Notes for Guidance – Protected Trust Deeds Bankruptcy (Scotland) Act 2016

This guidance describes the general functions of Accountant in Bankruptcy and trustees in relation to their responsibilities regarding protected trust deeds (PTDs) which were granted on or after 30 November 2016[[1]](#footnote-1)..

Contents

[1. General principles 5](#_Toc187332013)

[1.1 Accountant in Bankruptcy 5](#_Toc187332014)

[1.2 Trust deeds 5](#_Toc187332015)

[1.3 Protected Trust Deeds 6](#_Toc187332016)

[1.4 Trustees under PTDs 6](#_Toc187332017)

[1.5 Supervision of trustees under PTDs 6](#_Toc187332018)

[1.6 The EU Regulation 7](#_Toc187332019)

[1.7 The sheriff 7](#_Toc187332020)

[1.8 When these notes apply 8](#_Toc187332021)

[2. Preparation of trust deeds 8](#_Toc187332022)

[2.1 Who can grant a trust deed 8](#_Toc187332023)

[2.2 Initial contact 9](#_Toc187332024)

[2.3 Pre-trust deed work by third party agent 9](#_Toc187332025)

[2.4 Advice to debtors 10](#_Toc187332026)

[2.5 Trust deed information document 10](#_Toc187332027)

[2.6 Debt Advice and Information Package 11](#_Toc187332028)

[2.7 Adequate time 11](#_Toc187332029)

[2.8 Section 167 (3)(c )Statement 12](#_Toc187332030)

[2.9 Liabilities 12](#_Toc187332031)

[2.10 Assets 13](#_Toc187332032)

[2.11 Exclusion of a dwelling-house from a trust deed 14](#_Toc187332033)

[2.12 Agreement in respect of a heritable property 15](#_Toc187332034)

[2.13 Contributions 17](#_Toc187332035)

[2.14 Contributions paid by an employer 20](#_Toc187332036)

[3. Dissemination to creditors 21](#_Toc187332037)

[3.1 Notice in Register of Insolvencies 21](#_Toc187332038)

[3.2 Documents to be sent to creditors 21](#_Toc187332039)

[3.3 Objections 23](#_Toc187332040)

[3.4 Registration of the trust deed 24](#_Toc187332041)

[3.5 Date of protection 25](#_Toc187332042)

[4. Effects of protection 26](#_Toc187332043)

[4.1 Application for bankruptcy 26](#_Toc187332044)

[4.2 Debt Arrangement Scheme 27](#_Toc187332045)

[4.3 Time to pay 27](#_Toc187332046)

[4.4 Diligence 27](#_Toc187332047)

[4.5 Sequestration petition – qualified creditors 27](#_Toc187332048)

[4.6 Secured creditors 28](#_Toc187332049)

[4.7 Petition by the trustee 28](#_Toc187332050)

[5. Removal of Protected Status 28](#_Toc187332051)

[5.1 Removal of Protection due to material error or irregularity 28](#_Toc187332052)

[5.2 Application of Review 29](#_Toc187332053)

[5.3 Effects of removal of protection 30](#_Toc187332054)

[6. Administration 30](#_Toc187332055)

[6.1 Contributions 30](#_Toc187332056)

[6.2 Assets 31](#_Toc187332057)

[6.3 Notification of Meeting To Be Held 33](#_Toc187332058)

[6.4 Unfair preference 33](#_Toc187332059)

[6.5 Claims 33](#_Toc187332060)

[6.6 Dividend payments 34](#_Toc187332061)

[6.7 Fee payable to the trustee 35](#_Toc187332062)

[6.8 Increasing the trustee’s fixed fee 36](#_Toc187332063)

[6.9 Preferred debts 36](#_Toc187332064)

[6.10 Lloyd’s insurance debts 37](#_Toc187332065)

[6.11 Supply of utilities to a business 37](#_Toc187332066)

[6.12 Accounting Intervals 38](#_Toc187332067)

[6.13 Retention of documents 39](#_Toc187332068)

[6.14 Change of Trustee 40](#_Toc187332069)

[6.15 Power to cure defects 41](#_Toc187332070)

[6.16 Electronic delivery of forms and notices 42](#_Toc187332071)

[7. Audit 42](#_Toc187332072)

[7.1 Liability for audit 42](#_Toc187332073)

[7.2 Audit and determination of fixed fee 43](#_Toc187332074)

[7.3 Income verification in all cases 44](#_Toc187332075)

[7.4 Determination outlays in all cases 44](#_Toc187332076)

[7.5 Outlays 45](#_Toc187332077)

[7.6 Audit fee 46](#_Toc187332078)

[8. Supervision of protected trust deeds 46](#_Toc187332079)

[8.1 Information and documents 46](#_Toc187332080)

[8.2 AiB directions 47](#_Toc187332081)

[8.3 Examples of AiB directions 48](#_Toc187332082)

[8.4 Sheriff’s directions 49](#_Toc187332083)

[8.5 Reports and offences 49](#_Toc187332084)

[9. Debtor’s discharge 49](#_Toc187332085)

[9.1 Discharge is conditional 49](#_Toc187332086)

[9.2 Discharge due to extenuating circumstances 50](#_Toc187332087)

[9.3 AiB review of creditors objection to debtor discharge 51](#_Toc187332088)

[9.4 Date of discharge 52](#_Toc187332089)

[9.5 Trustee’s refusal to discharge the debtor 53](#_Toc187332090)

[9.6 Reversion 54](#_Toc187332091)

[9.7 Effect of discharge 55](#_Toc187332092)

[10. Trustee discharge 55](#_Toc187332093)

[10.1 Discharge by creditors 55](#_Toc187332094)

[10.2 Deemed consent 55](#_Toc187332095)

[10.3 Effect of discharge 55](#_Toc187332096)

[10.4 Right of appeal 56](#_Toc187332097)

[10.5 Notice to AiB 56](#_Toc187332098)

[10.6 Creditor’s application 56](#_Toc187332099)

[10.7 Payment to creditors and consignation of funds 56](#_Toc187332100)

[Annexes 58](#_Toc187332101)

[Annex A - Information on the Register of Insolvencies 58](#_Toc187332102)

[Annex B – Documents to be retained by AiB 59](#_Toc187332103)

[Annex C – Statement for purpose of Section 167(3) 60](#_Toc187332104)

# General principles

## Accountant in Bankruptcy

Accountant in Bankruptcy (The Accountant) is a statutory officer appointed by the Scottish Ministers under Section 1 of the Bankruptcy (Scotland) Act 2016 (the “2016 Act”).

The Accountant is independent as regards the exercise of their statutory functions, although their directions and determinations can generally be appealed to a sheriff. Scottish Ministers, after consultation with the Lord President of the Court of Session, may give the Accountant general directions as to the performance of their functions in relation to all bankruptcies and PTDs, but they may not give directions in respect of any particular case.

The Accountant may employ members of their staff to carry out administrative functions on their behalf. The Accountant’s staff will be referred to as AiB, throughout these notes.

The Accountant also provides Notes for Guidance - Bankruptcy. This document is an additional set of notes dealing specifically with matters affecting trustees under PTDs.

## Trust deeds

A trust deed is a voluntary arrangement entered into by a debtor to convey assets to a trustee for the benefit of their creditors generally. A voluntary trust deed is not binding on any creditor who does not consent to its terms, due to this a trustee generally will seek to have a trust deed protected.

For the purposes of the 2016 Act, a trust deed must convey the debtor’s whole estate, with the exception of property which would not vest in a trustee in sequestration, to their trustee, see section 228(1) of the 2016 Act, with the exception of any dwelling house that it is excluded under section 228(1) of the 2016 Act.

The Accountant will not expect an insolvency practitioner to agree to be appointed as a trustee of a trust deed of a living individual and which is to be proposed for protection, if it can be demonstrated that the total contributions, calculated using the format of the Common Financial Statement, over the proposed period of the PTD are sufficient to repay the total debts (including interest) advised by the debtor prior to the granting of the trust deed.

## Protected Trust Deeds

A trust deed that meets specified conditions set out in [section 2](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/2-preparation-of-trust-deeds#publication-content) and [section 3](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/3-dissemination-to-creditors/3-dissemination-to-creditors#publication-content) of these notes may be protected. A PTD is binding on all creditors. However, a creditor who was not notified of the trust deed or who objected to the terms of the deed within the 5 week notification period can petition for the debtor’s sequestration at any point within the 5 week period the sheriff may award sequestration if this is deemed to be in the best interests of creditors. The petition can be lodged at any time if the creditor avers that the provision for the distribution of the estate is prejudicial to him or any class of creditor. The sheriff may award sequestration in these circumstances if the sheriff considers that the creditor’s averment is correct.

The rules governing PTDs granted on and after 30 November 2016 are set out in the Bankruptcy (Scotland) Act 2016.

The previous provisions continue to apply to any trust deed granted before 30 November 2016.

## Trustees under PTDs

The trustee must be a person who is qualified to act as an insolvency practitioner. Rules on the qualifications of insolvency practitioner are set out in Section 390 of the Insolvency Act 1986.

The trustee must not hold an interest opposed to the general interest of the debtor’s creditors.

## Supervision of trustees under PTDs

The supervisory authority of the Accountant is set out in section 200 of the 2016 Act. The supervisory functions include the supervision of the performance by trustees under PTDs of the functions conferred on them by the 2016 Act.

Details of the Accountant’s supervisory role are set out in section 8.

## The EU Regulation

The EU Regulation is Council Regulation (EC) No. 1346/2000 of 29th May 2000 on insolvency proceedings. The EU Regulation is intended to counter forum shopping, i.e. to avoid incentives for the insolvent parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position.

The trustee under a PTD is required to state whether the EU Regulation applies to the trust deed. The EU Regulation will apply if the debtor’s main centre of interests is in any EU member state (other than Denmark). A copy of the EU Regulation is available on the Insolvency Service website.

If the EU Regulation applies to a PTD, information about the insolvency proceedings in another EU member state will be recorded in the Register of Insolvencies (see [Annex A](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/annexes/annex-a-information-on-the-register-of-insolvencies#publication-content)).

The trust deed will be main proceedings for the purposes of the EU Regulations if the debtor’s centre of main interest is in the UK and will be territorial proceedings if the debtor’s centre of main interest is in another member state, but the debtor has an establishment in the UK and the trust deed has been granted prior to the opening of any main proceedings elsewhere.

An EU member state liquidator may petition a sheriff for conversion of a PTD into bankruptcy, see section 190 of the 2016 Act.

## The sheriff

The 2016 Act provide rights of application and appeal to a sheriff. Any reference to a sheriff means the sheriff who would have had jurisdiction in a petition for bankruptcy at the date on which the trust deed was granted.

## When these notes apply

These notes only apply to trust deeds granted by debtors on, or after, 30 November 2016.

The Bankruptcy (Scotland) 1985 Act (as amended), as in force immediately before 30 November 2016, and the Protected Trust Deeds (Scotland) Regulations 2013 continue to apply to any trust deed granted before that date.

# Preparation of trust deeds

## Who can grant a trust deed

A trust deed can be granted by a living individual, or by any of the entities that are entitled to apply for their own bankruptcy under Section 6 of the 2016 Act. A trust deed can be granted by a partnership or a limited partnership, but not by a limited company or limited liability partnership.

A trust deed must only be granted for a single estate. A trust deed granted on behalf of a partnership is granted in respect of the estate of that partnership. Insolvent partners must grant separate trust deeds if they wish to include their personal assets and liabilities. A trust deed granted by a partnership does not protect the partners from bankruptcy for their personal debts nor discharge them personally from liability for partnership debts.

A couple cannot grant a joint trust deed. This includes a married couple, civil partnership, or those in a similar relationship even if there is estate held in common with the other person.

A trust deed cannot be granted by a debtor if they:

* are or have been bankrupt and their trustee has not been discharged, (Section 164(2)(a) of the 2016 Act)
* are an entity referred to in Section 6(2) of the Act (a company registered under the Companies Act 2006 or an entity in respect of which sequestration is incompetent)
* have total amount of debts of less than £5,000

## Initial contact

On The trustee must ensure that:

* the debtor is interviewed, either in person or by telephone, by the insolvency practitioner or by a suitably experienced member of their staff, before the debtor grants the trust deed
* the debtor understands that the insolvency practitioner must maintain their independence and that there is a difference between the services provided in providing initial advice and the responsibilities as a trustee
* the debtor understands that a trust deed is an insolvency procedure
* the debtor understands that they must disclose full information about all their assets and financial circumstances
* a trust deed is an appropriate debt relief option in the debtor’s circumstances
* the debtor understands that they may lose their home if they an owner occupier
* the debtor understands that a trust deed must be administered for the benefit of creditors

## Pre-trust deed work by third party agent

With the exception of a single valuation of any specified heritable estate, a debt due to a third party (agent) for work completed prior to the granting of a trust deed, may not be claimed by the trustee as an outlay of the PTD, Section 183(6) of the 2016 Act refers. This applies regardless of when the invoice for this work is raised and submitted to the trustee, even if this is not until a date after the granting of the trust deed.

## Advice to debtors

Section 167(3) of the 2016 Act, requires that the insolvency practitioner must advise the debtor that granting a trust deed may:

* lead to bankruptcy
* cause problems with future credit
* mean that their house may be sold and they might have to move home, unless it is excluded under section 228(1) of the 2016 Act ([see section 2.11](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/28-exclusion-of-a-dwelling-house-from-a-trust-deed#publication-content))
* require the debtor to relinquish other property which they may own
* require payment of contributions
* affect business interests
* affect employment prospects
* become public information

Where a trust deed is granted after 20th January 2025, Section 167(3) also requires the insolvency practitioner to:

* provide the debtor with a copy of a debt advice and information package, and a copy of a trust deed information document (see section 2.5).
* give the debtor adequate time to consider the advice and material provided (see section 2.7).

The insolvency practitioner and the debtor must sign a joint statement confirming that this advice and material have been provided and that adequate time was provided to the debtor to consider this advice and material (see section 2.8).

There is no statutory form of statement and insolvency practitioners are free to use their own format to record this information. Alternatively, a form of statement is provided at [Annex C](#_Annex_C_–).

## Trust deed information document

From the 20th January 2025, before a trust deed is granted, the insolvency practitioner must provide the debtor with the trust deed information document which is referred to in [Section 167(3)(b)](https://www.legislation.gov.uk/asp/2016/21/section/167) of the Bankruptcy (Scotland) Act 2016. This can be found on the AiB website or by contacting the trust deed team.

## Debt Advice and Information Package

Additionally, before a trust deed is granted the insolvency practitioner must provide the debtor with a copy of the Debt Advice and Information Package which is referred to in section 10(5) of the [Debt Arrangement and Attachment (Scotland) Act 2002.](https://www.legislation.gov.uk/asp/2002/17/section/10)

Before agreeing to be appointed as the trustee of a trust deed, the trustee must be satisfied that a trust deed will benefit the debtor’s creditors in general. Section 228(1) of the 2016 Act refers.

## Adequate time

Section 167(5) of the Bankruptcy (Scotland) Act 2016 Act requires the trustee to have regard to any guidance issued by the Scottish Ministers about giving debtors adequate time to consider the advice and material. This section provides that guidance.

After the debtor has been given the advice described in [Section 2.4](#_Advice_to_debtors), the information document described in [Section 2.5](#_Trust_deed_information) and the debt advice information package described in [Section 2.6](#_Debt_Advice_and), the debtor must then be given adequate time to consider the advice and materials provided.

Scottish Ministers consider the appropriate adequate time period to be a minimum of 3 calendar days, after the insolvency practitioner has provided the advice and material described in Section 2.4, 2.5 and 2.6 of this guidance.

Depending on the debtor’s individual circumstances, for example where there are more complex vulnerabilities, it may be appropriate for debtor to have a period longer than 3 calendar days to consider the advice and materials provided. The insolvency practitioner may decide to provide the debtor with additional time should they consider it appropriate, however as long as a minimum of 3 calendar days’ time has been provided, the requirements of Section 167(3) will have been met.

The insolvency practitioner should be confident that the debtor has understood the advice they have provided. Insolvency practitioners should bear in mind that the debtor’s anxiety about their immediate financial circumstances may affect their ability to think through the longer term consequences of a trust deed.

For the avoidance of doubt, follow up discussions, clarification or questions raised by the debtor after the provision of the advice and materials required does not have an impact on the starting point or duration of the adequate time period.

In calculating the calendar day period, this shall exclude the day where the last of the requirements described in Sections 2.4 – 2.6 is fulfilled and the day of signing the trust deed.

In some circumstances the trustee may provide the debtor with the trust deed document prior to the end of the adequate time period. However, the debtor must not sign the trust deed document before the adequate time period has expired, in order to avoid granting a trust deed that will not meet the protection requirements.

*Example – The advice and materials required are sent by the insolvency practitioner on 20 January 2025. The 3 calendar day period would then be 21 – 23 January. The earliest that the debtor could sign the trust deed to fulfil the protection requirements would be 24 January 2025.*

## Section 167 (3)(c )Statement

After the processes described in section 2.4, to 2.7 of this guidance have been followed, a Section 167(3)(c) statement must be signed by the trustee and the debtor confirming that these processes have been followed. This statement should be provided to AiB immediately following the advertisement of the trust deed as described in [Section 3.1](#_Notice_in_Register).

## Liabilities

The debtor must provide information about their debts. Prior to the trust deed being granted, the trustee is required to take reasonable steps to assess the debtor’s current total liability and confirm they exceed £5,000. The trustee should also obtain the contact details of all creditors prior to the initial circular being issued to creditors.

Debtors should be advised that they must disclose details of all their creditors and that a notice will be recorded in the public Register of Insolvencies (ROI), which brings the trust deed to the attention of any other creditors. The debtor should be advised that any member of the public will be able to view these details.

## Assets

The debtor must provide information about all their assets, irrespective of whether the trustee does not propose to realise an asset. The trustee must ensure that they identify and circularise details about all the debtor’s assets which are conveyed as a result of the trust deed being granted and provide a reason why any asset is not to be realised in full during the administration of the trust deed.

Debtors should be advised that deliberate misinformation about, or non-disclosure of assets, may be an offence under common law.

It is particularly important to ensure that the debtor fully understands:

* the trustee can seek to realise the full value of any assets which they own
* this includes any equity in the debtor’s family home, unless the dwelling house is excluded under section 228(1) of the 2016 Act ([see section 2.11](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/28-exclusion-of-a-dwelling-house-from-a-trust-deed#publication-content))

The PTD will exclude any assets that would not vest in a trustee in bankruptcy.

The following types of asset are not conveyed to the trustee under a PTD:

* assets which are held on trust for a third party
* assets which are exempt from attachment under the Debt Arrangement and Attachment (Scotland) Act 2002. See [section 7.15 of Notes for Guidance - Bankruptcy](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/7-vesting-of-the-estate/715-effect-of-the-debt-arrangement-and-attachment-scotland-act-2002)
* most personal and occupational pension plans. See [section 7.7 of Notes for Guidance - Bankruptcy](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/7-vesting-of-the-estate/77-pensions)

The insolvency practitioner must record all excluded assets.

When an asset of the debtor is conveyed to the trustee, the trustee must seek to realise the full value of the asset unless the trustee can demonstrate that sufficient funds can be realised from other sources, in order to maximise the dividend payable to creditors.

## Exclusion of a dwelling-house from a trust deed

The Home Owner and Debtor Protection (Scotland) Act 2010 amended the definition of trust deed in the 2016 Act in order to include trust deeds which exclude the debtor’s dwelling-house, this being defined as the debtor’s sole or main residence over which there is a secured loan.

A trust deed will be able to meet the statutory definition if it excludes secured creditors who have agreed not to claim under the trust deed.

It is expected that consideration will be given to excluding the dwelling-house if:

* a secured creditor holds a security over it
* there is no, very little, or negative equity in the property

If the secured debt is excluded from the trust deed the terms of repayment are not affected, the secured lender will not vote in the trust deed, nor receive a dividend. The debtor will not be discharged from their secured debts.

To consider if a dwelling house should be excluded, the trustee must obtain the following information:

* a current valuation of the property
* a current redemption figure(s)

This information will be required in order to allow the trustee to assess if it is reasonable to consider excluding the secured debt, or if action will be required to realise equity in a property.

Where there is no security over a dwelling-house, no exclusion will be possible.

Following consultation with the debtor, if they wish to proceed with the exclusion of the dwelling-house, they must consent to the trustee acting on their behalf with any secured creditor(s) holding a security over the dwelling-house. This consent is obtained by the debtor signing Part 1 of Form 1 of the Protected Trust Deeds (Forms) (Scotland) Regulations 2016.

The secured creditor(s) must then agree not to make a claim for any of the debt in respect of which the security is held.

To obtain this consent the trustee must send the Form 1A to the secured creditor(s), together with copies of the valuation and redemption and request that they agree to the exclusion by signing Part 2 of the Form 1A.

If agreement is obtained the trust deed must contain the following statements:

* that subject to any exclusion under section 228(1) of the 2016 Act, that all the debtor’s estate (other than property listed in section 88(1) of the 2016 Act or which would be excluded from vesting in a trustee of a sequestrated estate under any other provision of that Act or other enactment) is conveyed to the trustee
* that the debtor agrees to convey to the trustee for the benefit of creditors generally any estate, wherever situated, which is acquired by the debtor for a period of 4 years beginning with the date the trust deed is granted and would have been conveyed to the trustee if it had been part of the debtor’s estate on the date on which the trust deed was granted
* details of any secured creditor who has agreed not to claim under the trust deed under section 228(1) of the Act
* details of the debt in respect of which a secured creditor has agreed not to claim

## Agreement in respect of a heritable property

In This section does not apply to the debtor’s dwelling house if it has been excluded from the trust deed by virtue of section 228(1) of the Act.

The trustee can agree not to realise any property that has been conveyed to him by virtue of the trust deed and to relinquish his interest in such a property and recall any notice of inhibition, on condition that either the debtor:

* pays an amount, by a specified date, as determined by the trustee
* pays additional monthly contributions after the end of the 48 month payment period, for a period specified by the trustee
* co-operates with the trustee

An agreement between the trustee and debtor to pay funds to remove the trustee’s interest in their property must be recorded on Form 1B, as recorded in the Protected Trust Deeds (Forms) (Scotland) Regulations 2016.

A copy of Form 1B is to be sent to the Accountant and every creditor known to the trustee.

The trustee must determine the amount and period of the contributions to be paid, based on a professional valuation of the heritable property and the redemption figures for any debt secured on the property as at the date of granting of the trust deed. A chartered surveyor or other suitably qualified third party should complete the valuation. The valuation should detail the maximum market value.

The valuation should be specified as the current Royal Institution of Chartered Surveyors (RICs), Red Book equivalent of open market, and not impose other restrictions such as a forced sale or the sale price expected for a transaction concluded within a truncated period. The valuation documentation, including detail of the work undertaken to provide the property valuation must be available if requested by creditors. It is important to recognise that 100% of the assets are conveyed to the trustee in a trust deed. This means that 100% of the difference between valuation and security needs to be shown in the debtor’s statement of affairs. Any differences between the full equity figure recorded in the statement of affairs and the amount that is expected to be realised, as recorded on the Form 1B, must be fully explained.

It is possible at the outset that the options for dealing with heritable property have not been fully established. This could be, for example, where re-mortgaging is an option to be explored prior to consideration of property sale or additional contributions in lieu of equity at the end of the PTD. In these circumstances, it is essential that creditors are presented with a complete and realistic assessment of the actions that may be undertaken by the trustee in relation to property.

The following should be provided as additional information to the Form 1B:

* trustee’s intentions with regard to sale of property to realise full equity and reasons for not proceeding with this course of action if appropriate
* plans for potential re-mortgaging including the timing of any proposed action and the evidence that will sought to verify that reasonable steps have been taken to obtain a mortgage. As an example, this could include the debtor providing decision notices for two separate applications for re-mortgage
* the proposed additional contributions that will be taken in lieu of equity, including the timing and duration of these
* a statement detailing the comparison between, the potential dividend to creditors should the equity be fully realised, against, the potential dividend, if additional contributions are taken after the initial 48 month period

In circumstances where the proposals in relation to heritable property remain unclear, the Form 3 should record the minimum expected return on the property.

It would only be appropriate to record a higher figure where firm arrangements have been made e.g. a re-mortgaging agreement is in place or another suitable guarantee to purchase an interest in the debtor’s property has been obtained. The Form 3 should not include a speculative figure against total realisations from heritable assets.

If the debtor does not comply with the Form 1B agreement, the trustee may withdraw from the agreement and sell the property.

If the property is sold, regardless of the circumstances that lead to the sale, the trustee will receive the full amount of available equity and the amount agreed and recorded in Form 1B no longer applies.

## Contributions

The trust deed must state that the debtor will be expected to make a contribution from their income at regular intervals for a minimum period of 48 months, unless an alternative arrangement has been agreed – for example a deed based on asset realisation only.

The trustee may agree a shorter period, if it can be demonstrated that sufficient funds (from assets realisation supplemented by contributions) will be paid to allow payment of the debtor’s debts (including interest accrued at the date the trust deed is granted) that have been substantiated through the adjudication of claims submitted by the creditor. In these circumstances, provision should also be made for the payment of statutory interest accruing from the date the trust deed was granted and the costs of administering the PTD.

The debtor must provide information about their income and expenditure. The trustee will assess a reasonable level of contribution based on calculation of the debtor’s individual income and expenditure and any excess income they may have. This assessment must take into consideration the style and format of the Common Financial Statement, which is a recognised tool for determining acceptable amounts for a debtor’s expenditure on items, and services and for determining the amount of contribution that the debtor can pay.

No contribution can be taken from a debtor’s Universal Credit or Social Security benefits, but the trustee may take account of such payments when determining the amount of a contribution. The contribution will be derived from the element of income that is in excess of the benefits received. Section 181(6) of the 2016 Act refers. No contribution can be taken from a debtor’s tax credits, Universal Credit, or other Social Security benefits, which includes allowances and payments specified in the Social Security (Scotland) Act 2018 and the Scottish Child Payment Regulations. However, the trustee must take account of such payments when determining the amount of a contribution. A contribution amount can only be derived from the element of income that is in excess of the benefits received. Section 181(6) of the 2016 Act refers.

[Appendix A of the Notes for Guidance - CFT](https://www.aib.gov.uk/publications/notes-for-guidance-common-financial-tool/appendix-a-income-sources-from-which-a-contribution-can-be-taken) records the types of income from which a contribution can, and cannot, be taken.

Trustees should exercise care when taking account of any other parties’ income when determining if the debtor can pay a contribution, as there is no legal liability on any third party to contribute to the debtor’s PTD.

The trustee must inform creditors if all or part of the contribution is to be made by a third party. The trustee must inform creditors if an enforceable agreement has been entered into, or not. If not, creditors must be advised that the funds offered and paid by a third party, cannot be relied on, or guaranteed to creditors. If an agreement has been entered into, a copy should be submitted to AiB for retention. In all cases, the Accountant will require details of the third party’s name.

A trustee should not accept payment from a third party if the third party is also subject to a Debt Payment Programme approved under the Debt Arrangement Scheme or a statutory debt relief product and such a contribution may prejudice payments made to benefit their creditors.

Contributions should not be sought from any Scottish Welfare Fund grant paid to a debtor. These grants are awarded only in order to avoid serious damage, or risk to the health or safety of the recipient or their family and should not be taken by the trustee for payment of historic debts.

If a debtor has received a redundancy severance payment post granting of the trust deed, it is important that the trustee identifies if any aspect of the payment is conveyed to the trustee and, is income in lieu of wages. Detailed guidance on redundancy severance payments can be found in [Notes for Guidance - Bankruptcy](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/7-vesting-of-the-estate/77-pensions).

Pay in lieu of notice (PILON) should be considered income of the debtor over the period it has been paid for, when considering if there is the need to amend the debtor’s PTD contribution amount.

Statutory redundancy pay should be assessed in the period in which it is received.

The debtor should be advised that:

* an adequate level of contributions may be required in order to ensure that the trust deed makes an acceptable proposal for creditors
* the level of contributions can be varied up and down if the debtor’s circumstances change
* the period of contributions can be extended or shortened if the debtor’s circumstances change, or they miss any contribution payments
* if the debtor cannot pay a contribution, they must contact their trustee immediately
* if they fail to pay their contributions, their trustee may notify their employer and have the contribution deducted from their wages
* if they fail to pay their contributions, their trustee may apply for their bankruptcy

The level of contributions, frequency and the number of contributions to be made must be specified and agreed by the debtor, before the trust deed is granted.

If the total amount of contributions to be paid into the trust deed over 48 months will equal, or exceed, the total amount of the debtor’s debts, at the date the trust deed was granted, the trust deed cannot become protected. Section 168(4) of the 2016 Act refers.

## Contributions paid by an employer

If a debtor fails to pay two consecutive contribution payments to their trustee from their income, the trustee can request that the debtor instructs their employer to pay the required contribution payments from the debtor’s earnings, direct to the trustee.

The debtor will give this instruction to their employer using Form 4A, as recorded in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016.

If a debtor refuses to complete Form 4A, the trustee may direct the debtor’s employer to pay the required contribution payments from the debtor’s earnings, direct to him. The trustee will give this instruction to the employer using Form 4B, as recorded in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016.

If, at any time, the amount of the contributions paid direct by the employer to the trustee is to be varied, only the debtor may instruct the employer to vary the amount using Form 4C, as recorded in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016.

If the debtor refuses to complete and submit Form 4C to his employer, the trustee must consider if this non-cooperation is sufficient grounds to end the PTD and either, not discharge the debtor and/or submit a petition for the debtor’s bankruptcy.

Where an employer, without good cause, fails to make a payment due under an instruction the employer will be liable to pay the amount that should have been paid, direct to the trustee and he will not be entitled to recover these funds from the debtor.

The employer may charge a fee for making payments from the debtor’s income to the trustee. The fee can be deducted from the balance of earnings due to the debtor, post payment of the contribution to the trustee. The amount of the fee can be the equivalent to the fee chargeable under the terms of [section 71 of the Debtors (Scotland) Act 1987.](https://www.legislation.gov.uk/ukpga/1987/18/section/71)

The trustee must, without delay, notify the employer in writing, if the instruction to pay is to be recalled and specify when the last contribution should be paid to the trustee.

# Dissemination to creditors

## Notice in Register of Insolvencies

After the debtor has delivered the trust deed to the trustee, the trustee must, without delay, submit to AiB, preferably utilising the electronic portal system (ASTRA), a completed Form 1 notice, as recorded in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016, to be published by registration in the ROI.

Following the completion of the Form 1, please provide AiB with a copy of the Section 167(3)(c) statement as described in [Section 2.8](#_Section_167_(3)(c) of this guidance.

## Documents to be sent to creditors

Not later than seven days after the publication of the notice in the ROI, the trustee must send the following documents to every known creditor, other than a secured creditor who has consented in terms of section 166(2)(c) of the 2016 Act to enable the creditor to submit a claim:

* a copy of the trust deed
* a copy of the ROI notice
* a Form 2, as recorded in the Protected Trust Deeds (Forms) (Scotland) Regulations 2016

A statement of the debtor’s affairs which must contain the following:

* a list of the debtor’s assets and liabilities
* a statement of the debtor’s income and expenditure, at the date the trust deed was granted, in the style and format of the Common Financial Statement
* a statement as to the extent of any of the debtor’s assets or income which are not conveyed to the trustee and are therefore, excluded from the PTD
* the number and value of contributions expected from the debtor
* a statement about the EC Regulation ([see section 1.7](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/1-general-principles/17-the-eu-regulation#publication-content))
* a statement whether the creditors are expected to receive a dividend, and if they are, the expected amount of dividend to be paid
* where applicable, the effect of any exclusion of the dwelling house may have on the dividend they may receive
* the rights of the creditor to see copies of valuations held by the trustee which relate to an asset of the debtor and statements showing the amount(s) owed by the debtor under a security and documents recording the income of the debtor
* a copy of any agreement on heritage, Form 1B
* an explanation of the pre-conditions of protection
* an explanation of the consequences of protection
* details of any PTD under which, in the 6 months preceding publication of the notice in the Register of Insolvencies, the debtor has been discharged or refused a letter of discharge in terms of section 184(1) or (8)of the 2016 Act
* where a secured creditor’s consent has been obtained in terms of section 166(2)(c) of the 2016 Act , a statement containing a valuation made by a third party of the debtor’s dwelling house (or part thereof) which is excluded from the trust deed and the amount of the debt owed, in respect of the security
* a statement in Part 1 of Form 3, as recorded in the Protected Trust Deeds (Forms) (Scotland) Regulations 2016, detailing the trustee’s anticipated realisations from the PTD

Creditors must be provided with an explicit assessment of each debtor’s income and expenditure and the resultant contribution, even where the overall household position has been considered. This will ensure that the trust deed was only granted for a single estate and based on a debtor’s income and expenditure. The Accountant will require this evidence held by the trustee to verify the income or expenditure, when considering whether to grant protection.

This does not prevent creditors from being presented with a full picture of household income and expenditure where this is necessary. These situations can be particularly complex and in certain circumstances, the rationale for assessing an individual’s income and expenditure can be illustrated most appropriately in the context of the overall household situation.

However, if the trustee does not present creditors with an accurate calculation of the debtor’s individual financial status, the trust deed will not have met the condition of section 170 of the 2016 Act and may therefore, not be protected and registered in the ROI.

There is no statutory form of statement of affairs and trustees are free to use such format as seems best to them.

## Objections

The day following the date of publication in the ROI is considered the first day of the “relevant period” for submission of creditors’ responses. The relevant period is five weeks. If a trust deed advertisement is published on a Tuesday, the relevant period ends at midnight on the following fifth Tuesday.

A creditor’s response must be received by the trustee before the end of the relevant period for it to be considered.

AiB’s trust deed case management system ASTRA, and the ROI, are updated on the day after the end of the five week relevant period. Creditor responses received after the end of the relevant period cannot be recorded on ASTRA.

The trust deed may be protected if, during the relevant period, the creditors who submitted objections:

* do not constitute a majority in number of the creditors
* do not constitute one third or greater in value of creditors

A creditor who has not submitted a response by the end of the last day of the relevant period, is deemed to have acceded to the trust deed being granted protected status, in accordance with Section 170(2) of the 2016 Act.

The value of creditors is determined by the value of their claims; see section 228(6) of the 2016 Act. This does not require that the creditors claim be submitted within the relevant period.

If there are insufficient objections to prevent the protection of a trust deed at the end of the relevant period, any creditor who was sent the documents (referred to in [section 3.2](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/3-dissemination-to-creditors/32-documents-to-be-sent-to-creditors#publication-content)) but did not respond, will be deemed to have acceded to the trust deed.

Where a request has been made to exclude the dwelling-house and the creditors agree to protect the trust deed the dwelling-house will not be conveyed to the trustee.

Where a request has been made to exclude the dwelling-house and the creditors refuse to protect the trust deed the trust deed will remain unprotected and the trustee should consider what steps are necessary and appropriate to be taken in those circumstances.

## Registration of the trust deed

As soon as reasonably practical after the end of the period of five weeks from the date of publication in the ROI and in any event no later than 4 weeks after the expiry of the relevant period, the trustee must send to AiB:

* a copy of the trust deed (signed, witnessed and dated)
* a copy of any agreement obtained regarding the exclusion of a secured lender and a copy of Form 1A from each secured creditor or a statement to the fact no such agreement has been obtained, as referred to in [section 2.11](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/28-exclusion-of-a-dwelling-house-from-a-trust-deed#publication-content)
* a statement by the trustee that any creditor objections received in writing do not constitute a majority in number or one third or more in value
* a copy of the statement of the debtor’s affairs sent to creditors and referred to in [section 3.2](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/3-dissemination-to-creditors/32-documents-to-be-sent-to-creditors#publication-content) section 170(1)(d) of the 2016 Act
* a copy of the joint statement referred to in [section 2.4](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/24-advice-to-debtors#publication-content) section 167(3)(c) of the 2016 Act
* a copy of any agreement on property referred to in [section 2.12](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/29-agreement-in-respect-of-a-heritable-property#publication-content) (Form 1B) section 175(1) of the 2016 Act
* the statement of anticipated realisations and application for registration in the register of insolvencies, Part 1 and Part 2 to Form 3 in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016
* a statement that the trustee has assessed the debtor’s expenditure against the trigger figures published as part of the Common Financial Statement, to include an explanation if the trigger figures have been exceeded
* the trust deed will not be protected if it is not presented to AiB for protection within the statutory four week period. If the trust deed is not protected for any reason, and the trustee wishes the trust deed to be protected. They may apply to the sheriff for a direction to re-submit a Form 1 to the AiB for publication in the ROI
* re-present the trust deed for protection within four weeks following the end of the five week relevant period

If a trust deed is presented for a second time, as a result of an action, or inaction, of the trustee, the cost of re-presenting the trust deed may not be paid out of funds held in the trust deed estate without a direction being sought from the sheriff in accordance with Section 189 of the 2016 Act.

## Date of protection

On receipt of every document which the trustee must send to AiB, AiB will consider if:

* the conditions set out in section 164 to 170 of the 2016 Act have been met
* the debtor’s recorded income and expenditure is appropriate, having regard to the Common Financial Statement and any explanation that has been given by the trustee, as to how and why an income and/or expenditure figure has been determined

If AiB is satisfied that all the required conditions have been met, the AiB will register the trust deed in the ROI.

A trust deed shall have protected status from the date that the trust deed is registered by AiB in the ROI.

If AiB is not satisfied that a trust deed meets all the conditions for protection, the trust deed will not be registered in the ROI and therefore, not protected.

AiB will notify the trustee of the decision to registration of the trust deed in the ROI, giving the reason(s) why the trust deed will not be protected. AiB will notify this decision within 7 days of receiving all relevant information from the trustee.

It is the responsibility of the trustee to inform the debtor and all known creditors of AiB’s decision to either; register and protect the trust deed, or to refuse to protect the trust deed. This must be completed within 7 days of AiB’s decision.

The trustee, debtor and/or creditors may appeal to the sheriff AiB’s decision to refuse to protect a trust deed where that decision has been on the grounds that the Accountant is not satisfied that the expenditure allowed or the contribution from income is appropriate.

If on appeal under section 188(1)(a), a sheriff rules that the trust deed does meet the conditions for protection, the Accountant will register the trust deed in the ROI, with effect from the date the trust deed was first presented to the Accountant for registration, or a date specified by the sheriff.

# Effects of protection

## Application for bankruptcy

From the date on which the trust deed becomes protected, until the date of termination of the trust deed, the debtor cannot apply for their own bankruptcy (sequestration). See section 172(1)(b) of the 2016 Act.

## Debt Arrangement Scheme

From the date on which the trust deed is granted, until the date of termination of the trust deed, the debtor cannot apply for a Debt Payment Programme under the Debt Arrangement Scheme.

See [Regulation 21(2)(b) of the Debt Arrangement Scheme (Scotland) Regulations 2011](https://www.legislation.gov.uk/ssi/2011/141/regulation/21/made), as amended.

## Time to pay

A time to pay direction or a time to pay order ceases to have effect from the date on which the trust deed was granted, see [section 12 of the Debtors (Scotland) Act 1987](https://www.legislation.gov.uk/ukpga/1987/18/section/12).

## Diligence

Granting a trust deed constitutes apparent insolvency. On protection of a trust deed, any earnings arrestment, current maintenance arrestment or conjoined arrestment order (subject to section 173(3) of the 2016 Act) ceases to have any effect. It is not competent for a creditor to execute and try and enforce an earnings arrestment or make a conjoined arrestment order, after the date of protection.

Section 173 of the 2016 Act refers.

## Sequestration petition – qualified creditors

A creditor who notifies the trustee of their objection to the trust deed becoming protected before the end of the relevant period (see [section 3.3](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/3-dissemination-to-creditors/33-objections#publication-content)), or a creditor who has not been notified about the trust deed may, during the relevant period, petition a sheriff for the debtor to be made bankrupt.

A creditor who has objected to the terms of the trust deed can petition for bankruptcy after this, only if they aver that the provision for distribution of the estate is or is likely to be unduly prejudicial to a creditor or class of creditors, or if the trustee refuses to discharge the debtor under the trust deed.

## Secured creditors

Where the secured creditor(s) has agreed to the exclusion of the dwelling-house they will not be entitled to:

* make a claim in respect of the secured debt
* do diligence against assets covered by the trust deed
* petition for the debtor’s sequestration

## Petition by the trustee

The trustee can petition a sheriff for a debtor to be made bankrupt under section 2(1)(b)(iv) of the 2016 Act if:

* the debtor has failed to comply with an obligation under the trust deed
* a reasonable requirement or instruction of the trustee
* the trustee avers that bankruptcy is in the best interest of creditors

# Removal of Protected Status

## Removal of Protection due to material error or irregularity

If the trustee becomes aware within 3 months of the protected date that any of the conditions set out in in sections 164, 165, 166(2) (where it applies) and 167 to 170 of The Act were not met due to a material error or material irregularity, they must notify AiB as soon as is reasonably practicable.

AiB must then decide whether the trust deed should cease to have protected status. In making this decision, AiB will consider whether the nature of the material error or irregularity should have prevented the trust deed from gaining protected status from the outset, the impact on creditors, and the consequences of removing protection. Where AiB decides that protection should be removed under Section 171A of The Act, AiB must notify the trustee and the debtor of that decision, outlining the grounds for the decision and the date of decision.

Once the notification is received by the trustee, the trustee must then notify all known creditors as soon as reasonably practicable (excluding any secured creditor mentioned in paragraph (b)(ii) of the trust deed definition, who has agreed not to claim under the trust deed for any of the debt in respect of which the security is held).

The trust deed will cease to have protected status after 14 days of the AiB notice, unless a review application is received by AiB, see Section 5.2. If no review is received, AiB must remove the entry for the trust deed on the register of insolvencies and the protected status will cease.

## Application of Review

Either the trustee, debtor or any creditor can apply to the AiB for a review of their decision to remove the protected status of a trust deed. The application must be submitted in writing, explaining the reasons for the review, supported by any evidence the applicant wishes to be taken into consideration within 14 days of the date of notification of AiB’s decision.

If an application is received, the trust deed will remain protected until the outcome of the review, which must be made within 21 days of receipt of the application.

Once the review decision has been made, AiB must notify, as soon as reasonably practicable, the trustee, debtor or if relevant, creditor who made the application for review.

Once notification of the review decision is received by the trustee, the trustee must then notify all known creditors as soon as reasonably practicable (including any secured creditor mentioned in paragraph (b)(ii) of the trust deed definition, who has agreed not to claim under the trust deed for any of the debt in respect of which the security is held).

If the review decision is to revoke the initial AiB decision to remove the protected status, that initial decision has no effect, and the trust deed will remain protected.

If, however, the review decision is to confirm the initial AiB decision, the trust deed will cease to have protected status 21 days after the date of notification of the review decision, unless an appeal to the Sheriff is made under Section 188 of the Bankruptcy Act. The sheriff’s decision is final.

## Effects of removal of protection

A trust deed whereby the protection was removed following a decision by AiB under Section 171A does not:

* invalidate any actions which were carried out by the trustee between the time of protection and the date a decision to remove the protection was made.
* prevent the trust deed from re-attaining protected status again providing the conditions in Sections 164 – 170 are met.
* prevent the debtor from seeking an alternative debt solution or applying for a moratorium.

If the trust deed is re-presented for protection, as a result of an error or irregularity, the cost of re-presenting the trust deed may not be paid out of funds held in the trust deed estate without a direction being sought from a sheriff in accordance with Section 189 of the 2016 Act.

# Administration

## Contributions

In the determination of the amount of contribution the trustee may seek from a debtor, the trustee should assess the debtor’s expenditure against the trigger figures for expenditure as published as part of the Common Financial Statement.

A trustee can access the Common Financial Statement through the [Common Financial Tool](https://www.aib.gov.uk/systems/common-financial-tool) or by registering with AiB to obtain authorisation.  Further information can be found on the [Common Financial Statement Section](https://www.aib.gov.uk/debt-solutions/common-financial-tool/common-financial-statement-cfs) of the AiB website.

Further to [section 2.13](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/210-contributions#publication-content) a trust deed will not get protected status if the expected total amount of debtor’s contributions over the payment period (48 months – calculated using 48 monthly payments or the equivalent thereof) will be equal to, or greater than, the total amount of the debtor’s ordinary debts (including interest to date of granting the trust deed). Section 168(4) of the 2016 Act refers. In calculating the amount of the debtor’s contribution from income, to determine if the total contributions over the payment period will be equal to, or greater than, the total amount of the debtor’s ordinary debts (including interest to date of granting the trust deed), the trustee must use the whole of the debtor’s surplus income in the Trustee

Whilst no contribution can be paid from a debtor’s tax credits, Universal Credit, or other Social Security benefits, including allowances and payments specified in the Social Security (Scotland) Act 2018 and the Scottish Child Payment Regulations, the value of benefits and credits must be taken into consideration when determining if the debtor can afford to pay a contribution out of any other income.

The trustee should review the debtor’s income and expenditure regularly, at least annually. If the debtor’s income increases, or expenditure decreases, the level of contribution should be increased proportionately. If the debtor’s circumstances change, it may be necessary to vary the amount of any contribution or the period over which contributions are payable.

## Assets

Where the dwelling-house has not been considered for exclusion, a professional valuation of any property should be carried out at soon as practicable before the trust deed is presented to creditors for protection.

The cost of a single valuation of any specified heritable estate completed before the granting of a trust deed can be claimed as an outlay of the trust deed.

The trustee must be satisfied that they have obtained current valid information regarding the outstanding amounts of all secured loans.

The trustee must reach an agreement with the debtor on how equity in a property will be realised during the period of the PTD. If this agreement involves the payment of a sum at an agreed date or through contributions that will be taken based on an agreed amount of equity, this agreement is to be recorded using Form 1B and Part 1 of Form 3 to the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016. The equity figure used to calculate the sum realised is “frozen” provided that the debtor complies with the agreement that has been reached and documented on the Form 1B. This agreement ceases to apply if the property is sold. Further information relating to the use of Form 1B is set out at [section 2.12 – Agreement in respect of heritable property.](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/2-preparation-of-trust-deeds/29-agreement-in-respect-of-a-heritable-property#publication-content)

A trustee must be satisfied of the available equity to be realised from a property, prior to the initial circular being issued to creditors. The trustee should provide information to creditors in the circular explaining the valuation basis used in relation to property.

If the debtor does not comply with the terms of the agreement recorded on Form 1B, it is the responsibility of the trustee to take any appropriate action to realise the equity in the debtor’s property, in order to maximise the dividend payable to creditors in general.

If the trustee is required to sell a property, the trust estate is entitled to receive the full amount of equity realised from the sale, regardless of the circumstances that have resulted in the sale of the property.

The trustee should not allow a property to be relinquished back to the debtor, if it is calculated that there is equity which, if realised, will generate an increase in dividend payment to creditors, unless the trustee can demonstrate why it is not cost effective to realise the equity.

The Accountant recommends that the trustee agrees with the debtor how he will realise the equity in the property of a debtor as early as possible. This is in line with [section 10.2 of the Notes for Guidance - Bankruptcy](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/10-administration-of-the-estate/102-heritable-property).

Where a dwelling-house is not subject to a Form 1B agreement and the value of the property increases, before being sold during the term of the trust deed, the full amount of equity released will be conveyed to the trustee. This should be narrated as part of the agreement on Form 1B.

## Notification of Meeting To Be Held

The Homeowner and Debtor Protection (Scotland) Act 2010 extends the provisions of Section 113 of the 2016 Act, in relation to the family home, to trustee’s acting under a trust deed. See [section 10.2.6 of the Notes for Guidance - Bankruptcy](https://www.aib.gov.uk/publications/notes-for-guidance-bankruptcy-scotland-act-2016-as-amended/10-administration-of-the-estate/102-heritable-property#main).

Before commencing proceedings to obtain the authority of a sheriff under section 113(1)(b) of the 2016 Act the trustee must give notice of the proceedings to the local authority in whose area the home is situated. This notice should be given on Form 22 of the Bankruptcy (Scotland) Regulations 2016.

## Unfair preference

The trustee under a PTD or the creditor of a debtor, who has granted a trust deed which has become protected, is entitled to challenge an unfair preference, a capital sum on divorce or a gratuitous alienation under the same rules applying to bankruptcy.

## Claims

The Creditors should submit claims on Form 2 of the Protected Trust Deeds (Forms) (Scotland) Regulations 2016. The trustee should encourage known creditors to claim and where necessary issue a reminder in respect of outstanding claims. However, it is the creditor’s responsibility to submit a claim.

The trustee will be required to adjudicate on all creditors’ claims prior to payment of an interim or final dividend. Trustees can apply some discretion when accepting creditor claims. The Accountant considers it reasonable to accept claims where the sum claimed is within a 10% tolerance of that included in the documentary evidence provided.

When a local authority makes a claim for unpaid council tax, the trustee should confirm the period for which the unpaid council tax is due.

A full year’s council tax is payable from the start date of the council tax year. Therefore, a local authority may submit a claim for a full year’s council tax amount if the debtor was made bankrupt before the end of the council tax year.

A debtor may pay their council tax liability for a period included in the local authority’s claim. If this is the case, the local authority should revise their claim down accordingly, prior to the trustee’s adjudication and distribution. Trustees should be aware that a reduction may be required to a local authority’s claim, prior to adjudication.

If a local authority has submitted a claim for a whole council tax year, this should remove the requirement for the debtor to pay council tax for that year. However, some local authorities do expect the debtor to continue to pay their council tax, regardless if a payment period is included in their claim. The trustee should establish if this is the case. If council tax does not have to be paid by the debtor at any time during their bankruptcy, the trustee should review the debtor’s contribution calculation, as non-payment of council tax may increase the debtor’s surplus income from which a larger contribution can be paid.

## Dividend payments[[2]](#footnote-2)

If the trustee has sufficient funds from the debtor’s estate, he must pay dividend to creditors after 12 months from the date the trust deed was granted and every three months thereafter (the dividend period). There is no statutory requirement for the trustee to obtain a Form of Receipt from a creditor prior to payment of a dividend and trustees must not insist on the completion of such a form, as a pre-condition of dividend payment.

An interim dividend must be paid when after taking account of:

* the trustee’s fees and outlays to date
* an allowance has been made for any future contingencies
* whether there are funds left to pay a minimum of 5p/£ to creditors on adjudicated claims which have been accepted

The adjudication process should be completed within 12 months of the date of granting of the trust deed. Although the Section 176 of the 2016 Act stipulates the conditions under which an interim dividend must be paid, it is considered good practice for trustees to pay an interim dividend where a meaningful sum can be paid, even if this falls short of the 5p/£ sum set out in legislation. In particular, PTDs involving significant levels of debt could involve the payment of large sums to creditors even although these would represent less than 5p/£ when considering the total debt.

If an interim dividend can be paid:

* it must be paid within six weeks after the end of the first 12 month period of the PTD
* within six weeks after every subsequent 3 months, beginning with the end of the previous dividend period

Section 176 of the 2016 Act refers.

Section 181 of the 2016 Act allows a debtor or creditor to request an audit within 2 weeks after receipt of the trustee’s annual accounts. Where a dividend will be payable and the timing corresponds with the statement, the trustee should allow for the 14 day audit request period to lapse when issuing the annual statement to allow any dividend to be paid before the end of the 6 week period.

## Fee payable to the trustee

The trustee of a PTD is entitled to a fixed fee for the full administration of a PTD and an additional fee, based upon a percentage of the total assets and contributions that the trustee has realised during the period of the PTD. Section 183 of the Act refers.

The amount of the fixed fee and the percentage figure, upon which the additional fee will be calculated, must be recorded on Form 3, Part 1 and circulated to creditors during the relevant five week period and then submitted to AiB, with Part 2 of Form 3, when the trust deed is presented for protection.

The trustee may claim as an outlay of the PTD, any audit fee charged by the Accountant during the administration of the PTD.

The trustee may not claim as an outlay of a PTD, the cost of any work undertaken prior to the granting of the trust deed irrespective of when the invoice for this work is submitted to the trustee. Any debt due to a third party for such work does not rank higher than any other creditor’s in the PTD.

## Increasing the trustee’s fixed fee

In the event of an unforeseen circumstance, the trustee can seek approval for an increase in their fixed fee.

To obtain approval, the trustee must first notify all known creditors of the reason why an increase is required to their fixed fee and the amount that they wish to increase their fee by.

The trustee must receive the approval of a majority in value of the notified creditors, to have permission to increase their fee. Creditors should respond to the request for approval within 21 days of the date the request is issued.

If the trustee does not get the required approval from creditors and a majority of creditors in value have not notified the trustee that they refuse to approve the increase in fee, the trustee may ask the Accountant to approve their fee increase. In considering this the Accountant shall consider the number of creditors based on adjudicated and accepted claims.

The Accountant shall only approve an increase in the fixed fee where matters could not be reasonably foreseen by the trustee at the date of the trust deed being signed. Factors including instances of debtor’s defaulting on contribution payments or other instances of non-compliance or routine matters in relation to the administration of a PTD will not be regarded as issues that could not be reasonably foreseen. An increase in the fixed fee shall not be agreed in those circumstances.

The Accountant will decide if the fee increase can be granted and the amount of any increase.

If the trustee is unhappy with the Accountant’s final decision on their application to increase their fee, they may appeal to the sheriff under section 188(1)(b) of the Act.

## Preferred debts

Any debt that would be preferred under the 2016 Act in a bankruptcy should be treated as preferred under a PTD, so that the PTD does not prejudice the interest of any class of creditors.

## Lloyd’s insurance debts

A Trustees should note that regulation 33(7) of the Insurers (Reorganisation and Winding Up) Regulations 2004 as modified by [regulation 40(11) of the Insurers (Reorganisation and Winding Up) (Lloyd's) Regulations 2005](https://www.legislation.gov.uk/uksi/2005/1998/regulation/40/made), requires that Schedule 4 to the 2016 Act should be read as if, after paragraph 4, there is included paragraphs 4A and 4B if an underwriting member or former member of the Society incorporated by Lloyd’s Act 1871 grants a trust deed for creditors in Scotland.

**Paragraph 4A**

Whether or not provision is made in any trust deed, where such a trust deed includes a composition in satisfaction of any insurance debts of a member or former member and a distribution to creditors of some or all of the assets of that member or former member in the course of or with a view to meeting obligations of his insurance business carried on at Lloyd's, the trustee may not provide for any insurance debt to be paid otherwise than in priority to such of his debts as are not insurance debts or preferred debts within the meaning of section 129(2).

**Paragraph 4B for the purposes of paragraph 4A**

* insurance debt has the meaning it has in the Insurance (Reorganisation and Winding Up) Regulations 2004
* member and former member have the meaning given in regulation 2(1) of the Insurers (Reorganisation and Winding Up) (Lloyd's) Regulations 2005.

The trustee may not provide for any insurance debt (as defined in regulation 2 of the Insurers (Reorganisation and Winding Up) Regulations 2004) to be paid otherwise than in priority to such of his debts as are not insurance debts or preferred debts within the meaning of section 129(2).

## Supply of utilities to a business

Section 222 of the 2016 Act extends to trustees under PTDs. This provision allows the trustee to request a supply of gas, electricity, water or telecommunications for the purposes of the debtor’s business. This only applies where the debtor continues to run a business and includes not-for-profit businesses.

A utility supplier can require the trustee to accept personal liability for the on-going costs of supply but cannot make supply condition on the payment of the debtor’s outstanding liability for arrears. This means that a utility supplier cannot effectively create a preference as a condition of allowing a business to continue. This may mean that the debtor’s business is able to continue trading where it is in the best interest of creditors of the debtor to do so.

## Accounting Intervals

The trustee should prepare, at intervals of not more than 12 months from the date on which the trust deed was granted, the trust deed accounts and send these, no later than six weeks after the end of each accounting interval, to:

* the debtor
* each known creditor
* AiB

At the same intervals, the trustee must send to the AiB, the debtor and each creditor, a report in Form 4 to the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016. Section 181 of the Act refers.

The trustee is required to make Statements on Form 4 to confirm the position to creditors regarding interim dividends and the expected final dividend.

If the expected final dividend figure has varied at any time to less than 80% of the final dividend figure that was first declared to creditors and to AiB using Form 3, the trustee must provide, using Form 4, the full reasons for this drop and all the options that the trustee has for finalising the PTD, with their recommended course of actions.

Creditors are invited to approve the trustee’s recommended course of action.

If, after 21 days of issue of Form 4, the trustee does not receive objections to their recommended course of action, from either a majority in number of the creditors, or not less than one third in value of creditors, then it is assumed that creditors have consented to the recommended action and the trustee may proceed with this action. If objections are received from a majority of creditors in number or one third or more in value, the trustee may consider applying to the AiB or a sheriff for a direction – section 179 and 189 refers.

ASTRA should be updated following the 21 days to advise AiB of the outcome.

A supervision fee of £120 is payable by the trustee to the Accountant in Bankruptcy for each 12-month period of the PTD or part thereof, beginning on the date of registration of the PTD and ending on the discharge of the trustee.

In practice, this means that the full £120 remains payable for any part-year for which the trust deed subsists, before the trustee is discharged. If the trustee is discharged from office and the debtor is not discharged from their obligations, the final supervision fee will be waived and no invoice raised.

AiB will issue an invoice for the fee after each 12 month period from the date the trust deed becomes protected, to allow trustees time to ingather sufficient funds.

The supervision fee is payable by the trustee for all PTDs, regardless of whether sufficient funds have been in-gathered when the fee becomes due.

AiB will monitor receipt of the accounts, Form 4s and the supervision fee and monitor the information provided on the Form 4 annually. The trustee will receive a reminder, via the AiB Web Portal, or by email or post, if the accounts and a Form 4 are not received within the six week period after the due date.

Regular failure by a trustee to submit accounts or Form 4’s to the appropriate people within the specified timescales may result in the Accountant reporting the matter to a sheriff and/or the trustee’s recognised professional body (RPB) through the Insolvency Service Complaints Gateway.

## Retention of documents

The trustee should retain copies of the documents listed in [Annex B](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/annexes/annex-b-documents-to-be-retained-by-aib) to these Notes until 12 months after the date of their discharge. Section 182 of the Act refers.

AiB may request additional documents that should be retained, either generally or in relation to a specific case. AiB will not specify any additional documents in any case where the trustee has been discharged.

## Change of Trustee

The trustee may make such arrangements as appropriate to resign from office or to make contingency for circumstances in which another trustee may be nominated.

Creditors’ consent must be sought to approve a change of the fixed fee rate when the new trustee is appointed, see Section 183(2) of the 2016 Act.

If fee rates are to increase, the higher fee rate must not be charged until the date the replacement trustee is appointed, unless this has been approved by creditors or a sheriff.

An appropriately executed Deed of Assumption must be produced on each occasion a replacement trustee is appointed and a copy of this Deed must be sent to AiB, so the change of trustee details can be entered in the ROI.

If a replacement trustee is appointed for a large number of PTDs the notification to AiB may be made through a Deed of Assumption, signed by the original and replacement trustees, supported by a Schedule detailing all the PTDs affected by the change.

If a trustee is replaced as a result of a commercial arrangement between Insolvency Practitioners, or their firms, the cost of the replacement trustee process must not be claimed from the PTD estates, unless a sheriff has approved such payment.

The Keeper of the Register of Inhibitions has advised that, if a Schedule is submitted with a Deed of Assumption, listing multiple PTDs, each page of the Schedule must be signed by both the original and replacement trustees, or any inhibition that applies, will not be amended.

It is good practice for the replacement trustee to notify the creditors of their appointment. The discharge of the replacement trustee will have the effect of discharging any previous trustee unless there is a contrary ruling by a sheriff. AiB will record the change of trustee and this will be shown in the ROI.

## Power to cure defects

Under section 189 of the 2016 Act, the trustee can apply to a sheriff for an order to correct any defect in procedure. This is similar to the provision for bankruptcies in Section 211 of the 2016 Act.

## Electronic delivery of forms and notices

Any document or Form that is required to be submitted to any person so recorded in the Protected Trust Deeds (Forms) (Scotland) Regulations 2016, may be given, delivered or sent by electronic means, provided that the recipient has consented to this form of transmission and provided an electronic address. Section 187 of the Act refers.

Trustees are encouraged to utilise AiB’s Web Portal system, ASTRA. This Web Portal has provision to alert trustees to when statutory documents must be submitted and provides a secure network to complete the Forms on-line and submit them.

Subject to any evidence to the contrary, a document can be presumed to have been delivered electronically if the sender can produce a copy of an electronic message that confirms issue and which shows the date and time of issue and the address it was sent to.

A document may not be issued electronically if an alternative delivery method is required by order of a court.

The AiB consent generally with all trustees to electronic delivery of Forms 4, 5 and 7 via ASTRA or by e-mail to the trust deed team.

# Audit

## Liability for audit

A trustee in a PTD has the right to request that his fees are determined by the Accountant before creditors are circularised. However, as the trustee may only take a fixed fee for the administration of a PTD, and an additional fee, if so approved by creditors or the Accountant ([section 5.8](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/5-administration/58-increasing-the-trustee-s-fixed-fee#publication-content)), there is no expectation for trustees to request that their fees are determined by the Accountant. Such action will only add unnecessary cost to the PTD.

AiB may audit a trustee’s accounts and fix his outlays at any time. Section 183 of the Act refers.

A creditor, the debtor, or trustee can at any time request that AiB audit the accounts and determine the trustee’s remuneration.

Schedule 4 of the 2016 Act as amended, states:

1. Whether or not provision is made in the trust deed for auditing the trustee’s accounts and for determining the method of fixing the trustee’s remuneration or whether or not the trustee and the creditors have agreed on such auditing and the method of fixing the remuneration, the debtor, the trustee or any creditor may, at any time before the final distribution of the debtor’s estate among the creditors, have the trustee’s accounts audited by and his remuneration fixed by the Accountant in Bankruptcy.

1A. The Accountant in Bankruptcy may, at any time, audit the trustee’s accounts and fix his remuneration.

The Accountant may instruct the trustee to prepare accounts before the end of the usual accounting period, in order to carry out an audit.

In order for the Accountant to complete their statutory duty to audit PTD accounts and fix the trustee’s fees and outlays, the trustee must be able to provide information to The Accountant to enable him to understand whether the fixed fee is reasonable in the circumstances of the case.

## Audit and determination of fixed fee

An The Accountant will not expect a request for an audit of the trustee’s fixed fee, if the fee taken is in accordance with the information declared and approved by creditors.

The Accountant may determine a fixed fee at an alternative amount if the trustee has requested a proportion of the fixed fee for any work that has either not been completed or where the trustee should have known the work would not be completed during the administration of the PTD. In reaching a determination on the appropriate fixed fee, the Accountant will have regard to whether the fees are appropriate, reasonable and commensurate with regard to the work undertaken.

If AiB believe they have grounds to reduce a trustee’s fee, the trustee will be advised of this and given the opportunity to provide any additional information or documents to support the fee/outlay claimed.

AiB may reduce a fee claimed by the trustee in respect of the assets and contributions that have been in-gathered during the administration of the estate, if AiB can demonstrate that a percentage rate applied by the trustee to determine this fee, was greater than the rate declared at the outset to creditors on Form 3, or if the incorrect asset/contributions value has been used.

Where a trustee’s fee has been determined the trustee will be notified through AiB’s audit observation process.

In the event that a requested fee is reduced, the trustee will be notified of the determination and reason for the reduction.

The trustee, debtor or a creditor may appeal the Accountant’s determination. Section 188(1)(d) of the Act refers.

The debtor or creditor must be able to satisfy a sheriff that s/he, has, or is likely to have, a pecuniary interest in the outcome of the appeal.

## Income verification in all cases

Copies of bank statements are required to enable AiB to confirm bank interest received and the balance of funds held at the close of the account period.

Documents supporting the receipt of other funds e.g. a copy of the state for settlement for realisation of property, cheques from payee for realisation of moveable assets, are required.

## Determination outlays in all cases

Outlays are determined by checking that each entry has supporting vouchers or an invoice verifying the cost incurred. In cases where no supporting documentation is provided an audit observation is raised asking the trustee to forward the required documentation.

A number of outlays are accepted as standard and do not need to be vouched:

* statutory advertising fee
* bordereau (if under £100)
* stationery & postage – not required as this would be trustee writing a receipt for their own usage
* travel
* telephone/Fax
* Register of Inhibitions
* keeper’s registration fees
* cost of realisations deducted at source

Generally any outlay not detailed above, requires to be vouched, although the Accountant is entitled to query any outlay claimed if required.

If the trustee is unable to provide an acceptable invoice or supporting voucher to satisfy AiB that the outlay is payable and the work was necessary and the cost of the outlay was reasonable for the work completed, AiB may issue a direction to the trustee, instructing him to either remove part, or the whole, of the cost as an outlay of the PTD.

The fee for work completed by a third party, on behalf of the trustee, prior to the date the trust deed was granted, may not be claimed as an outlay of a PTD.

The trustee may appeal an AiB direction to a sheriff, if they are unhappy with the direction that they have received.

## Outlays

Outlays for this purpose include all sums actually paid by the trustee from his own or PTD funds and do not include statutory fees, trading expenses or expenses of realisation. Outlays not included in the calculation for the Audit fee are:

* bank charges
* trading expenses
* tax on interest
* income tax
* inheritance tax
* cost of realisations
* audit fees
* other statutory fees raised by AiB e.g. PTD supervision and registration fees

If a trustee notes on their receipts and payments accounts that an item is an expense of realisation, evidence must be provided to show that the trustee was not involved in paying these costs, for example a state for settlement which shows that legal fees were deducted directly by the solicitor.

## Audit fee

The Accountant’s statutory audit fee is 5% of the trustee’s remuneration (exc. VAT) and applicable outlays, including approved third party fees. AiB will raise a transaction from which an invoice is produced by the AiB Finance team and forwarded to the trustee responsible for paying the amount due, within 90 days of receipt. No charge can be levied on any other party for this cost.

When all actions have been completed and the trust deed account determined AiB will contact the trustee to arrange uplift of their files. The trustee is responsible for meeting this cost.

Trustees are encouraged to contact the Supervision team on 0300 200 2710, if any clarification is required prior to submitting accounts or case files.

# Supervision of protected trust deeds

## Information and documents

The Accountant has a statutory duty to supervise the actions of a trustee of a PTD and therefore, may challenge the performance and actions of a trustee if does not consider these have been completed in accordance with the legislation or guidance.

When AiB receives a request to audit a PTD, the Accountant may complete a review of the administration of the PTD at the same time.

In support of their supervision function, AiB may require the trustee to provide information or copies of documents relating to the administration of the PTD. AiB may require the trustee to keep such records as considered necessary to investigate the administration of a PTD.

Whether the trustee is still acting in a PTD or not, the trustee must supply the Accountant with such information as may be requested in order to allow the Accountant to complete their duty to supervise the actions of the trustee. Section 180(2) of the Act refers.

If the trustee fails, without a reasonable excuse, to provide information requested by the Accountant, the matter can be reported to a sheriff who can censure the trustee and make any other order as they deem is appropriate. Section 180(3) of the Act refers.

## AiB directions

AiB has the authority under sections 179, 184A(6) and 184C(10) of the Act to issue directions to the trustee under a PTD, as to how they should conduct the administration of the PTD.

This power of direction is wide and can cover a direction to the trustee to do anything or desist from doing something in respect of the conduct of the administration of a PTD. Generally, AiB will ensure that a direction is not issued unless it deems the action required is in the interests of the trustee, debtor or creditors.

A direction will be intimated in writing to the trustee. The trustee should copy the intimation to the debtor and all known creditors.

AiB may also copy the direction to the trustee’s RPB or the Insolvency Service Complaints Gateway, if it considers the direction supports any complaint that AiB may have about the trustee’s behaviour.

If a trustee receives a direction from the Accountant they must either; appeal the direction, within 21 days of the direction being issued, or comply with the direction within 30 days of its receipt. Section 188(1)(c) and 179(4) of the Act refer.

The Accountant may report a trustee to a sheriff, if the trustee fails, without reasonable excuse, as determined by the Accountant, to comply with a direction she has issued. A sheriff may censure the trustee or make any such order as the sheriff considers is appropriate in the circumstances.

There is a right of appeal to a sheriff against a direction. However, a debtor or creditor must be able to satisfy the sheriff that they have a pecuniary interest in the outcome of the appeal. The form of appeal is prescribed in the Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008. A sheriff may order intimation of any other party and may order such further procedure as they deem appropriate.

## Examples of AiB directions

The following are examples of Directions which the Accountant considers may be appropriate having reviewed a number of PTDs. This is not an exhaustive examples list and the Accountant may issue different directions as circumstances determine:

A third party agency fee is disallowed, or reduced, as an outlay of the PTD because:

* the third party agency work is not evidenced, or the fee is deemed excessive for the work evidenced as completed
* the third party fee was incurred prior to the granting of the trust deed
* The trustee is directed to realise an asset
* if they have failed to do so and the sale of the asset will benefit creditors
* the debtor should or should not be discharged from their obligations of the PTD

The trustee is directed to remove or reduce an outlay as a cost of the PTD if there is inadequate or no evidence to demonstrate that the outlay was a legitimate cost of the PTD.

The trustee is directed to end the PTD early and seek their discharge as trustee, if the PTD is not expected to realise a dividend to creditors. Issue of this direction will be subject to a number of conditions, including assurance that the trustee has received appropriate remuneration for their work and there is minimal risk that future funds will become available that could be paid to creditors. See section 9 regarding discharge of the debtor.

## Sheriff’s directions

There is also a general right for any interested person to apply to a sheriff at any time for a direction of the court in respect of, or in relation to, the administration of a PTD. Interested person means some person who has a direct, as opposed to general, interest in the administration of the PTD, for example, the debtor’s partner. Section 189 of the Act refers.

## Reports and offences

The supervisory function of the Accountant in relation to PTDs, subsection (1) of section 200 of the 2016 Act, extends the powers contained in subsections (4) and (5) of that section to trustees under PTDs.

Trustees have a statutory duty to complete and submit the PTD Forms and pay to the Accountant the PTD Supervision Fee. The Accountant will inform a trustee if they are late in submitting a Form, or have not paid the PTD Supervision Fee.

If it appears to AiB that a trustee under a PTD has failed without reasonable excuse to perform a duty under the 2016 Act or any other provision, the matter may be reported to a sheriff. A sheriff may call a hearing and remove the trustee from office or censure them or make any other order as appropriate.

If the Accountant has reasonable grounds to suspect that the trustee under a PTD has committed an offence, she may report the matter to the Lord Advocate.

# Debtor’s discharge

## Discharge is conditional

Discharge of the debtor is not automatic. Section 184 of the Act allows the trustee to apply to AiB for the debtor to be discharged from their debts, if the trustee is satisfied that, to the best of their knowledge, the debtor has met their obligations under the PTD and the debtor has co-operated during the administration of the PTD.

A PTD is a voluntary arrangement, and a debtor is expected to comply with the terms of that arrangement, to provide information about assets and liabilities, income and expenditure, to cooperate in the realisation of their estate and to pay contributions. A debtor who unreasonably fails to comply, or does not co-operate with the trustee, has not adhered to their agreement and should not have the benefit of imposing that agreement on creditors.

A debtor is not considered to have failed to meet their obligations if they refuse to consent to the sale of the dwelling-house which is excluded from a trust deed in accordance with section 228(1) of the 2016 Act or refuse to give a relevant consent in terms of section 113(1)(a) of the 2016 Act.

It would not be appropriate to refuse to discharge a debtor because of circumstances beyond their control, such as;

* a change of circumstances which prevents them from paying any contribution payable under section 168 of the 2016 Act, or
* any extenuating circumstances which may prevent the debtor from continuing to meet their obligations and there is no reasonable prospect of the debtor being able to resume meeting their obligations under the trust deed, or
* if an asset realises an amount less than originally estimated by the trustee on Form 3.

The trustee is entitled to charge a reasonable fee for a letter of discharge which is chargeable against the debtor’s estate.

A reasonable fee means a fee which the trustee would normally charge for the issue of a letter or a fee equivalent to the AiB fee for a certificate of discharge under bankruptcy.

## Discharge due to extenuating circumstances

If the trustee considers that the debtor has been affected by extenuating circumstances that are out with their control, can no longer meet their obligations and there is no reasonable prospect of being able to resume meeting their obligations before the end of the 48 month period, the debtor should be discharged.

For the purposes of Section 184B of the Act, extenuating circumstances may include for example any condition or illness which would prevent the debtor from fulfilling their obligations and from the evidence available, there is no reasonable prospect of recovery. The AiB will assess each case of extenuating circumstances based on the individual circumstances. In determining whether discharge should be granted, AiB may have regard to any factor that is considered to be appropriate.

The trustee must provide notice to all the creditors providing details of their considerations under Section 184B of the 2016 Act and seek agreement from creditors to discharge the debtor.

If after 21 days of the notice, a majority in number or a 1/3 in value of creditors consent to discharge the debtor, the trustee must apply to the AiB using a Form 5 to register the debtors discharge on the register of insolvencies.

Once registered the AiB must notify the trustee of the registration and date of debtor discharge. The trustee must then notify the debtor and creditors within 7 days of the date of notification.

However, if a majority in number or a 1/3 in value of creditors object to the proposal to discharge the debtor, the trustee must apply to AiB for a review of the proposal see section 9.3.

## AiB review of creditors objection to debtor discharge

An application for review of the proposal to discharge the debtor must include details of the proposal issued to creditors, details of the objections received from creditors and be made within 14 days beginning with the end of the 21 day period for creditor responses. The application for review can be emailed to the trust deed team mailbox: aib-trustdeedteam@aib.gov.uk.

AiB will determine whether it is fair and reasonable for the debtor to be discharged, taking into account all of the information provided. A notice will then be sent to the trustee providing an outcome of the review. The trustee must notify the debtor and all creditors of the outcome of the review within 7 days of the notification by AiB.

If AiB determine that the debtor should be discharged from the trust deed, the trustee must then apply to AiB using the Form 5 to register the debtor discharge on the register of insolvencies. AiB will notify the trustee of the registration and date of debtor discharge. The trustee must then notify the debtor and all creditors within 7 days of this notification.

Should AiB determine that the debtor should not be discharged, a direction will be issued to the trustee which can be appealed to the sheriff.

## Date of discharge

If the trustee is satisfied that the debtor has met their obligations in terms of their PTD, and they have co-operated in full with the trustee, an application for the debtor’s discharge, Form 5 in the Schedule to the Protected Trust Deeds (Forms) (Scotland) Regulations 2016, should be completed by the trustee and sent to AiB for approval after any notice of inhibition has been recalled or expired.

If AiB is satisfied that the debtor has met their obligations and cooperated, on receipt of Form 5, the debtor’s discharge will be recorded in the ROI and the date of their discharge will be the date the entry is made in the ROI.

AiB will, without delay, notify the trustee that the debtor has been discharged and provide the date of discharge. The trustee must notify the debtor and every known creditor, of the date the debtor has been discharged.

The Accountant may refuse to register a Form 5 in the register of insolvencies if the Accountant is not satisfied that the debtor has met their obligations in terms of the PTD or co-operated with the administration of the trust. Section 184(9) of the Act refers.

AiB will refuse to register the discharge of a debtor if it is not satisfied that, for example:

* the debtor has co-operated during the lifetime of the PTD, and this has impacted on the final dividend return to creditors
* the debtor has made full declaration of their assets and income
* the debtor has paid the appropriate amount and number of contributions
* the trustee has realised sufficient funds from the debtor’s assets and additional work is still required that requires the debtor’s cooperation

This list is not exhaustive.

AiB will notify the trustee and the debtor in writing if it refuses to discharge the debtor and give the reason(s) for this. AiB may also issue a direction to the trustee, to direct him how to act, if it is felt additional work is still required before the debtor can be discharged.

The trustee must send a copy of AiB’s notification to all known creditors, no later than 7 days after receipt of the notification from AiB.

If the issues that have been identified in AiB’s decision not to discharge the debtor can be addressed, a further Form 5 application may be re-submitted to AiB.

If any party is unhappy with the decision of AiB to refuse to register the discharge of the debtor in the ROI, they may appeal this decision to a sheriff within 21 days of the decision being made.

The decision of the Sheriff on an appeal is final.

## Trustee’s refusal to discharge the debtor

As the debtor’s discharge is conditional, the trustee may decide discharge is inappropriate if the debtor has unreasonably failed to comply with the terms of the trust deed or does not co-operate with the trustee.

If on request of the debtor, or at any time should the trustee consider that the debtor has failed to meet their obligations and not co-operated with the administration of trust deed, the trustee must as soon as reasonably practicable apply to AiB for agreement to refuse the debtor’s discharge.

The trustee must set out the reasons for their decision on the Form 5A for AiB to consider the refusal. This form is required in advance of any Form 6 applications to AiB, irrespective of the date on which the trust deed was granted.

Should AiB agree that the debtor should not be discharged, a notification will be sent to the trustee as soon as reasonably practicable.

On receipt of notification from the AiB, the trustee must inform the debtor in writing within 7 days and state:

* the reasons why they do not consider discharge appropriate
* that the debtor is not discharged from their debts
* the debtor’s right to appeal to the Sheriff

A copy of this letter should be sent to AiB no later than 21 days after the trustee has issued their notification.

If the trustee refuses to discharge the debtor, the debtor is not discharged from their debts and creditors are free to enforce debt recovery action.

The trustee may still seek his own discharge from the creditors where the debtor discharge has been refused. It is good practice for the trustee to notify the creditors if the debtor is not to be discharged.

Should AiB disagree with the trustee’s decision, the trustee will be contacted in the first instance to discuss matters. Where the trustee and AiB do not agree, the AiB will issue a direction to the trustee which can then be challenged by submitting an appeal to the sheriff.

## Reversion

If the remaining funds should revert to the debtor if:

* the debtor is discharged and the final distribution made
* the trustee is satisfied that all known creditors who were entitled to claim have submitted a valid claim, or following an appropriate reminder have declined to submit a claim
* funds remain in the estate after the full payment of remuneration and claims

## Effect of discharge

Once On discharge from the PTD, the debtor will be discharged from any outstanding debts and obligations for which they were liable at the date that they granted the trust deed. There are some important exceptions to this rule.

A PTD does not discharge a debtor from the following kinds of debt:

* fines, penalties, compensation and forfeiture orders imposed by any court
* any liability due to fraud
* student loans (Section 185(2) of the Act refers)
* money owed to someone who holds a security on their property, such as a mortgage or secured loan, including a security held where the secured creditors have consented in terms of section 166(2)(c) of the 2016 Act
* secured debt
* any liability arising after the date on which the trust deed was granted

# Trustee discharge

## Discharge by creditors

The trustee is required to seek their discharge from creditors within 28 days of the final distribution under the PTD. The trustee applies to the creditors using Form 6 in the Protected Trust Deeds (Forms) (Scotland) Regulations 2016. The final distribution date is considered to be date the estate is no longer under the control of the trustee, which may be the date any unclaimed funds are consigned to AiB (see [section 9.7](https://www.aib.gov.uk/publications/notes-for-guidance-protected-trust-deeds-bankruptcy-scotland-act-2016/9-trustees-discharge/97-payment-to-creditors-and-consignation-of-funds#publication-content)).

The trustee’s discharge depends on the consent (actual and deemed) of a majority in value of creditors within 14 days of the issue of Form 6.

## Deemed consent

Any creditor who does not respond to the Form 6 within 14 days from the date it is issued is deemed to consent to the trustee’s discharge.

## Effect of discharge

The discharge of the trustee releases them from any liability to the creditors in respect of any act or omission in exercising the functions conferred on them by the 1985 Act and the 2016 Act, except for a liability arising from fraud.

The effect of discharge extends to any previous trustee of the PTD unless there is a contrary ruling to the contrary from a sheriff.

## Right of appeal

If the creditors refuse to discharge the trustee, the trustee has a right of appeal to a sheriff under Section 188(4) of the Act.

## Notice to AiB

Within 28 days of the discharge of the trustee, the trustee will send a statement to AiB in Form 7 in the Protected Trust Deeds (Forms) (Scotland) Regulations 2016 and AiB will record this in the ROI. Accounts revised under section 186(8)(b) should also be sent to AiB.

## Creditor’s application

If a non-acceding creditor or a non-notified creditor believes that the way the trustee has collected and distributed the debtor’s estate is unfair, they can apply to a sheriff on the grounds that it is unduly prejudicial. See section 178 of the 2016 Act.

If the sheriff grants the creditor’s application, AiB will record the order in the ROI and the trustee will be liable to that creditor.

## Payment to creditors and consignation of funds

The It is expected that the trustee will make all efforts to ensure that monies are accepted by the creditors before consigning funds. There is no statutory requirement for the trustee to obtain a Form of Receipt back from a creditor prior to payment of a dividend. Funds should not be consigned for this reason if the trustee has a creditor’s details from their claim form and a dividend payment can be sent to the creditor’s last known address.

Prior to the trustee obtaining their discharge any unclaimed dividend must be consigned with the Accountant under Section 135(2) of the 2016 Act.

A certified list of the dividends being consigned should be sent with a cheque made payable to Accountant in Bankruptcy. In either case, a fee will be payable to the Accountant for each consignation lodged with him. This fee will be deducted from the consigned dividend unless otherwise notified. The relevant fee can be found in the Bankruptcy Fees (Scotland) Regulations 1993, as amended.

# Annexes

## Annex A - Information on the Register of Insolvencies

The Bankruptcy (Scotland) Act 2016 Schedule 2

The Register of Insolvencies maintained by the Accountant in Bankruptcy under section 200(1)(c) of the Bankruptcy (Scotland) Act of 2016 shall contain the following information:

**Protected trust deeds for creditors**

* name and address of granter of trust deed
* address of the centre of main interests and all establishments, within the meaning of the Council Regulation (EC) No. 1346/2000, of the granter of the trust deed, unless the granter of the trust deed is an undertaking as described in Article 1(2) of the said Council Regulation
* whether the protected trust deed is considered to be main or territorial proceedings within the meaning of the said Council Regulation
* the location and nature of any other insolvency proceedings
* name and address of trustee under deed
* date (or dates) of execution of deed
* date on which copy deed and certificate of accession was registered
* date of registration of statement indicating how the estate was realised and distributed and certificate to the effect that the distribution was in accordance with the trust deed
* date of trustee’s discharge
* date of registration of copy of order of court that non-acceding creditor is not bound by trustee’s discharge

## Annex B – Documents to be retained by AiB

This Bankruptcy (Scotland) Act 2016

The trustee under a protected trust deed must retain the following documents (or copies of those documents) for a period of at least 12 months after the date of the trustee’s discharge under section 182:

(a) the trust deed

(b) the statement mentioned in section 167(3)(c)

(c) the notice mentioned in section 169

(d) the statement mentioned in section 170(1)(d)

(e) all statements of objection or accession received from creditors

(f) the statement of anticipated realisations mentioned in section 170(1)(e)

(g) any written agreement relating to the debtor’s heritable estate mentioned in section 175(1)

(h) all reports sent under section 181(2)

(i) any adjudication on a creditor’s claim

(j) any scheme of division among creditors

(k) any circular sent to creditors with accounts

(l) the debtor’s discharge from the trust deed in Form 5

(m) the application to creditors for the trustee’s discharge

(n) the statement of realisation and distribution mentioned in section 186(8)(b)

(o) any decree, interlocutory decree, direction or order relating to the administration of the trust which is granted by the court

(p) any other document relating to the administration of the trust if it is a document which the Accountant, by notice to the trustee prior to the trustee’s discharge, identifies as a document the trustee should retain document the trustee should retain.

## Annex C – Statement for purpose of Section 167(3)

**Form of Statement for Purpose of Section 167(3) of the Bankruptcy (Scotland) Act 2016**

This statement or similar must be completed by the insolvency practitioner and the debtor before a trust deed is granted.

|  |  |
| --- | --- |
| **Name of Insolvency Practitioner** |  |
| **Business Address:**  |  |

|  |  |
| --- | --- |
| **Name of debtor** |  |
| **Home Address:** |  |

We confirm that, prior to granting the trust deed:

1. the debtor has been advised that granting a trust deed will become public information on the Register of Insolvencies
2. that granting a trust deed may result in –
3. Sequestration (bankruptcy)
4. Refusal of credit, either before or after the date of the debtor’s discharge
5. Sale of the debtor’s home and any other assets, unless the dwellinghouse has been excluded under section 167(2) of the 2016 Act
6. The debtor having to move home unless the dwellinghouse has been excluded under section 167(2) of the 2016 Act
7. The debtor being required to make payments out of their income
8. Damage to the debtor’s business interests
9. Damage to the debtor’s employment prospects

3. the debtor received a copy of the Scottish Government’s debt advice and information package and a copy of the trust deed information document.

and

4. the debtor was then given a minimum of 3 days’ time to consider the advice and material issued before they granted the trust deed.

|  |  |
| --- | --- |
| **Signed (Insolvency Practitioner)** |  |
| **Date:** |  |
|  |  |
| **Signed (Debtor)** |  |
| **Date:** |  |

1. Section 6.6 of these notes only applies to trust deeds granted on or after 1 July 2024. The legacy arrangements still apply to those protected before this date with the exception of protocol compliant trust deeds. [↑](#footnote-ref-1)
2. This section only applies to trust deeds granted on or after 1 July 2024. The legacy arrangements still apply to those protected before this date. [↑](#footnote-ref-2)