OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 2 May 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 2 May 2023

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DELEGATED POWERS AND LAW REFORM COMMITTEE

14th Meeting 2023, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Mercedes Villalba (North East Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lord Drummond Young (Scottish Law Commission)
Lady Paton (Scottish Law Commission)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 2 May 2023

[The Convener opened the meeting at 10:06]

Interests

The Convener (Stuart McMillan): Good morning and welcome to the 14th meeting in 2023 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch their mobile phones to silent.

The first item of business is a declaration of interests. In accordance with section 3 of the code of conduct, I invite Mercedes Villalba MSP to declare any interests that are relevant to the remit of the committee.

Mercedes Villalba (North East Scotland) (Lab): I have no relevant interests to declare, thank you.

The Convener: Thank you, and welcome to the committee.

Mercedes Villalba: Thank you for having me.

The Convener: Before we move to the next item on the agenda, I take this opportunity on behalf of the committee to thank Carol Mochan MSP for her contribution to the committee and her diligent work during her time with us. She has been in touch to pass on her thanks to everyone who is involved with the committee and to send her best wishes to us. I thank her for that and wish her all the best in her new role.

Decision on Taking Business in Private

10:07

The Convener: Item 2 is to decide whether to take items 5 and 6 in private. Is the committee content to take those items in private?

Members *indicated agreement.*

Trusts and Succession (Scotland) Bill: Stage 1

10:07

The Convener: Under item 3, we will take evidence on the Trusts and Succession (Scotland) Bill. I welcome Lady Paton, chair of the Scottish Law Commission, and Lord Drummond Young, the lead commissioner and former chair of the Scottish Law Commission.

I remind all attendees not to worry about turning on their microphones as they are controlled by broadcasting. If you would like to come in on any question, please just raise your hand or indicate to the clerks.

Before we move to questions, I invite Lady Paton to make some brief opening remarks.

Lady Paton (Scottish Law Commission): Thank you, convener, and good morning. On behalf of the Scottish Law Commission, I thank everyone for their contributions in bringing the proposed legislation to the stage that it is at. It has been quite a campaign and we appreciate it.

The Trusts and Succession (Scotland) Bill is a much-needed bill. It has been eagerly awaited by many people and not just by lawyers but by members of the public. That is because people have to administer trusts throughout Scotland in many fields. Although I have reminded the committee of the various areas in which trusts crop up, I will just run through one or two again: the national health service; environmental trusts; pension administration; charitable trusts; common repairs involving tenement owners; property developers with funds reserved for snagging; business partnerships; church elders; and individual people making provision for their death by setting up a trust.

Those are only a few examples. Trusts permeate Scottish society, and the problem is that the current legislation that governs them is more than 100 years old. The main statute was enacted in 1921, since when society and business have changed considerably. In 1921, trusts were predominantly used for private estates, landed estates and private funds, but in 21st century Scotland, they provide a useful tool for many public enterprises, business activities and communal activities that are set up for society's benefit. Trusts are hugely important, and the bill seeks to modernise them.

In addition to modernising trust law, the bill contains some provisions on the disposal of an intestate person's estate on their death, the aim of which is to reflect more the public's expectations of who should inherit in that particular area in 21st century Scotland.

It is hoped that the bill will provide a major modernising boost to Scotland's society and economy as we emerge from the pandemic. The overall goal is to contribute to an increasingly efficient, fair, productive and prosperous economy and society.

We are fortunate to have with us Lord Drummond Young, who was the lead commissioner when all the trust work was done at the Scottish Law Commission and was instrumental in bringing about the relevant report and draft bill. I also believe that sitting behind me—I hope; I have not seen them yet—are the bill team from St Andrew's house, headed by Michael Paparakis. I hope that we can help you in any way that is necessary to advance the cause of the bill.

The Convener: Thank you very much, Lady Paton. Lord Drummond Young, is there anything that you would like to say at the outset?

Lord Drummond Young (Scottish Law Commission): We have been provided with a list of topics that it is understood that the committee would like to be covered. I have a treatment on each of them, and I propose that I simply go through them one by one. Obviously, I am very happy to answer questions on any matter that occurs to anyone, whether on these topics or otherwise. Should I just work my way through the list of topics?

The Convener: No, it is okay. We will just ask the questions and then you can respond.

Lord Drummond Young: That is fine.

The Convener: I will open the questioning and then hand over to colleagues. Lady Paton, you have made a few comments about the current legislation and the bill before the committee today, but can you explain why the commission chose a project that aimed to reform trust law? What, genuinely, were the key objectives that the commission was seeking to achieve?

Lady Paton: I would like to give you my views on that, convener, but I feel that it might be best answered by Lord Drummond Young, who took over the project at a much earlier stage in, I think, 2004—is that right?

Lord Drummond Young: I started in 2010, I think.

Lady Paton: He is aware of the driving forces behind the project. What I have gathered, though, is that trustees' duties and obligations are not made very clear in the Trusts (Scotland) Act 1921. Things have changed enormously, and the legislation is vague with regard to what trustees

are supposed to do. A church elder, for example, will want something that is as clear as possible.

There was also some negativity with regard to telling beneficiaries who were perhaps entitled to something under the trust that that was the case. In other words, there was no provision for releasing information to a beneficiary.

Those are two things that I picked up, but I think that there were considerably more things than that. I would invite Lord Drummond Young to comment at this point.

Lord Drummond Young: I was not a commissioner when the project was initially adopted, but I became the lead commissioner in its latter stages.

The main reason for choosing this project was the recognition that trusts are a very important part of the law not just in themselves but as an adjunct to many other things such as contract law, charity law and, to some extent, property law.

10:15

The main statute governing the law is the Trusts (Scotland) Act 1921. Quite frankly, that was out of date. It had been amended repeatedly, many of the important sections were chaotic and it was extremely difficult to use. I can vouch for that from my experience at the bar and on the bench. I practised in this area a lot at the bar, and I went on the bench in 2001. Soon after that, I became the designated trust judge dealing with trusts litigation in the Court of Session. The 1921 act was extremely difficult to use and extremely inaccessible, and the law clearly needed reform.

A major function of the Scottish Law Commission is to keep the law up to date, and it was thought that trust law was an area that was crying out for fairly major updating. That is what has happened, not only by reference to Scotland but by reference to practice throughout the rest of the world where trusts are in use.

The Convener: That is helpful; thank you very much.

Mercedes Villalba: Good morning. A key theme of the responses to the committee's call for views was that it is important that the legislation is accessible to trustees and beneficiaries without legal backgrounds. Lady Paton, you alluded to that in your opening remarks. Ideas that the committee received to enhance accessibility included drafting changes, Government guidance, a publicity campaign and having template legal documents that could appear in the bill. Will you comment on those ideas, especially the proposal to have style or template legal documents in the legislation?

Lord Drummond Young: We considered that and dealt with it expressly in the commission report, which is the fairly hefty volume that I have with me here. We rejected that proposal because there are a couple of very good style books available. One is by Alan Barr, who teaches at the University of Edinburgh, and one is by Kessler and Grant, who are both practising. I think that one of them is an English barrister and the other is a Scottish solicitor in this field of law. The English style book was modified, but we have proper Scottish styles here. Both of those books provide styles for lawyers.

There is perhaps scope for providing styles to let laypeople set up trusts. A good example is that, if you are collecting money to carry out repairs on the common stair in a tenement, you might want to put those moneys into a trust account. In such cases, it would be helpful to have a generally available style of trust, as well as instructions on how to use it and what you have to do. That would involve far more detail than could go in the Scottish Law Commission report. We did not think that it is really the sort of thing that should go in legislation; we thought that ancillary documents should be used for that purpose.

I am planning to write a series of articles for the *Scots Law Times*, the *Journal of the Law Society of Scotland* or other legal periodicals about the main changes that are effected by the bill, or things that might be perceived as changes even when they are not really. Of course, those articles are for the legal profession, but I agree entirely that it would help to bring the matter home to members of the public. Articles in the general press could help with that, and maybe the Scottish Government could ensure that documents are published that give guidance on how people can set up trusts for their own purposes.

I would be very happy to co-operate with that if any help is required. However, we felt that having style documents involves having more detail than you require in the bill. If you put too much into the bill, you get the problems that you had with the 1921 act—the documents get amended and amended and become almost unusable after a time. Therefore, we felt that it is better to have those documents in separate sources, such as style books or perhaps as styles issued by the Government.

Mercedes Villalba: Thank you.

The Convener: Unlike the commission's draft bill, this bill does not include pension trusts in its definition of a trust. The Scottish Government intends to ask the United Kingdom Government to implement a section 104 order, which is something that this committee is very aware of given the Moveable Transactions (Scotland) Bill, which will reach stage 3 on Thursday afternoon.

Will you give a view on the Scottish Government's approach to the request for a section 104 order with regard to pension trusts?

Lady Paton: Before Lord Drummond Young contributes, I will say that I am very much in favour of adopting that route. It is the safest route at present not to run into any possible legislative competence problems. There have been two very obvious difficulties in the past: one to do with children and one relating to trans people.

There is doubt about the leg comp, if I can put it that way, of the particular issue that we are referring to. I encourage a request to Westminster, which could be dealt with by a statutory instrument that would disapply the exclusion of pensions. That would be very helpful as it would mean that the act would apply directly to pension funds.

Lord Drummond Young: I agree entirely with that. It is of the utmost importance that pension trusts should be brought within the regime in the act using the powers that are available in the Scotland Act 1998—there are actually very wide-ranging powers in the 1998 act.

I have had conversations with solicitors who are involved in pension schemes. Since I reached retirement age, I have returned to the bar to do a certain amount of advisory work, much of which has been in the field of trusts, and pensions trusts in particular. Solicitors dealing in the area have repeatedly emphasised to me that it is essential that pension trusts should be brought within the scope of the bill. The reason is obvious: pension schemes are invariably organised using the medium of a trust. There is no reason whatsoever for using any regime other than the general system of trust law, otherwise you have wholly unnecessary complexity. The lawyers in the area tend to move backwards and forwards between different types of trust. Such a lawyer in his or her firm is a trust specialist; they will deal with pension trusts, other trusts such as environmental trusts or trusts in commercial agreements. They need to be able to move backwards and forwards with the minimum of effort, and using one scheme for all trusts is the way to achieve that.

I may have mentioned this when we appeared last time, but in relation to pension funds, the amount of money that is held in pension scheme trusts is enormous. I may have mentioned the plumbing pensions case in the Court of Session in the early part of last year; I wrote the report for that case in an advocate, not a judge, capacity.

The funds in pension schemes set up for the plumbing industry throughout the United Kingdom, as it happens, amounted to around £2.3 billion. In terms of pension schemes, that is not a very big one. I was informed by a solicitor of a local authority pension scheme that at that time contained assets amounting to £39 billion, which gives you an idea of the very large amounts of money that are contained in these pension scheme trusts. With increased longevity, they will get increasingly important.

We considered it essential that Scottish employers and Scottish scheme providers, at least, should be governed by Scots law.

The Convener: On the issue of the pension trusts and the potential section 104 order, have you had any dialogue thus far with the Scottish Government on the matter?

Lady Paton: There is dialogue proceeding—in fact, I understood it to be with Westminster. Just give me a moment.

I believe that the Government is communicating with Westminster. We could send further details about who has been corresponding with whom, if that would assist you.

The Convener: That would be helpful; thank you.

Lady Paton: We undertake to do that, then. The matter is in the middle of negotiations just now.

Oliver Mundell (Dumfriesshire) (Con): I will ask about the codification of trust law. The Law Society of Scotland and the Scottish Law Agents Society have expressed their support for the bill overall, but expressed regret that it is not a complete codification of trust law. For the committee's benefit, what did you see as the drawbacks of attempting a full codification?

Lord Drummond Young: We considered that when we were preparing the report and finalising the commission's draft bill. Codification is a slightly ambiguous word. In a sense, the present bill is a codification, at least in the areas that have traditionally been regulated by statute and with the addition of some others.

The Scottish Law Commission decided against legislation in some areas, particularly those relating to stating the underlying nature of a trust in Scots law. That subject has attracted some academic interest in recent years and is an area in which Scots law differs radically from English law, which is based on a dual system of law and equity. The basic system of English law began in the middle ages. A system known as equity is superimposed on that, and trusts are a product of equity rather than of basic common law. It leads to considerable complexity and confusion in the system, so I am happy to say that we do not have anything like that here.

Trusts have existed in Scotland since the middle ages, and they have worked well. No one really thought much about the theory or underlying conceptual structure of trusts. That changed with a

series of articles written in the 1990s, starting with one by Professor George Gretton of the University of Edinburgh, who was a law commissioner for a time, and followed by one by Professor Kenneth Reid, another law commissioner from that university.

They came up with what is generally known as the dual patrimony theory, which is key to what a trust is. In a trust, there is a trust patrimony. It might be best to think of it as a ring-fenced fund that is separate from the trustees' own patrimony. A trustee has his or her own private property—their own patrimony—and also controls the trust's patrimony. Those things are separate, which is important. For example, if the trust becomes insolvent, the trustees are protected from liability for the insolvency. Likewise, if a trustee becomes insolvent, the trust's patrimony is protected because the funds are ring fenced. That is one reason why trusts are used so much in pensions. The funds are ring fenced and earmarked for the provision of employees' pensions and will not be affected by any financial difficulties that the employer might have.

We decided that that basic theory had been quite well explained in academic articles and taken up in case law since. I have been the judge in some cases that have shown how dual patrimony theory works. We did not think that it was necessary to put that into the bill. It would be quite a difficult thing to put in a bill, because it is an abstract theoretical analysis of what a trust is. You will find the same thing in other systems, where the underlying conceptual structure of the trust is not generally the subject of legislation.

In addition, not all trusts are express trusts. There are implied trusts, which can come into existence with a partnership or, sometimes, in agency relationships. The court will hold that implied trusts are implied in particular circumstances, but it is difficult to put that kind of thing into legislation. There is also a third type—the constructive trust—which is a non-express trust that is imposed by a court as a form of remedy following a breach of trust. If a trustee commits a breach of trust and obtains what should have been trust property as a result of that, the court may hold that he or she holds that property on a constructive trust for the same purposes as those of the original trust or partnership.

10:30

We thought that it would be too complicated to put all those things into legislation. There was, in addition to that, a quite considerable academic debate about matters such as constructive trusts. The case law is still developing in that area.

We felt that it was simply a bit too early to put it all into a code; and, in fact, that there is not really any need to put it into a code. In relation to the codes that you find in other countries—such as article 9 of the uniform commercial code in the United States, which touches on that area—I think that I am right in saying that you will not find an absolutely comprehensive definition of what a trust is. We therefore did not feel that we had to go that far. Further, as I said, the law was still developing in relation to implied and constructive trusts and it was very hard to encapsulate that in legislation that would be easy to apply.

The concepts are there and they are used regularly. In a sense, it is common sense. However, we thought that it was better to leave matters as they are and let those areas develop as they are developing. It is really about areas that have traditionally been dealt with by legislation, which are very extensive, and some additions. That includes, for example, private purpose trusts or the power of the court to alter trust purposes, in relation to which we felt that what is—in effect—a code with some omissions was desirable. That is what we have tried to provide here.

Oliver Mundell: To be absolutely clear, it is a deliberate approach.

Lord Drummond Young: It is a deliberate approach. It is pretty much a code but with one or two bits left out—and for good reason, because the law was still developing in those areas and was not as clear as it might be. Quite frankly, it works well enough in practice in those areas. It was in relation to the stuff that is the subject of legislation that the big defects existed.

Oliver Mundell: Thank you for that. I will also ask about the role of the Court of Session compared with that of local sheriff courts. I know that there are some expanded powers for sheriff courts. Will you explain the policy thinking around retaining the Court of Session as the main court for the bill, given that it is traditionally more expensive and less geographically accessible?

Lord Drummond Young: All courts obviously have their normal responsibility for interpreting and applying legislation. That applies in cases about a range of subjects in the Court of Session or sheriff courts, as the case may be. There are a number of specific powers in the bill. At a general level, those are divided into powers of an—in essence—administrative nature, where jurisdiction is conferred on both the Court of Session and the sheriff court, and more specialised powers that usually involve considerable elements of judgment and discretion, which are conferred on the Court of Session alone. That was a deliberate policy choice.

The reason for conferring the latter jurisdiction on the Court of Session is that the issues that are involved are generally rather technical and call for considerable expertise and experience in the law of trusts. In the Court of Session, a judge is designated as the trust judge—I was the trust judge for about 15 years—and it is likely that he or she would deal with the great majority of the more technical trust work. Under the bill, that will now be done in the outer house. Much trust work was previously done in the inner house, but most will now be done in the outer house by the designated trust judge and using procedures similar to those that have been developed in the commercial court. That involves a high level of case management, including, in every case, documents known as "statements of issues", which set out in detail the issues on which the court is expected to come to a decision.

That procedure has been very successful in the commercial court. In the course of that procedure, it can be expected that the counsel and solicitors acting will be specialised in the field of trust law. That is simply a recognition of the technical and often very complex nature of the issues that arise in many trust cases. As far as I can see, in nearly every jurisdiction in which trusts are recognised, trust cases are given to a limited number of courts and, ideally, to a limited number of judges with expertise in trust law.

A further problem that can arise in relation to sheriff courts is in determining which court has jurisdiction. A trust does not have legal personality, and the trustees might live in various parts of the country or outside Scotland. That is commonplace. If they live in several different sheriff court jurisdictions or if some live outside Scotland, which is not unusual, there is the question of which sheriff court would have jurisdiction. That problem is avoided by conferring jurisdiction on the trust judge in the Court of Session. As I said, that accords with most present practice.

There is a default provision. If there is no obvious sheriff court with jurisdiction over the trust, Edinburgh sheriff court is the default jurisdiction. That is no more accessible than the Court of Session. On the whole, we thought that the Court of Session would be quite accessible in such cases. We should bear in mind that, even if the beneficiaries of a trust are in, say, the Highlands, the solicitors who deal with the affairs of the trust are often based in Edinburgh. Therefore, it is easy to exaggerate the accessibility problem.

I am quite happy to go through the bill's provisions that deal with the jurisdiction of the courts. There are between 15 and 20 sections that include such provisions. The general division is between the sections that confer administrative powers—for example, section 1 gives the sheriff court the power to deal with the appointment of additional or new trustees, and section 6 gives the sheriff court the power to remove a trustee because of various sorts of unfitness—and the sections that give the trust judge or, in the future, possibly trust judges in the Court of Session more specialised powers and jurisdiction. Such powers include making orders relieving trustees of the consequences of ultra vires actings or actings in breach of a fiduciary duty, as set out in sections 29 and 31. The Court of Session is being given those powers because they relate to highly technical areas that involve a strong element of discretion and judgment.

In addition, section 43 covers applications for an order requiring the fulfilment of the purpose of a private purpose trust, which is another specialised area. Section 44, which covers applications to reform a private purpose trust, corresponds with the existing cy-près jurisdiction relating to public purpose trusts. Such applications have nearly always been dealt with by judges in the Court of Session. That is where the trust judge can be expected to develop expertise and provide the service to the public and the profession that one expects the courts to provide.

I can go through all the sections—I have a list of them with me—but, generally speaking, the division is between the sections that provide sheriff courts with powers of an administrative nature and the sections that are more concerned with detailed provisions on the law of trusts and how they operate. Such matters involve considerable discretion, so it was felt that they should be handled with a degree of expertise and in a consistent manner throughout Scotland.

The Convener: I have a brief supplementary question. What process would take place if a trust was to be looked at? Under what is proposed in the bill, would that be dealt with in the Court of Session or by a sheriff court?

Lord Drummond Young: The standard grounds of jurisdiction in the sheriff court would have to exist. As I said, there can be a problem if the trustees are spread across the country, because a trust has no separate legal personality. With a company or partnership, we can always go to the jurisdiction where it was incorporated or where it has a place of business. With a trust, it is much more vague than that. That is why one court has to deal with it—hence the provision for Edinburgh sheriff court to be the default sheriff court, if you want to litigate that way.

It is quite hard with a trust, because of its basic nature. It is difficult to see how you could do anything about that. We have dealt with it as well as we can. Frankly, we did not feel that there would be any significant disadvantage in having

the Court of Session deal with those matters. It is not more expensive than the sheriff court; it is a bit of a myth that sheriff courts are much cheaper. That is especially true in cases in which the solicitors are in Edinburgh or Glasgow, and the majority of trust cases originate from solicitors in those cities. In those cases, the Court of Session is just as handy as the sheriff court.

Oliver Mundell: Do you expect that there will be more legal action as a result of the bill or could the bill reduce the amount of litigation? Is there sufficient capacity in the sheriff court to deal with such cases?

Lord Drummond Young: The answer to that is that there could well be an increase in litigation to begin with. That is pretty standard with most acts, as any obscurities or ambiguities get decided.

On the whole, the bill gives greater certainty in most of the law. It might make Scotland a more attractive trust jurisdiction, which might mean more trust business in Scotland. At present, one hears stories that a certain amount of trust business that originates in Scotland goes off to England because there is a perception that it is dealt with with greater expertise there and that the legislation is kept more up to date. I am not sure that that is right, although there is likely to be a trust bill at Westminster to deal with English trusts in the near future. I gather that the English Law Commission is looking at that.

There could well be an increase in overall trust business in Scotland, not just in court but elsewhere.

Oliver Mundell: The second part of my question was about whether you think that there is sufficient capacity and expertise to handle that.

Lord Drummond Young: I think that there is. There are plenty of experienced trust solicitors and advocates who specialise in trusts. As far as the Court of Session is concerned, I am well aware of judges who have great expertise in trust law. Lord Tyre, for example, was the commissioner responsible for some of the earlier stages of this project, and other judges have good expertise in trust law. Lord Docherty, who dealt with the Plumbing Pensions case, is another. There is no shortage of ability there.

Jeremy Balfour (Lothian) (Con): One of the responses that the committee received was about the role of mediation. There is nothing in the bill about that. Did the commission consider a formal role for mediation? If so, what policy considerations led to the decision not to include in the bill a process whereby, rather than having to go to the Court of Session or a sheriff court, mediation could be used as a stepping stone?

Lord Drummond Young: We did not consider mediation because we feel that that is a matter of procedure rather than a matter of trust law. Mediation is quite important. There is nothing to prevent people from adopting mediation procedures in relation to anything in the bill, but it is really a matter of the procedures that are followed in litigation or prior to litigation. The legal advisers in a trust dispute can readily go to a mediator, and nothing that we put in the bill can change that.

To the extent that there is legislation on mediation, it is on procedure rather than on the substantive law of trusts, and we did not want to complicate the bill unduly by taking in stuff from other parts of the law. For example, there is not very much on court procedure in the bill. We leave that to the basic statutes and statutory instruments that deal with procedure.

Jeremy Balfour: I will leave it there. Thank you.

10:45

Mercedes Villalba: The term “incapable” is defined in section 75 of the bill, and the definition is similar to the one that is used in the Adults with Incapacity (Scotland) Act 2000. In response to the committee’s call for views, the Law Society noted that the Scottish mental health review has recommended significant changes to capacity law in Scotland, which include removing the term “mental disorder” and moving from a capacity test to one of an ability to make an autonomous decision.

The Law Society suggested to the committee that the bill needs to be future proofed in case any changes to capacity law occur later in relation to the Scottish mental health review. We would be interested to hear your comments on the need for future proofing. If you think that that needs to be done, what are your thoughts on how it could be achieved?

Lord Drummond Young: Future proofing is always difficult because it is so hard to make predictions about the future. I do not know what form—[*Inaudible*.]—to amend the definition in section 75 of the bill. It is difficult to know how we could do that now, because we do not know what future legislation is likely to say. In the future, it should be possible to make provision for amendment of the definition but, frankly, we had to go on the best definition that we had available to us, which is what is in the bill.

Future proofing really requires further legislation. There are legislative techniques that you can use for that, but it is difficult for me to comment on the issue, because the commission was not asked to do that kind of thing.

The Convener: As a supplementary to that question, could a small amendment be made to section 75 at some point in the future? Could the definition potentially be amended via a statutory instrument?

Lord Drummond Young: Yes, there would be no problem with that. It would be the obvious way in which to deal with the issue.

The Convener: Okay. Thank you.

Bill Kidd (Glasgow Anniesland) (SNP): Under section 7 of the bill, trustees can remove a fellow trustee on the basis that the trustee has become incapable. Under section 12, a trustee does not get to participate in trust decisions if they are incapable or—perhaps more understandably—if they are untraceable. The possible risk of abuse of those provisions by trustees has been highlighted by some of the respondents to the call for views, such as Gillespie Macandrew LLP. Can you highlight any safeguards in the bill as it stands, or elsewhere in trust law, that would guard against that risk? Do you see some merit in the concerns?

Lord Drummond Young: I can see that there is some merit in the concerns. In a case in which trustees abuse the power under section 7 to remove one of their number, the person who is removed can challenge the decision in court. There is no difficulty about that. Any decision can be challenged in court—I emphasise the generality of the right to go to court. That is why we did not see that there was any need for particular protections in that regard.

In addition to that, there is a power in sections 1 and 2 that allows incapable and untraceable trustees to be removed by the court. In a doubtful case, that is the procedure that you would use. There are cases in which the reasons are very obvious, which may be the more common ones. Most of the grounds for removal are fairly clear. "Incapable" is the one that the doubt is about. The others include

"convicted of an offence involving dishonesty",

which is fairly obvious, as are the ones that follow it.

Bill Kidd: I suppose that it is about mental incapacity.

Lord Drummond Young: "Incapable" is defined in section 75, which we have just been discussing, although that may require to be amended. I would agree that, if the general legislation in the area is amended, the bill should be amended accordingly. However, until we know what those amendments will be, it is very difficult to amend the bill. A statutory instrument to allow that to take place immediately would be the ideal way of doing that.

Bill Kidd: Under the structure of the bill as introduced, would it be possible for a trustee to challenge such a decision without reaching the stage at which it was necessary to go to court? Would the ability to challenge be built in for anyone who was dealt with in such a manner?

Lord Drummond Young: If there is a challenge, the way to do it is to make an application to the court. You want to have easy procedures for that to enable the court to come to a decision fairly quickly.

Bill Kidd: That makes sense. Thank you very much.

Mercedes Villalba: The Law Society and the academic lawyer, Yvonne Evans, have suggested that, in view of Scotland's increasing emphasis on net zero goals, sections 16 and 17 could be amended in relation to trustees' powers of investment. The bill could be amended to allow trusts to adopt environmentally friendly investment policies, particularly when those might underperform compared with other investments. Does the commission have a view on that suggested amendment?

Lord Drummond Young: The commission did not have any particular view. I have dealt with that sort of issue and I gave a talk at a conference on the area. I do not think that there is any particular bar to taking environmental considerations into account in investment. I have the text of the talk that I delivered on the issue.

It is possible, given the existing powers, to take environmental considerations properly into account as part of the general power of investment, which I do not think is to be construed as a power to maximise returns at all costs. It requires the trustees to take proper professional advice, of course, and to take due care in considering their investments, but there is nothing in that to prevent environmental considerations from being taken into account.

In addition to that, in relation to the decision to purchase any particular investment, it would be very hard to show that an investment was unprofitable just because it was made on environmental grounds. There is usually a choice of possible investments, and choosing the one that is best environmentally is often a sensible thing to do. You cannot show that it is wrong—that is the important point.

Beyond that, I would have no particular objection to including a provision on the matter, but there is a danger that trustees can sometimes go a bit too far. I am a trustee of a large charitable trust—I am talking now about my experience as a trustee—in which a body on which the trustees were not represented but which had a certain jurisdiction over the charitable trust decided that a

group of trusts should get rid of all their investments in companies with an interest in oil and other fossil fuels. It was done in an unthinking way, without any phasing out, and the move produced a very bad investment that year. Had I been asked, I would have said, "By all means move towards that, but do so in a sensible manner and phase out the investment properly."

There is no absolute right and wrong here. Yes, the general policy of phasing out fossil fuels—to take that example—is quite compatible with existing trustees' duties, but it should be done in a sensible way to ensure that a shock is not delivered to the trust.

Mercedes Villalba: So, although there is nothing to prevent environmental investments, is it possible to have a clarifying amendment to make it clear that maximising financial returns is not the only permissible criterion?

Lord Drummond Young: Something of that sort could be inserted into section 17, which deals with the exercise of the power of investment. For example, section 17(1)(a)(i) refers to

"the suitability to the trust of the proposed investment",

which would mean that, for example, with the trust fund of a charity set up to achieve a particular purpose, trustees could avoid investing in a company that was antithetical to that purpose. The classic example is trusts set up for the purposes of the Catholic church, which do not invest in companies with an interest in abortion and other procedures that are forbidden by Catholic canon law.

That is just one example—there are many others, and the provision will apply to nearly all charities. The reference, then, to

"the suitability to the trust of the proposed investment"

does permit that sort of decision to be made. Section 17(1)(a)(ii) deals with "the need for diversification", which is a general investment point, while section 17(1)(b) refers to taking "proper advice". Nothing in those provisions prevents taking environmental considerations into account.

If you wanted to add something specific, you would probably look at section 17, but you would have to be careful about how any such amendment was framed. As I have said, the commission reported on this matter eight years ago, I think, before people became so concerned about environmental issues. Since then, I have delivered a talk on the environmental issues. I could make the text of that talk available, if you were interested in receiving it.

Mercedes Villalba: Yes, please.

Lord Drummond Young: I will do so. As I have said, I do not think that it is a serious problem at present, but you could put in something that expressly authorised such things. I might add a covering note in that respect.

Mercedes Villalba: Thank you very much.

Jeremy Balfour: I wonder whether I can follow up that point by asking how a trust can get best financial benefit. If it is meeting other charitable needs, is that enough? Could the bill express that a bit more clearly? Does there need to be a slight clarification with regard to a trust—say, a charitable trust—always feeling that it has to get best value from its investments or property sales?

Lord Drummond Young: That is the topic that I considered to some extent in the talk that I mentioned. It was at a conference last year, I think, that, strangely enough, was organised by the Swiss embassy here in Edinburgh.

The law is reasonably clear at present, but a provision could be put into the bill. I would be happy to co-operate on devising some sort of amendment to it that permits what you suggest. The bill team would have to do it initially. It is important to have careful instructions about exactly what you want to be added to the bill and what topics you would want to be covered.

11:00

Jeremy Balfour: That is helpful. Thank you for your kind offer.

I move on to an issue that has been raised by one of the legal firms. It concerns section 19 of the bill, which is on nominees. The law firm thinks that the section might not go far enough. Specifically, it has said that doubt would remain as to whether trustees could use a nominee custody structure or sub-custodians. I am interested to get your view on the scope of section 19 and any potential risks that have been identified in relation to it.

Lord Drummond Young: Section 19 is a default provision. You can provide to the contrary in the trust deed quite easily but it is a default power on trustees to make use of nominees

"for the purpose of the exercise of any of their powers".

It is designed to provide the trustees with flexibility in administration.

The general policy is discussed in chapter 8 of the Law Commission report on trust law from paragraph 8.11 onwards. As a matter of law, a nominee will normally be classified as a fiduciary, like a trustee. The power to appoint a nominee is constrained in section 19. Section 19(3) imposes a trust on determined assets held by a nominee

"irrespective of any purported agreement to the contrary"

and in the manner specified in section 19(7). The provision is quite prescriptive, but you should bear in mind the fact that it is a default provision. A solicitor can, in a standard trust deed, change it.

If a nominee is acting, the trustees must keep the relative arrangement under review under section 19(10). There has been a bit of discussion about the position of client money, which is normally regarded as held on trust. I had a dispute with Lord Hope, who expressed some views on Scots law in an English Lehman Brothers litigation some years ago. I published an article disputing Lord Hope's interpretation in a collection of academic essays in honour of Professor George Gretton. It is important that client money should be held on trust by a nominee or however you designate the person. A nominee is, basically, a kind of trustee. That is the central point that I am trying to make.

To the extent that it is proposed that there could be changes to the provision, which the Law Commission discussed extensively following consultation with members of the legal profession, I would be happy to look at proposals for amendment of it and consider whether they would be suitable.

The Convener: We seem to have lost Jeremy Balfour.

We can come back to Jeremy if he wants to come back on that point.

Jeremy Balfour: No, I was just saying thank you to Lord Drummond Young for the kind offer. We may well come back to him on it.

The Convener: We move on to questions on sections 25 and 26. We have received a variety of responses on the provision of information under those sections. Some concern was expressed regarding the level of information that could be provided.

We had some comments from Anderson Strathern, which said that it felt that the provisions

"have been drawn too widely and places too onerous a duty on trustees to provide information."

Gillespie Macandrew LLP thought that the provisions could

"open the door to increased litigation by disappointed potential beneficiaries for whom receipt of information on the existence of the trust might lead to an expectation of a benefit thereunder."

In view of those and other comments that the committee has received, do you wish to offer any reflections on the policy underpinning the provisions at this stage?

Lord Drummond Young: The policy underpinning the provisions is discussed at some length in chapter 11 of the commission's report, which is headed "Information duties".

The problem was that there are no express information duties in Scots law. We followed the usual law reform technique of looking at other jurisdictions and following what they do. We did that quite extensively. It was obvious that, in those other jurisdictions, there were competing theories. Those are discussed in paragraph 11.8 onwards.

The duties are quite complicated. We sought views of members of the profession on those matters, and we took those comments into account.

At the end of the day, there is conflict between the trustees' interests in getting on with the administration without being bothered and the beneficiary's interests to be told of his or her rights in the trust. The provisions in the bill are an attempt at a compromise. On the whole, respondents were fairly content, I think, with what we proposed.

The consultation responses are referred to at length in chapter 11 of the commission's report. It is quite a substantial chapter. I am not sure that I can really summarise what it says here.

It is always possible—this is in section 26 of the bill—for the truster, by

"express provisions of the trust deed",

to limit or expand the trustees' statutory duty to provide information. I emphasise that that is a default provision. It is not difficult for a solicitor to devise a form of trust deed that alters those duties in some way or other.

Sorry—I am trying to look at the text of the bill.

The Convener: On information sharing, is the bill fine as proposed, or are the concerns that others have raised warranted?

Lord Drummond Young: Sorry—I am trying to look at the terms of the bill as introduced.

The basic duty to provide information involves trustees who become aware that a person is a beneficiary informing that person that they are a beneficiary. I really do not see what the problem is with that. I do not see how they could avoid doing that. To do otherwise would be to deny the beneficiary's fundamental right to know that he or she is a beneficiary. That is what section 25 does.

There is a duty to identify and trace beneficiaries. Again, I think that that is fairly obvious.

The Convener: That is helpful.

Lord Drummond Young: Section 26 confers a certain degree of discretion on the trustees. Section 25 deals with the fact that a person is a

beneficiary. Section 26 covers the wider point about the terms of the trust. Section 26(2) says that

"subsection (1) is subject ... to the express provisions of the trust deed"

and the rest of the section.

Solicitors may be complaining about this, but when they draft a trust deed, they can easily exclude the duty in section 26. They cannot exclude the duty in section 25, but that follows from the fundamental policy decision that a person who is a beneficiary should be informed that they are a beneficiary. That is perhaps self-evident.

The Convener: If you want to provide any further considerations on sections 25 and 26 in writing after the meeting, that would be helpful.

Lord Drummond Young: Yes.

The Convener: Thank you.

I hand over to Jeremy Balfour to ask question 12.

Jeremy Balfour: For our benefit, will you explain why the commission decided to make the role of supervisor optional in chapter 6 of part 1 of the bill, when it is mandatory in many legal systems that permit private purpose trusts?

Lord Drummond Young: We did not think that it was necessary. This relates to the contribution, which is mentioned in the report, from Dr Patrick Ford of the University of Dundee, who is an expert on trust law.

A number of jurisdictions have legislation that permits private purpose trusts. The example that we use as a kind of paradigm is the Special Trusts (Alternative Regime) Law 1997—the so-called STAR legislation—of the Cayman Islands. Although the Cayman Islands are an offshore jurisdiction, they are a reputable offshore jurisdiction, if I can put it in that way. Their judges and lawyers are frequently Scots who have gone out there; I have known one or two people who have gone there or been there. It is not one of the more dubious jurisdictions.

The STAR legislation provides for a supervisor under the name of an "enforcer". The word "enforcer" attracted critical comment for reasons that will be fairly obvious if you know about the criminal underworld in the west of Scotland in particular, so we changed it to "supervisor", which we think reflects what the person does.

Private purpose trusts are not recognised in English law. The case of Morice v Bishop of Durham in 1804 held that the only trusts that are recognised in English law are trusts that benefit named or identified persons and trusts that are charitable in the technical sense of that word. The concept of charity in those days was under an English statute of 1600; that was not an area that moved on very well.

Private purpose trusts are generally not used in English law, and any system that is based on English law or English equity has had to provide express legislation on the matter. It was felt that enforcement was a problem, and the enforcer—the equivalent of the supervisor—was considered to be essential to make sure that trusts could be enforced.

Patrick Ford pointed out to us that, in Scots law, there is a well-established concept of interest to sue. To raise an action in court, you have to have title to sue in the sense of a legal title, and you must establish that you have an interest to sue in the sense of a pecuniary or proprietary interest in the outcome of the action. It must make a difference to you; you cannot raise abstract points.

11:15

We felt that, ultimately, that was the answer. The concept of interest to sue allows a range of people to enforce a purpose trust. If you do not have an interest to sue, you cannot go to court to enforce the trust, but there will be people with that interest.

There are quite a lot of public purpose trusts. An example that I think that I mentioned on the previous occasion that we were here is the Nuclear Liabilities Fund, which is a purpose trust that covers the decommissioning of nuclear power stations throughout the United Kingdom. Scots law was chosen in that case because Scots law permits purpose trusts.

There are a number of other public purpose trusts in Scotland. They are not unusual at all and have been recognised for a very long time. The Scottish Law Commission took the view that those purpose trusts fulfil important functions in modern practice because the trust is the standard method of ring fencing funds for any particular purpose. That includes environmental purposes, which you get with the Nuclear Liabilities Fund.

A purpose trust can be used to identify a fund for a specific purpose in a commercial transaction, such as for snagging work in a construction contract or for making good the liabilities in a commercial development such as a shopping centre. The operation of those activities can be extremely complex, and having a ring-fenced fund to pay for future liabilities can be useful. Purpose trusts can also be used to isolate and hold electronic material.

Many of those examples are really private rather than public purpose trusts, but we could not see any real distinction between public trusts and

private trusts in this respect. For example, the fund to meet environmental liabilities in a commercial development is technically a private trust, but it is a purpose trust and it functions in much the same way as the Nuclear Liabilities Fund. It is a way of meeting your environmental liabilities and making sure that there are funds available to do that, because having funds readily available can be important.

Many of the so-called public purpose trusts are actually private in nature because they were set up by private parties to fulfil their own purposes. After the discussions with Dr Ford, it was decided that we should make use of the concept of interest to sue—that is how we felt that we should proceed.

We thought that private purpose trusts are almost certainly permitted under existing Scots law. As I said, there is a vague distinction between private and public purpose trusts. The commission was slightly concerned because a purpose trust of any sort other than a charitable trust is not recognised by English law. English judges who are now in the UK Supreme Court have a rather bad record of failing to give effect to institutions that are distinctive in Scots law. We were concerned that something might be done to stop the creation of purpose trusts, and we were concerned not to allow that to happen because they are used extensively in Scots law at present.

I hope that that explains why we thought that we needed to authorise, by legislation, the use of private purpose trusts. It is probably strictly not necessary, but it is safer to do it.

Jeremy Balfour: That is fine. Thank you for that helpful explanation.

The Convener: Jeremy, do you want to continue?

Jeremy Balfour: Chapter 7 extends to charitable trusts. Will you explain how, if there was a protector for a charitable trust, their powers and duties would sit alongside the Office of the Scottish Charity Regulator's powers to regulate charitable trusts?

Lord Drummond Young: In relation to charitable trusts, the primary regulation will be done by OSCR. A protector is optional. The reason for permitting a protector is that it already exists in Scots law; we think that the provision is not innovating at all.

As we prepared the report, one of the commissioners, Professor Hector MacQueen, pointed out that George Heriot's Trust, by which George Heriot's school was established, provided in 1624 for a group of overseers, who appear to have functioned in exactly the same way as a modern protector.

You can use the protector if you want to. I would have thought that, with charitable trusts, it may not be a good idea. It is more in non-charitable trusts that you would want to use the protector, but we could not see any reason for excluding them from charitable trusts.

At the end of the day, it will be OSCR that does most of the regulation, but private purpose trusts extend to many non-charitable purposes. I gave the Nuclear Liabilities Fund as one example—it is not charitable, but it is an important trust that fulfils important public purposes.

Jeremy Balfour: That is helpful. I will go a wee bit further. As you may be aware, as well as this bill, the Charities (Regulation and Administration) (Scotland) Bill is going through the Scottish Parliament. If you are not aware of that, perhaps you could write to the committee on my next question.

How do you envisage that OSCR's administrative power to appoint interim trustees to charitable trusts on its own initiative under section 8 of the Charities (Regulation and Administration) (Scotland) Bill will work with the court's power to appoint trustees under chapter 1 of part 1 of the Trusts and Succession (Scotland) Bill? Is there an interaction simply on the face of the two bills, or will that cause contradictions?

Lord Drummond Young: I would be surprised if there were anything in that regard. Are you referring in particular to the institution of protector or to the Trusts and Succession (Scotland) Bill more generally?

Jeremy Balfour: I am speaking more generally.

Lord Drummond Young: I do not think that there is anything in the bill more generally in that respect. OSCR is concerned primarily with the application and enforcement of charity law, which is a distinct area from trust law. Nearly all charities are constituted as trusts—the bill is, as it were, the ground on which the charities rest.

I would be surprised if there were any real conflict. The bill is concerned with the basic legal structures that are used. OSCR is concerned with the application of charitable purposes, so there is a difference, I think. I would not expect there to be conflict; there has not been in the past. However, I will look at section 8 in particular of the Charities (Regulation and Administration) (Scotland) Bill.

Jeremy Balfour: I am grateful for that.

Bill Kidd: I thank Lord Drummond Young for his evidence so far. Section 61 of the Trusts and Succession (Scotland) Bill proposes that, once a private trust has been in existence for 25 years, it can have its trust purposes altered on application to the Court of Session.

Half of those who responded to the committee's call for views, including the Faculty of Advocates, believe that that period is longer than necessary and that the minimum period should be shorter. Some who responded said that there should be no period at all before which a court application could be made. What are your reflections on the responses that the committee received?

Lord Drummond Young: The commission consulted in detail on the matter. We were conscious that what is now section 61 of the bill would be novel worldwide. It deals with the problem of time and the law. You cannot predict the future. As a wise person once said,

"Never make predictions, especially about the future."

I think that that is supposed to have originated from the celebrated Danish physicist Niels Bohr, although he may have been quoting a Danish folk saying. It is difficult to predict the future, which is what the provision is designed to do. It conforms to some extent to the cy-près jurisdiction that you get with public trusts, which is designed to deal with an unforeseen change in circumstance.

The issue became particularly acute with private trusts, because the Law Commission decided that the existing limitations on the duration of private trusts should go. That movement has been taking place in a number of jurisdictions throughout the world. Scotland has always placed fairly limited restrictions on the duration of trusts, so there may be less change here than in some other jurisdictions, such as the United States or New Zealand.

Trusts can last for a very long time, but things can change and it may therefore be necessary to change a trust's purposes. In the case of a family trust, there might be a change to deal with the family's current situation. The general theory, which is expressed in the commission's report, is the so-called dead-hand argument, which says that members of the present generation should not deprive succeeding generations of the power to do as they wish with trust property. In the 1950s, the celebrated American academic Professor Lewis Simes wrote:

"it is socially desirable that the wealth of the world should be controlled by its living members and not by the dead."

In the light of that, we thought that provision should be made for changes in circumstances analogous to the existing cy-près jurisdiction. One example of that would be a change in the family. In our report, we give the examples of a disabled child being born, of a member of the family becoming mentally incapable and of the family needing funds to provide for a daughter's university education.

There can also be changes in a trust's financial circumstances. The analogy that I drew was of the case of the R S Macdonald Charitable Trust, which I dealt with as the trust judge in the Court of Session. The trust was set up many years ago to provide for certain quite closely defined purposes. Its main asset was the Glenmorangie distillery, which was one of the last privately owned malt whisky distilleries and which the trustees sold in the 1990s for a vast sum of money. The trust received a vast increase in its funds and something had to be done about that. The issue was how to provide for suitable disposal of the funds.

A family's financial circumstances and its needs and resources may change. A breadwinner may lose his or her job, or there may be the need to put a daughter or son through university. A great number of things may change, so the measure is designed to provide flexibility, under the control of the court. It would not cause a radical change to a trust.

The commission consulted on the duration. I was very conscious that this was a novel jurisdiction. I did not know how it was going to go down and I was pleasantly surprised by the favourable response. The period of 25 years reflected a fairly lengthy default provision. That can always be changed in a trust deed. If you like the policy in the section, you can provide for five years, 10 years or whatever you like. It will always be under the control of a judge. You have to persuade the judge that there has actually been a change of circumstances.

11:30

Bill Kidd: Does that mean that, although section 61 proposes 25 years before someone could apply to the Court of Session, that period would not necessarily apply?

Lord Drummond Young: You are talking about section 61(3)(c). Section 61(4)(b) says that

"paragraph (c) ... is to apply with the substitution, for the reference to 25 years, of a reference to a shorter period of time (being a period specified in the deed)."

The trust deed can quite readily provide for less than 25 years.

Bill Kidd: That is really helpful.

Lord Drummond Young: As I said, there was an element of compromise. We did not want the default period to be too short, because some people liked the idea of continuing certainty in trusts. We felt that 25 years was a reasonable compromise; the period can always be changed in a particular trust.

Oliver Mundell: I want to ask about litigation expenses and, in particular, the Law Society's concerns about section 65. The Law Society was quite outspoken on that, citing

"a severe danger of a conflict of interest"

and describing section 65 as

"quite a radical provision",

which, it suggested, may deter people from becoming trustees or lead them to unfavourably settle or to abandon legal proceedings for fear of personal liability. Do you have any comments in response?

Lord Drummond Young: We looked at that, as discussed in detail in paragraphs 16.22 to 16.37 of the commission's report. Those particular provisions followed two earlier discussion papers: one on liability of trustees to third parties; and a second on supplementary and miscellaneous issues relating to trust law.

There is a certain analogy with companies here, but the trouble is that, with a company, you know what its financial position is, to some degree, by looking at the companies register. The central point here is that normally, the expenses will be recoverable from the trust's property without liability on the part of the trustee. If the trust property is insufficient, the trustees will be personally liable from their own property, but that is subject to a provision in section 65(6) that

"the court may, if it considers it would be unfair not to do so, relieve the trustee of personal liability for certain expenses".

That was thought to strike a fair balance among the competing interests, in particular those of the trustees and those of the party engaged in litigation with the trust. In these matters, there is inevitably a degree of compromise and uncertainty. You cannot avoid that. As I say, the issues are discussed from paragraph 16.22 of the commission's report.

Oliver Mundell: You would recognise the risk for parliamentarians and the Parliament in seeking to proceed with the legislation. If you read its submission as a whole, the Law Society is generally quite discursive about the bill. When I see words like

"severe danger of a conflict of interest",

"radical provision" and "real issues", it starts to worry me that the balance might not be quite right.

The Law Society also points out that non-recovery is a standard risk of litigating. I am thinking of examples where people take on roles in charitable trusts, not expecting that their personal property might be at risk if they proceed with litigation. I hear what you are saying about what the court "may" do, but if someone is taking legal advice it should be clear that there will always be a risk associated with that. I am just trying to satisfy myself that the bill strikes the right balance.

Lord Drummond Young: As far as I am aware I have not seen what the Law Society wrote on that point, but it sounds rather exaggerated. Expenses are always under the control of the court. One of the reasons for trying to focus trust litigation on the trust judges is that they are aware of all such matters and of the need to strike a balance here. At the end of the day, a balance must be struck, and it will be specific to the individual case. There are cases where trustees behave unreasonably, but normally they will not. If they act in accordance with proper legal advice the risk of that is pretty minimal.

Oliver Mundell: The Law Society suggests that the starting point, or the principle, should be that trustees should not have any personal liability unless it can be shown that it is fair for them to be liable, so it is suggesting flipping that point around. Without summarising its position unfairly, from my reading it seems that it is suggesting that the principle that personal liability should be introduced is wrong.

Lord Drummond Young: Section 65(1) of the bill sets out the basic rule:

"Subject to the following provisions ... a trustee does not incur personal liability for the expenses of civil litigation to which the trust is party."

The bill sets out exactly what the Law Society wants. Section 65(2) deals with the position where

"the trust property is insufficient to meet the expenses",

in which case

"the excess is recoverable from the personal property of the trustees".

Quite frankly, if trustees are becoming engaged in complicated litigation when there is hardly any trust property—that is what we are talking about here—they ought to draw that to people's attention and possibly drop out of the litigation at that point.

Section 65(3)(a) deals with litigation that

"is, in the opinion of the court, unnecessary".

Section 65(3)(b) covers certain specialised areas involving a judicial factor. Section 65(3)(c) deals with cases where

"the litigation relates to the trustee's opposing the reduction of the trust deed and the trustee is unsuccessful".

Ultimately, of course, the court always has discretion on litigation expenses. Section 65(3)(d) deals with cases where

"the trustee has, by breach of duty, brought about the litigation".

That is liable to constitute negligence on the part of the trustee. That is what the reference to breach of duty means there.

Section 65(3)(e) deals with the rather specialised case where a minority of trustees litigates against the wishes of the majority, and does so unsuccessfully. Again, that is a case

where there are special circumstances. The position is likewise in cases covered by section 65(3)(f), where a minority of trustees defends litigation without consulting the others and

"without the defence being of any benefit to the trust."

A trustee who takes proper legal advice and behaves in a responsible manner should not be under any difficulty from those provisions. I am slightly surprised by the Law Society's response. If I could be sent a copy of it I would be very happy to respond to it in detail. As I have said, the position is dealt with at some length in paragraphs 16.22 onwards of the Scottish Law Commission's report.

Oliver Mundell: The submission is on the Parliament's website, but I am sure that the committee clerks would be happy to send it to you. I am sure that, like me, the committee would be interested if you wanted to review the Law Society's points. Having seen many Law Society submissions on various bills, I think that its comments on section 65 seem quite strong. We would greatly appreciate any feedback that you have.

Lord Drummond Young: Paragraph 16.32 of the commission's report, which refers to responses to a separate consultation paper, says:

"respondents, including the Faculty of Advocates and the Judges of the Court of Session, agreed with the general structure of our proposals, but the Law Society was concerned that imposing personal liability on trustees in the first instance would mean in practice that trustees would hardly ever dare to litigate; they thought that exclusion of personal liability should be the norm."

The

"Advisory Group indicated that it should be made clear that currently trustees normally have a right of relief against the trust estate if they are found liable for litigation expenses, and that this should be made clear in the Report."

Paragraph 16.33 says that, in the light of those comments, the scheme was revised

"so that a trustee does not normally incur personal liability for the expenses of litigation to which the trust is a party."

That is what section 65(1) says. The report continues:

"We consider that the following recommendations deal with the concern expressed by our Advisory Group that ... a trustee should normally have a right of relief against the trust estate if he or she is found liable for litigation expenses. The normal position ... is that a trustee does not incur personal liability, but will only do so if a court order is made to that effect. In the latter situation, it will normally be inappropriate for the trustee to have any right of recourse against the trust estate",

but

"express power is given by"

a

"recommendation ... to allow the trustee relief against the trust property"

in some circumstances, if the court agrees. Under section 65(5),

"the court is given a residual power to relieve a trustee of personal liability for expenses."

A considerable number of safeguards are built into the bill.

The danger is that a trustee might litigate irresponsibly—that is not common, but it happens occasionally. However, the commission made it clear that the norm should be that a trustee does not incur personal liability, which is precisely what the bill achieves. It is important to read the sections carefully and to see what the norm is and what provisions deal with exceptional situations.

Oliver Mundell: The policy concern stems partly from the fact that lots of people who interact with trusts might not be familiar with the law and court proceedings. I guess that the point is that, if someone was looking at taking on responsibilities for a small charitable trust or interacting with a trust of relatively modest size, the fact that they might become personally liable could put them off.

Lord Drummond Young: If someone knows about the law, that should not be a problem. I am a trustee of charitable trusts and I am aware of the problem that you mention. On occasion, I am drafted on to a trust because someone with a bit of legal knowledge is wanted.

If trustees behave responsibly and take proper advice, the issue should not be a problem. I accept that there may be reluctance to take elaborate legal advice for very small trusts—there could be problems there. However, under section 65(1), the norm is that a trustee does not incur personal liability. I think that the Law Society has rather lost sight of that central point. In addition, litigation expenses are under the court's control.

Oliver Mundell: I will ask a final question about something that I have thought of as you have been answering questions. Would there be merit in putting in the bill an exemption from personal liability when people act in a charitable capacity or when a trust is relatively modest?

11:45

Lord Drummond Young: The danger with that is that it gives the trustees carte blanche to do what they want. If there is no liability, the trustee can really do what he or she wants, and a danger exists that someone behaves in a completely irresponsible fashion. It is open—this is provided somewhere else in the bill—to

"relieve a trustee from liability"

for negligence but not gross negligence.

A division has been drawn in Scots law between ordinary negligence and gross negligence, which has been the subject of repeated criticism by English judges, because English law does not recognise that distinction. For example, in a recent case, which I think involved Jersey—or it might have been Guernsey—the law had provisions that dealt with gross negligence, but the English judges sitting in the Privy Council were very critical of that notion and did not see that there was any difference from ordinary negligence.

The difference is a clear one: gross negligence is a situation in which the trustee does not do anything about their duties as trustee. It does not particularly bother me that you should not be able to exempt people from that liability—it is getting close to fraud in some cases, and you clearly cannot exempt a trustee from liability for fraud. As always, it is a question of drawing a line.

We felt at the commission that what we provided here gives trustees fair and reasonable protection and should not serve as a disincentive, but I would like to read what the Law Society has said and reconsider matters in that light.

The Convener: I am sure that we will come back to that particular aspect of the bill in further questioning. If you wanted to provide further comments to the committee in writing once you have had a look at the Law Society submission, that would be helpful.

Mercedes Villalba: I move us on to section 72, which deals with succession. In policy terms, the definition of spouse or civil partner includes a spouse or civil partner that the deceased person was separated from but where no divorce or dissolution of the partnership had taken place. That means that a spouse or civil partner, in that circumstance, could benefit from section 72 of the bill, on the right to inherit.

The Law Society and various other respondents to the committee's call for views have said that they would like to see a distinction drawn between spouses or civil partners who were living with the deceased person at the time of their death and those who had previously separated from the deceased person but had not divorced or had the partnership dissolved. What is the commission's response to that suggestion?

Lady Paton: Will you give us a moment to confer on that point?

The Convener: I will suspend the evidence session for a few moments.

11:49

Meeting suspended.

11:52

On resuming—

The Convener: We will resume.

Lady Paton: We want to apologise for being unable to give the committee any views on the succession sections of the bill. The Scottish Law Commission produced a succession report some years ago, and it is the Scottish Government that has grappled with the difficult question that has just been put.

The essence of the question is what the position is when there is an undivorced spouse who has not been living with their spouse for, say, 20 years—especially if there is also a cohabitant. I am afraid that the commission has not looked into that recently. It is purely a Scottish Government consultation, possibly run by Jill Clark and Alison Mason, and it has drawn very polarised views and strong responses. However, that difficult issue has not been discussed by the commission.

Do you agree with that, Lord Drummond Young?

Lord Drummond Young: Yes. The commission report on which the sections are based predates my time as chairman of the commission, which was quite a long time ago. It might be that the people who were commissioners then—they have all changed since then—can help with the matter, but I would find it difficult to contribute anything significant. I can understand what the concern is.

Mercedes Villalba: I think that the issue requires further consideration.

Bill Kidd: If you thought that that was controversial, you might think that my question is, too. Part 2 of the bill does not contain a blanket ban on an unlawful killer being an executor. As the law is not clear in this area, two academic lawyers, Dr Alisdair MacPherson and Professor Roddy Paisley of the University of Aberdeen, have suggested that part 2 of the bill be used to clarify the law in this area. The situation could be that the unlawful killer is the partner, husband or wife of the deceased and they would then become the executor of the will. That has raised a lot of concerns. What do you have to say about that?

Lady Paton: I personally share the concerns. Again, from the point of view of the Scottish Law Commission, that has not been discussed because it has not been part of any project. It could be referred to the commission, I suppose. However, I agree that there are serious concerns arising out of the scenario that you have painted.

Lord Drummond Young: I would agree with that. It is something that the courts would probably not have much difficulty with. There are very strong public policy arguments for restricting the rights of people who have been convicted of unlawful killing. For example, a beneficiary under a will could never benefit if they had unlawfully killed the testator.

You have to be slightly careful about unlawful killing, because it goes down in some respects to causing death by careless driving. You can imagine a situation where a wife is killed through her husband's careless driving—a tragic situation where it was clearly not intended. That is a totally different thing from the sort of unlawful killing that I think you are talking about here. It is really murder, culpable homicide and that sort of thing that you are concerned about.

If I was sitting in court, I would not have much difficulty dealing with that if it was brought before me, but that will not happen now. It may be that something could be put in. I would agree with that, but I am not prepared for it just now.

Bill Kidd: Thank you.

The Convener: As we have no further questions for the panel, I thank Lady Paton and Lord Drummond Young for their extremely helpful evidence. The committee may follow up by letter with any additional questions stemming from today's meeting. There are also a couple of action points for you to come back to the committee on.

Lady Paton: Can I just check that? I have noted down one or two points, but we would like to know whether we should await your request and further questions before we fulfil the undertakings. One undertaking was that we will send you the correspondence and dialogue between the Scottish Government and Westminster about the section 104 request. I take it that you would like that to be followed up without a further question from you—or are you perhaps going to send us a letter with five requests in it?

The Convener: We will certainly write to you to confirm.

Lady Paton: That would be very helpful.

Lord Drummond Young: It would be helpful if it could be comprehensive. I am conscious that, for example, I have undertaken to make available the text of the talk that I gave on green investment, if I can put it in that way. It is fairly short, I am happy to say, but it explains how that is possible, even working around the existing legislation.

Lady Paton: We will await a letter requesting all of that.

The Convener: Yes. That is no problem at all.

Lady Paton: Thank you. It has been a pleasure discussing trusts with you. I take it that that is the end of the proceedings.

The Convener: Yes. Once again, I thank both of you for coming. I will suspend the meeting briefly to allow the witnesses to leave the room.

11:59

Meeting suspended.

12:01

On resuming—

Instruments subject to Negative Procedure

Heat Networks (Heat Network Zones and Building Assessment Reports) (Scotland) Regulations 2023 (SSI 2023/123)

Public Procurement (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/124)

National Health Service (Optical Charges and Payments) (Scotland) Amendment Regulations 2023 (SSI 2023/125)

The Convener: Under agenda item 4, we will consider three instruments that are subject to the negative procedure. No points have been raised on the regulations. Is the committee content with them?

Members *indicated agreement.*

The Convener: Thank you. With that, we will move into private session.

12:01

Meeting continued in private until 12:32.

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