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Trusts and Succession (Scotland) Bill

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This briefing provides an overview of the Trusts and Succession (Scotland) Bill. The Bill proposes an overhaul of the law which applies to trusts in Scotland. The Bill also contains two provisions relating to succession law, the area of law which decides who inherits when someone dies.

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Contents

Executive Summary

The Trusts and Succession (Scotland) Bill ('the Bill'), a Scottish Government Bill, is based on two large-scale law reform projects by the Scottish Law Commission ('the Commission').

Part 1 of the Bill, most of the Bill, would reform the law relating to trusts.

> A trust is a legal device for managing assets. A trust enables assets to be **legally owned** by one person or entity (**the trustee**) while a different individual, entity or section of the general public **benefits** from those assets in practice.

The assets which can be held in a trust includes money, shares in a company, land or buildings.

Trusts are used in **commerce**, including in the **financial services sector**. They are used by **families**, **charities** and **other public interest bodies**. While there are many legitimate and important uses of trusts, trusts can be used for illegal purposes and there are risks here that have to be managed.

Part 1 of the Bill is split into eight chapters, described in detail in the briefing.

Chapter 3 of the Bill is particularly significant in policy terms, proposing a wide range of reforms to the **powers and duties of trustees**. It also clarifies what happens when something goes wrong in the management of the trust, resulting in a **breach of trust.**

The policy underpinning the Bill gives the trustees "extremely wide powers", subject to some important duties on trustees, both in the Bill and in other parts of the law. [1] One important duty on trustees, developed in the Bill, is the duty to give information about the trust to those who benefit from it, or who might benefit from it.

Chapter 6 would confirm that a type of trust known as a private purpose trust is allowed in Scots law. This type of trust is not permitted in the rest of the UK. Chapter 6 also sets out some requirements as to how these trusts should operate, although these are less prescriptive than those on which the Commission originally consulted.

In Part 1 of the Bill, a wide range of important powers are given to the courts, usually the Court of Session in Edinburgh, in relation to trusts. These powers are mainly, but not exclusively, in Chapter 8, another important chapter in policy terms.

Part 2 of the Bill contains two provisions on **succession law**, sometimes called **inheritance law**. It is the law which says who inherits when someone dies and in what order. The provisions in Part 2 are not regarded as controversial by the Commission or Scottish Government.

The main provision (section 72) aims to improve the position of a spouse or civil partner, where someone dies without leaving a will. One interesting policy issue is how to treat spouses or civil partners who were separated from the deceased person at the time of death. This is especially when, at that time of their death, the deceased person had been living with a new partner.

Introduction and overview of the briefing

The Trusts and Succession (Scotland) Bill ('the Bill'), a Scottish Government Bill, was introduced in the Scottish Parliament on **22 November 2022**. It was introduced by Keith Brown, Cabinet Secretary for Justice and Veterans.

Documents relating to the Bill are available on the Trusts and Succession (Scotland) Bill page on the Scottish Parliament website. They include:

- the Trusts and Succession (Scotland) Bill, as introduced in Parliament [2]
- the Policy Memorandum to the Bill, [3] ('the Policy Memorandum') which explains the overarching objectives which the Scottish Government aims to meet
- the Explanatory Notes to the Bill, [4] ('the Explanatory Notes') which explain the proposed purpose and effect of the individual provisions of the Bill.

The Delegated Powers and Law Reform Committee ('DPLR Committee') is the lead committee for Stage 1 parliamentary scrutiny of the Bill. Stage 1 scrutiny looks at the general principles of a bill. The DPLR Committee has issued a call for views on the Bill, which closes on **17 March 2023.**

The Bill originated in work carried out by the Scottish Law Commission ('the Commission'). The Commission makes recommendations to Scottish Ministers with the aim of simplifying, modernising and improving the law.

This briefing is divided into the following sections:

- the background to the Bill
- an introductory guide to the complex area of trusts
- a substantial section on the proposed reforms to trust law contained in Part 1 of the Bill
- a short section on how Part 2 of the Bill would affect succession law.

The briefing covers all the main proposals in the Bill. However, it does not include a description of every section of the Bill. For that purpose, see the Explanatory Notes.

The briefing largely describes key provisions **in chronological order**, except in a few places where an alternative grouping is thought to make more sense.

Also note that the briefing was produced in a time frame that did not allow SPICe to incorporate responses to the DPLR Committee's call for views on the Bill into the briefing.

Background to the Bill

This background section of the briefing is divided into **two main parts**:

- a description of the special legislative procedure being used for the Bill
- an introduction to the contents of the Bill, and its wider policy background.

Scottish Law Commission Bill: special procedure

The Bill is being considered under the Scottish Parliament's procedure for dealing with certain Scottish Law Commission bills which have been **classified as non-controversial**. This procedure is intended to get round the barrier of lack of parliamentary time in relation to technical bills which do not deal with high profile issues.

Rule 9.17A of the Standing Orders of the Scottish Parliament allow the DPLR Committee, rather than the relevant subject committee, to consider a bill which implements all or part of a Scottish Law Commission report.

To qualify for the special procedure, the Bill must also meet **other criteria**. The current criteria are that the Bill would:

"(a) simplify, modernise or improve the law to

(i) ensure it is fit for purpose,

(ii) respond to developments, or address deficiencies, in the common law, or

(iii) respond to other developments in the law;

"(b) make provision which is **not likely to generate substantial controversy** among stakeholders."

An introduction to the Bill and its policy background

The Bill is divided into **three parts,** considered in turn in this introductory section of the briefing.

Part 1: trust law

Part 1 of the Bill, the bulk of the Bill, would substantially reform the law relating to trusts in Scotland. Part 1 is based on the Commission's 2014 Report on Trust Law [5] and its revised draft Bill from 2018. [6]

The use of trusts in practice

It is thought that the value of assets held in trust in Scotland **may be more than £500 billion**. [7]

Trusts are used in a very wide range of settings in Scotland. For example, they are used by **families**. Parents may use them to provide for a **child** or for an adult with incapacity. [8] In families, they can be used to **pass that wealth between different generations of the same family**.

Trusts are also the legal form of many **charities** and other **public interest bodies**.

Trusts are also used extensively, and in a wide variety of ways, in **commerce**. For example, with a trust, one company in the group can hold assets in trust for the benefit of one or more related companies.

A trust can also be used to set aside money in the context of a **commercial development**. This could ensure, for example, that funds are available to meet possible future environmental liabilities.

In addition, trusts are the legal basis of **pensions**, **life policies** and other financial products, such as **unit trusts.** In this way they are important for **the financial services sector in Scotland**, and, in turn, the wider Scottish economy.

As the Commission itself acknowledges, "the trust permeates large areas of law." [9] This is arguably one of the challenges of any general reform of trust law, to create rules which recognise all the policy considerations associated with the diverse range of uses of trusts.

Unlike the Commission's draft Bill, the Bill as introduced does **not** include a **pension trust** in its definition of a trust.

The Scottish Government intends to ask the UK Government to make **a section 104 order** at Westminster, to apply the changes proposed in the Bill to pension trusts. [10]

While trusts can be used for a wide range of important and legitimate purposes, trusts can also be misused for **illegal purposes**. For example, they are one legal vehicle which has been linked to terrorist financing and money laundering, i.e. where attempts are made to conceal the proceeds of crime. [11] [12] [13] [14]

Misuse of trusts and other legal structures has been receiving some increased policy attention in the years since the Commission's report was published, both by policymakers [11] [12] [13] [14] and campaign groups. However, one Scottish legal academic, and a supporter of the Bill, has argued that those concerns should be kept in perspective, both when considering the policy merits of trusts and the Bill itself.

The Commission's approach

The Commission's overall approach in its 2014 Report on Trust Law ('the Report') was to

strongly support the concept of a trust. [15] The Commission emphasised the importance of the trust in the commercial world. [16]

The Commission saw the key advantages of trusts as their inherent **simplicity**, as well as their **flexibility**, in terms of the use to which they can be put. [17]

The Commission sought to keep the legal requirements on trusts in its proposed Bill "to an absolute minimum." [17] On the other hand, it saw some general legal safeguards relating to trusts as essential. [5]

Key points about the consultation process related to **Part 1 of the Bill** are:

- The Commission consulted extensively. There were eight discussion papers and two consultation papers, covering wide ranging topics, spanning a period of **2003-2012**.
- There has been no public consultation on Part 1 by the Scottish Government, or the Commission, since the main part of the Commission's work finished in 2014.
- An **Advisory Group**, mainly comprising members of the legal profession, played an important role in policy development. The Commission also investigated trust law from other countries and the rest of the UK.
- There were some policy topics on which the Commission did not specifically consult, such as whether a trust should continue to be able to exist in Scots law.
- For a number of topics, the Commission did ask for views, but ultimately made no recommendations for change.
- Those who responded to the Commission's consultations were mainly practising and academic lawyers, as well as judges. A handful of other bodies with a relevant policy interest also responded.
- There were often **less than ten respondents** giving views on any consultation question.
- **Written submissions by organisations and individuals to the Commission as part of its consultation process are not available online**. However, SPICe would like to thank the Commission and the Scottish Government for making them available to SPICe. This has assisted greatly with the preparation of this briefing.

What does the Bill do

Part 1 of the Bill is divided into **eight chapters** relating to trusts:

- **Chapter 1** sets out the processes by which trustees can take on their official role in a trust and the ways in which they can leave that role.
- **Chapter 2** says how trustees can make decisions about the trust. **Majority rule**

remains a key principle for decision-making.

- **Chapter 3** sets out the powers and duties that trustees have to enable them to run the trust. It also clarifies what happens when there is a breach of trust.
- **Chapter 4** covers some of the legal relationships of trustees with organisations and individuals outside a trust, for example, when contracts are entered into with third parties.
- **Chapter 5** says how long a trust can last (indefinitely, being the answer for some trusts).
- **Chapter 6** says a **private purpose trust** is allowed in Scots law, unlike in the rest of the UK. It also says how such trusts should be run.
- **Chapter 7** relates to the use of a **protector** for Scottish trusts. They can oversee trusts in certain circumstances and make some important decisions.
- **Chapter 8** gives the court an extensive set of powers to address situations that might arise with a trust. Chapter 8 also covers the process of altering or ending some trusts outside the court process.

The intention is that many of the Part 1's provisions would be **default provisions**. In other words, these would only apply if the law, court order or legal document creating the trust does not say (or imply) something different on the topic.

Part 2: succession law

Part 2 of the Bill contains two provisions on **succession law**, sometimes called **inheritance law**. It is the law which says who inherits when someone dies and in what order.

Part 2 was preceded by extensive law reform work and public consultation by the Commission and later the Scottish Government, spanning a period of over thirty years. [18]

The history of the attempts to reform the law are contained in a separate SPICe Briefing from 2021, called Inheritance Law in Scotland. [18]

Part 2 of the Bill would still leave much of the Commission's work to date on succession law unimplemented.

It proved challenging for the Scottish Government to reach the same consensus among interested individuals and organisations on many of the more far-reaching reform proposals. Accordingly, these were not included in the Bill. [19]

Section 72 of the Bill, the main provision in Part 2, would strengthen the position of the deceased person's spouse or civil partner (compared to their position under the current law) when someone dies without leaving a will. The proposal was mostly uncontroversial

on consultation . [19] [20]

Unlawful killers as executors

One policy topic which Scottish Government looked at in the context of its work on succession was whether it should be possible for **an unlawful killer**, for example, someone convicted of murder, to be an executor of the victim's estate. [21] An executor is the person responsible for winding up the deceased person's estate. This was not an issue that the Commission looked at.

The existing law here may be somewhat uncertain. However, there is at least one recent example of a family of an unlawful killer having the person convicted later appointed executor. A blanket ban on this practice was not controversial on consultation. In 2020, the Scottish Government said it would legislate in this area at "the next available legislative opportunity." [19]

A proposal on executors as unlawful killers does not appear in the Bill as introduced. However, in Scots law, an executor is also a trustee. **Section 6 of the Bill** aims to make it easier to remove a trustee.

> In **February 2023**, the Government said it remains committed to reforms that would prevent a person convicted of murder from being an executor to their victim's estate. It will explore what more, if anything, can be done in the context of the Bill to ensure this. [22]

Part 3: miscellaneous sections, including key definitions for Parts 1 and 2

Part 3 of the Bill contains various miscellaneous provisions, including **sections 74 to 76** which explain what certain key words and phrases used in the Bill mean.

For example, key concepts recurring in Part 1 of the Bill are a trustee who is **incapable** (defined in section 75) and a trustee who is **untraceable** (defined in section 76). See the discussion later in the briefing on section 1 , section 7 and section 12 of the Bill for more detail on this topic.

The **court** for the purposes of the Bill is also defined in Part 3. With a couple of exceptions, discussed later in the briefing, this is the Court of Session in Edinburgh (section 74(1) and (2)), which currently deals with the majority of trust applications in Scotland. This is instead of the local sheriff courts, where most legal cases in Scotland are heard.

In certain circumstances, **guardians** are given important powers in the Bill to take decisions for **under 16s**, or for an adult with incapacity. The term **guardian** is defined in section 74(1) (in a non-exhaustive way) with reference to the adults with incapacity legislation.

In the context of **under 16s**, a **guardian** is not a term used in the existing family law legislation to describe the living parents of that child or young person.[i] Consequently, on one view, the definition of guardian in the Bill might benefit from being adjusted.

i Children (Scotland) Act 1995, sections 1, 2 and 11.

An introductory guide to trusts

This section aims to support the in-depth consideration of **Part 1 of the Bill**, which appears later in the briefing.

Trust basics

An important feature of current trust law is that (as is proposed in Part 1 of the Bill) many of its rules are **default rules**. These rules apply only to the extent that the law, the court order, the document, or the circumstances creating the trust do not say (or imply) something different.

A tripartite relationship

A trust is a legal arrangement whereby a person or entity (**the truster**) passes the ownership of assets to individuals or entities known as the **trustees**.

In other parts of the UK, and for the purposes of UK tax law, the truster is known as **the settlor**.

Frequently, this transfer of assets into a trust is for the benefit of named or identifiable individuals or entities known as **beneficiaries**. Alternatively, some trusts exist for a broader **beneficial purpose or purposes**. For example, a trust which aims to preserve historic buildings in a specific geographical area.

Public and private trusts

Scots law makes a distinction between **public and private trusts**:

- **Public trusts** benefit the public or some section of the public. A (large) sub-set of the public trust is the **charitable trust**, discussed in various places later in this briefing.
- **Private trusts** are commonly used by families, as well as in commerce, including financial services.

The traditional view of private trusts in Scotland is that, unlike public trusts, they have named or identifiable beneficiaries. [23]

In recent years, a view has emerged, shared by the Commission and the Scottish Government, that it is competent to create a trust for particular private purposes, without specific beneficiaries.

Who can be a truster, a trustee and a beneficiary?

Anyone can be a **truster**, **trustee** or **beneficiary**. As alluded to earlier, this includes a **corporate entity**, such as a company, and this is common in practice. A beneficiary can also be a person yet to be born, as is frequently the case in family trusts.

Usually, once a trust is set up the truster drops out of the picture. **However, not always**. Some **role-sharing is possible**. The truster may be one of the beneficiaries. The truster can be a trustee. Also, a beneficiary can be a trustee. [24]

Trusts where the truster is also the trustee (**'truster-as-trustee' trusts**) have become important in the commercial world. [25]

The Commission consulted on reform to them. Options here included their **abolition**, or only allowing them if registered in a **public register**. [26] Neither proposal made it past the strong opposition on consultation. [27]

How a trust is born

Trusts can be created in a number of different ways, including **by a trust deed**, a written legal document which creates a trust. They can sometimes be **created verbally**. They can also be created **in someone's will**, so the trust will come into existence when the person dies.

Specific types of trust can also be created by **legislation** or **by a court**. For example, when a court appoints an executor to wind up someone's estate, it creates a specialist form of trust in the process.

For convenience, and unless the context otherwise requires it, all of these methods of creation of a trust are referred to as **the trust deed** in the rest of the briefing.

Trust property, trust purposes, powers and duties

With a trust, **the trustees own the trust property** in law. However, those assets sit in a separate fund. They do not form part of the trustees' personal assets, either under trust law or for tax purposes.

However the trust came into being, a trust must have **trust purposes**, i.e. aims or objectives. Trustees are given a **range of powers in law** to implement the trust purposes.

Trustees are also subject to a range of **duties in law**. These include the duty to implement the **trust purposes** and a general **duty of care**.

Trustees are also subject to **fiduciary duties**. This means that, in their management of the trust, they must put the interests of the beneficiaries, or the beneficial purposes of the trust, first, over and above their own interests. Specific fiduciary duties have been developed around this general concept.

When something goes wrong with a trust

Trust law provides **various legal remedies** to help the beneficiaries and others in the situation where trustees act **in breach of trust**. There are three basic types of breach of trust:

1. when the trustees do something they are not allowed to do under the trust deed, or under trust law (**an ultra vires breach**)
2. when trustees do something they are allowed to do, but do it badly (**an intra vires breach**)
3. when trustees breach their fiduciary duties, sometimes treated as part of 1 above. [28]

Depending on the circumstances, a trustee may be **personally liable** in their management of the trust. In other words, trustees would be liable to pay financial compensation, or other sums owed, **out of their own pocket**, as opposed to out of the trust property.

In other situations, the **trust property** will be used (wholly or partly) to meet any legal liability arising.

Some red herrings to watch out for

Some features of the legal terminology affecting trusts can cause confusion. It is helpful to be aware of them in the context of the Bill. [29]

When is a trust not a trust?

Sometimes a legal entity might have the word ‘trust’ in its name. However, it is actually a **company** not a trust. This is because there is no blanket ban on the use of the word ‘trust’ in the name of a specific company.

Also, an investment trust is **not** a trust but a company. On the other hand, a unit trust, another investment product, is a trust. There are other similar examples where confusion can arise.

When is a trustee not a trustee?

In practice, **company directors** are sometimes referred to as trustees, even though they are not as a matter of law.

Likewise, in Scotland, a charity can take the legal form of a trust (a **charitable trust**), as well as a range of other legal forms. However, under the charities legislation, the term **charity trustees** is used **whether or not** the charity is in fact a trust.[ii]

The current legal framework applying to trusts

At present, trust law relies heavily on **case law**, i.e., the law developed by the decisions of judges in individual cases (hereafter, **judge-made law**). There are also several important pieces of legislation, including:

- the Trusts (Scotland) Act 1921 ('the 1921 Act'): amended multiple times but still, after over a hundred years, the primary legislation governing trust law in Scotland
- the Trusts (Scotland) Act 1961: contains important, miscellaneous powers, including some of the court's powers
- the Charities and Trustee Investment (Scotland) Act 2005: this regulates **charities**, including charitable trusts. Part 3 of the Act relates to the investment powers of trustees more generally.

The older pieces of legislation governing trusts are very complex and difficult to understand in practice.

Trusts with an international element

A trust might be connected with more than one country. For instance, a **truster** might live in one country, however, the **trustees** live in another country.

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ii Charities and Trustee Investment (Scotland) Act 2005, section 106.

In terms of **which country's trust law applies to the trust**, a UK statute[iii] applies an international convention on trusts.[iv] The main convention rule is that **the truster** chooses which country's trust law applies.[v]

This law, with its emphasis on **truster choice**, was significant for the Commission's project. One policy concern was how to attract to Scottish trust law potential trusters who might otherwise use other country's legal systems. [30]

How a trust with an international element is treated for **tax purposes** is a separate topic, with its own rules. See HM Revenue and Custom's guidance on non-resident trusts, often called **offshore trusts**.

The wider policy context relating to trusts

When scrutinising the Bill, it is helpful to be aware of the wider policy and legal context relating to trusts.

A number of the relevant topics here are (wholly or partly) **reserved to the UK Government and Parliament**.

The taxation of trusts

First, how trusts are treated under tax law is one key factor which affects the popularity of trusts over time, compared with other legal vehicles which might be used instead.

Trusts in the UK now have fewer tax advantages than they used to, but minimising a tax liability is still a consideration in some circumstances.

The tax treatment of trusts was considered in the then UK Government's 2018 review. Responses to the associated consultation suggested to the UK Government that comprehensive reform was not required at that stage. The UK Government committed to keeping the area under review.

Other systems of statutory regulation

As explained earlier, trusts are important for the financial services sector. This sector has its own extensive and complex system of (reserved) statutory regulation.

Likewise, charitable trusts are subject to a specific system of (devolved) **statutory**

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iii Recognition of Trusts Act 1987.

iv The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition ('the Hague Convention').

v The Hague Convention, Article 6.

regulation relating to charities.[vi] Consequently, charitable trusts would be affected by the Bill and also the Charities (Regulation and Administration) (Scotland) Bill ('the Charities Bill'), another current Scottish Government Bill.

The Charities Bill is considered briefly later in this briefing and, in detail, in a separate SPICe Briefing, dated 21 February 2023. [31]

Transparency and ownership of land and buildings

Until recently, a long-term policy feature of trusts (apart from **charitable trusts**) has been that they can be created and exist in relative secrecy.

There are different policy views on whether privacy surrounding trusts is a strength or weakness of a trust and, if the current approach should be departed from, to what extent. [32]

Key policy developments

A trust is **latent** (hidden) when it appears from a public register, such as the property registers, that trust property is owned outright by someone, rather than in trust.

The Commission consulted on reform to **latent trusts**. However, it ultimately said that **how to obtain accurate information on land ownership** was an issue extending beyond trusts, to cover other legal entities. Accordingly, the Commission said more wide ranging reform was required. [33]

In recent years, there have been various UK and Scottish Government policy initiatives related to the transparency of trusts, and the transparency of ownership of land and buildings.

The following are **key initiatives in the devolved context** (with the most recent first):

- **in November 2022,** the previously mentioned Charities Bill was introduced. It proposes that more information would be given to both the charities' regulator and the public about charitable trusts
- **in July 2022,** a Scottish Government consultation paper was published on a possible Land Reform Bill by the end of 2023 **.** The paper considers the role of trusts in the concentration of Scottish land ownership (see pages 19 and 21)
- **in April 2022**, the publicly searchable, and important, Register of Persons Holding a Controlled Interest in Land (RCI) launched. It aims to show who controls the decisions of owners and certain tenants of land and property in Scotland, where this information may not be publicly available elsewhere

vi Charities and Investments (Scotland) Act 2005.

- **in 2020**, the Scottish Land Commission (not the Scottish **Law** Commission) published two new good practice protocols on private land-owning trusts and charities. See the related blog post on these.

At a UK Government level, significantly, UK trusts must now register with the UK trust registration service (TRS) held by HM Revenue & Customs (HMRC). In most cases, there is not unrestricted public access to the information held on the TRS. The information is for HMRC (for tax purposes) and law enforcement agencies (as trusts can be used for illegal purposes).

In addition, the Economic Crime (Transparency and Enforcement) Act 2022, a UK statute, introduced the Register of Overseas Entities. This requires overseas entities that own land or property in the UK to declare their **beneficial owners** and/or **managing officers**. This also affects some trusts.

In **2016**, another UK register, the People with Significant Control register (PSC register), was introduced. It is intended to capture the identities of individuals who have control over UK private (limited and unlimited) companies. The register can capture details of people who exercise **control of companies through trusts**.

A recent EU Court of Justice decision has introduced some uncertainty around the compatibility of publicly accessible registers disclosing personal data about the beneficial owners of land and other assets with human rights law. **Future legal developments will be important here.**

The UK Government recently said that, in its view, the Register of Overseas Entities and the PSC register were compliant with the European Convention on Human Rights.

Should a trust continue to exist at all?

The trust is very well established in Scots law, [34] other parts of the UK, in Commonwealth countries and the USA. [35]

On the other hand, in European systems, while some do recognise trust-like structures, it is much more common for people or entities who benefit from assets to also legally own them. [36] [13]

In recent years, a campaign group with an international perspective has questioned whether the concept of a trust should continue to exist. This, in turn, generated a strong critical reaction in some parts of the professional community dealing with trusts. [37] [38]

As noted earlier, **the Commission did not consult on the topic of whether a trust should continue to exist in Scotland.** However, in an article in the legal press in 2015, the Commission commented as follows: [39]

> “ One option would simply be to ban trusts, or to place stringent restrictions on their use. Many, however, would see this as throwing the baby out with the bathwater. It would harm those in Scotland who currently rely on them for what would be widely regarded as socially and commercially beneficial purposes... And it would be largely ineffective as it would do nothing to prevent determined trusters setting up a trust under ... other ... [legal systems]”

Part 1 of the Bill: trust law

This part of the briefing is a **chapter by chapter** look at **Part 1 of the Bill**.

Note that, with some limited exceptions, Part 1 applies to trusts regardless of when they were created.

Chapter 1: how someone becomes a trustee, and how they stop being a trustee

Chapter 1 of Part 1 (Chapter 1) would make reforms to the ways that people or entities can become trustees. It also proposes changes to the ways trustees can leave that role. The Commission consulted on this topic in 2004. [40]

This part of the briefing is split into **three sections**: appointment and assumption of trustees (sections 1-3); resignation and removal of trustees (sections 5-8) and discharge of trustees (section 10).

Assumption is a specific term for appointing a trustee which is used when it is the existing trustees (not the truster or the court) who are acting together to take this step.

Discharge of a trustee occurs when any personal legal liabilities, to be met out of their own pocket, end in respect of a trust. Discharge is a distinct legal step from removal or resignation of a trustee.

In policy terms, there are **two particularly significant powers** in Chapter 1:

- in **section 7**, a new power would be created for **fellow trustees** to act together to remove a trustee
- in **section 10**, a wider power would be given to **beneficiaries to discharge a trustee**. The Scottish Government believes this may have implications for some small family trusts.

Sections 1-3: appointment and assumption of trustees

In practice, the first trustees are usually appointed in the trust deed. However, over time, there may be a need to bring in new trustees.

The existing law

There are **three ways** new trustees can be added under the current law:

- Where the trust deed does not prevent it, the **existing trustees** can **assume** (appoint) new trustees.[vii]

vii Trusts (Scotland) Act 1921, section 3(b).

- For private trusts only, where there are no trustees left, and the trust deed does not prevent it, the **truster** can also appoint new trustees. [41]
- The Court of Session can **appoint new trustees**, either under statute[viii], or under the court's special fallback power, called the nobile officium, in some situations.

For charities (including **charitable trusts**) OSCR, the charities' regulator, also has a power to appoint **interim trustees**, in certain circumstances, at the request of the majority of charity trustees.[ix]

Section 8 of the Charities Bill would expand OSCR's administrative power to appoint interim charity trustees to a wider set of circumstances. Under section 8, OSCR could act without being asked by any existing charity trustees to do so, and without any involvement of a court.

Bringing in new trustees (sections 1-3)

Section 1 of the Bill proposes **revised powers of a court** to appoint a new trustee.

In a change to the existing law, the Court of Session **and** the local sheriff courts would have these powers.

Content-wise, the new powers would be, broadly, a combination of a) the existing statutory powers; and b) the wider power under the nobile officium. Specifically, the court could appoint a new trustee where:

- it considers it **expedient** (i.e. convenient and practical) for the administration of the trust (ground 1); or
- there is no **capable trustee** or **traceable trustee** (ground 2). See the box below on this.

A court application can be made by anyone with an **interest in the trust property**. The **trustees** are also given a specific power to apply for ground 1.

viii Trusts (Scotland) Act 1921, sections 2 and 22.

ix Charities and Trustee Investments (Scotland) Act 2005, section 70A.

An incapable trustee (section 75)

Someone is **incapable** (for section 1 and all parts of the Bill) where they cannot make, communicate, understand, or retain the memory of decisions. This, in turn, is either because the person is **mentally disordered**, or because of a **physical disability**, unable to communicate. Any communication difficulties could not be fixed by human or mechanical aid.

An untraceable trustee (sections 1 and 76)

For section 1 (but not some other parts of the Bill), a trustee is untraceable only where the court is sure **reasonable steps** have been taken to trace them.

Sections 2 and 3 of the Bill would largely **restate** the current legal powers allowing the appointment or assumption of trustees by **the trustees** and **the truster**.

The Commission's consultation

The Commission consulted on **the court's powers to appoint trustees**, the proposal now contained in **section 1 of the Bill**.

Eight out of the nine individuals or organisations who responded on the topic (**90%**) supported what was proposed. A couple of those responding, including the Scottish Law Agents Society, were worried, or somewhat worried, that disgruntled beneficiaries or trustees might "unnecessarily" raise court actions to add new trustees. [42]

In what would have been a change to the current law, the Commission also considered whether **beneficiaries** should be able to act together to appoint new trustees (outside a court process). It ultimately rejected this idea, unless this power is explicitly granted by the trust deed. [43]

Sections 5-8: resignation and removal of trustees

Over the lifetime of a trust, trustees may willingly leave their role. Others, such as trustees or beneficiaries, may wish to force a particular trustee to leave their role.

The existing law

Under general trust law, trustees can leave their role by **death**; **resignation**, common in practice; or, and typically as a last resort, they can be removed **by the court**.

Trustees can always resign, unless the trust deed prevents it, and with some statutory exceptions.[x]

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x Trusts (Scotland) Act 1921, section 3 and Succession (Scotland) Act 1964, section 20.

The Court of Session's powers to **remove trustees** come from statute, setting out specific grounds of removal,[xi] and the nobile officium, in some circumstances. [44]

The **trust deed** may also give a power to remove trustees to **other people or entities**, such as the **truster** or the other **trustees**. This is common in commercial, but not family, trusts. [45]

The Commission considered adding extra circumstances, other than death of trustee, which would result in a trustee's position in a trust being **automatically terminated**. The Commission ultimately decided against this. [46]

Resignation of trustees (section 5)

Section 5 of the Bill would restate the default rule that trustees can always resign.

Two current statutory exceptions to that rule would disappear: broadly, those prohibiting resignation where the trustee has received money or another asset (for example, in a will) in return for taking on the trustee role. Currently, they have to apply to the court to resign.[xii]

Part of the policy thinking for the proposed change here is that a reluctant trustee is unlikely to be a good trustee (Policy Memorandum, para 81). [47]

One possible consequence of this change is that the remaining trustees might feel that an outgoing trustee benefited from something (for example, a gift in a will) in circumstances where they should not have done.

Here the Commission suggested use of the (separate) **law of unjustified enrichment** to recover the value of the benefit. [47] This would require the remaining trustees to begin court action.

One point needs to be emphasised in relation to **professional trustees** and the policy impact of section 5. Professional trustees run a business providing trust administration services (although the term also has a more specific meaning in the context of **section 27**, considered later).

The Commission has said "most" professional trustees are **not** trustees, but **agents** of the actual trustees (see later in the briefing on agents). Arguably, the Commission said, firms and individuals acting as agents never fell within the scope of the statutory exception to resignation in the first place. [48]

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xi Trusts (Scotland) Act 1921, section 23.

xii Trusts (Scotland) Act 1921, section 3(2) and Succession (Scotland) Act 1964, section 20.

The Commission's consultation

On consultation, seven out of nine respondents (**80%**) who expressed a view wholly supported the proposal to remove two of the statutory exceptions to the right to resign. [42]

The support of the Faculty of Advocates was conditional on any benefit received under a will being repaid to the trust first. It thought that having to later resort to the courts to recover the benefit was "expensive and inconvenient." [42]

The court's powers to remove trustees (section 6)

Section 6 of the Bill would reformulate the court's powers to remove trustees, and put them all in statute for the first time.

The powers would be available to the Court of Session **and** the local sheriff courts.

The application to the court could be made by a **trustee**, a **beneficiary** or any other person with an **interest in trust property**, for example, a potential beneficiary.

Under section 6, the proposed **grounds for removal for the court** are where the trustee:

- is unfit to carry out their duties
- is acting, or might be acting, inconsistently with the trustee's **fiduciary duties**
- has neglected their duties
- is incapable
- is untraceable. The court must be satisfied here that **reasonable steps** have been taken to trace the trustee.

The Commission's consultation

On consultation, all those responding agreed with the general policy underlying the proposal. Suggestions were made about matters of detail. [42]

For example, the Trust Law Sub-Committee ('the Sub-Committee') of the Law Society was concerned about too wide a definition of who could raise a court application. [42]

Trustees removing a trustee (section 7)

As noted earlier, an individual **trust deed** can give trustees powers to act together to remove a trustee. However, this is not a feature of general trust law.

Section 7 of the Bill proposes a new general rule that a trustee can be removed by **a majority of fellow trustees**. This in four sets of circumstances, specifically, where the trustee is:

- incapable
- convicted of an offence involving dishonesty
- sentenced to imprisonment on conviction of an offence
- imprisoned for contempt of court for not having paid a fine.

The Commission's consultation

The Commission consulted on the proposal that is now contained in section 7. **It met with a mixed response on consultation.** [42]

Strong support was expressed by Standard Life plc, the Sub-Committee of the Law Society and some solicitors' firms. [42]

Others responding, including the Faculty of Advocates, thought that removal of trustees was a matter best left to the court. The Trustees and Trust Administration Group of the Law Society (a separate entity from the Sub-Committee) was very concerned about the ease with which a trustee could be victimised, calling the proposal "dangerous." [42]

After this consultation, in the Report, the Commission also added **an extra ground**, where the trustee was **untraceable**.

This extra ground is **not** in the Bill as introduced. The Scottish Government considered that it was not an appropriate ground for removal without the supervision of the court. [49]

Beneficiaries removing a trustee (section 8)

Section 8 of the Bill would allow **beneficiaries** to remove a trustee in one specific set of circumstances. These circumstances are where the beneficiaries all **agree to the removal**; are **absolutely entitled to the trust property**; have reached **the age of 18**; and are capable.

The Report explains beneficiaries can, in the same set of circumstances, compel the trustees to wind up the trust and give them the trust property. This is under the current law now largely restated in **section 54 of the Bill**. [50] **Section 8** is, from that perspective, a less drastic power. [51] The policy debate around sections 54 and related provisions is considered later in the briefing.

The Commission's consultation

On consultation, the Commission proposed that, **without exception**, the beneficiaries should **not** be able to remove (or to direct the trustees to remove) a trustee from office. [40]

This proposal met with universal support. [42]

Section 10: discharge of trustees

Section 10 of the Bill covers the circumstances in which an outgoing trustee can be discharged, that is to say, freed from their personal legal liabilities.

The existing law says a trustee who resigns or is removed can be **discharged** by the remaining **trustees**, failing which **the court** can order a discharge.

Section 10 would restate the law as it applies to trustees and the role of the court. However, it proposes that **discharge could also be granted by beneficiaries.**

Guardians of under 16s discharging trustees

For a **beneficiary** who is under 16, section 10 is particularly significant. It would allow the **guardian** of that child or young person to replace that beneficiary, and grant a discharge (section 10(4)). In practice, a guardian of an under 16 is usually a parent.[xiii]

The Scottish Government believes that this part of section 10 raises a potential policy issue for small family trusts (Policy Memorandum, paras 93-94). See the example in the box below.

Avril puts property into a trust for the following beneficiaries: her children (Brian, Claire and David) and grandchildren (Eleanor and Francis, who are Brian's children).

A sole trustee is then appointed. If the sole trustee sought to leave office and be discharged from any personal liability, consent would be needed from, or on behalf of, all beneficiaries.

Brian would be able to consent in his own right as a beneficiary. Brian would also, as the guardian of Eleanor and Francis, be able to consent on their behalf.

Brian has a potential conflict of interest between his interest in the trust property (as a beneficiary) and his children's interests.

A potential misuse of the power to grant discharge might be if the trustee wrongfully acted to advance Brian's interests, at the expense of the interests of Eleanor and Francis. The trustee might then be granted discharge from liability for those misdeeds by Brian.

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xiii Children (Scotland) Act 1995, sections 1 & 2.

The Scottish Government is keen to explore the extent to which this problem might arise in practice. It is also interested whether there are sufficient legal safeguards to protect beneficiaries under 16. [49] Note that a guardian has a **fiduciary duty** towards the young person. [49]

The Commission's consultation

The Commission did not specifically consult on what is now section 10. It thought it sufficiently similar to the existing law to not need this. [52]

Chapter 2: how trustees make decisions

How trustees make decisions about the trust is of fundamental importance. This topic was consulted on by the Commission in 2004. [40]

It is covered by **Chapter 2 of Part 1 of the Bill** ('Chapter 2').

The existing law

Trustees are appointed to act as a body and, accordingly, are under a **duty to consult each other** in relation to trust business.

However, the rule in Scotland, unless overridden by the trust deed, is that an **effective decision** about a trust may be made by **a majority of trustees**. [53]

The rule in Scotland contrasts with the default rule in England and Wales, and various other countries influenced by the English system. In England and Wales, for example, the alternative rule says that, unless overridden by the trust deed, **all trustees** must agree to a trust decision. [35]

Section 11: what is required before the trustees can take a decision

Section 11 of the Bill sets out the procedure that would have to be followed **before** the trustees can take an effective decision. This procedure, which could be overridden by an individual trust deed, would have **two steps**:

- First, the trustees must **receive notice** of any decision to be made and that notice must be **adequate.**
- Second, a trustee must be given an opportunity to **express their views** on the issue before a decision is taken.

There is a proposed exception to the statutory procedure, in that the requirements only must be followed **in so far as reasonably practicable** (section 11(2) of the Bill).

A key policy aim of section 11 is to remove the current legal uncertainty over whether **a meeting of trustees** is an mandatory requirement of decision-making.

The Bill says **a meeting would not be essential** (section 11(2)(b)). Both the Commission and the Scottish Government believe modern methods of communication (for example, video calling or emailing) make such a requirement unnecessary (Policy Memorandum, para 90). [54]

The Commission's consultation

All **nine respondents** who expressed a view on the proposals now contained in section 11 were entirely, or broadly, supportive of them. [42]

A handful of respondents had concerns on specific points. For example, one issue was how **so far as reasonably practicable** would be interpreted in practice. The Sub-Committee of the Law Society was also worried how **adequate prior notice** would be interpreted without further statutory definition. [42]

Section 12: making the decision

Section 12 of the Bill does two things. First, it restates the rule, which it is intended can be overridden by the trust deed, [49] that a decision can be made by a **majority of trustees**.

A deliberate policy choice has been made with section 12 to avoid using the term **quorum**. A quorum is a term traditionally associated with a meeting (not required under the Bill).

The second thing **section 12 of the Bill** does is set out default provision about the circumstances in which a specific trustee should **not** be able to participate in a decision. Broadly, these are:

- where the trustee has a **personal interest in that decision** (this is a modified version of the existing law)
- where the trustee is incapable or **the trustee is untraceable** (these are new grounds).

There are a couple of **exceptions to this general position**. For example, personally interested trustees can take a decision where the beneficiaries know about the interest and **consent to the decision** (section 12(3)(a)).

For a beneficiary who is **under 16**, their guardian can consent instead. This may raise similar policy issues to section 8, in terms of how to safeguard the interests of those

beneficiaries.

Another key point is that it is the **other trustees**, not a court, who decide whether a particular trustee is untraceable under section 12 (section 12(2)(c) and section 76(b)(iii)).

The Commission's consultation

As noted earlier, **majority decision-making by trustees** is a fundamental (default) principle of Scottish trust law.

The Commission did **not** consult on whether this should change to **unanimous agreement** for all decisions, or indeed for some key decisions, as exists in some other legal systems. [40]

The Commission did consult on a proposal similar to, but not identical to, the one now contained in section 12. [40]

Notably, the idea that a trustee might not be able to participate in a particular decision because they were **incapable** or **untraceable** was not included in the consultation proposal.

The addition of **the untraceable trustee** here may be particularly significant in policy terms, as there is no routine court oversight of when someone is untraceable.

Of the **nine individuals and organisations** responding to the original proposal all were (wholly or mainly) content with it. [42]

Again, some specific points were made. For example, the Trustees and Trust Administration Group of the Law Society thought the definition of what is a **personal interest** could be clarified. [42]

Chapter 3: powers and duties of trustees

This section of the briefing covers the **powers and duties of trustees**, dealt with in **Chapter 3 of Part 1 of the Bill** ('Chapter 3'). The existing law is discussed earlier in the briefing.

The policy underpinning the Bill gives the trustees "extremely wide powers", subject to some important duties on trustees, both in the Bill and in other parts of the law. [1]

In **Chapter 3**, the following are particularly important topics in policy terms:

- the **general power** given to trustees, replacing a list of specific statutory powers

- the power of trustees to give a beneficiary **an advance** of their capital share under the trust
- the power of trustees to appoint **nominees**, to whom they transfer ownership of the trust property for various purposes
- the duties on trustees to **provide information to beneficiaries**
- the new **higher standard of care** that must be met by **professional trustees** (falling within a specific statutory definition).

Section 13 of the Bill: a general power for trustees

At present, there is a lengthy and complex list of powers for trustees in statute.[xiv] These powers can be overridden and added to, and commonly are by the trust deed. [55]

Section 13 of the Bill would replace the current list with a (default) general power for trustees to manage the trust.

A trustee would be given all the powers a competent adult has in relation to their own property.

The Commission's consultation

The Commission consulted on the proposal now contained in section 13 in 2004. [40] Of the ten individuals and organisations responding to this aspect of the consultation, eight (**80%**) supported the general power. [42] The alternative policy option was to add to, and widen, the existing list of specific powers. [40]

The Faculty of Advocates was opposed to the general power. It was worried that for the large number of trustees who are not legally qualified, the general power may create doubt for trustees as to the power they hold, and the extent of their authority. [42]

Half of the respondents who wanted the general power also supported **an additional statutory list of specific powers**, providing examples of what was contained within the general power. They said this list was helpful for (non-professional) trustees and clients setting up trusts. [42]

Others responding thought the list could create confusion. The Faculty of Advocates thought it could be treated in practice as narrowing the scope of the general power. [42]

Section 13 of the Bill does **not** include a specific list of powers (alongside the general power).

Section 14 of the Bill: the court would be able to add extra

xiv Trusts (Scotland) Act 1921, section 4.

powers

Because the general power in section 13 of the Bill can be overridden by the trust deed, trustees of a particular trust might later find they do not have all the powers they need.

Section 14 of the Bill would allow the court to fix this, on application to it by the trustees. The court must agree the change would **benefit the administration or management of trust property**.

The Commission's consultation

The Commission's proposal received almost complete support on consultation. [42]

Section 15: a power to take out indemnity insurance

In some circumstances, a trustee can be personally liable for a loss which has occurred, associated with running a trust. It is possible for a trustee to get insurance to protect themselves financially against this risk.

Section 15 of the Bill would give a (default) power to trustees to take out **reasonable insurance** against personal liability, **paid for out of the trust property**. Whether they could fund it this way was previously unclear.

The Commission's consultation

The Commission consulted on this topic in 2003. [56] There was **strong consensus among those responding** that trustees should be able to get this insurance at the trust's own expense. [57]

Five out of seven individuals and organisations responding on this issue (**around 70%**) wanted an automatic statutory power, which is now in section 15. Two responding wanted the power to be available via a court application. [57]

Sections 16 and 17: trustees' investment powers

Sections 16 and 17 of the Bill would **restructure and restate the current law** relating to trustees' powers to invest the trust property.

Authorised unit trusts are excluded from sections 16 and 17, as they are covered by a specialist statutory regime.

Pension schemes also have their own specialist regime. Accordingly, the Scottish Government does not intend that any section 104 order will apply this part of the Bill to pension trusts. [58]

Trustees' **general powers of investment** were last reformed by the Charities and Trustee Investment (Scotland) Act 2005,[xv] (the 2005 Act) which amended the 1921 Act.[xvi]

Currently, the default position is the trustees have the same power to make an investment of any kind as if they were the absolute owners of the assets in the trust.[xvii] **Section 16 of the Bill proposes to keep this general rule.**

Under the existing law, there are also **several qualifications** to the general rule.[xviii] These are now in **section 17 of the Bill.** Specifically, the trustees must:

- choose wisely between various possible investments within their powers
- consider diversifying the investments. In other words, not put all the (investment) eggs in one basket [59]
- take and consider proper advice about investments, subject to some exceptions.

The Commission's consultation

The Commission did not consult as part of its most recent trusts project on the proposals now contained in sections 16 and 17 of the Bill.

The Commission was previously involved in developing the proposals on trustees' investment powers which were implemented for Scotland in the 2005 Act.

Section 18: the appointment of agents and the delegation of powers

Section 18 of the Bill sets out the default rule that trustees can collectively appoint and pay **agents**. The Commission consulted on agents for trusts in 2004. [40]

An **agent** is a person or entity who has legal authority to act for or on behalf of another person or entity (known as **the principal**).

The law of agency in Scotland sets out the **general powers and duties** which apply to agents. For example, agents owe a fiduciary duty to their principal.

A contract typically sets out the relationship between agent and principal. The normal rules of **contract law** apply to that contract.

In addition, specific legal rules also apply to agents operating in certain settings. Trust law has additional rules on agents appointed by trustees. For example, a trustee appointing an agent is subject to the trustee's overall **duty of care**.

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xv Charities and Trustee Investment (Scotland) Act 2005, sections 93-95.

xvi Trusts (Scotland) Act 1921, section 4 (amended); sections 4A-4C inserted.

xvii Trusts (Scotland) Act 1921, section 4, as amended.

xviii Trusts (Scotland) Act 1921, section 4A.

Any business or professional provider

The existing law (both statute and judge-made) allows appointment of agents by trustees. The current judge-made power is a broad one. The statutory power is focused on **legal providers**, such as solicitors, being appointed as agents.[xix]

Section 18 of the Bill would allow **any person or entity**, including any provider of business or professional services, to be appointed by trustees.

What powers can be delegated?

The current law says trustees may delegate **administrative tasks** to agents. However, without specific statutory provision,[xx] not those that require the **exercise of discretion or judgement**. The dividing line here could be unclear in practice. [60]

On **the proposed approach in section 18**, there are three key points:

- it remains possible, as under the existing law, for trustees to **transfer trust property** to agents
- **investment management functions**, including those requiring discretionary decision-making, can be delegated. (This replicates a rule added by the 2005 Act to the 1921 Act)[xxi]
- **certain powers cannot be delegated**, for example, the power to appoint trustees or the power to distribute the assets of the trust to beneficiaries.

Trustees as (paid) agents

It is currently not possible for **a trustee to also act as an agent of the trust, paid for their services**. This is unless the trust deed allows it, thought to be common in practice, or the beneficiaries consent to it. [61]

One concern about changing the default rule (to allow trustees to be paid agents) is that trustees might become more focused on generating fees than their fiduciary duty to the beneficiaries. The Commission decided the benefits of change here outweighed any risks. [62]

Section 18(3) of the Bill would allow a trustee of a trust to be appointed as a (paid) agent to that trust.

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xix Trusts (Scotland) Act 1921, section 4(1)(f).

xx Trusts (Scotland) Act 1921, section 4C.

xxi Trusts (Scotland) Act 1921, section 4C.

The Commission's consultation

All eight individuals and organisations who commented on the issue supported the basic idea that trustees should be able to appoint (paid) agents. [42]

On the important issue of whether a **trustee** should be able to be appointed as a **paid agent**, ten out of the eleven individuals and organisations who commented on the issue (**90%**) supported this. [42]

Section 19: transferring trust property to nominees

Section 19 of the Bill relates to **nominees**, a topic of considerable importance for trusts. [63]

A **nominee** is someone to whom a trustee **transfers ownership of trust property**, often for the purposes of investing that trust property.

Nominees can be 'in-house,' as part of a range of services offered by a professional firm, or a separate business. Nominee services can be offered by, for example, **solicitors**, **banks** and **investment managers**.

There are benefits and risks to using nominees. On the risk side, losses to the trust property may occur due to the nominee's fraud, negligence or insolvency. A key policy issue is how to reduce these risks to an acceptable level.

The 2005 Act clarified that, unless the trust deed says otherwise, a trustee could use nominees when exercising their **investment powers**. It also introduced **some safeguards** to guard against some risks of using nominees.

What section 19 would do

Section 19 of the Bill says that, unless the trust deed says otherwise, trustees could use a nominee **in respect of any of the trustees' powers**, not just trustees' investment powers (sections 19(1) & (2)). This aims to resolve one remaining uncertainty in the law.

Crucially, **section 19 of the Bill** also states what the **legal relationship** is between trustees and their nominees, as this is again unclear in the existing law.

Section 19 says that when a nominee is appointed, a **further trust** would always be created (section 19(3)). The rather complex mechanics of this are explained in the box below.

Where a nominee is appointed for trust A, trust B is created. The nominee of trust A is also a trustee of trust B. The beneficiaries of trust B are the trustees of trust A.

The Commission says this legal structure would **protect the trust property of trust A from the nominee's creditors**. Under general trust law, if the nominee becomes

insolvent, the trust property continues to be held for the purposes of the trust A. It does not go to the nominee's creditors. [64] [65]

The rest of **section 19 of the Bill** aims to mitigate the risks associated with nominees in a variety of other ways, following the approach of the 2005 Act. For example, there are sub-sections:

- aiming to avoid the excessive or unnecessary use of nominees (section 19(6)(a) & (8))
- requiring trustees to appoint nominees with suitable skills, knowledge and expertise and to supervise their activities (section 19(6)(b) & (10)).

The Commission's consultation

The Commission consulted on the topic of nominees twice, once in 2004, [40] once in 2011. [66]

Between the two consultations, there was high-profile litigation on nominees in the context of insolvency. The regime for nominees in the 2005 Act also came into force.

In 2004, the Commission consulted on **the general principle** that nominees could be used in relation to all the trustees' powers (not just their investment ones). [40] Seven out of nine (**around 80%**) of those offering a view fully agreed with this. [42]

In 2011, the Commission asked whether a nominee should always hold trust property as a trustee. [66] Seven out of eight of those offering a view (**around 90%**) agreed. For example, one solicitor commented: [67]

> " I do have a concern that solicitor (and other nominee) companies are accidents waiting to happen; examples like Lehman Brothers or Madoff show the risks. Anything which can be done to lessen that risk for eg sloppily run nominee companies ... has to be welcome."

Other **necessary safeguards** around nominees were consulted on in 2004 but not revisited in 2011. In 2004, the Commission asked whether: [40]

- eligible nominees should be those who provide services **in the normal course of a business**
- there should be general statutory requirements on nominees relating to **their insurance**.

While there was some support for these requirements, [42] the Commission ultimately preferred the safeguards in the Bill in as introduced.

Sections 20 and 24: advances from capital and income

Capital is the part of trust property that is made up of a collection or fund of assets. Capital can be distinguished from the **income** earned from those assets, another part of trust property.

So, for example, an office block might form part of the capital of a trust, the income for the trust would be the rent received from leasing out that office block.

Section 20 of the Bill applies where a beneficiary wants an **advance on the capital**, before they would otherwise be entitled to it.

Similarly, **section 24 of the Bill** covers possible **advance payments of income** to beneficiaries.

The Commission consulted on this area in 2004 [40] and, for advances on capital, also in 2011. [66]

For these sections, it is helpful to be aware that not all beneficiaries will necessarily have the same interest in a trust. For example, one class of beneficiary might be entitled to the capital, another class of beneficiary, the income only.

Section 20: advances from capital

Section 20 of the Bill, on **advances from capital**, deals with a complex and contentious area which arises frequently in practice.

The existing law

Section 16 of the 1921 Act contains the current statutory position, which the Commission thought was "unduly restrictive." This was for reasons including: [68]

- getting an advance is **only possible through the courts**, which the Commission thought might be too burdensome a requirement for smaller amounts
- section 16 only applies to **beneficiaries who are under 16**, but the Commission thought it was possible adult beneficiaries (such as elderly ones) could be struggling financially too
- an advance is possible where **necessary**, which the Commission felt was too high a standard to meet
- an advance is for **maintenance or education**. The Commission felt the acceptable purposes of an advance were too narrow.

What section 20 would do

Section 20 is a **default provision**, which can be overridden by the terms of the trust deed.

Section 20 of the Bill would change the current law on advances of capital. Specifically, section 20:

- applies to both **adult and child beneficiaries** (sections 20(1) and 74 (1))
- gives **the trustees** the power to authorise an advance of capital, where certain conditions are satisfied. This includes that all those prejudiced consent to the advance (section 20(1), (4) and (5) (a))
- allows the Court of Session to authorise the advance in other circumstances. This includes where that consent is being **unreasonably withheld** or, for example, a beneficiary is too young to consent (section 20(5)(b))
- says the advance must be for **the benefit** of the beneficiary concerned, a lower threshold than the existing law, and envisaging an advance for a range of purposes (section 20 (1))
- allows trustees to impose **reasonable conditions** on the advance, which they could subsequently change or remove (section 20(2) and (3)).

A key policy issue is whether there should be statutory cap on how much of a person's share of the capital could be advanced to them. **Section 20 does not propose a statutory cap.**

The Commission's consultation

As noted earlier, the Commission consulted twice, on two different versions of the proposal now contained in **section 20**, once in 2004 [40] and again in 2011. [69]

In both consultations, opinions were **evenly** (2004), **or nearly evenly** (2011), **split** between those individuals and organisations who wanted a statutory cap on the amount that could be advanced and those who did not. [42] [67]

Those who wanted a statutory cap were worried about trustees receiving excessive requests for advances or one beneficiary being unduly favoured at the expense of others. Some thought the default power might be an unexpected and unwanted one for trustees, and the cap would limit the impact of that. [42] [67]

Those in favour of no cap referred to the flexibility this offered trustees to respond to circumstances. [42] [67]

Section 24: power to make payments from income

At present, the Court of Session, under the nobile officium, may authorise trustees to make to a beneficiary **advance payments of income** for **their maintenance or education**. [70]

What section 24 would do

Section 24 of the Bill would authorise **the trustees** themselves to agree to an advance of income.

The advance must be for **the benefit of the beneficiary** and certain other conditions must be met.

A key condition is that the trustees must be satisfied that no other person other than that beneficiary is entitled to the income to be paid in advance (section 24(5)).

In other circumstances falling outside the scope of the trustees' power, **the court** can, instead of the trustees, authorise an advance of income (section 24(8) and (9)).

The Commission's consultation

The Commission consulted in 2004 on a version of the proposal now contained in section 24. [40]

Of the six individuals and organisations who commented on this issue, there was unequivocal support from three respondents, **half of those commenting**. There was support subject to certain drafting points from the others responding. [42]

Sections 21-23: apportionment between or among beneficiaries

Trustees of some trusts have to distinguish between capital and income, in some circumstances. They might also have to divide up trust property between different classes of beneficiaries.

Complex rules have developed (called **rules of apportionment**) with the aim of helping trustees undertake these tasks.

Sections 21-23 of the Bill propose some changes to those rules. The Commission consulted on this topic in 2003. [71]

Section 21: power to apportion between or among beneficiaries

Section 21 of the Bill contains **a default rule**.

It says that, when tasked with dividing trust property between different beneficiaries, trustees can divide trust property between beneficiaries so that a particular beneficiary takes nothing, or next to nothing. They are not, by that action alone, exercising their power improperly.

Section 21 would mirror an existing statutory rule, but removing the uncertainty that this rule applies to Scotland.[xxii]

Notably, the power in **section 21** is subject to the important power of the courts under **section 64**, considered later in the briefing, to review the acts of trustees on various grounds.

Under the existing law, trustees must also act in accordance with the trust purposes, their duty of care and their fiduciary duties.

Section 22: apportionment for regular payments over time

Section 22 of the Bill relates to how the current law on apportionment treats the income of a trust being **received at regular intervals over time**. For example, rent on a building or dividends from shares.

The current law requires complex calculations and the Commission and Government think these are of little practical benefit. [72] [73]

Also, a key concern of the Commission is that the current law of apportionment could, on occasion, produce results which don't meet with a truster's wishes for **liferent trusts**.

With a **liferent trust**, one beneficiary (A), known as **the liferenter** is entitled to receive income from the trust over the period of A's lifetime. Another beneficiary, (B), known as **the fiar**, is entitled to the trust property on A's death.

Under the current law, on occasion, person A might not get much income at the **start of the liferent** (when they might most need it). Sometimes, **person B might get less capital than the person setting up the trust might have wanted**. Some income (perhaps quite a significant amount on occasion) might fall to A's relatives on A's death.

What **section 22** would do (unless the trust deed says otherwise) is allow the trustees in a particular trust to depart from the current law on time apportionment on occasion. Instead, it can be apportioned by these trustees, **in a manner which seems to them to be appropriate.**

Section 23: three further rules about apportionment

Judge-made law in England and Wales sets out **three further technical rules** on apportionment. These are default rules, which can be overridden by the trust deed. There is some doubt about whether, and to what extent, these rules have been adopted in Scotland. They are explained in more detail in the Policy Memorandum, at **paras 46-48**.

Again, the Commission thought the rules required complex calculations by trustees,

xxii Powers of Apportionment Act 1874.

making little practical difference in most cases. [71]

Section 23 of the Bill would remove these rules for Scotland, to the extent they apply to trusts.

The Commission's consultation

On the Commission's consultation on this area, [71] there are **three key points**:

- for the proposal now in **section 21**, the general power for trustees, there was no specific consultation question
- on the content of **section 22** (on time apportionment) the three organisations expressing a view on this supported the proposal
- on the proposal to abolish three technical rules in **section 23**, the same three organisations offered views, **which were mixed**. The Law Society was in favour of abolition, the Faculty of Advocates, against, at least for one of the rules. The law firm, Turcan Connell, seemed to be hoping the rules could be retained in the form of (presumably non-binding) guidance.

Sections 25-26: trustees' duties to provide information to beneficiaries

Section 25-26 of the Bill considers trustees' duties to **provide information to beneficiaries**.

The Commission's review of the **existing law** can be summarised as follows:

- any duty here is a natural counterpart of a beneficiary's power to hold the trustees to account for proper management of the trust [74]
- existing duties on trustees are probably part of the trustees' fidiciary duties [74]
- there is a **duty to keep the beneficiary informed**, through **the provision of accounts** and **other relevant information**
- otherwise, the **precise content** of the trustees' information-sharing duties is undeveloped and therefore unclear. [75]

For **sections 25 and 26 of the Bill**, there is specific provision for beneficiaries who are either **under 16** or adults with incapacity. Here the information can be requested by, and given to, the person's guardian instead of the person themselves.

What sections 25 would do

Broadly, **section 25 of the Bill** requires trustees to tell any beneficiary that they are a beneficiary and give them all the trustees' names.

Beneficiaries are also to get **sufficient information** to enable them to enter into **"correspondence"** with a trustee. This term is not defined in the Bill.

There are two broad classes of beneficiary in trust law, and they would be treated differently under section 25:

- There are those beneficiaries who don't have to meet any conditions to receive that property. For them, the trustees **must** provide the basic information just described.
- There are also beneficiaries who **may or may not** receive trust property, for various reasons. Here the trustees would have discretion to do what is **reasonable** in giving basic information.

What section 26 would do

Section 26 of the Bill considers what information should be provided to beneficiaries **on request**, and in what circumstances.

Overall, section 26 would create a broad duty on trustees to provide information, including to **potential beneficiaries** under the trust.

Trustees must respond to a request as soon **as reasonably practicable**. Their response, both in terms of its content and how it is delivered, is what trustees consider **appropriate in the circumstances.**

In terms of the **content of what can be requested,** the trustees will not ordinarily have to disclose certain categories of information (section 26(6)):

- information about another beneficiary or potential beneficiary
- the trustees' deliberations or reasons for their decisions
- the **letter of wishes** from the truster, that is to say the device normally used in trusts where there is discretion, to guide trustees' decision-making.

Another restriction on the likely impact of section 26 in practice is that trustees can **charge reasonable expenses** to cover the work generated by the request (section 26(3)(b)).

Unlike section 25, section 26 can also be **overridden by the trust deed**. However, on application to it, the Court of Session can **determine** that a limitation on disclosure in the trust deed is not reasonable.

The Court of Session can also **direct** trustees to disclose information that had been refused to be disclosed by trustees.

Applications to the court can be made by trustees **and** those entitled to information. They can also be made by t**he truster** or their descendants (section 26(7)-(10)).

Section 26 does not apply to **private purpose trusts**, except to the extent they have beneficiaries. These trusts are explained later in the briefing.

The Commission's consultation

The Commission consulted extensively on the topic of trustees' duties to provide information in 2011. [66] In return, the Commission received some very detailed responses. [67]

There were **several key themes** from those responses.

For example, those responding considered what the correct approach should be for **discretionary trusts**. Here trustees have discretion as to which beneficiaries might benefit from the trust property. For these trusts, a popular suggestion was trustees themselves retaining some degree of discretion in relation to the duty to give information. [67]

Those responding also discussed whether **statute should list the documents** that should be available on request, and, if so, what should be on that list. Most were agreed the **trust accounts** should be available. Otherwise, a key theme was that any list should leave some discretion, either for the trustees and/or the court. [67] **The Bill does not contain such a list**, other than the exceptions to the general rule to provide information in section 26.

Section 27: trustees' duty of care

Earlier in the briefing, it was explained that there were various ways that trustees can go wrong when managing the affairs of a trust, resulting in a **breach of trust**.

One type of breach is when the trustees do something they are allowed to do in law, but do it badly. The technical term for this is **an intra vires delictual breach**.

Here trustees owe beneficiaries a **duty of care**. However, they are only liable to beneficiaries (for any losses suffered by the beneficiaries) if the trustees fall below the required **standard of care**.

That duty or standard is the topic covered in **section 27 of the Bill**. The current law is not statutory but judge-made law.

Under the existing law, it is unclear whether trustees who hold **professional qualifications** (for example, in law, accountancy or banking) must achieve a higher standard of care than those that do not.

What section 27 would do

Section 27 of the Bill does two things:

- sets, for the first time, different standards of care for different types of trustee
- says what happens if the trust deed tries to alter those standards of care.

The standard of care

Section 27(1) of the Bill sets out what would be the **basic rule for trustees**. A trustee, in managing the affairs of the trust, would have to exercise such **care** and **diligence** as any person of **ordinary prudence** would exercise in managing the affairs of another person.

Separately, section 27(2) sets out the special position of a **professional trustee**. As mentioned earlier, professional trustee services are often offered by law firms, accountancy firms and banks. Some professional trustees are actual trustees of a trust. Many are agents providing services to the trust.

In the context of **section 27**, a **professional trustee**:

- must be an actual trustee of the trust, not just an agent providing services to the trust
- provides professional services in relation to managing trust
- acts as a trustee in the course of business and is paid for carrying out their duties.

A professional trustee would have to exercise the skill, care and diligence as it is reasonable to expect from a member of the profession in question (section 27(2)).

Section 27(3) considers the trickier policy issue of trustees who are **not** acting in the course of a business in being a trustee. However, they happen to have relevant professional qualifications and skills, such as in law, banking, accountancy or fund management.

For this group of trustees, if they are **expressly instructed** by the other trustees to provide professional services or advice to the trust (whether paid or not), the Bill says that the **higher standard of care** described in section 27(2) will apply.

Otherwise, these trustees will be subject to the basic standard of care set out in section 27(1).

The effect of indemnity clauses and immunity clauses

Section 27(4) of the Bill covers **immunity clauses** and **indemnity clauses**.

An **immunity clause,** common in practice, aims to relieve trustees of a personal liability for a breach of trust.

An **indemnity clause** says that a trustee found personally liable can recover their associated financial outlays from the trust property.

Section 27(4) says that, for trustees subject to the basic standard of care, an **immunity clause** can exclude personal liability for negligence, but not gross negligence, a very serious form of negligence. Likewise, an **indemnity clause** would be ineffective to the extent it tries to indemnify the trustee against gross negligence.

Section 27(4) also says an **immunity clause** cannot relieve professional trustees of liability for failing to meet the **higher standard of care** which they are subject to (either under section 27(2) or 27(3)(a)). Similarly, an **indemnity clause** would be ineffective to the extent that it tries to indemnify these trustees against liability associated with a failure to meet that higher standard.

The Commission's consultation

The Commission consulted twice on the issue of trustees' duty or standard of care, once in 2003 [76] and again in 2011. [66] How to treat the third category of trustee, **who have professional qualifications but are not paid or acting in the course of business**, was a key issue for the second consultation.

Here the Commission said it did not want to discourage skilled people from putting themselves forward as trustees. However, it said that trustees, not acting as professional trustees, but with relevant qualifications:

> " are commonly asked to provide professional advice on an informal basis, without proper instructions and without payment. This is an obvious hazard for such trustees, as the legal status of such advice will often be far from clear."
>
> Scottish Law Commission, 2011[77] Scottish Law Commission, 2014[78]

When the Commission consulted in 2011 on the proposals now contained in **section 27**, all eight individuals and organisations responding, expressed support for it, subject to comments on points of detail. [67]

Section 29: when a trustee does something they have no power to do

Section 29 of the Bill deals with a different type of **breach of trust**, when trustees do something they have no power to do (**an ultra vires breach**).

The current law is not entirely clear. However, it is thought that a trustee who does this is personally liable, **regardless of any mitigating circumstances**.

What section 29 would do

Under **section 29 of the Bill**, the current law would be modified in favour of trustees. A trustee would be able to apply to the Court of Session for relief from the consequences of acting beyond their power, so far as the court thinks it just to do so.

The court could grant this relief where the trustee believed (after taking all **reasonable steps** and making all **reasonable enquiries**) that it was within the trustee's power to act as the trustee did.

Section 29(4) keeps the right of a beneficiary or trustee to recover trust property paid out to someone else, where this payment happened as a result of a trustee acting beyond their powers.

The Commission's consultation

In 2003, the Commission consulted on a **more radical version of the proposal** now contained in section 29. There would have been no need to apply specifically to the court for relief. The law's starting point would have provided that relief, where certain conditions were satisfied. [79]

Six out of seven individuals and organisations (**86%**) responding to the consultation supported the original proposal. [57]

The proposal was modified in the Report to what is now in section 29 to address the concerns of the then pensions regulator. It did not want trustees' liability in Scotland to be different from the rest of the UK. [57]

As noted earlier, the Scottish Government has excluded pensions trusts from the Bill's scope. It aims to ask the UK Government to apply them via a possible legislative order at Westminster.

Sections 28, 30 and 31: breaches of fiduciary duties

Sections 28, 30 and 31 of the Bill deal with various aspects of the situation where a trustee has breached some part of their fiduciary duties.

Under the existing law, a transaction which is in breach of fiduciary duty can be a) authorised by the trust deed (fairly common in practice); or b) agreed to by the beneficiaries. [80]

> Under these duties, for example, a trustee must not buy from the trust; sell to the trust; borrow from the trust; lend to the trust or otherwise deal with the trust in a personal capacity. [81]

Section 28 of the Bill would restate the existing law[xxiii] covering the situation where a beneficiary asked a trustee to breach their fiduciary duty, or consented to them doing so.

On application by a trustee, the Court of Session could order that **the beneficiary's share of the trust property** is used to **reimburse the trustee for the financial liability the trustee incurred for the breach**.

Section 30 of the Bill says that (subject to some limited exceptions) an immunity clause or an indemnity clause relating to a trustee's breach of fiduciary duty would be invalid.

Section 31 of the Bill would introduce into the law for the first time a different approach to breaches of fiduciary duty which **benefit trust property and beneficiaries** (or are likely to do so).

For breaches in this category, where certain conditions are satisfied, the trustee can apply to the Court of Session for such relief from the consequences of the breach as **the court considers just**.

The Commission's consultation

In 2003, the Commission consulted on the proposals contained in **sections 30 and 31 of the Bill.**

The Commission did not consult on the proposal in section 28, as the restatement of the existing law was regarded as uncontroversial by the Commission. [76]

The proposal in **section 30**, on the effect of immunity and indemnity clauses, was unanimously supported. [57]

On **section 31**, the approach to beneficial breaches, the Commission consulted on both the general principle and the detail of it.

Seven out of eight (**88%**) of those responding on the general principle supported it. Professor Gretton thought relief for trustees should be the starting point of the law, rather than something specifically granted by the court on a case-by-case basis. [57]

The Commission asked if there should be an extra condition for relief under **section 31**, that the trustee had acted **reasonably** and **in good faith**. In other words, the court could not later authorise **deliberate breaches of fiduciary duties.**

Four out of six (**two thirds**) of those responding agreed with this extra requirement, **which does not appear in the Bill**. They thought this was necessary for public confidence in trusts. Those opposed thought that even a deliberate breach of fiduciary duty should not be penalised if it benefits the trust and the beneficiaries. [57]

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xxiii Trusts (Scotland) Act 1921, section 31.

Chapter 4: the trust's legal relationships with the outside world

Chapter 4 of the Bill considers the legal liability of trustees towards people and organisations other than beneficiaries. The Commission consulted on this topic in 2008. [82]

The basic policy concern is that the existing law may be too hard on trustees. Due to the financial risks for trustees that come with personal liability, the concern is it may deter people from becoming trustees.

On the other hand, if trustees are not personally at risk, then the liability to third parties might have to be met out of the trust property. Here there are potential consequences for the beneficiaries.

Section 34: trustees enter into a contract

Section 34 covers the situation where trustees enter into **a contract** on behalf of the trust, with a third party, in relation to some aspect of trust business.

This legal step might be inside the scope of the trustees' powers, or outside them, depending on the individual situation.

If **inside the scope of the trustees' powers**, the current law says:

1. As a starting point, that the trustees are personally liable for any money due by them under the contract.

2. Rule 1 applies unless the trustees make it clear upfront that **they are entering into contract only as a trustee**. There is a very specific form of words that has to be used here.

3. If trustees end up being personally liable, then they have a **right of relief**. This means that legal obligations can be met out of trust property, to the extent there is sufficient trust property to do this.

Rule 3 can greatly limit risk to trustees' personal finances - but only if there is sufficient trust property to meet the liability.

On the other hand, the trustees might **act outside the scope of their powers** by entering into the contract. In this scenario, trustees are personally liable for any breach of such a contract, **without** a right of relief against trust property. To benefit here, the third party must have been acting in **good faith** (i.e. acting fairly and honestly) in entering into the contract.

What section 34 would do

Section 34 of the Bill would reduce the risk that contracts that are within the trustees' powers pose to a trustee's personal finances.

Unless the trust deed says otherwise, trustees' personal finances would **not** be at risk where the person or organisation they are contracting with **knows the trustees are acting as trustees**. Instead, any liability under the contract would be met out of trust property.

Crucially, section 34 applies regardless of whether the third parties were told directly by the trustees that they were acting as trustees, or whether they found out by some other means.

The trustees would still sometimes be personally liable under the proposed approach – if the third party was not aware that the trustees are acting as representatives for the trust. This would be much less common than before.

Here, with some technical changes, the trustees' **right of relief** from trust property would remain a key feature of the revised law (section 34(3) & (4)).

For contracts **outside the scope of the trustees' powers**, section 34 would retain the existing law with its focus on the trustees' personal liability, without a **right of relief** (section 34(5) & (6)).

The Commission's consultation

All six individuals and organisations who considered the proposal now in section 34 for **contracts within trustees' powers** agreed with it. [83]

For the proposal in section 34 for **contracts outside the scope of trustees' powers**, five out of six of those commenting (**80%**) agreed with it, on the basis the beneficiaries shouldn't suffer (through reduction in the trust property) for a contract entered into outside the trustees' powers. [83]

The Law Society, on the other hand, thought that, if the third party didn't know the contract was outside the trustees' powers, that third party should be able to claim from the trust property. [83]

Section 35-37: trustees' liability under the law of delict

The **law of delict** says that various actions, or failures to act, which cause loss or harm, are wrong in civil law.

Well-known here are **negligent actions or omissions**, covered by the **law of negligence**, a sub-set of the wider law of delict. A person can receive **damages** (financial compensation) in a successful court action under the law of negligence.

Currently, trustees can be found liable under the law of delict for their own acts or omissions towards third parties, as well as the acts or omissions of their employees or agents. For example, where a charitable trust runs a shop and a customer trips and breaks a leg due to an uneven floor.

What is somewhat unclear under the current law is whether the trustees are personally liable under delict, or whether any liability can be met out of the **trust property**.

The Commission thought that the most recent judge-made law suggested that the trustees

were probably personally liable. However, there was **a right of relief** out of trust property, where trust property was sufficient for this purpose. Also, the outcome can be varied in an individual case, depending on what the specific court order says.

What section 35 would do

In a proposed clarification to the law, **sections 35** lays out the general rule that financial damages under the law of delict would be **payable from trust property** (sections 35(1) & (2)).

The court can vary this to make a trustee personally liable where the trustee's act or omission which caused the loss to the third party fell below the required **standard of care** required in section 27.

> So, for example, if the loss to the third party was caused partly by the fault of a trustee, and partly by the fault of a trustee's employee, a specific court order could be tailored accordingly. Damages might be partly payable out of the trustee's pocket, and partly out of trust property.

The Commission's consultation

The Commission consulted on a version of the proposals now contained in section 35. [82] Four out of six (**two thirds**) of those individuals and organisations responding on the topic supported the proposals. [83]

The Faculty of Advocates was worried the new approach was too generous to trustees, to the extent it shielded them from personal liability. The Faculty thought the trust as a legal vehicle might then be at risk of abuse. STEP (the Society of Trust and Estate Practitioners) was also not wholly in favour of the proposals. It thought the extent to which there was personal liability on trustees was still too heavy a burden on them. [83]

Chapter 5: how long a trust can last

Chapter 5, containing one provision, **section 41 of the Bill**, relates to the fundamental question of **how long a trust should be able to last**. The Commission consulted on this area in 2010. [84]

> Chapter 5 does not apply to **charitable trusts**. It also only applies to **trusts created after the section comes into force** (section 41(5)).

The Commission thought the issue of **permitted duration of a trust** as important for two distinct, and very different, policy reasons: [84]

- a possible moral question about the extent to which the present generation should be able to tie up property long into the future, and remove the freedom of future generations of a family to do what they want with that property

- some of the existing rules affecting the duration of trusts (from the 18th and 19th Century) may not work for modern purposes in the financial services sector.

The policy impact of Chapter 5 should be considered alongside **section 61 of the Bill** which, mainly for family trusts, allows the trust purposes to be altered by the court where there has been a **material change of circumstances** .

Section 41(1): duration of a trust

Section 41(1) of the Bill sets out the general position on duration of trusts.

Under **the current law**, a trust can last as long as the truster wants**.** This is except in **limited circumstances**, and subject to **technical rules** (of trust and tax law) which impact how long trusts tend to last in practice.

Section 41(1) says that a truster would continue to be able to create a trust of any duration they like.

Section 41(2): accumulation of income

Section 41(2) of the Bill would repeal various statutory provisions which place a number of upper limits on the period during which income from a trust can be **accumulated** before it has to be paid out.

Accumulation of income is where **income** is added by trustees to the **capital** of the trust. Adding income to the capital will, in turn very likely generate future income, potentially prolonging the life of the trust overall.

Section 41(3) and (4): various technical rules

Section 41(3) and 41(4) of the Bill relate to **liferent trusts**, discussed earlier. The provisions would abolish various technical rules relating to them. These rules can also affect the duration of trusts in different ways.

A full description of the content of the technical rules is not possible in the space available (see instead, the Explanatory Notes, at paras 67 & 68). However, note that **section 41(3) of the Bill** would repeal a rule preventing **successive liferents**. These are liferents which aim to span several generations of one family, and which affect people not yet born when the trust deed is drafted.

The Commission's consultation

In the Commission's consultation in 2010, it said that the removal of any general restriction

on the duration of trust purposes (as in section 41(1)) was particularly important for commercial trusts, such as those used for life assurance policies and unit trusts. [84]

Of the six individuals and organisations considering the specific proposals for commercial trusts, four of them (**two thirds**) expressly supported what was proposed. The Faculty of Advocates thought the proposals should apply to **non-commercial trusts** too. [85]

The Commission also consulted on abolition of the rules on **accumulation of income** and **successive liferents** (section 41(2) and (3)). [84] Of the six individuals and organisations responding on this, five (**80%**) supported the proposed changes. One individual said **charitable trusts** should be excluded from their scope. [85] As noted earlier, section 41 as a whole does not apply to charitable trusts.

Chapter 6: private purpose trusts

In some smaller legal systems where trusts are a key part of the economy (for example, The Cayman Islands), legislation says that private trusts can exist for certain private purposes, such as commercial purposes. This is **without specific beneficiaries**. [86]

Private purpose trusts are not permitted in parts of the UK outside Scotland.

In 2011, the Commission consulted on the topic of private purpose trusts. [66] The Commission said then that it thought allowing these trusts to exist in Scotland would help in commerce. It said private purpose trusts had helped attract international trusts business in legal systems that had allowed them. [87]

Over the years since the Commission first looked at the issue, there has been growing acceptance of the concept of a private purpose trust in Scotland, including their apparent use in legal practice. [86]

The Commission's and the Scottish Government's current position is that it is probably competent in Scots law for a private purpose trust to exist. [88] However, its existence should be recognised in legislation (Policy Memorandum, paras 70 and 137).

Recognition of private purpose trusts in legislation is one key policy aim of Chapter 6. Another key aim is to enable these trusts to operate well in practice.

The next sections of the briefing explains Chapter 6 in more detail.

The basic concept: section 42

Section 42 of the Bill says that the private purpose (of a private purpose trust) must be **specific** and the trust must **not** have been created for the benefit of the trustee alone (section 42(1)).

Current (judge-made) trust law also requires the **trust purposes** to be lawful. In addition, they must not be **impossible**, **immoral** or **contrary to public policy**. They should not be **so vague** that trustees could not carry them out. [89]

The Bill would not alter this law. **It would also not set it out in statute, either for private purpose trusts, or more generally.**

Under section 42(2), it is possible for a private purpose trust to be, in effect, a legal hybrid. It can have both a) **some named and identifiable beneficiaries** (as traditional private trusts do); and b) a **specific purpose**, not associated with named or identifiable beneficiaries.

Supervisors: sections 45, 46-48

Section 45 of the Bill says that someone creating a private purpose trust **may**, in addition to trustees, appoint a **supervisor** in relation to that trust. A supervisor cannot be a trustee.

In specified circumstances, a supervisor could also be **appointed by the court** (sections 45(5) and (6)). More than one supervisor is possible at any one time (section 45(4)).

The main task of any supervisor appointed is to ensure the **trust purposes** are implemented (Policy Memorandum, para 136). The supervisor would have, for example, the right to receive and **inspect the trust documents**, and the **right to bring court action** in respect of the trust in a range of circumstances (sections 43, 44 and 46).

A supervisor would be subject to some familiar legal obligations, namely, fiduciary duties and a **duty of care** (section 45(2)).

A supervisor could **resign** (section 48), or be **removed by the court** in specified circumstances. A **truster** and a **trustee** can both apply to remove a supervisor (sections 6 and 47).

The appointment of an official equivalent to a supervisor is **usually mandatory** in the overseas legal systems which permit private purpose trusts. [90]

The Commission considered this but did not recommend it. [91] It is not proposed in the Bill.

Court applications: sections 43 and 44

Sections 43 and 44 of the Bill set out the two types of court application that can be made in respect of a private purpose trust:

- First, **anyone with an interest**, including a supervisor, may apply to the court to

ensure that steps are taken for the fulfilment of a purpose of the trust (section 43)

- Second, the supervisor or the trustees (if the supervisor is not excluded by the trust deed from doing this) may apply to the court to **reform the trust** in certain circumstances (section 44).

If the trust has failed and cannot be reformed, the court may order the trustees to dispose of the trust property under such a court application (section 44(3)(b)).

The Commission's consultation

As noted earlier, the Commission consulted on various issues associated with private purpose trusts in 2011. [66]

The basic concept

On the basic idea of having private purpose trusts, seven out of eight expressing a view (**90%**) were supportive of the idea. A further individual was neutral. [83]

Reasons given in support of the proposal included helping to attract international trusts business to Scotland and a small, but identifiable, need for these trusts in Scottish commerce already. [83]

Trust purposes in writing

The Commission consulted on the issue of whether the **trust purposes** should have to be **set out in writing** for a private purpose trust. [66]

All responding on this point agreed with it. [67] However, the Commission, in the Report (para 14.12) decided the requirement was not necessary and would be undesirable. **No relevant provision is in the Bill as introduced.**

Trust purposes of a private purpose trust

The Commission also consulted on whether the **trust purposes** should have to be **specific, reasonable and possible**, as well as **legal** and **not contrary to public policy**. [66]

Six out of eight (**75%**) responding on this point wanted something specific, although not necessarily particularly detailed, in the legislation. [67]

In the Report, the Commission agreed. It said international users may not be familiar with (judge-made) sources of Scottish trust law, which covers these issues for all trusts. [92]

Nothing on this appears in the Bill as introduced. The Scottish Government has given various reasons for taking this decision. For instance, it is concerned that **a specific**

statutory statement for private purpose trusts might create doubt as to whether the general restrictions for all trusts on permissible trust purposes did exist. These restrictions are to be retained in judge-made law. [89]

Special restrictions on who can be a trustee

The Commission consulted on whether there should be **any special restrictions on who could be a trustee** of a private purpose trust. [66] For example, a trustee might have to come from an authorised profession, or a trust company run 'in-house' by a firm of authorised professionals.

Four out of six responding (**two thirds**) agreed there should be special restrictions (in some form). [67]

Ultimately, the Commission did not recommend any particular restrictions in this context (see para 14.15 of the Report).

Record-keeping by trustees

The Commission also considered whether trustees of private purpose trusts should be required, under statute, to keep **records of various matters associated with the trust**. This was to avoid a private purpose trust which might ultimately, "disappear into some kind of black hole." [93]

Ultimately, the Commission did not recommend this (para 14.16 of the Report)**, and the Bill does not require it.** The Commission believed that it is sufficient to rely on trustees to keep adequate documentation to show what is happening.

Here it is also helpful to remember the statutory registers which now apply to trusts. Also, the (optional) supervisor has powers to gather specified information (section 46). At least for trusts with supervisors, record-keeping by trustees would be strongly advisable for that reason too.

Chapter 7: the role of the protector in a trust

Confirming that a **protector** for a trust was competent in Scots law was another policy proposal which the Commission thought might be helpful to attract international trust business to Scotland. [94] This topic is covered by **Chapter 7 of the Bill**.

Protectors have been found in offshore trusts since the 1980s. Their function there is to ensure that the trustees of such a trust, so many miles away from the truster, were running the trust properly. The Commission also noted protectors were being more generally used in New Zealand. [95]

The Commission and the Scottish Government believe that appointing a protector in a trust deed is "almost certainly" competent in Scotland at present, but not particularly common in practice (Policy Memorandum, para 139). [96]

What sections 49-53 of the Bill would do

Sections 49-53 of the Bill apply to **private trusts**, but also **public trusts**, including **charitable trusts**.

Section 49 of the Bill would expressly allow a truster of a trust to appoint a protector.

A **trustee** cannot be a protector, but the **truster** can (section 49(6)(7)). The truster does not have to be living in the UK for this purpose.

There are no other restrictions on who can be a protector, for example, that they are from a profession that can have relevant expertise in trusts.

In the Report, the Commission said it thought that, for a private purpose trust, the role of a supervisor and a **protector** should be able to coexist, as they served different functions. [97]

Unless the trust deed says otherwise, **more than one protector** is possible at the same time (section 49(8)). As well as the truster's power to appoint, a protector can be **appointed by the trustees** in specific circumstances (sections 50). Chapter 7 does not contain a power for **the court** to be able to appoint a protector.

Any protector appointed would be subject to fiduciary duties and a **duty of care** (section 49(5)).

Section 49(3) of the Bill relates to the protector's powers.

The truster, when drafting the trust deed, can select which (if any) of the powers set out in section 49(3) they wish to include for their trust. The proposed powers are not mandatory and other powers can be included.

Powers set out in section 49(3) include the power to:

- power to determine the permanent residence of the trust (**domicile**), or its administrative centre
- issue a **direction** to trustees to remove a trustee or assume (appoint) a new trustee
- issue a **direction** that someone should benefit or not benefit from the assets of the trust

- ask a court to alter the **trust purposes** on a material change of circumstances (available only for certain types of trust, see later in the briefing on this topic).

The protector may require the trustees to allow them to **inspect any trust document**, without charge and at any reasonable time (section 49(4)).

Unless the trust deed says otherwise, it is the protector, **not the trustees**, who will be personally liable for any loss that results from the trustees correctly following a competent direction given to them by a protector (section 53).

A protector can **resign office** (section 52). A protector could also be **removed by the court** in certain circumstances (sections 6 and 51).

The Commission's consultation

As noted earlier, the Commission consulted in 2011 on various issues associated with protectors, including on whether the basic concept was a useful addition in Scotland. [66]

Eight individuals and organisations responded on this issue and **views were mixed**. Four (**50%**) were in favour, with the Law Society saying it could help international trust business. [67]

A further three of those responding were neutral, with one in that category leaning towards the negative. The Charity Law Research Unit at the University of Dundee was worried it would unduly complicate Scots law. One respondent, the Faculty of Advocates was opposed; it also said it would confuse existing well-recognised trust relationships between truster and trustees. [67]

Several respondents said that if the role of protector was introduced into Scots law the statutory regime should be flexible, rather than too prescriptive in its requirements. [67]

Chapter 8: varying or terminating a private trust and the powers of courts in relation to trusts

This part of the briefing looks at:

- sections 54-60 of the Bill, which cover the topic of **variation and termination of private trusts**, both inside and outside a court process.
- More generally, a wide range of important powers given to the courts in **Chapter 8 of the Part 1 of the Bill** ('Chapter 8') . They are given to the Court of Session unless otherwise stated.

Sections 54-60: variation and termination of private trusts

Sections 54-60 of the Bill do not apply to public trusts, including **charitable trusts**.

Sections 54-60 set out the circumstances in which a private trust, other than a private purpose trust, can be **varied** (changed in some way) or **terminated**.

The fundamental policy question in this context is **whose wishes should prevail**, those of the **the truster** or those of **the beneficiaries.**

The existing law

The existing law in Scotland allows the beneficiaries' wishes to override the truster's wishes.

Specifically, **under judge-made law**, beneficiaries, providing they are **over 16** and have **capacity**, can agree outside a court process to end the trust. This end can be **before** the date or event originally chosen by the truster. [50]

The beneficiaries, where there are all in agreement, can probably agree to **vary** (change) the terms of the trust too in the same way, but the law here is slightly less clear.

There is also **a statutory procedure** for the court to step in and effectively supply the consent on behalf of an individual beneficiary (or potential beneficiary) who does not have capacity, is **under 18** or is not yet born.[xxiv]

For the court to provide the missing consent, there must be no **prejudice** (which has been interpreted as **economic prejudice**) to the beneficiary on whose behalf the court is providing consent.

What sections 54-60 would do

Sections 54-60 of the Bill largely restate the existing scheme in this area, both from judge-made law and statute. The Commission consulted on this topic in 2005. [98]

For a beneficiary who is an adult with incapacity, a guardian or attorney for that beneficiary with relevant legal powers can **give consent** on behalf of that beneficiary outside the court process (section 55).

A **guardian** or **attorney** might also be a **beneficiary** under the same trust, with the potential for a **conflict of interest**. The effectiveness of the regulatory regime for attorneys and guardians in the Adults with Incapacity (Scotland) Act 2000 seems a significant factor in terms of how big an issue this is likely to be in practice.

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xxiv Trusts (Scotland) Act 1961, section 1.

Whether there is **prejudice to a beneficiary** would now be assessed by the court having regard to a **broader range of factors** than before.

Notably, these factors include the **welfare of other members of the beneficiary's family** and other factors the court thinks are **material** (section 56(3)). The term **family** is not further defined in the Bill.

Section 59 of the Bill makes a minor departure from the Commission's draft Bill in order to ensure that any views of an **under 16** (which they wish to express) are considered by the court. A child is presumed to be capable of offering a view unless the contrary is shown.

Section 59 is consistent with the policy approach of other recent, significant pieces of Scottish Government legislation, such as the Children (Scotland) Act 2020 and the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.

The Commission's consultation

On consultation in 2005, the Commission suggested the basic policy approach of the current law should be retained. In other words, **the beneficiaries' wishes should prevail over the truster's**. [98] The eight individuals and organisations responding were largely in agreement with this. [99]

One specific issue that the Commission considered was whether **the legal representative of an under 16** (usually their parent) should be able to consent on behalf of a beneficiary who is under 16. A key policy point is that a parent and child can both be beneficiaries under the same trust.

On consultation, **opinions among those responding were significantly divided**. A majority thought it could save unnecessary court procedure. Others, however, including the Court of Session judges and the Faculty of Advocates, thought the problem of conflict of interest (between parent and child beneficiaries) was a significant obstacle to the proposal. [99]

This part of the Bill does not allow parents to consent on behalf of under 16s.

Section 61: altering the trust purposes where there has been a material change of circumstances

Section 61 of the Bill:

- applies to private trusts other than **commercial trusts** and private purpose trusts
- does **not** apply to public trusts, including charitable trusts.

Commercial trusts includes those associated with life assurance policies, unit trusts and other trust-based investment products (section 61(13) & (14)).

In other words, section 61 would mainly apply to **trusts used by families**.

The policy impetus for section 61 is that, as a result of what is proposed by section 41, private **trusts of long duration** might arise more often in practice.

The Commission and the Scottish Government believe the truster should not be able to tie up property for long periods of time in a way that, **through a change of circumstances**, fails to, "meet the reasonable needs and wishes of the living generation" (Policy Memorandum, para 115).

The proposed solution is a significant new statutory power for the court, as set out in section 61.

Under **section 61**, after a private trust has been in existence for **25 years**, the Court of Session will, in certain circumstances, have power to **alter the trust purposes**, where there has been a **material change of circumstances**.

The 25 year period would be a **statutory maximum**. In the trust deed, the truster could make the power available immediately or after a shorter period (section 61(4) & (5)).

A **non-exhaustive list** of what would amount to a material change of circumstances is provided (section 61(12)). They include, for example, **a change in a tax regime**, or **in the personal or financial circumstances of the truster's family**. The term 'family' is not further defined, other than including the **beneficiaries** of the trust.

The power to apply to the court would be exercisable by a wide range of people with an interest in the trust. This extends as far as **the truster's descendants**, even if not beneficiaries (section 61(8)).

In exercising its power, the court would have to consider **the intentions of the truster.** However, as with other areas in trust law, **these would not be binding on the court** (section 61(10)).

The Commission's consultation

The Commission consulted in 2010 on various issues associated with the proposal now

contained in section 61. [84]

The key area of disagreement for the five individuals and organisations responding on this topic was **how long the trust has to be in existence** for before the court power could be used. [85]

STEP said in their response there is a need to strike a balance between a) **certainty** about trust purposes for would-be trusters; and b) **flexibility** for future generations.

While unsure about a minimum period, STEP thought it might be helpful to prevent disgruntled family members (for example, who did not benefit from the trust) moving quickly to court proceedings. [85]

One legal practitioner thought 25 years was too short and risked deterring potential trusters from Scottish trusts. Others thought it too long. A law firm (Deloitte LLP) suggested **15 years,** the Law Society said **25 years**. The Faculty of Advocates thought the court power should always be there, as a relevant change of circumstances could happen very quickly. [85]

Another theme of the responses was that there might be a need to define the term **family** (in the context of a material change of circumstances) as what was meant here was potentially unclear (the Law Society; the Faculty of Advocates). [85]

Sections 62-63: ex officio trustees

An **ex officio trustee** is someone who becomes a trustee because the truster has said that the holder of a certain post in an organisation should be a trustee for as long as they are in that post.

Sections 62 and 63 of the Bill cover **ex officio trustees**. According to the Report, for certain trusts, they can often raise issues in practice. The Commission consulted on this topic in 2011. [66]

Ex officio trustees are most often found in public trusts, including **charitable trusts.** Common examples in practice are where the truster appoints a minister of a particular church, the principal or other office holder of a university, or a sheriff or judge as an ex officio trustee.

Typically, a succession of individuals will be that trustee over time. Furthermore, each holder of the post will find themselves a trustee automatically, rather than actively volunteering for that role. They will also be juggling the role of trustee with their professional role.

On occasion, they may not be able to carry out their duties properly, for various reasons. Alternatively, the relevant job role might ultimately disappear through an institutional reorganisation.

Sections 62 and 63 of the Bill would provide a court procedure, available through the local sheriff courts or the Court of Session allowing either:

- the replacement of an ex officio trustee with another person nominated by the ex officio trustee; or
- the severing of the connection between a particular job role and the role of trustee of the trust. A connection with a new job role can be substituted in some circumstances.

The Commission's consultation

On consultation in 2011, [66] there was **very strong support** for addressing the issues that can arise with ex officio trustees. [67]

The main policy issue appeared to be whether the power to solve problems should be one solely held **by the court**, or, for example, also exercisable by **a majority of the trustees**.

There was substantial support for **the trustees** rather than the court to oversee the power of an ex officio trustee to nominate a replacement trustee to act instead. [67]

A power for trustees in this regard is not included in the Bill. The Commission felt this might create an unduly complicated scheme. It said some court oversight of trustees' actions would still be needed, for when there was later unhappiness about actions taken.

For **charitable trusts**, there was also the question of whether an application to the charities' regulator, OSCR, would be an appropriate alternative (administrative) route.

The Commission and the Scottish Government think that section 17 of the 2005 Act already gives charitable trusts this route, [100] although the Charity Law Unit of the University of Dundee was doubtful. [67] Section 17 allows charitable trusts to change their constitution and notify OSCR that they have done this.

No specific provision on OSCR is made in the Bill. Sections 62-63, with their court process, apply to all **private** and **public trusts**, including **charitable trusts**.

Section 64: defective exercise of trustees' discretion

Typically, **trustees** are given by a trust deed **some discretion** as to a) whether they exercise any of the powers they have; and b) the way in which those powers are exercised.

Courts have traditionally been reluctant to intervene when trustees are exercising discretionary powers. However, judge-made law has made it possible to do so on certain grounds.

Section 64 of the Bill proposes a new statutory power, for which there is no equivalent in current legislation. This would allow **an exercise of a discretionary power by trustees**, or an anticipated exercise of that power, to be challenged on a number of grounds (section 64(3)).

These proposed grounds (for decisions already taken) are set out in the box below. The grounds are adjusted slightly in section 64 for situations where the decision is still to be taken.

Grounds of challenge (section 64(3))

1. the trustees have been considering the wrong question, or not considering the right question
2. the trustees have taken into account irrelevant considerations or failed to take into account relevant considerations
3. the decision is outside the trustees' powers (**ultra vires**)
4. that the power is being used for an improper purpose (called **fraud on a power**)
5. that the trustees failed to act honestly or in good faith
6. perversity, for example, that the trustees had 'shut their eyes' to the facts, or made a decision that is so unreasonable no reasonable person could have have made it
7. that the decision would not have been taken but for some error about the facts or the law.

A **relevant person** could apply to the court under section 64. Such a person includes (but is not limited to) **the truster**; a **trustee**; a **beneficiary**; a **potential beneficiary**; and any protector or supervisor (section 64(6)(b)).

If the court action is successful, the court can issue various **different types of court order** to resolve the problem. For example, one possibility is an order **overturning an original decision**, requiring it to be taken again (section 64(6)(a)).

The Commission's consultation

The Commission consulted on this issue, once, briefly, early in 2011, [66] and again, later in 2011, as the subject of an entire consultation paper. [101] Similar patterns of responses emerged in respect of both papers. [67] [102]

Some of those who specialised in **pension trusts** were particularly enthusiastic about what is now in section 64. [67] [102] (As noted earlier, a pension trust is now excluded from

the scope of the Bill but the Scottish Government has said it will seek a section 104 order to bring back within scope.)

For example, the Pensions Sub-Committee of the Law Society thought that the absence of "a simple non-technical forum" to address issues which can arise with pensions documents was resulting in disproportionately large legal bills for pensions trusts. [67]

When the Commission consulted in 2011 (for the second time) on the general idea underpinning section 64, six out of the nine responding (**two thirds**) were in favour of it. A further respondent, a law firm (Shepherd & Wedderburn) reported there were mixed views within the firm. [102]

The main opposition to the proposal came, first, from HMRC. It was concerned that the new law would be used to challenge decisions which led to undesirable tax consequences, creating legal uncertainty in this area. Second, the Trust Law Sub-Committee of the Law Society thought that the proposal was too broad, and that too many people could bring a challenge. [102]

The list of grounds of challenge in the proposal met with general approval from those responding, although a number of respondents made detailed comments. [102]

Section 65: expenses of litigation by the trust

Section 65 of the Bill covers a topic which can appear at first glance a rather technical one, the **expenses of litigation**. This includes, significantly, **lawyer's fees**, for both sides in a dispute. Accordingly, it can be of huge practical significance to trustees, as well as those they become involved in litigation with on behalf of the trust.

> The Bill retains the Court of Session as the main court, and here the legal bills can be particularly significant. For two different branches of the legal profession are typically involved in a case, solicitors and advocates.

Fundamentally, the policy question is, who pays the two sides' legal bills at the end of the case?

The current law and practice in this area is as follows:

- in any legal case, the court has **discretion** to determine where legal costs fall. However, the general principle is that **expenses follow success**. In other words, the losing side pays not only their own legal bill, but also that of the winning side
- in trust litigation, a common effect of what the court says on this topic is that, where trustees are on the losing side, they are personally liable to pay the legal bill of the winning side
- usually, but not always, the trustees have a **right of relief**. They can claim **necessary and reasonable costs** they have incurred back out of the trust property.

What section 65 would do

Section 65 of the Bill would alter the current position, with the policy aim of improving the situation for trustees. It says:

1. as a **basic rule,** trustees would **not** be personally liable for the expenses of trust litigation out of their own pocket, whether they are bringing the litigation or defending it. These expenses should be paid for out of the trust property (section 65(1)).

2. if the trust property is (to any extent) insufficient to meet the full amount of any expenses, t**he balance would come out of trustees' personal funds** (section 65(2)).

3. there would be various **exceptions to the basic rule** described at 1 above, where a trustee may be found liable (completely or partially) out of their own pocket in the first instance (section 65(3)). For example, if the court thinks the litigation was unnecessary.

4. the court also retains discretion in relation to points 2 and 3 for individual cases (section 65(4) and (5)).

The Commission's consultation

The Commission consulted twice on this topic, once in 2008, [82] and later in 2011. [66] Various proposals featured in the two consultations, and refinements were again made for the Report.

The policy challenge for the Commission was, on one hand, not placing too big a burden on trustees, on the other, not encouraging them to enter into rash litigation. Another key issue was avoiding leaving those involved in litigation with a trust out of pocket, as would-be litigants would not necessarily know about the financial position of a trust in advance.

The scheme in 2008 (with the starting point of no personal liability for trustees) [82] attracted some support. However, it also received some criticism from the Faculty of Advocates and STEP for being too favourable to trustees. [83]

On the other hand, the starting point of the 2011 scheme, which could be overridden in individual cases, was personal liability for trustees. [66] Several respondents thought this was too harsh on trustees, with the Law Society remarking that trustees would, "hardly dare litigate." [67]

Part 2 of the Bill: succession law

Part 2 of the Bill contains two provisions relating to **succession law**, sometimes referred to as **inheritance law**. This area of law says what should happen to someone's money, property and possessions when they die.

Section 71: special destinations ('mini wills' in title deeds)

Section 71 of the Bill aims to improve the drafting of section 2 of the Succession (Scotland) Act 2016 ('the 2016 Act') and remove possible unintended consequences of the original version.

Section 71 of the Bill, and section 2 of the 2016 Act, relate to a **special destination**, also known as a **survivorship destination**. In practice, this functions as a form of 'miniature will'.

A special destination is traditionally used where a property is to be co-owned by a couple. The **destination** is included in the property's title documents or **title deeds** (the property's official ownership documents).

The destination says **one person automatically gets the other's share of the property on death**. A variety of people might have had a claim to that share in the normal scenario overridden by the special destination.

To get rid of a special destination (before death) you have to **evacuate it**, i.e. complete a legal process to pre-emptively stop its legal effect. This might be important, for example, **if a couple later separate or divorce.**

Problems arose with special destinations in practice because the legal process (of evacuation) was not completed in circumstances where it should have been.

Accordingly, section 2 of the 2016 Act says a special destination will cease to have effect **automatically** on divorce or dissolution of a civil partnership.

Where **property is co-owned by the deceased with another person**, section 2 aims to prevent the share of the deceased person (A) passing automatically to the other person (B), where the two people have divorced, or their civil partnership has been dissolved.

In 2018, an academic lawyer (Dr Jill Robbie) argued that the original drafting of section 2 might actually **deprive B of their original share in that property**. This is the issue which section 71 of the Bill aims to address. [103] More recently, in 2022, another academic lawyer (Scott Wortley) took issue with the original comments on the drafting of section 2. [104]

Section 72: the deceased's spouse or civil partner

Section 72 of the Bill is the main provision in Part 2. It relates to intestate succession, the law which applies when someone dies without leaving a will. This law is mostly contained in the Succession (Scotland) Act 1964 ('the 1964 Act').

> " The Bill will ... amend the order of intestate succession to reflect the contemporary perception of a spouse or civil partner as a key member of the deceased's family"
>
> (Policy Memorandum, para 10).

The current law

At present, where someone **dies without leaving a will**, certain beneficiaries have rights to claim from a deceased person's **net estate**. In other words, the part of the estate left after any debts due by the estate, including taxes, have been paid.

The current law favours the **spouse** or **civil partner** and the **children and remoter descendants of the deceased** (such as grandchildren) but not exclusively so.

Where the deceased person had **no children**, the **spouse** or **civil partner** may have to share part of the estate, known as **the free estate**, with **other relatives**, for example, siblings or parents of the deceased person, in some circumstances.

The detail of the law here is rather complex, involving various different types of rights to inherit, and is explained fully in a separate SPICe Briefing from 2021. In summary, where there are no children, a **spouse** or **civil partner** will:

- get **prior rights** to a share of the deceased person's house, furniture and money, up to certain financial limits
- get **legal rights** to a share of the deceased's property other than land and buildings
- appear on a list of who is entitled to get the remaining **free estate** (if any), but ranking lower than some other relatives.

Cohabitants of the deceased person are not on the statutory list of who is entitled to get the free estate. However, if a cohabitant makes an application to the court, the court can exercise its discretion to say a cohabitant is entitled to get part of the net estate.[xxv]

xxv Family Law (Scotland) Act 2006, section 29.

What is proposed in the Bill

Where the deceased person left no will, and had no children or remoter descendants, **section 72 of the Bill** would change the law so the overall effect is that the spouse or civil partner would be top of the statutory list of those entitled to inherit the **free estate**.

The **definition of spouse or civil partner** includes a spouse or civil partner the deceased person was separated from, but where no divorce, or dissolution of the civil partnership, had taken place. This means such a spouse or civil partner could benefit from section 72.

In practice, a legally binding **separation agreement** may involve couples waiving their inheritance rights to each other, to cover the period until divorce or dissolution. However, couples do not always enter into such an agreement. Another way that this issue can be avoided is for either party to **prepare a will**.

There was a recent petition in the Scottish Parliament (PE1904, **now closed**) on the topic of separated spouses and civil partner's inheritance rights.

In its written submission on the petition, the Law Society said that, in its view, the legislative proposal (now section 72) should distinguish between couples who had been living together as spouses or civil partners, and those who had been separated for a long time. **The Bill does not make this distinction.**

However, in the specific scenario where there is both a **cohabitant** and **a spouse or civil partner**, the cohabitant may still be able to claim part of the net estate under what is proposed in section 72. This would be the situation if the court exercises its discretion in the cohabitant's favour in a particular case.[xxvi] In other words, the spouse or civil partner will not get all the estate in all circumstances.

Response to the Scottish Government's consultation

The Scottish Government has consulted twice on succession law, a wide-ranging consultation in 2015 [105] and a more targeted one in 2019. [106] Both times, in their responses to the consultations, the Scottish Government described what is in section 72 as uncontroversial. [20] [19]

In its response to the 2019 consultation, the Law Society did raise the same issue as it later made in its response to the recent petition.

In other words, the Law Society queried whether spouses and civil partners who were separated from the deceased should be treated as a distinct policy category, in terms of what is now section 72.

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