

Consumer Bankruptcy Law Reform in Great Britain

by

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Like their counterparts in other countries, policymakers in Great Britain are paying increasing attention to consumer bankruptcy.¹ The last decade has been characterized by stable macroeconomic conditions, expanding credit availability and (in a population where there is a relatively high *per capita* rate of home ownership) rising house prices. Aggregate household debt in the United Kingdom tops the £1 trillion mark and represents around 140% of aggregate household income.² These factors have prompted increasing concerns about consumer over-indebtedness and form the backdrop to a significant rise in the absolute numbers of debtors seeking relief through formal insolvency proceedings and other less formal means. Judged by our own standards, we are experiencing a consumer bankruptcy boom.³

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¹Great Britain is made up of two jurisdictions or law districts: (i) England and Wales and (ii) Scotland. See *infra* Part I.

²As of December 2005, aggregate personal debt in the United Kingdom (Britain and Northern Ireland) stood at £1,157.5 billion of which £962.5 billion was secured on a dwelling and £192.3 billion was unsecured. BANK OF ENGLAND, LENDING TO INDIVIDUALS DECEMBER 2005, available at <http://www.bankofengland.co.uk/statistics/li/2005/dec/index.htm> (last visited Jan. 31, 2007). The high proportion of secured debt reflects how rising house prices have created leverage for home owners to collateralize the financing of present consumption. According to a recent study carried out by Datamonitor, the United Kingdom also has the highest levels of unsecured debt in Western Europe. See Amy Watts, *Britons Have Highest Debts in Western Europe*, available at <http://www.abcmoney.co.uk/news/2720062611.htm> (last visited Jan. 31, 2007).

³For example, in England and Wales the number of individuals entering formal insolvency procedures (bankruptcy or individual voluntary arrangement) was 24,549 in 1998 growing year on year to 67,584 in 2005 and projected to top 100,000 in 2006. INSOLVENCY SERVICE, INDIVIDUAL INSOLVENCIES IN ENGLAND AND WALES, available at <http://www.insolvency.gov.uk/otherinformation/statistics/200611/table2.htm> (last visited Jan. 31, 2007). *Per capita* filing rates in Britain are historically low compared to equivalent rates in North America. See JACOB S. ZIEGEL, *COMPARATIVE CONSUMER INSOLVENCY RE-*

The policy response to these phenomena has two aspects. The first is an attempt by government to pursue strategies aimed at preventing consumers from becoming over-indebted. These strategies emphasize responsible lending, debt advice and financial education.⁴ The second — the subject matter of this article — is a series of reforms designed to modernize British bankruptcy law by aligning the law more closely with the needs of over-indebted consumers who can no longer meet their obligations. It has long been recognized that the laws of the two jurisdictions need to be updated to keep step with the rapid expansion of consumer credit and debt.⁵ However, to date, the Debt Arrangement Scheme (“DAS”), a formal debt rescheduling mechanism introduced in Scotland by the Debt Arrangement and Attachment (Scotland) Act 2002, is the only legal institution introduced primarily to address the problems of modern consumer debtors.⁶ The reforms now being pursued and implemented amount to a government-driven attempt to “consumerize” British bankruptcy laws in response to the perceived consumer debt “crisis.”⁷

The objective of these reforms is the creation of integrated legal frameworks of debt management and relief that provide a menu of options tailored to the needs of debtors whatever their financial circumstances whilst, as far as practicable, balancing the interests of debtors and creditors.⁸ Underpinning these emerging frameworks is a “can pay, should pay” principle that will be familiar to an American audience: namely that debtors with means (whether income, assets or both) should be required to contribute towards paying their debts. The notion that there should be a *quid pro quo* for formal debt relief, which in the case of salaried debtors may demand a contribution to the estate from future excess income, is embedded within British bankruptcy laws.⁹ In simple terms, the implication of “can pay, should pay” is

GIMES 109-12, 129-31 (Hart Publishing Ltd. 2003). However, these rates may give a skewed picture because they do not take into account the numbers of debtors in informal debt management plans in the private sector for which there are no reliable statistics.

⁴See DEPT. OF TRADE AND INDUSTRY, TACKLING OVER-INDEBTEDNESS ANN. REP. 2005, available at <http://www.dti.gov.uk/files/file18547.pdf> (last visited Jan. 31, 2007); FINANCIAL SERVICES AUTHORITY, TOWARDS A NATIONAL STRATEGY FOR FINANCIAL CAPABILITY (2003), available at http://www.fsa.gov.uk/pubs/other/financial_capability.pdf (last visited Jan. 31, 2007).

⁵See DEPT. OF TRADE AND INDUSTRY, INSOLVENCY LAW AND PRACTICE: REPORT OF THE REVIEW COMMITTEE, 1982, Cmnd. 8558, 9-13, 72-87 [hereinafter INSOLVENCY LAW AND PRACTICE]; DEPT. OF TRADE AND INDUSTRY, PRODUCTIVITY AND ENTERPRISE: INSOLVENCY—A SECOND CHANCE, 2001, Cm. 5234, §§ 1.45-1.48.

⁶See *infra* Part II.B.

⁷On the political economy of the reforms, see Iain Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency*, 7 THEORETICAL INQUIRIES IN LAW 509 (2006).

⁸The main stakeholders in the reform process are the credit industry, a relatively powerful consumer lobby, public and private sector debt advisers and insolvency practitioners with government holding the ring. *Id.* at 541-49. No stakeholder has predominant influence probably because of our strict rules on campaign finance.

⁹The idea that debtors who can afford it should pay something to their creditors may be thought

payment plans. These can be imposed on debtors (and creditors) via all of the formal debt relief mechanisms available in British law. Conversely, British policymakers have come to accept that consumer debtors who have *nothing* to offer their creditors should not be denied access to debt relief. Thus, the flip-side of “can pay, should pay” — that those who *cannot* pay should not be required to pay — is now a major focus of policy. The main driver here is the realization that there is little point in governments and creditors expending valuable resources attempting to get blood out of a stone. This has prompted an increased emphasis on streamlined administrative processing of debtors who “can’t pay.” Much of the reform effort has therefore concentrated on improving existing payment plan mechanisms for “can pays” — notably the individual voluntary arrangement (England and Wales) and the protected trust deed (Scotland) — and on facilitating access to debt relief for “can’t pays.”

In outlining and assessing the emerging legal frameworks of debt management and relief, we hope to add to the picture painted of emerging consumer bankruptcy systems across the globe¹⁰ and thereby to contribute to a process of “cross-systemic learning.”¹¹ While much has been done to develop comprehensive consumer-oriented systems in Britain, we contend that there are outstanding issues of *scope* and *suitability* which still need to be addressed. The issue of scope is concerned with *gaps* and *overlaps* in coverage. Are the emerging legal frameworks sufficiently comprehensive to accommodate the needs of all debtors, whatever the size of their indebtedness, and whatever their profile in terms of available assets and income? Where debtors have a choice of mechanisms to address their debt problems, how are those choices framed and mediated to ensure that debtors make an appropriate choice for their circumstances? The issue of suitability is concerned with whether the various legal mechanisms on the menu of available options are individually fit for purpose.

Part I provides a brief account of the constitutional relationship between Britain’s two jurisdictions (England and Wales; Scotland), Part II outlines the systems in place from the mid-1980s and the various options for debt management and/or debt relief that they provide. Part III critiques these systems from the perspective of the consumer debtor in terms of scope and suitability and explores the drivers behind the current reform program. Parts IV and V

relatively uncontroversial. However, the introduction in the United States of means-tested access to Chapter 7 with a view to redirecting ineligible debtors into Chapter 13 payment plans illustrates that its implementation in practice can be highly controversial.

¹⁰See JOHANNA NIEMI-KIESILÄINEN ET AL., *CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE* (Hart Publishing Ltd. 2003); see also Jason J. Kilborn, *Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, 81 AM. BANKR. L.J. 435 (2007).

¹¹Jason J. Kilborn, *Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 AM. BANKR. INST. L.R. 69, 70 (2006).

outline and evaluate these reforms, again in terms of scope and suitability. Part VI concludes. For the convenience of the reader, a glossary of the acronyms and abbreviations that recur frequently in the article is appended.

I. CONSTITUTIONAL POSITION

Notwithstanding that Scotland is part of the United Kingdom, it retains its own legal system. Under the Scotland Act 1998, it once again has its own Parliament, whose legislative competence is determined by that Act. Part I of the 1998 Act reserves to the UK Parliament the power to legislate on certain specified matters but delegates the power to legislate on all other Scottish matters to the Scottish Parliament. This delegation (or "devolution" as we call it) does not affect the UK Parliament's right to legislate on devolved matters,¹² and indeed it may be more convenient for it to pass legislation than for the Scottish Parliament to enact separate legislation for Scotland. However, a convention has evolved whereby the UK Parliament will not generally legislate on devolved matters without the consent of the Scottish Parliament.¹³

Corporate insolvency law (applicable to companies and limited liability partnerships) in both jurisdictions is similar and largely reserved to the UK Parliament. However, what we call "bankruptcy law" (the law applicable to debtors other than companies and limited liability partnerships including sole traders, other forms of partnership and consumers) remains distinct and is devolved to the Scottish Parliament by Part I of the 1998 Act. Nevertheless, in proposing the current reforms to Scottish bankruptcy law, the Scottish Executive identified as a key driver the recent reforms to bankruptcy law in England and Wales. One of the main policy considerations behind the proposed introduction of similar reforms in Scotland has been the need to maintain a level playing field between the two jurisdictions.¹⁴ An element of commonality of purpose therefore remains in the bankruptcy field despite devolution.

¹²Scotland Act, 1998, c. 46, § 28(7).

¹³See CHRIS HIMSWORTH & CHRISTINE O'NEILL, SCOTLAND'S CONSTITUTION: LAW & PRACTICE (Lexis Nexis UK 2003), 195-6.

¹⁴See SCOTTISH EXECUTIVE, PERSONAL BANKRUPTCY REFORM IN SCOTLAND: A MODERN APPROACH, § 4.4 (2003), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0030743.pdf> (last visited Jan. 31, 2007)[hereinafter MODERN APPROACH]. The emphasis there was on maintaining a level playing field for *business* debtors. The same point applies equally well in a consumer context.

II. THE EXISTING SYSTEMS FOR DEBT MANAGEMENT AND RELIEF IN BRITAIN

A. ENGLAND AND WALES

1. *Bankruptcy*

Bankruptcy under Part IX of the Insolvency Act 1986 ("IA 1986") is a judicial procedure for the liquidation of assets of individual debtors. The High Court or a relevant county court can make a bankruptcy order in prescribed circumstances on the petition of the debtor or a hostile creditor.¹⁵ Debtors filing for bankruptcy must lodge a statement of affairs with the court demonstrating inability to pay their debts,¹⁶ a less onerous threshold than has hitherto applied in Scotland.¹⁷ All bankruptcies are administered initially by an official receiver ("the OR"), a state official employed by the Insolvency Service, an executive agency of the Department of Trade and Industry.¹⁸ A private sector trustee may be appointed by the creditors or the Secretary of State for Trade and Industry to succeed the OR.¹⁹ In practice, this only happens if the debtor has sufficient assets to make the appointment worthwhile or if there are matters worthy of full investigation and possible challenge under avoiding powers. A trustee must be a licensed insolvency practitioner ("IP") authorized to take insolvency appointments under Part XIII of IA 1986. Most IPs are accountants and are licensed by one of several recognized professional bodies.²⁰

Bankruptcy is a debt relief tool taking the form of a statutory composition designed to balance the interests of debtors and creditors. The debtor surrenders non-exempt assets (exempt assets are limited to tools of trade and items necessary for satisfying basic domestic needs).²¹ In contrast to Chapter 7 of the US Bankruptcy Code, the debtor may be ordered to make contributions from any surplus income for up to three years under an income payments

¹⁵Insolvency Act, 1986, c. 45, §§ 264-268, 272, 373-374. The procedure is largely routine in the majority of debtor-filed petitions.

¹⁶*Id.* at c. 45, § 272.

¹⁷See *infra* Part IIB.

¹⁸IA 1986, c. 45, § 287. There are thirty-nine ORs in England and Wales each attached to a particular court or courts. For details, see Insolvency Service, <http://www.insolvency-service.co.uk/officemap.htm>. For the origins, history and functions of the OR system first established in 1883, see V. MARHAM LESTER, *VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND*, 170-221 (Oxford: Clarendon Press 1995).

¹⁹IA 1986, c. 45, §§ 292-296.

²⁰The licensing framework for IPs is set out in IA 1986, c. 45, §§ 388-98.

²¹IA 1986, c. 45, §§ 283, 307-308A. English law has no homestead exemption. However, the bankrupt's interest in a dwelling house automatically ceases to be comprised in the estate three years from the date of the bankruptcy order. *Id.* at c. 45, § 283A. This provision was introduced to prevent trustees from keeping estates open indefinitely in the hope of cashing out the interest at the top of a rising market.

order or agreement.²² The debtor also submits to an initial investigation carried out by the OR and must cooperate with the OR and any subsequently appointed trustee.²³ In return, the debtor obtains discharge of her “bankruptcy debts:” the debts or liabilities to which she was subject at the commencement of bankruptcy.²⁴ The discharge is generous. Bankruptcy debts are broadly defined and the categories of non-dischargeable debt are strictly limited.²⁵

Discharge policy in England and Wales has been further loosened by the Enterprise Act 2002 (“EA 2002”). Effective 1 April 2004, debtors receive an automatic discharge no later than one year after the bankruptcy order, a reduction from the previous period of three years.²⁶ Discharge can be obtained even earlier if, after the initial vetting process, the OR considers that investigation of the debtor’s conduct and affairs is unnecessary or concluded and files a notice with the court to that effect.²⁷ The policy of the EA 2002 was to encourage honest but failed entrepreneurs to reengage in risk-taking by providing a quick, comprehensive discharge and by reducing the stigma attaching to bankruptcy through the wholesale reduction of the legal restrictions to which undischarged bankrupts were previously subjected on public interest grounds.²⁸ However, it was not intended that bankruptcy should become a “soft touch.” The income payment provisions were clarified to reinforce the “can pay, should pay” principle by permitting surplus income to be captured before and after discharge for up to three years. To increase cost-

²²IA 1986, c. 45, §§ 310-310A. Income payments can only be demanded if they do not reduce the income of the bankrupt below what appears to be necessary for meeting the reasonable domestic needs of the bankrupt and her family. In practice, ORs determine what expenses can be deducted in calculating surplus income under the “reasonable domestic needs” test. INSOLVENCY SERVICE, *INSOLVENCY SERVICE TECHNICAL MANUAL* ch. 31.7 (2004), available at <http://www.insolvency.gov.uk/freedomofinformation/technical/techmanvol1/Ch25-36/Chapter31/part7/part1/part1.htm> (last visited Jan. 31, 2007); INSOLVENCY SERVICE, *CASE HELP MANUAL* (2006), available at <http://www.insolvency.gov.uk/freedomofinformation/technical/casehelpmanual> (last visited Jan. 31, 2007).

²³IA 1986, c. 45, §§ 291, 333.

²⁴*Id.* at c. 45, §§ 281, 382.

²⁵*Id.* at c. 45, § 281(3)-(8). Non-dischargeable debts include criminal penalties, debts arising from fraud or fraudulent breach of trust, debts arising under a court order made in family proceedings (such as alimony or child support payments) and student loans. *Id.* at c. 45, § 281(5)(b), (8); Higher Education Act 2004, c. 8, §42.

²⁶Enterprise Act, 2002, c. 40, § 256 (replacing IA 1986, c. 45, former § 279 with current § 279).

²⁷IA 1986, c. 45, § 279(2).

²⁸See INSOLVENCY SERVICE, *BANKRUPTCY: A FRESH START—A CONSULTATION ON POSSIBLE REFORM TO THE LAW RELATING TO PERSONAL INSOLVENCY IN ENGLAND AND WALES*, 19-27 (2000); DEPT. OF TRADE AND INDUSTRY, *PRODUCTIVITY AND ENTERPRISE: INSOLVENCY—A SECOND CHANCE*, 2001, Cm. 5234, 1-5 [hereinafter *SECOND CHANCE*]; see also DAVID MILMAN, *PERSONAL INSOLVENCY LAW, REGULATION AND POLICY* (Ashgate Publ’g Ltd. 2005); Iain Ramsay, *Bankruptcy in Transition: The Case of England and Wales* in *CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE*, *supra* note 10, at 205-26; Adrian Walters, *Personal Insolvency Law After the Enterprise Act: An Appraisal*, 5 J. CORP. L. STUD. 65, 65-8 (2005).

effectiveness, provision was made for income payments agreements to be reached between the debtor and the OR/trustee without a court order.²⁹ A new post-discharge restrictions system was also introduced, modeled on Great Britain's Company Directors' Disqualification Act 1986, which aims to penalize dishonest or irresponsible debtors who, by reason of past misconduct, are deemed unworthy of a full "fresh start."³⁰ A debtor subject to post-discharge restrictions is prohibited from acting in various capacities (such as a company director or an IP) and from obtaining credit above a prescribed amount (currently £500) without disclosing the restrictions.³¹ Post-discharge restrictions can be imposed by the court or, where the debtor consents, by administrative means, ranging from two to fifteen years.³² Post-discharge restrictions do not affect discharge.³³ As conceived, post-discharge restrictions limit the debtor's ability to re-enter the credit economy, thus confining the scope of the fresh start to discharge of old debts. They are a matter of public record that, in theory, should improve the information available to credit markets and affect credit scoring by enabling lenders to differentiate between culpable and non-culpable debtors.³⁴

The extent to which the EA 2002 reforms represent a liberalization of bankruptcy is contested. On the one hand, it can be argued that the combination of the income capture and post-discharge restrictions provisions, together with the public nature of the bankruptcy process,³⁵ still make bankruptcy a "tough" option. On the other hand, some have suggested that bankrupts now get an "easy ride" to a swift and generous discharge and that this has contributed to rising numbers of bankruptcies.³⁶ If this were so, we might expect to see debtors choosing bankruptcy over other debt solutions in ever increasing numbers. Yet, while aggregate numbers of formal insolvencies have certainly increased since EA 2002 came into force, bankruptcy's *share* of that increase relative to individual voluntary arrangements — the formal al-

²⁹See SECOND CHANCE, *supra* note 28, § 1.20; IA 1986, c. 45, §§ 310-310A.

³⁰See Donna McKenzie Skene, *Morally Bankrupt? Apportioning Blame in Bankruptcy*, 48 J. BUS. L. 171, 171-218 (2004); ADRIAN WALTERS & MALCOLM DAVIS-WHITE QC, *DIRECTORS' DISQUALIFICATION AND BANKRUPTCY RESTRICTIONS* (Sweet & Maxwell 2d ed. 2005); Walters, *supra* note 28, at 85-100.

³¹IA 1986, c. 45, § 360(5).

³²*Id.* at c. 45, §§ 4(2), 9(2), sched. 4A.

³³The only ground for suspending discharge is where the debtor has failed or is failing to comply with her statutory obligations to the OR and/or to her trustee. See IA 1986, c. 45, § 279(3)-(4). There are no grounds for absolute denial of discharge.

³⁴See Walters, *supra* note 28, at 99-100, 103.

³⁵The OR is statutorily obliged to advertise bankruptcy orders: Insolvency Rules, 1986, SI 1986/1925, § 6.46(2).

³⁶See Neil Smyth, *Blame the Enterprise Act for Rising Debt*, available at <http://www.timesonline.co.uk/article/0,,28009-2187082,00.html> (last visited Jan. 31, 2007).

ternative to bankruptcy provided for by IA 1986 — is declining.³⁷ One explanation is that IPs, whose business is selling arrangements to salaried consumer debtors, have no economic stake in recommending bankruptcy.³⁸

Despite the business orientation of the reforms, access to bankruptcy is not restricted to traders. Consumers can avail themselves of bankruptcy relief on the same terms — submission to a preliminary investigation by the OR, surrender of non-exempt assets and (where appropriate) contributions from surplus income for up to three years — if they are willing to run the risk of post-discharge restrictions. For consumers who have limited non-exempt assets and little surplus income, bankruptcy is a rational choice.³⁹ The same may be true of debtors whose assets are limited but who do possess surplus income, because income payments in bankruptcy cannot stretch beyond three years; whereas, creditors tend to demand five-year payment plans from consumers who wish to avoid bankruptcy.⁴⁰ The main barrier to entry is the cost of filing for bankruptcy. As well as the court fee (currently £150), the debtor must also pay a deposit of £325 to cover the OR's costs.⁴¹

2. Individual Voluntary Arrangements (“IVAs”)

The formal alternative to bankruptcy is an IVA under Part VIII of IA 1986. The origins of the IVA can be traced back to the early nineteenth century when creditor dissatisfaction with limited returns in bankruptcy first prompted consideration of statutory alternatives.⁴² An IVA is a binding consensual arrangement that arises from a proposal made by the debtor to her creditors. It is an extra-judicial procedure in which the court has only a limited supervisory role.⁴³ The proposal, which may encompass assets, income or both, is formulated by the debtor in conjunction with an IP (“the nominee”).⁴⁴ The creditors vote on the proposal, and if they approve it, the nomi-

³⁷INSOLVENCY SERVICE, *INDIVIDUAL INSOLVENCIES IN ENGLAND AND WALES*, available at <http://www.insolvency.gov.uk/otherinformation/statistics/200611/table2.htm> (last visited Jan. 31, 2007).

³⁸See *infra* Part II.A.2.

³⁹The majority of filings are now consumer filings. Of these, most are “no asset” cases that return nothing to creditors. See MICHAEL GREEN, *INDIVIDUAL VOLUNTARY ARRANGEMENTS, OVER-INDEBTEDNESS AND THE INSOLVENCY REGIME*, 22 (2002), available at <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/ivapolicyresearch/shortformreport.doc> (last visited Jan. 31, 2007).

⁴⁰See *infra* Parts II.A.2 and IV.A.2.

⁴¹IA 1986, c. 45, § 415; Insolvency Proceedings (Fees) Order, 2004, S.I. 2004/593 amended by Insolvency Proceedings (Fees)(Amendment) Order, 2006, S.I. 2006/251, § 2(2)(b); see also *R. v. Lord Chancellor, ex parte Lightfoot*, [2000] Q.B. 597. The deposit payable on a debtor's petition will increase to £335 with effect from April 1, 2007. See Insolvency Proceedings (Fees)(Amendment) Order, 2007, S.I. 2007/521, § 2(3)(b).

⁴²Lord Eldon's Act, 1825, 6 Geo. 4, c. 16; see also LESTER, *supra* note 18, at 1-39; *INSOLVENCY LAW AND PRACTICE*, *supra* note 5, at 14-35.

⁴³IA 1986, c. 45, §§ 256A(3), 259, 262, 263(3)-(5). Approved IVAs are subject to limited rights of challenge by dissentient creditors.

⁴⁴*Id.* at c. 45, § 256(1)(a).

nee becomes the supervisor of the IVA responsible for overseeing its implementation and ensuring that the debtor complies with its terms.⁴⁵ The key feature of an IVA is that it binds dissenting creditors.⁴⁶ If the proposal is approved by in excess of 75% of the creditors by value,⁴⁷ all creditors who were entitled to vote are bound regardless of whether or not they attended the creditors' meeting or how they voted.⁴⁸ IVAs are usually proposed as a means of avoiding bankruptcy but may also be proposed by undischarged bankrupts with a view to having their bankruptcy annulled.⁴⁹

The terms of an IVA depend on what the creditors will accept. Creditors can demand modifications to the proposal before approving it.⁵⁰ Debtors who are salaried homeowners will usually be expected to release at least some equity while also making income contributions. Debtors who have surplus income but no assets will need to offer sufficient payments to convince creditors, who often insist on a projected minimum dividend, to approve the arrangement. IVAs invariably provide for debt composition and discharge on successful completion and therefore function as a tool of debt relief. Debtors also avoid the greater publicity and perceived stigma associated with bankruptcy.⁵¹ For creditors, IVAs offer better returns than bankruptcy.⁵² However, it is important that payment terms are set at realistic and affordable levels because, should the debtor default, she is exposed to a bankruptcy order on the basis of her inability to meet the liabilities contracted under the IVA.⁵³ The terms can be varied with the unanimous agreement of the creditors should the debtor's circumstances change during the lifetime of the

⁴⁵*Id.* at c. 45, § 263.

⁴⁶*Id.* at c. 45, § 260.

⁴⁷*Id.* at c. 45, §§ 257-258; *Insolvency Rules*, 1986, S.I. 1986/1925, § 5.23.

⁴⁸IA 1986, c. 45, § 260. An IVA is therefore a contract given statutory force so that it binds dissenting creditors.

⁴⁹*Id.* at c. 45, § 261. EA, 2002, c. 40, § 264 also introduced a fast-track IVA procedure administered by the OR available exclusively to undischarged bankrupts. IA 1986, c. 45, § 263(A)-(G).

⁵⁰*Id.* at c. 45, § 258(2)-(5).

⁵¹Though, like bankruptcy, the fact that a debtor has entered an IVA is still a matter of public record noted on a statutory insolvency register maintained by the Insolvency Service. See *Insolvency Rules*, 1986, S.I. 1986/1925, §§ 6A.1-6A.2.

⁵²For historic evidence, see Keith Pond, *The Individual Voluntary Arrangement Experience*, 39 J. BUS. L. 118 (1995); Keith Pond, *An Insolvent Decade: The Changing Nature of the IVA 1987-1997*, Loughborough University Banking Centre Research Paper Series No. 125/98 (Oct. 1998), Social Science Research Network, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=139556; see also GREEN, *supra* note 39, at 16. In theory, the costs of an IVA should be lower than the costs of bankruptcy as (i) there are no OR's costs and (ii) the IP's role in administering an approved IVA is less onerous than that of a trustee in bankruptcy. However, the cost-effectiveness of IVAs has been questioned in cases where debt levels are relatively low because IVAs involve a fixed level of unavoidable cost. See *infra* Parts III.A. and IV.A.

⁵³IA 1986, c. 45, § 264(1)(c). The terms of the IVA will usually require the supervisor to file for the debtor's bankruptcy in the event of default.

IVA.⁵⁴

The key intermediary is the IVA nominee and supervisor who must be an IP.⁵⁵ As such, IVAs are subject to regulatory, as well as court, oversight. Nominees are professionally obliged to satisfy themselves that debtors considering IVAs have received appropriate advice about their available options (including bankruptcy).⁵⁶ The nominee must also file a report with the court indicating whether the proposal has a reasonable prospect of being approved and implemented⁵⁷ and notify the court of the outcome of the creditors' meeting.⁵⁸

IVAs are open to business and consumer debtors. The IP's costs for acting as nominee and supervisor are met from the arrangement proceeds. There are generally no court fees or deposits to pay upfront. Statistical evidence suggests that the popularity of IVAs has been increasing since the late-1990s. In 1998, roughly 20% of individuals who entered formal insolvency proceedings went into IVAs. The figure for 2006 is over 40%.⁵⁹ Research conducted by accountancy firm PricewaterhouseCoopers has demonstrated that consumers are now the principal users of the IVA.⁶⁰ Their increasing popularity may be attributable to so-called IVA "factories:" firms which aggressively market IVAs as a debt solution through the media and employ IPs to process debtors.⁶¹

⁵⁴*In re Alpha Lighting Ltd.*, [1997] B.P.I.R. 341. Provision for variations to be approved by a majority of creditors is commonly included in the proposal.

⁵⁵IA 1986, c. 45, §§ 388(2)(c), 389. IVA provision therefore remains a professional monopoly.

⁵⁶See ASSOC. OF BUSINESS RECOVERY PROFESSIONALS, STATEMENT OF INSOLVENCY PRACTICE No. 3 § 3.3 (Eng. & Wales), available at <http://www.r3.org.uk/publications/?p=80> (last visited Jan. 31, 2007). The debtor must be provided with a copy of the booklet *Is a Voluntary Arrangement Right for Me?* and confirm in writing that she has read and understood it. *Id.* (referring to ASSOC. OF BUSINESS RECOVERY PROFESSIONALS, *Is a Voluntary Arrangement Right for Me?* (rev. ed. Apr. 2004)[hereinafter R3 BOOKLET]).

⁵⁷IA 1986, c. 45, §§ 256(1)(a), 256A(3)(a).

⁵⁸*Id.* at c. 45, § 259.

⁵⁹For the most recent figures, see INSOLVENCY SERVICE, STATISTICS RELIEF, INSOLVENCIES IN THE THIRD QUARTER 2006 (Nov. 3, 2006), available at <http://www.insolvency.gov.uk/otherinformation/statistics/200611/index.htm> (last visited Jan. 31, 2007).

⁶⁰See PRICEWATERHOUSECOOPERS, *LIVING ON TICK: THE 21ST CENTURY DEBTOR* (2006), available at <http://www.pwc.com/uk/eng/about/svcs/brs/PwC-IVARreport.pdf> (last visited Jan. 31, 2007) [hereinafter *LIVING ON TICK*]. PricewaterhouseCoopers' data derives from approximately 6,500 IVA proposals made between July and November 2005. *Id.* The overwhelming majority of debtors in the sample were consumer debtors. *Id.* The evidence shows that the typical debtor in an IVA is likely to be someone under forty of either gender with credit card and personal loan debts of around £40,000, living in rented accommodation and earning less than £30,000 per annum. *Id.*

⁶¹See, e.g., *Debtsolver*, <http://www.debtsolver.co.uk> (last visited Jan. 31, 2007); *Debt Free Direct*, <http://www.debtfreedirect.co.uk/home.php> (last visited Jan. 31, 2007); *Debt Advice Online*, <http://www.debt-advice-online.com> (last visited Jan. 31, 2007). The business model of the factories is not that of a traditional professional services firm. A number of the factories are quoted companies.

3. County Court Administration Orders ("CCAOs")

CCAOs offer a limited means of dealing with over-indebtedness outside the bankruptcy system.⁶² Originally, they were designed to facilitate the recovery of small debts while protecting the debtor from creditor harassment (which, despite the abolition of imprisonment for debt in 1869, included the possibility of committal for non-payment of judgment debts until 1970).⁶³ To be eligible, the debtor's total indebtedness must not exceed the current county court limit of £5,000 and must include at least one judgment debt.⁶⁴ Eligible debtors who wish to apply must file a request in the county court for the district in which they reside or carry on business setting out details of their assets, income, expenses and debts.⁶⁵ A court officer then considers whether the debtor has sufficient means to pay the debts listed in the request in full by installments within a reasonable timeframe.⁶⁶ If the court officer decides that payment in full by installments over time is feasible, she determines the amount and frequency of the payments and notifies the debtor and the creditors listed in the request of the proposed repayment terms.⁶⁷ Where no objection is received within a prescribed period, the court officer may make a CCAO in the terms proposed.⁶⁸ If, however, the debtor or a creditor files an objection or the court officer considers that the debtor has insufficient means to make full payment by installments within a reasonable time, the matter is referred to a district judge.⁶⁹

CCAOs provide the debtor with protection from the creditors specified in the request and scheduled to the order. No enforcement action can be taken against the person or property of the debtor in respect of scheduled debts without the court's permission.⁷⁰ If the debtor fails to make payments in accordance with the terms of a CCAO, the court may revoke it.⁷¹

CCAOs are essentially a court-based debt management solution designed to provide relatively small debtors who have some income but limited assets with respite from enforcement coupled with rescheduling and consolidation of their debts. To some extent, they are analogous to a debt payment pro-

⁶²County Courts Act, 1984, c. 28, Part VI.

⁶³For historical background and critique, see *INSOLVENCY LAW AND PRACTICE*, *supra* note 5, §§ 68-73, 151-65, 276-80.

⁶⁴County Courts Act, 1984, c. 28, § 112(1).

⁶⁵See Civil Procedure Rules, S.I. 1998/3132, sched. 2 (referring to Order 39 of the County Court Rules).

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰County Courts Act, 1984, c. 28, §§ 112(4), 114. There are limited exceptions permitting execution against goods and distress for rent in controlled circumstances. *Id.* at §§ 115-16.

⁷¹IA 1986, c. 45, § 429.

gramme entered into under the DAS in Scotland.⁷² However, as a matter of law, CCAOs can also be used to provide some measure of debt relief. A CCAO “may provide for the payment of the debts of the debtor by installments or otherwise, and either in full or to such extent as appears practicable to the court under the circumstances of the case.”⁷³ Where the amounts received under the order are sufficient to cover costs and “to pay each creditor scheduled to the order to the extent provided by the order,” the debtor will be discharged from the scheduled debts.⁷⁴ Thus, if the CCAO provides for payment in part and the debtor complies with its terms, any remaining balance is discharged.⁷⁵ A CCAO can therefore operate as a form of statutory composition in respect of the scheduled debts.⁷⁶ Empirical evidence suggests that CCAOs are used for debt relief as well as debt management though this is subject to variations in local legal culture.⁷⁷ However, repayment programmes under CCAOs have a low completion rate⁷⁸ with the result that few debtors are discharged by this method.

4. Debt Management Arrangements (“DMAs”)

DMAs are an informal option available to over-indebted consumers independent of the bankruptcy system. While debtors can negotiate DMAs themselves, they commonly arise after the debtor has sought debt advice from the voluntary sector or a private sector provider.⁷⁹ Debt management can only work with debtors who have a regular source of surplus income. The debts are rescheduled and, where a provider is involved, consolidated into a single monthly payment which the provider distributes to creditors.⁸⁰ DMAs usually provide for repayment in full over time or repayment on the terms of the DMA until such time as the debtor has sufficient resources to meet the

⁷²See *infra* Part II.B.3.

⁷³County Courts Act, 1984, c. 28, § 112(6).

⁷⁴*Id.* at c. 28, § 117.

⁷⁵*Id.* at c. 28, §§ 112(6), 117.

⁷⁶An express power to make a CCAO with a “composition provision” was inserted as section 112B of the County Courts Act by the Courts and Legal Services Act, 1990, c. 41, § 13(5). Even though this power has never been brought into force, it prompts the argument that its enactment would have been unnecessary had the existing provisions allowed for debt composition. The counter-argument (which we prefer) is that section 112B merely clarifies the scope of the court’s power under section 112(6). We consider the wording of section 112(6) to be tolerably clear especially when read alongside section 117.

⁷⁷See ELAINE KEMPSON & SHARON COLLARD, MANAGING MULTIPLE DEBTS—EXPERIENCES OF COUNTY COURT ADMINISTRATION ORDERS AMONG DEBTORS, CREDITORS AND ADVISORS, DEPT. OF CONSTITUTIONAL AFFAIRS RESEARCH SERIES No. 1/04 (Jul. 2004) ii, 32-36, available at http://www.dca.gov.uk/research/2004/1_2004.htm (last visited Jan. 31, 2007).

⁷⁸*Id.*

⁷⁹See Ramsay, *supra* note 28, at 214-17.

⁸⁰See INSOLVENCY SERVICE, IMPROVING INDIVIDUAL VOLUNTARY ARRANGEMENTS, § 24 (2005), available at <http://www.dti.gov.uk/files/file14069.pdf> (last visited Jan. 31, 2007)[hereinafter IMPROVING IVAs]; see also <http://www.payplan.com/debt-management-plans.php> (last visited Jan. 31 2007).

repayments as originally contracted.⁸¹ Costs vary according to the provider. Some providers pass their costs onto the creditors while others charge the debtor but spread the cost over the lifetime of the arrangement.⁸²

DMAs may have advantages for some debtors, such as homeowners, as they can be entered into without assets having to be surrendered.⁸³ However, compared with the other options described above, they have several disadvantages. They are non-binding and do not stay individual collection efforts.⁸⁴ Unless creditors can be persuaded to waive it, interest will continue to run on the amount of the principal debts outstanding when the debtor entered the DMA.⁸⁵ This contrasts with bankruptcy, IVAs and CCAOs where debts (and any accrued interest) are frozen on commencement. Depending on levels of indebtedness and surplus income, DMAs may need to run for many years and can therefore become a treadmill. Finally, they are largely unregulated. Nevertheless, DMAs are popular with debtors, which may be attributable to high-profile advertising.

B. SCOTLAND

1. Sequestration

The Scottish equivalent of bankruptcy is sequestration under the Bankruptcy (Scotland) Act 1985 ("B(S)A 1985"). A sheriff court or the Court of Session may award sequestration in prescribed circumstances on the petition of the debtor, a qualified creditor⁸⁶ or a trustee acting under a trust deed for creditors.⁸⁷ A debtor may petition for her own sequestration only where she (i) has the concurrence of a qualified creditor⁸⁸ or (ii) satisfies a number of other requirements,⁸⁹ including a requirement that she is *either* apparently

⁸¹See IMPROVING IVAs, § 24.

⁸²To illustrate, say that Debtor needs to pay £200 per month for five years to pay off her debts and the DMA provider's costs are 10% of the total repayments (£1,200). If the creditors bear the cost (as is the case with DMAs offered by the Consumer Credit Counselling Service, a charity funded by the credit industry), the provider will distribute the proceeds to creditors net of the 10% but this will be treated as payment in full. See Consumer Credit Counselling Service, <http://www.cccs.co.uk> (last visited Jan. 31, 2007). If Debtor is required to pay the costs, the repayment term would need to be extended by a further six months to cover the costs and return one hundred pence in the pound to creditors.

⁸³See <http://www.payplan.com/frequently-asked-questions/debt-management-plans.php#HomeRisk> (last visited Jan. 31, 2007).

⁸⁴See <http://www.payplan.com/frequently-asked-questions/debt-management-plans.php#Disadvantages> (last visited Jan. 31, 2007).

⁸⁵See <http://www.payplan.com/frequently-asked-questions/debt-management-plans.php#FrozenCharges> (last visited Jan. 31, 2007).

⁸⁶A qualified creditor is a creditor owed at least £1,500. B(S)A, 1985, c. 66, § 5(4). The Bankruptcy and Diligence etc (Scotland) Act, 2007, asp. 3, § 25 increases this sum to £3,000.

⁸⁷B(S)A, 1985, c. 66, §§ 5(2), 9.

⁸⁸*Id.* at c. 66, § 5(2).

⁸⁹*Id.* at c. 66, § 5(2), (2B).

insolvent⁹⁰ or has granted a trust deed for creditors which has not become protected.⁹¹ In practice, obtaining the concurrence of a qualified creditor is rare, and most debtors wishing to petition for sequestration are therefore forced to meet the alternative requirements for a debtor petition.⁹² Many debtors cannot do so, however, because they cannot demonstrate apparent insolvency and have not granted a trust deed which has failed to become protected.⁹³ The eligibility requirements are therefore significantly more onerous for sequestration than for bankruptcy.

All sequestrations are administered initially by an interim trustee appointed by the court who may be either an IP or the Accountant in Bankruptcy ("AIB"), a public official employed by the Scottish Executive agency of the same name, who has functions in relation to non-corporate insolvencies that are similar in some respects to those of the OR in England and Wales.⁹⁴ The interim trustee is then succeeded by a permanent trustee, elected by the creditors or appointed by the court, who again may be either an IP or the AIB.⁹⁵ As in England and Wales, an IP will usually only accept appointment if there are sufficient assets in the estate to make it worthwhile.

Sequestration, like bankruptcy, is a debt relief tool. The debtor surrenders her non-exempt assets⁹⁶ and may also be ordered to contribute from income up to the date of discharge.⁹⁷ The debtor's affairs are subject to investiga-

⁹⁰This concept, analogous to the concept of "acts of bankruptcy," was introduced by B(S)A, 1985, which lists the means by which a debtor may become apparently insolvent. B(S)A, 1985, c. 66, § 7. Critically, debtors cannot rely on their own actions or simple inability to pay debts in order to establish apparent insolvency.

⁹¹*Id.* at c. 66, § 5(2B)(c)(ii).

⁹²On the reluctance of creditors to concur in a debtor petition, see SCOTTISH OFFICE, APPARENT INSOLVENCY, A CONSULTATION PAPER ON AMENDING THE BANKRUPTCY (SCOTLAND) ACT 1985 (Jul. 1997), § 10.

⁹³See MODERN APPROACH, *supra* note 14, §§ 7.1, 7.8.

⁹⁴See <http://www.aib.gov.uk/>. The AIB has certain supervisory and record-keeping functions in relation to non-corporate insolvency in Scotland and may also administer sequestrations; in relation to corporate insolvency, the AIB has certain record-keeping functions only. The proposed reforms, if enacted, would extend the role of the AIB in relation to non-corporate insolvencies in several important respects. See *infra* Part IV.B. For the year to 31 March 2006, the latest for which figures are available, the AIB was appointed interim trustee in 87% of sequestrations. 2005-2006 ACCOUNTANT IN BANKR. ANN. REP. 24.

⁹⁵B(S)A, 1985, c. 66, §§ 2-3, 18-27.

⁹⁶B(S)A, 1985, c. 66, §§ 31(1), 32(6), 33(1)(a), (aa). The list of exempt assets includes items reasonably required to meet the basic domestic needs of the debtor and her family as well as tools of trade including a car (subject to a prescribed limit, currently £1,000). *Id.*; see also Donna McKenzie Skene, *Whose Estate Is It Anyway? The Debtor's Estate On Sequestration*, 2005 JURIDICAL REVIEW 311. There is no homestead exemption in Scots law although the Bankruptcy and Diligence etc (Scotland) Act, 2007 introduces an automatic vesting provision similar to that applicable in England and Wales. See *supra* note 21.

⁹⁷B(S)A, 1985, c. 66, § 32(2), (2A), (3). Payments may be ordered where income exceeds that which the court considers suitable for the debtor's own aliment and any "relevant obligations" *i.e.*, aliment, periodical allowance and child support. *Id.* The threshold amount allowed for the debtor's own needs must not be less than the total of any income she receives by way of guaranteed minimum pension in respect of the debtor's protected rights as a member of a pension scheme. *Id.* In deciding the allowance for "relevant

tion,⁹⁸ and she is obliged to cooperate fully in the sequestration even after discharge.⁹⁹ In return, the debtor obtains a discharge of all debts and obligations for which she was liable at the date of sequestration, subject to limited exceptions only.¹⁰⁰ At present, unless discharge is deferred by the court on cause shown, a debtor is discharged automatically three years after the date of sequestration.¹⁰¹ Alternatively, the debtor may obtain a discharge at any time after the date of sequestration if an offer of composition is accepted.¹⁰² This occurs only rarely in practice.¹⁰³

Reform of sequestration along parallel lines to the EA 2002 reform of bankruptcy is part of the reforms contained in the Bankruptcy and Diligence etc (Scotland) Act 2007.¹⁰⁴

2. Trust Deeds for Creditors

The main alternative to sequestration is a trust deed for creditors. This is functionally equivalent to an IVA, albeit structured differently. A trust deed is a voluntary deed granted by a debtor, which conveys assets and usually income to a trustee to be administered for the benefit of creditors. At common law, creditors who do not accede (agree) to a trust deed are not bound by it, but a trust deed which satisfies certain conditions may be converted into a protected trust deed ("PTD") if the trustee follows the procedure in the B(S)A 1985 and a defined percentage of creditors do not object.¹⁰⁵ PTDs bind all creditors and can only be challenged on limited grounds.¹⁰⁶ Trust deeds which do not become protected are rare,¹⁰⁷ and this article therefore concentrates on PTDs.

A PTD must convey to an IP as trustee¹⁰⁸ the debtor's estate excluding

obligations" the court is not bound by any prior court order or agreement fixing the amount of any aliment or periodical allowance. *Id.* Beyond these limited provisions, there is no guidance on how the debtor's allowance is to be calculated. In practice, the amount of any contribution is often agreed to by the debtor and the trustee without an application to court.

⁹⁸B(S)A, 1985, c. 66, §§ 2(4), 3(1).

⁹⁹*Id.* at c. 66, §§ 64(1), 55(2)(e) (general obligation to cooperate with the permanent trustee).

¹⁰⁰*Id.* at c. 66, §§ 54, 55. The main exceptions are: fines or other penalties payable to the Crown; bail; liability for fraud or breach of trust; aliment or periodical allowance which could not be claimed in sequestration; child support maintenance prior to the date of sequestration; and liability for certain student loans. *Id.*

¹⁰¹*Id.* at c. 66, § 54(1).

¹⁰²*Id.* at c. 66, § 56, sched. 4.

¹⁰³The debtor must promise to pay at least 25p in the pound and the procedure is cumbersome. *Id.* The procedure will be streamlined by the Bankruptcy and Diligence etc (Scotland) Act, 2007, asp. 3, § 21.

¹⁰⁴See *infra* Part IV.B.

¹⁰⁵B(S)A, 1985, c. 66, §§ 6, 7, sched. 5.

¹⁰⁶*Id.*

¹⁰⁷See SCOTTISH EXECUTIVE, PROTECTED TRUST DEEDS: CONSULTATION ON DRAFT REGULATIONS § 2.7 (2006), available at <http://www.scotland.gov.uk/Publications/2006/01/20093732/0> (last visited Jan. 31, 2007)[hereinafter PROTECTED TRUST DEEDS].

¹⁰⁸B(S)A, 1985, c. 66, § 5(1)(a), sched. 5.

property that would not have vested in a trustee in sequestration under B(S)A 1985.¹⁰⁹ It will generally provide for the debtor to make appropriate contributions from income,¹¹⁰ and in practice many PTDs are income-only because the debtor has no non-exempt assets. In order for the trust deed to become protected, the trustee must publish a notice in prescribed form and then send a copy of the trust deed, the notice and certain other information to all known creditors.¹¹¹ Unless a majority in number or at least a third in value of the creditors notifies the trustee in writing within five weeks that they object to the trust deed, it will become protected on completion of the remaining formalities.¹¹² Unlike IVAs, the approval procedure is therefore negative rather than positive, and this has prompted concern that trust deeds may often become protected through creditor inertia.¹¹³ PTDs do not automatically grant debt relief but, in practice, generally provide for discharge after three years, the same period as would normally apply in sequestration.¹¹⁴

A PTD is essentially an informal sequestration without all of sequestration's consequences for the debtor. The debtor generally obtains debt relief and the creditors usually receive better returns than they would have on sequestration.¹¹⁵ A PTD will generally provide for variation of any income contributions on a change in the debtor's circumstances, but any default by the debtor may allow the trustee to petition for the debtor's sequestration.¹¹⁶

PTDs are private and are not supervised by the court, although the AIB has a limited supervisory role. Like the nominee/supervisor of an IVA, the key intermediary is the trustee who as an IP is subject to specific regulatory guidance in relation to PTDs.¹¹⁷

PTDs may be entered into as a means of avoiding sequestration. They may also be entered into because the debtor wishes to obtain debt relief but

¹⁰⁹§§ 73(1), 5(4A). The PTD estate is not identical to the sequestration estate because certain assets are excluded from sequestration by provisions other than § 33(1). *Id.*

¹¹⁰While this is not a requirement for a trust deed to become a PTD, it is unlikely that a trust deed would become a PTD without such a provision, as creditors would be likely to object to the deed and thus prevent it from becoming a PTD.

¹¹¹B(S)A, 1985, c. 66, § 5(1)(b), (c), sched. 5.

¹¹²*Id.* at c. 66, § 5(1)(d), (e), sched. 5.

¹¹³See PROTECTED TRUST DEEDS, *supra* note 107, § 4.26. There was a comparable negative approval procedure in the US Bankruptcy Act of 1841. See Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 351-52 (1991).

¹¹⁴See PROTECTED TRUST DEEDS, *supra* note 107, § 4.25.

¹¹⁵*Id.* at §§ 3.1-3.2, 3.8-3.9.

¹¹⁶B(S)A, 1985, c. 66, §§ 5(2), (2C). Moreover, the trustee may petition for the debtor's sequestration at any time if it is in the best interests of the creditors that an award of sequestration be made. *Id.* at c. 66, § 5(2)(b).

¹¹⁷See ASSOC. OF BUSINESS RECOVERY PROFESSIONALS, STATEMENT OF INSOLVENCY PRACTICE No. 3A (SCOTLAND), available at <http://www.r3.org.uk/publications/index.cfm?p=80&s=0&startrow=21> (last visited Jan. 31, 2007).

cannot fulfill the eligibility requirements for sequestration. Like sequestration, PTDs are open to business and consumer debtors.¹¹⁸ The costs are generally met from the trust estate.¹¹⁹ Like IVAs, the popularity of PTDs is increasing and it is believed that consumer debtors are now the principal users.¹²⁰

3. Debt Arrangement Scheme

Introduced by the Debt Arrangement and Attachment (Scotland) Act, 2002 as an alternative mechanism for dealing with over-indebtedness,¹²¹ the DAS came into force on 30 November 2004.¹²² It allows individual business or consumer debtors with multiple debts to enter into a debt payment programme (“DPP”) during which there is a stay on enforcement.¹²³ There are no monetary or time limits.

The debtor must receive money advice before applying for a DPP. The application is made by a certified money adviser on behalf of the debtor to the DAS administrator (currently the AIB).¹²⁴ In principle, all creditors whose debts are included in a DPP must consent to it.¹²⁵ Where this consent is forthcoming, the application is automatically approved.¹²⁶ However, the DAS administrator may dispense with the consent of non-consenting creditors within certain limits¹²⁷ and approve the application if it is “fair and rea-

¹¹⁸B(S)A, 1985, c. 66, § 5(4A) which simply refers to a trust deed being granted by “a debtor”.

¹¹⁹Ultimately, payment of costs depends on the terms of the deed though, in practice, PTDs invariably provide for costs to be met from the estate. This is recognized by B(S)A, 1985, c. 66, sched. 5, § 1 which makes provision for the auditing of trust accounts and the fixing of the trustee’s remuneration. One of the main concerns raised by the Scottish Executive was the impact of costs on returns to creditors. PROTECTED TRUST DEEDS, *supra* note 107, §§ 4.28-4.34.

¹²⁰See ENTERPRISE AND CULTURE COMMITTEE, STAGE 1 REPORT ON THE BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) BILL VOL. 1, § 27 (May 17, 2006), available at <http://www.scottish.parliament.uk/business/committees/enterprise/reports-06/ecr06-07-Vol01-00.htm> (last visited Jan. 31, 2007)[hereinafter ECC STAGE 1 REPORT]. In 2001-2005, there were more PTDs than sequestrations and the rate of growth in the number of PTDs was also greater. The apparent insolvency requirement in sequestration appears to be the key explanatory variable. The issue of debtor access to sequestration is discussed further in Parts IV.B and V.B.

¹²¹Policy Memorandum, Debt Arrangement and Attachment (Scotland) Bill, SP Bill 52-PM, §§ 12, 15.

¹²²Debt Arrangement and Attachment (Scotland) Act, 2002, (Commencement No. 2 and Revocation) Order, 2004, S.S.I. 2004/416, § 2.

¹²³The Debt Arrangement Scheme (Scotland) Regulations, 2004, S.S.I. 2004/468, Part 5. Debts are defined widely but exclude secured debts with the exception of arrears. *Id.* § 3.

¹²⁴*Id.* § 20.

¹²⁵*Id.* § 22(1). Any creditor who does not respond to the request to consent within the prescribed period is deemed to consent. *Id.* § 22(3).

¹²⁶*Id.* § 25(1).

¹²⁷*Id.* § 22(4)(including where (i) the amount due to the creditor is 50% or less of the total debt included in the DPP and (ii) the amount due to all creditors who refuse to consent does not exceed 60% of the total debt included in the DPP).

sonable."¹²⁸ Where there are non-consenting creditors with whose consent the DAS administrator cannot dispense, or where a creditor objects on specified grounds,¹²⁹ the DAS administrator must refer the application to the sheriff, who will approve it if it is fair and reasonable.¹³⁰ All DPPs are subject to standard conditions¹³¹ and may be made subject to a number of additional discretionary conditions.¹³² A DPP will generally provide for the debtor to make a single periodic payment from surplus income.¹³³ The payment is made to an approved payments distributor who distributes it to the creditors included in the DPP in accordance with its terms.¹³⁴ The functions of the approved payments distributor are carried out by a commercial provider who is wholly distinct from the money adviser and the DAS administrator.¹³⁵ The debtor is restricted from taking on new credit¹³⁶ and prevented from granting a trust deed,¹³⁷ but not from petitioning for sequestration subject to the eligibility requirements. A DPP may be varied on the application of the debtor or a creditor¹³⁸ and revoked in defined circumstances including default by the debtor.¹³⁹

The DAS is primarily an income-based debt management tool. It is possible to include assets,¹⁴⁰ but in practice, many debtors will have no assets or

¹²⁸*Id.* § 26(1).

¹²⁹*Id.* § 23(1)(stating that the debtor should be sequestrated or is in possession of heritable property with substantial unsecured value).

¹³⁰*Id.* § 27. In determining whether a DPP is fair and reasonable, the DAS administrator or sheriff must have regard to various matters including: the total indebtedness; the period of the DPP; the method and frequency of payments; any earlier proposed DPP that was not approved; the extent of creditor consent or objection; any comments by the money adviser; and any assets that could have been realized to pay the debts included in the DPP. *Id.* §§ 26(2)-(3), 27(3).

¹³¹*Id.* § 29(1)-(2). These standard conditions are: (i) all payments under the DPP must be made on time; (ii) continuing liabilities must be paid on time; (iii) no other payments may be made to creditors taking part in the DPP; (iv) no new credit may be obtained other than in prescribed circumstances; (v) the debtor's money adviser must be notified of any change of address or material change of circumstances; (vi) information must be supplied to the debtor's money adviser on request; (vii) all payments for credit obtained in prescribed circumstances must be made on time; and (viii) all required notices and intimations must be made on time. *Id.*

¹³²*Id.* § 30(1)-(2). These discretionary conditions are: (i) realization of a non-exempt asset and distribution of its value amongst the creditors; (ii) wage garnishment; (iii) seeking agreement from a creditor to pay a continuing liability via the payments distributor; (iv) completion and return of any tax or duty return or declaration; (v) maintaining an emergency fund as prescribed or any other reasonable condition. *Id.*

¹³³*Id.* § 29.

¹³⁴*Id.* § 15(b).

¹³⁵*Id.* §§ 11, 15.

¹³⁶*Id.* § 35.

¹³⁷*Id.* § 36.

¹³⁸*Id.* §§ 37-39.

¹³⁹*Id.* §§ 41-44.

¹⁴⁰*Id.* § 30. The existence of heritable property with substantial unsecured value is a ground for a creditor objecting to a DPP. *Id.* § 23(1)(b). Moreover, the existence of an asset that could have been

will choose the DAS precisely because they wish to manage their debts without realizing their assets. There is no provision for automatic debt relief. Individual creditors may agree to waive interest on or compound their debts,¹⁴¹ but agreements of this kind are rare.

4. *Voluntary Arrangements*

Voluntary arrangements are a further, more informal, response to over-indebtedness. Not to be confused with IVAs, these are the Scottish equivalent of DMAs. Debtors may negotiate such arrangements themselves or they may arise after a debtor has sought advice from money advice organizations such as Citizens Advice Bureau.¹⁴²

Voluntary arrangements are debt management tools that typically involve income payments and exclude assets. They generally provide for full repayment over time, although creditors may waive accruing interest and charges and/or agree to an element of composition at the outset or after the arrangement has been operating for a period of time.¹⁴³ Their disadvantages are similar to those of DMAs. The DAS was intended to provide a better alternative for debtors, but this has not been borne out in practice as take-up under the scheme has been low.¹⁴⁴

III. THE EXISTING SYSTEMS: SCOPE AND SUITABILITY

A. ENGLAND AND WALES

1. *Scope*

In practice, the existing system makes no provision for what are termed “no income, no assets” (“NINA”) debtors who have no meaningful resources to contribute to creditors. NINA debtors cannot make arrangements with their creditors through an IVA, CCAO or DMA; all of these require stable and consistent levels of surplus income if payments are to be sustained. One danger is that these debtors may opt for payment plans that they simply

realized to pay the debts included in the DPP is one factor which the DAS administrator or sheriff may take into account in determining whether it is fair and reasonable to approve a DPP. *Id.* §§ 26-27. It may be made a discretionary condition of a DPP that the debtor realizes a non-exempt asset and distributes its proceeds to creditors. *Id.* § 30. Exempt assets in this context are a house or mobile home which is the debtor’s sole or main residence and articles exempt from the diligence of attachment under the Debt Arrangement and Attachment (Scotland) Act, 2002. *Id.* § 30(3).

¹⁴¹*Id.* § 24.

¹⁴²Consumer debt is currently the biggest single issue brought to Citizens Advice Bureau in Scotland. See CITIZENS ADVICE BUREAU, ON THE CARDS: THE DEBT CRISIS FACING SCOTTISH CAB CLIENTS (2004), available at <http://www.cas.org.uk/ontheCards.aspx> (last visited Jan. 31, 2007).

¹⁴³For a full account of how voluntary arrangements work in practice, see SCOTTISH EXECUTIVE, ENFORCEMENT OF CIVIL OBLIGATIONS IN SCOTLAND, §§ 4.120-4.130 (2002), available at <http://www.scottishexecutive.gov.uk/Publications/2002/04/14590/3531> (last visited Jan. 31, 2007).

¹⁴⁴See *infra* Part IV.B.6.

cannot afford¹⁴⁵ and/or that are unrealistically short in timescale. NINAs may also be denied access to bankruptcy relief because they cannot afford to pay the mandatory OR's deposit.¹⁴⁶ The risk is that our poorest debtors — including the unemployed and other welfare recipients — will be left at the mercy of their creditors.¹⁴⁷ Moreover, many NINAs will not have had access to mainstream credit. Their creditors may be "sub-prime" lenders that employ more aggressive and intensive collection techniques than mainstream providers. The absence of effective access to bankruptcy therefore leaves vulnerable debtors exposed to harassment even where there is no realistic prospect of repayment.

As well as the gap in provision for NINAs, there are significant overlaps in provisions. Salaried debtors whose indebtedness exceeds £5,000 can (in theory) choose between debt relief (bankruptcy or IVA) and debt management (DMA).¹⁴⁸ Those whose indebtedness is less than £5,000, but includes a judgment debt, could also seek a CCAO.¹⁴⁹ This complexity raises the concern that debtors will not necessarily make the best choice for their circumstances. Furthermore, the available provisions for salaried debtors are not joined up. A range of public, private and voluntary intermediaries are involved in delivery.¹⁵⁰ This reinforces regulatory concerns surrounding the

¹⁴⁵See KEMPSON & COLLARD, *supra* note 77, at v, 45-46 (suggesting that most CCAO debtors can only afford to make token payments, which may go towards explaining the low completion rates); see also DEPT. OF CONSTITUTIONAL AFFAIRS, A CHOICE OF PATHS—BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT, CP 23/04, §§ 28, 30 (2004), available at <http://www.dca.gov.uk/consult/debt/debt.htm> (last visited Jan. 31, 2007)[hereinafter CHOICE OF PATHS]; INSOLVENCY SERVICE, RELIEF FOR THE INDEBTED—AN ALTERNATIVE TO BANKRUPTCY?, §§ 27-31 (2005), available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/consultationpaperwithnewannex1.pdf (last visited Jan. 31, 2007)[hereinafter RELIEF FOR THE INDEBTED].

¹⁴⁶See CHOICE OF PATHS, *supra* note 145, § 32. The government insists that the deposit is necessary in order to meet the OR's administrative costs. DEPT. OF CONSTITUTIONAL AFFAIRS, RESPONSE PAPER ON THE CONSULTATION—"A CHOICE OF PATHS"—BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT CP(R) 23/04, 8-9 (2005), available at <http://www.dca.gov.uk/consult/debt/responses.pdf> (last visited Jan. 31, 2007). Waiver of the deposit would mean that the cross-subsidizing of "no asset" cases by cases in which there are assets would have to increase significantly to enable the system to remain self-financing. Creditors of debtors with non-exempt assets would pick up the tab. Despite a long campaign by the voluntary money advice sector, the Court of Appeal held that levying the deposit does not infringe the due process rights of debtors without means to pay it on the analysis that bankruptcy relief is a "paid for" service or benefit not a constitutional right. *R. v. Lord Chancellor, ex parte Lightfoot*, [2000] Q.B. 597 (a British re-run of *United States v. Kras*, 409 U.S. 434 (1973)).

¹⁴⁷Based on survey evidence, the government estimates that over 30% of debtors who seek face-to-face advice at Citizens Advice Bureau are NINAs. RELIEF FOR THE INDEBTED, *supra* note 145, §§ 23-26.

¹⁴⁸See *supra* Part II.A.1, 2, 4.

¹⁴⁹See *supra* Part II.A.3.

¹⁵⁰Ramsay, *supra* note 28, at 214-18. For the point that complexity of provision increases the dependency of consumer debtors on intermediaries and may lead to their effective disempowerment, see Iain Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, 20 J. CONSUMER POL'Y 269, 277 (1997)[hereinafter *Models of Consumer Bankruptcy*].

capacity of the system to deliver independent, impartial and appropriate debt advice.

One issue is whether bankruptcy and IVAs are sufficiently differentiated. If we leave aside psychological variables associated with perceived stigma, debtors who have surplus income but no non-exempt assets and little risk of attracting post-discharge restrictions are better off going bankrupt than opting for an IVA on a crude cost-benefit analysis. This is because the maximum period for which they can be required to contribute from surplus income in bankruptcy is three years compared to the now industry-standard five years in an IVA.¹⁵¹ Yet, the IVA market continues to grow fast, raising regulatory concerns about the quality of advice and information debtors are receiving about the relative merits of five-year IVAs and bankruptcy from providers whose business is selling IVAs. The availability of debt relief and debt management in a complex system raises similar concerns.

2. Suitability

There are suitability issues surrounding the utility of IVAs and CCAOs for consumer debtors with surplus income. IVAs were originally designed as a bankruptcy alternative for debtors from business and the professions.¹⁵² Despite their continuing popularity, it is arguable that they have been under-utilized in comparison to DMAs even though they offer consumer debtors the prospect of debt relief and creditors the prospect of better returns than bankruptcy at limited cost to the state.¹⁵³ The procedural requirements (including the requirement for the holding of a creditors' meeting at which creditors can suggest and vote on modifications to the proposal) generate a fixed level of unavoidable cost that is incurred regardless of the size of the overall indebtedness.¹⁵⁴ Thus, IVAs proposed by consumer debtors with small debt burdens tend to be rejected because the projected returns net of fixed costs do not satisfy creditors' dividend demands.¹⁵⁵ There is a strong case for simplifying the IVA to make it accessible to consumer debtors at a lower threshold of indebtedness.

CCAOs are of limited use. Consumer debtors rarely satisfy the eligibility criteria. They may have defaults but no judgment debts. Many will owe more than £5,000.¹⁵⁶ The procedure is a limited payment plan scheme for

¹⁵¹See Walters, *supra* note 28, at 80-81, 102-03.

¹⁵²INSOLVENCY LAW AND PRACTICE, *supra* note 5, § 365.

¹⁵³It is estimated that 59% of debtors who entered a debt resolution process in 2004 opted for a DMA compared to 9% who opted for an IVA. IMPROVING IVAs, *supra* note 80, § 24; GREEN, *supra* note 39, Part III (characterizing this as a market and a regulatory failure).

¹⁵⁴See IMPROVING IVAs, *supra* note 80, §§ 26-37.

¹⁵⁵See LIVING ON TICK, *supra* note 60, at 12.

¹⁵⁶*Id.* (showing that British consumers, on average, incur high debt burdens (c. £40,000) before seeking advice and formal solutions).

small debtors whose viability is questionable in cost-benefit terms.¹⁵⁷

DMAs are *prima facie* suitable for debtors who have stable incomes, assets that they wish to preserve and relatively low levels of debt that they wish to repay over an extended period of time. However, the availability of debt relief for this type of debtor through a five-year IVA does call into question the appropriateness of DMAs for anyone other than the “terminally proud.”¹⁵⁸

B. SCOTLAND

1. Scope

There are also gaps and overlaps in the Scottish system. Mirroring England and Wales, the main gap in Scottish provision is the lack of solution for NINA debtors¹⁵⁹ giving rise to a corresponding risk that they will simply be left at the mercy of their creditors. In Scotland, it is the eligibility requirements rather than the cost of applying for sequestration which is the issue for these debtors.¹⁶⁰ NINAs, who by definition lack the means to enter a PTD or the DAS, effectively have no access to an appropriate procedure if they cannot establish apparent insolvency. The Scottish Executive set up a Working Group on Debt Relief to consider the NINA question.¹⁶¹ The Working Group agreed that there was a pool of NINA debtors, although it was not possible to quantify the number with any accuracy from the information available.¹⁶² It acknowledged the pressure which NINAs may feel, as a result of formal or informal enforcement action or otherwise, as a result of their inability either to pay their debts or obtain debt relief.¹⁶³

In terms of overlaps, as in England and Wales, a given debtor, particularly one with disposable income, may in theory choose between different debt relief/management options. Where the choice is between sequestration (assuming eligibility) and a PTD, which capture essentially the same assets and contributions from income and generally result in debt relief after the same period of time, debtors may regard a PTD as a better option because it is less formal and has less severe consequences than sequestration in terms of public-

¹⁵⁷The CCAO scheme does not cover its costs and is therefore subsidized by other court users and taxpayers.

¹⁵⁸Pat Boyden, *Individual Voluntary Arrangement*, RECOVERY, Spring 2004, at 18, available at http://www.r3.org.uk/uploaded_documents/spring2004.pdf (last visited Jan. 31, 2007).

¹⁵⁹NINA debtors are now referred to in Scotland as LILA (low income, low asset) debtors.

¹⁶⁰The current fee for a sequestration petition is £63. The Sheriff Court Fees Order, 1997, S.I. 1997/687 (S. 47), § 3, sched. 1, amended by Sheriff Court Fees Amendment Order, 2002, S.S.I. 2002/269, § 2(3).

¹⁶¹See MODERN APPROACH, *supra* note 14, §§ 7.9, 7.10; SCOTTISH EXECUTIVE, REPORT OF THE WORKING GROUP ON DEBT RELIEF (2005), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0016112.pdf> (last visited Jan. 31, 2007)[hereinafter WORKING GROUP REPORT].

¹⁶²*Id.* at 3, 16-20.

¹⁶³*Id.* at 22-24; see *infra* Part IV.B.3 for further discussion of the Working Group’s recommendations.

ity and legal restrictions. Debtors with surplus income may also consider the DAS. Here, debtor choice may be influenced by a number of factors. One is the extent of any assets. Both sequestration and a PTD include the debtor's non-exempt assets while the DAS generally does not. So, a debtor with assets which would be captured by sequestration or a PTD who does not wish to lose them may prefer the DAS.¹⁶⁴ Another is the availability of debt relief. Sequestration and a PTD generally result in debt relief while the DAS does not. A third is the repayment period. This is likely to be longer in DAS than in sequestration or a PTD because of the requirement to pay in full. Against this, the DAS may have less severe consequences for the debtor, particularly in terms of future access to credit.¹⁶⁵ A debtor with surplus income may also consider a voluntary arrangement. The DAS, however, will generally be a better choice because it is regulated and dissenting creditors can be crammed down.

The issues of debtor choice resulting from these overlaps are similar to those in England and Wales although, even with the introduction of the DAS, the Scottish system is probably less complex. These issues are explored further below in the discussion of the Scottish reforms.¹⁶⁶

2. Suitability

There are also a number of issues with respect to the suitability of the various options. The Scottish Executive presented reform of personal insolvency law as necessary to produce "a common sense bankruptcy regime suitable for the twenty-first century."¹⁶⁷ The system was seen as outdated and in need of reform in order to be fit for purpose despite having been the subject of major reform in 1985 and 1993.¹⁶⁸

Sequestration was criticized as unfit for purpose in several ways. It was seen as stigmatic and inhibiting to enterprise. Reform was seen as necessary to reduce stigma and encourage entrepreneurship while still providing robust protection for the public and business community from culpable debtors¹⁶⁹ and ensuring a level playing field with England and Wales following the changes brought in by EA 2002.¹⁷⁰ It was seen as unfit for purpose as regards the balance between debtors and creditors. Reform was seen as necessary to

¹⁶⁴There is anecdotal evidence that creditors are prepared to accept PTDs providing for reconveyance of assets to the debtor following a remortgage which will thereby release equity for distribution to the PTD creditors.

¹⁶⁵It is understood anecdotally that the main credit reference agencies score DAS debtors more favorably.

¹⁶⁶See *infra* Part IV.B.

¹⁶⁷See MODERN APPROACH, *supra* note 14, § 1.6.

¹⁶⁸B(S)A, 1985, c. 66; Bankruptcy (Scotland) Act, 1993, c. 6.

¹⁶⁹*Id.* § 1.7.

¹⁷⁰*Id.* § 4.4 .

strike an appropriate balance between debtor and creditor interests,¹⁷¹ for example, in relation to income payments and the treatment of the debtor's home and other assets and to address problems with access to sequestration. It was also seen as unfit for purpose because the procedure was perceived to be unnecessarily cumbersome and in need of streamlining and modernization.¹⁷²

PTDs were seen as unfit for purpose because they were also perceived as not striking an appropriate balance between debtor and creditor interests, not least because they offer debt relief with a much "lighter touch" than sequestration.¹⁷³ There were concerns over a perceived lack of proper returns for creditors,¹⁷⁴ especially in the case of income-only trust deeds,¹⁷⁵ and lack of regulation.¹⁷⁶

DAS was seen as unfit for purpose because of its low take-up. Reasons given for this included lack of capacity in the system because of insufficient certified money advisers, lack of any automatic debt relief, even in the limited form of freezing of interest and/or charges, and the availability of income-only PTDs.¹⁷⁷

IV. THE REFORMS

A. ENGLAND AND WALES

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

The introduction of a moratorium procedure to protect NINA debtors from harassment was previously contemplated¹⁷⁸ but not implemented. However, a more radical "bankruptcy lite" scheme for NINA debtors, frozen out of bankruptcy by the prohibitive filing cost, is being implemented. The scheme was first vetted in a consultation paper issued by the Department of

¹⁷¹*Id.* at v (entitled Ministerial Forward); SCOTTISH EXECUTIVE, MODERNISING BANKRUPTCY AND DILIGENCE IN SCOTLAND: DRAFT BILL AND CONSULTATION, § 1.1 (2004), available at <http://www.scotland.gov.uk/consultations/justice/cdbdb.pdf> (last visited Jan. 31, 2007)[hereinafter MODERNISING BANKRUPTCY].

¹⁷²See MODERN APPROACH, *supra* note 14, § 1.6.

¹⁷³See PROTECTED TRUST DEEDS, *supra* note 107, §§ 3.1-3.9.

¹⁷⁴See MODERN APPROACH, *supra* note 14, §§ 8.5, 8.6; PROTECTED TRUST DEEDS, *supra* note 107, §§ 3.32, 3.39.

¹⁷⁵See PROTECTED TRUST DEEDS, *supra* note 107, § 4.7.

¹⁷⁶See MODERN APPROACH, *supra* note 14, § 8.4; MODERNISING BANKRUPTCY, *supra* note 171; § 6.3; see also PROTECTED TRUST DEEDS, *supra* note 107, §§ 3.43-3.57.

¹⁷⁷See PROTECTED TRUST DEEDS, *supra* note 107, § 3.16; see also ENTERPRISE AND CULTURE COMMITTEE, ENTERPRISE AND CULTURE COMMITTEE OFFICIAL REPORT 7 MARCH 2006, 2006-6, available at <http://www.scottish.parliament.uk/business/committees/enterprise/or-06/ec06-0602.htm#Col2713> (last visited Jan. 31, 2007)[hereinafter ECC REPORT-7 MARCH 2006]. All ECC reports are available on the Scottish Parliament website at <http://www.scottish.parliament.uk/business/committees/enterprise/meetings.htm>.

¹⁷⁸See INSOLVENCY LAW AND PRACTICE, *supra* note 5, § 309.

Constitutional Affairs (“DCA”), which expressed the concern that too many NINA debtors were accessing the unsuitable CCAO procedure.¹⁷⁹ As CCAOs are not self-financing, the cost of processing NINA debtors through an unsuitable procedure, with apparently little benefit for them and their creditors, is subsidized by other court users and taxpayers. The DCA concluded that a self-financing administrative debt relief scheme operated by the Insolvency Service should be introduced for NINAs with relatively low levels of debt.¹⁸⁰ A court-based scheme was considered inappropriate because debt relief is outside the dispute resolution and enforcement functions of the courts and could be delivered better, and more cost-effectively by the Insolvency Service.¹⁸¹

As a majority of respondents to the consultation indicated that they were in favor of some form of separate NINA scheme,¹⁸² the Insolvency Service was tasked to produce a more comprehensive proposal, details of which were subsequently set out in a further consultation.¹⁸³ The scheme — modeled on a no asset procedure that is being introduced in New Zealand — is targeted at NINA debtors who cannot realistically pay even a portion of their debts.¹⁸⁴ NINAs are defined as debtors whose liabilities, both secured and unsecured, are less than £15,000 and whose net disposable income is no more than £50 per month after deducting necessary living expenses.¹⁸⁵ The inclusion of secured debts in calculating total liabilities would have the effect of excluding homeowners who have mortgage debts.¹⁸⁶ The figure of £50 per month is the threshold figure that the OR uses as the trigger for income payments in bankruptcy.¹⁸⁷ Allowable expenses would be calculated in accordance with the Common Financial Statement approved by the British Bank-

¹⁷⁹See CHOICE OF PATHS, *supra* note 145, §§ 24-35.

¹⁸⁰*Id.* §§ 28-42.

¹⁸¹*Id.* § 34. Moves are also afoot to remove voluntary bankruptcy petitions from the court system on similar grounds.

¹⁸²See DEPT. OF CONSTITUTIONAL AFFAIRS, RESPONSE PAPER ON THE CONSULTATION—‘A CHOICE OF PATHS’—BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT CP(R) 23/04, 8 (2005), available at <http://www.dca.gov.uk/consult/debt/responses.pdf> (last visited Jan. 31, 2007).

¹⁸³See RELIEF FOR THE INDEBTED, *supra* note 145.

¹⁸⁴*Id.* §§ 5, 20, 22, 31; see also Thomas Telfer, *New Zealand Bankruptcy Law Reform: The New Role of the Official Assignee and the Prospects for a No-Asset Regime* in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 10, at 247-68. In New Zealand, the objective is to channel NINAs away from bankruptcy, which is regarded as an excessively punitive response to the problems of subsistence-level debtors and welfare recipients. Telfer, *supra*, at 263-64. By contrast, in England and Wales, the need for bankruptcy administration to remain self-financing, manifested in the government’s refusal to countenance means-tested exemption from the requirement to pay the OR’s deposit, is perhaps the most significant driver behind establishment of a separate scheme.

¹⁸⁵See RELIEF FOR THE INDEBTED, *supra* note 145, §§ 51-64.

¹⁸⁶*Id.* §§ 51-54.

¹⁸⁷*Id.* § 57.

ers' Association and the Money Advice Trust, which relies on data from the family expenditure survey conducted by the Office for National Statistics.¹⁸⁸ Access to the scheme would also be denied to debtors who have non-exempt assets worth more than £300.¹⁸⁹

Under the scheme, the OR would make a debt relief order ("DRO") staying individual enforcement and providing for discharge of debts scheduled to the order after one year.¹⁹⁰ Applications would be made electronically to save costs, but would have to be routed through an approved intermediary drawn from the not-for-profit debt advice sector.¹⁹¹ A moderate fee in the region of £100 would be charged to cover administrative costs,¹⁹² a significant reduction on the costs of filing bankruptcy.

Given the generous nature of the relief, safeguards to protect creditors and the public are contemplated in addition to the eligibility requirements. DROs would be entered on the publicly accessible individual insolvency register (as are bankruptcies and IVAs).¹⁹³ The debtor would be subject to the same legal restrictions as an undischarged bankrupt, including the prohibition on obtaining credit over a prescribed amount without disclosure.¹⁹⁴ Creditors would have a right to object on specified grounds which could lead the OR, after enquiry, to revoke the order.¹⁹⁵ It would be an offence for a debtor to fail willfully to disclose information about her affairs, especially her assets, income and liabilities.¹⁹⁶ Non-disclosure could also be a ground for revocation. Any misconduct would also be dealt with through the existing post-discharge restrictions regime.¹⁹⁷ It would not be possible for a qualifying debtor who obtains a DRO to seek a further one within the next six years.¹⁹⁸ Finally, mechanisms are proposed for dealing with improvements in the

¹⁸⁸THE COMMON FINANCIAL STATEMENT—A PARTNERSHIP APPROACH TO DEALING WITH DEBT (2004), available at <http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=146&a=729> (last visited Jan. 31, 2007)[hereinafter THE COMMON FINANCIAL STATEMENT]. On current dollar-sterling exchange rates, it is conceivable that a hypothetical debtor with £50 per month of surplus income who would just qualify for relief under the proposed scheme would be a presumptive abuser for the purposes of 11 U.S.C. § 707(b)(2) by virtue of the \$100 current monthly income trigger.

¹⁸⁹See RELIEF FOR THE INDEBTED, *supra* note 145, §§ 65-68. Exempt assets would be the same as for bankruptcy. *Id.* § 65.

¹⁹⁰*Id.* §§ 32, 72

¹⁹¹*Id.* §§ 38-50. The process is therefore similar to the Scottish DAS scheme, albeit DROs would be a tool of debt relief.

¹⁹²*Id.* § 36.

¹⁹³*Id.* §§ 74, 89.

¹⁹⁴*Id.* § 88.

¹⁹⁵*Id.* §§ 82-84.

¹⁹⁶*Id.* § 87. Full disclosure of these matters is critical given the eligibility requirements.

¹⁹⁷*Id.* §§ 87, 92-95.

¹⁹⁸*Id.* §§ 91.

debtor's financial circumstances during the one-year duration of the order.¹⁹⁹

The response to the proposed scheme was overwhelmingly positive.²⁰⁰ A Working Group has been formed consisting of representatives from the debt advice sector to consider further the licensing, resourcing and functions of the approved intermediary. Draft legislation to establish the scheme is currently going through Parliament.²⁰¹

2. "Consumerizing" IVAs

A Working Group made up of representatives from the IP profession, the IVA factories and the debt advice sector was set up by the Insolvency Service to address the issue of the suitability of the IVA for consumer debtors. The Group's proposals were put forward in a consultation paper published in 2005.²⁰² It is perhaps ironic that "consumerizing" IVAs reached the top of the policy agenda at just the point when the existing procedure has become the debt relief tool of choice for salaried consumer debtors.²⁰³ Nevertheless, the main theme of the paper was the continuing under-utilization of IVAs relative to DMAs, despite the IVA being "the best product in the market for both debtors and creditors,"²⁰⁴ because it offers a stay and debt relief within a finite timescale for the former, and the prospect of a better return than bankruptcy for the latter. The proposals therefore aim to increase the accessibility of the IVA, with a view to correcting a perceived market failure and to fulfilling the IVA's potential as an alternative to DMAs and bankruptcy that balances the interests of debtors and creditors.²⁰⁵ The chosen vehicle is the

¹⁹⁹*Id.* §§ 90, 93-99. It is contemplated that debtors would be given an opportunity to consider an IVA or a CCAO, pending revocation of the DRO.

²⁰⁰See *INSOLVENCY SERVICE, RELIEF FOR THE INDEBTED—AN ALTERNATIVE TO BANKRUPTCY, SUMMARY OF RESPONSES AND GOVERNMENT REPLY*, §§ 1-15 (2005), available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/relieffortheindebtedanalternativeto bankruptcyresponse.pdf (last visited Jan. 31, 2007)[hereinafter *RELIEF FOR THE INDEBTED-RESPONSES AND REPLY*]. Some in the credit industry appear to have recognized that there is no point incurring further costs trying to get blood out of a stone.

²⁰¹See *TRIBUNALS, COURTS AND ENFORCEMENT BILL*, H.L. Bill 5 06-07 (2006), available at http://www.publications.parliament.uk/pa/pabills/200607/tribunals_courts_and_enforcement.htm (last visited Jan. 31, 2007).

²⁰²See *IMPROVING IVAs*, *supra* note 80.

²⁰³See *LIVING ON TICK*, *supra* note 60, at 8.

²⁰⁴See *IMPROVING IVAs*, *supra* note 80, § 21.

²⁰⁵The Insolvency Service only seeks income payments from bankrupts in roughly 20% of cases (albeit this represents an increase on historic levels). *INSOLVENCY SERVICE, EVALUATION OF CONTRIBUTIONS FROM INCOME BY BANKRUPTS — SECOND INTERIM EVALUATION REPORT*, § 16 (2006), available at <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/evaluation/Contributions/Contributions2.pdf> (last visited Jan. 31, 2007). We interpret IVA reform as therefore being more about shifting the market away from DMAs towards IVAs than it is about channeling debtors away from bankruptcy towards IVAs. *IMPROVING IVAs*, *supra* note 80, §§ 21-24. It follows from the Insolvency Service data on income payments, *supra*, that many of those who currently file for bankruptcy would not have sufficient surplus income to support a viable IVA.

“simple individual voluntary arrangement” (“SIVA”). As the name suggests, what is envisaged is a simplified version of the IVA. SIVA would not displace the IVA, which would remain available for business debtors and consumer debtors who fail to satisfy the proposed SIVA eligibility requirements. The idea is to reduce the fixed costs associated with setting up an IVA through procedural streamlining and other forms of standardization so as to create a cost-effective model capable of balancing the interests of debtors and creditors, while providing sufficient incentives to private sector IPs to operate it.

SIVA would be open to debtors whose undisputed unsecured debts do not exceed £75,000.²⁰⁶ Access would be barred to anyone whose conduct would attract post-discharge restrictions in bankruptcy²⁰⁷ or who had entered a SIVA within the previous six years.²⁰⁸ The main target group is consumer debtors in regular employment who have sufficient surplus income (or income and assets) to pay a higher dividend than would be achieved in bankruptcy.²⁰⁹

The procedure would be vastly simplified. The majority required for approval would be reduced from its current level (in excess of 75% of creditors by value) to a simple majority by value.²¹⁰ There would be no requirement for a creditors’ meeting and no scope for creditors to propose modifications. Creditors would vote for or against the proposal in writing within a prescribed period on a “take it or leave it” basis.²¹¹ The emphasis would be on the nominee to ensure that the best deal is reached using a standard approach to the assessment of allowable expenses and disposable income.²¹²

As well as a streamlined procedure, SIVAs would have standard default

²⁰⁶See *IMPROVING IVAs*, *supra* note 80, §§ 28-29. The majority of the IVA debtors sampled in *LIVING ON TICK*, *supra* note 60, would have qualified.

²⁰⁷See *IMPROVING IVAs*, *supra* note 80, §§ 32, 34. The nominee would effectively act as gatekeeper.

²⁰⁸*Id.* §§ 33, 35.

²⁰⁹*Id.* § 28. Homeowners with equity in their homes would be required to contribute something from the equity. Homeowners who insist on excluding equity from the arrangement would likely be denied access to a SIVA. *Id.* §§ 60-64.

²¹⁰*Id.* §§ 34, 89-93. This is designed to reduce the influence of creditors who choose not to support the process or who have unrealistic dividend demands. *Id.* In the original proposals, an even more radical scheme for a two-tier SIVA was advanced which contemplated a non-voting procedure for qualifying debtors whose debts did not exceed £30,000 and a simple majority approval procedure for qualifying debtors whose debts were between £30,000 and £75,000. *Id.* §§ 30-33. The non-voting SIVA met with a cool response from the credit industry and only the simple majority approval SIVA is being taken forward. See *INSOLVENCY SERVICE, IMPROVING INDIVIDUAL VOLUNTARY ARRANGEMENTS, SUMMARY OF RESPONSES AND GOVERNMENT REPLY*, 5, 9-12 (2006), available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/improvingIVAsgovtresponse.pdf (last visited Jan. 31, 2007).

²¹¹See *IMPROVING IVAs*, *supra* note 80, §§ 35, 73-77, 84-88.

²¹²*Id.* §§ 34, 78-83. The approach would be based on *THE COMMON FINANCIAL STATEMENT*. See *supra* note 188.

features. The default period for a SIVA would be five years.²¹³ This reflects the prevalence of five-year IVAs in the existing market place.²¹⁴ The development of an industry-wide best practice model would be encouraged, incorporating standard terms and conditions.²¹⁵ The cost savings from procedural streamlining and product standardization should improve access for consumer debtors who have relatively low debt burdens. IP fees would also be spread over the life of the arrangement to provide a better balance for creditors, increasing the likelihood that creditor approval would be forthcoming.²¹⁶ Legislation to bring in the SIVA is anticipated in 2008 although no formal announcement to that effect has been made.

3. CCAOs/DMA_s

It might be thought that the promotion of wider access to formal payment plans through the development of the SIVA would prompt the abolition of the discredited CCAO procedure. It has long been recognized that the CCAO eligibility requirements are a bar to access, and the available evidence suggests that the main users are people on low incomes with limited means of repayment many of whom would qualify for relief under the DRO scheme for NINAs.²¹⁷ However, the current indications are that CCAOs are to be retained alongside a new out-of-court regulated DMA scheme.

During its consultation on NINAs, the DCA posited a revised CCAO model with an increased debt ceiling, a fixed duration and under which statutory composition would be available where scheduled repayments were made but at levels insufficient to meet the debts in full.²¹⁸ Consultees were asked to consider whether the model could best be delivered through the court system or through an out-of-court approved intermediary scheme (similar in design to the DAS).²¹⁹ After consultation,²²⁰ the DCA is now promoting three schemes for which provision has been made in draft legislation: (i) a revised court-based CCAO with a £15,000 debt ceiling, a maximum duration of five years and with composition to be offered as an incentive to compliance with the terms of the order; (ii) a parallel out-of-court regulated DMA

²¹³See IMPROVING IVAs, *supra* note 80, §§ 33, 35.

²¹⁴See LIVING ON TICK, *supra* note 60, at 23.

²¹⁵See IMPROVING IVAs, *supra* note 80, §§ 45-50, 55-59, 65-68.

²¹⁶*Id.* §§ 106-24. IPs can currently draw their fees from realizations achieved in the early years of an IVA. Where the IVA subsequently fails, creditors may receive little or nothing because any realizations will have been absorbed in costs. *Id.* § 108.

²¹⁷See KEMPSON & COLLARD, *supra* note 77, at 5-20; CHOICE OF PATHS, *supra* note 145, §§ 30-42.

²¹⁸See CHOICE OF PATHS, *supra* note 145, §§ 61-77.

²¹⁹*Id.* §§ 58-77.

²²⁰See DEPT. OF CONSTITUTIONAL AFFAIRS, RESPONSE PAPER ON THE CONSULTATION—'A CHOICE OF PATHS'—BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT CP(R) 23/04, 3-24 (2005), available at <http://www.dca.gov.uk/consult/debt/responses.pdf> (last visited Jan. 31, 2007).

scheme with similar features (including composition) to be operated by approved intermediaries; and (iii) an enforcement restrictions order procedure simply offering a short-term moratorium on enforcement to debtors whose difficulties are temporary pending the revival of their fortunes.²²¹ The varieties of payment plans offering debt relief look set to multiply further.

B. SCOTLAND

The Scottish reforms, like the earlier introduction of the DAS, are part of a wider Scottish Executive policy of creating a new approach to debt management and enforcement in Scotland. A brief account of their development is followed by discussion of the reforms themselves under a number of headings: (i) reforms parallel to those introduced in England and Wales by the EA 2002 ("EA 2002-style reforms"); (ii) debtor access to sequestration; (iii) other reforms to sequestration; (iv) reforms to PTDs; and (v) reforms to the DAS.

1. *Development of the Reforms*

The Scottish Executive began consulting on its proposed reforms in 2003. It initially sought views on EA 2002-style reforms in Scotland, debtor access to sequestration, other reforms to sequestration (including the relationship of sequestration and the DAS), changes to the range of debt management tools, streamlining of sequestration procedure, reform of PTDs and NINA debtors.²²² Firm proposals on several of these issues were put out for further consultation in 2004, and the Working Group on Debt Relief was set up to consider debtor access to sequestration and NINA debtors.²²³ The Working Group's report was published on the Scottish Executive website during 2005 but was not the subject of formal consultation.²²⁴

The Bankruptcy and Diligence (Scotland) Bill ("BD(S) Bill") was introduced into the Scottish Parliament on 21 November 2005.²²⁵ It included the EA 2002-style reforms, limited provisions affecting debtor access to sequestration, provisions designed to adjust the balance between debtors and creditors and to streamline sequestration procedure as well as provisions for the reform of PTDs.²²⁶ The majority of these provisions were to be contained in separate regulations, a draft of which was subsequently the subject of a separate consultation and a separately issued partial regulatory impact assessment published in early 2006.²²⁷ The Scottish Executive also completed an internal

²²¹See TRIBUNALS, COURTS AND ENFORCEMENT BILL, *supra* note 201, Part 5.

²²²See MODERN APPROACH, *supra* note 14, at 2-33.

²²³See MODERNISING BANKRUPTCY, *supra* note 171, §§ 7.8-7.10.

²²⁴See WORKING GROUP REPORT, *supra* note 161.

²²⁵See BANKRUPTCY AND DILIGENCE ETC. BILL, S.P. Bill 50 06-07 (2006), available at <http://www.scottish.parliament.uk/business/bills/50-bankruptcyDiligence/index.htm> (last visited Jan. 31, 2007).

²²⁶*Id.* at Part 1.

²²⁷See PROTECTED TRUST DEEDS, *supra* note 107, Annex B.

review of the DAS in February 2006, which formed the basis of its advice to the Scottish Ministers on DAS reform but which was not published or the subject of formal consultation.

During the legislative process, a number of new provisions were added to the bankruptcy part of the BD(S) Bill including provisions on NINA access to sequestration and DAS reform. The Scottish Parliament passed the Bankruptcy and Diligence etc (Scotland) Act, 2007 ("BD(S)A 2007") on 30 November 2006 and received the Royal Assent on 15 January 2007, but most of its substantive provisions, including the majority of the bankruptcy reforms, will come into force on a date or dates to be appointed, probably in late 2007 or early 2008.²²⁸

2. The EA 2002-Style Reforms

The BDS(A) 2007 contains reforms which mirror in most respects the EA 2002 reforms in England and Wales. When it comes into force, the debtor will be discharged automatically one year after the date of sequestration unless discharge is deferred by the court.²²⁹ In contrast to England and Wales, however, there will be no possibility of an earlier discharge unless the debtor utilizes the composition procedure.²³⁰ Debtors with sufficient means will, however, be required to make income contributions for up to three years from the date of sequestration, and formal provisions on income payment agreements have been introduced to complement the existing provisions for court orders.²³¹ There will also be a post-discharge restrictions regime, closely mirroring that introduced in England and Wales, which will be operated by the AIB.²³² As has happened in England and Wales, the legal restrictions applicable to undischarged debtors are being cut back²³³ and the Scottish Ministers have been given power to make orders repealing, revoking, amending or modifying other such restrictions where appropriate.²³⁴

These reforms have a similar business rationale to the parallel reforms introduced in England and Wales, an additional driver in Scotland being the need to keep a level playing field between the two jurisdictions.²³⁵ However,

²²⁸For the Bill's progress, see <http://www.scottish.parliament.uk/business/bills/50-bankruptcyDiligence/index.htm> (last visited Jan. 31, 2007).

²²⁹BD(S)A, 2007, asp. 3, § 1.

²³⁰B(S)A, 1985, c. 66, § 56, sched. 4. The composition procedure will be simplified as part of the reforms streamlining the sequestration process. See *supra* Part II.B.

²³¹BD(S)A, 2007, asp. 3, § 18.

²³²*Id.* at asp. 3, § 2.

²³³*Id.* at asp. 3, § 3 makes appropriate amendments to IA 1986, c. 45, § 51, which deals with disqualification from being appointed as a receiver. BD(S)A, 2007, asp. 3, § 4 also makes amendments to the Local Government (Scotland) Act, 1973, c. 65, § 31, which deals with disqualification from nomination, election and holding office as a member of a local authority.

²³⁴BD(S)A, 2007, asp. 3, § 5, inserting B(S)A, 1985, c. 66, § 71B.

²³⁵The Enterprise and Culture Committee of the Scottish Parliament, however, took the view that the

the reforms are not restricted to business debtors but apply equally to consumer debtors and raise the same kinds of issues that have been raised in England and Wales.²³⁶

3. Debtor Access to Sequestration

Debtor access to sequestration became a key issue in the context of the Scottish reforms. The problem of apparent insolvency as a barrier to debtor access to sequestration had long been recognized²³⁷ and the definition had in the past been the subject of piecemeal amendment prior to the introduction of the BD(S) Bill. The BD(S) Bill contained one further amendment which impacted indirectly on the apparent insolvency requirement but still depended on creditor action as the trigger.²³⁸ None of these changes addressed the fundamental issue.

The Working Group on Debt Relief considered the issue of debtor access to sequestration in the context of access to debt relief generally and for NINAs in particular. It took account of the DRO proposals in England and Wales but rejected a separate NINA procedure for Scotland on the basis that this would add further complexity to the system. It favored a solution based on widening access to sequestration.²³⁹ Despite some concerns with this approach, in particular the possible unintended economic effects of any sustained rise in sequestrations that might result, the majority of the Working Group believed it was possible to widen access to sequestration for NINAs for whom it was appropriate while avoiding a significant rise in sequestra-

impact on levels of entrepreneurial activity or business restarts will be negligible and the desire to create a level playing field as regards discharge periods across the UK was a more likely reason for the reforms. See ECC STAGE 1 REPORT, *supra* note 120, §§ 32-33.

²³⁶See ECC REPORT-7 MARCH 2006, *supra* note 177, col. 2173. The Enterprise and Culture Committee took evidence on the effect of the Enterprise Act reforms south of the border.

²³⁷See MODERN APPROACH, *supra* note 14, § 6.3 (referring to SCOTTISH OFFICE, THE BANKRUPTCY (SCOTLAND) ACT 1985, A CONSULTATION FOLLOW-UP: PROTECTED TRUST DEEDS AND OTHER ISSUES (Jul. 1998)[hereinafter JULY 1998 CONSULTATION]). The JULY 1998 CONSULTATION was a follow-up to an earlier consultation, SCOTTISH OFFICE, APPARENT INSOLVENCY, A CONSULTATION PAPER ON AMENDING THE BANKRUPTCY (SCOTLAND) ACT 1985 (Jul. 1997). Apparent insolvency is not the only barrier to debtor access to sequestration. Before a debtor can petition for sequestration without the concurrence of a qualifying creditor, she must also establish that there has been no award of sequestration in the preceding five years and that she has the qualifying level of debt, currently £1,500. B(S)A, 1985, c. 66, § 5(2B)(a). This level will be increased to £3,000. BD(S)A, 2007, asp. 3, § 25.

²³⁸The amendment introduced a requirement that enforcement of a summary warrant — a warrant to do diligence (execution in other jurisdictions) without the need for a judgment on the debt — must be preceded by service of a “charge to pay” (a form of demand). BD(S)A, 2007, asp. 3, § 195. Non-compliance with a “charge to pay” constitutes apparent insolvency. B(S)A, 1985, c. 66, § 7(1)(c)(ii). Summary warrants may be obtained on application to the sheriff by certain types of creditors only, notably creditors for rates and taxes. Debtors’ (Scotland) Act, 1987, c. 18, §§ 74, 106 and sched. 4. Thus, the amendment may indirectly extend access to sequestration for rate and tax debtors.

²³⁹See WORKING GROUP REPORT, *supra* note 161, at 22-45.

tions and any unintended adverse economic consequences.²⁴⁰

The Working Group identified two categories of NINAs: “true” NINAs, who had no reasonable prospect of paying off their debts within a reasonable time, and temporary NINAs, who had suffered a change of circumstances but whose position might improve with the result that they could resume repaying their debts.²⁴¹ The Working Group considered that true NINAs should obtain immediate access to sequestration, but access to debt relief for temporary NINAs should be delayed for a period to see whether their position did improve.²⁴²

Having considered various possible ways of achieving this, the Working Group recommended the introduction of a new “single gateway” procedure designed to give those NINAs for whom sequestration was appropriate an alternative means of access to it, while also providing a solution for temporary NINAs.²⁴³ It also recommended, *inter alia*, compulsory referral to independent money advice — a form of pre-bankruptcy counseling — for all debtors seeking sequestration.²⁴⁴

The Scottish Executive accepted that widening access to sequestration was the appropriate solution for NINAs but has not implemented the Working Group’s proposed “single gateway.”²⁴⁵ In fact, when it was introduced, the BD(S) Bill did not contain any NINA provisions. When the issue was raised in evidence to the Enterprise and Culture Committee of the Scottish Parliament,²⁴⁶ the Scottish Executive responded that it was still considering how to address the problem and would introduce appropriate amendments at a later stage.²⁴⁷ The provisions ultimately enacted will allow a debtor who satisfies certain conditions to establish that she is unable to pay her debts as an alternative to establishing that she is apparently insolvent or has granted a

²⁴⁰*Id.* at 25-28.

²⁴¹*Id.* at 21.

²⁴²*Id.* at 29-37.

²⁴³*Id.* at 38-49. The proposed procedure envisaged an application for debt relief by an approved money adviser on behalf of the debtor where an independent assessment of the debtor’s financial position showed that there was no suitable alternative procedure such as a PTD or the DAS. *Id.* at 38-39 This would result either in an immediate award of sequestration (true NINAs) or a moratorium of up to 12 months (analogous to the proposed enforcement restrictions order procedure in England and Wales) with provision for re-assessment at appropriate intervals (temporary NINAs). *Id.* at 40-41. The moratorium would be terminated where the debtor ceased to be a NINA. *Id.* at 41. Where the debtor remained a NINA at the end of the moratorium, an award of sequestration would then be made. *Id.*

²⁴⁴*Id.* at 4, 31-32, 38, 42, 46, 49.

²⁴⁵BD(S)A, 2007, asp. 3, § 15 introduces a new point of access to sequestration but not in the form of the single gateway.

²⁴⁶See ENTERPRISE AND CULTURE COMMITTEE, ENTERPRISE AND CULTURE COMMITTEE OFFICIAL REPORT 17 JANUARY 2006, 2006-1 AND 24 JANUARY 2006, 2006-2, available at <http://www.scottish.parliament.uk/business/committees/enterprise/2006.htm>.

²⁴⁷See ECC REPORT-7 MARCH 2006, *supra* note 177, cols. 2747-48.

trust deed which has failed to become protected.²⁴⁸ The conditions are that her weekly income does not exceed £100, she does not own any land and the total value of her assets does not exceed £1,000.²⁴⁹ Matters such as how the debtor's income and the value of her assets are to be determined for this purpose will be prescribed in regulations.²⁵⁰ This is akin to the approach adopted in England and Wales.

4. *Other Reforms to Sequestration*

The BDS(A) 2007 contains other reforms to sequestration, including (i) those designed to adjust the balance between debtors and creditors; and (ii) those designed to streamline the procedure to improve its efficiency, cost-effectiveness and user-friendliness. The first group includes the introduction of time limits for dealing with the debtor's home²⁵¹ and for retaining certain other assets of the debtor within the sequestration.²⁵² These proposed reforms shift the balance in favor of the debtor and, as such, may increase the attractiveness of sequestration as a debt solution for eligible debtors. The second group includes provision for debtor petitions to be determined administratively by the AIB rather than the court; consolidation of all other bankruptcy proceedings in the sheriff court (with limited exceptions); the combining of the roles of interim and permanent trustees in sequestration; and the streamlining of the procedure for judicial composition.²⁵³ These reforms address perceived fitness for purpose issues.

5. *Reforms to PTDs*

The BDS(A) 2007 itself contains some of the reforms to PTDs and paves the way for the remainder to be implemented by regulations. As already noted, a draft of the regulations was the subject of a separate consultation in early 2006.

The proposed reforms embodied in the draft regulations fell broadly into two overlapping categories: reforms to the requirements for a trust deed to become protected and reforms relating to the regulation of PTDs. In relation to the former, the Scottish Executive proposed the introduction of a formal statutory requirement for the debtor to be given certain prescribed informa-

²⁴⁸See BD(S)A, 2007, asp. 3, § 15.

²⁴⁹*Id.* § 15.

²⁵⁰*Id.*

²⁵¹*Id.* § 19. These reforms provide similar treatment of the bankrupt's home as exists in England and Wales. IA 1986, c. 45, § 283A.

²⁵²See BD(S)A, 2007, asp. 3, § 29. This provision is similar to the provision relating to the debtor's home in so far as it provides for the revesting in the debtor of any non-vested contingent interest which forms part of the debtor's estate by virtue of B(S)A, 1985, c. 66, § 31(5). However, in this case, revesting occurs on discharge.

²⁵³See BD(S)A, 2007, asp. 3, §§ 6, 14, 16, 21.

tion and advice²⁵⁴ and for a PTD to be identified as more appropriate than either the DAS or sequestration.²⁵⁵ It also proposed that protection should be formally granted by the AIB as opposed to following automatically from completion of the necessary formalities.²⁵⁶ This marks a shift towards greater administrative and regulatory oversight. In granting protection, the AIB would have to be satisfied that it was reasonable²⁵⁷ and that the PTD would produce a minimum dividend: the suggested level was 30p in the pound, although views were also sought on 20p or 25p in the pound.²⁵⁸ Creditors would also receive more extensive information, and the trustee would have to provide a fixed quote for the cost of the work carried out up to the decision on protection and a costs estimate for the administration of the PTD to creditors and the debtor.²⁵⁹ Where protection was refused, the debtor would be given a six-week "cooling off" period during which she could cancel the trust deed.²⁶⁰ It was also proposed that a PTD should provide for the debtor to be discharged after a maximum of three years.²⁶¹

On the regulatory side of the equation, it was proposed to introduce a formal statutory requirement for the trustee to keep certain specified records and to produce a statement of affairs.²⁶² The trustee would also be obliged to notify all interested parties of a change of more than a specified percentage in the projected level of either the trustee's fees and outlays or the dividend to creditors.²⁶³ The AIB would be given extended powers to audit fees²⁶⁴ and new powers to give directions to or remove the trustee, to act as trustee and to revoke the protected status of a PTD.²⁶⁵

The Scottish Executive specifically addressed the issue of the overlap be-

²⁵⁴See PROTECTED TRUST DEEDS, *supra* note 107, §§ 4.5, 4.6.

²⁵⁵Information and advice requirements are currently governed by professional rules rather than by statute. See STATEMENT OF INSOLVENCY PRACTICE 3A (SCOTLAND) available at <http://www.r3.org.uk/publications/index.cfm?p=80&s=0&id=245>.

²⁵⁶See PROTECTED TRUST DEEDS, *supra* note 107, § 4.11.

²⁵⁷*Id.* In determining whether it were reasonable to grant protection, the AIB would have to consider in particular: whether the debtor would have been able to pay her debts in full without granting a trust deed; whether it was likely that the court would grant an application for post-discharge restrictions were the debtor's estate to be sequestrated; whether the projected dividend payable under the PTD would be higher than that payable on sequestration; and the extent to which the proposed dividend would be funded by the debtor's income. *Id.* at Annex B. The last factor reflects the Scottish Executive's concern about income-only trust deeds given the overlap with DAS. *Id.* § 4.7.

²⁵⁸See PROTECTED TRUST DEEDS, *supra* note 107, §§ 4.12-4.22.

²⁵⁹*Id.* § 4.30.

²⁶⁰*Id.* § 4.35.

²⁶¹*Id.* §§ 4.23-4.25.

²⁶²*Id.* §§ 5.2, 5.3.

²⁶³*Id.* §§ 5.4-5.8. A change in one, of course, may lead to a change in the other.

²⁶⁴See BANKRUPTCY AND DILIGENCE ETC. BILL, *supra* note 225, cl. 21.

²⁶⁵See PROTECTED TRUST DEEDS, *supra* note 107, § 5.9. Regarding the AIB acting as trustee, the Scottish Executive has indicated that it envisages that the AIB would do so only in cases where the trustee has been removed, but the draft regulations annexed to PROTECTED TRUST DEEDS do not contain

tween sequestration, PTDs and the DAS, starting from the premise that “[i]n a properly integrated system there should be no overlap unless it serves a clear purpose, as in general having two tools doing more or less the same thing will make the system both harder to understand and less likely to be fair to either debtors or creditors.”²⁶⁶ Having considered the degree of overlap between the existing tools in relation to debtor protection, debt relief, payments from income and payments to creditors, it concluded that: (i) there was a clear justification for overlap between all three tools in terms of debtor protection;²⁶⁷ (ii) there was justification for a less severe form of debt relief than sequestration in the form of PTDs, and PTDs should therefore be retained despite the overlap with debt relief in sequestration and, possibly in the future, with a reformed DAS;²⁶⁸ (iii) there was a clear justification for overlap between all three tools in terms of the “can pay, should pay” principle, but the current position with respect to income payments in PTDs could not be justified;²⁶⁹ and (iv) there was insufficient differentiation between sequestration and PTDs in terms of the dividends payable to creditors which could not be justified but could be remedied by the introduction of a minimum dividend.²⁷⁰ In principle, therefore, the Scottish Executive concluded that PTDs are a useful tool which has a place in a reformed and integrated system of debt management and relief, but that reform is required to enable them to fulfill that role.²⁷¹

The proposals, particularly the proposal for a minimum dividend, proved highly controversial.²⁷² The Enterprise and Culture Committee took the view that the case for a minimum dividend of 30p in the pound had not been

such limitation. *Id.* at Annex B. There are obvious conflicts of interests with the AIB acting as trustee even in such limited cases.

²⁶⁶*Id.* § 3.12. On the potential disempowering effects of complex choices in the consumer bankruptcy context, see *Models of Consumer Bankruptcy*, *supra* note 150, at 277.

²⁶⁷See PROTECTED TRUST DEEDS, *supra* note 107, § 3.14.

²⁶⁸*Id.* §§ 3.20, 3.21; see *infra* Part IV.B.6 for further discussion regarding possible reforms to DAS.

²⁶⁹*Id.* § 3.26.

²⁷⁰*Id.* § 3.39.

²⁷¹*Id.* § 3.54. The Enterprise and Culture Committee agreed that PTDs should continue to have a major role and should be simple to access, rigorously monitored and appropriately regulated. ECC STAGE 1 REPORT, *supra* note 120, at § 71. However, the Committee did not support the minimum dividend proposal. *Id.*

²⁷²See E. MacLean, *The Bankruptcy & Diligence (Scotland) Bill - A Battle Ahead*, RECOVERY, Summer 2006, at 33, available at http://www.r3.org.uk/uploaded_documents/summer2006.pdf (last visited Jan. 31, 2007); see also D. Hunter, *Changes to Trust Deed legislation will cause misery for thousands*, RECOVERY, Summer 2006, at 40, available at http://www.r3.org.uk/uploaded_documents/summer2006.pdf (last visited Jan. 31, 2007). The responses to the consultation are summarized in PROTECTED TRUST DEEDS - CONSULTATION ON DRAFT REGULATIONS AND PARTIAL REGULATORY IMPACT ASSESSMENT ANALYSIS OF RESPONSES (June 2006), available at <http://www.scotland.gov.uk/Resource/Doc/1097/0031324.pdf> (last visited Jan. 31, 2007)[hereinafter PROTECTED TRUST DEEDS ANALYSIS OF RESPONSES].

made out.²⁷³ The Scottish Executive indicated that it would consider how best to take reform forward in the light of the consultation responses²⁷⁴ but has not yet published any revised proposals. It is possible that the price for abandoning the requirement for a minimum dividend may be a positive approval process similar to that required for an IVA.

6. *Reform of the DAS*

Reform of the DAS is the only part of the reform package which has not been the subject of formal consultation. As already noted, the DAS was regarded as in need of reform because of a disappointingly low take-up. The reasons for this can be identified as: lack of capacity in the system because of insufficient certified money advisers; lack of any automatic debt relief; and the availability of income-only PTDs.²⁷⁵ PTD reform has already been discussed, and it is understood that the issue of lack of capacity is being addressed administratively.²⁷⁶ With regard to debt relief, the Scottish Executive simply indicated that it was considering the introduction of an element of debt relief into the DAS on the basis that the system arguably lacked a modest form of debt relief falling between the DAS and sequestration/PTDs (such as waiver of interest or charges after payments from income had been sustained for a suitable period).²⁷⁷ An amendment to the BD(S) Bill was then introduced. The provision ultimately enacted is an enabling provision which permits the Scottish Ministers to make provision in regulations for an element of debt relief in the DAS.²⁷⁸ The extent of debt relief which might be introduced under this provision is, however, at present unknown.

V. EVALUATING THE PROPOSED REFORMS

A. ENGLAND AND WALES

1. *Scope*

The implementation of the DRO scheme for NINAs will address the main gap in current provision. There is some logic in an initial cap of £15,000, as it would be aligned with the cap proposed for the CCAO and would therefore provide a facility for temporary NINAs whose circumstances improve to reach an arrangement with their creditors.²⁷⁹ While at first sight the cap looks like a compromise between the money advice agencies and the

²⁷³See ECC STAGE 1 REPORT, *supra* note 120, § 71.

²⁷⁴See PROTECTED TRUST DEEDS ANALYSIS OF RESPONSES, *supra* note 272, § 63.

²⁷⁵See ECC REPORT-7 MARCH 2006, *supra* note 177, cols. 2744-47

²⁷⁶*Id.*

²⁷⁷See PROTECTED TRUST DEEDS, *supra* note 107, § 3.16; *see also* ECC REPORT-7 MARCH 2006, *supra* note 177, cols. 2744-47 (providing the Scottish Executive's evidence to the ECC which confirmed that the DAS review was addressing the issue of whether some element of debt relief was appropriate).

²⁷⁸BD(S)A, 2007, asp. 3, § 211.

²⁷⁹See RELIEF FOR THE INDEBTED-RESPONSES AND REPLY, *supra* note 200, § 63.

credit industry, it probably reflects the profile of NINA debtors that the policymakers have in mind, namely the unemployed, the long-term sick and other welfare recipients who have tended to gravitate towards the CCAO.

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

If all the various reform proposals are implemented, salaried debtors would be presented with a bewildering array of options. Salaried consumer debtors with unsecured debts of £15,000 or less could access bankruptcy, reformed CCAO, regulated or unregulated DMA or SIVA (assuming a satisfactory dividend could be offered net of costs). Salaried consumer debtors with unsecured debts of more than £15,000 but less than £75,000 could access bankruptcy, SIVA or (possibly) DMA (though a realistic repayment programme within a reasonable timeframe would depend on income and debt levels). Regarding the salaried consumer debtors with unsecured debts of £15,000 or less, it is questionable whether reform of the CCAO is worth pursuing. If CCAOs were abolished outright, there would still be a range of options, especially if SIVA could be made cost-effective for debtors in the £10,000-£15,000 bracket.²⁸⁰ The likelihood is that the type of debtors who have tended to use the CCAO could be better accommodated either in bankruptcy or in the proposed NINA scheme.

The SIVA has been identified as the best policy tool for balancing the interests of salaried debtors and their creditors.²⁸¹ However, the question of whether it is sufficiently differentiated from bankruptcy to make it the appropriate solution for debtors remains open. The role of bankruptcy as a debt

²⁸⁰Below these levels, it may be difficult for providers to cover costs and generate a dividend for creditors based on realistic payment levels over five years.

²⁸¹See *supra* Part IV.A.2.

relief tool for consumer debtors has not been articulated in policy terms.²⁸² While there is no doubt that it is an inferior mechanism from the standpoint of creditors, the differential from a debtor perspective looks quite marginal. There is a rhetorical insistence from government that bankruptcy is a tough option. Yet, a salaried debtor with little or no non-exempt assets can obtain a swift discharge in bankruptcy at the price of three years' worth of income payments. It is true that an undischarged bankrupt may be subject to greater legal restrictions and that there is greater publicity than is the case with SIVA/IVA. Debtors also run the risk of post-discharge restrictions in bankruptcy. However, the credit industry does not treat IVAs any more favorably than bankruptcy for the purposes of lending decisions.²⁸³ The risk of a debtor being subject to post-discharge restrictions is not high in practice because of practical limits on the capacity of the Insolvency Service to investigate and process cases with the consequence that resources are carefully targeted. In any event, SIVA targets precisely those salaried debtors who would not attract post-discharge restrictions in bankruptcy.²⁸⁴ Essentially, these debtors have a choice between a five-year payment plan (SIVA/IVA) and a three-year payment plan (bankruptcy) at the price of the diminishing legal restrictions on undischarged bankrupts and a higher degree of publicity. For rational maximizers who can afford the filing fee and who have nothing to fear from the legal restrictions on undischarged bankrupts (for example, because they are not, or do not wish to become, company directors or members of a profession), bankruptcy is a rational choice.

Of course, consumer debtors do not act in the manner predicted by classical economic theory. A host of other variables, some of them "fuzzy" and difficult to quantify, may impact on debtor choice. Despite the loosened restriction policy of EA 2002, bankruptcy appears to retain considerable stigma.²⁸⁵ For others, the choice will be influenced by their point of entry into the debt solutions market and/or by personal factors such as pride or shame. If a consumer debtor prefers to enter a five-year SIVA rather than petition for bankruptcy because of perceived stigma and/or personal reasons,

²⁸²Ramsay, *supra* note 28, at 223-25.

²⁸³See, e.g., R3 BOOKLET, *supra* note 56, § 35.

²⁸⁴See *supra* Part IV.A.2.

²⁸⁵In a recent survey, over 70% of a sample of debtors gave answers that indicated a continuing perception of stigma attaching to bankruptcy. JOHN TRIBE, CENTRE FOR INSOLVENCY LAW AND POLICY, BANKRUPTCY COURTS SURVEY 2005—A PILOT STUDY, 104-107 (2006), available at <http://www.insolvency.gov.uk/insolvencyprofessionalandlegislation/research/personaldocs/BankruptcyCourtsSurvey.pdf> (last visited Jan. 31, 2007); see also INSOLVENCY SERVICE, ATTITUDES TO BANKRUPTCY, available at <http://www.insolvency.gov.uk/insolvencyprofessionalandlegislation/policychange/attitudes/report-attitudetobankruptcy.pdf> (last visited Jan. 31, 2007) (reporting on four surveys of various groups, including a sample of bankrupts, which identified similar perceptions based, among other things, on the publicity given to bankruptcy orders through advertisement and the signal that bankruptcy sends about debtors' inability to meet their obligations).

there is no problem *per se*. However, where the choice between bankruptcy and SIVA is finely balanced (as it may be in the case of salaried debtors with no assets), the system needs to ensure that consumer debtors are properly advised on all the options available to them in their particular circumstances. Given the overlap between bankruptcy and SIVA, regulatory and ethical concerns still arise.²⁸⁶ The simple truth is that the IP profession, the IVA factories and private sector DMA providers have no economic stake in bankruptcy as a debt solution for consumer debtors. No asset bankruptcies are dealt with exclusively by the OR. The potential for conflicts of interest is obvious.²⁸⁷ These concerns will be reinforced as the complexity of the system increases further with the implementation of the CCAO and regulated DMA reforms. On the other hand, plenty of consumer debtors are accessing bankruptcy,²⁸⁸ so the problem should not be exaggerated. Nevertheless, the capacity of an increasingly complex system to deliver appropriate advice for salaried debtors remains a pressing issue. There are related issues concerning whether the various agencies involved in the provision of debt advice and debt solutions are sufficiently coordinated and whether key players, such as the voluntary sector and the Insolvency Service, are adequately resourced to meet demand.

2. Suitability

Bankruptcy, SIVA, reformed CCAOs and regulated DMAs all offer debt relief options appropriate for salaried consumer debtors with limited assets and stable income. For salaried debtors, especially those with relatively low levels of indebtedness who have assets, reformed CCAO and DMAs (regulated or unregulated) provide repayment options in which assets can be sheltered. SIVAs offer a useful alternative for salaried debtors who want the discipline of a payment plan but for whom full repayment through a DMA of maximum five years' duration would not be possible.

The DRO scheme would plug the gap in the current provision. It offers a cheap bankruptcy equivalent for debtors who cannot afford to file for full bankruptcy. Without it, the system discriminates in favor of debtors who have some ability to pay by offering them a debt relief option that is not open to NINAs. Clearly, the system would provide a route out of indebtedness for the poorest debtors, and to that extent it may be judged both suitable and appropriate. In terms of design and implementation, the principal concern is

²⁸⁶See *supra* Part III.A.1.

²⁸⁷See 2005 INSOLVENCY PRACTICES COUNCIL ANN. REP. 3, 6-7, available at http://www.insolvencypractices.org.uk/reports/2005/annual_report.htm (last visited Jan. 31, 2007) (raising concern of potential for conflicts of interest). The IPC was established in 2000 to represent the public interest in relation to the regulatory, ethical and professional standards of IPs. See <http://www.insolvencypractices.org.uk/pages/about.htm> (last visited Jan. 31, 2007).

²⁸⁸See TRIBE, *supra* note 285, at 29-34.

whether such a low-cost scheme will be sufficiently robust to exclude debtors for whom it is not intended and to ensure that temporary NINAs are channeled into repayment alternatives. Indeed, temporary NINAs, as distinct from true NINAs, pose a problem for policymakers who will not be thanked if the scheme provides a full discharge for debtors whose circumstances shortly after the expiry of the twelve-month period are such that they would no longer be classified as NINAs. This begs the question of whether temporary NINAs should be denied access and channeled into the proposed enforcement restrictions procedure.²⁸⁹ It may be that, in practice, approved intermediaries will be encouraged to channel temporary NINAs into enforcement restrictions as a holding measure. It remains to be seen how well the DRO scheme will be ring-fenced to maintain the integrity of the underlying “can pay, should pay” principle.

Another possible concern is that NINAs admitted to the scheme may have limited incentives to improve their fortunes during the twelve-month period for fear that they would lose eligibility and be forced to switch to some form of repayment option. This may be thought to cut against the grain of social norms of individual responsibility and self-help. If, however, in practice, the scheme would be reserved via the screening process to true NINAs, this concern may be exaggerated. In any event, similar incentives operate in bankruptcy because the OR or trustee cannot seek income payments after discharge. Thus, a debtor who has insufficient surplus income to warrant income payments at the commencement of bankruptcy may have little incentive to increase her income until after she has received her discharge.

B. SCOTLAND

1. *Scope*

It is more difficult to evaluate the overall effect of the Scottish reforms. Several key elements of the reform package are still missing, in particular the detailed regulations on aspects of the NINA provisions, the bulk of the PTD reforms and the extent of any debt relief to be introduced into the DAS.

The NINA problem has been addressed to the extent that debtors satisfying the conditions set out in the legislation will be able to access debt relief through sequestration. However, the provisions fail to distinguish between true and temporary NINAs or to provide a solution other than sequestration for the latter. It also remains to be seen whether the entry thresholds have been set at an appropriate level to meet the needs of the current (and future) NINA pool. Much may depend on how these are fleshed out in the regulations.

The ultimate form of the PTD reforms is not yet known. It is worth

²⁸⁹See *supra* Part IV.B.3 (setting forth the views of the Working Group on Debt Relief in Scotland).

noting, however, that the original proposals raised the prospect of the creation of a new pool of debtors who would no longer be able to access PTDs because they could not meet the minimum dividend. Even if the minimum dividend is abandoned, it is probable that the reforms will still result in a reduction in the number of debtors able to access PTDs. The Scottish Executive recognized this potential effect in relation to its original proposals,²⁹⁰ but suggested that debtors who could no longer access a PTD and were not in a position to pay anything to their creditors would be able to petition for sequestration, while debtors who could no longer access a PTD but who could pay something to their creditors would be able to enter the DAS.²⁹¹ Given the new provisions on access to sequestration, NINA debtors cut off from PTDs may be able to apply for sequestration instead, but appropriate care will be required to ensure that the two sets of provisions dovetail so that all debtors cut off from PTDs do have this (or some other suitable) option. It should also be noted that, since any element of debt relief introduced into the DAS is likely to be less than that available in a PTD, any “can pay” debtors cut off from PTDs who enter the DAS will obtain a lesser degree of debt relief. This, however, may be seen as justifiable on policy grounds.

The introduction of an element of debt relief into the DAS will result in three tools offering debt relief of varying degrees. The Scottish Executive did not perceive this to be an issue on the basis that the DAS will remain significantly different from other available forms of debt relief,²⁹² but this may depend on the extent of the debt relief introduced.

The overall effect of the reform package seems (potentially) to narrow access to PTDs while increasing access to sequestration and the DAS.²⁹³ It is still not clear, however, that all existing and potential new gaps will be adequately closed, and there is still the potential for overlaps. Debtors may in some cases have less choice, but could still have difficult choices to make. For example, a debtor who is eligible for a PTD and sequestration may still prefer the former because it will probably remain a “lighter touch” than sequestration, but the latter will result in a quicker discharge. Either will be more attractive than the DAS in terms of debt relief but less attractive in terms of formality and consequences. A debtor with income who is not eligible for a PTD but has a choice of sequestration (assuming eligibility) or the DAS will have similar issues to consider. The attractiveness of the DAS where there is a choice may come down to the extent of the debt relief introduced, but it will remain a good option for debtors with income *and* assets who wish to

²⁹⁰See PROTECTED TRUST DEEDS, *supra* note 107, § 3.41.

²⁹¹*Id.* § 3.42.

²⁹²*Id.* § 3.17.

²⁹³Even under any revised PTD reforms, it would appear likely that access to PTDs would still be narrowed, albeit perhaps not as much as under the original reforms.

avoid realizing (all of) their assets. The issue of appropriate advice will therefore remain critical.

2. Suitability

Some doubt whether the introduction of EA 2002-style reforms in Scotland will achieve their intended purpose of fostering entrepreneurship, notwithstanding that the evidence given to the Enterprise and Culture Committee on the operation of the EA 2002 in England and Wales was positive.²⁹⁴ Furthermore, the suitability of a reformed procedure tailored to (the minority of) business debtors for (the majority of) consumer debtors may be questioned.

Any reform of the regulatory aspects of PTDs may increase public confidence and to that extent strengthen their role in the reformed system. On the other hand, it is likely that their availability for many consumer debtors will be restricted. This would only be a significant problem, however, if such debtors did not have access to a suitable alternative option.

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

CONCLUSION

It is clear from the foregoing that strides are being made towards the development of comprehensive consumer bankruptcy systems in Britain. In England and Wales, the outstanding issues are issues of scope concerning the relationship between the various overlapping debt relief options (bankruptcy, SIVA/IVA, reformed CCAO, regulated DMA). The byzantine complexity of this emerging system also raises related issues about the capacity of the accompanying infrastructure to deliver appropriate advice and channel debtors towards an appropriate solution. The key will be to ensure that the infrastructure is sufficiently joined up and robust to enable debtors (especially salaried debtors) to navigate the system and to make what may be quite difficult choices.

In Scotland, there are also still outstanding issues of scope. It is not yet clear that all gaps in the system will be closed by the reforms. While the reformed system will be less complex and offer less choice than the reformed

²⁹⁴See ECC REPORT·7 MARCH 2006, *supra* note 177, at cols. 2715-36.

system in England and Wales, there will still be overlaps and the same issues concerning the capacity to deliver appropriate advice. There are also resourcing issues relating to the AIB, who will have a hugely increased role across all the options, and outstanding issues of suitability in relation to a reformed sequestration process tailored for business debtors, but utilized mainly by consumers, and the extent of debt relief to be introduced into the DAS without any contribution from assets.

Despite some differences in approach which are attributable to the fact that the two jurisdictions have separate legislative competency for personal insolvency matters, some common themes can be identified. First, considerable attention is being focused on how to accommodate NINA debtors. Secondly — and somewhat incongruously — both jurisdictions have committed to reforms that seek to customize bankruptcy and sequestration as “fresh start” regimes for failed entrepreneurs. Given that the main users of these regimes are consumer debtors, the emphasis on business debtors seems misplaced.²⁹⁵ Regarding consumer debtors, most of the emphasis has been on the provision of “consumer-friendly” alternatives to bankruptcy and sequestration (DAS, SIVA, reformed PTD, reformed CCAO, regulated DMA). Finally, both jurisdictions place limited emphasis on the educative potential of insolvency processes beyond the salutary impact of the processes themselves. The possibility of North American-style compulsory debtor counseling and education programs has been floated in both jurisdictions, most recently by the Working Group on Debt Relief in Scotland,²⁹⁶ but generally such initiatives have met with little enthusiasm. Instead, there is a much greater emphasis on improving financial awareness and budgeting skills within the general population as an *ex ante* measure falling within the statutory remit of the UK’s principal financial regulator, the Financial Services Authority. Nevertheless, as we have seen, there is also a growing emphasis on schemes (such as DAS and NINA) involving approved intermediaries who may perform *de facto* educative functions. This, in turn, may lead to the increasing formalization of the role of the voluntary sector in the provision of debt advice.

There are thus patterns of divergence and convergence within the emerging systems which reflect the constitutional relationship between the two jurisdictions as well as their geographical proximity. The potential, given dev-

²⁹⁵Much of the initial impetus behind the EA 2002 reforms derived from the view that British culture is not as tolerant of business failure as the prevailing culture in the United States and that this has a chilling effect on the willingness of our citizens to take business risks. See Walters, *supra* note 28, at 65-8. It is ironic that the US “fresh start” policy was seen as an inspiration for business-oriented bankruptcy reform in the United Kingdom at a point in the 1990s when it was already obvious that, in practice, Chapter 7 was a consumer remedy! The subsequent tightening of the US “fresh start” policy brought about by the 2005 reforms only adds to the sense of irony.

²⁹⁶See *supra* Part IV.B.

olution, for policymakers north and south of the border to experiment with different models, while learning from each other, is obvious. It remains to be seen what will emerge from that process and how the proposed reforms will work in practice.

GLOSSARY

AIB: Accountant in Bankruptcy (Scotland).

BD(S) Bill: Bankruptcy and Diligence etc (Scotland) Bill, 2006, S.P. Bill 50 06-07.

BD(S)A 2007: Bankruptcy and Diligence etc (Scotland) Act, 2007, asp. 3.

B(S)A 1985: Bankruptcy (Scotland) Act, 1985, c. 66.

CCAO: A county court administration order under Part VI of the County Courts Act 1984, c. 28 (England and Wales).

DAS: The debt arrangement scheme established by Part I of the Debt Arrangement and Attachment (Scotland) Act, 2002, asp. 17.

DCA: Department of Constitutional Affairs.

DMA: An unregulated debt management arrangement (England and Wales).

DPP: A debt payment programme entered into under the DAS.

DRO: Debt relief order.

EA 2002: Enterprise Act, 2002, c. 40 (England and Wales).

IA 1986: Insolvency Act, 1986, c. 45.

IP: Licensed insolvency practitioner.

IVA: An individual voluntary arrangement under Part VIII of IA 1986.

NINAs/NINA debtors: Debtors with no assets and no disposable income.

OR: Official Receiver.

PTD: A protected trust deed under B(S)A 1985.

SIVA: Simple individual voluntary arrangement.