be administered for the benefit of creditors and the payment of debts. At common law,

---

periodical allowance and child support. It is specifically provided that the threshold amount to be allowed for the debtor's own needs must not be less than the total of any income received by the debtor by way of guaranteed minimum pension in respect of the debtor's protected rights as a member of a pension scheme: *see* B(S)A 1985 § 32(2A). In deciding the amount to allow for any "relevant obligation", however, the court is not bound by any prior court order or agreement fixing the amount of any aliment or periodical allowance: *see* B(S)A 1985 § 32(3). Beyond these limited provisions, there is no guidance as to how a suitable amount to allow the debtor is to be calculated. In practice, the amount of any contribution will often be agreed between the debtor and the trustee without the need to apply to the court.

[80] This will be begun by the interim trustee and carried on by the permanent trustee: *see* B(S)A 1985 §§ 2(4) and 3(1) respectively.

[81] A variety of specific duties are imposed on the debtor by B(S)A 1985 and section 64(1) sets out a general obligation to co-operate with the permanent trustee which is specifically exempted from the debtor's discharge by B(S)A 1985 § 55(2)(e). There is no corresponding general obligation to co-operate with the interim trustee, but B(S)A 1985 § 18 makes it an offence for the debtor to fail without reasonable excuse to comply with certain directions or requirements of the interim trustee or to obstruct the interim trustee in carrying out certain functions.

[82] B(S)A 1985 §§ 54, 55. The main exceptions are: fines or other penalties payable to the Crown; bail; liability for fraud or breach of trust; aliment or periodical allowance which could not be claimed in the sequestration; and child support maintenance prior to the date of sequestration. Liability for student loans will be added to this list if the proposed reforms are enacted.

[83] B(S)A 1985 § 54(1).

[84] The debtor must promise to pay at least 25p in the pound and the procedure is rather cumbersome. The proposed reforms, if enacted, will retain the concept but streamline the procedure considerably.

creditors who do not accede (agree) to a trust deed are not bound by it, but a trust deed which satisfies certain conditions may be converted into a protected trust deed if the trustee follows the procedure set out in Schedule 5 of the B(S)A 1985 and a defined percentage of creditors does not object. Where this happens, all creditors are bound by the PTD and there are limited rights of challenge to it.[85] In practice, trust deeds which do not become PTDs are rare[86] and this article therefore concentrates on PTDs.

A trust deed must convey to the trustee, who must be an IP,[87] the estate of the debtor excluding property that would not vest in a trustee in sequestration under B(S)A 1985, s 33(1).[88] It need not, but generally will, provide for the debtor to make appropriate contributions from income.[89] In order for the trust deed to become protected, the trustee must publish a notice in prescribed form and then send a copy of the trust deed, the notice and certain other information to all known creditors.[90] Unless a majority in number or at least a third in value of the creditors notifies the trustee in writing within five weeks that they object to the trust deed, the trust deed will become protected on the trustee completing the remaining formalities.[91] In contrast with the IVA, the approval procedure is therefore negative rather than positive and this has given rise to some concern that trust deeds may often become protected through creditor inertia.[92] A PTD does not automatically result in the debtor obtaining debt relief but, in practice, it will usually provide for discharge of the debts and liabilities for which the debtor was liable at the time of the granting of the trust

---

[85] Creditors who objected to the trust deed or did not receive the relevant notice have no higher right to recover their debts than acceding creditors — *see* B(S)A 1985, Schedule 5, paragraph 6 — although they may apply for the debtor's sequestration in certain limited circumstances: *see* B(S)A 1985, Schedule 5, paragraph 7.

[86] *See*, *Protected Trust Deeds*, paragraph 2.7.

[87] B(S)A 1985, Schedule 5, paragraph 5(1)(a).

[88] *See* B(S)A 1985 §§ 73(1) and 5(4A) which define a trust deed for the purposes of that Act. The assets to be included in a PTD are therefore not identical to those which would be included in a sequestration because certain assets are excluded from sequestration by provisions other than B(S)A 1985 § 33(1). A trust deed which did not satisfy this condition would still be a valid trust deed at common law but could not become a PTD.

[89] While this is not a requirement for a trust deed to become a PTD, it is unlikely that a trust deed would become a PTD without such a provision as creditors would be likely to object to the deed and thus prevent it from becoming a PTD. The amount of any such contribution will be determined in accordance with the provisions of the deed.

[90] B(S)A 1985, Schedule 5, paragraph 5(1)(b), (c).

[91] B(S)A 1985, Schedule 5, paragraph 5(1)(d), (e).

[92] *Protected Trust Deeds*, paragraph 4.26. This was, however, denied by ICAS in its response to *Protected Trust Deeds*. There was a comparable negative approval procedure in the US Bankruptcy Act of 1841: *see* Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 351-352 (1991).

deed after a specified period. That period will normally be three years, the same period as would normally apply in a sequestration.

In practice, a PTD operates as an informal sequestration but without all of sequestration's consequences for the debtor. The debtor generally obtains debt relief and the creditors will often obtain a better return than they would have done on sequestration.[93] A PTD will generally provide for variation of any income contributions on a change in the debtor's circumstances but any default by the debtor may allow the trustee to petition for the debtor's sequestration;[94] indeed, the trustee may petition for the debtor's sequestration at any time if it is in the best interests of the creditors that an award of sequestration be made.[95]

PTDs are essentially a private matter and they are not supervised by the court, although the AIB has a limited supervisory role. Like the nominee/supervisor of an IVA in England and Wales, the key player is the trustee who, as already noted above, must be an IP and, as such, is subject to specific regulatory guidance in relation to PTDs.[96]

PTDs may be entered into as a means of avoiding sequestration. They may also be entered into because the debtor wishes to obtain debt relief but cannot fulfil the requirements necessary to be eligible for sequestration. Like sequestration, PTDs are open to both business and consumer debtors. The costs of a PTD are met from the trust estate. As with IVAs in England and Wales, statistical evidence shows that the popularity of PTDs has been increasing and it is believed that consumer debtors are now the principal users.[97]

3. *Debt Arrangement Scheme*

The debt arrangement scheme offers an alternative to sequestration or a PTD as a means of dealing with debt problems. Introduced by the DAA(S)A 2002 and

[93] *See*, *Protected Trust Deeds*, paragraph 3.9.
[94] B(S)A 1985 §§ 5(2) and 5(2C).
[95] *Id.*
[96] STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND).
[97] For statistics, *see* Appendix. The growth of PTDs relative to the number of sequestrations is even more striking than the growth of IVAs relative to the number of bankruptcies in England and Wales. A key variable which may go some way to explaining the higher ratio of PTDs to sequestrations is the requirement in Scotland to demonstrate apparent insolvency as a pre-condition to sequestration. The issue of debtor access to sequestration is discussed further in Parts V.B. and VI.B.

intended to provide a simple mechanism for dealing with multiple debt,[98] it came into force on 30 November 2004. The DAS allows individual business or consumer debtors with multiple debts[99] to enter into a debt payment programme for payment of their debts while protected from enforcement action. Although both monetary and time limits for the DAS were originally proposed,[100] these were not ultimately implemented.

The debtor must receive money advice before applying for a DPP. The application is then made by a certified money adviser on behalf of the debtor to the DAS administrator.[101] In principle, all creditors whose debts are included in a DPP must consent to it,[102] and where this consent is forthcoming, approval of the application is automatic.[103] However, the DAS administrator may dispense with the consent of non-consenting creditors within certain limits[104] and, in those circumstances, approve the application if it is fair and reasonable.[105] Where there are non-consenting creditors with whose consent the DAS administrator may not dispense, or where a creditor objects on specified grounds,[106] the DAS administrator must refer the application to the sheriff, who will approve it if it is fair and reasonable.[107] All DPPs are subject to standard conditions[108] and may be made

---

[98] POLICY MEMORANDUM ON THE DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) BILL, SP BILL 52-PM, paragraphs 12, 15.

[99] DAS Regulations § 21(1). Debts are defined widely but exclude secured debts with the exception of arrears: *see* DAS Regulations § 3.

[100] SCOTTISH EXECUTIVE, ENFORCEMENT OF CIVIL OBLIGATIONS IN SCOTLAND (Apr. 2002), paragraphs 4.152-4.153.

[101] Currently the AIB.

[102] DAS Regulations § 22(1). Any creditor who does not respond to the request to consent within the prescribed period is deemed to consent: *see* DAS Regulations § 22(3).

[103] DAS Regulations § 25(1).

[104] The DAS administrator may dispense with the consent of a creditor where (i) the amount due to the creditor is 50% or less of the total debt included in the DPP and (ii) the amount due to all creditors who refuse to consent does not exceed 60% of the total debt included in the DPP: *see* DAS Regulations § 22(4).

[105] DAS Regulations § 26(1).

[106] These are that the debtor should be sequestrated or is in possession of heritable (immoveable) property with substantial unsecured value: *see* DAS Regulations § 23(1).

[107] DAS Regulations § 27. In determining whether a DPP is fair and reasonable, the DAS administrator or sheriff must have regard to: (i) the total amount of debt; (ii) the period of the DPP; (iii) the method and frequency of payments; (iv) any earlier proposed DPP that was not approved; (v) matters which would have barred an application but which no longer exist; (vi) participation by the debtor in a voluntary arrangement, a DPP, a time to pay direction, an order under the Debtors (Scotland) Act 1987 or a time order under the Consumer Credit Act 1974; (vii) the extent of creditor consent or objection; (viii) any comments by the money adviser; (ix) any assets that could have been realized to pay the debts included in the DPP and any other relevant factor: *id.*, §§ 26(2), (3) and 27(3).

[108] *Id.*, § 29(1). These are: (i) all payments under the DPP must be made on time; (ii) continuing liabilities must be paid on time; (iii) no other payments may be made to creditors taking part in the DPP; (iv) no new credit may be obtained other than that permitted by the DAS Regulations; (v) the

subject to any of a number of additional discretionary conditions.[109] A DPP will generally provide for the debtor to make a single periodic payment based on her surplus income. The payment is made to an approved payments distributor who distributes it to the creditors included in the DPP in accordance with its terms. The functions of the approved payments distributor are carried out by a commercial provider who is wholly distinct from the money adviser and the DAS administrator. Most enforcement action by creditors, other than the enforcement of a security, is stopped during the currency of a DPP, including sequestration.[110] The debtor is restricted from taking on new credit[111] and prevented from granting a trust deed,[112] but not from petitioning for sequestration.[113] A DPP may be varied on the application of the debtor or a creditor[114] and may be revoked in defined circumstances including default by the debtor.[115]

The DAS is a debt management tool and is designed primarily to be an income-based scheme. It is possible to include assets,[116] but in practice, many debtors will have no assets or will choose the DAS precisely because they wish to manage their debts without realizing their assets. There is no provision for automatic debt relief, although individual creditors may agree to waive interest on or compound their debts[117] thus affording the debtor an element of debt relief. It is thought, however, that agreements of this kind are rare in practice.

---

debtor's money adviser must be notified of any change of address or material change of circumstances; (vi) information must be supplied to the debtor's money adviser on request; (vii) all payments for credit obtained as permitted by the DAS Regulations must be made on time; and (viii) all notices and intimations required by the DAS Regulations must be made on time: *id.*, § 29(2).

[109] *Id.*, § 30(1). These are: (i) realization of an asset which is not an exempt asset as defined by the DAS Regulations and distribution of its value amongst the creditors; (ii) provision of a payment mandate to an employer; (iii) seeking agreement from a creditor to pay a continuing liability via the payments distributor; (iv) completion and return of any tax or duty return or declaration; (v) maintaining an emergency fund as provided for in the DAS Regulations or any other reasonable condition: *id.*, § 30(2).

[110] DAA(S)A 2002 § 4 and DAS Regulations § 35.

[111] DAS Regulations § 35.

[112] *Id.*, § 36.

[113] The debtor would, however, still have to fulfil the normal requirements for sequestration.

[114] DAS Regulations §§ 37-39.

[115] *Id.*, §§ 41-44.

[116] The existence of heritable property with substantial unsecured value is a ground for a creditor objecting to a DPP: *see supra* note 106. Moreover, the existence of an asset that could have been realized to pay the debts included in the DPP is one factor which the DAS administrator or sheriff may take into account in determining whether it is fair and reasonable to approve a DPP and it may be made a discretionary condition of a DPP that the debtor realizes an asset which is non-exempt for the purposes of the DAS Regulations and distributes its value amongst the creditors. Exempt assets in this context are a house or mobile home which is the debtor's sole or main residence and articles exempt from the diligence of attachment under the DAA(S)A 2002: *see* DAS Regulations § 30(3).

[117] DAS Regulations § 24.

4. *Voluntary Arrangements*

A further, more informal, response to debt problems is to enter into voluntary arrangements with some or all creditors. Not to be confused with IVAs, these are the Scottish equivalent of DMAs. As in England and Wales, debtors may negotiate such arrangements themselves or they may arise after a debtor has sought help with her debt problems, increasingly from voluntary sector organizations offering specialist money advice such as Citizens Advice Bureaux.[118]

Like DMAs, such arrangements are essentially a debt management tool. They typically involve the debtor making payments from income and do not include assets. They generally provide for the debtor to make full repayment over time, although creditors may waive accruing interest and/or charges in the light of an agreement and/or may agree to an element of composition either at the outset or after the arrangement has been operating for a period of time.

The disadvantages of such arrangements are similar to those of DMAs: they require creditor agreement; cannot be used to bind dissenting creditors; do not necessarily provide any protection from enforcement action; do not usually provide debt relief; and are essentially unregulated. It was intended that the DAS would be a better alternative to such arrangements for debtors, but this does not seem to have been borne out in practice as the take-up of DAS has been low. Possible reasons for the low take-up of DAS are discussed further below.

[118] Consumer debt is currently the biggest single issue brought to Citizens Advice Bureaux in Scotland: *see* ON THE CARDS: THE DEBT CRISIS FACING SCOTTISH CAB CLIENTS (2004), Executive Summary. The provision of appropriate money advice is another important part of the Scottish Executive's strategy for debt management.

IV. THE CURRENT SYSTEMS: PROBLEMS OF SCOPE AND SUITABILITY

A. ENGLAND

1. *Scope*

The existing system makes no effective provision for so-called NINA ("no income, no assets") debtors who simply have no meaningful resources from which to contribute towards repayment of their debts. NINA debtors cannot come to an arrangement with their creditors through the medium of an IVA, a CCAO or a DMA as all of these require a stable and consistent level of surplus income to ensure that payments can be sustained. There is therefore a danger that such debtors may opt for payment plans that they simply cannot afford[119] and/or that are unrealistically short in terms of timescale. NINAs may also be barred from seeking bankruptcy relief because they cannot afford to pay the mandatory OR's deposit.[120] The risk is that the poorest debtors in our society — those who are unemployed or in receipt of welfare benefits — will simply be left at the mercy of their creditors.[121] Moreover, many of the debtors in the NINA category will not have had access to mainstream credit. Their principal creditors will often be drawn from the "sub-prime" market. Faced with saturation and increasing competition in the mainstream market, sub-prime

---

[119] KEMPSON & COLLARD, *supra* note 64 suggest that most of the debtors who apply for CCAOs can only afford to make token payments, which may go towards explaining the low completion rates. *See further*, *Choice of Paths*, paragraphs 28, 30; *NINA Consultation*, paragraphs 27-31.

[120] Despite a long campaign orchestrated by the voluntary money advice sector, the Court of Appeal held in R. v. Lord Chancellor, ex parte Lightfoot, [2000] Q.B. 597 that debtors do not have a constitutional right to bankruptcy relief regardless of whether or not they can contribute towards the OR's costs. Thus, the court cannot waive the deposit on grounds of inability to pay. Ex parte Lightfoot amounts to a British re-run of United States v. Kras, 409 U.S. 434 (1973) with a similar outcome to that reached by the United States Supreme Court. Citizens Advice continues to campaign for an exemption from the deposit for debtors on low incomes or means-tested benefits: *see* IN TOO DEEP — CAB CLIENTS' EXPERIENCE OF DEBT (May 2003), paragraph 12.4. However, the government insists that the deposit is necessary in order to meet the costs of administering bankruptcies. Waiver of the deposit would mean that the cross-subsidizing of no asset cases by cases in which there are assets would have to increase significantly to enable the system to remain self-financing, *i.e.* the creditors of debtors who have some level of non-exempt assets would pick up the tab: *see*, *NINA Consultation*, paragraphs 6-7 and Annex 4 (Partial Regulatory Impact Assessment). Note also that the court fee and deposit cannot be paid by instalments.

[121] Based on a survey carried out by the Insolvency Service in February 2004, it is estimated that over 30% of debtors who seek face-to-face advice at Citizens Advice Bureaux are NINAs: *see*, *NINA Consultation*, paragraphs 23-26.

lenders have targeted borrowers who, in the past, would have had difficulty in accessing credit because of limited means or damaged credit histories. They will generally charge higher interest rates than mainstream lenders to reflect the additional risk. While these lenders should *not* be regarded as equivalent to unregulated loan sharks, it has been suggested that they are likely to employ more aggressive and intensive collection techniques than the mainstream credit card companies. The absence of effective access to bankruptcy relief therefore leaves vulnerable debtors exposed to those practices even where there is no realistic prospect of repayment.

Aside from the gap in provision for NINAs, there is an array of overlapping provision within and outside the bankruptcy system for salaried debtors. A salaried debtor whose indebtedness exceeds £5,000 can (in theory) choose between debt relief (via bankruptcy or an IVA) and debt management (via a DMA). A salaried debtor whose indebtedness is less than £5,000, but includes a judgment debt, could also seek a CCAO. The complexity of the system in relation to salaried debtors raises the concern that debtors will not necessarily make the best choice. Furthermore, provision for salaried debtors is not joined up. A range of public, private and voluntary agencies are involved.[122] This, in turn, reinforces concerns of a regulatory nature about the capacity of the existing system to deliver best advice from a debtor standpoint. The key question, following the Enterprise Act reforms, is whether bankruptcy and IVAs are sufficiently differentiated. If we leave aside issues of human psychology and perceived stigma, debtors who have surplus income but no non-exempt assets and who are not in danger of attracting bankruptcy restrictions appear to be better off going bankrupt than opting for an IVA on the basis of crude cost-benefit analysis. This is because the maximum period for which they can be required to contribute from surplus income having filed for bankruptcy is three years.[123] While, contrary to some predictions, the Enterprise Act has not affected sign-up rates for IVAs, they do raise regulatory and ethical issues for IVA providers concerning the amount of advice and information that debtors should be given about

---

[122] Ramsay, *supra* note 24. For the point that complexity of provision increases the dependency of consumer debtors on intermediaries and may lead to their effective disempowerment *see* Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, 20 JOURNAL OF CONSUMER POLICY 269, 277 (1997).

[123] Walters, *supra* note 24. Note also this telling statement about IVAs in LIVING ON TICK, *supra* note 54: "The bargaining process should be done in good faith on both sides if it is to succeed: the debtor cannot expect to carry on as before, but neither should he be reduced to a bare existence as it gives no incentive to maintain a challenging payment plan over five years. Bankruptcy may then seem a better alternative."

the merits of a five-year IVA as compared to bankruptcy. There may therefore be a case both for simplification of the existing options for consumer debtors and for starker differentiation between those options. The availability of debt relief alongside debt management options in a complex system raises similar regulatory and ethical concerns.

2. *Suitability*

There are suitability issues, in particular, surrounding the utility of IVAs and CCAOs for consumer debtors who have surplus income. IVAs were originally conceived as an alternative to bankruptcy targeted primarily at debtors from business and the professions.[124] Despite their continuing popularity, it is arguable that they have been under-utilized in comparison to DMAs even though they offer consumer debtors the prospect of debt relief and creditors the prospect of better returns than bankruptcy at limited cost to the state.[125] The procedural requirements (including the requirement for the holding of a creditors' meeting at which creditors can suggest and vote on modifications to the proposal) generate a fixed level of unavoidable cost that is incurred regardless of the size of the overall indebtedness. As a consequence, IVAs proposed by consumer debtors who have relatively small debt burdens tend to be rejected because the projected returns net of fixed costs do not satisfy the creditors' minimum dividend demands.[126] There is therefore a case for tailoring the IVA procedure to make it more suitable for a wider range of consumer debtors.

CCAOs are of limited use. Consumer debtors rarely satisfy the eligibility criteria. They may have defaults but no judgment debts. Many will owe more than £5,000.[127] As we have seen, there is a lack of clarity over the extent to which CCAOs are a tool of debt relief as well as debt management which is compounded by variations in local legal culture. The procedure amounts to a limited payment plan

---

[124] *Cork Report*, paragraph 365.

[125] It is estimated that 59% of debtors who entered a debt resolution process in 2004 opted for a DMA compared to 9% who opted for an IVA: *see*, *Improving IVAs*, paragraph 24. GREEN, *supra* note 30 characterises this as both a market and a regulatory failure.

[126] GREEN, *supra* note 30; LIVING ON TICK, *supra* note 54.

[127] As borne out by PwC's findings on IVAs, *supra* note 54.

scheme for small debtors. Its viability has also been questioned on cost-benefit grounds.[128]

DMAs are *prima facie* suitable for debtors who have stable incomes, assets that they wish to preserve and relatively low levels of debt that they wish to repay over an extended period of time. However, the availability of debt relief for this type of debtor via a five-year IVA does call into question the appropriateness of DMAs for anyone other than the "terminally proud".[129]

B. SCOTLAND

1. *Scope*

It is possible to identify both gaps and overlaps in the current Scottish system. In terms of gaps, as in England and Wales, the main problem in Scotland is the lack of a suitable solution for NINA debtors.[130] A Scottish Executive consultation document, *Modern Approach*, issued in 2003, acknowledged that there might be people in debt for whom the existing (and planned) solutions did not work or were not accessible and sought further information about the nature and scale of the problem from consultees.[131] A subsequent consultation document, *Modernising Bankruptcy*, disclosed that the majority of consultees who responded to this question[132] thought that there were people who fell into this category.[133] In response, the Scottish Executive, while stating clearly that it was not attracted to the idea of a separate scheme for such debtors, decided that the matter required further consideration and set up a Working Group to examine the issue.[134] The Working Group on Debt Relief

---

[128] The CCAO scheme does not cover its costs and is therefore subsidized by other court users and the taxpayer: *see*, *Choice of Paths*, paragraph 28.

[129] A phrase borrowed from Pat Boyden, *Individual Voluntary Arrangement*, RECOVERY (Spring 2004), the magazine of the Association of Business Recovery Professionals (R3), *available at* http://www.r3.org.uk/recovery.

[130] Another problem is the lack of a rescue-oriented procedure for trading debtors, but as this article is concerned with consumer debtors, no more will be said of this here. It may be worth noting in passing, however, that despite the emphasis on encouraging entrepreneurship in the current proposals for reform, this issue has not been considered in the reform process so far.

[131] *Modern Approach*, paragraph 6.26.

[132] 29 out of 54.

[133] *Modernising Bankruptcy*, paragraph 7.8.

[134] *Id.*, paragraphs 7.9, 7.10. This approach contrasts with that in England and Wales where a separate scheme for NINA debtors has been put forward modelled on the no assets regime currently under contemplation in New Zealand: *see infra* Part VI.A.

reported in June 2005.[135] It concluded that there was a pool of NINA debtors, although it was not possible from the information available to quantify with any accuracy the number of NINA debtors in Scotland.[136] The recommendations of the Working Group are discussed in the next part.

The problem with NINAs, identified in *Modernising Bankruptcy*,[137] is that the DAS is not accessible if a debtor lacks any surplus income from which payments can be made and a PTD, in theory at least, is not accessible if a debtor has few or no non-exempt assets and little or no income to convey to the trustee.[138] Moreover, while lack of assets and/or income is not a bar to sequestration, the difficulty in fulfilling the pre-conditions where the debtor is seeking to petition for her own sequestration, in particular the requirement of apparent insolvency,[139] means that, in practice, sequestration is not accessible to many NINA debtors either. There is, therefore, a gap in provision for such debtors and, as in England and Wales, a corresponding risk that they will simply be left at the mercy of their creditors. In this respect, the Working Group on Debt Relief were mindful of the pressure which such debtors may feel themselves to be under, whether as a result of formal or informal enforcement action taken by creditors or otherwise as a result of their inability either to pay their debts or obtain debt relief.[140]

There are also a number of overlaps and thus, as in England and Wales, a given debtor — particularly a debtor with at least some disposable income — may in theory choose between different debt relief/management options. Sequestration and PTDs overlap to the extent that they both capture essentially the same assets of the debtor and any contribution from income[141] and generally result in debt relief.[142]

---

[135] *See* http://www.scotland.gov.uk/Topics/Justice/Civil/17868/rwgdr.
[136] *Debt Relief*, Executive Summary and Part III.
[137] *Modernising Bankruptcy*, paragraph 7.8.
[138] This is because the PTD cannot then be said to be for the benefit of creditors. Under the professional rules applicable to IPs there must be at least some prospect of a dividend to creditors: *see* STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND). It is understood that some PTDs are nonetheless entered into in circumstances where there is in fact no prospect of a dividend to creditors, generally because the debtor has no other means of obtaining debt relief, but, perhaps ironically, concern about this abuse of PTDs is one of the reasons for the proposed reform of PTDs (discussed further below).
[139] Discussed *supra* in Part III.B.
[140] *Debt Relief*, Part IV.
[141] As noted above, in order to become a PTD, a trust deed must convey to the trustee the same assets as would be captured by a sequestration and while a PTD need not include provision for a contribution from income, in practice it will do so and any such contribution will normally be calculated in the same way as a contribution from income in a sequestration.
[142] As noted above, unlike sequestration, a PTD does not automatically result in the debtor's discharge, but in practice it will generally do so.

Where there is a choice, bearing in mind that sequestration may not be accessible to the debtor in any event for the reasons discussed above, PTDs may be seen by debtors as a better option than sequestration because they are less formal and to a certain extent have less severe consequences than sequestration in terms of publicity and legal restrictions.

PTDs and the DAS overlap to the extent that a debtor who has surplus income may utilize either. The debtor's choice may be influenced by a number of factors, including the debtor's asset position (a PTD includes the debtor's non-exempt assets whereas the DAS will generally not, so a debtor who has assets which would be captured by a PTD, but does not wish to realize them, may prefer the DAS)[143] and the availability of debt relief (a PTD generally results in debt relief whereas the DAS does not). A DPP is also likely to last for longer than a PTD because of the requirement to pay in full. On the other hand, entering the DAS may have less severe consequences for the debtor, particularly in terms of the future ability to access credit.[144]

Sequestration and the DAS overlap to the extent that a debtor who has sufficient income to enter a DAS may also utilize sequestration. Where there is a choice, bearing in mind that sequestration may not be accessible to the debtor in any event for the reasons discussed above, the DAS may be seen by debtors, particularly debtors with non-exempt assets which they do not wish to realize, as a better option than sequestration, because although it does not give automatic debt relief and is likely to last for longer, it is less formal, has less severe consequences for the debtor and does not automatically capture non-exempt assets.

The DAS and voluntary arrangements with creditors overlap to the extent that the debtor is using surplus income to make payments to creditors without any guarantee of debt relief. The DAS will generally be a better choice than a voluntary arrangement because it is regulated and there is the possibility of binding dissenting creditors, but as indicated, take-up has been low.

[143] In practice, it may be possible for the debtor to retain, or more accurately to have reconveyed to her, assets captured by a PTD, for example, where there is equity in a property and the PTD provides for the reconveyance of the property to the debtor following a remortgage which will release that equity for distribution to the creditors under the PTD. It is understood that this is now quite common, although it requires the creditors to have accepted a PTD in those terms.

[144] At a meeting at ICAS in Edinburgh on 16 March 2006, representatives of the Scottish Executive team responsible for the BD(S) Bill stated that this was believed to be the position following discussion with the main credit reference agencies.

The issues raised by debtor choice resulting from these overlaps are similar to those discussed in relation to England and Wales, although even with the introduction of the DAS, the Scottish system is probably less complex. These issues are explored further below in the context of the proposed reforms.

2. *Suitability*

A number of issues with respect to suitability or fitness for purpose of the various options have been identified. In *Modern Approach*, the reform of personal bankruptcy law was seen as an important step in building a modern and prosperous Scotland, with the proposed reforms aimed at producing "a common sense bankruptcy regime suitable for the twenty-first century."[145] Despite being the subject of major reform in 1985 and again in 1993, the existing system is seen as outdated and in need of reform in order to be fit for purpose.

Sequestration has been seen as unfit for purpose in a number of ways. In particular, it has been seen as stigmatic and inhibiting to enterprise. Reform is therefore seen as necessary to reduce the stigma of sequestration and encourage entrepreneurship while providing a robust and effective regime to protect the public and business community from culpable debtors,[146] while also ensuring a level playing field in these respects following the changes in England and Wales brought in by EA 2002.[147] It has also been seen as unfit for purpose as regards the balance between debtors and creditors and so reform is also seen as necessary to ensure that an appropriate balance between debtor and creditor interests is struck,[148] for example, in relation to contributions from income and the way in which the debtor's home and other assets are treated, and to address problems with debtor access to sequestration. Finally, it is seen as unfit for purpose because the procedure is perceived to be unnecessarily cumbersome and in need of streamlining and modernization.[149]

PTDs are seen as unfit for purpose in so far as they are perceived not to strike an appropriate balance between debtor and creditor interests, especially given that PTDs provide debt relief to debtors, but with a much "lighter touch" than

[145] *Modern Approach*, paragraph 1.6.
[146] *Id.*, paragraph 1.7.
[147] *Id.*, paragraph 4.4 and further discussion below in text.
[148] *Id.*, Ministerial Foreword; *Modernising Bankruptcy*, paragraph 1.1.
[149] *Id.*, paragraph 1.6.

sequestration. There is concern over the perceived lack of proper returns for creditors,[150] especially in the case of income-only trust deeds.[151] There is also concern over the perceived lack of proper regulation.[152]

DAS is seen as unfit for purpose for a number of reasons which have been cited to explain the low take-up rate. These include lack of capacity in the system because there are insufficient certified money advisers, lack of any (automatic) debt relief, even in the limited form of freezing of interest and/or charges, and the possibility of entering an income-only PTD.[153]

The reforms which have been put forward to address these various issues are considered in the next section.

V. THE PROPOSED REFORMS

A. ENGLAND AND WALES

1. *Addressing the Gap: Separate Provision for NINAs*

In the early 1980s, the *Cork Report* recommended the introduction of an enforcement restriction procedure to protect NINA debtors from creditor harassment.[154] The recommendation — which contemplated a stay of individual collection efforts but not formal debt relief — was not taken forward into legislation. However, a more radical scheme, amounting to "bankruptcy lite" for NINA debtors barred access to bankruptcy by the prohibitive filing cost, is now under active consideration. The NINA proposal was first advanced in *Choice of Paths,* a consultation paper issued by the Department of Constitutional Affairs in 2004 which canvassed various options for dealing with over-indebtedness. The DCA's principal concern was that too many NINA debtors were accessing the unsuitable CCAO procedure. As a result, completion rates for CCAOs are low. CCAOs are not self-

---

[150] *Id.*, paragraph 8.5, 8.6; *Protected Trust Deeds*, paragraph 3.32, 3.39.
[151] *Protected Trust Deeds*, paragraph 4.7.
[152] *Modern Approach*, paragraph 8.4; *Modernising Bankruptcy*, paragraph 6.3; *Protected Trust Deeds*, paragraph 3.43 *et seq.*, 3.57.
[153] *See*, *Protected Trust Deeds*, paragraph 3.16; ECC OFFICIAL REPORT of 7 Mar. 2006 (Scottish Executive's evidence). All ECC reports are available on the Scottish Parliament website, http://www.scottish.paliament.gov.uk.
[154] Ch. 6, especially paragraph 309.

financing. Therefore, in practice, the cost of processing NINA debtors through an unsuitable procedure, which apparently provides them and their creditors with little benefit, is subsidized by other court users and the taxpayer. The DCA concluded that a self-financing administrative debt relief scheme operated by the DTI Insolvency Service should be introduced for NINAs with relatively low levels of debt.[155] A court-based scheme was considered inappropriate because the provision of debt relief falls outside the dispute resolution and enforcement functions of the courts and would be better and more cost-effectively delivered by the Insolvency Service.[156]

As a majority of respondents to the *Choice of Paths* consultation indicated that they were in favour of some form of separate NINA scheme,[157] the Insolvency Service was tasked to produce a more comprehensive proposal, details of which were subsequently set out in the *Nina Consultation* document issued in 2005. The proposed scheme — modelled on a no asset procedure that looks certain to be adopted in New Zealand — is targeted at NINA debtors who will never realistically be able to pay even a portion of their debts.[158] NINAs are to be defined as debtors whose liabilities, both secured and unsecured, are less than £15,000 and whose net disposable income is no more than £50 per month after deducting necessary living expenses. The inclusion of secured debts in calculating total liabilities would have the effect of excluding homeowners who have mortgage debts.[159] The figure of £50 per month is the threshold figure that the OR uses as the triggering threshold for income payments in bankruptcy. Allowable expenses would be calculated in accordance with the Common Financial Statement approved by the British Bankers' Association and

---

[155] *Choice of Paths*, paragraphs 28-42.

[156] *Id.*, paragraph 34. Moves are already afoot to remove debtor-own bankruptcy petitions from the court system on similar grounds: *see*, *NINA Consultation*, paragraph 49.

[157] DCA, RESPONSE PAPER ON THE CONSULTATION — 'A CHOICE OF PATHS' — BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT CP(R) 23/04 (2005).

[158] *NINA Consultation*, paragraphs 5, 20, 22, 31. For background to and commentary on the proposed no asset procedure in New Zealand *see* Thomas G. W. Telfer, *New Zealand Bankruptcy Law Reform: The New Role of the Official Assignee and the Prospects for a No-Asset Regime* in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 9. Provision for the enactment of the procedure has been made in draft legislation currently under consideration: *see* http://www.med.govt.nz/templates/ContentTopicSummary____4386.aspx. The drivers behind the prospective adoption of the no asset procedure in New Zealand differ from those that lie behind the proposed NINA scheme for England and Wales. In particular, there appears to be a desire to channel NINA debtors *away* from bankruptcy, which in New Zealand is regarded as an overly punitive response to the problems of subsistence-level debtors and welfare recipients: *see* Telfer, *supra* at 263-264. By contrast, in England and Wales, the need for bankruptcy administration to remain self-financing, manifested in the government's refusal to countenance a means-tested exemption from the requirement to pay the OR's deposit, is perhaps the most significant driver behind the establishment of a separate NINA scheme.

[159] *Id.*, paragraphs 51-54.

the Money Advice Trust, which relies on data from the family expenditure survey conducted by the Office for National Statistics.[160] Access to the scheme would also be denied to debtors who have non-exempt assets worth more than £300.[161]

It is envisaged that the scheme would involve the OR making a debt relief order under which individual enforcement action would be stayed and debts listed in a schedule to the order would be discharged after one year.[162] Applications would be made electronically to keep costs to a minimum, but would have to be routed through an approved intermediary drawn from the not-for-profit debt advice sector.[163] A moderate fee in the region of £100 would be charged to cover administrative costs,[164] a significant reduction on the costs of filing for bankruptcy.

Given the generous nature of the relief, a range of safeguards to protect creditors and the public are contemplated in addition to the eligibility requirements. DROs would be entered on the publicly accessible individual insolvency register (as are bankruptcies and IVAs).[165] The debtor would be subject to the same legal restrictions as an undischarged bankrupt, including the prohibition on obtaining credit over a prescribed amount without disclosure of status.[166] Having been notified of the order,[167] creditors would have a right to object on specified grounds which could lead the OR, after enquiry, to revoke it.[168] It would be an offence for a debtor to fail wilfully to disclose information about her affairs, especially her assets, income and liabilities.[169] Non-disclosure could also be a ground for revocation of a DRO. Any misconduct would be dealt with through the existing bankruptcy restrictions

---

[160] THE COMMON FINANCIAL STATEMENT — A PARTNERSHIP APPROACH TO DEALING WITH DEBT (2004) *available at* http://www.moneyadvicetrust.org/financial_statement.html. *See also*, *Choice of Paths*, paragraphs 36-38; *NINA Consultation*, paragraphs 56-63. On current dollar-sterling exchange rates, it is conceivable that a hypothetical debtor with £50 per month of surplus income who would just qualify for the NINA scheme (and therefore escape paying anything) would be a presumptive abuser for the purposes of 11 U.S.C. § 707(b)(2) by virtue of the $100 current monthly income trigger.

[161] *NINA Consultation*, paragraphs 65-68. It is anticipated that exempt assets would be the same as for bankruptcy: *id.*, paragraph 65.

[162] *Id.*, paragraphs 32, 72

[163] *Id.*, paragraphs 38-50. In terms of process, the NINA scheme therefore resembles the DAS scheme in Scotland. However, in substance, the two schemes are different because DAS is currently a debt management scheme targeted at debtors with surplus income and not a tool of debt relief: *see* Parts III.B. and IV.B.

[164] *NINA Consultation*, paragraph 36.

[165] *Id.*, paragraphs 74, 89.

[166] *Id.*, paragraph 88.

[167] *Id.*, paragraph 73.

[168] *Id.*, paragraphs 82-84.

[169] *Id.*, paragraph 87. Full disclosure of these matters is, of course, extremely important given the eligibility requirements.

regime.[170] It would not be possible for a qualifying debtor who obtains a DRO to seek a further one within the next six years.[171] Finally, mechanisms are proposed for dealing with improvements in the debtor's financial circumstances during the one-year duration of the order.[172]

The response to the *NINA Consultation* was overwhelmingly positive.[173] A Working Group has been formed consisting of representatives from the debt advice sector to consider further the licensing, resourcing and functions of the approved intermediary. It appears, for now, that the government is committed to taking the NINA scheme forward.

2. *"Consumerizing" IVAs*

A Working Group made up of representatives from the IP profession, the IVA factories and the debt advice sector was set up by the Insolvency Service to address the issue of the suitability of the IVA for consumer debtors. The Group's proposals were put forward in *Improving IVAs*, a consultation paper published in the summer of 2005. It is perhaps ironic that the "consumerizing" of the IVA reached the top of the policy agenda at a time when the existing procedure seemed to be coming of age as a debt relief tool for salaried consumer debtors.[174] Nevertheless, the main theme of *Improving IVAs* was that the IVA was still significantly under-utilized when compared with DMAs, despite it being *prima facie* "the best product in the market for both debtors and creditors",[175] because it offers a stay on enforcement and a considerable measure of debt relief within a finite timescale for the former, and the prospect of a reasonable return for the latter. The main objective of the proposals is therefore to increase the accessibility of the IVA, with a view to correcting a

---

[170] *Id.*, paragraphs 87, 92-95.
[171] *Id.*, paragraphs 91.
[172] *Id.*, paragraphs 90, 93-99. In such circumstances, it is contemplated that debtors would be given an opportunity to consider an IVA or a CCAO, pending revocation of the DRO.
[173] INSOLVENCY SERVICE, RELIEF FOR THE INDEBTED — AN ALTERNATIVE TO BANKRUPTCY: SUMMARY OF RESPONSES AND GOVERNMENT REPLY (Nov. 2005). Some in the credit industry appear to have recognized that there is no point incurring further costs trying to get blood out of a stone.
[174] *See* LIVING ON TICK, *supra* note 54. Of course, IVA reform may have been prioritized *precisely because* the IVA factories that have been so influential in pioneering consumer usage of the existing procedure were able to hijack the policy agenda with the aim of reinforcing their present market advantage and capturing business from DMA providers. For the outlines of an interest group theory of consumer bankruptcy reform with particular reference to England and Wales *see* Iain Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales*, 7 THEORETICAL INQUIRIES IN LAW 509 (2006).
[175] *Improving IVAs*, paragraph 21.

perceived market failure, and to fulfilling the IVA's potential as an alternative to DMAs and bankruptcy that balances the interests of debtors and creditors.[176] The proposed means for improving the accessibility of the IVA to consumer debtors is the "simple individual voluntary arrangement" or SIVA. As the name suggests, what is envisaged is a simplified, standardized version of the IVA. SIVA is modelled in part on the streamlined FTVA procedure introduced as a potential exit route from bankruptcy by EA 2002.[177] SIVA would not displace the IVA, which would remain available for business debtors and consumer debtors who fail to satisfy the proposed SIVA eligibility requirements. The idea is to reduce the fixed costs associated with setting up an IVA through procedural streamlining and other forms of standardization so as to create a cost-effective model capable of balancing the interests of debtors and creditors, while providing sufficient incentives to IPs to operate it.

To qualify for SIVA a debtor's undisputed unsecured debts could not exceed £75,000.[178] Access would be barred to anyone whose conduct would provide grounds for the imposition of bankruptcy restrictions were they to file for bankruptcy[179] and to anyone who has entered a SIVA within the previous six years.[180] The main target group is consumer debtors who are in regular employment and have sufficient surplus income (or income and assets) to enable a higher dividend to be paid to creditors than would be achieved in bankruptcy.[181]

The procedure would be vastly simplified. The majority required for approval would be reduced from its current level (in excess of 75% of creditors by value) to a simple majority by value.[182] As with the FTVA, there would be no requirement for

---

[176] On market failure *see further* GREEN, *supra* note 30 whose research provided a starting point for the Working Group's deliberations. Given that on the Insolvency Service's own admission the majority (in the region of 80%) of debtors who file for bankruptcy have insufficient means to justify the imposition of income payments, it may be safe to conclude that IVA reform is more about shifting the market away from DMAs towards IVAs than it is about channeling debtors away from bankruptcy towards IVAs. The point is that most of those who currently file for bankruptcy would not have sufficient surplus income to support a viable IVA proposal.

[177] *Supra*, Part III.A.

[178] *Improving IVAs*, paragraphs 28-29. The majority of the IVA debtors sampled in LIVING ON TICK, *supra* note 54 would have qualified. A debtor who has any Crown debts (such as unpaid taxes) would be ineligible. In practice, this would rule out the majority of business debtors.

[179] *Id.*, paragraphs 32, 34. The nominee would effectively act as gatekeeper.

[180] *Id.*, paragraphs 33, 35.

[181] *Id.*, paragraph 28. Homeowners with equity in their homes would be required to contribute something from the equity. Homeowners who insist on excluding equity from the arrangement would likely be denied access to SIVA: *see id.*, paragraphs 60-64.

[182] *Id.*, paragraphs 34, 89-93. This is designed to reduce the influence of creditors who choose not to support the process or who have unrealistic dividend demands. In the original proposals an even more radical scheme for a two-tier SIVA was advanced which contemplated a non-voting procedure for

the convening of a creditors' meeting and no scope for creditors to propose modifications. Creditors would vote in favour or against the proposal in writing within a prescribed period on a "take it or leave it" basis.[183] The emphasis would be on the IP as nominee to ensure that the best deal is proposed using a standard approach to the assessment of allowable expenses and disposable income.[184] The mandatory regulatory requirement for the nominee to have a face-to-face meeting with the debtor would be lifted to trim costs and to facilitate further the routinised processing of consumer debtors.[185]

As well as a streamlined procedure, SIVAs would have a number of standard default features. The default period for a SIVA would be five years. This reflects the prevalence of five-year IVAs in the existing market place.[186] The development of an industry-wide best practice model would be encouraged, incorporating standard terms and conditions.[187] The cost savings from procedural streamlining and product standardization should improve access for consumer debtors who have relatively low debt burdens. IP fees would also be spread over the life of the arrangement to provide a better balance for creditors, increasing the likelihood that creditor approval would be forthcoming.[188]

As was the case with the NINA scheme, the response to *Improving IVAs* was broadly positive. The prospects for legislative implementation of SIVA appear to be extremely good.

---

qualifying debtors whose debts did not exceed £30,000 and a simple majority approval procedure for qualifying debtors whose debts were between £30,000 and £75,000. All of the emphasis in the non-voting SIVA would have been placed on the nominee to balance the interests of debtors and creditors. The non-voting SIVA met with a cool response from the credit industry during the consultation process with the result that only the simple majority approval SIVA is being taken forward: *see* INSOLVENCY SERVICE, IMPROVING INDIVIDUAL VOLUNTARY ARRANGEMENTS — SUMMARY OF RESPONSES AND GOVERNMENT REPLY (2006).

[183] *Improving IVAs*, paragraphs 35, 73-77, 84-88.

[184] *Id.*, paragraphs 34, 78-83. The approach would also be based on THE COMMON FINANCIAL STATEMENT, *supra* note 160.

[185] *Improving IVAs*, paragraphs 33-35, 51-54.

[186] *See*, *e.g.*, LIVING ON TICK, *supra* note 54; Keith Pond, *New Rules and New Roles for the Individual Voluntary Arrangement*, 18(1) INSOLVENCY LAW & PRACTICE 9 (2002).

[187] *Improving IVAs*, paragraphs 45-50, 55-59, 65-68.

[188] *Id.*, paragraphs 106-124. Creditors have expressed concern about the fact that IPs can draw their fees from realizations achieved in the early years of an IVA. Where the IVA subsequently fails, creditors may receive little or nothing because any realizations will have been absorbed in costs. The influence of the credit industry in shaping the detail of the proposed reforms can be seen at work here.

3. *CCAO Reform*

One outstanding question that does not yet appear to have been resolved is what to do about CCAOs. It has long been recognized that the eligibility requirements effectively bar access to the majority of modern consumer debtors. All the available evidence suggests that the main users are people on low incomes with limited means of repayment many of whom would qualify for relief under the proposed NINA scheme. There are already reforms on the statute book which relax the eligibility requirements and set a three-year time limit for repayment with provision for debt write-off.[189] However, these reforms have never been brought into force seemingly because of fears that the courts would be unable to cope with the projected increase in the volume of applications and doubts over whether a CCAO scheme is desirable in any event.[190]

In *Choice of Paths*, the DCA put forward a revised model with a debt ceiling of £10,000, a repayment limit of a maximum of three to five years with composition available where repayments are made for the duration of the order but at levels insufficient to meet the debts in full. Consultees were asked to consider whether the model could best be delivered through the court system or through an out-of-court approved intermediary scheme (similar in design to the DAS).[191] After consultation, the DCA now seems wedded to the retention of a court-based CCAO with a £15,000 debt ceiling, a maximum duration of five years and composition to be offered where there is full compliance with the order but this does not result in full repayment.[192] The DCA has also indicated that it is considering whether to take enabling powers permitting approved intermediaries to operate a parallel out-of-court scheme with similar features.[193]

---

[189] Courts and Legal Services Act 1990 § 13 introduced on the recommendation of THE CIVIL JUSTICE REVIEW, CMND. 394 (1988).

[190] *Choice of Paths*, paragraphs 25-27; *NINA Consultation*, paragraphs 11-12.

[191] *Choice of Paths*, paragraphs 58-77.

[192] DCA, RESPONSE PAPER ON THE CONSULTATION — 'A CHOICE OF PATHS' — BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT CP(R) 23/04 (2005).

[193] *Id.*. An enforcement restrictions order procedure providing respite from enforcement pending the revival of the debtor's fortunes is also contemplated. This revives a scheme that was previously floated during the early 1980s in the *Cork Report*.

B. SCOTLAND

The reforms currently being proposed, like the recent introduction of the DAS, are part of a wider Scottish Executive policy of creating a new approach to debt management and enforcement in Scotland. They have for the most part already been the subject of extensive consultation, but consultation is still ongoing at the time of writing and some further reforms are also expected.

Following a brief account of how the proposals have developed, the proposed reforms will be considered under a number of broad headings: (i) reforms similar to those introduced in England and Wales by the EA 2002 ("EA 2002-style reforms"); (ii) debtor access to sequestration; (iii) other reforms to sequestration; (iv) reforms to PTDs; and (v) possible reforms to the DAS.

1. *Development of the Proposals*

The Scottish Executive began consultation on the current proposed reforms in November 2003 with the publication of *Modern Approach* which, *inter alia*, sought views on EA 2002-style reforms in Scotland, various issues relating to debtor access to sequestration, other reforms to sequestration (including the relationship of sequestration and the DAS), changes to the range of debt management tools available, streamlining of sequestration procedure and reform of PTDs. It also identified the potential problem of NINA debtors and sought the views of consultees.

Following consideration of the consultation responses, *Modernising Bankruptcy* was published in July 2004. It set out firm proposals on which it was intended to legislate, including a refined version of the EA 2002-style reforms, streamlining of sequestration procedure and reform of PTDs, and also proposals and topics for further consultation and consideration, including debtor access to sequestration and NINA debtors. It also announced the setting up of a Working Group to consider these last two issues.

The Working Group on Debt Relief first met in November 2004 and reported in June 2005. Its report was published on the Scottish Executive website but was not the subject of formal consultation. The Bankruptcy and Diligence (Scotland) Bill was introduced into the Scottish Parliament on 21 November 2005. It includes EA 2002-

style reforms, limited provision affecting debtor access to sequestration, various provisions designed to streamline sequestration procedure and provisions for the reform of PTDs. Some of the PTD reforms are set out in the BD(S) Bill itself, but it is intended that the bulk of these will be contained in separate regulations which were the subject of consultation in *Protected Trust Deeds* and a separately issued partial regulatory impact assessment on the PTD proposals, published in January and February 2006 respectively. Finally, the Scottish Executive completed an internal review of the DAS in February 2006. In light of that review, advice has been given to Ministers as to possible options for reform of the DAS. Details of the review have not, however, been published at the time of writing.

2. *The EA 2002-Style Reforms*

The BD(S)A Bill contains reforms which mirror in most respects the EA 2002 reforms in England and Wales. Thus, if the Bill is enacted, unless discharge is deferred by the court, the debtor will be discharged automatically one year after the date of sequestration. In contrast to England and Wales, however, there is no possibility of an earlier discharge unless the debtor utilizes the composition procedure referred to earlier in Part III.B.[194] The debtor will, however, be required to make income contributions for up to three years from the date of sequestration[195] and formal provisions on income payment agreements are being introduced to complement the existing provisions for court orders.[196]

Provision is also made for a bankruptcy restrictions regime closely mirroring that introduced in England and Wales. In Scotland, applications for BROs will be made by the AIB, who will also have the power to accept BRUs.[197] As has happened

[194] B(S)A 1985 § 56 and Schedule 4. It should be noted that the composition procedure will itself be simplified as part of the proposals to streamline the sequestration process.

[195] Some concern was expressed during the evidence on the Bill about the differential periods for discharge and income contributions — *see further* ECC OFFICIAL REPORT (17 Feb. 2006 and 24 Feb. 2006) — and the issue of synchronizing the two periods was raised. Clearly, altering part of the overall reform package in this way this would have significant implications for the balance between debtors and creditors as well as introducing differences between the reforms north and south of the border. The ECC, while taking the view that synchronization would have obvious benefits, has recognized that it would have implications for creditors and it is not being pursued: *see*, *Stage 1 Report*, paragraph 39.

[196] Such agreements may be entered into at present, but this would put them on a formal statutory footing.

[197] Originally, it was proposed to make provision only for BROs and not BRUs — *see*, *Modern Approach*, paragraph 9.6 — but, following consultation, it was decided to make provision for the latter as well as the former. It should be noted that some of the disqualifications which are intended to result

in England and Wales, some changes are being made to the existing legal restrictions flowing from bankruptcy itself,[198] while power is being taken to review other such restrictions with a view to future amendment where appropriate.[199]

The reasons for introducing these reforms are ostensibly the same as the reasons for their introduction in England and Wales, an additional reason in Scotland being the need to keep a level playing field between the two jurisdictions.[200] However, the reforms are not restricted to business debtors but apply equally to consumer debtors and raise the same kinds of issues as have been raised in England and Wales and the Enterprise and Culture Committee of the Scottish Parliament accordingly took evidence on the effect of the reforms south of the border.[201]

3. *Debtor Access to Sequestration*

This has become a key issue in the context of the Scottish reforms. The BD(S) Bill currently contains one provision which impacts on debtor access to sequestration through its effect on apparent insolvency.[202] Clause 185 of the BD(S) Bill introduces a requirement that enforcement by a creditor of a summary warrant[203] must be preceded by service of a "charge to pay". Under the B(S)A 1985, expiry of a charge for payment without payment being made constitutes the debtor's apparent insolvency.[204] The introduction of this requirement may therefore mean that more debtors will in future be able to establish apparent insolvency, thus indirectly

---

from a BRO or BRU, such as disqualification from acting as an IP, will require amendments to reserved legislation to be enacted by the UK Parliament.

[198] The Bill makes appropriate amendments to IA 1986 § 51 which deals with disqualification from being appointed as a receiver and the Local Government (Scotland) Act 1973 § 31 which deals with disqualification from nomination, election and holding office as a member of a local authority.

[199] Any changes which require amendments to reserved legislation will, however, require to be enacted by the UK Parliament.

[200] *Modern Approach*; *Modernising Bankruptcy*. The ECC, however, has taken the view that the impact on the levels of entrepreneurial activity or business restarts will be negligible and the desire to create a level playing field as regards discharge periods across the UK is a more likely reason for the reforms: *see*, *Stage 1 Report*, paragraph 38.

[201] *See* ECC OFFICIAL REPORT (7 Mar. 2006).

[202] As noted above, the difficulty in fulfilling the conditions for sequestration where the debtor is seeking to petition for her own sequestration is often linked to the debtor's inability to establish that she is apparently insolvent.

[203] A summary warrant is a warrant to do diligence (referred to as execution in other jurisdictions) without the necessity of first obtaining a court decree for the debt. It may be obtained on application to the sheriff by certain types of creditors only, notably creditors for rates and taxes.

[204] B(S)A 1985 § 7(1)(c)(ii). This provision refers to a "charge for payment" whereas the Bill refers to a "charge to pay", but it is thought that this is a drafting infelicity which will hopefully be cured by amendment during the passage of the Bill.

extending debtor access to sequestration. However, the constitution of apparent insolvency on the basis set out in clause 185 will still be dependent on creditor action.

The problem of apparent insolvency as a barrier to debtor access to sequestration has long been recognized[205] and some changes to the definition designed to ease the problem had already been made prior to the introduction of the BD(S) Bill.[206] These earlier changes were regarded as insufficient, however, and clause 185 represents a slightly different version of further changes consulted on in *Modern Approach* and *Modernising Bankruptcy*.[207] It may be questioned, however, whether this goes far enough to solve the problem of debtor access to sequestration insofar as it is linked to apparent insolvency, assuming that greater debtor access to sequestration is what policymakers desire. The advice sector in Scotland have indicated to the Scottish Executive that this latest change may allow around 20-25% of those persons who currently cannot access sequestration through inability to establish apparent insolvency to do so, but that still leaves 75-80% of such debtors unable to do so.

The Working Group on Debt Relief considered the issue of debtor access to sequestration in the wider context of access to debt relief generally and for NINAs in particular. It considered the *NINA Consultation* proposals in England and Wales but ultimately concluded, in contrast to the approach taken there, that it would not be

---

[205] *Modern Approach*, paragraph 6.3 referring to SCOTTISH OFFICE, THE BANKRUPTCY (SCOTLAND) ACT 1985, A CONSULTATION FOLLOW-UP: PROTECTED TRUST DEEDS AND OTHER ISSUES (Jul. 1998). As its name suggests, that consultation was a follow-up to an earlier consultation, SCOTTISH OFFICE, APPARENT INSOLVENCY, A CONSULTATION PAPER ON AMENDING THE BANKRUPTCY (SCOTLAND) ACT 1985 (Jul. 1997). Apparent insolvency is not, of course, the only barrier to debtor access to sequestration. Before a debtor can petition for sequestration without the concurrence of a qualifying creditor, she must also establish that there has been no award of sequestration in the preceding five years and that she has the qualifying level of debt, currently £1,500. With respect to the latter, *Modern Approach* sought views on the qualifying level of debt for sequestration and, in particular, whether it should be reduced for debtor petitions, which would effectively have made debtor access to sequestration easier. *Modernising Bankruptcy*, however, confirmed that it was intended to make no change to the qualifying level of debt and it is thought that reducing the qualifying level of debt for debtor petitions would in fact have little, if any, impact on the ability of debtors to access sequestration since the real barrier to debtor access is not the qualifying level of debt, but apparent insolvency. Notwithstanding this, the ECC has said that it is not convinced that £1,500 is the appropriate level or indeed that there is any rational basis for it. Observing that the threshold is lower in England, it has recommended that the Scottish Executive give consideration to other ways of defining what the debt threshold should be including, for example, a set percentage of debt relative to assets, and whether it should increase with inflation: *see*, *Stage 1 Report*, paragraph 98. It is understood that the Scottish Executive is now considering this further.

[206] A particular problem with poinding (now attachment) was resolved by the DAA(S)A 2002 and following the introduction of the DAS, failure of a DPP where at least one of the debts was legally constituted was added as an additional ground for constituting apparent insolvency by the Debt Arrangement Scheme (Scotland) Regulations 2004, S.S.I. 2004/468.

[207] *See*, *Modern Approach*, paragraphs 6.2-6.9 and *Modernising Bankruptcy*, paragraphs 7.1-7.7.

appropriate to introduce an entirely separate new procedure specifically for NINAs in Scotland as this would add further complexity to an already complex area of law and that any solution could and should be found within the existing procedures.[208] Concerns were expressed about any attempt to widen access to debt relief by widening access to sequestration because of the potential effects of such a change, in particular, the possible unintended economic effects of any sustained rise in sequestrations that might result.[209] However, the majority of the Working Group believed that it would be possible to widen access to sequestration for those NINAs for whom sequestration was appropriate while avoiding a significant rise in sequestrations and any unintended adverse consequences of such a rise.[210]

The Working Group considered that the NINAs for whom debt relief through sequestration was appropriate were those whom it identified as true NINAs, that is NINAs who had no reasonable prospect of paying off their debts within a reasonable time, in contrast to temporary NINAs, whom the Working Group identified as debtors whose NINA status had resulted from a change of circumstances and whose circumstances might improve in the short term with the result that they might then have the prospect of paying off their debts within a reasonable time. The Working Group felt that different solutions were appropriate for these types of NINAs and that access to debt relief for temporary NINAs should be delayed for a period to see whether a further change of circumstances taking them out of the NINA category took place and that immediate access to sequestration was only appropriate for true NINAs.

Having considered and rejected the possibility of trying to achieve this result either by further amending the definition of apparent insolvency or replacing it with a different test, the Working Group recommended the introduction of a new single gateway procedure which would give those NINAs for whom sequestration was appropriate an alternative means of access to it, while also providing a solution for temporary NINAs. The proposed single gateway procedure envisages an application for debt relief being made by an approved money adviser on behalf of the debtor following an independent assessment of the debtor's financial position showing that there was no suitable alternative for the debtor such as a DPP or PTD. The result of

[208] *Debt Relief*, Part II.
[209] *Debt Relief*, Executive Summary and Part IV.
[210] *Id.*

that application would be either an immediate award of sequestration where the debtor was a true NINA or a moratorium of up to 12 months, with provision for re-assessment at appropriate intervals, where the debtor was a temporary NINA. In the latter case, the moratorium would either be brought to an end as and when the debtor ceased to be a NINA[211] or an award of sequestration would be made where the debtor remained a NINA at the end of the moratorium. The Working Group also recommended, *inter alia*, compulsory referral to independent money advice for all debtors seeking sequestration.

The BD(S) Bill does not (yet) incorporate any of the recommendations of the Working Group, although the issue of access to sequestration and NINAs in particular was raised in evidence to the ECC.[212] The Scottish Executive has indicated that it is still considering how to address these issues and advised the ECC during evidence that it would introduce appropriate amendments at a later stage.[213] The ECC has in turn indicated that it awaits the outcome of the Scottish Executive's deliberations and recommended that they be completed as soon as possible and preferably before the completion of the passage of the Bill.[214] At the time of writing, however, it is not yet known what form any changes are likely to take. Possibilities include additional changes to the definition of apparent insolvency, the abolition of apparent insolvency altogether, a move towards the model in England and Wales or something more akin to the *Debt Relief* recommendations, all of which would have different implications for the system overall.

4. *Other Reforms to Sequestration*

The BD(S) Bill contains a number of other reforms to sequestration which are designed to adjust the balance between debtors and creditors and to streamline the procedure to make it more efficient, cost-effective and user-friendly. The former category includes the introduction of time limits for dealing with the debtor's home[215]

---

[211] The Working Group envisaged that this would include both a situation where the debtor's circumstances changed to the extent that she could be expected to pay off her or debts in full and a situation where she became able to access an alternative to sequestration, such as the DAS or a PTD.

[212] *See* ECC OFFICIAL REPORT (17 Jan. 2006 and 24 Jan. 2006).

[213] *See* ECC OFFICIAL REPORT (7 Mar. 2006).

[214] *Stage 1 Report*, paragraph 94.

[215] The provisions are similar to IA 1986 § 283A inserted by EA 2002 although unlike the other EA 2002-style reforms proposed in Scotland, the source of inspiration for this reform is nowhere explicitly acknowledged.

and for retaining certain other assets of the debtor within the sequestration.[216] These proposed reforms shift the balance in favour of the debtor and as such may increase the attractiveness of sequestration as a solution to debt problems where there is a choice. The latter category includes provision for debtor petitions for sequestration to be determined by the AIB rather than the court; consolidation of all other bankruptcy proceedings in the sheriff court (with very limited exceptions);[217] the combining of the roles of interim and permanent trustee in sequestration; and the streamlining of the procedure for judicial composition. These proposed reforms address fitness for purpose issues in relation to the current sequestration procedure.

5. *Reforms to PTDs*

The BD(S) Bill contains some of the proposed reforms to PTDs and paves the way for the remainder, which are to be implemented by regulation. To this end, draft PTD regulations were annexed to *Protected Trust Deeds*. The proposed reforms fall broadly into two categories (albeit with some overlap): reforms to the requirements for a trust deed to become a PTD and reforms relating to the regulation of PTDs.

So far as the requirements for a trust deed to become a PTD are concerned, *Protected Trust Deeds* proposed the introduction of a formal statutory requirement for the debtor to be given certain prescribed information and advice[218] and for the debtor and the trustee to agree that a PTD is more appropriate than either the DAS or sequestration.[219] In contrast to the present position, where a trust deed which satisfies the necessary conditions automatically becomes protected on the completion of the necessary formalities by the trustee, it also proposed that protection would require to be formally granted by the AIB, who would do so only where this was reasonable.[220] This marks a shift towards far greater administrative and regulatory oversight. In determining whether it is reasonable for protection to be granted, the AIB would be required to consider in particular whether the debtor would have been able to pay all

[216] The provisions are similar in nature to the provisions relating to the debtor's home in so far as they provide for the revesting in the debtor of any non-vested contingent interest which forms part of the debtor's estate by virtue of B(S)A 1985 § 31(5), but in this case they revest in the debtor on discharge.
[217] Reduction and suspension of sequestration would remain matters for the Court of Session as would recognition of and co-operation with foreign insolvencies.
[218] *Protected Trust Deeds*, paragraphs 4.5, 4.6; draft § 6(a).
[219] Draft § 6(b). These matters are currently governed by professional self-regulation: *see* STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND).
[220] *Protected Trust Deeds*, paragraph 4.11; draft § 12.

debts in full without granting a trust deed; whether it is likely that the court would grant an application for a BRO were the debtor's estate to be sequestrated; whether the dividend payable to creditors under the PTD would be likely to be higher than the dividend payable on sequestration; and the extent to which the proposed dividend would be funded by the debtor's income.[221] The AIB would also have to be satisfied that the PTD would be likely to produce a minimum dividend, at a suggested level of 30p in the pound, although views were also sought on possible alternatives of 20p or 25p in the pound.[222] It was proposed that the PTD should also provide for the debtor to be discharged after a maximum of three years, thus converting current practice into a statutory requirement.[223] It was also proposed to extend the information which must be sent to creditors and to make it easier for them to object to the trust deed should they wish to do so.[224] One of the new pieces of information which the trustee would be required to provide to the debtor, as well as to the creditors, is a fixed quote for the cost of the work carried out up to the decision on protection and an estimate of the cost of the work for the administration of the PTD.[225] Where protection of the trust deed is refused, it was proposed to give the debtor a six-week "cooling off" period during which she may cancel the trust deed,[226] which would otherwise remain a valid trust deed but without protection (and thus vulnerable to the actions of non-acceding creditors).

So far as regulation of PTDs is concerned, it was proposed to introduce a formal statutory requirement for the trustee to keep certain specified records and to produce a statement of affairs.[227] The trustee would also be under an obligation to notify all interested parties of a change of more than a specified percentage in the expected level of either the trustee's fees and outlays or the dividend to creditors.[228] The AIB would be given extended powers to audit of trustee's fees[229] and new powers

---

[221] Draft § 12(2). As noted above, the Scottish Executive has been particularly concerned about income-only trust deeds because of the overlap with DAS.
[222] *Protected Trust Deeds*, paragraphs 4.12-4.22; draft § 11.
[223] *Id.*, paragraphs 4.23-4.25; draft § 7.
[224] *Id.*, paragraphs 4.26 and 4.27; draft § 9.
[225] *Id.*, paragraph 4.30; draft §§ 6(d), 9(g).
[226] *Id.*, paragraph 4.35; draft § 15.
[227] *Id.*, paragraphs 5.2, 5.3; draft §§ 16 and 9(c) respectively. Compare the current requirements of STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND).
[228] *Protected Trust Deeds*, paragraphs 5.4-5.8; draft §§ 17 and 18. A change in one, of course, may lead to a change in the other.
[229] BD(S) Bill, clause 21.

to give directions to or remove the trustee, to act as trustee and to revoke the protected status of a PTD.[230]

In formulating the proposed reforms, the Scottish Executive explicitly considered the issue of the overlap between sequestration, PTDs and the DAS, starting from the premise that "[i]n a properly integrated system there should be no overlap unless it serves a clear purpose, as in general having two tools doing more or less the same thing will make the system both harder to understand and less likely to be fair to either debtors or creditors."[231] Having considered the degree of overlap between the existing tools in relation to the four factors of debtor protection, debt relief, payments from income and payments to creditors, *Protected Trust Deeds* took the view that (i) there is a clear justification for overlap between all three tools in terms of debtor protection;[232] (ii) there is justification for a less severe form of debt relief in the form of PTDs as compared to sequestration provided that the other benefits of such a tool offer an appropriate balance and that PTDs should therefore be retained despite the overlap with debt relief in sequestration and, possibly in future, with a reformed DAS;[233] (iii) there is a clear justification for overlap between all three tools in terms of the "can pay, should pay" principle but the current position with respect to income payments in PTDs cannot be justified;[234] and (iv) there is insufficient differentiation between sequestration and PTDs in terms of the dividends payable to creditors which cannot be justified but could be remedied by the introduction of a minimum dividend.[235] It therefore concluded that in principle, PTDs are a useful tool which have a place in a reformed and integrated system of debt management and debt relief but that reform is required if they are to fulfil that role.[236]

The assertion that there is insufficient differentiation between sequestration and PTDs in terms of the dividends payable to creditors and that a minimum dividend

---

[230] *Protected Trust Deeds*, paragraph 5.9; draft § 19. So far as the AIB acting as trustee is concerned, the Scottish Executive has indicated that it envisages that the AIB would do so only in cases where the trustee had been removed, but the draft regulations do not contain any such limitation. There are obvious conflicts of interests in the AIB acting as trustee even in such limited cases.
[231] *Id.*, paragraph 3.12. On the potential disempowering effects of complex choices in the consumer bankruptcy context *see* Ramsay, "Models" *supra* note 122.
[232] *Protected Trust Deeds*, paragraph 3.14.
[233] *Id.*, paragraphs 3.20, 3.21. Possible reforms to DAS are discussed further below.
[234] *Id.*, paragraph 3.26.
[235] *Id.*, paragraph 3.39.
[236] *Id.*, paragraph 3.54. The ECC has agreed that PTDs should continue to have a major role to play and that they should be simple to access, rigorously monitored and appropriately regulated: *see*, *Stage 1 Report*, paragraph 71. It did not support the proposal for a minimum dividend, however.

is therefore required has proved particularly controversial.[237] In its response to the *Protected Trust Deeds* consultation, the Institute of Chartered Accountants in Scotland argued that the calculations of the dividends in sequestrations and trust deeds used to justify this assertion were inaccurate and misleading and claimed that the AIB's office had accepted this argument, although at the time of writing, the matter was still being considered by the Scottish Executive. If ICAS is proved correct, this would certainly have implications for the proposed level of any minimum dividend, if not the principle itself. Any minimum dividend would, however, be arbitrary and if the real issue is simply that a PTD should produce a greater dividend than sequestration in order to justify the PTD's "lighter touch", then it would be simpler and more flexible to frame the requirement in those less controversial terms. The likely level of dividend payable under a PTD as compared to sequestration is one of the factors which it is proposed that the AIB would be required to take into account in deciding whether it is reasonable to grant protection. It could be argued that this is all that is required. Certainly, the ECC was not convinced that the case for a minimum dividend of 30p in the pound had been made out.[238] It therefore seems likely that there will be at least some change to the proposals. At the time of writing, the Scottish Executive has not issued its formal response to the consultation but it has indicated informally that it may reconsider this aspect of the proposals *inter alia* in light of the consultation responses, although the price for abandoning the requirement for a minimum dividend may be a positive approval process similar to that required for an IVA.

6. *Reforms to the DAS*

As noted above, the details of any proposed reforms have not been published at the time of writing. However, *Protected Trust Deeds* made it clear that the Scottish Executive is considering whether some form of debt relief should be introduced to the DAS.[239] It suggested that the Scottish system arguably lacks a modest form of debt relief falling between the DAS and sequestration/PTDs, for example, waiver of interest or charges after payments under a DPP have been sustained for a suitable

[237] *See*, *e.g.*, E. MacLean, *The Bankruptcy & Diligence (Scotland) Bill – a battle ahead*; D. Hunter, *Changes to Trust Deed legislation will cause misery for thousands*, both in RECOVERY (Summer 2006).
[238] *Stage 1 Report*, paragraph 71.
[239] *Id.*, paragraph 3.16.

period.[240] It argues that DAS at present is clearly very different from sequestration/PTDs and, even if extended to allow some modest form of debt relief, would still remain significantly different from those other forms of debt relief.[241]

Protected Trust Deeds clearly contemplated only very modest reform. At one stage, it appeared that a more extensive form of debt relief, going beyond and perhaps well beyond freezing of interest and charges, might be being contemplated. This would have had important implications for both the scope and suitability of the DAS. However, it now seems as if only the more modest form of debt relief contemplated in *Protected Trust Deeds* is likely to be taken forward after all and further details of the proposed reforms are awaited with interest.

VI. EVALUATING THE PROPOSED REFORMS

A. ENGLAND AND WALES

1. *Scope*

If, as seems likely, the NINA scheme were to be implemented, it would address the main gap in current provision. However, NINAs whose debts exceed £15,000 would be excluded. There is some logic in an initial cap of £15,000 as it would be aligned with the cap proposed for the CCAO and would therefore provide a facility for temporary NINAs whose circumstances improve to reach an arrangement with their creditors.[242] While at first sight the cap looks like a compromise between the money advice agencies and the credit industry, it probably reflects the profile of the NINA debtor that the policymakers have in mind, namely the unemployed, the long-term sick and other welfare recipients who have tended to gravitate towards the CCAO. The cap would be set in secondary legislation so as to be capable of upwards adjustment in the light of experience.

---

[240] *Id. See also* the Scottish Executive's evidence to the ECC which confirmed that the DAS review was addressing the issue of whether some element of debt relief — perhaps just freezing of interest or charges — was appropriate: *see* ECC OFFICIAL REPORT (7 Mar. 2006).
[241] *Protected Trust Deeds*, paragraph 3.17.
[242] INSOLVENCY SERVICE, RELIEF FOR THE INDEBTED — AN ALTERNATIVE TO BANKRUPTCY: SUMMARY OF RESPONSES AND GOVERNMENT REPLY (Nov. 2005), paragraph 63.

Whether, in practice, the scheme would successfully channel NINAs away from unsuitable repayment alternatives appears to depend on a range of variables. Firstly, it would require a joined up approach among the various public, private and voluntary sector agencies who are involved in the provision of debt advice and/or debt solutions. It makes sense to locate approved intermediaries within the voluntary sector on the reasonable assumption that most NINAs access debt advice via that route. However, there may need to be an effective referral system for NINAs who make initial contact with the court, an IVA provider or a debt management company. Secondly, it remains to be seen whether such a scheme could be run cost-effectively on the basis of a fee in the region of £100 given set-up, training, publicity and ongoing administration costs as well as the additional burden that would be placed on the already hard-pressed voluntary sector. There are also concerns about whether a low-cost, self-financing scheme would be sufficiently robust in terms of screening and scrutiny to prevent abuse.

If all the various reform proposals were to be implemented, salaried debtors would be presented with a bewildering array of options. Salaried consumer debtors who have unsecured debts of £15,000 or less could access bankruptcy, reformed CCAO (in or out of court), DMA or SIVA (though this would depend on whether a satisfactory dividend could be offered notwithstanding set-up and supervisory costs). Salaried consumer debtors who have unsecured debts of more than £15,000 but less than £75,000 could access bankruptcy, SIVA or (possibly) DMA (though a realistic repayment programme within a reasonable timeframe would depend on income and debt levels). As regards the first category, it may be questioned whether it is worth pursuing reform of the CCAO. If CCAOs were abolished outright, there would still be a range of options, especially if SIVA could be made cost-effective for debtors in the £10,000-£15,000 bracket.[243] The likelihood is that the type of debtors who have tended to use the CCAO could be better accommodated either in bankruptcy or in the proposed NINA scheme.

It is clear that the SIVA has been identified as the best policy tool for balancing the interests of salaried debtors and their creditors. However, the question of whether it is sufficiently differentiated from bankruptcy to make it the first choice solution for debtors remains open. The role of bankruptcy as a debt relief tool for

[243] Below these levels it may be difficult for providers to cover costs and generate a dividend for creditors based on realistic payment levels over five years.

consumer debtors has simply not been articulated in policy terms.[244] While there is no doubt that it is an inferior mechanism from the standpoint of creditors, the differential from a debtor perspective looks quite marginal. There is a strong rhetorical insistence from government that bankruptcy is a tough option. Yet, a salaried debtor with little or no non-exempt assets can obtain a swift discharge in bankruptcy at the price of three years' worth of income payments under an IPO or IPA. It is true that an undischarged bankrupt may be subject to greater legal restrictions and that there is greater publicity than is the case with SIVA/IVA. It is also true that debtors run the risk of post-discharge restrictions in bankruptcy. However, all the evidence suggests that the credit industry does not treat IVAs any more favourably than bankruptcy for the purposes of lending decisions[245] on the principle that "default is default" regardless of the means chosen by the debtor to address it. As regards post-discharge restrictions, the risk of a debtor being subject to a BRO or BRU is less than 10% in practice because of practical limits on the capacity of the Insolvency Service to investigate and process cases.[246] In any event, SIVA targets precisely those salaried debtors who would not attract post-discharge restrictions in bankruptcy.[247] Essentially, these debtors have a choice between a five-year payment programme via SIVA and a three-year payment programme in bankruptcy at the price of the now diminishing legal restrictions on undischarged bankrupts and a higher degree of publicity. For rational maximisers who can afford the filing fee and who have nothing to fear from the legal restrictions on undischarged bankrupts (for example, because they are not, or do not wish to become, company directors or members of a profession), bankruptcy looks like a rational choice.

Of course, consumer debtors will not necessarily act in the manner predicted by classical economic theory. A host of other variables, some of them "fuzzy" and therefore difficult to quantify, may impact on debtor choice. Despite the de-restriction policy of EA 2002, bankruptcy may still retain a stigma in some quarters.[248] For others, the choice will be influenced by their point of entry into the

---

[244] Ramsay, *supra* note 24.

[245] *See*, *e.g.*, "Is a Voluntary Arrangement right for me?", *supra* note 47, paragraph 35; Pond, *supra* note 186.

[246] *See* EA 2002 Regulatory Impact Assessment.

[247] *See* Part IV.A.

[248] In a recent survey, over 70% of a sample of debtors gave answers that indicated a continuing perception of stigma attaching to bankruptcy: *see* JOHN TRIBE, BANKRUPTCY COURTS SURVEY 2005 — A PILOT STUDY (2006). *See also* INSOLVENCY SERVICE, ATTITUDES TO BANKRUPTCY *available at* http://www.insolvency.gov.uk/ reporting on four surveys of various different groups (including a

debt solutions market and/or by personal factors such as pride or shame. If a consumer debtor prefers to enter a five-year SIVA rather than petition for bankruptcy because of perceived stigma and/or personal reasons, there is no problem *per se*. However, where the choice between bankruptcy and SIVA is finely balanced (as it may be in the case of salaried debtors with no assets), the system needs to ensure that consumer debtors are properly advised on what is the best choice for them in their particular circumstances. Given the overlap between bankruptcy and SIVA, the regulatory and ethical concerns identified above in Part IV.A. still arise. The simple truth is that the IP profession, the IVA factories and private sector DMA providers have no economic stake in bankruptcy as a debt solution for consumer debtors. No asset bankruptcies are dealt with exclusively by the OR. The potential for conflicts of interest is obvious.[249] Indeed, were the scope of the CCAO to be widened along the lines proposed, the complexity of the system in relation to salaried debtors with debts of £15,000 or less, may further reinforce these concerns. On the other hand, plenty of consumer debtors are finding their way into bankruptcy,[250] so the problem should not be exaggerated. Nevertheless, the capacity of such a complex system to deliver best advice for salaried debtors remains a pressing issue. There are related issues concerning whether the various agencies involved in the provision of debt advice and debt solutions are sufficiently joined up and whether key players such as the voluntary sector and the Insolvency Service are adequately resourced to meet demand.[251]

2. *Suitability*

Bankruptcy, SIVA and reformed CCAO all appear to offer debt relief options that are well-suited to salaried consumer debtors who have a stable income and few or no assets. For salaried debtors, especially those with relatively low levels of

---

sample of bankrupts) which identified similar perceptions based, among other things, on the publicity given to bankruptcy orders through advertisement and the signal that bankruptcy sends about debtors' inability to meet their obligations.

[249] A concern raised by the Insolvency Practices Council in its Annual Report for 2005 — http://www.insolvencypractices.org.uk/reports/2005/annual_report.htm. The IPC was established in 2000 to represent the public interest in relation to the regulatory, ethical and professional standards of IPs. Its recommendations are fed into the IP professional bodies.

[250] *See* Appendix and TRIBE, *supra* note 248.

[251] A debt advice gateway involving a number of voluntary sector advice providers has been piloted through which debtors can be referred to a specialist debt solution provider (such as an IP) drawn from a panel. Membership of the panel, and therefore eligibility for referrals, is established through an open tender process against agreed criteria. This kind of infrastructure has the potential to channel debtors via telephone money advice into SIVA/IVA where appropriate.

indebtedness, who have assets, reformed CCAO and DMAs provide repayment options in which assets can be sheltered. The SIVA offers a useful alternative for salaried debtors who want the discipline of a payment programme but for whom full repayment through a DMA lasting no longer than five years would not be possible. SIVA and reformed CCAOs would also have mechanisms for dealing with adverse changes in circumstances such as a sudden drop in income should debtors become ill or lose their jobs.

The proposed NINA scheme would plug the gap in current provision. It offers what amounts to a cheap bankruptcy equivalent for debtors who cannot afford to file for full bankruptcy. Without it, the system discriminates in favour of debtors who have some ability to pay by offering them a debt relief option that is not open to NINAs. Clearly, the system would provide a route out of indebtedness for the poorest debtors and, to that extent, it may be judged both suitable and appropriate. In terms of design and implementation, the principal concern is whether such a low-cost scheme will be sufficiently robust to exclude debtors for whom it is not intended and to ensure that temporary NINAs are channelled into repayment alternatives. Indeed, temporary NINAs, as distinct from true NINAs, pose a problem for policymakers who will not be thanked if the scheme provides a full discharge for debtors whose circumstances shortly after the expiry of the twelve-month period are such that they would no longer be classified as NINAs. This begs the question of whether temporary NINAs should be denied access and channelled into a temporary enforcement restrictions regime in line with the current thinking of the Working Group on Debt Relief in Scotland.[252] It may be that, in practice, approved intermediaries will be encouraged to channel temporary NINAs into the enforcement restrictions procedure proposed by the DCA in *Choice of Paths* as a holding measure. It remains to be seen how well the NINA scheme will be ring-fenced to maintain the integrity of the underlying "can pay, should pay" principle.

Another possible concern is that NINAs admitted to the scheme may have limited incentives to improve their fortunes during the twelve-month period for fear that they would lose eligibility and be forced to switch to some form of repayment option. This may be thought to cut against the grain of social norms of individual responsibility and self-help. If, however, in practice, the scheme would be reserved

[252] *See* Part V.B. *supra*.

via the screening process to true NINAs (*eg* debtors who are long-term unemployed or who suffer from long-term sickness or disability), this concern may well be exaggerated. In any event, similar incentives operate in bankruptcy because the OR or trustee cannot seek an IPO or IPA after discharge. Thus, a debtor who has insufficient surplus income to warrant an IPO/IPA at the commencement of bankruptcy may have little incentive to increase her income until after she has received her discharge.

B. SCOTLAND

1. *Scope*

It is more difficult to evaluate the overall effect of the proposed reforms in Scotland because the package of reform proposals is still incomplete. Although it has been indicated that further reforms will be introduced to address the gap in relation to NINA debtors, until the details of these are known it is difficult to assess their potential effect. If they are to be successful, they will need to address similar issues to those raised in relation to NINA debtors in England and Wales, in particular debtor access to advice, especially if an approach such as that proposed by the Working Group on Debt Relief is adopted, bearing in mind that lack of capacity has been identified as one of the problems with the DAS.

Furthermore, the proposals for reform of PTDs as set out in *Protected Trust Deeds* raise the possibility that a *further* pool of debtors would be created who, no longer able to access PTDs as a result of the reforms, would not be able to access any tool. *Protected Trust Deeds* recognized that the reforms might have the effect of cutting off the PTD option for some debtors,[253] but suggested that debtors who could no longer access a PTD, but were not in a position to pay anything to their creditors and therefore needed debt relief, would be able to petition for sequestration while debtors who could no longer access a PTD, but who could pay something to their creditors, would be able to enter the DAS.[254] However, this is questionable. Unless the issue of access to sequestration is also addressed, it is likely that many debtors who are not in a position to pay anything to their creditors, but who can currently

[253] *Protected Trust Deeds*, paragraph 3.41.
[254] *Id.*, paragraph 3.42.

enter PTDs would not, in fact, be able to petition for sequestration. This does not mean to say that they should continue to be able to access PTDs, only that care needs to be taken to ensure that reforms undertaken to address one perceived problem do not inadvertently create a different one which is left unaddressed. Furthermore, debtors who could pay something to their creditors who enter a DAS instead of a PTD would get debt management, not debt relief, and even if an element of debt relief is introduced into the DAS, it is likely to be less than would have been obtained in a PTD. This may, of course, be seen as justifiable in policy terms. The position may be less stark if the proposals are altered, as seems likely, to require only that a PTD should produce a greater dividend than sequestration. However even then, unless the issue of access to sequestration is adequately addressed, there are likely to be debtors left without access to any tool and some debtors may be forced into using a tool which gives only debt management and not debt relief.

If any element of debt relief were introduced into the DAS, there would then be three tools offering debt relief of varying degrees. *Protected Trust Deeds* did not perceive a problem with this, stating that even if an element of debt relief is introduced into DAS, it will remain different from other available forms of debt relief.[255] The validity of that argument may depend on the extent of the debt relief introduced.

The overall effect of the proposed reforms would seem to be to narrow access to PTDs while increasing access to sequestration and the DAS (assuming that the anticipated further reforms on NINAs/access to sequestration and the DAS are forthcoming).[256] In such a system, it is suggested that a debtor with assets and/or income who can cross the thresholds for a PTD would probably still prefer it to sequestration, because it will capture roughly the same assets and income but still be a "lighter touch" than sequestration. Debtors who cannot meet those thresholds, however, are likely to opt for sequestration if they can meet the new requirements (whatever they may be). How many are likely to opt for a reformed DAS instead may depend on the extent of any debt relief introduced, but even if little or no debt relief is introduced and/or such debt relief as is introduced is restricted to debtors who have no non-exempt assets or debtors who can contribute a proportion of their assets, the DAS

[255] *Id.*, paragraph 3.17.
[256] Even under any revised PTD reforms, access would still be narrowed, albeit not so much as under the original reforms.

would remain a good option for debtors with income and assets who wish to avoid realizing (all of) those assets. For debtors with income and no assets, the choice between the DAS and sequestration will come down to the extent of the debt relief introduced in the DAS balanced against the harsher regime of sequestration as those debtors would be unlikely to be able to meet the thresholds for a reformed PTD.

2. *Suitability*

As noted above, it has been doubted whether the introduction of EA 2002-style reforms in Scotland will in fact achieve their intended purpose of fostering entrepreneurship notwithstanding that the evidence given to the ECC on the operation of the EA 2002 in England and Wales was positive.[257] Doubts may remain, however, about the suitability of a reformed procedure tailored to (the minority of) business debtors for (the majority of) consumer debtors.

The reform of the regulatory aspects of PTDs may increase public confidence in them and to that extent strengthen their role as a tool in a reformed system. On the other hand, the introduction of a minimum dividend and maximum time limit would undoubtedly restrict their suitability for many consumer debtors who would simply be unable to meet the required thresholds. Even if these proposals are altered to require only that a PTD should produce a greater dividend than sequestration, it is likely that there would still be debtors, albeit a smaller number, who would be unable to meet the required threshold. This would only be a significant problem, however, if such debtors did not have access to a suitable alternative option.

If debt relief is introduced into the DAS, this raises the issue of whether the DAS would then achieve an appropriate balance between debtor and creditor interests since debtors would be able to obtain at least an element of debt relief in a procedure which does not automatically include assets. The greater the element of debt relief involved, the more problematic this issue becomes. One way round the problem would be to offer debt relief in the DAS only to debtors who have no assets or who, if they have assets, agree to include a suitable proportion of them in the DAS.

[257] ECC OFFICIAL REPORT (7 Mar. 2006).

VII. CONCLUSION

It is clear from the foregoing that considerable strides are being made towards the development of comprehensive consumer bankruptcy systems in Scotland, England and Wales. However, it is still early days and, at this stage, it is difficult to judge whether all of the various reform proposals will come to fruition in their current form or at all.

In England and Wales, assuming that the reforms are taken forward, the main outstanding issues are issues of scope concerning the relationship between the various overlapping debt relief options (bankruptcy, SIVA/IVA, reformed CCAO). The sheer complexity of this emerging system also raises related issues about the capacity of the accompanying infrastructure to deliver best advice and to channel debtors towards an appropriate solution. The key will be to ensure that the infrastructure is sufficiently joined up and robust to enable debtors (especially salaried debtors) to navigate the system and to make what may be quite difficult legal (and moral) choices.

In Scotland, even assuming that all the reforms, including the anticipated further reforms on NINAs/access to sequestration and the DAS, are taken forward, the reformed system is likely to be less complex, and to offer less choice, than the reformed system in England and Wales. As in England and Wales, however, there will still be an outstanding issue of scope concerning overlapping debt relief options, particularly if an element of debt relief is introduced into the DAS, and similar issues concerning the capacity to deliver best advice are likely to arise notwithstanding that the system is likely to be less complex. There will also be similar issues of resourcing relating to the AIB, who will have a hugely increased role across all the options. There may also be outstanding issues of suitability in relation to a reformed sequestration process tailored for business debtors, but being utilized mainly by consumer debtors, and in relation to the DAS if an element of debt relief is introduced without addressing the issue of debtors with assets thereby being able to obtain debt relief without necessarily contributing something from those assets.

Despite some differences in approach which are attributable to the fact that the two jurisdictions have separate legislative competency for personal insolvency matters, some common themes can be identified. First, considerable attention is being focussed on how to accommodate NINA debtors with England and Wales currently in

the vanguard. Secondly — and somewhat incongruously — both jurisdictions have committed to reforms that seek to customise bankruptcy and sequestration as "fresh start" regimes for failed entrepreneurs. Given that the main users of these regimes are consumer debtors, the emphasis on business debtors seems thoroughly misplaced.[258] Furthermore, there has been no systematic attempt to articulate a policy role for bankruptcy and sequestration as tools of consumer debt relief.[259] As regards consumer debtors, most of the emphasis has been on the provision of "consumer-friendly" *alternatives* to bankruptcy and sequestration (DAS, SIVA, reformed PTD, reformed CCAO). Finally, both jurisdictions place limited emphasis on the educative potential of insolvency processes beyond the salutary impact of the processes themselves. The possibility of North American-style compulsory debtor counselling and education programmes has been floated in both jurisdictions — most recently by the Working Group on Debt Relief in Scotland[260] — but generally such initiatives have met with little enthusiasm. Instead, there is a much greater emphasis on improving financial awareness and budgeting skills within the general population as an *ex ante* measure falling within the statutory remit of the UK's principal financial regulator, the Financial Services Authority. Nevertheless, as we have seen, there is also a growing emphasis on schemes involving approved intermediaries (such as DAS and NINA) who may perform *de facto* educative functions. This, in turn, may lead to the increasing juridification of the role of the voluntary sector in the provision of debt advice.

There are thus patterns of divergence and convergence within the emerging systems which reflect the constitutional relationship between the two jurisdictions as well as their geographical proximity. The potential, given devolution, for policymakers north and south of the border to experiment with different models, while learning from each other, is obvious. It remains to be seen what will emerge from the legislative process and how the proposed reforms will work in practice.

---

[258] Much of the initial impetus behind the EA 2002 reforms derived from the view that British culture is not as tolerant of business failure as the prevailing culture in the United States and that this has a chilling effect on the willingness of our citizens to take business risks: *see* Ramsay, *supra* note 174; Walters, *supra* note 24. It is ironic that the US "fresh start" policy was seen as an inspiration for *business-oriented* bankruptcy reform in the UK at a point in the 1990s when it was already obvious that, in practice, Chapter 7 was a *consumer* remedy! The subsequent tightening of the US "fresh start" policy brought about by the 2005 reforms only adds to the sense of irony.

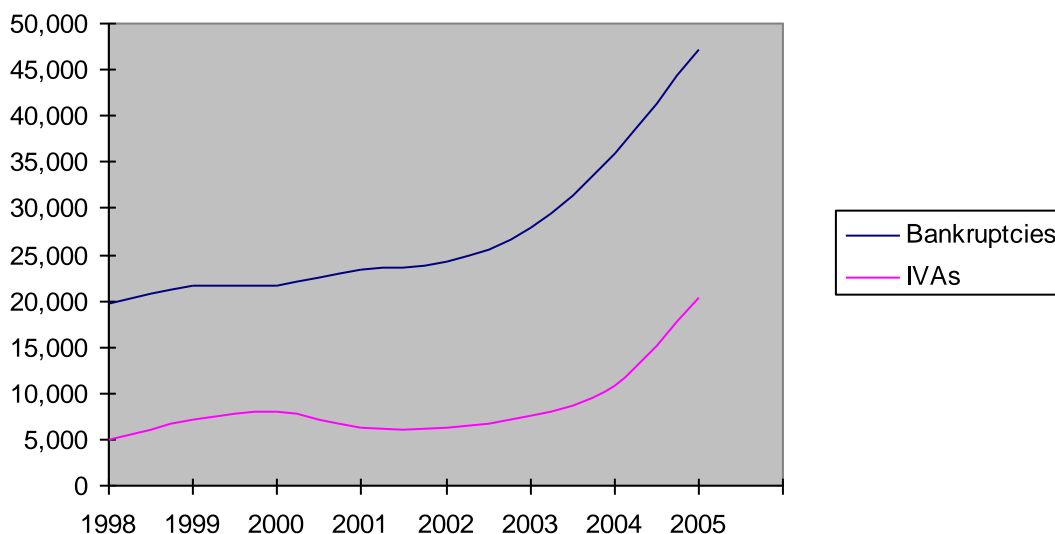
[259] This leaves room for arguments, advanced from time to time, that two-tier bankruptcy systems should be considered which treat business debtors differently from consumer debtors.

[260] Part V.B. *supra*. *See also*, *Fresh Start*, paragraphs 7.19-7.21 and *Second Chance*, paragraph 1.5.

APPENDIX

Fig. 1: Individual Insolvencies (England and Wales)

YEAR	BANKRUPTCY ORDERS	IVAs	TOTAL
1998	19,647	4,902	24,549
1999	21,611	7,195	28,806
2000	21,550	7,978	29,528
2001	23,477	6,298	29,775
2002	24,292	6,295	30,587
2003	28,021	7,583	35,604
2004	35,898	10,752	46,650
2005	47,287	20,293	67,580

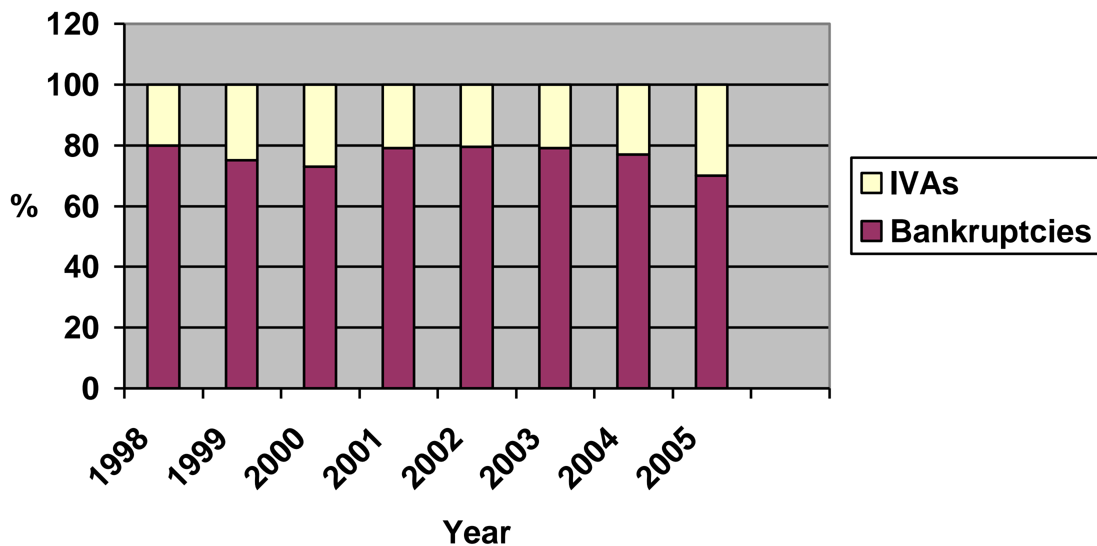


Source: DTI

According to the most recent figures from National Statistics, the estimated population of England and Wales is c 53,000,000. Thus, the approximate number of individual insolvencies per 1,000 of population was 0.88 in 2004 rising to 1.27 in 2005. These *per capita* rates are low compared to the equivalent rates in North

America.[261] However, the current rate would be likely to more than double if DMAs and CCAOs were taken into account. It may therefore be important for comparative consumer bankruptcy scholars to focus on differences in the aggregate figures for debtors seeking formal and informal debt solutions (where available) rather than simply on differences in the aggregate numbers accessing formal insolvency regimes.

Fig. 1a: IVAs and bankruptcies expressed as a percentage of total personal insolvencies (England and Wales)

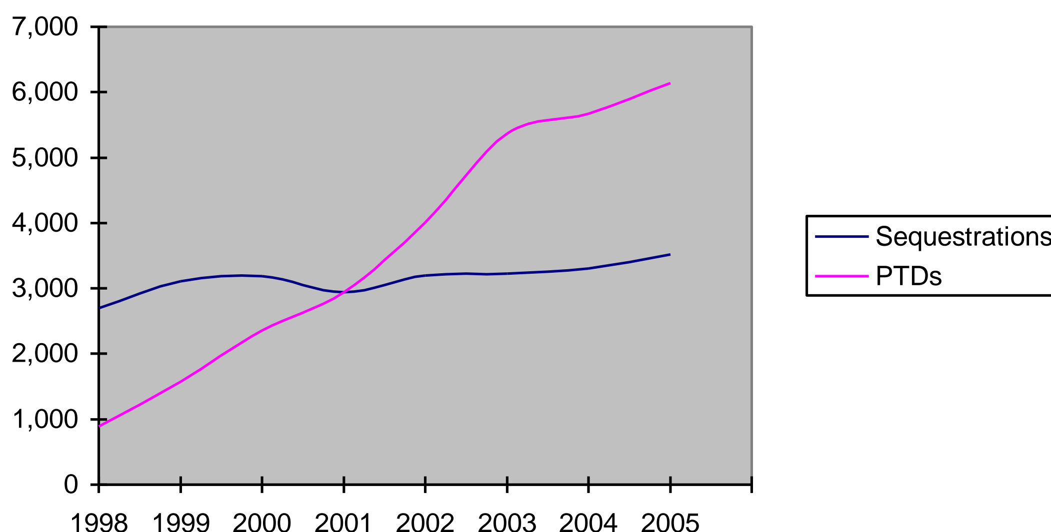


[261] *See further*, Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 AM. BANKR. L.J. 81 (2002); JACOB S. ZIEGEL, COMPARATIVE CONSUMER INSOLVENCY REGIMES — A CANADIAN PERSPECTIVE (Oxford and Portland, Oregon: Hart Publishing, 2003).

Fig. 2: Individual Insolvencies (Scotland)

YEAR	SEQUESTRATIONS	PTDs	TOTAL
1998	2,701	890	3,591
1999	3,110	1,574	4,684
2000	3,185	2,353	5,538
2001	2,938	2,946	5,884
2002	3,193	4,011	7,204
2003	3,228	5,363	8,591
2004	3,309	5,669	8,978
2005	3,521	6,141	9,662

Source: AIB



According to the most recent figures from National Statistics, the estimated population of Scotland is c 5,100,000. Thus, the approximate number of individual insolvencies per 1,000 of population was 1.76 in 2004 rising to 1.89 in 2005. The *per capita* incidence of formal personal insolvencies is therefore higher in Scotland (which contains only c 8.5% of the UK population) than it is in England and Wales (which contain c 88.6% of the UK population).

Fig. 2a: trust deeds and sequestrations expressed as a percentage of total personal insolvencies (Scotland)

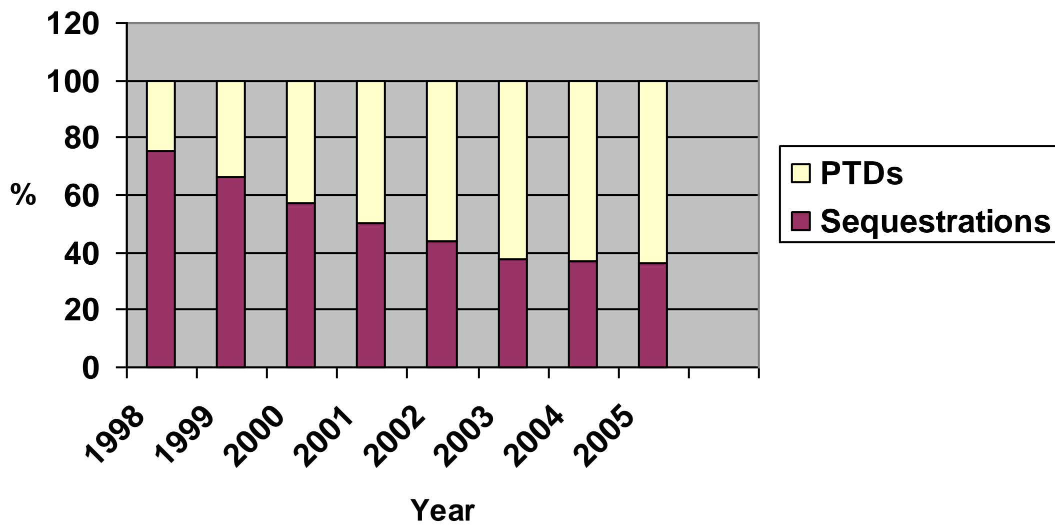
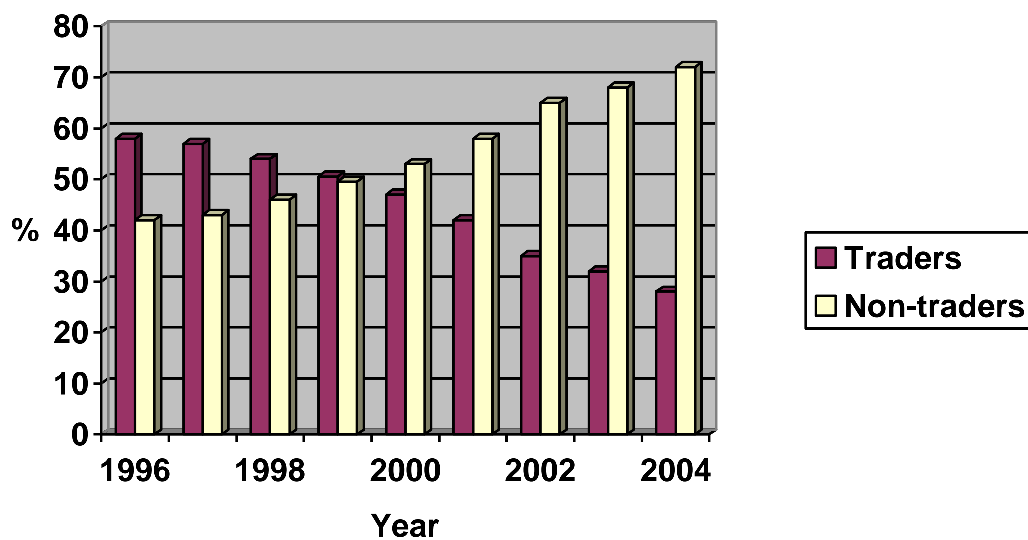


Fig. 3: Number of traders and non-traders declared bankrupt 1996-2004 expressed as a percentage of total numbers declared bankrupt (England and Wales)



Source: INSOLVENCY SERVICE ANNUAL REPORT & ACCOUNTS 2004-2005

No equivalent data is available for Scotland.