



Stuart McMillan
Convener,
Delegated Powers and Law Reform Committee

By email to: DPLR.Committee@parliament.scot

23 August 2023

Dear Convener

TRUSTS AND SUCCESSION (SCOTLAND) BILL

Thank you for your letter of 7 July 2023 seeking the Scottish Government's views on how to ensure the Trusts and Succession (Scotland) Bill will be able to be easily amended in the future, once further changes to the law around incapacity are implemented.

The term "incapable" is defined in section 75 of the Bill in a manner that is similar to the definition in section 1(6) of the Adults with Incapacity (Scotland) Act 2000 ("AWI(S)A 2000"), but with minor adjustments. The definition in the Bill focuses on the person's ability to make, communicate, understand and retain memory of decisions. The difference reflects the particular role of a trustee, which is to take decisions (often as part of a collective) on behalf of beneficiaries.

As the Committee rightly points out in its letter, the Scottish mental health review recently recommended significant changes to capacity law in Scotland, which could lead to changes to the definition of "incapable" in the AWI(S)A 2000. The Scottish Government has responded to this and set out initial timescales for the delivery of 7 high-level priorities, one of which is mental health law reform.

I have listened to the views of those stakeholders who gave evidence to the Committee which is why I have agreed to work with the Committee on this matter. It is desirable - as a matter of policy - that trust law, like other areas of Scots law, adopts a modern law on capacity which reflects current understanding of the issue.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot
Tha Ministearanna h-Alba, an luchd-comhairleachaidh sònraichte agus Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot



When I spoke to the Committee in early June we discussed the possibility of adopting the definition of “incapable” in the Adults with Incapacity (Scotland) Act 2000 and conferring a regulation-making power on Scottish Ministers, and I remain keen to ensure the Bill can reflect a future modernised law on capacity. Since then, my officials have been consulting with the Scottish Law Commission about its recommendation and how to future-proof the Bill. This is still under discussion and when I have more information about the preferred way forward I will update the Committee.

I hope the Committee finds this information of assistance.

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