OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 9 May 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 9 May 2023

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DELEGATED POWERS AND LAW REFORM COMMITTEE

15th 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:

Yvonne Evans (University of Dundee)
Emeritus Professor George Gretton (University of Edinburgh)
Professor Roderick Paisley (University of Aberdeen)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 9 May 2023

[The Convener opened the meeting at 10:10]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Good morning, and welcome to the 15th meeting in 2023 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch their mobile phones to silent. We have received apologies from Oliver Mundell.

The first item of business is to decide whether to take item 6 in private. Are members content to take that item in private?

Members *indicated agreement.*

Trusts and Succession (Scotland) Bill: Stage 1

10:10

The Convener: Our next agenda item is to take evidence on the Trusts and Succession (Scotland) Bill. I welcome Yvonne Evans, a senior lecturer in law at the University of Dundee; Professor George Gretton, the emeritus Lord President Reid professor of law at the University of Edinburgh; and Professor Roderick Paisley, the chair of Scots law at the University of Aberdeen.

I note that Mercedes Villalba is joining us online today. I remind all attendees not to worry about turning on their microphones during the session, as those are controlled by broadcasting. Anyone who would like to come in on any question should raise their hand, catch my eye or indicate that to the clerks. Any witness who cannot answer a question should feel free to follow up in writing or to indicate that the question is not for them to respond to.

I will open the questioning for the committee. Will you confirm whether you support the general principles of the bill? If so, what do you see as being the key strengths of the bill? We will go into more specific areas of the bill as we progress through the session.

Emeritus Professor George Gretton (University of Edinburgh): I very much welcome the bill and support its general principles. It is a much-needed measure. As I am sure members are aware, trust law has not had a proper overhaul since 1921. There have been bits of work, but the law is now pretty badly out of date. Comparator jurisdictions have done a lot of reform in recent years. A project for the complete overhaul of trust law in England has just begun. Even there, more has been done in recent years to update trust law than has been done here. We are falling behind. If nothing is done in the next few years, that will look even worse.

The bill restates a lot of the existing principles of legislation, but does so in updated terms. It also introduces certain very welcome new provisions.

I strongly support the bill. Trusts are an important part of the law. I think that some bits and pieces of the bill need to be revisited, but that is inevitable. I could go on for hours, but that is probably enough.

Professor Roderick Paisley (University of Aberdeen): I fully support the bill, its principles and outline, so much so that I imagine that quite a lot of what I am about to say, and quite a lot of what George Gretton and Yvonne Evans will say, will appear to be nit-picking to improve detail.

The bill is really necessary. I would like to say a little more about succession, which is an area of the law that needs to be revisited, but the bill is very welcome and is, in many respects, particularly well thought out.

Yvonne Evans (University of Dundee): I absolutely agree with that and I am delighted to finally see the bill coming to fruition in the near future. As has been said, the bill needs only some minor tweaks and improvements that we can perhaps suggest to you.

The Convener: I will go into one aspect of the bill that has come up so far, which is the issue of the section 104 order. Do the witnesses believe that the Scottish and the United Kingdom Governments should design a protocol, so that, if there is a section 104 issue with the bill, that can be dealt with automatically?

Professor Gretton: Do you mean in general; not just for this bill?

10:15

The Convener: I mean in general. Last week, the Parliament passed the Moveable Transactions (Scotland) Bill, and the section 104 order was one of the outstanding issues with the bill—it certainly was at the beginning of the bill process, but the section 104 issue has arisen again.

I suspect that as more Scottish Law Commission bills are introduced—and potentially other legislation—the section 104 order might become more of an issue. If a protocol of some kind was put together, would that help with the advancement of legislation?

Professor Gretton: That question is moving towards being about constitutional law; it is not exactly constitutional law, but it is getting near there, and I do not have a strong view about that.

I was there last week for the stage 3 debate on the moveable transactions bill—I was up in the gallery cheering and was being shushed by the staff.

I understand why the Scottish Government is a little bit cautious on these legislative competence issues, because it is safer to leave out the provision—in the case of the moveable transactions bill, the provisions were about financial instruments, or whatever the terminology is—and then wait for a section 104 order. I think that that is the right way to go.

As to whether a protocol would be possible, you would need to ask people such as Chris Himsworth, Christine O'Neill and other experts in that area, rather than me. I do not think that I can offer a useful view.

It can be a bit of a technical problem. For instance, if pension schemes were left out of the bill—as they are—and it went through and, for some reason, there was no section 104 order, or even no timeous section 104 order, because suppose it took a couple of years, there would be a bit of black hole for pension schemes covered by Scots law. The Trusts (Scotland) Act 1921 would be repealed in toto, so we would be in a position in which Scottish-regulated pension trusts would be in a black hole. Therefore, if the bill goes through, it is very important to ensure that a section 104 order would be forthcoming timeously.

That was not very helpful, but it is all that I can say.

The Convener: The committee genuinely appreciates the work of both the Scottish and UK Governments on moveable transactions and also with regard to the section 104 order, because a lot of work has taken place on that.

That was not a trick question, and it was not a constitutional question; it was just to see whether there was a smoother way.

Professor Gretton: I am sorry, but I cannot offer you anything further on that point.

The Convener: No bother.

Jeremy Balfour (Lothian) (Con): Good morning to the panel. If I can come back to this specific bill, it looks like it takes about a year to do a section 104 if everything moves smoothly. Do you think that there is any way that we could amend the bill to avoid a section 104, which would then mean that it would all come into force at the same time, or is a section 104 inevitable because of the pension scheme aspect?

Yvonne Evans: It is quite important that pensions are covered. Pensions are of huge value, there is a big pensions industry in Scotland and they are a hugely important part of trust law, so even if there is a delay, it is really important to include pensions.

Professor Paisley: There is one tiny point on pension schemes that I want to bring to your attention. I noticed that there is no definition of pension schemes in the Trusts and Succession (Scotland) Bill, although there was a definition for a particular statutory provision in the draft bill by the Scottish Law Commission. I do not know if that was deliberate or an oversight, but pension schemes are not defined at all, as I read it.

Professor Gretton: Yes, I agree that that needs to be double checked.

Timing will be important, and I suppose that the answer is that the bill is passed and commencement is delayed until the section 104 order is ready, but I have no personal experience

of section 104 orders. I have done many things in my life—I fought as a mercenary in Africa—but I have never been involved in a section 104 order, so I do not have hands-on experience in that. Okay, I made up the bit about Africa. [*Laughter.*]

The Convener: Okay, thank you.

On 2 May, the Scottish Law Commission said to the committee that it is important that the trust law reforms ultimately apply to the pension trusts as well. You just touched on that issue with regard to the definition. Do you think that if the pension trusts are not included, that will have a detrimental effect on implementation of the law?

Professor Gretton: If they are not included in the bill, and currently they are not, and if there is no section 104 order, that is going to be a problem. In that case, for example, the 1921 act will have to be kept in force just for pensions, and that will be awfully messy.

Yvonne Evans: I absolutely agree. Trust lawyers who advise on trusts are advising on pension trusts. You do not want to have two separate bits of law to have to know. We do not really want the 1921 act to have to carry on once we have the new act.

The Convener: Would it be common to operate using two separate bits of legislation?

Yvonne Evans: We operate using many bits of legislation, but this is a chance to tidy that up and make it much more simple to look at where the law is.

Professor Gretton: Yes.

The Convener: Even if the 1921 legislation were to be still in use purely for this aspect, whether it is for six months or a year, as Jeremy Balfour touched on, and although it is a bit complicated, or "messy" and untidy, would that be impossible to do?

Yvonne Evans: It would not be impossible—no.

Professor Gretton: It would not be impossible, although, as the bill stands, it will repeal the 1921 act. If there is a possibility of the bill being passed and coming into force before a section 104 order is available, the bill would have to keep the 1921 act alive for pension funds. As Yvonne Evans says, it is possible, but awfie messy.

The Convener: Thank you.

Mercedes Villalba (North East Scotland) (Lab): We know that reforms to capacity law might be forthcoming due to the report of the Scottish Mental Health Law Review. Can future proofing the bill be achieved simply by ensuring that there is a route to easily amend the definition of "incapable" in the bill, or would more significant structural changes to the trust legislation be required?

Professor Gretton: My first point is that, setting aside for a moment the new bill on charities that is in the pipeline—the Charities (Regulation and Administration) (Scotland) Bill—the current definition of "incapable" in the trusts bill is essentially the same as the definition of it in the Adults with Incapacity (Scotland) Act 2000.

However, it might be neater to do what is often done in legislation and, instead of copying the definition from another act, have it say that the term "has the same meaning as". Although that can cause a little bit of fiddle-faddle for users because they have to look at the other act, overall it is more convenient for users because they can look at the interpretation of the definition in the other act in case law and by commentators. A user of this bill, if it is enacted, might look at that definition and say, "What does this mean?", and it would not be often that they would find any interpretation of it. If there is a reference to say that the term "has the same meaning as in" the Adults with Incapacity (Scotland) Act 2000, they could immediately turn to the textbooks on that area of law. That approach is often used in legislation. For example, you often see, "The word 'company' in this act has the same meaning as the word 'company' as defined in the Companies Act 2006". My first general comment is that that might have been preferable as a drafting technique. However, that is for the drafters to decide.

I agree that future proofing is desirable. The term "incapable" as used in the trust legislation should track what is in the Adults with Incapacity Act 2000. The best way to do that is a drafting question, but I agree with you that it would be unfortunate if the meanings were to drift apart.

Yvonne Evans: I agree with that absolutely. It would help the interpretation of the section if there was, as George Gretton said, a body of case law to look at. There are potential problems with interpretation of what is now in the bill regarding incapacity. I think that there is a problem with regard to judging capacity, especially if we might be talking about trustees trying to judge capacity.

Professor Paisley: It is important that the two are identical, because so many trusts are set up for individuals who lack or are at risk of lacking capacity, and it would be useful it a decision in one area were applicable across the board.

Mercedes Villalba: I have a follow-up question. Would amending the bill in line with that approach mean that the definition would automatically be updated when it was updated in the 2000 act? Is it a more streamlined option for future proofing the bill—if, instead of having a set definition, it refers to the definition and interpretation in another act?

Professor Gretton: The answer to that is yes. How to do that is a drafting question, but the general answer is yes—and, as I have said, it would be desirable. It is a good point.

Mercedes Villalba: Thank you.

Jeremy Balfour: I will move on to the bill's interaction with charity law. You will be aware that the Charities (Regulation and Administration) (Scotland) Bill is also going through Parliament. Under section 8 of that bill, the Office of the Scottish Charity Regulator would have an administrative power to appoint on its own initiative interim trustees to a charitable trust. How would that work with the court's power to appoint trustees under chapter 1 of the Trusts and Succession (Scotland) Bill? Is there an interaction?

Yvonne Evans: That is an interesting question. Interim trustees are a novel idea. They have good uses—perhaps in continuing operation of charities that otherwise would struggle to carry on without the appointment of interim trustees.

There is perhaps an uneasy interaction between the two bills. Missing from the relevant section of the Trusts and Succession (Scotland) Bill is the option for current trustees to add trustees. There is provision for the removal of trustees by co-trustees, but there is no option to add trustees. Adding that could cover the interim trustee situation, which would make provision for that less necessary in the Charities (Regulation and Administration) (Scotland) Bill.

Professor Gretton: I have not studied the new charities bill in detail, so what I am about to say is a bit provisional. I think that the provisions can run in tandem so that, in addition to the general provisions in the trusts bill, there would be special provisions in the charities bill about interim trustees and OSCR. When I had a quick look, I saw no reason why they should not run in tandem. However, as I said, it was just a quick look; I have not investigated in detail.

Professor Paisley: I think that the two bills can run in tandem. However, I would just like to be sure that the provisions that enable the conveyance of property to trustees and interim trustees would be sufficiently well defined to operate in both cases.

Jeremy Balfour: To follow that up, should there be some explanation in the trusts bill that refers to the charities bill, so that that interaction is understood, or would simply an explanatory note suffice?

Yvonne Evans: The trusts bill could say that "trustees" includes interim trustees who have been appointed under the charities bill. That would be fine and would merge the two things—although, as I have said, a slight expansion of the trusts bill could also help.

Bill Kidd (Glasgow Anniesland) (SNP): In their responses to the committee's call for views, Gillespie Macandrew LLP and the Law Society of Scotland say that the circumstances that are covered by the grounds in section 6—especially the ground

"unfit to carry out the duties of a trustee"—

should be clarified. I know that Yvonne Evans made some comments on that. Section 6 of the bill sets out various grounds on which the courts can remove a trustee. Are the circumstances that are necessary for establishing the grounds clear enough, or is further statutory guidance necessary? What more detail, if any, would you like to be added?

Yvonne Evans: As I said, the matter is important because lay trustees could be making those decisions. We need to consider what they would understand the term "unfit" to mean. Some respondents have expressed the concern that it could be used vexatiously, so it is important that we have a common understanding of the meaning and definition of "unfit".

10:30

Bill Kidd: How would a challenge to that being presented in a vexatious manner be taken up?

Yvonne Evans: A trustee who is being pushed out because other trustees are saying that they are unfit for the role could go to court to resist that. In reality, whether they would want to stay on as a trustee in that circumstance is another matter. However, they could resist the challenge in court.

Professor Paisley: I will link this to the topic of an executor who has murdered the deceased. As I understand it, some people think that the provision would deal with that particular issue, but it would not. Section 6 says that

"where a trustee ... is unfit to carry out the duties of a trustee",

the court has the power to remove them. However, the rule in Scots case law is that someone who murders a testator is not a trustee and is never a trustee. You cannot remove someone who is not a trustee and is never a trustee. The committee might want to look at that later, but I think that that provision should be added to the bill in order to clarify what is already the law.

The consultation that was carried out by the Scottish Parliament has confused the matter considerably. It missed the case law, did not identify the relevant principle and simply said that the law in the area is a mess, and it referred to one book. The snag with the matter having gone

out to consultation from the Scottish Parliament is that that is now being quoted as if it is case law and as if it is a decision. Going out to consultation on that point and coming to no decision has greatly influenced the advice that is given by solicitors who do not research the law. However, cases exist and it would be a quick win for the Scottish Parliament and a sensible provision. It would be utterly repugnant to all views of decency that someone who murders a testator could become their executor. Section 6 does not deal with that in any way.

Bill Kidd: That is very important and it is a good point for us, as the primary committee on the bill, to look into.

Professor Gretton: I agree that the bill should have a provision on a homicidal executor. It would be easy to do, would not have consequences and would not be controversial. Just do it.

On section 6, which is entitled "Removal of trustee by court", I am more relaxed about it than Yvonne Evans. The section is workable and I do not think that it will cause problems—although that is a matter of judgment.

Professor Paisley: In my experience, where a trustee is unfit to carry out their duties, the biggest fights come with regard to what might be called constitutional trusts for churches. Someone will say, "You're not fit to carry out the duties of a trustee because you don't adhere to this particular doctrine," or whatever the spin is. You will have to trust the courts to get it right; you will not be able to legislate in detail for absolutely everything that could come up. I am slightly more relaxed than Yvonne Evans about that and I agree with what George Gretton has said.

Bill Kidd: It is always nice to have minor disagreement among witnesses.

The Convener: Before we move on, I will clarify a point about the consultation. It was run by the Scottish Government, not the Scottish Parliament.

We have been speaking about section 6, but I will turn to section 7. A trustee does not get to participate in trust decisions under section 12 when they are incapable. Trustees can, under section 7, also remove a fellow trustee from a role on the basis that the trustee is "incapable". The risk of those provisions being abused has been highlighted to the committee. Do you see merit in those concerns? If so, how can we safeguard against those risks?

Professor Gretton: I saw those comments. Again, I am fairly relaxed about that—it may be the drugs that I am taking. Such removal would happen only when there is a majority against the person. If there is a trustee who is regarded as unsatisfactory, they cannot control the trust decisions anyway, because the majority can make the decision, so in a sense they are out of it. Therefore, booting them off the board is, in a way, not a huge further step.

I am sorry, that was not very coherently expressed. Maybe I should try that again.

That trustee would be a minority anyway; otherwise, there would not be a majority to get rid of them. If they are a minority already, they might be causing a bit of trouble or nuisance but, in principle, that will not ultimately make any difference to what the trust does and decides.

Again, I do not think that we are likely to see a lot of abuse or a lot of litigation arising from the provision, although maybe I am being too optimistic.

Professor Paisley: I agree with that. Again, there will be individual cases, but most of the problems in trusts around getting rid of trustees are not problems of law or of property law, but problems of personality.

Generally, in my experience, someone among the trustees acts in a strange way and the others decide that they have to get rid of the individual because they cannot work with him. Such cases work their way out to the courts very occasionally. I do not see any enormous mischief with the wording in front of me. I think that it is quite good.

Yvonne Evans: I tend to agree that it is good to have a mechanism that does not involve the courts.

The Convener: Could an aggrieved trustee raise a court action in those circumstances and, if so, what would be the legal basis for that court action?

Professor Gretton: The basis would be a factual thing about denial of one of the grants, for example. If that happened, there could be nasty litigation. However, that can happen. I am trying to pursue my thoughts here. Does someone else want to pick up on that?

Professor Paisley: I have seen one or two such cases in practice. There is a statute that George Gretton will remember the name of better than I can. Through it, if someone repeatedly raises litigation, they can be excluded from—

Professor Gretton: A vexatious litigant—

Professor Paisley: Yes—that is it. There is legislation that covers vexatious litigants.

Trust law is the only circumstance in which I have seen litigation that goes on and on and on, because an individual has been removed as a trustee and has decided that they did not agree that the grounds for their removal had been established. Such individuals get a taste for

litigation and just continue for years. I discovered an individual in Kilmarnock sheriff court who did that. The case went on for about 20 years until he was disqualified under the legislation and could bring court action only provided that he had the consent of the relevant official. However, by and large, such examples are right at the edge—they do not happen frequently. As an academic, when you see such cases your eyes light up, because they are really unusual.

For a person to avoid being dismissed as a trustee, there would have to be a complete denial that the circumstances exist. That could be done by a declarator or something like that.

The Convener: Okay. Thank you.

Jeremy Balfour: I will pursue questions on section 7. I know that there are differences in what the three of you have said in your submissions, so please feel free to offer a critique to each other.

Section 7 sets out various grounds under which the majority of trustees can remove fellow trustees, as we discussed. Should those grounds be expanded or altered? It mentions "incapable" trustees, but should we add other grounds to the bill?

Yvonne Evans: [*Inaudible*.]—combine this with disqualification for company directors and OSCR-sanctioned trustees and so on, as well. You could perhaps also include people who have been warned off from being trustees in England by the English equivalent of OSCR—the Charity Commission for England and Wales.

Professor Gretton: I do not have a concluded view on the matter, but I am inclined to think that what Yvonne Evans said is right and that maybe those things should be mentioned in section 6 and section 7.

Professor Paisley: I agree with all that. I will add one qualification, which is that when you bring in the possibility of removal of a trustee by co-trustees on the basis that they have been convicted of an offence that involves dishonesty, it might be difficult to get evidence of foreign convictions that satisfies a Scottish court.

Jeremy Balfour: How would you deal with that?

Professor Paisley: By and large, you would just have to ignore it if you cannot get reliable evidence. That is the honest truth. You could possibly deal with it using another ground altogether. You could water the provision down and not require a conviction, but instead require something else, but I do not like that. I would like there to be some certification of dishonest behaviour. I do not think that an allegation or assertion of dishonesty is good enough.

Jeremy Balfour: If I may, I will pursue that further. Is your concern—had I been convicted in a foreign jurisdiction, for example—that that jurisdiction did not complete trials properly? I am just a wee bit confused. Presumably, if I were convicted in X country, that would be on public record in my country. You do not think that that is enough.

Professor Paisley: I do not have a problem with establishing convictions for people who were convicted in the United States of America, the Irish Republic, France or somewhere like that, but if someone is coming from Iraq or somewhere like that, and the records have gone, I would be deeply uneasy. I have come across a few situations in relation to Pakistan, from where it is just impossible to get such records to anyone's satisfaction.

Such a case would be a civil matter. In essence, trusts are civil matters, so you could possibly prove that someone had been convicted on the civil standard in Scotland and have a disqualification apply without having to produce a certificate of conviction abroad, but that is pretty messy.

Bill Kidd: I am looking at section 10 of the bill—there is a lot of crossover—on the discharge of trustees and discharge being separate from the resignation or removal of a trustee. In paragraphs 93 and 94 of the policy memorandum, the Scottish Government highlighted a potential policy issue in relation to section 10 of the bill and the circumstance of a guardian consenting to discharge of a trustee on behalf of someone who is under 16, in a small family trust. Do you have any concerns that a potential conflict of interests might be involved? Is that a valid policy concern, and if so, do you have any insight as to how it could be resolved?

Yvonne Evans: It is a fairly common for the trustees to be family members in small family trusts. However, I am not very convinced that that is a real or important concern. When people are acting on behalf of someone who is under 16, they should be acting in their best interests, so they have trustee duties towards them at points.

Bill Kidd: Okay. Obviously, as you say, the situation is not unknown, but is reasonably common. However, because it is so common, is there potential for an occasional breach of trust, if I might put it that way? There is some concern about that. Who might represent the person who was under 16 in such a situation?

Yvonne Evans: The alternative would be expensive. You would either have to appoint someone separate—a curator of some sort—or give jurisdiction to the accountant of court or

something like that. You could build in extra protection, but it would come at a cost.

Professor Gretton: I agree with Yvonne Evans.

Professor Paisley: With regard to conflicts of interests, there have been one or two court decisions on trusts that have been set up in family situations. The court tends towards the view that the conflict-of-interests rules be applied slightly less strictly or, at least, that the conflicts are known in advance, because the person who set up the trust would have recognised that the conflicts would have arisen. In many situations, it is just about impossible for the trustee to avoid conflicts of interests. I am absolutely content that, if there was anything egregious, the courts will have sufficient powers under the bill to intervene and deal with it.

Bill Kidd: That is excellent. Thank you all for your responses.

The Convener: On that point, I know that the Scottish Government was keen to explore the extent to which that problem might arise in practice. That is touched on in the policy memorandum. Are sufficient legal safeguards already in place to protect beneficiaries who are under the age of 16?

10:45

Yvonne Evans: Yes—as we just said.

Professor Gretton: Yes.

The Convener: Right. Thank you.

Mercedes Villalba: Moving on to trustees' powers of investment, I note that Ms Evans, along with the Law Society, has suggested that, in view of Scotland's increasing emphasis on net zero, sections 16 and 17 could be amended to allow trusts to adopt environmentally friendly investment policies, particularly when those kinds of investments "might ... underperform compared to" other investments. We are keen to hear the views of the other witnesses on that policy idea.

In terms of drafting, the Scottish Law Commission seems to think that the bill would already permit trustees to focus on environmentally friendly investments. My question for everyone is: do you agree with that, or do you think that the bill would need to be altered to achieve that policy outcome, either partly or fully?

Perhaps we could start with Professor Gretton.

Professor Gretton: I am very aware of those issues, but I have not researched the point. Of course, one preliminary point to make is that, if the trust deed says that green investments are permitted, or even required, that is fine. The issue is what happens if the trust deed is silent.

As I have said, I have not researched the point, so I cannot see my way clearly on it. I should probably just shut up, as I have nothing to add without having done further research.

Professor Paisley: If you look at the existing law of trusts, you might see that a difficulty arose with the City of Edinburgh Council when it decided to disinvest from South Africa as a result of disliking the disgusting apartheid regime there. There is always a price to be paid for being principled. I accept that it is generally the case that the people who cut corners on morals and decency are the ones who make money. When the opportunity has been there, coupled with an obligation to maximise returns, trusts have been put in a bit of a bind. They will have to do things that do not conform to their consciences.

George Gretton's point comes in four square here. Many trusts have been originally set up to give trustees the opportunity—and the obligation—to pick investments that are compatible with the environment and with principles and morals as they change. The issue could be addressed by looking at the possibility of changing the purposes of other trusts that are already set up. When new trusts are set up, solicitors in Scotland will ask the people who do so, "Do you want the ability to invest only in ethical investments?" I think that that will work its way through fairly quickly; indeed, I am reasonably sanguine that this will work itself out in the law of trusts.

Mercedes Villalba: So, you see no need to amend the bill further to account for that, as this sort of thing can be done in other ways.

Professor Paisley: Yes, I think that it can be done in other ways.

Mercedes Villalba: Thank you.

Yvonne Evans: I suppose that I am more strongly in support of this idea. I am on the Law Society of Scotland trusts and succession committee, and it was I who fed in this point, which I think is quite important.

I saw Lord Drummond Young's evidence at the committee last week, and I agree with him that this power can be implied from section 17, but I think that the legislation should still expressly state that this can be a consideration for the trustees when they make investment decisions. It is important for the future proofing of the trust legislation. In England, the case of Butler-Sloss v Charity Commission has clarified that the equivalent part of England's trust law can be read as giving trustees the power to enact environmental, social and governance goals as part of their consideration of what to invest in—particularly, as I have said in my written evidence, if the investment might not be as profitable as other investments or might make a loss.

Fundamentally, such a provision would empower trustees. It would, if anything, be a reminder for them. It could be said that it is just messaging, but it is important to have it as a clear and defined starting point, so that it is not being left to trustees to think that something can be implied or that the law can be interpreted as including these things. A statement would put that beyond doubt. Obviously, in England, the High Court case clarified the situation, but if we wrote this provision into the bill, there would be no need for a case to clarify the matter if someone objected.

In addition, I agree with Lord Drummond Young that trustees should not be cavalier with their investment choices. It needs to be part of a full consideration of all the options. Equally, however, I do not want trustees to be too cautious and not consider what else they can do ethically, particularly with regard to public and charitable trusts but also, for some issues, private purpose trusts. Trustees could be emboldened and empowered to use the law in that way and, as a result, prevented from being quite so cautious and concerned about someone questioning their decisions on investment.

Mercedes Villalba: Ms Evans, when it comes to practical ways of amending the bill, would the statement that you mentioned be in the form of a "for the avoidance of doubt" clause? How do you see it working in practice?

Yvonne Evans: It could be added to section 17, which refers to having

"regard to ... the suitability to the trust of the proposed investment".

If we added a phrase such as "specifically including environmental, social and governance goals", it would be a reminder that we were not talking simply about financial goals.

Jeremy Balfour: I just want to follow this up slightly. In a previous life, I worked with a trust that was trying to buy property from another trust; however, the view of the other trust was that it always had to get best value—the highest price—because it was scared. Would the sort of clause that we have been talking about help in such situations—not only with investments but with selling off heritable property—by making it clear that it was not necessary to get the best price if the money was being passed to another charity? If not, would there be a way around that? I ask the question, because quite a number of trusts keep saying that they have to get best value almost as an excuse not to sell to another trust.

Yvonne Evans: Absolutely. As I have said, a balance needs to be struck when trustees consider what they are going to do and why. It should not always be about getting the best price; trustees need to look at the trust's purposes and how best they can serve them in their decisions. The answer, then, is yes, that would help in such situations.

Bill Kidd: The Law Society, Yvonne Evans and Turcan Connell have all commented on chapter 5 of part 1 of the bill, which relates to the duration of a trust. Professor Paisley, in your joint response with Dr Alisdair MacPherson to the committee's consultation, you, too, have commented on this provision, under which a person will be able to create a trust of any duration that they liked, and have said:

"We wonder whether sufficient consideration has been given to the consequences ... This change could have significant economic impact as certain trusts accumulate assets over a sustained period of time and accordingly obtain sizeable economic power."

Will you explain a wee bit more your policy concerns in that respect?

Professor Paisley: Certainly. I should say in advance that I am not an economist but a lawyer, so what I am about to say might appear in the eyes of economists as being quite simplistic.

Broadly speaking, once a trust is established and gains assets, it obtains a certain amount of economic power. It can become an entity. If it is perpetual, it can grow to a considerable size and have a considerable amount of influence, and what worries me is the lack of investigative powers from the point of view of the state to work out what is going on inside it.

I could tie that in with another part of the bill in which some trusts, particularly beneficiary-lacking trusts—that is, those without beneficiaries—are able to change their domicile. That worries me considerably, because if a trust that can last for ever can be set up in Scotland and then change its domicile to England, Northern Ireland or anywhere else, it becomes absolutely impossible for the Scottish Government or the Scottish Parliament to find out who is controlling it through the register of controlled interests. It would be the easiest thing in the world to set that trust up, only for it to escape the jurisdiction almost immediately.

For example, if we want to work out who owns land, we will not be able to, and we will not be able to find out who is really getting the benefit from the assets. I regard that as a real difficulty when coupled with the change of domicile issue. I do not think that we would be able to work out whether Russians, say, own parts of Scotland or anything else.

The economic point of accumulating great wealth is the type of thing that we come across in American anti-trust legislation. It deals with assets that are owned by individuals but which have been disguised through trusts that go on for a long, long

time and in which there is transmission of intergenerational wealth that grows and grows. Unless there is some counterbalance to allow us to find out what is going on, that will not be good for the state.

Bill Kidd: Are you suggesting that a charitable trust, for instance, could be hijacked into becoming a private business while still using the frontage of that trust?

Professor Paisley: I suppose that it depends on how dismal a view you have of human nature. I would not say the same for all charitable trusts. In the main, charitable trusts are splendid bodies and the people involved in them are great, but there will be a minority in which whatever is set up is going to be hijacked.

I want a way to unravel all that if things go wrong. You will remember the great difficulty with the limited liability partnerships that were set up in Scotland; we had money laundering and everything else flushing through Scotland from eastern Europe, and the approach had to be closed down afterwards. I am worried that very lengthy trusts will be used by the superwealthy to avoid insight.

I am not a Marxist, but the state and the populace of Scotland have a legitimate interest in not having part of their economy closed or controlled by entities that are unknowable and which are controlled by people whose identity we cannot find out.

Bill Kidd: That is interesting.

Yvonne Evans: I had not thought about it before, but I agree that the domicile issue is important. It seems strange that a protector should be able to change the domicile of the trust—it is an odd one.

Professor Gretton: I, too, am worried about the change of domicile—or, perhaps, the law of domicile. The wording is problematic. I am, as I have said, worried about it; indeed, I think that we all are.

I do not have very strong views on section 41 itself, but I note that, if it goes through, the provision in section 41(5)(b) will mean that the section does not apply to charities. I do not think that that is right; indeed, one or two consultees did not agree with it. I think that charities are the one type of trust where we do not really need controls, given that other controls exist for them. If controls on duration are needed, they should not be needed for charities—I think that that would be 180 degrees wrong. There are also some drafting problems with the section, but I just do not think that the policy itself is right.

On the core question of duration, I am not very clear in my mind about it. I was reasonably persuaded by the Scottish Law Commission's report, but I do not have a personal view. I do think, though, that the exclusion of charities in section 41(5) is the wrong way round.

Like Roddy Paisley and Yvonne Evans, I am concerned about the domicile point that was mentioned earlier, because it could, as Roddy said, make things worse. The issue needs to be considered in and of itself, apart from section 41.

Bill Kidd: We are going off at a slightly different angle to the duration issue, but what you have said adds to the background and our depth of knowledge, and it has been worth while listening to the comments. Thank you.

11:00

Jeremy Balfour: I will move us on to chapter 6 of the bill, which makes clear that private purpose trusts are permitted in Scots law and sets out certain requirements as to how those trusts should be run. In policy terms, are the requirements in chapter 6 stringent enough to guard against the possible abuse of those trusts?

Yvonne Evans: I do not have very strong views about that.

Professor Paisley: I would simply reiterate the point about domicile. Limited companies cannot change their domicile. Why on earth should those people be able to change their domicile? Why would they want to attempt to escape the scrutiny of the Scottish courts and the legislation in Scotland?

The bill relates to Scottish trusts. If changing domicile means that it is no longer a Scottish trust, people will set something up here, waltz off to somewhere else in the world, own Scottish land, and you will not be able to find out who has an interest in it. It is as easy as that. That is completely contradictory to the policy of having the register of controlled interests to find out who owns Scotland.

If I was advising a Russian oligarch, I would go straight for this—for change of domicile of a private purpose trust, where you cannot even work out who the beneficiaries are. How do you get hold of the documentation once they go abroad, as it were? What is the nature of the rights? As soon as you move from Scottish to English jurisdiction, the nature of the rights changes. They do not have the same type of trust in England.

Again, I have no problem with private purpose trusts. We have them already; we have many of them set up as individual foundations. There is even case law on that; indeed, I would have liked to have seen a little bit more exploration of that prior to the bill's being brought in, but that is a purely academic point. I like the bill generally and I

quite like private purpose trusts, but I do not like this idea of changing domicile. They should be locked into Scotland so that you can keep an eye on them.

Professor Gretton: We agree on the domicile point. I think that we are probably all agreed that it needs to be looked at again.

I have one or two hesitations on private purpose trusts, which I mentioned in the very late consultation response that I put in. I do not know whether it reached the committee. I have been doing some more work since then and I might put in a supplementary response, if that would be of interest to the committee.

One issue that I am concerned about in relation to private purpose trusts is their definition. People always talk about definitions, and you can always nit-pick with draft legislation, but there is a significant issue here. It says "private purpose trust", but what is it? It is for a specific purpose, but all trusts in Scotland of every type have their purposes.

Let us take a vanilla-flavoured, very ordinary private law trust. A traditional example would be the setting up of a trust for your widow for her life and for your oldest son thereafter, if the committee will forgive me for using a traditional example. That has a purpose of holding an asset for the widow and the oldest son and their respective interests. I do not think that we have managed to demarcate a private purpose trust from other trusts in Scots law. English law is a bit different, because it does not talk about purposes in the same way that we do. The idea of all trusts having their purposes goes back deep into Scots law and continues to be the case; indeed, the bill talks about purposes for trusts, not only for private purposes trusts—and rightly so, because that is the way that we conceptualise. More work is needed on what a private purpose trust is as opposed to another sort of trust. My view is that referring to their having a specific purpose does not really cut the mustard, although I am ready to be shot down on that.

My other concern is a bit more nebulous, but it is the worry that you are setting up a kind of ownerless trust, which, because it is ownerless, will be immune to creditors' claims. In an ordinary private law trust, beneficiaries have their beneficial interests and those can be attached by their creditors if they are insolvent. In a private purpose trust, it seems that there are not beneficiaries in that sense, and I am slightly worried that it could be used for asset protection purposes. I mentioned that concern in my consultation response paper. I am not sure how well founded it is, but I thought that I would mention it, also by way of background. If someone with money wants to set up an asset protection vehicle whereby there is a fund of assets to benefit a family, for example, and no creditors can ever get their claws into it, there are already other ways of doing that if they are well advised—that is, if they are advised by a clever law firm. There are other ways of doing asset protection, but I am a bit concerned about private purpose trusts. I am not against them; I am just a bit concerned.

Those are the two points that I mentioned in my paper. I do not think that the definition cuts the mustard, and I am a little bit concerned about creditors. I could be wrong on both points.

Jeremy Balfour: I am grateful for that response. If you send supplementary information to the committee and could include an idea that you have for a definition, or could point us towards a definition, that would be helpful. If we are looking at amendments and such things in stages, we are probably not the best people to draft definitions.

Professor Gretton: Sure. Drafting is difficult.

Jeremy Balfour: I direct my next question initially to Ms Evans. In your response to the committee's consultation, you said that you did not think that the standard of care that is applicable to supervisors and protectors was clear in the bill. Can you expand slightly on that? Do the other witnesses agree with Ms Evans?

Yvonne Evans: That comment was particularly in relation to professional trustees, because the standard of care will obviously be higher for them. I would tend to think that protectors and supervisors would be professional trustees, and I just wanted to clarify whether that was meant to carry across to them, or, indeed, whether you want to have a different higher standard of care for protectors and supervisors, given how powerful they are. A clarification on that would be useful.

Jeremy Balfour: Do you think that there should be a higher standard of care?

Yvonne Evans: I definitely think that there should be a higher standard of care for professional trustees. I also absolutely agree with the exception to that, which is when professional trustees are acting in a non-professional capacity. Those of us with a bit of trust expertise are always getting asked to come on to this or that committee and give off-the-cuff advice, and we do not really want to be on the hook for that—otherwise, we would probably not sign up to those things. I think that that would be a sensible balance between trustees' responsibilities and beneficiary protection.

Jeremy Balfour: Is there agreement on that point?

Professor Paisley: Yes.

Professor Gretton: Yes.

The Convener: We move on to section 61 of the bill, which is in regards to private trusts. Section 61 gives the power to the beneficiaries and others to apply to the court to alter the trust purposes of a family trust. It sets out the default position that that power cannot be used for 25 years.

Given that the views on the 25-year restriction have been mixed in the consultation, and that it is a default power only, are all the witnesses satisfied that it is the right policy decision to retain the 25-year restriction in the bill?

Yvonne Evans: I disagreed with the 25 years. That is quite a long time. When I was in practice, we would draft around that sort of provision.

It very much depends what the person is setting up the trust for. Do they want maximum flexibility? In that case, they would want to have that power immediately. Do they want to retain control for a period of time? In that case, a longer duration would be workable. The bill does not override that possibility; they can choose a different period of time. However, to me it seems that 25 years is quite a long time in the scheme of things.

There are also quite complicated provisions around when the time starts for a trust that is in a will. If someone writes their will and then lives for a period of time before they die, when does the 25-year clock kick off? It is a complicated thing.

Professor Paisley: I do not have any particular objection to that provision, but I would make it less than 25 years. That is quite a lengthy period. It is far longer than the period of negative prescription that applies to property matters.

I do not know what to bring it down to—I would just say less than 25 years. I could not tell you how long, but maybe 10 years.

Professor Gretton: Let us say 24 years, nine months.

Professor Paisley: That will do.

Professor Gretton: I would agree with Yvonne Evans. I do not really have anything to add to that. It could maybe be something like 20 years.

The Convener: Thank you. Going back to the issue of moving domicile, would that be an issue with regard to this, in terms of the 25 years?

Professor Paisley: Good grief, that is a good question.

Professor Gretton: The simple answer is to scrap this moving domicile business.

Professor Paisley: My view would be to get rid of moving domicile. I do not really understand exactly what people are trying to achieve when they are moving domicile, to be perfectly honest. However, it strikes me that, if you are letting trusts be perpetual, just like a juristic body—like a limited company that could potentially live for ever—why on earth should trusts be able to move domicile when a limited company cannot?

We all know how trusts can be used to emulate other legal relations—how can they hide ownership and so on. There is a dark edge to moving domicile that I really do not like at all. I could suggest various things—if you allow a trust to move domicile, you should have certain restrictions and so on—but once you allow a trust to move domicile, how do you see the documentation to see who is involved? The answer is that you do not; you never get it back. It goes out into the world like a virus. I do not want Scotland to have that reputation.

The Convener: Okay. Thank you.

Mercedes Villalba: I will move on to sections 65 and 66, on the expenses of litigation. The Law Society, although supportive of the bill overall, is very concerned about the policy current underpinning section 65, which provides principles to determine how legal bills are paid for in trust cases. The Law Society says that trustees should not find themselves personally liable for the expenses of litigation where there is insufficient trust property. The Law Society thinks that section 65 will deter people from becoming trustees and may lead them to unfavourably settle or abandon legal proceedings for fear of personal liability. Do you share those concerns or can you offer the committee any reassurance in that regard?

Professor Gretton: When I read section 65, it struck me as fine, but I have not really researched this. The only thing I noted in section 65 is a detail, which is that the trustee would be liable if the litigation was “unnecessary”. That is true if it is the trustee who litigates but, if the trustee is the defender, it may be someone else who is litigating unnecessarily, so I think that the wording does not work there.

More generally, I do not have an answer to this. I have not really looked into it properly—I am sorry.

Professor Paisley: Again, I have not looked at it in great detail but possibly those concerns, as narrated to us, are slightly overstated in that, for litigation, various products are available together with insurance so that certain expenses can be covered or at least mitigated. That is all that I would wish to say on that.

Yvonne Evans: The concerns are possibly a little bit overstated. I cannot recall exactly what point the Law Society was trying to make, although I understand that it was part of its discussions on this. I am not a litigation expert. It might be more about the wording of the section

than the actual substance of it, but I know that you are speaking to the Law Society next week, so you will be able to ask it then.

Mercedes Villalba: I will leave that there and move on to part 2 of the bill, looking at section 72—

The Convener: Mercedes, before you move on, as Yvonne Evans has just indicated, the Law Society is coming to the committee next week. If the panel members have any further thoughts on section 65 between now and next week, and if they want to send something to the committee, that would be very helpful. Sorry, Mercedes.

Mercedes Villalba: No problem. I want to look at the right of a spouse or civil partner to inherit under the part of the bill that deals with succession law. Various people who responded to the call for views—including Ms Evans, who is here today—have said that a distinction should be drawn between spouses or civil partners who were living with the deceased person at the time of their death and spouses or civil partners who had previously separated from the deceased person but had not divorced or had the partnership dissolved.

The committee is interested in the views of other witnesses on that. How easy is it in practice to draft legislation making separation a key factor in the scope of section 72 when, sometimes, in practice, whether a couple has finally separated for good might not be entirely clear at any given point in time? How can legislation address that?

11:15

Yvonne Evans: The current law is unfair because, at the moment, although it covers the situation of separated couples, the prior right to the dwelling house is only available if the spouse was “ordinarily resident” there. That can be unfair if the person had moved out and it is the deceased’s spouse who has continued to live in the house—it could be unfair to them because they could miss out on £473,000-worth of house. However, the proposal in the bill is pretty liberal. It is too liberal in my view, because a person could have been separated for a very long time and then suddenly be eligible to inherit a substantial estate. There could be a situation in which there is also a cohabitant and they would still have a claim under section 29 of the Family Law (Scotland) Act 2006. That is a possibility.

My other concern is about how that provision translates to cohabitant situations, such as a situation in which there is no spouse but there is a section 29 claim for cohabitants. At the moment, section 29 of the Family Law (Scotland) Act 2006 says that the maximum that a cohabitant can get is what a spouse would get. So, by changing the law through this bill on what a spouse without children can get to be everything, the follow-on is that a cohabitant would also be able to take everything. That should be updated and followed through.

Professor Paisley: The issue of the requirement to be ordinarily resident is quite tricky. Yvonne Evans mentioned how it refers to section 9 of the Succession (Scotland) Act 1964. A matter that is not addressed in the bill is where a surviving spouse has to have been ordinarily resident in the house in order to inherit it. If at all possible, I would like that section to at least be explicated. There might be situations such as that of my parents, for example, in which, when one of them died, the other was in a home and was certainly not ordinarily resident in the house. Had they been living in Scotland, that would have been an issue—except in a very charitable reading of the statute. It somewhat troubles me how we can say that someone who survives their spouse and is permanently resident in care is ordinarily resident in their home. It would be very simple to make a declaration to amend section 9 of the 1964 act, through this bill.

There are other situations that might require a little consideration, such as someone being in the navy, serving in the armed forces for a length of time or even being in jail. However, my primary sympathy is for someone who is in long-term care and who will never go back to the house—that is the problem.

Professor Gretton: First, I would supply a sort of footnote: when people separate, it is quite common for them to have a separation agreement if they are not too embittered or hostile. Separation agreements usually have a clause dealing with what happens if one of them pops their clogs prior to divorce. If a couple have such an agreement, that is all well and good. We are really talking about a situation in which there is a separation with no divorce and no separation agreement, which is, of course, equally common.

Mercedes Villalba asked whether separation is reasonably definable. I do not think that it is very problematic. The concept is included in the Family Law (Scotland) Act 2006 in relation to divorce: the time when the couple actually separated is a key provision. There will be some slightly mushy cases, but I do not see it as a big problem.

Roddy Paisley mentioned the parallel problem of being “ordinarily resident” for the purposes of prior rights. Under the bill, prior rights would disappear in a situation in which there is no issue. However, where there are issue and intestacy, those rights will still apply. It may be that Roddy Paisley has a point on that.

To sum up, in general, I support the provision in relation to situations in which there is no issue and

the surviving spouse takes the estate. However, I agree with other people's comments that there should be an exception where there is a separation, although I do not see that as being terribly problematic. Does that cover your question?

Mercedes Villalba: I think that it does. The issue that the committee is grappling with is how we might allow for separation to be a factor without excluding people in similar circumstances to the examples that were given by Professor Paisley, where the surviving spouse is not normally living with the deceased. There are a whole range of situations in which that might occur. How do we define separation without it merely being geographical? There are many circumstances in which people might be physically separated but still together, as it were.

Professor Gretton: I think that that is doable; it would not be terribly difficult.

To add to Roddy Paisley's point about section 9 of the Succession (Scotland) Act 1964, I do not think that that can be opened up in this bill because that would be too big a job. However, the definition of separation is doable. The drafters could tackle that one.

Mercedes Villalba: Thank you.

Jeremy Balfour: I want to follow up one of Professor Paisley's opening remarks in which he said that he felt that succession could go further in the bill. Would you expand on those comments, Professor Paisley, so that we do not miss that point?

Professor Paisley: Where do you go with succession law in general? There are legal rights, discretion, forced provision and so on. There has been report after report on succession for 25 or even 30 years. There have also been Scottish Law Commission consultations. Nothing has been taken forward.

The straightforward way to deal with the issue is to leave legal rights as they are, but to tackle anything that is obnoxious about them. In other words, we could make some exclusions from legal rights in certain cases. That would be a minimalist approach, which would be better than nothing. I like legal rights and, in general, I do not like discretion. I think that legal rights work well. However, there is constant sniping at legal rights, so let us just get rid of what is obnoxious. That cannot be that hard.

Jeremy Balfour: For those of us who are less aware of legal rights, which category of individual do you want to remove from them?

Professor Paisley: Let me give you one example. An English couple have a drug addict son in Newcastle upon Tyne who steals from them. They move to Scotland to get away from this character, acquire Scottish domicile and are subject to legal rights in their estate. When the old lady dies, followed by the old man, do the executors have to search for this guy in the gutters of Newcastle upon Tyne and pay him the money and legal rights? According to current Scots law, the answer is yes. I would take that out for a start.

Jeremy Balfour: To play devil's advocate for a moment, Professor Paisley, that is a very subjective test. Your morality might not be my morality. You are better at dealing with this than I am, but, in regard to drafting legislation, we need to have some kind of principle and clarity around that. We might or might not want to exclude that individual, but how would we make that decision in law?

Professor Paisley: I would look to the civil codes of France, Germany and Poland or any of the continental civil codes in which, in certain defined circumstances, forced provision can be avoided by a testator. They are not everything that we would want, but in large measure they provide the mechanism that you seek—that forced provision is not absolutely bomb proof. In some of those legal systems, there are extreme cases that allow forced provision to be got round, and I suggest that they should be looked at in the first place. There is usually a section of around four single lines that say that forced provision can be avoided provided 1, 2, 3 and 4. That is how I would deal with it.

Jeremy Balfour: Just to follow that up further—perhaps your colleagues could answer—would having a will be one way to exclude it? Could you write it directly into the will that you want to exclude legal rights, or does that go too far?

Professor Paisley: No, it does not, and that is quite a good idea. We have lots of sections in the bill on how to get rid of people as trustees. It is a similar type of thing: I want to get rid of my forced heir, so I am writing it in the will and have justified it on the basis of the grounds that are set out in the civil code. You would not be able to say, "I don't want someone to have legal rights," on any ground whatsoever—you would have to fit in the recognised statutory headings.

Jeremy Balfour: Do either of the other witnesses have a view on that change in law?

Yvonne Evans: You should look at succession more widely and more generally in all those areas—testate and intestate—and consider legal rights. My view is that, if there is a will, you should, as Professor Paisley says, be able to disregard legal rights in that sense, but obviously you cannot do that at the moment, so you can end up in those sorts of situations. That seems sensible to me.

I would definitely push for more. I know that it is very controversial, which is why it has not happened. The Scottish Law Commission has done a lot of work on succession that has not gone anywhere. Like trust law—until, I hope, now—it is a mess. Lots of different bits of legislation have been added on, revised and tweaked as civil partnerships, cohabitation and so on have been brought in.

Professor Gretton: There are some areas of law where reform can get general consensus, such as the Moveable Transactions (Scotland) Bill. On the whole, trusts are a controversial issue, but you can get consensus. Succession is notorious—you cannot get consensus. You can get consensus—everyone will agree—that the current law is unsatisfactory, and you will find the same answer in every country in the world. Everyone in Germany or France would agree that the law is unsatisfactory, but you cannot get consensus on what should replace it, and that is also true in Scotland.

In a way, it is not surprising that this process of reforms being proposed but not much happening has gone on for years. It is pretty intractable stuff. I am not saying that it should not be looked at further—it should be—but it will not be an easy job.

I agree with Professor Paisley. I support legal rights in Scots law, and I agree that it should not be discretionary, but there is certainly scope for reform.

The Convener: On that point, I note that, in your submission, you state:

"A full codification would have stretched the SLC's resources and would have considerably delayed the completion of the project. From a practical point of view the SLC had to stop somewhere. Passing the existing bill would not preclude the possibility of further measures at some time in the future."

Is what is proposed in the bill, notwithstanding the comments that have been made today, a useful starting point to update the law on succession to help with the flow of activity?

Professor Gretton: Do you mean what is in part 2?

The Convener: Yes.

Professor Gretton: Yes—it is good. As I say, I support part 2. I agree on the separation point and the homicidal executor point. As Professor Paisley said, a provision on a homicidal executor should possibly be in part 1, because executors are trustees. That would be an easy thing to put in.

It is a good start, and it is good to see that something is happening on succession. The Succession (Scotland) Act 2016, which the Parliament passed, made some progress. I do not want to be too gloomy, because progress has been made, and the bill will make further progress. It is good stuff.

11:30

Bill Kidd: You have just about covered this, but I will sum it up. Last week, the Scottish Law Commission told the committee that, in respect of part 1 of the bill, it did not think that full codification of trust law was necessary or desirable, and it said that part 2 made limited proposals for succession law. Nonetheless—and you have covered a great deal of this—do you think that there is anything that has been missed out of parts 1 and 2 or that has not yet been discussed but that might be easy to add to the bill without interfering with the strong policy consensus that is currently associated with it? Do you want to stick your oar in and say that something else could be done?

Professor Paisley: I want to raise a very straightforward point about section 4 and the trusts element. Section 4(1) deals with the assumption of an additional trustee operating

"as a general conveyance of the trust property in favour, jointly, of the additional trustee and the existing trustees."

I have a technical point that could very sweetly fit into that simple section. In Scotland, when any trust assumes a new trustee, it cannot easily grant a lease or a servitude to derivative real rights. Why is that important? The trust has to produce an additional document called a notice of title, to which are attached some taxes and the land register of Scotland registration dues.

With every other party, you can do a deduction of title. That is a purely technical point: about five or six words are added into a document. Trustees, assuming that they are new trustees, should be allowed to deduce title, which would avoid doing a notice of title and make things simpler. They should be able to do that in connection with leases, which are important because many trusts lease out property to make an income. If we assume that trustees have to do a notice of title every time—such as happens in wind farm projects, which frequently involve landowners who are trustees and have to do a notice of title for what might be an enormous area of land—that can cost a lot of money.

To sum up, the bill should allow trustees to deduce title for the purposes of leases and servitudes, and that should be fitted into section 4(1) or 4(2).

Bill Kidd: That is interesting. Thank you.

Does anyone else have anything to say?

Yvonne Evans: I have a few quick points.

The first is about trustees' ability to ask the court for directions. I am not sure whether I have missed it, but that seems to have dropped out of the bill, yet it is a useful thing. In the recent Vindex Trustees case at the end of 2021, the trustees went to court in connection with the interpretation of a will, because they were not quite sure which charity was meant to benefit. The trustees proposed giving money to a particular charity and asked the court if that was okay. The court said that it could not give directions, although it gave a bit of a nod and a wink that the trustees were probably acting reasonably. It would be really useful for trustees to have the ability to ask for directions, rather than their making decisions and then worrying about what the comeback might be.

Secondly, although I know that we cannot cover everything and do not want to, I will move on to succession. One fairly uncontroversial thing is that a cohabitation claim has to be done within six months, which a lot of people say is far too short a time for a grieving cohabitant to do that. I know that the Faculty of Advocates feels quite strongly about that. I would propose a 12-month period, which would be another easy win and a quick fix.

Bill Kidd: That is very helpful. Thank you.

Professor Gretton, would you like to say anything in rounding off?

Professor Gretton: I agree with the point about petitions for directions. I do not know what has happened to that. There has been some confusion on that point in the past few years, and it needs to be looked at again. There should be provision about petitions for directions. I do not know what has happened to that.

I have no more to say.

Bill Kidd: Professor Paisley, are you fine? Okay. What you said was useful.

I thank all three of you. That was very helpful.

The Convener: Before we close, does anyone have any final points to highlight?

Professor Gretton: I could go on endlessly, but I will not.

Professor Paisley: This has been a most enjoyable session. Thank you.

The Convener: I thank our panel of witnesses for their helpful evidence. If the committee has any additional questions stemming from today's session, we will follow that up in writing.

I briefly suspend the meeting to allow the witnesses to leave.

11:34

Meeting suspended.

11:40

On resuming—

Instruments subject to Affirmative Procedure

The Convener: Under agenda item 3, we are considering instruments that are subject to the affirmative procedure.

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2023 [Draft]

The Convener: An issue has been raised in relation to the draft International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2023, which amends existing legislation to grant immunities and privileges, insofar as they are within devolved competence, to certain persons working with the International Criminal Police Organization, Interpol.

The order states that the term "Member Country" has the meaning that it has in the constitution of Interpol. However, the term does not appear in Interpol's constitution, although it appears in the agreement between the UK and Interpol, which is referred to in the order. When asked about that, the Scottish Government responded that the term "Member Country" has been used for consistency with the terms of the agreement and that the term has evolved into general use.

Does the committee wish to draw the instrument to the attention of the Parliament on reporting ground (h) because the meaning of the term "Member Country" could be clearer?

Members *indicated agreement.*

Police Negotiating Board for Scotland (Constitution, Arbitration and Qualifying Cases) Regulations 2023 [Draft]

The Convener: No points have been raised on the regulations. Is the committee content with the instrument?

Members *indicated agreement.*

Instrument subject to Negative Procedure

11:41

The Convener: Under agenda item 4, we are considering an instrument that is subject to the negative procedure.

Discontinuance of Cornton Vale Prison (Scotland) Order 2023 (SSI 2023/132)

The Convener: No points have been raised on the order. Is the committee content with the instrument?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

11:41

The Convener: Under agenda item 5, we are considering an instrument that is not subject to any parliamentary procedure.

Health and Care (Staffing) (Scotland) Act 2019 (Commencement No 1) Regulations 2023 (SSI 2023/131 (C 12))

The Convener: No points have been raised on the regulations. Is the committee content with the instrument?

Members *indicated agreement.*

11:41

Meeting continued in private until 12:02.

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