



Law Society
of Scotland

Stage 3 Briefing

Trusts and Succession (Scotland) Bill

December 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) Bill¹ (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 Parliament² 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.

The stage 1 debate on the Bill took place on 28 September 2023. We issued a briefing ahead of the stage 1 debate.⁵ On 28 September 2023, the Parliament agreed to the general principles of the Bill.

The Delegated Powers and Law Reform Committee of the Scottish Parliament considered the Bill at stage 2 on 14 November 2023. We issued amendments⁶ and amendments with effects and reasons ahead of stage 2 consideration.⁷ The Bill completed stage 2 on 14 November 2023, and the Bill as amended at stage 2 was published on the same date.⁸

We welcome the opportunity to consider and provide comment on the Bill ahead of the stage 3 consideration scheduled for 20 December 2023. We have focused our comments on those sections of the Bill which have been amended during parliamentary scrutiny. We have also commented on the amendments tabled ahead of stage 3.⁹

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

² [23-03-20-ts-trusts-and-succession-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 \(azureedge.net\)](#)

⁵ [23-09-26-ts-trusts-and-succession-s-bill-stage-1-briefing.pdf \(lawscot.org.uk\)](#)

⁶ [23-11-07-ts-trusts-and-succession-s-bill-stage-2-amendments.pdf \(lawscot.org.uk\)](#)

⁷ [23-11-07-ts-trusts-and-succession-s-bill-stage-2-amendment-with-reasons-and-effects.pdf \(lawscot.org.uk\)](#)

⁸ [Bill as amended at Stage 2 \(parliament.scot\)](#)

⁹ [Marshaled List \(parliament.scot\)](#) and [Supplement to the Marshaled List of Amendments for Stage 3 \(parliament.scot\)](#)

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 welcome the amendments made to the Bill at Stage 2, which address many of the principal concerns raised in our engagement with the Bill at stage 1. We also largely welcome the amendments brought forward ahead of stage 3, although we have commented on some of these in further detail below.

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*¹⁰ ("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 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 welcomed the recommendation in the Stage 1 Report¹¹ 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, and the Scottish Government's commitment to keep the law under review.¹²

We also welcomed the recommendation in the Stage 1 Report¹³ that succession law be given priority for future reform. Whilst we welcome the limited reforms set out in the Bill, and note the Scottish Government's indication that it has no plans at this time to progress any further primary legislation on reform of fundamental aspects of succession law during the course of this Parliamentary session, we do consider that wider reform is needed in early course.

Public Trusts and Charitable Trusts

The Bill raises considerations regarding the interaction between trust law and charity law. We note the comments in the Stage 1 Report¹⁴ regarding the interaction between the Bill and charities legislation and

¹⁰ No. 239, 2014

¹¹ [Stage 1 Report on the Trusts and Succession \(Scotland\) Bill \(azureedge.net\)](#), at para 237.

¹² [SG Gaelic Cabinet Secretary for Justice and Veterans \(parliament.scot\)](#), page 12

¹³ [Stage 1 Report on the Trusts and Succession \(Scotland\) Bill \(azureedge.net\)](#), para 311

¹⁴ Above, paras 102-103.

the Scottish Government's commitment to including additional information in the Explanatory Notes to the Bill.¹⁵ Given the recent changes to charity law arising from the Charities (Regulation and Administration) (Scotland) Act 2023, amending the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"), we welcome further clarification. 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.

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. 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 2005 Act.¹⁶ 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. This is relevant in particular for section 41 of the Bill.

In general, the Bill makes provision for 'public trusts' as such, irrespective of whether they are or will be registered as charities. The exceptions are sections 17B and 41, which make specific reference to 'charitable trusts'. In these contexts, 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, or as defined for the purposes of UK tax legislation— hence our suggestion at the earlier stages of the Bill that this should be made clear by an express interpretative provision.

The Bill adopts the long-established approach that public trusts are in principle governed by the same common law rules and trust 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. Accordingly, some provisions of the Bill are declared expressly not to apply to public trusts, while some are clearly inapplicable by virtue of their content. In the case of others, however, clarification would be helpful. As mentioned, where a public trust is registered as a charity, the applicability of the provisions of the Bill must be viewed in conjunction with the requirements of the charities regime.

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

¹⁵ [SG Gaelic Cabinet Secretary for Justice and Veterans \(parliament.scot\)](https://www.parliament.scot), page 5

¹⁶ In support of these remarks see generally Stair Memorial Encyclopaedia, 2nd Charities Reissue, paras 1-8.

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 on 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 supported the recommendation in the Stage 1 Report¹⁷ 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 therefore welcome the Scottish Government’s commitment to work with the UK Government to bring forward a section 104 Order which will apply the Bill to pension trusts, in order to achieve “maximum certainty”.¹⁸

Public Awareness-raising

The changes set out in the Bill represent very significant changes to trust law, and it is essential that, if the Bill becomes law, implementation is accompanied by a comprehensive publicity and awareness-raising campaign for trustees, their professional advisers and the wider public interacting with trusts.

¹⁷ [Stage 1 Report on the Trusts and Succession \(Scotland\) Bill \(azureedge.net\)](#), para 250.

¹⁸ [SG Gaelic Cabinet Secretary for Justice and Veterans \(parliament.scot\)](#), page 12

Comments on sections of the Bill

Part 1 Chapter 1

Section 1

We welcome the amendment brought forward at stage 2 to replace the word 'expedient' with 'necessary' in section 1(1)(a). We consider that this preserves the position at common law.

We would welcome clarification as to whether interim trustees appointed by OSCR under charity legislation are 'trustees' for all purposes under the Bill.

Section 5

Section 5 of the Bill relates to the resignation of a trustee. 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. Section 5(1) provides that with certain exceptions, a trustee has power to resign office and section 5(2) provides that a sole trustee, or the only remaining capable and traceable trustee, may only resign 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 welcome the amendment to section 5(2) brought forward at stage 2 which clarifies 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, have 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. We note the Government amendment to this section tabled ahead of stage 3, which confirms for the avoidance of doubt that written acceptance of office is not required. We are supportive of this approach.

We also consider the new subsection 5(3A), added to the Bill at stage 2, to be a welcome clarification of the requirement for intimation of resignation, and the effective date of resignation.

Section 5A

We welcome the addition of new section 5A to the Bill at stage 2. We consider that this provides helpful clarification on the powers of a guardian where a trustee is incapable.

Section 6A

Section 6A provides that a trustee is to be deemed 'unfit', and can therefore be removed by the court under section 6, where the trustee is the executor nominate or executor dative of a deceased person's estate and is being prosecuted for, or convicted of, the murder or culpable homicide of the deceased. We are generally supportive of steps to prevent unlawful killers acting as executors and have responded to a recent targeted consultation by Scottish Government on this topic.¹⁹ It is appropriate that the court has the power to remove such a trustee on application, as this allows for decisions to be made on a case-by-case basis.

Section 7

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

We welcome the amendments made to this section at stage 2, adding new sub-sections (1A) and (1B) which allow co-trustees to remove a professional trustee where that trustee ceases to be a member of the relevant regulated profession, or is no-longer entitled to practice.

We note amendment 2 tabled ahead of stage 3 in the name of Stuart McMillan MSP which extends the power of removal by co-trustees to include corporate entities acting as trustees. It is very common for solicitors' firms and other professional advisers to establish such corporate entities as an alternative to individuals within the firm accepting trustee appointments.²⁰ Whilst we do see the attraction in principle in extending the removal provisions in Section 7(1A) and (1B) to corporate trustees, we are concerned that the amendment tabled may have unintended consequences in practice.

The provision seems to create a very wider power for co-trustees to remove a corporate trustee where an individual employee, partner or director of the corporate trustee who provided professional services to the trust ceases to be entitled to practice- even if the other employees/partners/directors are still regulated professionals and continuing to practise as such.

This could be triggered in a wide range of day-to-day situations where an individual retires or otherwise steps down from practice. The general advantage of corporate trustees is that they provide continuity in these situations. We are concerned that this provision could be used by co-trustees to remove corporate trustees, and therefore professional input, where this is inappropriate and goes against the intention of the truster. There do not appear to be any safeguards on the face of the Bill to prevent this.

We also have concerns regarding how this provision might work in practice, where a number of individuals from one firm may be involved in providing professional services to a trust- the advantage of a corporate trustee is generally that more than one individual is able to act on behalf of the corporate trustee when required.

¹⁹ [23-09-08-ts-trusts-and-succession-scotland-bill-unlawful-killer-as-executor-to-victims-estate.pdf \(lawscot.org.uk\)](#)

²⁰ Although note that such bodies are not generally regulated by the Law Society of Scotland: [D5: Trust and Company Service Providers | Law Society of Scotland \(lawscot.org.uk\)](#)

We have concerns that amendment 2 and uncertainly arising from it might discourage the use of corporate trustee bodies and increase reliance on the appointment of individual professionals as trustees. We are not aware of any widespread issues arising from the use of corporate trustees. We therefore welcome amendment 2A, lodged as a manuscript amendment on 18 December,²¹ which would remove the proposed provisions relating to corporate entities.

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 safeguards may be necessary to mitigate the risk of abuse.²² We are supportive of additional safeguards and would welcome clarity on the routes available to trustees deemed incapable by co-trustees, as well as any mechanism for incapable trustees to resume their trustee role on regaining capacity, where applicable.

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

Section 8

The amendment to this section tabled ahead of stage 3 is a sensible provision, which we welcome.

Chapter 2

Section 12

We welcome the amendments brought forward at stage 2, which clarify the application of this section.

Section 12(2)(a) of the Bill as introduced may have caused 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. We therefore welcome the clarification of this section at stage 2 by the addition of subsection 3A, and the further clarification by way of amendment tabled ahead of stage 3 which provides for those situations where a public trust is intended to benefit the public as a whole.

Chapter 3

Section 17A

We welcome this helpful confirmatory provision added to the Bill at stage 2.

Section 17B

We recognise the helpful confirmatory intention behind this provision added to the Bill at stage 2, but note that it may place the trustees of charitable trusts in a different position to the charity trustees of other types

²¹ [Supplement to the Marshalled List of Amendments for Stage 3 \(parliament.scot\)](#)

²² [Stage 1 Report on the Trusts and Succession \(Scotland\) Bill \(azureedge.net\)](#), paras 62-63.

of charities. We therefore welcome the further amendments to this section tabled ahead of stage 3 which clarify that the operation of this section does not alter the obligation of the trustees of a charitable trust to abide by the same charity trustee duties under the provisions of the 2005 Act as the charity trustees of charities constituted in other forms.

There may be scope, however, for confusion regarding the implementation of this section, and we would therefore welcome further guidance for charitable trusts on the use of this section in practice and the differences- if any- to the position under existing law.

Sections 19

We note the amendment tabled ahead of stage 3 which we understand is intended to address concerns raised regarding whether the Bill fully captures the ways in which trusts are used in the financial services sector.²³ We are sympathetic to these concerns and welcome this amendment.

Section 25

We welcome the clarifications made to this section as a result of amendment at stage 2.

Given that the new provision is to apply to existing trusts, it is important that it is publicised.

Section 26

We welcome the amendments made to this section at stage 2, which restrict the very wide potential scope of these provisions.

Section 30

We are supportive of the amendment to this section tabled ahead of stage 3, which would have the effect of allowing protective clauses to extend to all actions and decisions, rather than just 'transactions' as per the Bill as introduced.

Chapter 4

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.

We welcome the amendments made to this section at stage 2 which allow for circumstances where a trustee's failings would be so great that the just outcome is that the trust estate bears *none* of the damage.

²³ [Stage 1 Report on the Trusts and Succession \(Scotland\) Bill \(azureedge.net\)](https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/trusts-and-succession-scotland-bill-stage-3.pdf), paras 129-140 and correspondence between the Minister and the Convener of the lead committee dated 12 December 2023: <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/trusts-and-succession-scotland-bill-stage-3.pdf>

Section 39

We welcome the clarification provided by amendments to this section brought forward at stage 2.

Section 40

We note the amendment made to this section at stage 2, which brings it in to line with the approach in section 73 in that there is no exclusion from the majority of trustees who are incapable or intractable.

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 welcome its extension to charitable trusts.

We welcome the amendments made to this section at stage 2, both to allow the change to accumulation periods to apply to trusts created before the section comes into force where this has been specifically anticipated in the trust deed, and also to include public trusts which are charitable trusts within the scope of the abolition on the restrictions on accumulation of income. We also support the retention of fixed-term restrictions for non-charity public trusts, which are not subject to the jurisdiction of OSCR and to the supervisory powers which enable OSCR to restrain inappropriate accumulation in charitable trusts by other means.

We further welcome the stage 3 amendment tabled in the name of the Minister, which provides clarity and consistency in language.

Chapter 6

Section 42

We would highlight the potential for confusion between the common law and statutory definitions of 'charitable purposes'.

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 welcome the clarifications made to these provisions by way of amendment at stage 2, particularly as 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. Amendments at stage 2 and proposed amendments tabled ahead of stage 3 clarify these examples, and we welcome these changes to the Bill.

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.

Section 55

We welcome the amendment made to this section at stage 2 to clarify 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- we consider this a useful clarification.

Section 56

We welcome the amendment made to this section at stage 2, which we consider provides useful clarification on the scope of the provision.

Section 61

This section has been extensively amended at stage 2. We welcome these amendments. We also welcome the Government amendment tabled ahead of stage 3 which confirms that public trusts are excluded from the scope of this provision. Charitable trust reorganisations are covered by the 2005 Act and the cy-près regime, and non-charity public trust reorganisations by the cy-près regime and the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, sections 9-11. Section 61 would cut across these more nuanced arrangements if applied to public trusts.

Section 64A

This section, added by way of amendment at stage 2, is an extremely useful provision which we welcome. Trust deeds may be unclear, and trustees may welcome the certainty afforded by an ability to seek directions from the court.

Section 65

We welcome the amendments made to this section at stage 2 to remove personal liability for trustees where the trust property is insufficient to meet the expenses of litigation. We raised significant concerns regarding this provision,²⁴ and welcome its removal from the Bill.

Part 2

Section 72

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.

Section 72A

This section was added to the Bill by way of an amendment at stage 2, and extends the period for an application to the court by a surviving cohabitant for provision on intestacy from 6 months to 12. We are supportive of reform in this area.²⁵ 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 would welcome wider reform of the law relating to the rights of cohabitants. We are pleased to note that the Minister has now confirmed that the Scottish Government intends to publish a consultation on cohabitants' entitlement to financial provision on intestacy by summer 2024.²⁶

Part 3

Section 73A

We are generally supportive of steps to prevent unlawful killers acting as executors and have responded to a recent targeted consultation by Scottish Government on this topic.²⁷ We welcome the inclusion of this provision in the Bill.

²⁴ See our letter to the lead committee dated 28 July: [response-from-alan-barr-on-trusts-bill.pdf \(parliament.scot\)](#)

²⁵ See our paper *Rights of Cohabitants*, March 2019: [rights-of-cohabitants-paper.pdf \(lawscot.org.uk\)](#)

²⁶ [Written question and answer: S6W-23651 | Scottish Parliament Website](#)

²⁷ [23-09-08-ts-trusts-and-succession-scotland-bill-unlawful-killer-as-executor-to-victims-estate.pdf \(lawscot.org.uk\)](#)

Section 74

“Potential beneficiaries”

We welcome the amendments made to section 26 (see our comments above) to restrict the potentially wide scope of that section in relation to potential beneficiaries, but do still consider this to be a wide definition for some purposes in the Bill.

Section 74A

This section allows Scottish Ministers to use regulations to amend jurisdiction in relation to trusts. We are generally supportive of moves towards greater choice of forum for trust cases, and welcome this amendment to the Bill at stage 2.

Section 75A

We welcome the amendments to the Bill brought forward at stage 2 to clarify the meaning of ‘incapable’ for the purposes of the Bill and related expressions. The Bill as amended links directly to the definitions set out on the Adults with Incapacity (Scotland) Act 2000. We consider that this approach will ensure consistency. We also welcome the regulation making power in section 75A(2), which would allow the Scottish Ministers to modify the definition of incapable- 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.

We would welcome express clarification that the safeguards and section 1 principles set out in the 2000 Act, which provide important protections of the rights of incapable person, apply to decisions made under the Bill.

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