OFFICIAL REPORT
AITHISG OIFIGEIL

# Delegated Powers and Law Reform Committee

**Tuesday 6 June 2023**

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

# Tuesday 6 June 2023

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## DELEGATED POWERS AND LAW REFORM COMMITTEE

**19th 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:**

Jamie Bowman (Scottish Government)
Siobhian Brown (Minister for Victims and Community Safety)
Michael Paparakis (Scottish Government)

**CLERK TO THE COMMITTEE**

Greg Black

**LOCATION**

The Adam Smith Room (CR5)

# Scottish Parliament

## Delegated Powers and Law Reform Committee

*Tuesday 6 June 2023*

*[The Convener opened the meeting at 10:00]*

## Decision on Taking Business in Private

**The Convener (Stuart McMillan):** Welcome to the 19th 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 to decide whether to take items 4, 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

10:00

**The Convener:** Under agenda item 2, we will take evidence on the Trusts and Succession (Scotland) Bill from Siobhian Brown, the Minister for Victims and Community Safety. Welcome, minister.

The minister is accompanied by four Scottish Government officials: Michael Paparakis, policy manager, private law unit; and Jamie Bowman, Jane Duncan and John Thomson, legal directorate. I welcome all of you to the committee and remind all attendees not to worry about turning on their microphones during the session, as they are controlled by broadcasting.

I invite the minister to make some opening remarks.

**The Minister for Victims and Community Safety (Siobhian Brown):** Good morning, convener and committee. Thank you for giving me the opportunity to speak to you about the Trusts and Succession (Scotland) Bill, which is the second Scottish Law Commission bill to be introduced this session.

Trusts are an important legal structure in Scotland. In modern society, they are used as solutions in an incredibly wide variety of situations, as the committee has heard in its evidence. They are used extensively by charities and pension funds; in commercial transactions to set funds aside to deal with future liabilities; in individual estate planning; and to protect and administer assets on behalf of vulnerable people such as children, and adults with incapacity and disabilities.

Scots law, however, has not kept up to date with the increasing variety of situations in which trusts are used. The bill aims to modernise the law of trusts and take forward all the substantive recommendations on reform that are contained in the Scottish Law Commission's report on trusts.

Given the versatility of trusts and the uses to which they are put, the policy aim is to make sure that the law of trusts is clear and coherent and can respond appropriately to modern conditions. The huge variety of uses to which trusts are put also presents a challenge, as the bill must work equally as well for large-scale commercial or charitable trusts as it does for small-scale family trusts.

As for some of the key changes that the bill makes, it updates the powers and duties of trustees, including introducing a non-judicial method for removing trustees; restates trustees'

power of investments; sets out trustees' duty of care and duty to provide information to beneficiaries; and confers a number of important powers on the court, including a new power to alter trust purposes after the 25-year period has elapsed.

There are also two provisions on succession law, one of which is technical and is intended to clear up potential confusion in the drafting of a section in the Succession (Scotland) Act 2016. The other, more substantive provision makes changes to the order of intestate succession so that the spouse or civil partner of a person who has no children and who dies without leaving a will inherits the entire estate of the deceased. That important change reflects what many people expect to happen already, but which is not actually reflected in the current law.

The committee has heard from a number of stakeholders who have welcomed and have been positive about the bill. I am aware that points of detail have been raised, which I am sure that we will come on to discuss. I would like to say at this stage that I am willing to work with the committee on some of the issues that have been raised with you, and I am happy to take any questions.

**The Convener:** I will open the questions, the first of which is on section 104 orders. We faced a similar situation with the Moveable Transactions (Scotland) Bill. Will you provide the committee with an update on how discussions are progressing between the Scottish and UK Governments on a possible section 104 order with regard to the application of the bill's provisions to pension scheme trusts?

**Siobhian Brown:** Yes. So far, we have had positive engagement with the officials at the Office of the Advocate General, the Scotland Office and other United Kingdom Government departments on using a section 104 order to apply the bill's provisions to pension trusts.

**The Convener:** A couple of weeks ago, at the conveners' group meeting, I asked the First Minister whether he thought that some type of protocol regarding section 104 orders would be useful, as this is the second—and probably not the last—SLC bill in which the situation has arisen. Although my question is not about the bill per se, do you think it would be worth while considering some type of protocol between the Scottish and UK Governments on section 104 orders?

**Siobhian Brown:** Yes, I think that that could be worth while. Perhaps an official might have more detail on that. Do you want to come in, Michael?

**Michael Paparakis (Scottish Government):** Certainly. I am aware, convener, that you raised the question with the First Minister, and I think that he agreed to take it away for further consideration. I do not think that we have anything further to add to what the First Minister has said. I understand that Scottish Government officials will be writing to the committee on that matter.

**The Convener:** Assuming that the bill is passed by the Parliament, can you indicate how long you think that it will take for any associated section 104 order to come into force? What legislative options are there to ensure that the bill's commencement is not delayed and that there will be no black hole or gap in the law applying to pension scheme trusts?

**Siobhian Brown:** The Scottish Government's aim is to bring the bill's provisions and the section 104 order on pension trusts into force at the same time, as that would have the effect of applying the updated trust law in the bill to all types of Scottish trusts, including Scottish pension trusts, at the same time. That is the preferred approach, because it would avoid fragmenting trust law by creating different regimes for pension trusts and other kinds of trusts.

Should a 104 order not be forthcoming in time for the bill's commencement, there is a range of options to ensure that no gap in the law is created for pension trusts. Sections 78 and 80 would allow provision to be made to keep the Trusts (Scotland) Act 1921 and any other parts of pre-reform legislation in force for pension trusts for as long as required. It would complicate the legislative landscape, and it is not a desirable solution, but it is possible.

Another option is to defer commencement of the bill as long as is necessary to ensure co-ordination with the section 104 order. Again, that is not desirable, but it demonstrates that a gap in the law would not be created.

**The Convener:** Thank you. Over to Mercedes Villalba.

**Mercedes Villalba (North East Scotland) (Lab):** Good morning, minister. I want to move us on to section 75 of the bill and discuss definitions of "incapable" and "mental disorder". The committee has heard a number of views on future proofing the bill and its interaction with capacity law, in the context of possible reforms stemming from the Scottish mental health review, and it has been suggested to us that the bill cross-refer with the Adults with Incapacity (Scotland) Act 2000 with regard to the definition of "incapable" instead of its having its own, very similar definition. Do you agree with that? Would that provide an effective mechanism for allowing incapable adults to offer a view on situations that affect them, or would changes to trust law ultimately still be required after any reforms to capacity law?

**Siobhian Brown:** I thank Mercedes Villalba for her question. The bill uses a familiar definition of

"incapable" that is very similar, but not identical, to the one found in the 2000 act. The committee has, rightly, pointed out that significant and far-reaching changes have been recommended for mental health legislation.

I agree that it would be undesirable for the meaning of "incapable" in trust law to differ from the usual widely understood definition, and I see merit in making sure that the bill does not diverge from the general law on capacity and that it keeps pace with any changes in that area. As a result, I am willing to work with the committee and the SLC to explore how that can be done. I have also asked my officials to look at possible solutions, whether that be adopting the definition of "incapable" used in the adults with incapacity legislation by conferring a regulation-making power on Scottish ministers to alter the definition of "incapable" in this bill or by some other means.

**Mercedes Villalba:** Thank you.

**Jeremy Balfour (Lothian) (Con):** Good morning to you, minister, and to your officials. I wonder whether I can just briefly follow up that point. I think that, in the evidence that we took, the preferred model—although it was not preferred by everybody—was that the definition would simply refer back to the 2000 act. Can you give us a wee bit more information on what would be the advantages and disadvantages, from a Scottish Government perspective, of using that particular model?

**Siobhian Brown:** I will bring in Michael Paparakis, if I may.

**Michael Paparakis:** I am happy to answer that. As this is an area that we have yet to explore, we have not fully worked out what the advantages and disadvantages might be. Obviously, when the Scottish Law Commission was looking at this project, it decided to follow the model in the 2000 act closely, but not exactly—there is a slight difference. Therefore, it will be important to discuss the matter with the SLC to understand a bit better the reasons why it took that particular decision and then to begin to work out the potential advantages and disadvantages of the possible models that the minister has already set out.

**Jeremy Balfour:** Okay. Thank you for that.

**The Convener:** Jeremy, just before you go on to your other question, I should add that one concern that the committee has heard quite clearly, certainly in the evidence that it has taken, is about the fact that language can change and the need to safeguard language and individuals. The need for future proofing has also been raised quite strongly by a variety of people who have given evidence. I have to be honest and say that I am sure that the committee will be urging the Government to look at the point with some haste.

**Michael Paparakis:** Certainly. As the minister has pointed out, it is something that we are willing to work with the committee and the SLC on to make sure that the definition in the bill is appropriate.

**The Convener:** Thank you. I am sorry, Jeremy.

**Jeremy Balfour:** No, convener—that was very helpful.

On sections 7 and 12, we have heard quite a lot of evidence, particularly last week, that it would be difficult for trustees to reach a decision on whether a particular trustee was incapable, and there was concern about the possible abuse of those sections, with trustees perhaps trying to get rid of each other by using that methodology. Should there be a statutory procedure for assessing a specific trustee's capacity by a third party, such as a medical professional, or would there be drawbacks in going down that road?

**Siobhian Brown:** On the risks of abuse, section 7 contains a number of safeguards against abuse of the power by trustees. First, a majority of the trustees must agree before a co-trustee can be removed from office; the power cannot be exercised by a minority of trustees or a single trustee acting without the support of a majority. Moreover, if a trustee abuses the power, it can be challenged in court. Trustees who wrongfully remove co-trustees might be in breach of a fiduciary duty and might find themselves removed, and if they have acted negligently or in bad faith, they can be personally liable for court expenses. My view is that the bill contains sufficient safeguards to ensure that trustees exercise the power appropriately, but I will ask whether any of my officials want to add further to the history behind this.

**Michael Paparakis:** On the procedure with regard to obtaining a report, you have heard from stakeholders that, when decisions have to be made, there is sometimes a need to move at speed, and having to obtain a report in order to try to remove an incapable adult so that decisions can be made might delay things. You also heard from Mr Barr of the Law Society of Scotland about the assessment of capacity by legal professionals and how a report—that is, a medical report—should not be the final say. Obviously, there are potential issues in that respect.

It is also worth pointing out that the power to remove co-trustees is just one of the powers in the bill under which a trustee can be removed. If there are hard cases in which trustees do not think that they can make this particular decision, there are alternatives that they can follow. For example, they can apply to the sheriff court to remove a

trustee who might be incapable, and in relevant circumstances, beneficiaries have the power to remove a trustee, too. Although trustees have a power to remove a trustee under section 7, it is just one power—there are other options.

10:15

**Jeremy Balfour:** The concern that we heard in evidence was about how to know that someone was incapable. People's capacity can come and go, and the worry is that the decision might come down to four or five people sitting around a table who have no medical training but are concerned that an individual might not have capacity. You are asking people who have no medical knowledge or perhaps no legal background—smaller trusts might have to take legal advice—to take on a large responsibility, and concern was expressed about putting a lot of pressure on volunteers to make medical decisions.

**Michael Paparakis:** I come back to the minister's point about the safeguards against abuse. I would also reiterate my point that the power in section 7 is not mandatory—it does not have to be used. If there are hard cases in which the trustees do not feel capable of making the decision, they can apply to the court to make the decision for them. Equally, nothing in the bill prevents trustees from seeking a medical report if they want to. If it will give them the confidence to remove the trustee, that course of action is entirely open to them. Nothing in the bill prohibits them from doing so.

**Jeremy Balfour:** The problem is that they need the individual's consent to get a medical report, which might mean the trustees having to persuade the person in question, who might say that they are quite capable. If that person says no, the trustees have no power to take it further.

**Michael Paparakis:** Again, there are other options in the bill for removing a trustee. Trustees have the power to apply to the court and, in certain cases, beneficiaries also have the power to remove a trustee. There are ways of removing an incapable trustee that do not necessarily involve co-trustees making the decision.

**Jeremy Balfour:** Okay—I will move on.

The Scottish Law Commission told us in evidence that an aggrieved trustee who wanted to challenge a decision on their capacity could use common law to go to court. You have already mentioned that, but do you think that that sort of thing should be explicit in the bill instead of just being left to common law?

**Siobhian Brown:** Michael Paparakis can give you the history on that.

**Michael Paparakis:** If the committee wanted to make a recommendation in that respect, we would be happy to consider it. Ultimately, though, the Scottish Law Commission did not feel the need to make that explicit in the bill, presumably because it is something that is well established in common law and because there are no problems with the law as it works at the moment. However, if the committee wants to make a recommendation about putting it into the bill, we can consider it.

**Jeremy Balfour:** Thank you.

**Mercedes Villalba:** I want to take us back briefly to the question about the definition of "incapable". I remember that the committee heard another view. As I have said, the suggestion was made to us that, rather than having a new, albeit similar, definition in the bill, the bill could refer to the Adults with Incapacity (Scotland) Act 2000 so that, as that is updated, the definition in the bill would automatically be updated. However, STEP Scotland raised a potential concern with us about tying the definition to that act, because

"Scots law applies to trustees of Scottish trusts even if they are not Scots law jurisdiction persons."—[*Official Report, Delegated Powers and Law Reform Committee,* 16 May 2023; c 34.]

That means that, if we have the definition in the bill, we would at least be clear that it applies to trustees of Scottish trusts.

Have you considered that suggestion? Should we be concerned about it, or would it not cause issues? Would it be quite straightforward to simply link the definition to the 2000 act?

**Siobhian Brown:** I am willing to work with the committee on the definition of "incapable". The definition of "incapable" in the bill is focused on the decision-making abilities of trustees because, ultimately, the essence of trusteeship is about making decisions to the benefit of others. Therefore, the bill does not reflect the adults with incapacity legislation, as the grounds for assessment in that legislation do not align with the trustees' functions. Instead, the definition of mental disorder is based on the definition in England and Wales, in section 1 of the Mental Health Act 1983, as amended by the Mental Health Act 2007. That appears to have been on the basis that the English and Welsh definition of mental disorder was at the time more up to date than that used in the Adults with Incapacity (Scotland) Act 2000. I am willing to work with the committee and to take on recommendations to define "incapacity".

**Mercedes Villalba:** Do you see that as a potential issue and that who the definition applies to could be unclear?

**Siobhian Brown:** We will work together to ensure that that is clear.

**Mercedes Villalba:** Okay. Thank you.

**Jeremy Balfour:** We will move on, if that is okay, minister.

Some stakeholders have queried how the Office of the Scottish Charity Regulator's powers under the charities legislation in relation to charitable trusts interact with the bill's provisions that affect charitable trusts. For example, how does OSCR's power to appoint interim trustees interact with the court's power to appoint trustees under section 1 of the bill? If a protector is appointed to a charitable trust under chapter 7 of the bill, how will their powers and duties interact with OSCR's powers to regulate charitable trusts? Will you offer some explanation on those two specific points?

**Siobhian Brown:** On the interaction with the Charities (Regulation and Administration) (Scotland) Bill, charity law and trust law are two distinct and well-established areas of Scots law. That point was made separately by Lord Drummond Young and John McArthur in their evidence to the committee. We know that 12 per cent of charities that are registered in Scotland take trust as their legal form, and those charities are subject to both charity law and trust law. Otherwise, there is a range of other legal forms that charities can take, which include a company, an unincorporated association and a Scottish charitable incorporated organisation. Charitable companies, for example, must comply with charity law and company law, and trust law is of no relevance to them.

OSCR has written to the committee and welcomed the bill. It has said of the trustee's duty of care, for instance, that it fits with

"the standard of care expected of charity trustees when managing the ... charity".

My view is that the two bills complement each other and work well together, and that the modernisation of trust law is helpful for charities that take trust as their legal form.

**Jeremy Balfour:** With respect, minister, that does not really answer the question. There is the issue of who has jurisdiction if OSCR seeks to appoint and the court seeks to appoint. Does the court overrule OSCR or does OSCR overrule the court?

**Siobhian Brown:** OSCR has had the power to appoint an interim charity trustee since 2010. The Charities (Regulation and Administration) (Scotland) Bill will simply extend the circumstances in which OSCR can appoint interim charity trustees. That power is not new.

Similarly, the Court of Session has long-standing powers in trust law to appoint trustees. The power in section 1 of the bill simply replaces the existing power of the court to appoint trustees, and that is not new, either. That can be done following an application from OSCR where there is misconduct, or where it is necessary to protect charitable assets.

**Jeremy Balfour:** I thought that that power was new to OSCR, but I will go and check that out. Your answer is helpful.

What do you make of the interaction between the two bills? Do you think that there needs to be any more clarification of how the two bills will work together?

**Siobhian Brown:** Scottish Government officials who have been working on the bills are aware of the provisions in each. Trust law is relevant to charities only where the charity takes the legal form of a trust. Therefore, the bill will not impact on all charities. Generally, trust law and charity law operate in parallel, as is the case where charities take other legal forms, such as companies. As both bills progress through Parliament, officials will continue to work closely together to consider the ways in which they interact.

**The Convener:** On 23 May, Madelaine Sproule of the Church of Scotland Trust and Joan Fraser, a trustee of various trusts, appeared before the committee. Madelaine Sproule said:

"the crossover between the legislation that affects charitable trusts and the legislation that affects charities and other trusts is not entirely clear. I think that that could be specified better in the bill."—[*Official Report*, *Delegated Powers and Law Reform Committee*, 23 May 2023; c 28.]

In correspondence, the Scottish Law Commission expressed the view that section 70A of the Charities and Trustee Investment (Scotland) Act 2005, as amended by section 8 of the charities bill, if that bill is passed by Parliament, was a particular statutory power that would take priority over the general default power of the court in section 1 of the trusts bill. It went on to suggest that nowhere in the trusts bill is that explicitly stated.

To go back to Jeremy Balfour's questions, it would be worth considering those points, and it would be good if you could write to the committee on them.

**Siobhian Brown:** I am happy to take on any recommendations that the committee makes.

Perhaps my officials might want to come in on that point.

**Michael Paparakis:** On the question that Mr Balfour asked about interim trustees and the power that OSCR has in relation to trustees under section 1 of the bill, I think that the letter that the committee received from the Scottish Law Commission last week or the week before set out its position with regard to the general and the specific issues. However, as the minister has said,

we can write to the committee with further information.

**The Convener:** Thank you.

**Oliver Mundell (Dumfriesshire) (Con):** I have a question on charitable trusts. Some of the legal stakeholders, including the Law Society, have expressed surprise that chapter 5 of the bill, which concerns how long trusts will last in practice, does not apply to charitable trusts. Having heard the comments on this topic, do you think that there is a case for reconsidering the exclusion of charitable trusts from the scope of chapter 5?

**Siobhian Brown:** The trusters who set up public and charitable trusts almost invariably want the benefits to be provided immediately, so I do not think that that exclusion will create any practical difficulties. The Scottish Law Commission was impressed by the evidence of Dr Patrick Ford from the charity law research unit at the University of Dundee, who pointed out that there was a risk that a trust might direct long-term accumulations for the fulfilment of grand charitable purposes that would not materialise for many years, and that such accumulations could fall foul of the charity tests that are set out in sections 7 and 8 of the Charities and Trustee Investment (Scotland) Act 2005 and the definition of charitable purposes that is applicable for United Kingdom tax purposes and the Charities Act 2006. If there was no statutory limit to accumulation, OSCR would be left to consider every direction or power to accumulate on its own merits under the 2005 act charity test, and HM Revenue and Customs would have to do the same under UK tax legislation.

**Oliver Mundell:** For clarity, are you saying that you were not convinced by the evidence that we heard from the Law Society, Yvonne Evans or the firm Turcan Connell that a change is needed in that respect?

**Siobhian Brown:** I am not convinced at the moment, but I am happy to take any recommendations that the committee would like to put forward.

10:30

**Oliver Mundell:** I also want to ask about the balance of powers between the sheriff court and the Court of Session. Some legal stakeholders have told the committee that it would be helpful if the bill offered more choice for litigants between the Court of Session and the sheriff court for trust litigation, to suit litigants' preferences and circumstances. What is the Scottish Government's view on the strength of those arguments? Will the Government consider altering the bill in any way to reflect the evidence that we heard?

**Siobhian Brown:** The SLC consulted on that issue, and its allocation of jurisdiction between the courts met with general agreement. Currently, most trust litigation is conducted through the Court of Session, while some matters, such as appointing and removing trustees, can be heard in the sheriff courts. The bill expands the types of cases that can be considered by the sheriff court.

Trust litigation is a technical and specialised area that requires considerable expertise at judicial level and among those who present cases. There is a designate trust judge at the Court of Session who has the level of specialism that is required. The bill takes a balanced approach, conferring jurisdiction on the sheriff court where practical but ensuring that complex matters will be dealt with by a single court that has sufficient expertise to ensure consistency in decision making. The SLC looked at other legal systems and found that other countries similarly ensure that trust cases are dealt with by specialist judges who have appropriate expertise.

**Oliver Mundell:** I want to push back on that a wee bit. It has been recognised that, for many small trusts across Scotland, given the geography, it would cost them considerable time and expense to come to Edinburgh to have their case heard, and that that might be a barrier for them. Have you looked in any detail at creating different thresholds or expanding the choice? Those are suggestions that have been made to us in evidence. The SLC consulted a while ago, before the bill was in front of the Parliament. Is there any room for movement or expansion on that front?

**Siobhian Brown:** If the committee would like to write to me to make recommendations at stage 1, I would be happy to take those to the SLC to discuss.

**Oliver Mundell:** Does the Government does not have any strong views beyond what the SLC has stated?

**Siobhian Brown:** We are going with what the SLC says at this stage, but we are open to consideration.

**Oliver Mundell:** Okay.

**Jeremy Balfour:** To follow up on that issue, what would be the disadvantage of allowing the trustees to decide whether to go to the Court of Session or to a sheriff court? I presume that the trustees would take legal advice, and their lawyers could advise them of the best option. What would be the disadvantage of letting the trust make that decision, instead of its having to go down a certain route?

**Siobhian Brown:** I will bring in Michael Paparakis, if I may.

**Michael Paparakis:** I think that the committee will be aware that, usually, only a small number of trust applications are made in Scotland each year. If we were to open up those cases to the sheriff court, we could begin to lose the necessary expertise on the bench.

In addition, there are questions about which sheriff court would hear a case and how the jurisdiction would fall among the sheriff courts. I think that the SLC laid out that issue in its evidence to the committee.

Finally, a number of stakeholders who gave evidence to the committee referred to the fees of the courts and pointed out that the difference in fees between the sheriff court and the Court of Session is probably not as big as people might expect. I think that that came through from both the SLC and a number of legal professionals when they gave evidence.

**Jeremy Balfour:** Again, I want to push back on that. I think that the question about jurisdiction was answered by the SLC when it said that, if there were any question about jurisdiction, the case would come to Edinburgh sheriff court. That is clear. It might well be the case that people want to go down the Court of Session route, but I am not sure why we cannot give them the choice and trust solicitors to make that choice.

**Michael Paparakis:** The use of Edinburgh sheriff court is the fallback or final position. In other words, if no other sheriff court was ready to take jurisdiction, Edinburgh sheriff court would do so. The SLC considered the matter and it has laid out all its reasons for opting for that position, including the expertise and judicial discretion that are involved in a number of such decisions. It felt that the Court of Session was the best forum in which such cases should be raised. I also point out that, in a number of other jurisdictions, including England, the higher or superior court model tends to be the one that is used.

**Oliver Mundell:** I am interested in the point that Michael Paparakis made about there being relatively few cases at the moment. Clearly, the bill envisages a greater role for courts in the administration of trusts. There will be several new opportunities to involve the court in trust matters. Does that give a greater reason to expand the options for people?

On the point about some of the evidence that we have heard about court costs, there is certainly a public perception—including on the part of many people involved with trusts—that the sheriff court could be a more expensive route. If the bill goes ahead, what do you plan to do to publicise information on the likely costs of going to the sheriff court?

**Siobhian Brown:** I do not think that the bill is going to produce much litigation—certainly not in the long term—but I recognise the cost issue. I am sorry, but I do not have information on that in front of me.

**Michael Paparakis:** We will certainly consider how we will get information about costs out there. I am not sure that there is a need for a media campaign, because I do not think that that would be particularly helpful, but there are Government-run web pages that could be used to bring the issue to people's attention. It might be that someone who is considering litigation and is involved in trusts will use a search engine to try to find information on this, and that could bring up a Government page where that information could be displayed. We can consider that and write to the committee about it.

**Oliver Mundell:** That would be helpful. It feeds into a wider issue—one which will potentially be referenced in other questions—about how people navigate the legislation, bearing in mind that a lot of the individuals who interact with it are not going to be legal professionals. Many people put themselves forward for smaller charitable trusts to try and do something good for society, and having clear advice and guidance for them on how legislation affects them would be useful.

You say that you do not expect an increase in litigation. However, the bill creates a lot of new opportunities for the courts to get involved in trusts, so it is hard to see how there would not be an increase in cases. What is your analysis based on?

**Siobhian Brown:** Having a statutory style in primary legislation is not necessary or helpful at times—it can become outdated and can be difficult to update. The 1921 act contains only two straightforward styles: a form of minute of resignation and a deed of assumption.

On guidance, in terms of accessibility for laypersons, I am confident that the bill represents a vast improvement on what we have under the 1921 act and other trust legislation. The Government has set out its priorities for this parliamentary session. Preparing guidance on trusts could affect the delivery of those priorities if we need to take resources away from other areas.

I do not think that using a media campaign to communicate what people already expect to happen is an efficient use of public resources.

**Oliver Mundell:** I will leave it for now, convener.

**The Convener:** If the Government will not consider carrying out a media campaign, will it consider writing to each trust after the legislation is passed, to make them aware that new legislation is in place, and to provide helpful links in any

correspondence so that trustees can then look at those themselves?

**Siobhian Brown:** That could be quite difficult to do, but I am willing to consider that and speak to SLC and my officials regarding that.

**Mercedes Villalba:** I would like to move us on to sections 16 and 17, which are on the trustees' powers of investment. Yvonne Evans and others have suggested that, partly because of Scotland's increasing emphasis on net zero goals, that sections 16 and 17 should be amended to explicitly allow trusts to make environmental, social and governance investments, particularly when those might underperform compared with other investments. We have heard mixed views on that. Does the bill allow trustees to do that already?

**Siobhian Brown:** That is an area on which I am willing to work with the committee. Trustees are given broad investment powers that do not prohibit taking into account environmental concerns, as stakeholders have recognised. Trustees are presently required to consider the suitability of a proposed investment for the trust. That is not an instruction to maximise financial return at all costs. I am aware that the committee has heard that trustees of trusts whose purposes are the eradication of poverty would not consider it suitable to invest in tobacco, alcohol or gambling for example. Ultimately, the investment policy that the trustees should adopt must reflect the purposes of the trust as set out by the truster in the trust deed.

As I have said, the role and fundamental duty of the trustees is to implement the trust's purposes and care is needed to ensure that the trustees, when making investment decisions, are not instructed to take into account their personal values.

I have heard the views of a wide range of stakeholders that express provision would be helpful to make clear that, when assessing the suitability of an investment for a trust, financial returns are not the only consideration that may be taken into account. For example, the environmental and social impacts could also be relevant considerations. I will consider further what could be done on the issue, and look forward to working with the committee and the SLC on the matter as the bill continues its passage through Parliament.

**Mercedes Villalba:** It sounds as though you are considering making a change to the bill along the lines that have been suggested. Do you think that there are any policy drawbacks to making that change?

**Siobhian Brown:** No, I do not, but we will have to wait to see once we move that forwards.

**Bill Kidd (Glasgow Anniesland) (SNP):** The legal company CMS Cameron McKenna Nabarro Olswang LLP—which, thankfully, is simply referred to as CMS—raised a key concern about section 19 on nominees as currently drafted. It thinks that it may not go far enough in capturing the ways in which trusts are used in the financial services sector. Specifically, the firm has said doubt would remain as to whether trustees can use nominee custody structures and sub-custodians. The firm said that those structures and arrangements are permitted under the Financial Conduct Authority's client asset rules and are commonplace in the financial services sector. Will you confirm whether section 19 allows the use of nominee custody structures and sub-custodians? If it does not, will you accept CMS's view that there might be risks with that approach or do you have an alternative view?

10:45

**Siobhian Brown:** I have listened carefully to the evidence that has been given to the committee and it seems helpful if trustees who follow rules laid down by the Financial Conduct Authority for the protection of client assets were found to be liable for the breach of fiduciary duty, or otherwise criticised. Those are narrow and technical matters of general trust law that my officials and I need time to consider fully. I agree with Professor Gretton that the issues raised are potentially important. That is why we need to take time to understand them before considering how we can best resolve them. I confirm that I will write to the committee once I have considered the matters fully.

**Bill Kidd:** Thank you. As you say, Professor Gretton said that he thought that CMS had raised a potentially significant point about those complex structures and that the matter requires further consideration anyway.

**The Convener:** We move on to sections 25 and 26, which concern the trustees' duties to provide information. Some concern has been expressed to the committee about the trustees' duties to provide information to potential beneficiaries under those two sections. Specifically, the concern is that the exact scope of the duties is uncertain but they are potentially too onerous.

We heard from Gillespie Macandrew, which presented different information to the committee from what its written submission said. In the committee, the firm said that the current provisions were better than being too prescriptive. However, the Law Society considered that there were problems with the existing provisions. Alan Barr, on behalf of the Law Society, said quite a number of things about potential beneficiaries.

Having heard the views expressed by stakeholders, do you share any of their concerns about the current drafting? If so, how would the Scottish Government change sections 25 and 26 of the bill to address them?

**Siobhian Brown:** With information duties, there is a balance to be struck between the interests of the trustees and those of the beneficiaries. Many of the issues that were raised about the burden placed on trustees were also raised when the policy was being developed. The SLC has considered those competing interests at some length in developing the provisions, and the information duties in the bill attempt a compromise.

I recognise that requiring trustees to inform beneficiaries or potential beneficiaries about their position under a trust could add a burden of work to trustees. However, against that, beneficiaries could have a fundamental role in a trust in holding the trustees accountable. They cannot do that if they are not properly informed.

My view is that the bill strikes an appropriate balance between the ease of administration for the trustees and enabling beneficiaries to hold them to account. Beyond that, the information duties contained in it can be tailored for individual trusts. A truster is permitted to limit the duty to provide information requested by the beneficiaries subject to certain safeguards and the bill allows for some flexibility.

The Scottish Legal Complaints Commission has said that many complaints are made because beneficiaries are not clear on what they have or do not have the right to expect. We welcome the clear provisions on the duty of trustees to pass information to the beneficiary and on what the beneficiary is entitled to expect or request.

The bill strikes an appropriate balance. However, if the committee has another view and would like to make a recommendation, we will consider it.

**The Convener:** Okay. Thank you, minister.

**Bill Kidd:** As has been mentioned, chapter 7 of the bill says that the person who sets up a trust can appoint a protector to it. Section 49(3)(a) says that a protector could, for a particular trust,

"determine the law of the domicile of the trust".

On a number of occasions, the issue of where trusts are based has been spoken about as an important aspect. What is the precise nature of the power that the Scottish Government intends to confer on protectors under that section?

**Siobhian Brown:** I am willing to work with the committee on this issue. Under the Recognition of Trusts Act 1987, a truster may determine which law governs a trust that they set up. The proposed example power in the bill would make it clear that the truster may confer their power to determine the law that governs a trust on to a protector. That may be relevant when no applicable law has been chosen by the truster and would prevent the need to rely on the default statutory provisions that narrate how the law governing a trust is to be determined where there is no expense provision.

I have listened to the evidence on the issue, which appears to be causing the committee some concern, and I will work with the committee in the coming months try to reach agreement.

**Bill Kidd:** We have heard differing views about the potential scope and effect of the provision. Do you accept that, if the provision remains, its drafting should be improved, particularly because some legal academics have suggested that the provision should simply be removed from the bill altogether?

**Siobhian Brown:** The power would not allow a protector to amend the domicile of a trust, but would instead allow a protector to determine, but not thereafter to change, the jurisdiction whose laws shall be used to determine what the governing law of the trust is. Accordingly, where a protector determines that the law of domicile of a trust is in Scotland, the domicile of that trust will be determined in accordance with Scots law. Under Scots law, it may be determined that the domicile of a trust is a jurisdiction other than Scotland. I am happy to work with the committee on that issue.

**Bill Kidd:** Should the drafting need to be improved, are you happy to work with the committee on that?

**Siobhian Brown:** Yes.

**Jeremy Balfour:** I move to section 61 of the bill, which gives a power to the beneficiaries, and others, to apply to the court to alter the trust purposes of a family trust where there is a material change in circumstances. Section 61 sets out the default position that that power cannot be used for 25 years. Most, though not all, of those who expressed a view to the committee thought that the 25-year period was too long. How did you arrive at the period of 25 years and, having heard the evidence, are you persuaded that that is still the right period?

**Siobhian Brown:** It is the Scottish Government's view that there should be a default time period that must elapse before the proposed jurisdiction can be exercised. The 25-year limit was chosen because that section of the bill is intended to deal predominantly with long-term trusts and the problems that can arise in relation to those.

The SLC considered that 25 years provided an easily workable default route that represented a short generation. A default time limit also helps to avoid the risk that family members who are unhappy with a trust might mount an early application to have the trust's terms altered before any material change of circumstance has occurred.

The 25-year limit cannot be extended by a truster, but a truster can shorten that limit or do away with it altogether. I have heard evidence from stakeholders on the matter and, although some have suggested that 25 years is too long, none have suggested an alternative time period.

I will consider any recommendations that the committee makes in its stage 1 report, including any alternative recommended time limit.

**Jeremy Balfour:** STEP Scotland was also critical of a further requirement to be met before the court power could be used, which is that the person who set up the trust must now be dead. Does the Scottish Government still think that that requirement should be in section 61? What was the rationale for that provision?

**Siobhian Brown:** I will bring in Michael Paparakis to answer that question.

**Michael Paparakis:** The Scottish Law Commission considered that in its report. I think that the suggestion about the truster being dead came from Standard Life, as part of the Scottish Law Commission's consultation. The SLC was impressed by that suggestion, which is why the change was brought in.

Our default position is that the truster must either be dead or the 25 years must have passed—whichever is longer. The idea is that there is balance between respecting the truster's wishes and the trust property beneficiaries. We think that the right balance is to wait until the truster has passed away or 25 years has passed, whichever is longer.

**Jeremy Balfour:** I appreciate that the bill was drafted by the Scottish Law Commission, however it is now a Government bill, so the Government's view must be that that is the right thing to do.

**Siobhian Brown:** We took the recommendations from the Scottish Law Commission but if the committee wants to make any suggestions in its stage 1 report we would be happy to consider them and talk to the SLC.

**Jeremy Balfour:** Okay, thanks.

**The Convener:** Mhairi Maguire of Enable Trustee Service and Madelaine Sproule of the Church of Scotland Trust said that, although they did not work with family trusts, they thought that 25 years could be too long for certain groups of beneficiaries. Could the 25-year period be amended or could a further subsection be added setting out a timescale that was more relevant to different types of beneficiaries?

**Siobhian Brown:** Yes. As I have said in answer to previous questions, I will consider any recommendation that the committee makes at stage 1, including on alternative time limits.

**The Convener:** Okay.

**Oliver Mundell:** In the same evidence session, we also heard concerns that people might try to draft around the provision or include clauses to create the flexibility to make changes outwith that period. Multiple witnesses at that session seemed to agree that that would not be desirable. Do you take that point on board?

**Siobhian Brown:** Yes, I do. That is why I am willing to work with the committee on moving the time limit forward.

**Oliver Mundell:** Thank you.

**Mercedes Villalba:** Sections 65 and 66 relate to expenses. The Law Society, as well as other legal stakeholders who appeared before the committee, raised concerns about the current policy underpinning section 65, which sets out principles for determining how legal bills are paid for in trust cases. Specifically, it provides that trustees will be personally liable for those expenses in certain situations, including when the trust fund does not have enough resources to cover them.

The Law Society has said that section 65 will deter people from becoming trustees and might lead trustees to unfavourably settle or abandon legal proceedings for fear of personal liability, which would mean their having to pay out from their own funds. We also heard from various legal stakeholders that obtaining trustee insurance for personal liability is not straightforward.

Having heard those views, do you share the concerns about section 65?

**Siobhian Brown:** Currently, it is usual for trustees to be personally liable for litigation expenses in order that successful opponents have the right of relief against the trust estate. Section 65 clarifies that the starting point is that a trustee does not incur personal liability and will only do so when certain grounds exist, as set out in sections 65(2) and 65(3) and the court exercises its discretion to make an order for expenses against the trustee personally on one of those grounds.

Section 65 achieves what the Law Society seemed to be asking for by making the default position that trustees are not personally liable for expenses. There are some exceptions to that default position, but they are subject to the court's discretion, which is widely drawn. That ensures

that trustees of underfunded trusts who unnecessarily litigate are not given an unfair advantage in litigation proceedings.

My officials might want to add something further.

11:00

**Michael Paparakis:** The issue of litigation expenses was consulted on extensively by the Scottish Law Commission. The approach set out in the initial consultation on litigation expenses was very similar to what the Law Society seemed to be asking for, which was a blanket no-personal-liability approach, but the responses that were received by the Scottish Law Commission—in particular, from the Faculty of Advocates and STEP—made it reconsider the original proposal, principally in respect of the issue of litigation by trusts with insufficient funds. The Scottish Law Commission took on board the views of the Faculty of Advocates and STEP, which is why it has attempted a compromise in the bill.

Basically, as the minister has said, the initial point is that trustees do not have personal liability for such expenses—which is exactly what the Law Society wants—but there are exceptions in the provision, and in such cases, the court would make a decision with regard to personal liability.

**Mercedes Villalba:** Minister, does the default position that you have explained—that is, that individuals would not be personally liable but that there would be exceptions—mean that the Government does not propose to amend section 65 in any way?

**Siobhian Brown:** I will bring in Michael Paparakis to respond to that.

**Michael Paparakis:** We are happy to listen to any recommendations that the committee might make on the matter.

**Mercedes Villalba:** But you are not currently proposing anything.

**Michael Paparakis:** No.

**Oliver Mundell:** Let me push a little further on this question. I am, as I have said in previous questioning, concerned by the Law Society's written submission. It describes this provision as "radical" with "real issues", saying that it is not standard and that it creates

"a severe danger of a conflict of interest".

The Law Society comments on a wide range of legislation before the Parliament, and by its own standards that is pretty strongly worded. Obviously, it is a very significant stakeholder, and I am struggling to get comfortable with the provision, given such strongly worded concerns.

As drafted, the provision does not reach a compromise that the Law Society is comfortable with. I would have thought that the Government might want to look at whether the compromise that the Law Commission has arrived at is the right one, or whether there is room to find something better. That issue should not be left to the committee or to others; the Government itself could take a more proactive role in finding something that all stakeholders can agree with.

**Siobhian Brown:** You have raised some valid points and I am happy to take that into consideration.

**Oliver Mundell:** Are you happy to approach the Law Society directly about wording?

**Siobhian Brown:** I will work with officials and report back to the committee.

**Oliver Mundell:** Okay.

The Faculty of Advocates and numerous other legal stakeholders have said that they think that the power in section 67 to give direction to the court needs to be much wider than it currently is. Having heard those views, do you agree that it would be useful to add to the bill a general power to give directions?

**Siobhian Brown:** The SLC proposed that its recommendations be given effect by the amendment of sections of the Court of Session Act 1988. However, those sections were repealed back in 2014, at around the same time that it published its report on trust law. It is not our intention to do away with that useful method for trustees to obtain advice on administrative difficulties that are encountered in a trust, and the repealed provisions of the 1988 act were replaced by a much wider and more general power for the court to determine its own procedure, which could include powers to give directions. That is why the relevant section was removed from the SLC's draft bill for introduction.

Officials communicated the decision to remove the provision from the SLC's draft bill to the Lord President's private office when the bill was introduced. I have listened to the views of various stakeholders who have given evidence to the committee—in particular, to the view of the senators of the College of Justice—and I am happy to take the matter away and consider it further.

**Oliver Mundell:** I do not want to put words in your mouth, but for clarity, you think that it would be worth restating that in the bill. You are willing to look at putting something in the bill.

**Siobhian Brown:** We will look at that further and get back to the committee.

**Jeremy Balfour:** In the evidence that we have heard, particularly last week, there seemed to be some confusion with regard to the different types of trusts, as we have discussed already. Obviously, the Scottish Law Commission did not consider that, but has the Government considered trying to define a bit more clearly the different types of trust and how they work in practice? Indeed, we heard evidence from an individual with quite a lot of expertise in being a trustee, and she was not sure where one of the trusts that she is dealing with at the moment would fit into the bill. Has any thought been given to trying to define different forms of trusts, and if not, why not?

**Siobhian Brown:** I think that one of my officials on the legal side—perhaps Jamie Bowman—would like to respond.

**Jamie Bowman (Scottish Government):** Thank you, minister. I am happy to speak to that question, which goes to the issue whether the bill attempts a complete codification of trust law and, in particular, whether it makes provision on the nature and constitution of trusts—that is, what they are and how they are constituted. The SLC considered the issue when it was developing the project to modernise trust law, with a paper on the nature and constitution of trusts.

In its report, however, the SLC ultimately concluded that that was not an area on which the bill should seek to make provision, because it had not been identified as a part of the law that had been causing problems in practice, compared with some of the other areas where the bill does make provision, particularly, for example, on the powers and duties of trustees. They were not the issues that the SLC considered needed to be remedied most urgently.

However, it was also considered that the area of law that is contained in common law might not lend itself particularly easily to being codified in a statute. I think that the SLC looked at attempts to undertake the same exercise in other jurisdictions and concluded that, in any event, codification rarely ends up being comprehensive.

Therefore, at quite an early stage in the project of developing the bill, the SLC made the decision about what should and should not be in the bill, and that was the basis on which the bill was developed. It is not comprehensive in its statement of trust law, and the Scottish Government's view is that that is the right approach, taking account, in particular, of the significant body of work involved in the development of the report on trust law prior to 2014.

**Jeremy Balfour:** In that case, minister, what advice would you give to the lady who came to the committee on 23 May and said, "I don't know where my trust fits in"? What does she—and other laypeople who are trustees—do if there is no legal definition?

**Siobhian Brown:** I am happy to take that issue away and to look at providing more information to the committee on how we can raise more awareness around the different types of trusts.

**The Convener:** Oliver, did you want to come back in?

**Oliver Mundell:** Briefly, convener. I had planned to ask about the codification of trust law later, but would you rather that I asked about that now?

**The Convener:** Yes, you can do that now.

**Oliver Mundell:** Coming back to the points that your officials have made, minister, do you think that this has been a missed opportunity? Some people have been in touch with the committee to say that there could have been a wholesale codification of trust law. Given that we have not had major legislation in this area for a long time and that the bill has come to the Parliament through the SLC process, I imagine that it is unlikely that the Parliament will legislate on trusts on this scale for years. Have we missed the opportunity to do that codification exercise?

**Siobhian Brown:** Complete codification of any area of law is never a straightforward task. The SLC considered codification of the law but ultimately rejected it. Its view, as Lord Drummond Young told the committee, was that some areas of the law are better left out of statute—for example, the somewhat abstract dual patrimony theory that underpins trusts and the law around express or implied trusts.

The bill reforms all the parts of Scots trust law that have traditionally been dealt with by statute, and it consolidates and modernises nearly all the statutory trust areas. I am content that the SLC, after extensive consideration of the issue, has identified the right approach in the bill, which focuses on reforming those parts of the law that create problems in practice.

I understand the view that comprehensive codification would make it easier for a layperson to access and understand the legislation. However, as the SLC suggested in its evidence, in other jurisdictions where codification has taken place, the statutory law is seldom absolutely comprehensive.

**Oliver Mundell:** So you do not think that the benefits would outweigh the negatives.

**Siobhian Brown:** I do not. I refer to the SLC's recommendation.

**Oliver Mundell:** More broadly, though, it is not the Scottish Government's position to move

towards as much codification within the civil law as possible.

**Siobhian Brown:** Not at this stage, no.

**The Convener:** Before we move on to discuss succession, I note that, a couple of weeks ago, we had someone giving evidence who was a sole trustee. We know that, under charity law, when somebody is in that position, OSCR can step in to assist. Do you believe that the bill provides enough safeguards for a person who becomes a sole trustee to a trust? Something might happen to that individual. Clearly, we do not want that to happen but, in such a case, the trust could end up having no trustee.

**Siobhian Brown:** I ask Michael Paparakis, who has worked on the bill during its history, to comment on that.

**Michael Paparakis:** In the case of a sole trustee who becomes incapacitated and is no longer able to look after the trust, there is a route for someone to apply to the court to add a trustee, who can then take over its running. That application can be made by the beneficiary, for example. There is an avenue for a trustee to be replaced and for the trust administration to continue.

**The Convener:** However, the beneficiary might not be in a position to make such an application.

**Michael Paparakis:** There might be instances where the interest to raise an application goes wider than just the beneficiary. For instance, a guardian to the beneficiary may be able to raise legal proceedings on their behalf. There could be a parent, who would be the legal guardian if the beneficiary was a child, and they could raise proceedings on their behalf.

**The Convener:** Jeremy Balfour has a question about that.

**Jeremy Balfour:** That does not cover all situations, however. For example, I could have a trust as a person with a physical disability. If the person who is the trustee loses capacity for whatever reason and I lose capacity at the same time, how will the trust run if nobody else has been appointed? How will my payments be made?

**Michael Paparakis:** If the adult becomes incapacitated as well, I do not know whether, in that situation, an application would be made for a guardian to come in. If the adult becomes incapacitated, there could be family members who would be able to make an application for guardianship or an intervention order. Ultimately, the local authority is able to do that. Once that happens, applications to the court could be made as well.

**Jeremy Balfour:** I suppose that I am trying to push at whether we believe that, as a principle in law, there should ever be only a sole trustee in a trust. Does the Government have a view on that? Do you agree that trusts should have more than one trustee?

**Michael Paparakis:** That is not a matter that the SLC consulted on—

**Jeremy Balfour:** I am not asking about the SLC. I am asking whether the Scottish Government has a view on that.

**Michael Paparakis:** I am happy to take the question away and consider it. It is not something that was raised during the consultation, so it is not something that we have given thought to as part of the bill.

**The Convener:** I mentioned an individual who gave evidence to the committee. In the trust that they were involved in, there were two trustees, but that went down to one. That created a different dynamic in the discussion that we had in that evidence session.

I also note the points that Jeremy Balfour has raised. Those are legitimate issues of concern. We all want to ensure that the legislation is good and robust, that trusts will be managed appropriately and that beneficiaries will have access to required funds. Obviously, bills have to get paid, and if there ends up being only one trustee and they lose capacity, there is a concern about what will happen and who will pay the bills.

11:15

**Siobhian Brown:** You have raised a really valid point. We will go away and consider it, and we will get back to the committee on that point.

**Mercedes Villalba:** I want to move us on to part 2 of the bill, which is the part of the bill that deals with inheritance. Section 72 relates to the right of a spouse or civil partner to inherit. A range of stakeholders, including the Law Society of Scotland, 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 not divorced or had the partnership dissolved. Having heard the views that have been expressed, are you persuaded that section 72 should be amended to make that distinction?

**Siobhian Brown:** The Scottish Government consulted back in 2016, and the changes that will be made by the bill received the backing of an overwhelming number of consultees. I understand that the Law Society has made a drafting suggestion that, in its view, would resolve the problem that has been identified. My officials are

currently considering that. However, any test could come with its own set of problems.

The committee has heard from stakeholders that certainty is an important feature of Scots succession law. The provision provides certainty, and the definition of separated spouses risks creating unwelcome uncertainty. Any definition risks—however remote some might consider the risk to be—disinheriting spouses who are living apart only because they are prevented from living together. That might include couples in which one of the spouses is in long-term care or prison. Separated spouses can already avoid that problem altogether by preparing a new will, updating their current will or preparing a separation agreement. The change that will be brought about by the bill will be limited to cases in which there is no will and no children. The suggested change would be at odds with the position under the law of succession, whereby a will that is not changed following a couple's separation will continue to be given effect up until the parties' divorce.

There are unanswered policy questions about the proposed alternative approach. For example, it is not clear whether a separated spouse would still inherit some of the estate—but only after the deceased's parents or siblings—or whether the separated spouse should not inherit anything.

As I have said, my officials are considering the issue at the moment.

**Mercedes Villalba:** It sounds as though there are risks either way, regardless of whether a distinction is made. The issue becomes about where the burden should land. You said that one way of avoiding the problem could be for people to change and update their will, which is an administrative burden, obviously. However, the alternative is a different group of people being faced with that burden.

**Siobhian Brown:** All those aspects need to be considered. My officials will go away and consider those carefully, and we will come forward with something as we progress the bill.

**Mercedes Villalba:** But, at this stage, you are not sure which way the balance will go.

**Siobhian Brown:** No. It is still under consideration.

**Bill Kidd:** Minister, it seems a bit odd to me that an unlawful killer would be allowed to be the executor of their victim's estate. However, apparently, that is a circumstance that pertains. Professor Paisley, Professor Gretton and a number of legal professionals and law firms have added their support for a specific proposal to clarify that an unlawful killer should not be able to be an executor of their victim's estate. Professor Paisley proposed the idea first and others came on board with his suggestion. They told the committee that they think that the bill needs to be amended to clarify that the law does not permit an unlawful killer to be an executor of their victim's estate. STEP Scotland identified section 6 of the bill as being potentially helpful in that respect. However, most of those who gave evidence said that dramatic action needs to be taken to address the issue.

**Siobhian Brown:** I am very willing to work with the committee on the issue. I am committed to introducing reform that would prevent a person who has been convicted of murder from being an executor of their victim's estate, and my officials and I will explore what can be done in the context of the bill to ensure that that happens.

As the committee is aware, the Scottish Law Commission did not produce recommendations on the matter, so the bill as introduced does not mention it. There was consensus on the matter when the Scottish Government consulted on it in 2019, which is why we are committed to introducing reform at the next legislative opportunity. The existing law is not clear.

I understand that Professor Paisley has written to the committee with his view, but that the leading academic textbook on confirmation of executors appears to take a different view. Depending on questions of scope, the bill could be used to bring the needed clarity. My officials and I are actively considering the issue. Recently, the SLC announced that it will look at executory law in its eleventh programme. I will consider our approach in the light of that announcement.

It is important that whatever is taken forward is capable of working in practice, because we do not want to have a situation in which the deceased's estate cannot be administered or the administration of it is called into question. That is not to say that the bill does nothing. Section 6 will make it more straightforward to remove a murderer from the role of executor, and the jurisdiction is extended to the sheriff court. However, I reiterate my commitment to introducing reforms that would prevent a person who has been convicted of murder from being an executor of their victim's estate.

**Bill Kidd:** That is clear. I am certain—I hope—that the committee will be pleased to work with the minister and the Government on that.

**The Convener:** We move on to the issue of what happens when someone dies without leaving a will. Currently, a cohabitant has six months to apply to the court in order to access the deceased person's estate. We have heard a lot of evidence on the strict six-month time limit. It is fair to say that the majority feel that that time period is far too

short. Various witnesses have suggested that the bill should be amended to address the issue, and there have been several suggestions about the specific nature of any changes. Having heard the views that have been expressed in evidence, is the minister persuaded that the bill should be amended to change the six-month time limit, or are there drawbacks to a change in policy?

**Siobhian Brown:** The law of succession affects everyone, but it can also divide opinion. The committee has heard that, although everyone agrees that the law of succession needs reforming, there is no consensus on what those reforms should be. It has heard about possible reforms to the financial provision for cohabitants when one partner dies, which the Scottish Government has consulted on previously.

Any amendment to the relevant timescale would need to address the issue of scope and it would fragment the law in the area. Recently, the SLC has published a report on financial provision in the case of the breakdown of a cohabiting relationship in circumstances other than death. The Scottish Government will give consideration to a revised definition of cohabitants, which should extend to situations in which a cohabiting relationship ends by way of death, including the relevant timescale.

**The Convener:** Thank you, minister. The Faculty of Advocates argued that a power for the court to extend the time limit on an individual case-by-case basis should have been included in the bill; indeed, it did not think that that particular aspect would be controversial. It also suggested that it would help grieving and vulnerable cohabitants navigate family dynamics after the death. I should add that Yvonne Evans suggested that the time limit simply be extended to 12 months, and others thought that that should be the case, too.

**Siobhian Brown:** I will bring in my officials to give you the history on that.

**Michael Paparakis:** As the minister has pointed out, the Scottish Law Commission has taken a look at cohabitation and provision where the relationship breaks down otherwise than by death. The statute itself is structured on the basis of the provisions in section 29 of the Family Law (Scotland) Act 2006.

The Scottish Government is considering both the SLC recommendations on cohabitation that breaks down otherwise than by death and whether that necessitates a change to update the law where cohabitation ends by death of the spouse. The committee will be aware that, as part of our programme for government at the beginning of the parliamentary session, the Scottish Government was considering the implementation of a number of SLC reports, including one on cohabitation. It is something that we are actively considering.

**The Convener:** Just before I bring in Jeremy Balfour, I want to pick up the point about grief. Obviously, grief affects everyone differently, so the six-month time period might be far too short for some individuals. Therefore, the recommendation from the Faculty of Advocates on extending the period on an individual case-by-case basis could be a compromise in the bill. That said, there was strong evidence in support of a full extension to 12 months.

**Siobhian Brown:** You raise some valid points. We are happy to consider them.

**Jeremy Balfour:** One of the key themes of the written responses to the committee's call for views—and it was also mentioned by some of the witnesses who appeared before the committee—was the importance of the legislation being as accessible as possible to trustees and beneficiaries without legal backgrounds. Most people who do the job do so on a voluntary basis and do not have an understanding of the law.

Ideas that the committee has received to enhance accessibility include drafting changes, including improving or adding to definitions in the bill, as has already been mentioned; Government guidance; a publicity campaign; and style legal documents for the benefit of trust users. In the light of the views that have been expressed to the committee, can the minister describe the measures that the Scottish Government intends to take to maximise the accessibility of the legislation to its users?

**Siobhian Brown:** In terms of accessibility for laypersons, I am confident that the bill represents a vast improvement on what we currently have under the 1921 act and in other trust legislation. Given that trusts are used in a widely varied and ever-changing range of circumstances, producing and maintaining guidance that accommodates the breadth of purposes to which they are put would be a significant undertaking.

The Government has set out its priorities for this parliamentary session. I take on board Mr Balfour's points regarding enhancing accessibility to people who are volunteering, but at this stage I think that any sort of campaign in that respect would not be a good use of public resources.

**Jeremy Balfour:** Are you not concerned that people will be put off becoming trustees, if they do not understand how the role works, if they always have to consult lawyers and if there is no kind of style document? A lot of trusts are already struggling to find people. Are you not concerned that that will put more people off? What analysis have you done of that situation?

**Siobhian Brown:** I am not concerned that it is going to put people off, but I am willing to consider the issue further. I will bring in my officials, who might be able to give you some history on the work that has been done previously.

11:30

**Michael Paparakis:** The Scottish Law Commission was aware of the important role that trustees play in trusts in Scotland. It was certainly one of its primary thoughts when it was writing the report; indeed, that comes through in the consultation and the report. As the minister has said, we will give consideration to that, and we have already agreed to write to the committee on the issue of litigation in response to Mr Mundell's question, so we could write to the committee on this matter, too, and tie them together.

**Jeremy Balfour:** Has the Scottish Government done any analysis of the reasons why fewer people are coming forward as trustees?

**Michael Paparakis:** I am not sure how such analysis could be undertaken. Lay trustees tend to be in smaller trusts involving individuals; it is not a public office that is advertised and which people can sign up to. I am therefore not sure what kind of analysis could be undertaken.

There are professional trustees but as far as lay trustees are concerned, you are talking about small family trusts in which the beneficiaries, the truster and so on are all known to each other. On the basis of that analysis, I am not sure that there is a problem.

**Jeremy Balfour:** The evidence that we have taken says that there is an issue in that respect.

Minister, just for clarification, are you saying that at the moment you are not intending to have any style documents in the legislation or to add or take away any definitions in the bill?

**Siobhian Brown:** At this stage, no, we are not. Setting out a statutory style in primary legislation is not necessary or helpful, because, as I have said, it can become outdated and difficult to update. The original 1921 act had only two straightforward styles. A style might give the layperson a misplaced sense of confidence that their do-it-yourself trust deed is fit for purpose when that might not be the case. Style books are produced and maintained by professionals based on their experience of contemporary practice, and the SLC was right not to attempt to take on that task.

**Jeremy Balfour:** Thank you.

**The Convener:** In 2020, the Scottish Government was considering referring a specific project on succession law to the SLC, but there is no mention of any project on the substantive rules of succession law in the commission's "Eleventh Programme of Law Reform". How do you see the future of succession law reform in Scotland? The committee has heard evidence that there needs to be a great deal of change in that respect.

**Siobhian Brown:** The Scottish Government is committed to exploring the views of the wider general public on intestate succession and we have commissioned research from the Scottish Civil Justice Hub, which is a venture led by the University of Glasgow's school of law in collaboration with the Scottish Government's civil law and legal systems division. That phase of research has finished and we are awaiting the report on its findings, which will be published by the hub. When we receive a copy, we will consider whether any next steps need to be taken on succession law reform. The research will be used to inform any future reform, but we have no plans to progress any further primary legislation to reform fundamental aspects of succession law during the current parliamentary session.

**The Convener:** Will the Scottish Government send that research to the SLC for additional work or will it remain solely for the Scottish Government?

**Siobhian Brown:** My understanding is that it will be sent to the SLC, but Michael Paparakis might have more to say on that.

**Michael Paparakis:** A decision will have to be taken whether it will be referred to the SLC or whether the Scottish Government will take it forward. The research has just been completed and we are awaiting the report, which will help inform our next steps.

The Scottish Law Commission has just published its 11th programme, which will take it through to 2028, so if we refer anything on succession law reform to it, there might or might not be a delay in that respect. That might not be the case if the Scottish Government were to take the issue forward. Again, those are all factors that we have to consider.

**The Convener:** It would be useful if, after the research has been published, the Scottish Government could keep the committee updated by writing to us with its views and thoughts.

**Siobhian Brown:** I am happy to do so.

**The Convener:** As there are no further questions, I thank the minister and her officials for their evidence this morning. The committee might follow up by letter with any additional questions stemming from today's meeting.

11:35

*Meeting suspended.*

11:39

*On resuming—*

## Instrument subject to Negative Procedure

**The Convener:** Under item 3, we are considering one instrument, on which no points have been raised.

### Packaging Waste (Data Reporting) (Scotland) Amendment Regulations 2023 (SSI 2023/160)

**The Convener:** Is the committee content with the instrument?

**Members** *indicated agreement.*

**The Convener:** That concludes the public part of the meeting.

11:39

*Meeting continued in private until 12:05.*

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