Law Society of Scotland

Stage 1 Briefing

Trusts and Succession (Scotland) Bill

September 2023

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Trusts and Succession (Scotland) Bill[1] (the Bill) was introduced by the then Cabinet Secretary for Justice and Veterans, Keith Brown MSP, on 22 November 2022. We previously submitted written evidence on the Bill to the Delegated Powers and Law Reform Committee of the Scottish Parliament[2] and provided oral evidence as part of the Committee's stage 1 consideration of the Bill on 16 May 2023.[3] The Delegated Powers and Law Reform Committee's Stage 1 Report on the Trusts and Succession (Scotland) Bill (the Stage 1 Report)[4] was published on 15 September 2023.

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 28 September 2023

Executive Summary

General Remarks

We welcome the introduction of the Bill and the opportunity it presents to reform and consolidate trust law, in order to continue and extend the use of Scotland as a favourable jurisdiction for trusts.

In our engagement with the Bill, we have suggested ways to further refine and improve the proposals.

We are disappointed that the Bill does not legislate for the nature and constitution of trusts. We welcome the recommendation in the Stage 1 Report that the Scottish Government considers other options for taking forward work outside of this Bill, to further codify this area of the law, including defining different types of trusts.

The Bill raises considerations regarding the interaction between trust law and charity law. Some- but not all- public trusts are registered as charities in the Scottish Chairty Register and supervised as such by the

[1] Trusts and Succession (Scotland) Bill – Bills (proposed laws) – Scottish Parliament | Scottish Parliament Website

[2] 23-03-20-ts-trusts-and-sucession-scotland-bill-written-evidence-final.pdf (lawscot.org.uk)

[3] Delegated Powers and Law Reform Committee | Scottish Parliament TV

[4] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net)

Scottish Charity Regulator ('OSCR') under the Charities and Trustee Investment (Scotland) Act 2005 (as amended by the Charities (Regulation and Administration) (Scotland) Act 2023). In our engagement with the Bill, we have highlighted specific considerations which apply to public trusts generally, and to public trusts which are registered charities specifically. Whilst there are areas of the Bill where we would welcome clarification as to the interaction between the Bill and charities legislation, particularly as regards the definition of 'beneficiary', we are generally of the view that trust and charity legislation can and should run in tandem in relation to charitable trusts.

We note the comments in the Stage 1 report in relation to the role of the courts and we are generally supportive of moves towards greater choice of forum for trust cases.

We note particular concerns regarding pension scheme trusts. We support the recommendation in the Stage 1 Report that the Scottish and UK Governments pursue the timely implementation of a section 104 Order, as a priority, to ensure commencement of the Bill is not delayed, and that there is no need for an 'undesirable' dual operation of the 1921 and 2023 laws.

Whilst we agree with the view reached in the Stage 1 Report that it is not generally desirable for trusts to have a sole trustee, we are concerned that any attempts to remove the possibility of sole trustees would have potential unintended consequences- particularly retrospectively.

Part 1

Chapter 1

Part 1, Chapter 1 makes provisions for the appointment, assumption, resignation, removal and discharge of trustees.

We welcome the proposals contained in this chapter, but note a number of aspects where further clarity is required. In particular, we would welcome clarification as to: when an individual is considered to become a trustee; what is meant by "unfit" to carry out the duties of a trustee means in terms of section 6(1)(a); the scope and application of section 7- particularly where there are only two trustees or where a trustee is deemed 'incapable' by follow trustees; the practical consequences of the removal of a trustee by beneficiaries; and the interaction of the discharge provisions in section 10 with the position that a trustee's duty to account never prescribes.

Chapter 2

Part 1, Chapter 2 relates to decision-making by trustees.

These provisions largely codify the existing law and are generally helpful.

We would welcome some clarification of liability in relation to a dissenting trustee. We also have particular concerns regarding the definition of 'incapable' within the Bill, which we have commented on below. We would welcome specific reference to the position of a *sine qua non* trustee on the face of the Bill.

Chapter 3

Part 1, Chapter 3 makes provision for the powers and duties of trustees.

We generally welcome these provisions, subject to some specific comments. We highlight specific considerations relation to public trusts, and to charitable trusts subject to charities legislation.

We welcome the recommendation in the Stage 1 Report that the Bill be amended to explicitly allow trustees (subject to the terms of the trust deed) to choose to invest in environmental, social and governance investments, particularly when these might underperform compared to other investments.

On delegation and the appointment of agents and nominees, we are sympathetic to concerns raised during stage 1 scrutiny regarding whether the Bill as introduced goes far enough to capture the ways in which trusts are used in the financial services sector. We are also of the view that trustees should not be able to avoid their personal duties entirely and there may be a need to clarify scope and application of section 18(5).

We consider the provisions on duty to provide information in sections 25 and 26 to be an important development of the current position. Implementation of these provisions- if passed- will need to be well publicised. We would welcome clarification on a number of aspects of these provisions, including their practical application and the definition of 'beneficiary' and 'potential beneficiary' in this context. We welcome the request in the Stage 1 Report for the Scottish Government to review the evidence heard at stage 1 and consider whether sections 25 and 26 of the Bill should be amended.

We would welcome further clarification regarding section 27 on trustees' duties of care, and whether these standards are also applicable to protectors and supervisors. We would also welcome further consideration of the interaction with the duties of care imposed on charity trustees by the 2005 Act. We would further welcome clarification in respect of the breach of duty provisions in sections 28-31, particularly regarding application to property which has left the trusts as a result of a breach of fiduciary duty and the scope of the protection afforded by a trust deed for the purposes of section 30(2).

Chapter 4

Part 1, Chapter 4 makes provisions for contractual rights, damages, and the validity of certain transactions and documents.

We have commented on the detail of specific provisions in this chapter, including highlighting a number of areas where further clarification would be helpful.

Chapter 5

Part 1, Chapter 5 makes provision for the duration of trusts, and specifically for the abolition of restrictions on accumulation and on creation of future interests.

We are generally supportive of this provision and would welcome its extension to charitable trusts. Trustees of charitable trusts are subject to other rights and duties under charity law to manage funds appropriately and are subject to oversight from OSCR and HMRC. There may be reasons consistent with the charity's purposes for income to be accumulated and we consider that retaining the prohibition on accumulation of income for charitable trusts serves little practical purpose.

We would also welcome the extension of this provision to existing trusts, where this has been expressly provided for by the truster in contemplation of future changes in the law.

Chapter 6

Part 1, Chapter 6 makes provisions for private purpose trusts.

We have commented on the detail of specific provisions in this chapter. We consider that the position of a supervisor is a novel one in Scots law.

Chapter 7

Part 1, Chapter 7 makes provision for protectors.

We consider that these provisions bring Scotland into line with other jurisdictions.

We do consider that the provisions in this chapter could benefit from further improvement, particularly as protectors are relatively rare in domestic trusts and the legislation may be used as a basis for drafting. We have commented on the detail of specific provisions in this chapter.

We would welcome clarification on the wording of some of the specific powers that may be conferred on protectors, particularly the "power to determine the law of the domicile of the trust". We welcome the request in the Stage 1 Report for further clarification on this point.

We would also suggest that a protector should be given the power themselves to appoint and remove trustees, rather than the protector having powers to direct the trustees to remove one of their number and to direct the trustees to assume additional trustees as presently provided for in the Bill. We would further suggest that the protector should have the power to appoint a new protector, rather than the trustees.

The Bill refers to the power of the protector to represent an incapable person. We would welcome clarification on the safeguards to avoid substitute/ 'best interests' decision-making, and on the interaction with the role of any attorney or guardian with relevant powers to represent the incapable person in the matter.

Chapter 8

Part 1, Chapter 8 makes provisions for the powers of the court.

We note that this chapter extends the jurisdiction of the courts in relation to trusts and suggest that careful consideration should be given to how capacity to manage this can be ensured within the court system.

We would welcome clarification as to the reason for the exclusion of private purpose trusts from the scope of sections 54- 60.

We have commented on the detail of specific provisions in this chapter, including: seeing clarification in respect of the scope and definitions used within a number of provisions; the interaction- if any- with the principles set out in section 1 of the Adults with Incapacity (Scotland) Act 2000; and whether there are sufficient safeguards in cases where the trust may have been established to give effect to the truster's protective intent.

On the provision for alternation of trust purposes in section 61, we suggest that the 25-year period may be too restrictive. We therefore welcome the recommendation in the Stage 1 Report that would allow alternation in exceptional circumstances- although the scope of 'exceptional circumstances' would inevitably require to be tested via the courts.

We have particular concerns regarding section 65 of the Bill, which deals with expenses of litigation. Whilst we welcome the general rule against personal liability for trustees, our concerns relate to section 65(2) which provides that, in cases where the trust property is insufficient to meet the expenses of litigation, the excess is recoverable from the personal property of the trustees on a joint and several basis. A trustee may apply to the court under section 65(6) to be relieved from personal liability for certain expenses in certain circumstances; but our concern is with personal liability in these circumstances being the default rule. This may put people off accepting office and will more than likely be a disincentive for trustees to litigate. We would suggest that the starting point should be that the trustees should not have any personal liability unless it can be shown it is fair for them to be so liable. Non-recovery is a standard risk of litigation. We therefore welcome the request in the Stage 1 Report that Scottish Government reflect on the evidence heard at stage 1 and consider whether amendment is required.

We note the evidence heard at stage 1 in support of a broader power for the court to give directions to trustees. We do not consider existing legislation to be a solution and would be supportive of amending the Bill to add a general power to the court to give directions to trustees.

Part 2

Part 2 of the Bill makes changes to the law of succession.

We welcome the provision in section 71 clarifying the effect of divorce, dissolution or annulment on a special destination.

We have a number of comments on section 72 of the Bill, which would make changes to rights of succession to intestate estates. Where the deceased is survived by a spouse/civil partner and no issue, the effect of this provision would be that the spouse/civil partner would take the whole estate. This is a significant change to the current position.

We have specific concerns regarding situations where spouses or civil partners are separated at the time of the death of one of the parties. Under the proposals in the Bill, a separated spouse/civil partner would take the entire estate no matter the state of the relationship at the time of death. Whilst we have suggested

possible alternative approaches, there is no straightforward solution to these issues and legislative change in this area must be considered extremely carefully. We welcome the request in the Stage 1 Report for the Scottish Government to provide further clarification of its intentions in relation to this provision.

If enacted, the changes proposed in Part 2 of the Bill must be accompanied by widespread public education. Under section 80(2), section 72 comes into effect 3 months after the Act comes into force. We would query whether 3 months is sufficient time to allow for appropriate public education.

The Stage 1 Report highlights a number of areas of the law of succession not presently covered by the Bill.

We note the recommendations in the Stage 1 Report regarding amending the Bill to clarify that the law does not permit an unlawful killer to be an executor of their victim's estate. We are generally supportive of this recommendation and have responded to a recent targeted consultation by Scottish Government on this topic. The sheriff should have the discretion to refuse the appointment of an unlawful killer as an executor on a case-by-case basis,

We note the recommendation in the Stage 1 Report that the Bill is amended to extend the current six-month period for cohabitants' claims to a deceased person's estate under the 2006 Act to 12 months. We are supportive of reform in this area. However, whilst extending the period for claims to 12 months would be a welcome development, we do not consider that it would provide a complete solution to the potential difficulties in this area.

We welcome the recommendation in the Stage 1 Report that succession law be given priority for future reform.

Part 3

Part 3 of the Bill contains miscellaneous and general provisions.

We consider that a number of the definitions set out in the interpretation section could be clarified, including those relating to beneficiaries, guardians, potential beneficiaries, and charitable trusts.

We have particular concerns regarding the Bill's definition of persons who are incapable. The definition is similar to that set out in the Adults with Incapacity (Scotland) Act 2000. However, it does not incorporate the principles set out in section 1 of the 2000 Act, which provide important safeguards of the rights of incapable persons. Further, there is no safeguard within the Bill providing that incapacity should be determined by an independent third party on an objective basis. In the context of proposed wider changes to capacity law in Scotland, it is also important that the present Bill is future-proofed to accommodate and keep step with possible future changes to the law in this area. We welcome the call in the Stage 1 Report for the Scottish Government to further consider the best approach to the definition of "incapable" in the Bill and to seek to amend the Bill accordingly.

Our comments on the Bill

General Remarks

We welcome the introduction of the Bill and the opportunity it presents to reform and consolidate this important area of law, following the excellent work of the Scottish Law Commission on the subject over a number of years. The Bill when enacted will be the most significant development in trust law for over 100 years, continuing and extending the use of Scotland as a favourable jurisdiction for trusts. We hope that the opportunity will be taken in its progress through the Parliament to refine further and improve some of the proposals made.

As a matter of principle we do regret that the opportunity was not taken to enact legislation on the nature and constitution of trusts. This was considered and reasons for the omission of these matters were explained in Chapter 3 of the Scottish Law Commission's *Report on Trust Law*[5] ("the SLC Report"); but in what is to some extent a code of trust law it would in our view have been even more useful to have a clear statutory basis for such matters as the definition and nature of a trust in Scots law; rules for creation; special rules for "truster as trustee" trusts; latent trusts; and the delivery of trust property. We recognise that at this stage the development of legislation on these fundamental matters would be a considerable and thus unrealistic exercise; but we urge that sight is not lost of the desirability of legislation on such matters at a later date. This might be combined with any reactive legislation in relation to the new Act once there has been an opportunity to experience its provisions in practice. We welcome the recommendation in the Stage 1 Report[6] that the Scottish Government considers other options for taking forward work outside of this Bill, to further codify this area of the law, including defining different types of trusts.

Public Trusts

The Bill raises considerations regarding the interaction between trust law and charity law. We note the comments in the Stage 1 Report[7] regarding the interaction between the Bill and charities legislation. Given the recent changes to charity law arising from the Charities (Regulation and Administration) (Scotland) Act 2023, we would welcome further consideration of the interaction. However, we are generally of the view that trust and charity legislation can and should run in tandem in relation to charitable trusts and that detailed provision in the Bill seeking to clarify how the two should work together is not necessary. Such areas of potential interaction between the trusts and charities regimes have existed since the 2005 Act first came into force but have caused little difficulty in practice.

[5] No. 239, 2014

[6] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), at para 237.

[7] Above, paras 102-103.

A public trust may be registered as a charity in the Scottish Charity Register and supervised as such by the Scottish Charity Regulator ('OSCR') under the Charities and Trustee Investment (Scotland) Act 2005 (as amended by the Charities (Regulation and Administration) (Scotland) Act 2023) ('the 2005 Act').[8] At common law, a public trust is a trust in which the beneficial interest is intended for the benefit of a section of the public (or of the public as a whole), rather than, as in the case of private trusts, named or designed individuals. Any trust registered as a charity will be a public trust because the charity test under the 2005 Act, which must be met as a precondition of registration, requires the applicant body to provide benefit to the public or a section of the public. The 'body of trustees' of the public trust is the 'body' entered in the Register. For the purposes of the 2005 Act regime, the trustees are the 'charity trustees' of the charity, that is 'the persons having the general control and management of the administration of the charity'.

Not all public trusts are registered as charities. Because there is no register of public trusts as such, the number of non-charity public trusts in existence is uncertain, but they are provided for by the existing law of trusts and it remains possible to constitute a public trust which will operate outside the framework of the 2005 Act. For example, a trust may confer sufficient benefit on the public to qualify as a public trust at common law but fail to meet the more demanding requirements of the charity test; and the trustees of a public trust which would meet the charity test may choose not to apply for registration, perhaps to avoid the burdens of regulation, though without registration they would be unable to describe the trust as a charity and would have to forego the benefits of charitable tax relief. In other words, public trusts which are not charities already exist and may be validly constituted in the future, though most new public trusts will be set up to conform with the charity test with a view to the trustees' applying for registration as a charity.

In general, the Bill makes provision for 'public trusts' as such, irrespective of whether they are or will be registered as charities. The exception is that section 41(5)(d) makes special provision as to the accumulation of income as respects public trusts which are 'charitable trusts'. (On the substance of the subsection see further below: it seems clear that 'charitable trust' here means a public trust entered in the Scottish Charity Register, rather than a charitable trust in the pre-2005 Act common law sense of the term.) Accordingly, our comments on individual provisions below (other than on section 41) are directed first at their treatment of public trusts generally, and secondly at the implications (where relevant) for public trusts which are registered as charities, with a specific focus on compatibility with the 2005 Act regime. It has not been possible for us in the time available to explore the compatibility issues in detail, but we have sought to flag them up for further consideration.

The Bill adopts the long-established approach that public trusts are in principle governed by the same common law rules and legislation as private trusts, except where the special character of a public trust as a trust intended for the benefit of the public requires differentiation of treatment. Some provisions are declared expressly not to apply to public trusts, while some are clearly inapplicable by virtue of their content. In the case of others, clarification is required on whether they are intended to apply to public trusts or not, and – again – we have sought to flag these up for further consideration.

[8] In support of these remarks see generally Stair Memorial Encyclopaedia, 2nd Charities Reissue, paras 1-8.

Against this background, it may be helpful to address at the outset the scope of the definition of 'beneficiary' which appears throughout the Bill, as defined in section 74(1). If the beneficiary of a public trust is a section of the public or the public as a whole, 'beneficiary' in that sense does not fit readily into the definition in section 74, even taking into account the extended meaning of 'person' under the Interpretation and Legislative Reform (Scotland) Act 2010. Again, if a 'beneficiary's right is nothing more than a personal right to sue the trustees and to compel them to administer the trust in accordance with the directions which it contains'[9], there is uncertainty as to how the section 74 definition applies in the case of a public trust. A public trust is enforceable by *actio popularis*, that is, at the instance of individual members of the section of the public intended to benefit from the trust, suing not 'in their own private interest, but in the interest of all members of the public who have, or may have, occasion to avail themselves' of the facility or service provided by the trust.[10] The same would apply in the case of a public grant-making trust: individuals or organisations eligible to benefit from the trust at the discretion of the trustees could require the trustees to exercise their discretion under the trust, not in their own interest but in the interest of the beneficiary section of the public as a whole. It is not clear whether this right to sue in a representative capacity makes the members of the beneficiary section of the public 'beneficiaries' for the purposes of the section 74 definition.

This should be clarified either way by amendment of section 74(1). Our provisional view is that in most of the contexts in which 'beneficiary' appears in the Bill it is used to mean the beneficiary of a private trust and that it would not be appropriate to include the individual members of the beneficiary class of a public trust in the definition. By contrast, there can be little doubt that the members of the beneficiary class of a public trust fall within the expression 'any person with an interest in the trust property', which is used at various points in the Bill, though not defined in section 74. The 'beneficiary' issue is linked to the question of whether certain provisions are or are not intended to apply to public trusts, and (as mentioned) those provisions are flagged up below accordingly.

The role of the courts in the Bill

We note the comments within the Stage 1 Report[11] relating to the role of the courts in the Bill. We are generally supportive of moves towards greater choice of forum for trust cases.

We note that the Stage 1 Report asks that the Scottish Government provide comparative typical costs for Court of Session and sheriff court cases before the deadline for stage 2 amendments. Whilst we agree that such information would be helpful, in our experience it is difficult to capture. There is often a significant difference between audited costs and the actual costs incurred by parties.

[9] *IRC v Clark's Trustees* 1938 SC 11 at 22, per LP Normand

[10] *Andrews v Ewart's Trustees* (1886) 13 R (HL) 69 at 73, per Lord Watson

[11] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), paras 49-51.

Pension scheme trusts

In Scotland, as in the rest of the UK, almost all private sector pensions and some public service pension schemes are established using trust structures. The regulation of occupational pension schemes and personal pension schemes is a reserved matter. In practice this means that the general law of Scotland relating to trusts (including common law and the Trusts (Scotland) Act 1921 ("the 1921 Act")) is modified by more recent UK-wide legislation that is (typically) more detailed.

We recognise that updating the general law of trusts in its application to pension schemes in Scotland is potentially quite an intricate matter. There is a practical need to avoid ambiguity and ensure that the older UK-wide legislation continues to override the newer legislation in all necessary places in the one hand, and to avoid dual operation of the 1921 Act and new Scottish trusts legislation on the other. We consider that it would be desirable to extend the Bill to include pension schemes wherever possible.

We therefore support the recommendation in the Stage 1 Report[12] that the Scottish and UK Governments pursue the timely implementation of a section 104 Order, as a priority, to ensure commencement of the Bill is not delayed, and that there is no need for an 'undesirable' dual operation of the 1921 and 2023 laws. We have commented further on the Bill as it relates to pension trusts below at section 74.

Safeguards for sole trustees

Whilst we agree with the view reached in the Stage 1 Report[13] that it is not generally desirable for trusts to have a sole trustee, and would welcome consideration of safeguards in relation to trusts with sole trustees, in our view there are certain circumstances where it is necessary to allow for the possibility of sole trustees. We would be concerned that any attempts to remove the possibility of sole trustees would have potential unintended consequences, particularly retrospectively.

Further proposed reform of the law of succession

We welcome the recommendation in the Stage 1 Report[14] that succession law be given priority for future reform. Whilst we welcome the limited reforms set out in the Bill, we consider that wider reform is needed in early course.

[12] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 250.

[13] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 262

[14] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 311

Comments on sections of the Bill

Part 1
Chapter 1

Whilst we welcome the proposals contained in Chapter 1, there are a number of aspects where we would suggest further clarity is required.

Section 1

We would query whether the reference to 'expedient' in section 1(1)(a) is appropriate as this seems to represent a weakening of the common law position, which refers to 'necessary'. We would also suggest that a definition of having an "interest in trust property" would assist with consistent interpretation.

Public trusts: Petitioning the court for the appointment of new trustees is currently an enforcement option at common law under the *actio popularis*. On the basis that a member of the beneficiary class of a public trust is a 'person with an interest in the trust property', this option is allowed for here. It is important that it should be in the case of non-charity public trusts, whose beneficiary class cannot look to the machinery of the 2005 Act for enforcement. In theory, the Lord Advocate also has power at common law to apply to the court for enforcement of a public trust, but in practice intervention by the Lord Advocate is a rarity.

Charitable trusts (i.e., public trusts registered as charities): public trusts registered as charities may be enforced at present by *actio popularis* in the same way as non-charity public trusts, but where enforcement is required the members of the beneficiary class are likely to look instead to state-funded intervention by OSCR under the 2005 Act. There seems to be no reason, however, to remove the option of applying to the court for appointment of new trustees even if it may be rarely used. That option under this section would be additional to the court's power under the 2005 Act, section 34(5) to appoint a trustee at the instance of OSCR in the event of misconduct, etc, but it may be valuable to have a basis for appointment on the wider ground of expedience. A charitable trust may also benefit from machinery available under the 2005 Act, section 70A by which OSCR may appoint one or more persons as an interim charity trustee for the purpose of appointing one or more charity trustees (i.e., in the case of a trust, trustees in the strict sense) in certain circumstances (such as where the charity trustee body is inquorate) in which new charity trustees could not be appointed under the charity's constitution. Where the relevant circumstances applied, there would be no need for recourse to the court. We would welcome clarification as to whether interim trustees appointed by OSCR under charity legislation are 'trustees' for all purposes under the Bill.

Section 2

We support this provision in the limited terms in which it is framed. Most trust deeds are moving to having such provisions included.

We note that, whilst there is no specific acknowledgement, there is nothing in the Bill to abolish the status of *sine qua non* trustees. It should be made clear in the Bill that if a trust deed appoints a *sine qua non* trustee, this is a provision otherwise for the purposes of section 2.

Section 4

This is a welcome confirmatory provision.

Section 5

Section 74 (Interpretation) provides that a "trustee" means a trustee under any trust but includes an executor nominate and, except in sections 3 and 5, an executor dative. This is not a change from the current position, but the question arises, when does someone become a trustee? Section 5 of the Bill relates to the resignation of a trustee. Section 5(1) provides that with certain exceptions, a trustee has power to resign office and section 5(2) states:-

"But if the trustee is a sole trustee, the trustee may do so only after:-

(a) An additional trustee is assumed or appointed, or

(b) A judicial factor is appointed to administer the trust."

Section 5(3) states that any resignation given in breach of sub-section (2) is of no effect.

We suggest that section 5 could usefully be clarified to make it clear that mere nomination of a sole trustee does not make that individual a trustee unless they have accepted the office in writing or after intimation of their appointment, had acted in a fashion which indicated that they had accepted office as trustee. Put another way, the office of trustee should not be forced on a sole nominee who has not accepted that office and who does not wish to do so.

Section 6

It is appropriate to have new statutory grounds for removal, because under the common law or the 1921 Act, the process is unnecessarily difficult. It should be clear and (relatively) straightforward to remove a trustee where it is appropriate to do so.

Whilst actions to remove a trustee under the provisions of the Bill won't be constrained by previous common law, it will presumably be necessary for the court to refer to common law for definitions of terms used within this section including 'neglected duties' and 'fiduciary duties', although it will still be somewhat vague as there is no code of what trustees are required to do.

In particular, it is not clear what "unfit" to carry out the duties of a trustee means in terms of section 6(1)(a) - this seems to be unspecific and could usefully be clarified. It is not clear what circumstances not otherwise covered by sections 1(b)-(d) this provision is intended to address. In the absence of clarification within the Bill, it is likely that interpretation will develop by case law. As applications under section 6 can be made to

the Sheriff as well as to the Court of Session, there is the potential for varied jurisprudence to develop at first instance which may create confusion and inconsistency.

Public trusts: the same general considerations apply to this section in respect of removal as to appointment under section 1(1).

Charitable trusts: Section 6(1)(b) and (c) raise the question of the interplay between trust law and the 2005 Act regime. For example, the 2005 Act, section 66 imposes certain duties on 'charity trustees', i.e., in the case of a charitable trust the trustees of the trust. Section 66(5)(b) requires charity trustees to take such steps as are reasonably practicable for the purpose of ensuring that any charity trustee who has been in serious or persistent breach of those duties is removed as a charity trustee. Would a trustee's breach of a charity trustee's duty under the 2005 Act amount to a breach of duty as a trustee under trust law, which might provide the basis for removal by the court under section 6(1)(b) or (c) of the Bill? See further under section 27 below.

The practical consequence of trusts and charity legislation operating in tandem may be that there are alternative ways to remove the trustees of a charitable trust, and trustees may opt to use OSCR's processes rather than take potentially expensive court action. We would welcome clarification on whether an order of the court under section 24 of the 2005 Act would remove a trustee for the purposes of trust law, or if a separate order under section 6 of the Bill would be required. We would also questions whether section 6 would allow the courts to remove an interim trustee appointed by OSCR under amended charity legislation.

Section 7

This provision is very welcome, particularly as it does not require a court action.

It is not clear from the provisions whether co-trustees can only remove a trustee on the basis of the grounds set out in section 7, which appear to be more restrictive than those at common law available to co-trustees via the court. We refer to Lady Poole's comments in the case of *Ciarrocca* v. *Ciarrocca*[15] which concerned a Petition by one executor for removal of his co-executor and appointment of a Judicial Factor.

Clarity is required on how this provision would apply to trusts with two trustees. For example, with two trustees, a single trustee is a majority of the "other" trustees (with more trustees, there is more practical capability for a majority to act anyway) and there are perhaps also difficulties with a trustee *sine qua non*.

We note the recommendation in the Stage 1 Report that the Bill be amended to include explicit reference to the right of a trustee, deemed incapable by fellow trustees, to go to court to challenge their co-trustees' decision. We also note the recommendation that the Scottish Government considers whether additional

[15] [2021] CSOH 59

safeguards may be necessary to mitigate the risk of abuse.[16] We are supportive of these additional safeguards.

We have commented on the definition of incapacity for the purposes of the Bill below at our comments on section 75.

Public trusts: subject to the above, this power to remove might prove useful to the trustees of a public trust, just as to the trustees of a private trust.

Charitable trusts: the grounds for removal by co-trustees would appear to be too narrow to be helpful to co-charity trustees seeking to remove an offending charity trustee under the 2005 Act, section 66(5)(b). It appears that they would have to rely on removal by the court under section 6 of the Bill.

Section 8

We note that, whilst this section provides for removal of a trustee by the beneficiaries, there is no corresponding power for beneficiaries to add a trustee. Whilst we agree that there may be good policy reasons for this position, it is nonetheless notable.

It is unclear how this section would operate in the case of a bare trust where the beneficiaries agree to remove the last trustee. A question would then arise as to who would convey the trust property to the beneficiaries. One possible solution would be to extend the scope of section 4 to address such circumstances.

Section 8(3)(b) states that the section does not apply "as respects a private purpose trust", which is defined in section 42(1). The purpose of section 8 therefore appears not to give beneficiaries in a "private purpose trust" any rights in this regard.

Public trusts: the question raised in our general remarks above as to the definition of 'beneficiary' arises here. Does 'beneficiaries' in subsection (1) include the individual members of the beneficiary class of a public trust? The content of the section as a whole suggests that it is intended to apply only to private trusts, yet there is no express disapplication to public trusts, as there is to private purpose trusts. Perhaps an express disapplication should be considered. These considerations apply equally to charitable trusts as to non-charity public trusts.

Section 9

This is a welcome clarification.

Section 10

[16] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), paras 62-63.

We request clarity on how this provision sits with the fact that a trustee's duty to account never prescribes. The duty to account wouldn't prescribe, but any liability to pay following the accounting could have been discharged.

Public trusts: The question of the definition of 'beneficiary' arises here, too, and again the content of the section suggests that it does not include (here, at least) the members of the beneficiary class of a public trust. The provision for discharge by the remaining trustees is, however, likely to be valuable in the case of a public trust. There appear to be no special considerations here for charitable trusts.

Chapter 2

These are largely a codification of existing law and are generally helpful.

There could be some clarification of liability in relation to a dissenting trustee (i.e. not in the majority).

See our comments on specific sections, below.

Section 12

Section 12(1) refers to trustees 'able to make' a decision. Section 12(2) sets out circumstances where a trustee is not to be regarded as able to make a decision, including but not limited to where the trustee is incapable. We have commented below on the definition of 'incapable' for the purposes of the Bill.

Section 12(3) sets out circumstances where subsection (2)(a) is to be disregarded. While this subsection seems somewhat vague, it is helpful to cover off the current challenges with the law in this area.

As above, we note that there is nothing in Bill to abolish the status of *sine qua non* trustees. However, the role is not acknowledged in this Chapter on trustee decision-making. There may require to be more specific reference to the position of a *sine qua non* trustee on the face of the Bill. The SLC Report implies that the Bill is intended to include them. It should be made clear that if a trust deed appoints a *sine qua non* trustee this is a "provision otherwise" where relevant for the purposes of the Bill.

Public trusts: Section 12(2)(a) may cause difficulty to public trusts which include in their trustee body one or more trustees drawn from the section of the public the trust is intended to benefit. Such trustees might be ruled out of a wide range of decisions. The disregard provisions of subsection (3) seem to be directed only at private trusts, and it may be desirable to add a further disregard provision catering for public trusts.

Charitable trusts: The 2005 Act, section 66(1)(b) contains limited (and not entirely satisfactory) provision on conflicts of interest for 'charity trustees' (including, therefore, the trustees of a charitable trust). On the face of it, this provision is much less strict than the proposed provision for trustees at section 12(2)(a) here. More generally, consideration needs to be given to the compatibility of the duties imposed on charity trustees under the 2005 Act with the duties imposed on trustees under trust law, including under the Bill – see further under section 27.

Chapter 3

We welcome these proposals, subject to our specific comments below.

Section 13

This section sets out very wide general powers. We welcome this. It is common for most trusters to add very wide powers to trust deeds and wide general powers- as opposed to prescriptive powers- allow trusts to adapt better to changes in law and technology. The section provides that the wide general powers can be restricted if required under the trust deed, and we consider that this is an important safeguard.

Section 14

We welcome this provision, which reflects powers currently available to the court under section 5 of the 1921 Act.

Public trusts: On the face of it, this might provide an attractive alternative to a *cy-près* application for a public trust which is not a charity. There are difficulties, however: the 'beneficiary' question arises here, too, as also the range of persons the court might specify under section 14(4)(d) and what form of intimation or publicity would be appropriate. Once again, these are provisions apparently drafted with private trusts primarily in mind, and perhaps this section, too, should be expressly declared inapplicable to public trusts.

Charitable trusts: charitable trusts can look to the reorganisation provisions of the 2005 Act, sections 39-42, under which an application for additional powers can be made to OSCR rather than the court.

Section 15

We welcome this provision, subject to our further comments below.

Public trusts: this could be a valuable provision for non-charity public trusts where there is no provision in the trust deed.

Charitable trusts: The 2005 Act, section 68A authorises 'charity trustees', and therefore the trustees of a public trust which is a charity, to take out indemnity insurance. Unlike here, the terms of the authorised insurance are prescriptively specified, and further consideration is needed on the compatibility of the power granted here with the terms of section 68A.

Section 16

We welcome this wide and general provision, but it would be useful to have clarified that this could extend to adopting environmentally friendly investment policies, particularly when these might underperform compared to other investments. The provision could allow for this, but confirmation that maximising financial returns is not the only permissible criterion, especially in the modern world, would be welcome.

We therefore welcome the recommendation in the Stage 1 Report[17] that the Bill is amended to explicitly allow trustees (subject to the terms of the trust deed) to choose to invest in environmental, social and governance investments, particularly when these might underperform compared to other investments.

Section 17

This is a welcome confirmatory provision.

Sections 18 and 19

These are welcome wide extensions. However, the provisions should not allow trustees to be excused from not carrying out their duties properly.

In section 18, we consider that the general term 'agents' is appropriate, as it would include not only factors and law agents, but also investment managers, tax advisors and others.

It would be useful to clarify under section 18(1) whether the delegation power applies generally or for the execution of a specific deed or transaction. In relation to section 18(1), we would query whether it should be stated that the authorisation of a person to execute a deed or other document in relation to a conveyance of land should be self-proving.

Section 18(5) may need to be further restricted, as it would seem to imply that the trust deed could be drafted to allow the trustees to delegate any action – whilst we understand this could be helpful in some situations, trustees should not be able to avoid their personal duties entirely and there may be a need to clarify the interaction with the list of powers which can't be delegated in section 18(5).

We note the discussion in the Stage 1 Report regarding whether the Bill as introduced goes far enough to capture the ways in which trusts are used in the financial services sector.[18] We are sympathetic to these concerns and would agree that the Bill should be explicit that such structures are permitted.

Section 20

The proposed power to advance from capital is a useful addition for trusts where such a power is not expressed. In modern drafting, it is usual to include such a power of advancement. It may be helpful to make it clear that the power is in favour of capital rather than income beneficiaries, although this is clear from the later wording of the provision.

It should be considered whether there should also be power to advance to income beneficiaries where that does not exist within a trust (it is commonly drafted in). It is recognised that this is more controversial and may be impossible without court intervention where capital has not vested.

[17] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 128.

[18] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), paras 129-140.

We note that the power can be contracted out of by way of the trust deed. We consider that this is appropriate. Exercise of the power is also largely subject to court authorisation, meaning that the power is limited in itself.

Public trusts and charitable trusts: This section raises once again the question of the definition of 'beneficiary' in relation to public and charitable trusts. The provisions do not look to be appropriate for such trusts, and perhaps the section should be expressly declared inapplicable to public trusts.

Section 21

This is a useful confirmatory provision.

Sections 22 and 23

These are welcome statutory clarifications and removals of rules which cause disproportionate difficulty for very little benefit.

Section 24

This is a welcome clarification of what can otherwise create a difficult and apparently illogical situation, under which income may otherwise require to be retained to no particularly good purpose.

Public and charitable trusts: These provisions do not look readily applicable to public trusts generally and should perhaps be expressly declared inapplicable.

Section 25

This is an important and, in some ways, radical development of the current position. But as the scope and extent of the current rules (if any) are unclear, the clarification is to be welcomed. We welcome the request in the Stage 1 Report for the Scottish Government to review the evidence heard at stage 1 and consider whether sections 25 and 26 of the Bill should be amended.[19]

Given that the new provision is to apply to existing trusts, it is important that it is publicised. In the vast majority of cases, with existing trusts, those affected will be in possession of the information the provision of which is specified as a positive duty in section 25. But there will be numerous cases where that is not the position – are trustees then subject to the positive duty immediately on this provision coming into force? It would be appropriate to have a transitional period such as is set out in section 26(14).

There is no apparent sanction on trustees for failing to fulfil the positive duty imposed by section 25. The lack of sanction for failure in this respect however seems appropriate, as any failure in this respect alone seems unlikely to cause any actual loss to a beneficiary; but it seems likely that failure under this section

[19] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 158.

would be considered relevant in relation to any action which beneficiaries may be able to take against trustees more generally (for example in relation to alleged irresponsible investment).

The overlap or interaction between subsections 25(2) and (3) seems unclear and we are concerned that the definition of beneficiary in this context may be too wide. We would suggest that beneficiaries who do not have a vested interest should for this purpose alone be potential beneficiaries. Then the circumstances specified in paragraph (c) could readily be subsumed within (b). As an alternative, it should be made clear that an actual (not potential) beneficiary who in practice is unlikely to be favoured is not one whom it is "reasonable" for the trustees to inform.

If a guardian of a person under 16 is informed under paragraph (1)(a), is there a new duty to inform the beneficiaries when they become 16?

It should perhaps be clarified that there is no separate duty to inform a guardian where the guardian is themself a trustee.

Section 25(7) is confusing and should be clarified.

Public and charitable trusts: These provisions do not look readily applicable to public trusts generally and should perhaps be expressly declared inapplicable. In the case of charitable trusts, the provision of information is catered for by the 2005 Act, sections 3, 21 and 23 (information on the Register and by request to the charity).

Section 26

While again the potential clarification of an area which is currently unclear is welcome, there is still much scope for dispute and unnecessary expense (although the ability to charge seekers of information under section 26(3)(b) is welcome).

There is no restriction on the term "potential beneficiary" and a very wide definition in section 74 – some trusts have a vast number of potential beneficiaries with little likelihood of them becoming actual beneficiaries; and it would be useful if the likelihood of a potential beneficiary becoming an actual beneficiary could be a specific factor which trustees should consider when deciding whether it was ‘appropriate’ to provide the information sought. This might deter "fishing expeditions".

Similarly, some trusts may have a very wide class of actual (discretionary) beneficiaries, a large number of whom will not receive anything from the trust fund. A common example of this is a class consisting of the descendants of the truster's parents, which can create a very large class of actual beneficiaries. The practical beneficiaries are in many cases likely to be the truster's own issue, with the wider class only relevant as fallbacks in the event of there being at any point no actual issue of the truster.

It may be helpful to consider provisions similar to those in sections 55(7)(b) and 55(8) to identify potential beneficiaries for the purposes of sections 25 and 26. The ‘future date’ for these purposes could be the date the trustees are considering who are the beneficiaries and where the future event had happened at the date of the trustees’ deliberations.

Public and charitable trusts: Same considerations as for section 25.

Section 27

This gives new standards for duties of care, separating these out into duties imposed on "ordinary" trustees and a higher standard for those supplying professional services in relation to trust management. The removal of protections for trustees that may be provided in a trust deed is brought into effect by subsection (4) and given that this is applied to existing trusts, it is in effect retrospective. The interaction between paragraphs (4)(a) and (c) does not seem clear, as any relief from gross negligence would presumably lessen the requirements of subsection (1), which is already prevented by paragraph (a).

It is not clear whether the standards for duties of care are also applicable to protectors and supervisors, or whether alternative standards apply to those appointed to these roles.

Public trusts: In broad terms, the provisions look appropriate for a non-charity public trust.

Charitable trusts: The 2005 Act, sections 66(1)(b) imposes a duty of care on charity trustees expressed in different (and much less detailed) terms than the one imposed here. Further consideration is needed on the compatibility of two sets of provisions, but on the face of it the provisions here set higher standards than found in section 66(1)(b). It seems clear in principle that where the standards differ, trustees should meet the higher standards.

Section 28

It may be appropriate to make clear that the trust property which could be the subject of such an order includes property that has left the trust as a result of the breach of fiduciary duty. The instigation or consent of the relevant beneficiary may involve actions reducing or indeed winding up the trust, after which there may be no "beneficiary's interest in the trust property".

It would be useful – but not an easy task - if there was a definition of "fiduciary duty", a concept relevant to a number of sections.

Public and charitable trusts: These provisions do not look appropriate for public trusts generally and should perhaps be expressly declared inapplicable.

Section 30

This is most likely to be relevant where a trustee is also a beneficiary, where a trustee's fiduciary duty would be likely to put his personal interests in a conflict of interest with their fiduciary duty as a trustee. This is often expressly permitted (sometimes with qualifications) within a trust deed. It seems that such protection will continue to be effective because of section 30(2), but such protection is usually seen to be wider than whatever may be meant by "transactions". It is suggested that it may be more appropriate to allow protective clauses to extend to all "actions" and/or "decisions" of the trustees.

Section 31

The conditions in section 31(3) seem very restrictive, given that the relief is supervised by the court in any event. For example, if the breach involves property leaving the trust, it seems inconceivable that this can benefit "the trust property". It may be more appropriate if the conditions in this paragraph were alternative rather than cumulative.

Section 32

Public and charitable trusts: If this section is to apply to public trusts (generally) the scope of the term 'beneficiary' in subsection (1) will have to be clarified.

Section 33

Public and charitable trusts: These provisions do not look readily applicable to public trusts generally and should perhaps be expressly declared inapplicable.

Chapter 4

Section 34

This section increases or at best confirms the potential personal liabilities of trustees; there are situations where whether the contract is *ultra vires* may not be clear and perhaps relief from the court for personal liability (and thus imposing it on trust property) where a trustee has acted *ultra vires* but had a reasonable belief that the contract was within trust powers may be appropriate.

Section 35

It appears that the purpose of this provision is that where a trustee fails to exercise reasonable care and skill and that causes loss, the court can order damages be paid by the failing trustee personally. The result of the wording is that the court's power only goes as far as allowing it to award damages partly payable by the trust and partly by the trustee. We consider that there must be conceivable circumstances where a trustee's failings would be so great that the just outcome is that the trust estate bears *none* of the damage. We would suggest that provision that the court has power "to determine that damages are recoverable, in whole or in part, from the trustee's personal property (to the extent of the trustee's failure) and the balance (if any) from the trust property" would be more appropriate.

Section 36

It is our understanding that the purpose of section 36(3) is to allow the body of trustees to bring in T as a defender *as an individual* (that would then allow the other trustees to take a section 35 argument that T was negligent and so should pay personally). That might usefully be clarified.

Section 37

This is usefully codified.

Section 38

‘Environmental law’ claims are excluded. It is not clear how this is to be defined and could potentially be very wide including delict, nuisance etc. Consideration should be given to including a definition for the purposes of this section.

It may be useful to include here or in section 27 a requirement to take external advice where appropriate.

Section 39

The following words might be usefully added at the end of section 39(1)(b):- "….whether the power derives from the trust deed or is implied by those sections".

Section 40

It would be particularly helpful to third parties if, where the execution was by other than all of the trustees, this was stated, along with any relevant reasons (e.g. that a non-signing trustee was incapable or was not traceable).

We note that a majority of trustees for the purposes of this section excludes those who are incapable or untraceable. We consider this a sensible approach but note the difference between this provision and section 73. We have commented further on this below.

Chapter 5

Section 41

We are generally supportive of the proposed abolition of restrictions on accumulation and on creation of future interests proposed by section 41 of the Bill, and would welcome its extension to charitable trusts.

It is noted that this section applies the change to accumulation periods only to trusts created after the section comes into force. The Commission's report comments on this change in the note to clause 40 of its draft bill (with something similar in para 69 of the explanatory notes to the new bill) saying there might otherwise be an adverse effect on acquired rights in property as well as human rights issues. These issues would not arise where the changes have been expressly provided for by the truster, in contemplation of future changes to the law. These trusts will be unable to benefit from the new provisions. This was specifically discussed by solicitors with the Scottish Law Commission and could be solved by the insertion of the words "….unless specifically anticipated in such trusts" after the word "force" in section 41(5)(a).

Section 41(5) of the Bill as introduced excludes public trusts which are charitable trusts from the abolition of restrictions on accumulation of income with the result that such charitable trusts will remain subject to accumulation of income rules. In our view this is not appropriate, and the scope of the section should be extended to include charitable trusts. Trustees of charitable trusts are subject to other rights and duties under charity law to manage funds appropriately and are subject to oversight from OSCR and HMRC.

There may be reasons, consistent with a charity's purposes, for income to be accumulated, for example to generate funds for the next cycle of charity work or for a specific project, and retaining the prohibition on accumulation of income for charitable trusts serves little practical purpose.

Consideration might, however, be given to retaining existing restrictions on accumulation for public trusts which are not charities, on the basis that the safeguards for appropriate management of funds under the 2005 Act do not apply to such trusts. Consideration could be given to retaining existing restrictions expressly on the face of the Bill, rather than leave it to take effect under any un-repealed element of earlier statutes.

Chapter 6

Section 42 and 43

Presumably with such trusts anyone with an interest is able to request the trustee(s) to implement the private purpose trust – consideration should be given to whether that should be made explicit, as a starting point without court action if the trustee appears unwilling to fulfil the purposes of the trust.

Section 44

The power to reform is on very wide grounds – e.g. in section 44(2)(a) 'impracticable' might be quite a low bar. Much will depend on how court applies this.

Sections 45 – 48

The position of a supervisor is a novel one in Scots law; and these provisions indicate that the duties of such might overlap with those of the trustees themselves. However, the provisions on protectors bring Scotland into line with other jurisdictions.

Chapter 7

Chapter 7 is, in the main, subject to contrary provision in the trust deed - in practice, a professionally drawn deed is likely to have a full set of protector provisions where it is wished to have a protector, rather than rely on the statutory rules. We consider these provisions would benefit from some improvement, particularly as protectors are relatively rare in domestic trusts and the legislation may be used as a basis for drafting.

Section 49 says the truster can make provision for a protector in the trust deed. As far as we are aware it has always been open to a truster to do this and while it may not be common in domestic trusts, there is nothing in the law to prohibit it. That said it is helpful to have a clear statutory basis.

Section 49(3) lists examples of specific powers that may be conferred on the protector – we consider that the wording of some of these could be more clearly expressed. While it seems to be open to the truster to include whatever powers he wishes and those listed are simply examples, if these are adopted in drafting deeds, some could cause confusion. For example, the list includes "power to determine the law of the domicile of the trust" and "power to determine the administrative centre" of the trust. It is not clear what the scope of these powers is meant to be and we welcome the request in the Stage 1 Report for further clarification.[20] The question of the domicile of a trust and its "administrative centre" are determined on first principles, so does this mean a protector can say that the domicile/administrative centre is other than what it would be on first principles? Or that the protector can change the domicile /administrative centre?

Section 49(3)(c) and (d) allow the protector to be given powers to direct the trustees to remove one of their number and to direct the trustees to assume additional trustees. In the experience of our members, it is more usual to give the protector themself power to appoint and remove trustees. That is part of their role as "watchdog". If the protector wants to remove a trustee, it is likely to be because there is some dispute or difference with that trustee so it would be better if the protector can do that directly rather than have to rely on the trustees complying with a direction. Speed is often of the essence in these cases so giving a direction which has to be complied with is likely to result in delay. Also, what if there is a sole trustee, could that trustee be directed to remove itself and appoint a new trustee simultaneously?

Section 49(3)(e) and (f) refer to powers to direct that a person is/is not to enjoy a beneficial interest. We do not consider the scope is clear. Does this equate to a power to add and remove beneficiaries?

Section 49(3)(k) refers to the power of the protector to represent an incapable person. It is not clear what safeguards will be in place to avoid substitute/ ‘best interests’ decision-making, or what the interaction would be with the role of any attorney or guardian with relevant powers to represent the incapable person in the matter. Could a protector be appointed simply to override the opinions of an attorney or guardian, if trustees disputed / disagreed with that attorney's or guardian's view? This might be clarified by making it clear that the protector's role in this capacity is purely in relation to the relevant trust property; and requires to take account of others occupying a protective role for the incapable person. See discussion elsewhere in this submission relating to the definition of "incapable" for the purposes of the Bill.

Section 50 confers the power to appoint a new protector in certain circumstances. It is not unusual to include protector provisions in the trust instrument, but without an initial protector being appointed. The person who has the power to appoint the protector (which could be the truster or someone else) can activate the protector provisions by appointing a protector at some future time. Section 50 does not seem to prevent that practice continuing.

Subject to contrary provision in the trust deed, the power of appointment of a protector defaults to the trustees if the truster cannot act/has died. That seems inappropriate given that the protector's role is to act as a check on the trustees. A professionally drafted deed is likely to avoid this, but if the deed does not contain appropriate provisions, the situation could arise where the trustees choose their own "watchdog".

[20] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 185.

This is perhaps not so much an issue where the trustees are family members, but could be a problem if there is a professional trust company, where sometimes differences can arise with the beneficiaries. What happens, for example, if the truster is dead, the protector wishes to resign, and there are no express or implied provisions in the trust deed about who has the power to appoint a new protector? It would seem more appropriate for the protector himself to have the power to appoint a new protector, rather than the trustees.

Section 52 gives the protector power to resign but there is no requirement for a new protector to be appointed before the resignation takes place. That may be deliberate, and in the absence of other provision in the deed, would allow the truster/trustees to appoint under section 50.

Section 53 deals with liability for compliance with protector's direction. It is rather oddly framed, in that it says if compliance with a direction comprises a breach of duty, "the protector and not the trustee incurs personal liability". As a preliminary point, if the trustees are legally bound to comply with the direction, it is hard to see how they could be liable for breach of trust. However, it seems odd to say that "the protector and not the trustee" is to be liable. It would perhaps be clearer to say the trustees are not liable, rather than seeking to transfer liability from the trustees to the protector. The protector is a fiduciary and has duty of care (section 49(5)) so they can be liable in their own right.

Public and charitable trusts: We see no reason in principle why these provisions should not apply to public trusts. We consider that provision for a protector in a trust deed constituting a charitable trust would not displace OSCR as the primary regulator, and that a trust registered as a charity in the Scottish Charity Register would be fully subject to the jurisdiction of OSCR in the normal way. .

Chapter 8

As a general comment, we note that the powers set out in Chapter 8 extend the jurisdiction of the courts in relation to trusts and we would suggest that careful consideration should be given to how capacity to manage this can be ensured within the court system.

We would welcome clarification as to the reason for the exclusion of private purpose trusts from the scope of sections 54- 60.

Section 55

Age 16 may be more appropriate than 18, although we presume that the age of 18 is used to cater for the position that those aged 16 and 17 may still challenge decisions made for them in certain circumstances.

We would suggest that section 55(4) should be amended to make it clear that a person must be both authorised and must have the relevant powers under the Adults with Incapacity (Scotland) Act 2000 or under the law of a country other than Scotland. See further discussion below regarding incapacity for the purposes of the Bill.

We would suggest that subsection (5)(c) should more appropriately read a "Potential beneficiary who does not fall within subsections (7)(a)(i) or (ii)".

Section 56

In considering whether this is broad enough, it is noted that the court can bring in any consideration required. It might be possible to clarify that "benefit" should be given a wide meaning and that some variations can be considered to provide a benefit in that wide sense to beneficiaries even though it may cause actual economic detriment to a beneficiary.

Section 56 (2)(a) refers to "Paragraph (c) of section 55(5) on behalf of an unascertained person" - but section 55(5)(c) refers to "a potential beneficiary who does not fall within subsection (7)". We would suggest that a better wording for section 56(2)(a) may be "a potential beneficiary who does not fall within subsection (7)(a)(i) or (ii) but cannot be ascertained".

Section 57

It seems to be the case that under section 57(2) B has to be ascertained by the trustees as a potential beneficiary and so included in the list of beneficiaries before the Court before the protection afforded to the trustees by this section is available to the trustees. This is realistic for an actual beneficiary but given the wide definition of potential beneficiary, this may be a challenge and thus the apparent protection available from the provision could be non-existent.

It should perhaps be clarified whether the limitation on who are potential beneficiaries contained in 55(7)(b) applies to this section.

Section 58

This is a restatement of the common law and picks up reforms made to the independence of a wife provided by the Law Reform (Husband and Wife)(Scotland) Act 1984.

Section 59

We consider this provision sensible. However, we note that there appears to be no equivalent provision to ensure that the views of incapable adults are ascertained and taken in to account, in line with the principles set out in section 1 of the Adults with Incapacity (Scotland) Act 2000. If it is intended that the 2000 Act principles should apply where the court is considering matters under Chapter 8 of the Bill, that should be made explicit.

Section 60

There are arguments in the other direction. Are the truster's views completely irrelevant? If available, there could be reference to the views of the truster when the trust was set up, although this may be difficult if the reasons why the trust was set up are not set out in the preamble to the Trust Deed. If the truster is dead, can parties knowing his views give evidence? We would query whether these provisions contain sufficient safeguards where the trust may have been established to give effect to the truster's protective intent.

Section 61

We consider the proposals set out in section 61 to be fairly significant development, although tempered by the requirement that the trust has been in existence for (generally) 25 years. Given that the provision allows a variation to take account of changes in circumstances of the beneficiaries, as well as tax regime changes (sections 60(12)), the 25 years requirement may be restrictive and could mean that it is rarely used. It is not clear why a period needs to be specified at all – presumably the court could take into account the length of time since the trust was set up as a factor in deciding whether to allow the change in all such applications. Alternatively, consideration could be given to a mechanism enabling petitioners to make a case for the 25 period to be reduced. We therefore welcome the recommendation in the Stage 1 Report that would allow alternation in exceptional circumstances- although the scope of 'exceptional circumstances' would inevitably require to be tested via the courts.[21]

Note that section 61(9) gives power to court to alter trust purposes where 'expedient to do so…'. The Explanatory Notes make reference to 'necessary to do so', which is different.

In section 61(10) it is not clear how 'fairness' will be applied by the court.

Section 62

It may be desirable that the *ex officio* trustee should be able to appoint someone else without a court application, e.g. where the official position changes.

There are a number of cases where the *ex officio* trustee is only going to be in the relevant official position for a period of 12 months or similar. This provision would not assist such a case, given the likely delay and cost of a court action. That is one reason why a more extensive power for the trustees themselves would be desirable.

Section 63

Section 63 is a very welcome solution to a situation in many charitable (and some other) trusts, where the office of the *ex officio* holder has ceased to exist, or the office holder of the particular office is constitutionally changed every 12 months. As noted above, it may be desirable to have this solution available (perhaps only where there are other trustees) without a court process.

Section 64

This is a welcome provision, but it would be helpful if section 64(6)(b) also had expressed within it the provision in subsections 55(7)(b) and 55(8) limiting the class of potential beneficiaries.

Public and charitable trusts: Further consideration is needed of whether these provisions should apply to public trusts generally. If so, the definition of 'relevant person' in section 64(6)(b) will have to be revisited.

[21] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 206.

Section 65

Section 65(1) of the Bill provides that, subject to the following provisions of section 65, a trustee does not incur personal liability for the expenses of civil litigation to which the trust is party. For the avoidance of doubt, we welcome this general rule against personal liability for trustees; and we believe that reflects our earlier responses both to the SLC and the Scottish Government.

Our concerns relate specifically to section 65(2) of the Bill which provides that, in cases where the trust property is insufficient to meet the expenses of litigation, the excess is recoverable from the personal property of the trustees on a joint and several basis. A trustee may apply to the court under section 65(6) to be relieved from personal liability for certain expenses in certain circumstances; but our concern is with personal liability in these circumstances being the default rule.[22]

This is quite a radical provision. There are real issues with the default being that the trustees personally pick up the liability for expenses where the trust property is insufficient unless they can show that would be unfair. This may put people off accepting office and will more than likely be a disincentive for trustees to litigate (although that may be part of the point). Whilst section 65(6) provides a remedy it is not clear why it refers to 'certain expenses'. We would suggest that the starting point should be that the trustees should not have any personal liability unless it can be shown it is fair for them to be so liable. If trustees have acted reasonably but unsuccessfully and the trust fund is insufficient to meet expenses, there is clearly going to be an unmet liability – but it is unclear why the successful litigant should have recourse to the personal patrimony of a trustee which is only available because the unsuccessful party is an (insolvent) trust. There is no such alterative available to successful litigants where the unsuccessful party is a different form of insolvent person (natural or otherwise). We therefore welcome the request in the Stage 1 Report that Scottish Government reflect on the evidence heard at Stage 1 and consider whether amendment is required.[23]

Non-recovery is a standard risk of litigation. If a company is an unsuccessful litigant and it doesn't have assets to meet an award of expenses, the successful party cannot (usually) pursue the directors or shareholders to make up a shortfall. Why should parties litigating with a trust be in any better position? This is not to protect the pot for the beneficiaries – the assumption is that the trust will pay if it has the means and unless section 65(3) is engaged.

There is also a severe danger of a conflict of interest being created between the personal interests of the trustees and those of the trust. This may impact upon a trustee's liability to fully prosecute/defend a claim. The trustees may be tempted to compromise an action for something well short of what it is worth because continuing and losing puts their own property at risk.

Section 65(3) should also be subject to subsection (6) and both should be permissive. It may be more appropriate that the whole question of expenses – and the possible shift of liability - should be left to the

[22] See our letter to the lead committee dated 28 July: response-from-alan-barr-on-trusts-bill.pdf (parliament.scot)

[23] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 220.

discretion of the court. This section as presently drafted may impinge in that discretion. Perhaps this provision should depend on whether the action was raised or defended by the trust when they should have settled; or the trustees had acted vexatiously? The provision could even be along the lines of "the court may, on either the application of the party awarded expenses or on its own motion" to make clear that the court retains a discretion to engage the provision absent a motion from the receiving party.

There may need to be thought about allowing a party to make such an application by Note, after final decree has been granted, until the decree for expenses has been fully implemented. The reason for this is that people are unlikely to know whether there is enough in the trust pot until it comes to enforcing the expenses award.

We note that the Stage 1 Report highlights that section 65 does not appear to extent to the sheriff courts and we would welcome clarification on this point.[24]

Section 66

In contrast to the above, section 66 looks to be a very useful, confirmatory provision.

Section 67

Whilst this seems a useful provision as introduced, we note the evidence heard at stage 1 in support of a broader power for the court to give directions to trustees. Trust deeds may be unclear, and trustees may welcome the certainty afforded by an ability to seek directions from the court. We would be supportive of amending the Bill to add a general power to the court to enable it to give directions to trustees.

We note the Minister's comments highlighted in the Stage 1 Report[25] regarding the existing powers of the courts to give directions. Under the section 103 of the Court Reform (Scotland) Act 2014 the Court of Session has a power to regulate the procedure and practice to be followed in proceedings before the court and any matter incidental or ancillary thereto. There is an indicative, non-exhaustive list of matters the court can make provision about. It does so by Act of Sederunt. Whilst this power is drafted more widely than the one it replaced (section 5 of the Court of Session Act 1988) it is still relates to procedure and practice in relation only to those powers already within the jurisdiction of the court. The SLC's original proposal would have conferred additional jurisdiction on the court in terms of direction making powers. We do not therefore agree that the 2014 Act is a solution to this issue and welcome the Minister's commitment to considering this matter further.[26]

Sections 68 and 69

This is a helpful provision which removes the need to reconstitute a trust to complete a conveyancing process. Otherwise we assume that petitioning the court to appoint a new trustee would be necessary if the

[24] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 221.

[25] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 224.

[26] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 224.

title had not been taken in the name of the trustee who has died or become incapable, as it would only be the new trustee who would have to locus to get the title put in their name, before transferring to the beneficiary.

Section 70

This seems a useful alternative to other possible solutions in the hopefully rare circumstances where such an intervention may be necessary.

Part 2

Section 71

We welcome this clarification, and have no further comments.

Section 72

Where the deceased is survived by a spouse/civil partner and no issue, the effect of this provision would be that the spouse/civil partner would take the whole estate.

This contrasts with the current situation quite markedly, where such a surviving spouse/civil partner would take prior rights and legal rights only. The primary prior right in most cases is to a house in which the survivor was ordinarily resident at the date of death, to which will be added the furniture and plenishings of that house and a cash right, as well as legal rights of one half of remaining moveable estate. That will mean that in many, but by no means all cases, such a surviving spouse/civil partner takes the whole estate. However, in high value cases the changes proposed will result in much more going to the spouse/civil partner than under current intestacy law.

We note that situations arise where spouses or civil partners are separated at the time of the death of one of the parties. At present, a surviving party who is residing in the house of the deceased at the time of death would inherit the property regardless of whether or not the couple were living together as cohabiting spouses at the time of death or whether they were separated. Potentially, the surviving individual may inherit more than a house. In contrast, where a couple have separated and the survivor does not reside in a house owned in whole or in part by the deceased, such a survivor would not take the house or furniture. The place of residence produces somewhat inconsistent effects.

Under the proposal for a surviving spouse/civil partner to take the whole estate in the absence of issue, a separated spouse/civil partner would take the entire estate no matter the state of the relationship at the time of death. This cannot be assumed to be what the deceased in these circumstances would have wished to happen. It thus produced different inconsistent effects.

One way in which this matter can be resolved would be to use a test of ‘living together as husband and wife/civil partners’ before the surviving partner could inherit. This is a concept recognised in both Scots

family law and (for many years and for many purposes) tax law. It would not be an issue in most cases where the deceased was survived by a spouse/civil partner and no issue, but would resolve both current anomalies and further ones that would arise from the proposed new law. However, we recognise that this may create unfairness towards a separated spouse as compared to a divorced spouse, who would be likely to have received financial provision on divorce. It would lead to an imbalance between succession rights on intestacy and on testacy, in that where the separated surviving spouse/civil partner was left a bequest under the deceased's Will, they would only lose that bequest under the Will if divorced at the time of death. Whilst we have written to the lead committee with our specific comments on this section of the Bill,[27] there is no straightforward solution to these issues and legislative change in this area (frankly of much wider import than many of the trust changes) must be considered extremely carefully. We welcome the request in the Stage 1 Report for the Scottish Government to provide further clarification of its intentions in relation to this provision.[28]

The changes proposed by the Bill, if enacted, should be accompanied by widespread public education to encourage members of the public to make a Will to ensure their testamentary intentions are realised. Under section 80(2), section 72 comes into effect 3 months after the Act comes into force. We would query whether 3 months is sufficient time to allow for appropriate public education.

Suggested proposals not currently in Part 2 of the Bill

Unlawful killers

We note the recommendations in the Stage 1 Report regarding amending the Bill to clarify that the law does not permit an unlawful killer to be an executor of their victim's estate.[29] We are generally supportive of this recommendation, and have responded to a recent targeted consultation by Scottish Government on this topic.[30] The sheriff should have the discretion to refuse the appointment of an unlawful killer as an executor on a case-by-case basis,

Cohabitants claiming a share of the deceased's estate

We note the recommendation in the Stage 1 Report that the Bill is amended to extend the current six-month period for cohabitants' claims to a deceased person's estate under the 2006 Act to 12 months.[31] We

[27] response-from-law-society-of-scotland.pdf (parliament.scot)

[28] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 272.

[29] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 289.

[30] 23-09-08-ts-trusts-and-succession-scotland-bill-unlawful-killer-as-executor-to-victims-estate.pdf (lawscot.org.uk)

[31] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 303.

are supportive of reform in this area.[32] However, whilst extending the period for claims to 12 months would be a welcome development, we do not consider that it would provide a complete solution to the potential difficulties in this area.

Part 3

We have the following comments which relate to Part 3 of the Bill:

Section 73

This is an extremely useful provision to be welcomed. It may be appropriate to set out how the person can be authorised to sign the document on the body's behalf. For example, would a minute of a trustees meeting be adequate, or is an actual deed required?

We note that there is no qualification excluding those trustees who are incapable or untraceable from a majority for the purposes of this section. We note that this is different from the approach set out in section 40, which includes such qualification. We would welcome clarification as to this difference in approach. We would suggest that it would be sensible for the qualification in section 40 to also apply to section 73.

See also our comments above on sections 18 and 40.

Section 74

“Beneficiaries”

“Beneficiary” is defined in section 74(1). See our general comments, above, regarding the definition of ‘beneficiary’ as it relates to public trusts and otherwise and below on "Potential beneficiaries".

“Guardian”

Section 74(1) provides only that a “guardian” includes a person’s continuing attorney. It would be helpful for the Bill to include a clear definition of the term ‘guardian’ for the purposes of the Bill, with reference to the Adults with Incapacity (Scotland) 2000 Act or any subsequent legislation in respect of adults, to clarify if the definition extends to welfare guardians, and to also include where appropriate a wider scope along the lines of “any other person or entity holding similar powers or authority in relation to the matter in question”.

Further, there appears to be an assumption throughout the Bill that an incapable person will always have a “guardian”- but this is not automatically the case and/or the guardian may not have the requisite powers to deal with the beneficiary’s interaction with the trust.

“Potential beneficiaries”

[32] See our paper *Rights of Cohabitants,* March 2019: rights-of-cohabitants-paper.pdf (lawscot.org.uk)

The Bill confers quite significant rights on "potential beneficiaries", for example, the right to obtain information (section 26), right to apply to court for alteration of trust purposes (section 61), petition to the court regarding defective exercise of fiduciary power (section 64).

Potential beneficiary is defined (section 74 (1)) as a person who is not a beneficiary but may become a beneficiary on being, at a future date or on the happening of a future event, a person of some specified description or a member of some specified class of persons. That is a very wide definition. It is not unusual for modern trust deeds to give the trustees or the settlor power to add beneficiaries so potentially anyone could be a potential beneficiary of a trust. In more traditional trusts, the beneficial class is typically "the children and remoter descendants of X, and their spouses, widows and widowers". If a descendant of X is engaged to be married, the fiancé would seem to be a potential beneficiary as defined.

It may however be that the definition is not restricted enough for some purposes, for example in relation to the right to receive or request information about the trust. Perhaps a distinction could be drawn among a beneficiary with a vested interest; a beneficiary named or identified as a discretionary beneficiary but who does not have any actual vested interest unless and until discretion is exercised in their favour and a genuine potential beneficiary who is not at a relevant time within the class of beneficiaries but may become so. We make this point in relation to section 25.

“Trusts”

We note that section 74(1) excludes any pension scheme established under a trust from the definition of “trust” for the purposes of the Bill. “Pension scheme” is not defined. As above, we, we would welcome further clarity on how the Scottish Government intends to work with the UK Government to ensure that pension schemes established under trust benefit from modernisation under the Bill.

“Charitable trust”

If the term ‘charitable trust’ is to be used in the Bill (as currently in section 41(5)((b), it should be defined to make it clear that what is meant is a public trust registered as a charity in the Scottish Charity Register. It should also be made clear that "public trusts" includes "charitable trusts” for the purposes of the Bill unless otherwise stated. As presently drafted, there may be scope for confusion with the common law meaning of ‘charitable trust’.

Section 75

Incapacity definition (relevant to section 7 and other provisions)

Section 75 of the Bill sets out the circumstances in which a person is to be regarded as incapable for the purposes of the Bill. The definition is similar to that set out in the Adults with Incapacity (Scotland) Act 2000. However, it does not incorporate the principles set out in section 1 of the 2000 Act, which provide important safeguards of the rights of incapable persons (see also our specific comments above on sections 49 and 59). There may be a particular risk in the context of family trusts of family members seeking to remove trustees on the basis of incapacity, where this is inappropriate and without provision of support to enable to the trustee to continue. Further, there is no safeguard within the Bill providing that incapacity

should be determined by an independent third party on an objective basis. We would suggest that it is inappropriate for a decision as to capacity to be taken by the person or persons affected by the outcome- in this case the other trustees.

We further note that the 2000 Act is now over 20 years old, and it is generally recognised that it no-longer reflects the modern human rights environment, including UN CRPD. The Scottish Mental Health Law Review has recommended significant changes to capacity law in Scotland, including removing the terminology of 'mental disorder' and moving from a capacity test to one of an ability to make an autonomous decision. A Scottish Government response to these proposals is awaited. It is important that the present Bill is future-proofed to accommodate and keep step with possible future changes to the law in this area.

It would be useful if the definition of incapacity were tied to that term in other more directly relevant legislation, as adapted from time to time. As above, this is particularly relevant at present as it is understood that the definition may be changed in other such legislation and it would be unfortunate to have multiple definitions of the term (or related terms) for different but very often closely related legislative purposes.

We appreciate that there is a balance to be struck in order to achieve the purposes of the Bill to ensure the smooth administration of trusts, whilst also ensuring sufficient freedoms for individuals. We welcome the call in the Stage 1 Report[33] for the Scottish Government to further consider the best approach to the definition of "incapable" in the Bill and to seek to amend the Bill accordingly.

[33] Stage 1 Report on the Trusts and Succession (Scotland) Bill (azureedge.net), para 91.

For further information, please contact:
Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk