TRUSTS AND SUCCESSION (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Trusts and Succession (Scotland) Bill introduced in the Scottish Parliament on 22 November 2022.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 21–EN);
- a Financial Memorandum (SP Bill 21–FM);
- a Delegated Powers Memorandum (SP Bill 21–DPM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 21–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

TERMINOLOGY

4. A number of legal terms are used in this Policy Memorandum. Where relevant to the understanding of the discussion, these terms are explained below; a fuller glossary of legal terms relevant to the provisions in the Bill can be found in the Explanatory Notes to the Bill.

POLICY OBJECTIVES OF THE BILL

5. Trusts, or at least devices similar to trusts, may well have been used in Scotland since Medieval times. Trusts in the proper sense have been used since at least the early 17th century, and throughout the following centuries. The first statute dealing in detail with trusts was the Trusts (Scotland) Act 1867. This was replaced by the Trusts (Scotland) Act 1921 ("the 1921 Act"), which - in a highly amended form - is the primary statute governing the law of trusts.

6. In today's society, the trust plays a crucial part in many areas of the law, including contract and general commercial law, life assurance and pensions, property law, succession and family law. The part played by the trust in commercial structures, for instance, means that trust law is of economic importance: trusts are widely used for investment and financial planning. Yet the use of trusts in modern society is wide and varied: a trust can be used to support those who are unable to manage their own affairs; to ring-fence funds to ensure consumer protection (for instance, travel

companies holding funds provided for holidays); or to hold business (or other) assets rather than fragmenting ownership, to give just a few examples.

7. Statute has not kept pace with the use of trusts in our modern society. Most of the current statutory framework is found in the 1921 Act: not only is its structure and wording old-fashioned, it has been heavily amended so that it is not easy for trusters, trustees or beneficiaries to understand what their legal rights and duties are. Added to this, parties must also take into account subsequent limited reforms to the legislation carried out in the intervening 100 years.

8. The world has changed greatly since the 1921 Act came into force. It was amended and added to by four statutes during the 1960s: the Trusts (Scotland) Act 1961, the Trustee Investments Act 1961, and the Law Reform (Miscellaneous Provisions) (Scotland) Acts of 1966 and 1968. Further changes were effected by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and the Charities and Trustee Investment (Scotland) Act 2005. In part the foregoing statutes amend the 1921 Act and in part they make further freestanding provisions. The end result is that the legislation governing trusts is complicated in form and can be difficult to locate in practice. This is not ideal for solicitors, but it is worse for lay trustees seeking to understand and implement their duties.

9. Given the versatility of the trust as a legal institution, the overall policy aim of this Bill is to ensure that the Scots law of trusts is clear, coherent and able to respond appropriately to modern conditions. The Bill will reform the law of law trusts and bring together various pieces of trust legislation, forming a single statute framed in clear and modern language.

10. The Bill will also 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. The law on intestate succession provides a default position in cases where an individual dies without leaving a will and the statutory scheme for intestacy provides a default set of rules about what should happen to someone's estate when they die without a will. The Bill usefully clarifies the rule set out in section 2(2) of the Succession (Scotland) Act 2016, which is concerned with the effect of divorce, dissolution or annulment on a special destination.[1]

BACKGROUND

11. This Bill is the end result of a significant reform project undertaken by the Scottish Law Commission ("the Commission"). In respect of trust law, the project took over a decade and included the publication of a total of eight Discussion Papers, two Consultation Papers, and two Reports on specific issues: first, on trustees' powers and duties (a Joint Report with the Law Commission for England and Wales) and, secondly, on variation and termination of trusts. In 2014, the Commission published its final, comprehensive Report on Trusts.[2]

[1] Special destinations are conditions that commonly appear in the title of property held by more than one person, usually spouses, which provide that on the death of one of the spouses their title automatically passes to the survivor.
[2] Information on the reform project - including access to all the papers mentioned - can be found at https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/trusts/.

What is a trust?

12. At its simplest, a trust is a legal relationship created when ownership of specified property held by one person ("the truster") is transferred to another ("the trustee") to be used for the benefit of another person ("the beneficiary") before then being transferred to them at some certain point in time. For example, Anna has three children, one of whom – Ben – suffers from a severe disability that requires lifelong care at home. Anna wants to make sure that the family home is always available for Ben's use but that it will eventually pass to her other children upon her and Ben's death. Creating a trust over the house would be one way of achieving this aim.

13. The trustee who holds the property is given powers to manage the property, which is held subject to two important categories of duties. First, it is subject to the trust purposes themselves, which define the uses to which the property and its proceeds, including income, must be put. Secondly, the trustee is subject to fiduciary duties.[3] The essence of the duty in trust law is that the fiduciary, in this case the trustee, must act in the utmost good faith in achieving the trust purposes. That means that the trustee must at all times act in the interests of the beneficiaries or the purposes of the trust, and, unless expressly authorised, may not permit any conflict to arise between their own interests and the interests of the beneficiaries or the trust purposes.

OVERVIEW OF BILL

14. Perhaps the most significant change effected by this Bill is the bringing together of various pieces of trust legislation within a single, coherent statute, drafted in modern form and with regard to modern conditions. A significant number of provisions deal with the powers and duties of trustees but Part 1 of the Bill also includes a number of other key changes to the law of trusts:

- restating the statutory provisions that govern the appointment, resignation, removal and discharge of trustees and decision-making by trustees;
- clarifying the law on breach of trust;
- reforming the powers of the courts to create a comprehensive set of remedies that deals with problems in the administration of trusts, for the liability of trustees in the expenses of litigation, and restates and improves the legislation governing petitions for the variation of trust purposes;
- permitting the courts to remedy defects in the exercise of trustees' fiduciary powers;
- conferring power on the courts to alter trust purposes to take account of a material change of circumstances that has occurred since the trust was set up, normally only be exercisable once 25 years has elapsed since the creation of the trust; and,
- expressly providing for private purpose trusts (non-charitable and non-public trusts that do not have defined persons as beneficiaries but rather exist to achieve defined purposes, frequently of a philanthropic or business nature) and the role of a supervisor.

15. Part 2 of the Bill includes a substantive provision on the Scots law of intestate succession. The law on intestate succession provides a default position in cases where an individual dies without leaving a will and the statutory scheme for intestacy provides a default set of rules about what should happen to someone's estate when they die without a will. The Bill will amend the

[3] That is, trustees must not place themselves in a situation where their personal interests conflict, or may possibly conflict, with their duties to the beneficiaries in terms of the trust deed.

order of intestate succession to reflect the contemporary perception of a spouse or civil partner as a key member of the deceased's family. One other provision attempts to clear up a concern that has been raised about possible legislative interpretation of section 2 of the Succession (Scotland) Act 2016 (the effect of divorce, dissolution or annulment on special destinations) that runs counter to the stated policy intention.

THE POWERS OF TRUSTEES

16. Under the current legal framework, the powers of trustees are those expressly given in the trust deed, those implied by the trust deed and trust purposes, those conferred by section 4 of the 1921 Act or other statutes, and those conferred by the court.

17. The principal statute governing the powers and duties of trustees is now over 100 years old and it no longer reflects the modern uses of trusts. Trusts and the assets that are usually held by them are now very different from those in 1921 and the 1921 Act no longer gives trustees the powers they need to administer a trust effectively, making it difficult for trustees to comply with their paramount duty –to give effect to the trust purposes in the best interests of the beneficiaries.

18. The Bill makes a number of important changes to the statutory powers of trustees. These include:

- A general management power for trustees (section 13);
- Re-stating the investment powers of a trustee (sections 16 and 17);
- Power to delegate and appoint agents and nominees (sections 18 and 19);
- Power to advance capital and make payments from income (sections 20 and 24);
- Power to take out insurance (section 15); and,
- Reforming trustees' powers of apportionment (sections 21 to 23).

A general management power for trustees

19. Statute confers on trustees a large number of powers relating to the administration and management of the trust and the trust estate, listed in section 4(1) of the 1921 Act. These are default provisions – meaning that there is no power to do any of the acts if it is at variance with the terms or purposes of the trust. A particular power may be excluded by express provision in the trust deed or by implication from the purposes of the trust.[4]

20. Section 4 of the 1921 Act, as amended, is a lengthy provision and is inflexible. Trustees are restricted to the powers in the list, together with any additional powers in the trust deed and the powers that can be readily implied from them. It is often not possible to anticipate or include every power trustees are likely to need when drafting the trust deed, and over the course of administering a trust new situations or new ways of carrying out transactions may emerge for which the listed powers are inadequate.

[4] Trustees can apply to the court for authority to exercise one or more of the section 4 powers notwithstanding that it is at variance with the terms and purposes of the trust.

21. Determining whether a trust deed confers power to carry out a particular act is very much easier if the existence or otherwise of the power is simplified. Contemporary best practice in the drafting of trust deeds is to provide a very general power of management, designed to supersede the multiplicity of powers in section 4 of the 1921 Act. In this way, trustees are able to achieve the trust purposes without any administrative impediment.

22. Section 13 of the Bill replaces the current list of powers and confers on trustees a default general power to deal with the trust estate. A trustee would be given all the powers that a competent adult had in relation to his or her own property. It confers certainty by permitting trustees to do anything that a natural person could do, subject only to the general restrictions that are placed on trustees as result of their fiduciary duty and duty of care and the restrictions inherent in the trust deed itself.

23. It would not be helpful to the administration of trusts to retain the complex system of powers in section 4 of the 1921 Act for existing trusts. Therefore, the new general power will be implied into all trusts, regardless of when they were created, subject only to an exception for trusts which expressly provide otherwise (and any particular restrictions or exclusions imposed under other legislation). This will not have retrospective effect: acts already performed by trustees will not be affected by it.

Alternative approach

24. An alternative approach to reform would be to amend the current list of powers in section 4(1) of the 1921 Act, adding new powers to the statutory list and widening existing powers. The list approach has the advantage of continuity: those involved with trust law have been familiar with a statutory list of default powers for nearly 150 years. If the default powers are inadequate to carry out the trust purposes then trusters can confer additional powers in the trust deed and many do so. The Commission consulted on this alternative but only two respondents were in favour of a list approach, while the rest favoured a statutory general management power.

Trustees' investment powers

25. Trustees have the same power to make an investment of any kind as if they were absolutely entitled to the assets of the trust, subject to the expression of a contrary intention in the instrument creating the trust.

26. Trustees' powers of investment were last amended by sections 93 to 95 of the Charities and Trustee Investment (Scotland) Act 2005. Those sections took effect by amending section 4 of the 1921 Act and inserting new sections 4A, 4B and 4C, adding more complexity to the structure of that Act. One of the Scottish Government's general policy aims is to bring together legislation governing Scottish trusts into one statute, which will supersede the 1921 Act in its entirety. Accordingly, sections 16 and 17 restate and re-structure trustees' powers of investment.

Power to delegate and appoint agents and nominees

Delegation by trustees to agents

27. Trustees are not bound to perform the whole duties of the trust personally. They already have the power, both under statute and at common law, to appoint an agent and pay them suitable

remuneration,[5] even to carry out tasks that the trustees could have performed themselves, provided such a course would be followed by reasonably prudent people in relation to their own affairs. Indeed, trustees have a duty to appoint agents to carry out tasks that are beyond their skills and qualifications. There are corresponding duties: trustees must only appoint an agent where it is reasonable to do so, the particular agent must be suitable for the proposed task, trustees should exercise periodic reviews of the agent's work, and so on.

28. Not only is the statutory power framed in old-fashioned terms – reflecting an era in which solicitors were expected to carry out work which is now generally done by others, such as accountants and fund managers – but, on appointing an agent, there is some doubt about the extent of permissible delegation. The traditional view is that managerial or administrative functions may be delegated but that trustees may not delegate discretionary functions. While the current position is clear in principle the dividing line is sometimes unclear in practice and depends to some extent on the size and nature of the trust estate and the objectives of the trust. On consultation, there was a strong preference on the part of practitioners for the current law to be clarified.

29. Section 18 confers on trustees a default power to appoint an agent and pay them reasonable remuneration. Furthermore, it offers a useful guide by setting out a core list of functions which will not normally be capable of being delegated. Such conceptual simplicity means that there should be no need to distinguish between types of function such as fiduciary, dispositive or administrative. This list can be narrowed by an individual truster, or even removed entirely, if desired.

Delegation by trustees to nominees

30. Trustees are under a duty to gather together and become the owners of the trust assets. Thereafter they are under a duty to keep the trust property under their own control and will be liable for any losses arising out of a breach of this duty. It is, however, desirable to allow trustees, in some circumstances, to transfer trust property to other people, for investment and other purposes.

31. Having trust property, particularly investments, held by nominees has many benefits. Nevertheless, the use of nominees poses risks for trustees and the beneficiaries. Once property is transferred to a nominee, instead of a real right in the trust assets themselves, the trustees hold only a personal right against the nominees. Losses may occur due to fraud, negligence or insolvency of the nominees. These risks can be minimised: the trustees can select a nominee who is reputable and carries adequate insurance against fraud or negligence; and, the nomineeship can be set up as an express trust so that assets held by the nominee would not then form part of its estate on insolvency.

32. Nominees are a common feature of current practice and the law should authorise trustees to use them. Section 19 confers on trustees a default statutory power to transfer title of trust assets to a person who would hold it as a nominee. The relationship between a trustee and nominee will always be one of trust. Trustees would remain liable for losses arising out of an inappropriate use of a nominee, the selection of an unsuitable nominee or failure to keep the nominee's performance under review.

[5] The statutory power is in section 4(1)(f) of the 1921 Act.

Powers to advance capital and make payments from income

Advance of capital

33. Sometimes beneficiaries might want to use part of their capital entitlement to meet their needs before they are due to receive it. Trusters can facilitate this by conferring on trustees a power to advance money from their capital entitlement to beneficiaries. Many testamentary family trust deeds, for instance, grant trustees such a power. In the absence of an express power in the trust deed, authority to advance capital to beneficiaries may be obtained from the Court of Session under section 16 of the 1921 Act or in the exercise of its nobile officium.[6]

34. Section 16 of the 1921 Act empowers the court to authorise trustees to advance any part of the capital of the trust to minor beneficiaries for the purpose of their education or maintenance if their income from the trust or elsewhere is insufficient or not available for these purposes. The court cannot grant such authorisation if the trust deed prohibits advances. The power is, however, narrowly drawn and unduly restrictive. First, it limits advances of capital to beneficiaries who are not of full age, whereas adults might require advances of capital if they have insufficient resources of their own. Second, advances of capital may only be made for the "maintenance or education" of beneficiaries: this is restrictive as it might not cover such cases as a beneficiary who requires a capital payment for setting up or expanding a business, or an elderly beneficiary who might require to alter their home. Third, it specifies that an advance of capital must be "necessary", which is a high standard. Fourth, while it permits advances to contingent beneficiaries, this is possible if their rights to capital are contingent only upon their survival; other contingencies, such as marriage or graduation, are not covered. Finally, court authorisation is required before advances of capital may be made. The cost of a court application might easily deter use of the power, especially if the sum proposed to be advanced were relatively small.

35. Section 20 widens the statutory power where a truster did not prohibit in the trust deed the advancement of capital. Trustees would be able to make an advance of capital for the benefit of a beneficiary of any age and impose conditions on it. These might include conditions as to how the sum advanced should be repaid, whether there should be interest paid on the sum advanced (including the amount and type of interest), giving security, or otherwise. Generally consent for an advance will be required from any person with a prior interest in the trust property which would be prejudiced by the advance. The court, on application, may authorise an advance where a person with a prior life interest who would be prejudiced by the advance is incapable of consenting and a reasonable person in his or her position would have consented; or is withholding consent unreasonably. This is a default provision which can be excluded by the truster, wholly or in part, if they so wish.

Alternative proposal for reform

36. The default power laid out in section 20 is a power to advance to an entitled beneficiary the whole of their capital entitlement. An alternative approach would be to limit the advance, for example, to one half of the entitled sum. Advancement of trust property can be contentious in practice and arises frequently. Some consultees thought that a cap could assist trustees in resisting

[6] The noble office or duty of the Court of Session. An equitable jurisdiction in virtue of which the court may, within limits, mitigate the strictness of the law and provide a legal remedy where none exists. The court will exercise this jurisdiction only where an application under section 16 of the Trusts (Scotland) Act 1921 is incompetent, where there has been some unforeseen and un-provided for (by the truster) circumstance, and where the advance is necessary for the education or maintenance of a beneficiary.

excessive requests for advances from beneficiaries, while others thought that maximum flexibility was desirable. In this connection, England and Wales recently amended the corresponding law so as to remove its statutory cap of one half of a beneficiary's prospective share.

37. The Scottish Government agrees that the power of advancement should not be limited in this manner. As noted above, this is a default provision: if a truster wishes to restrict the power of advancement by imposing a cap, they may readily do so. If necessary they can use wording similar to the statutory provision but with the addition of appropriate words of limitation. Additionally, the default power allows trustees to impose conditions upon any advance which could assist trustees in resisting excessive request for advances.

Payments from income

38. As with an advance of capital, there are situations where it might be useful for a trustee to have power to pay income to a prospective beneficiary who was in need. To give an example, suppose a truster directs trustees to accumulate the income of his estate during his widow's lifetime and hold it and the capital for his children who survived their mother (his widow). If one child was in undoubted poverty then it might be helpful if trustees were authorised to spend for their benefit the income arising from that beneficiary's prospective share of the trust property. This is different from a power to advance from capital as only income arising out of the trust property is affected - the trust capital is left intact. There is no equivalent statutory power in the 1921 Act.

39. There is currently no statutory power authorising trustees to pay income for the benefit of beneficiaries, although in the exercise of its nobile officium the Court of Session might authorise trustees to make such payments. The power set out in section 24 is similar to a statutory power in England and Wales that appears to have worked well in practice. Trustees would have the power to make payments to beneficiaries of income arising out of their prospective share of the trust property and, as with the power to advance capital, would be able to impose conditions upon any such payment. The power to make payments from income would be a default power which can be amended or excluded by a truster.

Power to take out insurance

40. Indemnity insurance benefits beneficiaries and protects trustees and has an important role to play where the trust is such that the trustees enter into contracts with third parties or carry out activities which could possibly result in injury to third parties. Indemnity insurance would protect trustees from potentially ruinous claims and at the same time would protect the trust estate in cases where the trustees have a right of relief against it.

41. Trustees can pay for insurance out of their own pockets but there is no common law power to charge the cost of personal liability insurance against the trust estate, nor is it amongst the powers of trustees listed in section 4(1) of the 1921 Act. Therefore, before trustees can charge the premiums against the trust estate, power to do so must be given expressly in the trust deed, or authority must be granted by the court or all the beneficiaries must consent.

42. Trust deeds commonly contain a power to enable trustees "to maintain and acquire policies of whatever description; and to insure any property on whatever terms they think fit including on a first loss basis", though it is not intended to authorise personal liability insurance. Since professional trustees may simply include the cost of any indemnity insurance in the fees which

they charge to the trust estate, the lack of a statutory power to obtain personal liability insurance may have greater impact on lay trustees. On consultation, there was a strong consensus among respondents a default statutory power, and this is set out in section 15 of the Bill.

Apportionment

43. It is a common feature of some trusts that trustees have to distinguish between capital and income in their management of trust property. Certain rules of apportionment have developed which determine whether various different types of investment return are classified as capital or as income. Sections 21 to 23 of the Bill make a number of changes to this area of law.

44. Firstly, under the Powers of Appointment Act 1874 trustees who appoint funds in a way that a particular beneficiary takes nothing or next to nothing are not, by that mere appointment, exercising their power improperly. For example, a deed may provide for a deliberately broad class of beneficiaries, such as "my relatives". This class potentially would comprise children, siblings, nephews, nieces, and succeeding generations. By the terms of the trust, some of this broad class may have only a remote possibility of ever benefiting from the trust. The 1874 Act makes clear that trustees are not acting incorrectly if they exercise their discretion not to appoint some trust property to these remoter beneficiaries. The difficulty is that it is not certain whether this applies to Scotland. Section 21 makes this point clear. This a default power which is to apply unless express contrary provision is made in a trust deed.

45. Secondly, time apportionment is of practical importance where a liferent[7] begins or terminates between dates upon which a periodic payment falls due or on the sale and purchase of income producing investments. Time apportionment at the beginning and end of a liferent can produce results that are quite different from the expectations of most trusters and may result in liferenters receiving little or no income in the initial stages of a liferent. This may, however, be a time when they are most in need of it, for instance, in the case of widows who have lost husbands on whom they were financially dependent. A corresponding problem arises at the end of a liferent. Section 22 confers on trustees a discretionary power not to apportion in the manner required by section 2 of the Apportionment Act 1870, but instead may apportion in such other manner as appears appropriate to the trustees. Cases may arise where fairness requires apportionment and a discretionary power will ensure that where required, such apportionment can be achieved by the trustees.

46. Finally, a number of specific rules dealing with the apportionment of receipts and outgoings have been developed under the common law in England and have, to some extent, been adopted

[7] A liferent is, strictly, the right to use somebody else's property for life. It is a subordinate real right, encumbering the other party's ownership. The relationship exists only between the owner of the property (sometimes called the 'fiar') and the person enjoying the liferent ("the liferenter"). This arrangement is sometimes called a 'proper liferent'. In the context of trusts, there is something slightly different, variously referred to as an 'improper liferent', 'trust liferent' or 'beneficiary liferent'. For practical purposes it is very similar to a 'proper liferent', although the nature of the relationship and the parties involved is different.

in Scots law - the rules in Howe v Earl of Dartmouth,[8] Re Earl of Chesterfield's Trusts,[9] and Allhusen v Whittell.[10]

47. The rule in Howe v Earl of Dartmouth states that if a trust is created over moveable property which comprises wasting assets (that is, assets which decline in value over time) or unauthorised investments (i.e. those which are outwith the trustees' powers), such property must generally be sold and the proceeds invested in authorised securities. The rule in Re Earl of Chesterfield's Trusts applies where a truster is entitled to future or reversionary property,[11] moveable in nature and not currently yielding income, and directs it to be sold but leaves the time of sale to the discretion of trustees, who decline to sell it until it falls into possession. Finally, the rule in Allhusen v Whittell is the corresponding rule relating to debts, liabilities and other charges payable out of trust property. The general rule requires that, as liferenters are entitled to the profits of the trust property, they must also bear the burdens attending the liferented subjects, including debts payable in respect of those subjects. This may include repairing and similar obligations.

48. All of the foregoing rules appear to have been incorporated into Scots law to some extent at least, but they can be excluded by the trust deed. They are, however, of little use as they require complex calculations to be made and generally affect the rights of the beneficiaries to a minor extent only. There is, moreover, some doubt as to whether and to what extent they were part of Scots law at all. Section 23 disapplies these rules in so far as they relate to the allocation and apportionment of trust receipts.

THE DUTIES OF A TRUSTEE

49. Trustees exercising their powers in the course of administering a trust are subject to a number of duties. There are two general duties which all trustees are subject to: to carry out the trust purposes and their fiduciary duties. Legislation also sets out a number of specific duties and the Bill makes a number of important changes to these. This includes:

- Trustee's duty to provide information (sections 25 and 26);
- Trustee's duty of care (section 27);
- Breach of trustee's duty (sections 28 to 31); and,
- The personal liability of trustees (sections 32 and 33).

The information duties of a trustee

50. Trustees have a duty to pass information to a beneficiary. The trustee, as a fiduciary, is seen as having an obligation to keep the beneficiary informed, through the provision of accounts and other relevant information, in order that the beneficiary is able to satisfy him or herself about the proper administration of the trust and its property. There is no equivalent statutory duty in the 1921 Act.

[8] (1802) 7 Ves 137.
[9] (1883) 24 Ch 643.
[10] (1867) LR 4 Eq 295.
[11] A reversionary interest, in trust law, is where an interest in trust property reverts to the truster when the prior interest of the beneficiary comes to an end. For example, if Janet transfers a house she owns into trust for use by her mother for life, with ownership to revert to Janet then back to her on her mother's death, Janet has created a reversionary interest in the house.

51. There is little authority in Scots law on the duty to provide information to beneficiaries. There is a lack of legal guidance in respect of a trustee's duty to pass information to a beneficiary, and a corresponding lack of clarity as to what a beneficiary is entitled to expect or request. Given the variety of uses to which trusts are put nowadays, the importance of transparency as to the roles of those involved in trusts and the fact that other jurisdictions are including provision on the duty to inform in their trust legislation, the Scottish Government agrees with the Scottish Law Commission view that the current lack clarity is unsatisfactory.

52. Sections 25 and 26 set out a scheme for the trustee's duty which has two phases: first, there is an initial stage at which the trustee is to inform a person that they are a beneficiary and to provide basic information about the trust. This will alert the person to their interest (which may be immediate or may be remote) and lets them know who is administering the trust property in which they are interested. Without such basic information the beneficiary is wholly unable to exercise their power to hold the trustees to account. This first phase is a mandatory provision because the information duties of a trustee goes to the heart of trust law; any departure would call into question whether a trust could exist at all.

53. Following that, in the second phase, there is a separate and continuing duty on the trustee to provide certain information on request. The amount and type of information the beneficiary may wish to have might vary, depending (for example) on whether they have a present or a future entitlement, and indeed on factors such as the degree of confidence they have in the trustee. This phase takes a more general approach that is better suited to permit individual trustees to decide what ought to be done in the context of the particular trust for which they have responsibility. A trustee must give careful consideration to all requests by a beneficiary for trust information. At the same time, the Bill sets out what will generally not be disclosable, including information as to trustees' deliberations or reasons for their decisions, information relating to another beneficiary or third party, and letters of wishes would not be disclosable.

54. Whereas the truster is not able to limit the duty to provide initial information, this is not the case with trust information on request. The balance between the interests of the truster and the trustees on this matter means that a truster should be permitted to make an express statement in the trust deed limiting the duty of trustees to disclose specified information to specified beneficiaries. The Scottish Government considers this to strike an appropriate balance between the wishes of the truster, which is an essential feature of a trusts regime, and beneficiaries being able to satisfy themselves about the proper administration of the trust.

55. It is important to note that the Bill also provides two counterbalancing measures. First, any express limitations on the duty of disclosure would be subject to powers conferred on the court to alter trust purposes (section 61). In this way those with an interest in the trust will be able to seek to keep the trust purposes in line with any material changes which may have occurred or be in prospect. Second, a court may, at any time, be asked to rule on whether an express limitation of the trustees' duty to provide information is reasonable in all the circumstances. The court will have power to alter the express limitation to such extent as it considers expedient having regard to the beneficiary's right to hold the trustees to account. If that is not possible then the court may strike the limitation down.

Alternative approach

56. This area of the law is largely undeveloped in Scotland, and there is very little authority in this area from the Scottish courts. Some jurisdictions have statutory statements of trustees' duties of disclosure to beneficiaries under trust law and so the Scottish Law Commission consulted on this issue.

57. One alternative is to do nothing but as this is an undeveloped area of trust law such an approach would be at odds with the overall policy objective of the Bill. Doing nothing would not assist beneficiaries because the information duties of trustees, looked at from the other end of the telescope, is also about beneficiaries' rights to obtain information. With this information, beneficiaries would be better able to hold trustees to account for the administration of the trust.

Trustee's duty of care

58. Section 27 of the Bill is concerned with the standard of care appropriate to professional and lay trustees. Under the current law, when administering trust, the general rule in Scots law is that a trustee is required to exhibit the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs. Although there is an absence of authority on this point, the same standard of care appears to apply to lay trustees and professional trustees alike.[12]

59. Trustees are liable for loss arising out of an act authorised by the terms of the trust deed (or by trust law) only if they failed to carry it out to the appropriate standard of care. Similarly, the trustees are liable for their omission to do some act which they were authorised to carry out, only if their failure to act was negligent. They may, for example, have invested trust funds rashly, without proper consideration of the risks, or failed to dispose of a poorly performing investment left by the truster, or failed to supervise an agent or co-trustee appointed to manage some part of the trust business.

60. The Scottish Government considers that a minimum standard of care applicable to all trustees is necessary. Without a minimum standard beneficiaries would be at the mercy of lazy, ignorant or incompetent trustees. The minimum standard must be objective otherwise it would present difficulties in determining whether a breach of trust had occurred. The test set out in section 27(1) makes clear that (subject to the particular rules for trustees providing professional services or advice to the trust) trustees should use the same care and diligence as an ordinarily prudent person would use in managing the affairs of others. This emphasises the essence of trusteeship: trustees administer the trust property not for themselves but for the beneficiaries.

61. Professional trustees, however, are frequently appointed on the basis that they offer a superior standard of service, especially professional corporate trustees and banks' trustee departments. In many cases, too, solicitors and accountants market their services as professional trustees. As mentioned, there is uncertainty whether trustees who act as such in the course of their business or have relevant special skills are expected to show a higher standard of diligence and

[12] A professional trustee is someone who represents themselves as having greater expertise in trustee matters than untrained lay-persons, and who acts as trustee in the course of business. When discussing professional trustees, there is a distinction to be made between professional trustees who are paid to assume the office of trustees, and natural persons who happen to hold professional qualifications and who are appointed as trustees, but are not paid or expressly instructed to provide professional services (see paragraphs 60 and 61).

knowledge than the basic objective standard of an ordinarily prudent person. Sections 27(2) puts this beyond doubt. The view of the Scottish Government is that a higher standard of care should be required: professional trustees should exercise such skill, care and diligence as it is reasonable to expect from a member of the profession in question.

62. Where trustees have professional qualifications but do not act as trustee in a professional capacity, the Scottish Government's view is that they should be subject only to the general standard of care, as set out in section 27(3). Such trustees play an important role and should not be discouraged from accepting office as a trustee in a non-professional capacity. These trustees are commonly asked to provide professional advice on an informal basis, without proper instructions and without payment. That creates an obvious hazard for them, as the legal status of such advice may often not be clear. The higher, professional, standard of care would apply to such a trustee if they were expressly instructed to provide professional advice to the trust.

Immunity clauses restricting trustees liability

63. It is common practice for trust deeds to contain an immunity clause in favour of the trustees. Some purport to relieve the trustees of personal liability for delictual breach of trust.[13] Scots common law makes it clear that a trustee who is guilty of gross negligence (equivalent to fraud or lack of good faith) is not protected by an immunity clause. This concept had been applied in a number of Scottish cases for well over 150 years without significant difficulties, but judicial comments made in other jurisdictions have cast doubt on whether this view of the law remains accurate.[14]

64. Providing immunity against gross negligence is fundamentally at variance with the concept of trust. A trustee is appointed to take a responsible attitude towards trust property and to permit the trustee immunity from serious lack of attention to the affairs of the trust or serious mismanagement of its affairs negates this. This goes to the very essence of trusteeship, and is so fundamental that exclusion of liability for gross negligence (and fraud) should not be permitted. An effective immunity clause would put the interests of the beneficiaries at risk from acts or defaults of trustees. If loss occurs as a result the beneficiaries are unable to sue the trustees and will have no redress.

65. Trustees are appointed to carry out the trust purposes and to act in the interests of all of the beneficiaries, and there is a public interest in the proper administration of trusts. Section 27(4) therefore restricts the effect of immunity clauses in general, and in particular would, in line with the standards of care, distinguish between professional trustees and lay trustees. Professional trustees should be liable for breaches of their duty of care whatever the terms of the immunity clause. Professional trustees are appointed on the basis that they can provide a better standard of service than ordinary untrained trustees, and hold themselves out as specialists. Solicitors, accountants, bankers and the like do not generally act for clients in other areas of work on the basis that they are to be immune from claims for negligence. In relation to lay trustees, however, the position is different. The present law, that an immunity clause may protect trustees against negligence but not gross negligence, strikes an appropriate balance. Liability for negligence (which

[13] Delict is the name used for a civil wrong that inflicts loss or harm.
[14] See Armitage v Nurse [1998] Ch 241 and Spread Trustee Co Ltd v Hutcheson [2011] UKPC 13.

is not gross negligence) might be regarded as too heavy a burden for untrained trustees, and trusters should be capable of alleviating this by means of an effective immunity clause.

66. The Scottish Law Commission consulted on this matter in its Discussion Paper on Breach of Trust. A majority of respondents agreed that a clause in a trust deed purporting to relieve professional trustees from liability should be regarded as ineffective in so far as the liability arises from the trustees' failure to exercise the degree of care, diligence and skill required by law. Consultees also generally agreed that an immunity clause should continue to be effective in excluding liability for negligence but not for gross negligence.

Breach of trustee's duty

Relieving trustees of consequences of entering into a transaction in breach of fiduciary duty

67. Trustees have fiduciary duties towards beneficiaries which arise by virtue of the trust relationship. Trustees must not place themselves in a situation where their personal interests conflict, or may possibly conflict, with their duties to the beneficiaries in terms of the trust deed. Types of transaction that are regarded as a breach of fiduciary duty include a purchase of trust property by the trustee; a sale by a trustee of property to the trust, a loan to or by a trustee and other similar contracts where there is an actual or potential conflict of interest; a trustee diverting contracts that would otherwise come to the trust to himself or herself or setting up in competition to a trust business; a trustee taking remuneration or commission; and, a trustee using for personal advantage information obtained by virtue of being a trustee or disclosing such information.[15] A trustee may carry out a transaction in breach of fiduciary duty if it is authorised in the trust deed or agreed by the beneficiaries. Some trust deeds authorise a wide variety of transactions.

68. In general there is a clear need for trustees to be subject to rules against self-dealing and conflicts of interest but the current rules are strict and inflexible - transactions which represent good value for the trust are struck at as well as those which are disadvantageous. A trustee who obtains any property or advantage in breach of fiduciary duty is deemed to hold it on behalf of the beneficiaries. They may recover the property by reducing the transaction or making the trustee account to them for any profit. These remedies are available whether or not the transaction was fair, the trustee acted reasonably, or the trust estate had not in fact suffered any loss. The beneficiaries may also raise an action of damages against the trustee for loss suffered by the trust estate, irrespective of whether the transaction was fair or the trustee acted reasonably.

69. At the moment, the court has no power to sanction in advance a transaction by a trustee in breach of this rule. Section 32 of the 1921 Act empowers the court to grant relief for breaches of trust that have already taken place, but the Scottish Government is not aware of any cases where it has been used to relieve a trustee who was in breach of fiduciary duty. Section 31 of the Bill confers power on the courts to, on a case-by-case basis, relieve trustees of the consequences of breaching their fiduciary duty. In other jurisdictions, like England and Wales, a court power is the method used to sanction such transactions by trustees.

Relieving trustees of the consequences of an ultra vires breach

70. Trustees who perform some act which is not authorised by the trust deed or the rules of trust law commit an *ultra vires* breach. Trustees who commit this type of breach incur near absolute

[15] This is a non-exhaustive list of types of transactions regarded as being a breach of fiduciary duty.

liability for any loss suffered by the beneficiaries. Where, for example, trustees have made a payment to a non-beneficiary, it does not matter that the trustees honestly and reasonably believed that that person was a person entitled to the payment under the trust deed. Likewise, trustees may not escape liability for making an unauthorised investment because they reasonably and in good faith believed the investment was authorised and in the best interests of the trust. Yet despite the personal liability of trustees there are various exemptions.

71. Not only is the present law not clear but the near absolute liability of trustees for an *ultra vires* breach of trust is a heavy burden. Such liability can operate in an arbitrary and inconsistent manner and can produce harsh results. For example, if trustees made a prudent investment that turned out disastrously and which was reasonably but mistakenly thought to be within their powers, they would be personally liable. If the making of the investment was authorised by the trust deed, however, there would be no such liability.

72. The Scottish Government's view is that the rule of personal liability for *ultra vires* breaches of trust should be relaxed slightly. The court should have a power to relieve trustees from personal liability for actions which are *ultra vires* provided that the trustee believed they were acting within their powers. Before any such exemption will be granted, trustees must demonstrate to the court that they took all reasonable steps and made all reasonable enquiries as to whether the action was within their powers, as set out in section 29 of the Bill.

Judicial relief from liability for breach of trust

73. Section 31 of the 1921 Act provides that where a trustee has committed a breach of trust at the instigation or request or with the written consent of a beneficiary, the court may make an order applying all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee. In order for the court to consider granting relief, the beneficiary must have known the facts that made the trustee's action a breach of trust.

74. The Scottish Government considers that as it serves a useful purpose and has not given rise to difficulties in the few cases in which it has been used it should be re-stated – see section 28 of the Bill.

Consultation and Alternative Approaches

75. The Scottish Law Commission consulted on these matters in its Discussion Paper on Breach of Trust.

76. On relieving trustees of consequences of entering into a transaction in breach of fiduciary duty, respondents generally agreed with the proposal. One alternative considered was whether to include a requirement for the exercise of the above power that the trustee had acted reasonably and in good faith. Without a requirement of good faith, trustees could carry out a transaction in full knowledge that they are in breach of fiduciary duty and still have it authorised retrospectively by the court. Respondents to the consultation, however, were divided in their opinions.

77. Regarding the personal liability of trustees for ultra vires breaches of trust, this issue was considered in Part 2 of the Scottish Law Commission's Discussion Paper on Breach of Trust. All but one of the respondents supported the Scottish Law Commission's proposal for reform of the law.

TRUSTEES AND THE ADMINISTRATION OF TRUSTS

78. The truster will normally have appointed the initial trustees[16] and may occasionally have reserved a power in the trust deed to appoint further trustees or have conferred power on some other person to appoint them but over time, as the trust continues, the composition of a body of trustees is likely to change. In some instances, a new trustee may assume office; in others, it may be that a trustee is removed from office. The Bill makes a number of important changes to the way that that trusts are administered and how trustees are appointed, removed or resign. These include:

- The appointment or assumption of trustees (sections 1 to 4);
- The resignation and removal of trustees (sections 5 to 8);
- The discharge of trustees (section 10); and,
- Trustees' decision-making (sections 11 and 12).

Appointment or assumption of trustees

79. Under statute trustees (unless the trust deed makes provision to the contrary) and the court have a power to assume or appoint a trustee[17] while under common law the truster in private trusts has power to appoint new trustees to the trust if there are no acting trustees.[18] The Scottish Government understands that both these powers can be useful in the administration of trusts and sections 1 and 3 of the Bill restates the current legislative position and, with regards to trusters, section 2 puts the current common law position in statutory form.

Resignation and removal of trustees

Resignation of trustees

80. In terms of section 3(a) of the 1921 Act all trusts shall be held to include the power of any trustee to resign the office of trustee (unless the contrary is expressed in the trust deed). There are, however, four exceptions to this general rule where: there is a sole trustee who has not assumed new trustees; the "trustee" is a judicial factor[19] or executor dative[20]; a trustee assumes office after having accepted a legacy or bequest or annuity in return for doing so; and, a trustee who is appointed to the office on the footing of receiving remuneration for his services.

81. The Scottish Government's reform is focused on the latter two exceptions, that is, where a trustee accepts office after having accepted a legacy, bequest or annuity and where a trustee is appointed to the office on the footing of receiving remuneration for their services. It currently appears to be common practice to include a clause in trust deeds reserving the right of resignation to any trustee who receives some benefit such as a legacy or remuneration. The Bill makes clear

[16] In certain circumstances the initial trustees may have been appointed by the court.
[17] Section 3(b) of the 1921 Act . The court has a power of appointment under section 22 of the 1921 Act and at common law.
[18] Glentanar v Scottish Industrial Musical Association Ltd 1925 SC 226.
[19] A judicial factor is an Officer of the Court, who is appointed by the Court in complex or difficult cases, where a particular problem has been identified and where the estate (known as the Judicial Factory Estate) is without any other legal protection or administration. Their role is to preserve and protect the estate and where appropriate, realise and distribute the estate amongst those entitled to it. A Judicial Factor is independent to the case, and is normally a professionally qualified individual, such as a solicitor or accountant.
[20] A person appointed by the court to administer the estate of a deceased person, normally when the person dies intestate.

that it is, by default, competent for such a trustee to resign office, unless they are the sole trustee, or the trust deed provides otherwise. Unwilling trustees should not be forced to continue to act, particularly as those likely to suffer will be the beneficiaries of the trust. Moreover, the trust is likely to suffer if a trustee is unable for personal reasons to give proper attention to its administration. Section 5 of the Bill makes this reform. For those seeking to recover the repayment of any legacy or other remuneration the law of unjustified enrichment provides a legal remedy.

Non-judicial removal of trustees

82. The Scottish Government recognises that non-judicial procedure for removal of a trustee can be faster and cheaper than an application to the court and the Bill provides two means for removing a trustee that do not involve an application to a court.

Removal of trustee by co-trustees

83. First, the trustees as a group should be capable of terminating an individual trustee's tenure of office by a resolution of the remaining trustees. Section 7 lays out the four circumstances in which trustees may remove one of their number: where a trustee is incapable; convicted of an offence involving dishonesty; sentenced to imprisonment on conviction of an offence; or, imprisoned for contempt of court or for not having paid a fine. With the exception of incapacity, the power is largely confined to certain easily provable fact-based situations that do not involve subjective value judgements or the resolution of disputed questions of fact.

84. With regards to incapable trustees, the concept of capability is explained in section 75 of the Bill. The Scottish Government does not think it would be helpful to frame the explanation of incapability simply by listing the various orders under mental incapacity legislation in Scotland and their equivalents in the other United Kingdom jurisdictions.[21] Such legislation would be complex and would have to be amended every time there was a change in mental incapacity legislation. Neither would it be appropriate for removal of a trustee to occur in every instance where the trustee is certified as suffering from mental disorder or if an order had been granted on the basis of certified mental disorder or mental incapacity: some mental disorders might not affect the trustee's ability to discharge their duties of office. Removal on grounds of capability would instead need to be carefully considered by the trustees in the circumstances of each individual case. Ultimately, were trustees to remove one of their number on the grounds of incapacity the removed trustee would have the option of raising legal proceedings to challenge the decision of the remaining trustees.

85. It is the Scottish Government's view that responsible trustees would consider removal in these situations only on the basis of an objective judgment or non-disputed question of fact. If it were not the case, then, ultimately, the trustee unjustly removed would have the option of raising legal proceedings to challenge the decision of the remaining trustees.

Removal of trustee by beneficiaries

86. In general, the administration of the trust is left in the hands of the trustees. However, under the common law rule of Miller's Trustees v Miller,[22] where all of the beneficiaries are absolutely

[21] The meaning of the term incapable, for purposes including removal of a trustee from office , in section 75 of the Bill, does not list various orders under the mental incapacity legislation in Scotland.
[22] (1890) 18 R 301.

entitled to the trust property and are of full age and full capacity and they act unanimously, they may compel the trustees to make over the whole of the estate to them. The Scottish Government considers that in the same circumstances the whole of the beneficiaries, acting together, should also be able to remove an existing trustee. Section 8 of the Bill sets out this power.

Alternative approach

87. Section 7 of the Bill confers on trustees a discretion to exercise their power when removing a co-trustee. Alternatively, the law could provide for the automatic termination of trusteeship in certain circumstances. For example, under the current law this occurs on the death of a trustee. The provision required for this approach, however, would be complex and such complexity would outweigh the advantages. For instance, the effect automatic cessation of trusteeship might have on acts that have already been carried out by the trustee in question would need to be carefully thought through. To give an example, if a trustee becomes mentally disordered to the point of being incapable of acting, at what point should the automatic cessation of trusteeship take effect? What would be the effect of any acts carried out by the trustee: are they void and of no effect, should they be capable of being set aside; or do they remain effective? The two non-judicial procedures already provided for in the Bill go some way to addressing the removal of unfit trustees. The Scottish Law Commission considered the possibility of the termination of trusteeship by operation of law in its Discussion Paper on Trustees and Trust Administration but ultimately concluded that the complexity of the necessary provisions would outweigh the advantages. All but one of the respondents to the consultation agreed that there should be no automatic termination of trusteeship.

The discharge of trustees

88. The 1921 Act currently provides a default power whereby trustees who resign (or the representatives of a deceased trustee) may be discharged either by the remaining trustees or by the court, with the effect that any remaining liability of that person is brought to an end.[23] The effect of a deed of discharge is to protect the trustees from liability from any claim that may arise from their previous acts of administration as trustees or which may arise in future. Section 10 of the Bill restates the current position but extends it to cover all the circumstances in which a trustee may leave office.[24] It is open to the truster, in the trust deed, to make a provision about the discharge of trustees.

Trustees' decision-making

89. The means whereby trustees make decisions involving the trust is clearly of fundamental importance. An effective decision binds any dissenting trustees. If the decision is implemented without notice to them, a trustee can free themselves from personal liability by taking prompt and effective steps to disclaim responsibility. Sections 11 and 12 make two changes to the way that trustees may make a decision: the first concerns the requirements on trustees in relation to consultation prior to the holding of meetings and the making of decisions; the second concerns what constitutes a majority or quorum of trustees.[25]

[23] Sections 4(1)(g) and 18 of the 1921 Act.
[24] These are found in sections 6, 7 and 8 of the Bill.
[25] Majority and quorum are generally synonymous: a quorum is the number of persons who must be present at a meeting for it to be valid and able to transact business.

Consultation and meetings

90. Trustees are appointed to act as a body and are under a duty to consult one another in relation to trust business, even though their decision on any particular matter may be made by a majority or quorum. Each and every trustee has a right to take part in the decision-making process and in the 19th and early 20th centuries it was generally assumed that an actual meeting of trustees was required as an essential feature of trust business. Modern communication methods and the conducting of trust business have moved on significantly and therefore the Scottish Government considers that a clear statement of rules that reflect current practice can usefully be stated in legislation. Section 11 sets out the essential point – that all of the trustees should be given an opportunity to put forward their views on the subject that has to be decided. Before a decision binding the trustees can be made, all trustees must (so far as is reasonably practicable) be given adequate prior notice of the matters to be decided and an opportunity to put forward their views, by attending a meeting of the trustees or in any other manner. This is a default rule, subject to any contrary provision in the trust deed.

Majority and quorum

91. The 1921 Act provides that no effective decision can be made unless it is agreed by a quorum, and that a quorum is constituted by a majority of the acting trustees who must be present at a meeting for it to be valid and able to transact business. Yet a trust deed may depart from this by stipulating that the quorum is to be a larger or smaller number of acting trustees (in which case it is the quorum that may make an effective decision, not the majority) and trustees may, in addition, make effective decisions otherwise than at meetings. Overall the use of the word quorum is potentially misleading.

92. The Scottish Government's view is that it would be clearer to replace the current statutory provision with one that did not use the concept of a quorum. Section 12 of the Bill would replace the current statutory provision and adopt the term 'majority' in place of 'quorum'.

Alternative approach

93. On discharge of trustees, the Scottish Law Commission recommended that the statutory power is restated[26] and in its draft Bill (which is attached to its Report) it provides that a guardian of a beneficiary under the age of 16 has the power to discharge a trustee on behalf of that beneficiary. The guardian owes a fiduciary duty to the minor beneficiary not to let their own (i.e. the guardian's) personal interests come into conflict with those of the beneficiary. This represents an appropriate balance between protecting the interests of a minor beneficiary, and allowing the effective (and cost efficient) administration of the trust, by avoiding the need for an application to the court for discharge of a trustee in cases that are not controversial. The Scottish Government recognises that the interests of a minor beneficiary and their guardian could conflict, particularly in a family trust where both parents and children are beneficiaries. In other contexts, the Scottish Law Commission recognises the potential for conflicts of interest between a parent and child where the parent acts on behalf of their child who is under 16 in relation to a trust.[27]

94. Regarding trustees' decision making powers, the Scottish Government recognises that in some cases a truster may appoint a trustee in the knowledge that the trustee might be personally

[26] See paragraph 4.44 of its Report on Trust Law.
[27] For instance, see paragraph 17.15 of its Report on Trust Law.

interested in the outcome of the decision. For instance, this would apply in particular to a case where the trustee is a member of the family benefited by the trust, or where they are a partner in the firm of solicitors acting for the trust. Equally, beneficiaries may consent to the interested trustee taking part in the decision-making. The Scottish Law Commission's draft Bill provides that a guardian of a beneficiary under 16 may provide this consent on behalf of that beneficiary. Similar to considerations above, the Scottish Government recognise the potential for conflict, particularly in a family trust where both parents and children are beneficiaries. The Scottish Law Commission did not specifically consult on these matters.

95. The Scottish Government consider this particular aspect of both policies to be finely balanced and will listen carefully to the evidence of stakeholders given at Stage 1 and the views of the lead Committee.

THE POWERS OF THE COURT

96. Trusteeship, even in private trusts, is to some extent a public office and there is a public interest in ensuring the effective, prudent and honest management of trusts. In this context, the court has a crucial role to play and should have a number of powers. The Scottish Government considers that it is important that the court should be able to ensure that trusts are properly administered, and that any dishonesty, impropriety or negligence on the part of trustees should be effectively dealt with. It is equally important that there should be relatively simple and informal methods of resolving any difficulties or disputes that may arise in the administration of trusts.

97. The Bill makes a number of important changes to the powers conferred on a court to ensure that trusts are administered effectively. These include:

- The appointment of trustees (section 1);
- The removal of trustees (section 6);
- Court directions (section 67);
- Granting additional management powers (section 14);
- Variation (or termination) of trust purposes (sections 54 to 60);
- Alteration of trust purposes on material change in circumstances (section 61);
- Defects in the exercise of trustees' powers (section 64);
- Liability for litigation expenses (section 65); and
- Jurisdiction (section 74).

Judicial appointment of trustees

98. A court has power to appoint a trustee conferred in terms of legislation and at common law. The 1921 Act empowers a court to appoint a trustee: when trustees cannot be assumed under any trust deed; when any person who is the sole trustee appointed in or acting under any trust deed is or has become insane or is or has become incapable of acting by reason of physical or mental disability; or being absent continuously from the United Kingdom for a period of at least six months; or by having disappeared for a like period. A common example of judicial appointment is where a sole trustee dies without having assumed new trustees.

99. Where the statutory power does not apply, the Court of Session, by virtue of its nobile officium, can appoint a trustee. Examples of appointment at common law are: where the trust administration is deadlocked because of disagreement between the trustees; where the sole trustee is removed due to unsatisfactory conduct; and where the "office" of the *ex officio* trustees ceases to exist.

100. The Scottish Government considers that the current position can be simplified. Section 1 accordingly confers on courts a power to appoint new trustees in all the situations that are presently dealt with by section 22 and the common law. The court would have a new statutory power to appoint a trustee (or trustees) in any case where this is expedient for the administration of the trust, or, under section 1(1)(b), where no capable trustee exists or is traceable.

Judicial removal of trustees

101. Resignation is often a preferable alternative to removal when the aim is for a trustee to leave the trust but, in some circumstances, removal may be the only option. Specified grounds for the removal of a trustee are laid out in statute: section 23 of the 1921 Act empowers the court to remove a trustee who is or becomes insane or incapable of acting by reason of physical or mental disability, or who is absent from the United Kingdom continuously for at least six months, or who has disappeared for the same period. Other grounds for removal are left to the common law, by application to the Court of Session which, in the exercise of the nobile officium, has a general discretion to remove a trustee.

102. It is the Scottish Government's view that the statutory provision should deal with all the grounds of removal. It is potentially misleading for the current statute to present only part of the picture regarding the judicial removal of trustees. Section 6 of the Bill sets out the grounds for removal in fairly general terms so that all cases where the removal of a trustee is clearly desirable are covered. The Scottish Law Commission consulted on this matter in its Discussion Paper on Trustees and Trust Administration and all respondents agreed with the general policy underlying the proposal.

Court directions

103. The courts are able to assist trustees by providing guidance, directions and advice where trustees encounter problems relating to the administration of the trust or the rights of the beneficiaries and other parties involved. There are three main ways in which trustees may obtain guidance from the court. These are: a petition for directions, the presentation of a special case, and an action of multiplepoinding.[28]

104. While the current procedures are broadly satisfactory, the Scottish Government considers that helpful reform can be made. The Bill sets out a new procedure whereby trustees can be authorised by the court to distribute the trust property on a particular footing and relieve the trustees of personal liability.[29] The new procedure would be capable of dealing with events that might or might not happen in the future. For example, trustees of a trust where a beneficiary has

[28] Multiplepoinding is an action to determine the rights of parties to a fund or property in dispute and to release the holder of the fund from any claim.

[29] This would be similar to *Benjamin orders* in England and Wales. The procedure derives from *Re Benjamin* [1902] 1 Ch 723, where the court was reluctant to declare that a potential beneficiary had predeceased the testator but authorised trustees to proceed on that basis.

been missing for several years may apply to court to distribute trust funds on the basis that the person is dead. The trust property might otherwise have to remain undistributed to the current beneficiaries because of a remote chance that some other person would become entitled to it, if the trustees were not prepared to take the risk of being personally liable should the contingency arise and the recipients of the trust funds be unable to pay the true beneficiaries.

105. The power in section 67 is framed in general terms and would be available where it was very likely, but not certain, that a particular event had or had not happened or where there was a remote chance that the present beneficiaries' entitlements might be defeated by some future event, as in the example provided above. The freeing of the trustees from personal liability will not prejudice any right of the true beneficiaries to recover the trust property from those to whom it had been distributed.

Granting additional management powers

106. Although modern trust practice tends towards conferring wide powers of administration and powers of investment on trustees in the trust deed, in some cases trusters may choose to confer more limited power on trustees. Similarly, many existing trusts contain more limited powers. In these cases it is found on occasion that useful powers may have been inadvertently omitted, or powers that appeared unnecessary when the trust was set up may have become necessary. Likewise, the legal or factual background may change in ways that were not imagined by the truster. In such a case it may be desirable that additional powers, going beyond those in the trust deed, should be conferred on the trustees.

107. Currently, there are a number of ways that additional management powers can be conferred on the trustees by the court. Legislation[30] permits the court to grant trustees authority to do any of the acts mentioned in section 4 of the 1921 Act, notwithstanding that such act is at variance with the terms or purposes of the trust. Before granting authority, the court must be satisfied that the act is, in all the circumstances, expedient for the execution of the trust. In addition, the Court of Session may, under its nobile officium jurisdiction, be used to give trustees greater powers than they enjoy under the trust deed. Another way that trustees' powers may be altered is in the course of a trust variation, either at common law or under the Trusts (Scotland) Act 1961 ("the 1961 Act").[31]

108. The extent of the court's jurisdiction to confer new powers on trustees under the nobile officium mentioned above is, however, unclear. Many of the authorities on the issue are seemingly contradictory. In addition, powers will be granted only on grounds of necessity or strong expediency. Judicial variation of trusts under section 1 of the 1961 Act is designed to deal principally with the variation of purposes rather than enlargement of powers and the result is that one beneficiary can veto the acquisition of useful additional powers.

109. The Scottish Government's view is that these existing methods are unsatisfactory. There should be a simple and straightforward way of obtaining additional powers relating to the administration or management of the trust estate where variation by agreement of all the beneficiaries is not possible. Section 14 of the Bill confers on the court power to grant additional administrative and managerial powers in relation to the trust property provided that it is satisfied

[30] Section 5 of the 1921 Act.

[31] For more on trust variation see below, beginning at paragraph 102.

that such powers would be of benefit to the future administration of the estate. Any application would be intimated to all of the beneficiaries, who would be entitled to object, although the court could grant additional powers notwithstanding such objections. The court would also have the power to attach conditions to the order as it might think fit.[32]

Variation (or termination) of trust purposes

110. Arrangements to vary trust purposes usually involve the adjustment of the respective rights of the persons most immediately interested in the trust capital and income. At common law, trusts can be varied extra-judicially by the beneficiaries provided that the beneficiaries are all of full age and full capacity. If all beneficiaries consent to the termination of the trust or to the variation of the terms upon which the trust property is held, there is no-one (not even the truster, as confirmed by section 60) with the right to object.

111. The 1961 Act proceeds upon the same basis but the court has power to supply approval on behalf of beneficiaries who are incapable of consenting. The court must be satisfied that no prejudice will be sustained by such beneficiaries and all ascertained beneficiaries of full age must consent to the scheme, otherwise it cannot proceed. This brought about a useful and successful reform but in certain respects the existing procedure has proved inflexible, especially when addressing remote theoretical contingencies – such as highly improbable events and the emergence of remote interest. In addition, in addressing the question of absence of prejudice the courts have looked solely to economic prejudice, whereas other jurisdictions have construed the corresponding requirement, that the arrangement should be for the "benefit" of the person on whose behalf approval is sought, more broadly.

112. Section 54 of the Bill makes provision for both judicial and extra-judicial variation or termination of trusts while section 55 sets out the circumstances in which the agreement of a beneficiary or approval on behalf of a beneficiary is required. It essentially restates the framework found in section 1 of the 1961 Act in terms of which, with some minor exceptions, all capable beneficiaries must agree to any variation or termination.

113. Agreement may be given by capable beneficiaries who are at least 18 years old. Where there are beneficiaries from whom agreement cannot be obtained, such as those beneficiaries who are incapable or who have not attained the age of 18 years, the court can be asked to supply approval on their behalf. The court can only approve an arrangement on behalf of a beneficiary if it thinks that the arrangement would not prejudice any persons who cannot consent for themselves and on whose behalf the court is therefore giving approval. Currently, the court will consider whether the arrangement is economically prejudicial but in terms of section 56 the current legal position is widened such that the court may have regard to a wider range of factors when determining whether an arrangement is prejudicial.

114. The Scottish Government, however, has some concern that the statutory scheme for judicial variation drafted by the Scottish Law Commission is not sufficiently clear as regards taking into account the views of child beneficiaries who have not attained the age of 16. In the Bill, the Scottish Government have proceeded with the Scottish Law Commission's recommendation and in addition made clear that that a court is to have regard to the views of child beneficiaries who have

[32] This would be similar to the procedure available in England and Wales under section 57 of the Trustee Act 1925, and other procedures that exist in many Commonwealth jurisdictions.

not attained the age of 18 but who are capable of forming a view about the proposed variation. Where a child beneficiary is aged between the age of 16 and 18 years, the court is to have regard to the person's views in relation to the arrangement. Where the child beneficiary is under the age of 16, the court – if it is satisfied that the child is capable of forming a view – must give the child an opportunity to express their view and have regard to that view, taking into account their age and maturity (section 59).

Alteration of trust purposes on material change in circumstances

115. As a result of reform elsewhere in the Bill, it would be possible that trusts of long-duration which accumulate income could be created.[33] The Scottish Government has concerns that with long term trusts the original trust purposes may become inappropriate in the light of a material change of circumstances. This is not confined simply to long term accumulation trusts or trusts that provided for a long sequence of successive liferents - it applies to all long term private trusts of every sort. Ultimately, the Scottish Government's view is that a truster should not be entitled to tie up property for a long period in a manner that, through change of circumstances, fails to meet the reasonable needs and wishes of the living generation.

116. In order to prevent this section 61 of the Bill sets a solution to this problem: 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. This would be to the extent that such alteration was clearly expedient in order to take account of any material changes in circumstances that had occurred since the trust was created. The power would be exercisable on the application of a wide range of parties with an interest in the trust, including, but not limited to, the trustees, the truster in an inter vivos trust,[34] any one or more of the truster's descendants, whether or not they are beneficiaries, and beneficiaries or potential beneficiaries. There is no equivalent statutory power in the 1921 Act.

117. A material change of circumstances must be demonstrated, and would at least extend to changes in the personal or financial circumstances of one or more members of the truster's family or changes in the nature or amount of the trust property. The court will be subject to the constraint that the alterations to trust purposes be restricted to those that were clearly expedient in order to deal with the relevant changes in circumstances. In this connection, the court should have regard to the intentions of the truster but these should not, however, be binding on the court.

118. The Scottish Government's view is that a period should elapse before the proposed jurisdiction could be exercised for three main reasons. First, it is designed to deal with a problem that exists in long term trusts, and the requirement that a trust should have been in existence for a substantial period emphasises that important feature. Secondly, the requirement should help to avoid the risk that family members who are unhappy with a trust will mount an early application to have its terms altered before any material change of circumstances has occurred. Thirdly, because the proposed jurisdiction does not require the consent of all of the beneficiaries this should be counterbalanced by a requirement that a substantial period should have elapsed before the jurisdiction can be exercised.

[33] See paragraph 121 and section 41 of the bill.

[34] An inter vivos trust is one set up by a living truster, with the intention that it takes effect during their lifetime.

Consultation and Alternative Approach

119. The Scottish Law Commission consulted on this issue in its Discussion Paper on Accumulation of Income and Lifetime of Private Trusts, putting forward a number of proposals. The overall proposal was welcomed by consultees although there was some difference of opinion on specific matters. For example, some respondents questioned whether the 25 year time limit that specifies that an application cannot be made starting at any time from the creation of the trust up to 25 years after its creation is too short or too long.

Defects in the exercise of trustees' powers

120. In Scotland trustees are usually given a discretion as to whether or not to exercise any of the powers granted in the trust deed and as to the manner in which those powers are exercised. The Scottish courts have been reluctant to review the exercise of those discretionary powers. The Scottish Government considers that there is merit in a statutory enactment of a rule which would enable the exercise of trustees' discretionary powers to be reduced or otherwise altered if the trustees were in error as to the considerations that ought to have been taken into account by them in the exercise of their power.

121. There are two reasons for allowing these decisions to be challenged. First, Scots law already allows unilateral acts to be challenged on grounds such as error or failure to act honestly or in good faith. Second, the essential feature of a fiduciary power is that it is exercisable for the benefit of others, not the donee of the power, who, in the case of a trust, is the trustee. If the power is not exercised properly, it is normally not the trustee who suffers the loss, but the objects of the power, that is, the beneficiaries. In the Scottish Government's view, this situation requires the possibility of challenge by the beneficiaries if there has been a defect in the exercise that has prejudiced them. The English case of Pitt v Holt[35] serves as an example: it concerned the wife of a seriously disabled man who was appointed his receiver and who, on incorrect advice, made an error in administering the funds that her husband received as compensation for his accident.

122. In many cases where powers are exercised defectively the reason will be incorrect legal advice. While it is true that in such cases there might well be a right of action against the professional advisors for their negligence, this is not a complete answer. In a typical trust situation, proceedings for professional negligence are far from straightforward. Establishing negligence may not be easy in cases where, for example, the relevant tax law is not clear. Furthermore, professional advice will normally be given to the trustees with the result, at least in Scots law, that only the trustees had title and interest to sue for professional negligence. They are not, however, the parties who normally suffer the loss; the loss is likely to be suffered by beneficiaries, who would lack title and interest to sue because they had no contact with the professional advisors. The defence might therefore be mounted that trustees themselves had suffered no loss and so should recover nothing.

123. Section 64 of the Bill introduces a new statutory remedy in Scots law, based largely on existing Scottish authorities, setting out a number of precisely defined grounds of challenge to defective exercise of fiduciary power. There is no equivalent statutory power in the 1921 Act. The Scottish Law Commission consulted on this issue in its Discussion Paper on Supplementary and

[35] [2010] EWHC 45 (Ch).

Miscellaneous Issues relating to Trust Law and again in its Consultation Paper on Defects in the Exercise of Fiduciary Powers.

Liability for litigation expenses

124. There are no fixed rules about who is liable to pay expenses in litigation proceedings, as awards are always at the discretion of the court. The general practice is making an award in favour of the successful party. The nature of trustees' liability for litigation expenses depends on the form of the interlocutor awarding expenses. The normal form of award is an interlocutor against named trustees without further qualification. This has the effect of making the trustees personally liable to pay the expenses to successful opponents but preserves the right of relief against the trust estate. The general rule is that trustees have such a right of relief provided that the expenses are necessarily, properly and reasonably incurred in the discharge of their duty. If trustees litigate following the advice of counsel, they will normally be entitled to reimbursement of legal expenses from the trust property.

125. The present scheme has the advantage of discouraging trustees from indulging in rash litigation, in that they might then be personally liable for expenses. Furthermore, successful litigants who raise or defend proceedings against trustees have a right to recover from the trust estate and, if that is insufficient, from the trustees' own private property. Nevertheless, the Scottish Government considers that the present system is too discretionary and potentially onerous for trustees. The basic rule should be that trustees who litigate as such should not be personally liable in expenses. The expenses would be awarded against the trustees as trustees and would be paid by them out of the trust property. If that proved insufficient the balance would not be payable by the trustees out of their private property.

126. A difficulty arises when a trust has insufficient assets to meet an award of expenses: when litigation is raised by trustees, a defender will have no obvious source of knowledge of the trust's financial position. In such a case, a successful litigant could be left without any payment of expenses. Section 65 deals with this by laying out a basic rule that trustees are not personally liable for the expenses of civil litigation to which the trust is a party. This is subject to particular rules which impose personal liability on trustees for those expenses in certain circumstances (for instance where the trust property is insufficient to meet the expenses or the trustee has brought about the litigation by breach of duty). Where a trustee is personally liable for expenses, the court may allow the trustee relief against the trust property. Trustees are also entitled to apply to the court for an order relieving them of personal liability for expenses on grounds of fairness. To obtain such an order, they would require to establish by credible testimony that the trust estate would be sufficient to pay the defender's expenses if the pursuers were unsuccessful in the action. Trustees will be personally liable for the expenses of litigation, which will be removed only if they satisfy the court that the trust has adequate resources to finance the litigation, and this will prevent trusts without adequate resources from raising proceedings.

Jurisdiction

127. As a result of delegation by various statutes and rules of court much of the trust litigation is conducted in the Outer House of the Court of Session while the sheriff courts hear cases in relation to certain functions in appointing and removing trustees. Trust law is a technical and specialised area, requiring considerable expertise not merely at a judicial level but among those

who present cases in court and those who may be appointed as reporters in cases where the facts require to be investigated.

128. Against this background, the Scottish Government considers that the current scheme of jurisdiction for trust litigation is appropriate subject to some reform. Remedies for some of the more straightforward issues should continue to be available in the sheriff court, including applications for the appointment and removal of trustees; applications relating to ex officio trustees; and applications to enable a beneficiary to complete title. These are all likely to be relatively frequent and routine applications that neither require a specialised knowledge of trust law, or involve a major discretionary element.

OTHER TRUST ISSUES

Accumulation of income and lifetime of private trusts

129. Income from trust assets must be distributed, retained as income, or accumulated. If it is accumulated, it becomes additional capital of the trust. Accumulation involves the addition of income to capital, thus increasing trust property in favour of those entitled to capital and against the interests of those entitled to income. Statute sets out that accumulations can only be lawfully directed for one of six periods, after which trust property cannot be accumulated.[36] The law in this area is complex, uncertain and inconsistent. For instance, significant problems have arisen as to what an "accumulation" is, what amounts to a "direction" to accumulate, what the duration of the permitted periods of accumulation is, and to the application of the rule restricting accumulations in a commercial context. This leads to a number of problems including increased costs for trusters. The Scottish Government considers that the rules of accumulation can be usefully repealed (section 41 of the Bill).

130. The Scottish Law Commission consulted on repealing the existing rules on restricting accumulation and successive liferents in its Discussion Paper on Accumulation of Income and Lifetime of Private Trusts. The repeal of the existing rules met with universal support.

Liability of trustees to third parties

Contractual liability of trustees: intra vires contracts

131. When trustees enter into a contract on trust business with a third party the presumption is that they are personally liable; thus the third party may claim against the trustees' private patrimonies.[37] To avoid liability of their private patrimonies, trustees have to make clear to the third party that they are contracting only as trustees. Where trustees are liable only in respect of their trust patrimony, the creditor has to claim against the acting trustees. If the trustees do not confine liability to the trust patrimony, they are personally liable to the other party to the contract.[38]

[36] See section 5 of the Trusts (Scotland) 1961 Act and section 6 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966.

[37] A trustee is considered to have two 'patrimonies'. The first is their 'trust patrimony' which comprises all of the trust assets and liabilities which they hold as trustee. The second is their 'personal patrimony' which comprises all of the assets and liabilities they hold in their personal capacity, which are not connected with the trust.

[38] Provided, however, that the contract is one that they may properly enter into, the trustees have a right of relief against the trust property, and so can settle the creditor's claim from the trust patrimony.

132. The present law is too ready to impose personal liability on trustees who enter into contracts without expressly limiting liability to the trust patrimony. The trustees are potentially liable to pay from their private funds should the trust property prove insufficient. That means that trustees may be putting their personal funds at risk even where they are carrying out their duties properly. Creditors, by contrast, benefit from the present law in that they have recourse to both the trust property and the trustees' private patrimonies.

133. Section 34 makes clear that where trustees enter into a contract with a third party which is within their powers then as long as the fact that the trustees are acting in a representative capacity is known to the third party then the third party's rights under the contract should be enforceable only against the trustees' trust patrimony. It is open to the contracting parties to provide otherwise.

Liability for delict and other wrongs

134. In respect of delictual liability[39] there is a lack of authority in this area, however, recent authority suggests that under Scots law, when trustees make payment of a delictual claim they are liable as individuals.[40] Trustees are, however, entitled to relief out of the trust property for any loss incurred personally. Whether the trustees are liable as individuals or only in their capacity as trustees can be modified by the form of decree that is taken against the trustees. If the trust property is insufficient, the form of decree becomes important: if the decree is against the trustees "as trustees", it is limited to recovery out of the trust property; if, however, it is against the trustees as individuals, it is not so limited and recovery is possible from the trustees' own property. If the trustees have themselves been negligent, it is possible for damages to be awarded against them personally without relief from the trust property.

135. The Scottish Government considers that trustees should be responsible for delicts committed by them or by their agents or employees. The question is the extent to which damages should be payable from the trust property or from the trustees' own assets. It is not preferable that trustees should be personally liable in all situations where their employees or agents had been negligent. Sections 35 and 36 lay out the general rule that damages are payable only from the trust property and trustees are not, therefore, personally liable. Nevertheless, power is conferred on the courts to apportion damages between the trust property and the personal assets of a trustee who had been personally at fault. This might be appropriate where, for example, the damage was caused partly by the trustee's own fault and partly by the fault of an employee of the trust.

Private purpose trusts and supervisors

136. These are two legal institutions that have appeared in recent years in a number of jurisdictions, in the form of a non-charitable purpose trust. A "purpose trust" is a trust that does not have defined persons as beneficiaries but rather exists to achieve a defined purpose, frequently of a philanthropic or business nature. One objection taken in other jurisdictions to a private purpose trust is that there is no identifiable beneficiary who can enforce the trust purposes. The solution favoured by those other jurisdictions that have adopted private purpose trusts is the supervisor,[41]

[39] Delict is a civil wrong which inflicts loss or harm.
[40] Meaning that a trustee might require to meet the cost of any damages for loss or harm caused from their personal patrimony , rather than from the trust property.
[41] Otherwise referred to as "enforcer".

whose main task is to ensure the proper implementation of the trust purposes, from the standpoint of those who may benefit from the trust.

137. Whilst it is already competent to establish a private purpose trust in Scots law, the Scottish Government's view is that, given their importance, Scots law should have express legislation dealing with private purpose trusts and supervisors. These matters are dealt with in sections 42 to 48 of the Bill.

Protectors

138. The Scottish Government want to ensure that Scots law of trusts is up to date with developments in other parts of the world that have proved useful. One institution that has proved successful in other jurisdictions is the protector. Their function is to ensure that the trustee of a trust, who could be a significant distance from the truster, is appropriately discharging their duties. This allows the truster to exercise a degree of control, or at least influence, over the trustees, and might give them some assurance as to whether the trust was being properly administered.

139. It is almost certainly competent at present for a Scottish truster to appoint a protector by express provision in a trust deed. The institution of protector is clearly wholly compatible with the underlying policy of the law of trusts in Scotland. Nevertheless, this is not commonly done, perhaps because there is no legislation dealing with protectors (which means that a truster must set out expressly the whole of the rights, duties, powers and liabilities of a protector in the trust deed). Additionally, some aspects of the position of protector calls for the exercise of careful judgement, and it may be thought that devising a suitable scheme is simply too difficult when a trust deed (which may contain other complex matters of a more substantive nature) is being drafted.

140. Sections 49 to 53 set out a statutory framework for protectors in Scots law, including a helpful list of powers that may be conferred on a protector by trust deed. It is entirely up to the individual truster whether any particular power should be included in respect of any particular protector. Accordingly, the list which is included in the Bill is designed to be wide, simply because it is a list of powers that a truster might like to consider but is not required to include in a trust. The duties of a protector would be fiduciary in nature: it can be said of the responsibilities typically conferred on a protector that they are for the benefit of others, which is the fundamental criterion for fiduciary responsibilities.

SUCCESSION

141. The Scottish Law Commission's 2009 Report on Succession included a set of recommendations for reform of the law regulating intestate succession.[42] Its first recommendation was that where a person dies intestate survived by a spouse or civil partner but not by issue the spouse or civil partner should inherit the whole of the net intestate estate. The Scottish Government consulted on this (and a number of other recommendations) in 2015. There was agreement with this proposal and the Scottish Government's response committed to implementing the recommendation.[43]

[42] See its Report on Succession in 2009 available at https://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf
[43] https://www.webarchive.org.uk/wayback/archive/20190324010110mp_/https://www2.gov.scot/Resource/0054/00542136.pdf

Rights of succession to intestate estate

142. A scheme for intestacy provides a default set of rules about what should happen to someone's estate when they die without a will. The Scottish Government's view is that a scheme for intestacy should reflect outcomes which individuals and their families would generally expect and on which there is a degree of consensus.

143. Under the current legal framework, where a person dies without a valid will a surviving spouse[44] and any surviving children[45] have rights on the intestate estate, known as prior rights and legal rights, that require to be satisfied before all other claims. Where prior rights and legal rights do not exhaust the estate, what remains of the estate is distributed in accordance with section 2 of the Succession (Scotland) Act 1964 ("the 1964 Act").

144. In the absence of a surviving spouse the cumulative effect of these rules is that the entire intestate estate will pass to the deceased's children, but in the converse situation where there is a surviving spouse but no children the effect of section 2 of the 1964 Act is that the spouse's rights may be limited to prior rights and legal rights and that any surviving parents or siblings would have a preferred claim on the remainder of the estate. Depending on the composition and size of the estate, this may result in the bulk of the estate passing to parents or siblings rather than the surviving spouse.

145. The Scottish Law Commission criticised this aspect of the current rules as being out of line with public opinion and with their assessment of what most childless testators would probably provide in their wills and therefore recommended that where a person dies leaving a spouse but no issue, the surviving spouse should be entitled to the whole of the net intestate estate. The Scottish Government agreed with that recommendation, which was supported in the responses to its own consultation on the Scottish Law Commission's proposals and committed to implementing it at the next opportunity (section 72).

Effect of divorce, dissolution or annulment on special destination

146. Section 2 of the Succession (Scotland) Act 2016 ("the 2016 Act") is concerned with the effect of divorce, dissolution or annulment on a special destination. Special destinations, also sometimes known as survivorship destinations, are conditions that commonly appear in the title of property held by more than one person, usually spouses, which provide that on the death of one of the spouses their title automatically passes to the survivor. Section 2 is a re-enactment of earlier legislation, with two earlier pieces of legislation on survivorship destinations repealed and combined in one place.

147. The effect of section 2(2) of the 2016 Act is to evacuate a special destination in favour of a spouse or civil partner where the marriage or civil partnership had been terminated prior to the deceased's death unless the terms of the destination make clear that the destination is to have continued effect notwithstanding the ending of the relationship. Evacuation is achieved by treating the surviving joint owner (B) as if they had already died before the deceased (A) in relation to the succession to the jointly owned property. Rather than simply preventing A's share passing automatically to B on A's death, it has been suggested that section 2(2) is open to an unintended

[44] Spouse here also includes civil partner.

[45] Children here also includes remoter issue, which refers to descendants or issue more distant, as distinct from a deceased's children.

interpretation under which it would actually operate to deprive B of his or her share and to vest it in A's estate.[46]

148. The Scottish Government considers that the drafting of section 2(2) of the 2016 Act can be usefully clarified here. Section 71 of the Bill seeks to do so by clarifying that the rule set out in section 2(2) applies only in relation to the succession to A's interest in the jointly held property and not in relation to the succession to any other interest in the property.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

149. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website at http://www.scotland.gov.uk/Publications/Recent. The EQIA concluded that, overall, the Bill will have some positive impacts on identified groups. The Bill will clarify and in certain instances strengthen the rights of child beneficiaries, for example, by placing a duty on the Court of Session to have regard to the views of 16 and 17 years olds in deciding whether or not to approve a trust variation or termination on their behalf and by setting out how the views of persons under 16 must be taken into account. It will also clarify, and in certain instances, strengthen, the rights of disabled beneficiaries, for example, by setting out duties on trustees to provide information to beneficiaries.

Human rights

150. The Scottish Government has assessed the effects of the Bill on human rights and is of the view that its provisions are compatible with the European Convention on Human Rights (ECHR).

151. A beneficiary's vested interest under a trust may constitute a possession for the purposes of Article 1 of Protocol 1 ECHR. A contingent interest may do so depending on how immediate or remote the beneficiary's interest.[47]

152. Part 1 of the Bill makes changes to the general rules of Scots trust law which govern how trusts are managed and operated. In particular as noted above, many of the trusts provisions in the Bill are default provisions which do not apply where the contrary is provided in the trust deed (either expressly or by implication). Where loss is caused to a beneficiary by an action for which the trustee is not made personally liable, it will generally remain open to the disadvantaged beneficiary to pursue their claim against the other beneficiaries who may have benefitted at their expense.

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[46] See Dr Jill Robbie's 2018 article "Death, Divorce and Defective Drafting", Edinburgh Law Review, Vol 22 pp 307-313; and Mr Scott Wortley's article - "Destination Rectifying Construction?" (forthcoming) – which takes issue with Dr Robbie's comments on the drafting of section 2(2) of the 2016 Act.

[47] In *Kopecky v Slovakia* (2005) 41 E.H.R.R. 43 the Grand Chamber of the ECtHR noted: '"[P]ossessions" can be either "existing possessions" or assets, including claims, in respect of which the applicant can argue that he or she has at least a '"legitimate expectation" of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right … cannot be considered to be a "possession", nor can a conditional claim which lapses as a result of non-fulfilment of the condition…'.

153. In respect of Article 1 of Protocol 1 ECHR, the Bill strikes an appropriate balance between, on the one hand, protecting the interests of trusters and in turn beneficiaries or potential beneficiaries in the trust property, and on the other, preventing trustees from being paralysed from properly administering to the trust by insufficient or inflexible administrative powers, or by the risk of personal liability for disadvantage caused to a remote or potential beneficiary.

Island communities

154. The Scottish Government does not anticipate any significant impact on island or rural communities as a consequence of this Bill. The provisions will apply equally to all communities in Scotland. The Bill affects those who choose to set up or administer a trust or who are beneficiaries under a trust and applies equally to those who live on an island or on the mainland. Conversely, for those not wishing to be involved with a trust, there is a range of other legal devices which may be considered and which remain unaffected by this Bill. The provisions on intestate succession are not affected by whether an individual lives on an island or not. An impact assessment has been carried out and will be published on the Scottish Government website at http://www.scotland.gov.uk/Publications/Recent.

Local government

155. The Scottish Government does not anticipate any significant impact on Local Government, except insofar as local authorities might hold property on trust as trustees or otherwise be party to a trust. If local authorities do hold property as trustee then they would need to familiarise themselves with the legislative changes brought about by the Bill in the same way as any other party to a trust. The provisions in the Bill related to succession law will not impact local authorities as they cannot inherit under intestate succession law.

Sustainable development

156. Given that the Bill is concerned with the powers and duties of trustees, the administration of trusts, and the court's powers in trust administration, the Scottish Government does not anticipate any significant impact on the environment.

CROWN CONSENT

157. Paragraph 7 of Schedule 3 to the Scotland Act 1998 requires that Crown consent be signified to the Parliament if the same Bill would need such consent were it passed by the UK Parliament. Crown consent is therefore required where a Scottish Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign. As the Bill is drafted on introduction, it is the Scottish Government's expectation that, in order to comply with Rule 9.11 of the Parliament's Standing Orders, Crown consent will be required. The Scottish Government's view is that the general reforms to the Scots trust law made by Part 1 of the Bill may impact the personal property of the Crown to the extent that such property may be, or may come to be, held in trust. By altering the rules governing the management and operation of trusts, the Bill has potential to affect the administration of trust property in which the Crown has an interest (whether as truster, trustee or beneficiary).

This document relates to the Trusts and Succession (Scotland) Bill (SP Bill 21) as introduced in the Scottish Parliament on 22 November 2022

TRUSTS AND SUCCESSION (SCOTLAND) BILL

POLICY MEMORANDUM

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents