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Delegated Powers and Law Reform Committee  
Scottish Parliament

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28 July 2023

Dear Convener,

### **Trusts and Succession (Scotland) Bill**

Thank you for your letter of 29 June seeking our further comments on section 65 (Expenses of litigation) of the Trusts and Succession (Scotland) Bill (“the Bill”).

As you note in your letter, we expressed concern regarding this section of the Bill in both our written evidence to the Committee and during the evidence session on 16 May.

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

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

As stated in our written evidence, we consider that section 65(2) has the potential to discourage trustees from accepting office and also to discourage trustees from entering into or defending litigation where there may be good reasons to do so, perhaps particularly where defending. Litigation expenses are significant, and many trusts may for quite proper reasons have limited funds at various points if they are distributing to beneficiaries.

We recognise that without the provisions set out in section 65(2) in cases where trustees have acted reasonably but unsuccessfully and the trust fund is insufficient to meet expenses, the result will be an unmet liability. However, this may be the case in many instances of litigation where the unsuccessful party is insolvent. Non-recovery is a risk of litigation.



There is considerable merit in deterring trustees of underfunded trusts from unnecessarily litigating but that could be achieved through section 65(3)(a) if the blanket default position was no personal liability. On this basis, section 65(2) is unnecessary.

What section 65(2) may, and almost certainly will, do is prevent the trustees of underfunded trusts from necessarily litigating because the trustees are concerned for their own position (and then, in conflict with their duties as trustees). It may also deter trustees from defending an action where they have reasonably strong prospects of success because of the possibility of losing and the starting point that they would be liable for anything the trust could not cover.

We continue to have significant concerns regarding section 65(2) of the Bill as introduced.

I hope this is helpful to the committee.

Yours sincerely,

**Alan Barr**

Convener, Trust and Succession Law Sub-Committee  
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