

Delegated Powers and Law Reform Committee

14th Meeting, 2023 (Session 6), Tuesday 2 May 2023

Trusts and Succession (Scotland) Bill: analysis of responses to the call for views

Purpose of the briefing

1. The purpose of this briefing is to provide an analysis of the issues raised in the Committee's [call for views](#).
2. The [call for views](#) on the [Trusts and Succession \(Scotland\) Bill](#) ('the Bill') ran from 6 January to 17 March 2023. [Individual responses received were published online](#), where respondents consented to this publication.
3. A separate SPICe Briefing on the Bill, dated 8 March 2023, [has also been published online](#).

What the Bill does

4. The Bill is divided into three parts.
5. **Part 1** is most of the Bill, and it would reform the law relating to trusts. A trust is a legal device for managing assets. A person or entity (**the trustor**) passes ownership of assets to the **trustees**. Frequently, this is for the benefit of individuals or entities known as **beneficiaries**. [Part 1 of the Bill is divided into eight chapters](#).
6. Part 2 contains two provisions on succession law, sometimes called inheritance law. It is the law which says who inherits when someone dies and in what order.
7. Part 3 contains miscellaneous sections, including key definitions.

8. [A separate SPICe Briefing on the Bill](#), dated 8 March 2023, has also been published online.

Responses to the call for views

9. There were [26 responses](#) to the call for views on the Bill, from a range of individuals and organisations:
- 7 responses were from individuals, including 2 responses from academic lawyers
 - 6 responses were from law firms, of varying sizes
 - 6 responses were from organisations representing the legal profession and the judiciary
 - 4 responses were from public bodies
 - 2 responses were from organisations in the charitable and voluntary sector
 - 1 response was from a private firm specialising in asset protection, a part of financial planning services.

The analysis of views – preliminary points

10. The remainder of this briefing contains the analysis of the call for views. There are some preliminary points relating to this part of the briefing:
- it begins with a summary of the key points emerging from the call for views
 - thereafter, it covers topics of relevance to the whole Bill first, then topics affecting individual parts of the Bill after that
 - the references to chapters in this part of the briefing are to the chapters in Part 1 of the Bill
 - where legal terms and concepts associated with trust and succession law are used, they are explained, for the benefit of readers without a legal background.

Key points from the call for views

11. The following key points emerged from the responses to the Committee's call for views:
- There is strong support for the Bill and not many areas of concern.
 - Sections affecting **adults with incapacity** in the Bill (for example, section 75) featured in a number of the responses. Some respondents said some further consideration of the topic of adults with incapacity is required.
 - Sections 25 and 26 of the Bill, containing a trustee's new duties to provide information to beneficiaries and potential beneficiaries about the

trust, concerned some respondents. These respondents thought the duties were too widely drawn, especially for some types of trust.

- Section 61 of the Bill, which contains a power to change the purposes of a family trust, attracted some commentary. Half the respondents commenting on the provision were not convinced there should be a minimum time period before the power in section 61 of the Bill could be used.
- Section 65 of the Bill, which says how legal bills should be paid for in court actions about trusts, attracted some criticism from the Law Society of Scotland ('the Law Society').
- Section 72 of the Bill, which aims to strengthen the position of a deceased's spouse or civil partner when someone dies without leaving a will, was regarded by a number of respondents as producing potentially unfair results in one situation. This is when a spouse or civil partner is separated from the deceased at the time of death.

General themes and topics

Broad support for the Bill

12. Respondents to the call for views were generally supportive of the Bill. Often suggestions for improvement raised by those responding were points of detail, including drafting points, rather than opposition to key policy principles.
13. For example, having made one minor drafting point in its response, [Aberdeen City Council](#) commented that, overall:

“Aberdeen City Council, as a local authority connected to numerous public trusts, is in favour of the increased clarity which this proposed legislation will bring to the law of trusts...The provisions to modernise the law are...to be welcomed. The law on trusts will as a result be more accessible and easier to ascertain.”

14. There was strong support for the Bill among the legal profession. For example, [the Law Society commented](#):

“We welcome the introduction of the Bill and the opportunity it presents to reform and consolidate this important area of law, following the excellent work of the Scottish Law Commission on the subject over a number of years. The Bill when enacted will be the most significant development in trust law for over 100 years, continuing and extending the use of Scotland as a favourable jurisdiction for trusts.”

Other views on the Bill

15. One dissenting voice in the legal responses was Andres Knobel, an international lawyer, specialising in the possible risks of trusts. While offering no

view on the specific provisions of the Bill, [his written response](#) referred to his work for the [Tax Justice Network](#) in relation to trusts across various legal systems. This response highlights what he sees as the secrecy risks created by trusts. He called for the registration of all trusts with a government authority and the prohibition of discretionary trusts.

16. Portfolio Counselling Services Limited, an asset protection company, had one key point in [its response](#). This was that the company's business model, using an Isle of Man trust and a trustee company to create trusts, meant that, in the company's view, its activities would not be covered by the proposed legislation.

Accessibility, guidance and publicity

17. One recurring theme of the responses was the importance of legislation that is accessible to trustees and beneficiaries without a legal background, known as **lay trustees** and **lay beneficiaries**.
18. Various respondents suggested drafting changes to the Bill itself to improve accessibility ([Yvonne Evans, University of Dundee](#); [Anderson Strathern](#); [Faculty of Advocates](#)).
19. Some respondents suggested a publicity campaign and further guidance about the legislation would be helpful, assuming the Bill is passed by Parliament ([Alice Pringle](#); [Yvonne Evans](#)).
20. Several respondents suggested that **style legal documents** for possible use by lay trustees and others, could form part of the Bill itself. These are templates which can be used by those dealing with trusts in individual situations. Some respondents mentioned that current trust legislation has some style legal documents ([Yvonne Evans](#); [Brian McKenzie](#); [Gillespie Macandrew LLP](#)).

New powers for the local sheriff courts

21. The [Court of Session](#) in Edinburgh is retained as the main court relating to trusts under the Bill. However, for certain types of court application (in Chapters 1 and 8) [the local sheriff courts](#) are given new power to consider trust cases.
22. The [Sheriffs and Summary Sheriffs Association](#) said that it thought the balance in the Bill between powers for the Court of Session and powers for the sheriff courts were "appropriately drawn."
23. On the other hand, [the Scottish Churches Committee](#) said cases before the Court of Session were traditionally more expensive. The Committee was not convinced the split in the Bill is appropriate. It wondered whether trusts with available funds below a certain threshold should have a power to apply to the sheriff court in all cases.

24. The Law Society thought that the new powers for the sheriff courts should mean there is “careful consideration” of how capacity to manage this can be ensured in the court system.

The Register of Persons Holding a Controlled Interest in Land

25. The public body, [Registers of Scotland](#) (“RoS”) responsible for managing a range of public registers relating to land and buildings, raised a specific issue about the Bill. This, RoS thought, affected various parts of the Bill.
26. RoS’ interest relates to a new register it manages, called the [Register of Persons Holding a Controlled Interest in Land](#) (“RCI”). A key policy aim of the register is to improve transparency around land ownership. It makes available to the public details of people and legal entities with influence over land, who would not necessarily appear in traditional registers relating to ownership.
27. [In its response to the Committee](#), RoS said it thinks that various provisions of the Bill will expand the people who are regarded as people whose details must be included in the RCI. For example, **supervisors** in Chapter 6 and **protectors** in Chapter 7, roles discussed in more detail later in this briefing, at pp 35-36.
28. RoS said that the Scottish Government is aware of RoS’ position on this issue. Furthermore, subject to any changes arising in volumes of applications to register on the RCI, RoS thinks there will be a “relatively minor operational change” for RoS.

Pension trusts

29. Unlike [the Commission’s draft Bill](#), the Bill as introduced does not include a **pension trust** in its definition of a trust. [The Scottish Government intends to ask the UK Government](#) to make a section 104 order at Westminster, to apply the changes proposed in the Bill to pension trusts.
30. On this, the Law Society commented:
- a. “Whilst we note that pensions are a reserved matter, we would welcome further clarity on how the Scottish Government intends to work with the UK Government to ensure that pension schemes established under trust benefit from modernisation.”
31. In its response, the [Association of Pension Lawyers](#) (“APL”) (Legislative and Parliamentary Sub-committee) said that the association was not aware of any stated policy aims of the Bill in relation to pension schemes.
32. APL also pointed out that, by virtue of schedule 2 to the Bill, [the Trusts \(Scotland\) Act 1921](#), a key piece of legislation, is repealed in its entirety. On the implications of this for pension trusts, APL commented:

“in the event that the Bill is finalised on the basis that it will not apply to pension scheme trusts, we assume that the Trusts (Scotland) Act 1921 would continue in operation and not be revoked to the extent that it applied to pension scheme trusts. We make this assumption on the basis that if matters relating to pension schemes are a reserved matter for the UK Parliament, the extent to which the Trusts (Scotland) Act 1921 is amended or revoked as it relates to pension scheme trusts would also be a reserved matter for the UK Parliament.”

33. APL explored the interaction between some parts of the Bill and pension trusts in its response, arguing certain provisions should not apply to them. These provisions are referred to later in the briefing.

Key definitions and concepts

34. Several respondents had concerns about some of the definitions which had been used in the Bill. Other respondents felt some terms were not defined in that Bill that should have been.
35. Some key examples are discussed in this section. Others are discussed later in the briefing.

Incapacity and mental disorder

36. The term, **incapable**, defined in section 75 of the Bill, similar to the one in [Adults with Incapacity \(Scotland\) Act 2000](#) ('the 2000 Act') and including someone with a **mental disorder**, is an important one in the Bill.
37. Trustees may become incapable, and other trustees may wish to remove them. When beneficiaries themselves have an opportunity to make decisions, these may need to be made for incapable beneficiaries by someone else.
38. The Law Society said the Bill's definition of **incapable** lacks a reference to section 1 of the [Adults with Incapacity \(Scotland\) Act 2000](#) ('the 2000 Act'), which contains certain key principles. These, in turn, provide important safeguards for incapable adults.
39. On the definition in the Bill, the Law Society also commented:
- “There may be a particular risk in the context of family trusts of family members seeking to remove trustees on the basis of incapacity, where this is inappropriate and without provision of support to enable the trustee to continue.”
40. The Law Society argued that there is no safeguard in the Bill providing that incapacity should be determined by an independent third party on an objective basis.

41. The Law Society noted that the [Scottish Mental Health Review](#) recommended significant changes to capacity law in Scotland. This included removing the terminology of **mental disorder** and moving from a capacity test to one of an ability to make an autonomous decision. A Scottish Government response to these proposals is awaited. The Law Society commented:
- a. “It is important that the present Bill is future-proofed to accommodate and keep step with possible future changes to the law in this area.”

Other issues raised relating to definitions

42. Some other examples of definitions which respondents thought needed further consideration included:

Term	Respondent	Commentary
Guardian (section 74)	Law Society	The Law Society said the Bill assumes that an adult with incapacity has a guardian, but this may not be the case. The Law Society also said the definition of guardian should be linked more explicitly to the 2000 Act and the range of interventions for incapable adults in it.
Public trust	The Scottish Churches Committee	The committee said this term, currently used in trust law , should be defined in the Bill.
Charitable trust	Law Society	The Law Society said this term, currently used in trust law , should be defined in the Bill.
Beneficiary (section 74)	Law Society	The Law Society said this definition is geared towards private trusts and is not particularly suited to public trusts.
Potential beneficiary (section 74)	Law Society	The Law Society said this term may be too broad for some purposes.

What is not in the Bill

43. In the call for views, respondents were asked a specific question about whether there was anything which was not in the Bill which they would have liked to have seen in the Bill. Key points respondents made on this topic (in response to this question or otherwise) are summarised below.

The scope of the Bill

44. For [Scottish Land and Estates](#), the possibility of adding to the Bill later was, of itself, a concern. It thought the scope of the Bill is “fairly wide”. [It commented](#):
45. “There may therefore be benefit in reconsidering the scope of the Bill to avoid more controversial or divisive amendments being brought forward at a later stage which have not had the benefit of the Scottish Law Commission’s detailed consideration nor full consultation with stakeholders.”

‘Codification’ of trust law

46. [The Law Society](#) and [the Scottish Law Agents Society](#) (‘the Law Agents Society’) expressed regret that the Bill did not represent a complete ‘codification’ of trusts law. The Law Agents Society described it as a “missed opportunity”.
47. By way of background, if the Bill is to be passed in its current form, in some areas of trust law, it will still be necessary to consider **the common law**. This is the branch of law developed by the decisions of judges in individual cases. It is typically more difficult for the layperson to access than legislation.

Directions to trustees

48. In section 67 of the Bill there is a power for the court to authorise trustees to distribute trust property in a specific set of circumstances. This power is referred to as a **court direction** in the [Policy Memorandum to the Bill](#) (paras 103-105).
49. However, [the Faculty of Advocates](#) and [the Senators of the College for Justice](#) (senior judges) both said the Bill should contain a much broader power for the court to give **directions** to trustees. The Faculty commented:
50. “These powers should be wide with maximum flexibility as to the court procedure to be followed. In our experience, Trustees not uncommonly face difficult challenges in interpreting trust provisions and the facility to seek directions from the court is a useful means of overcoming such challenges.

Unlawful killers

51. [Dr Alisdair MacPherson and Professor Roddy Paisley, of the University of Aberdeen](#), said the Bill should clarify that it is not legally competent to appoint the unlawful killer of a deceased person (for example, someone convicted of their murder) as an executor. An executor is the person responsible for winding up the deceased person's estate.
52. The existing law in this area is somewhat uncertain. However, there is at least one recent example of a family of an unlawful killer having the person convicted later appointed executor.
53. [In the course of its work on succession law](#), the Scottish Government consulted on a statutory ban on unlawful killers as executors. [This was not controversial on consultation.](#)

The cohabitant's claim – time limit

54. At present, where someone dies without leaving a will, a cohabitant has **six months** to apply to the court, in order that it might exercise its discretion and award the cohabitant a share of the deceased's estate ([Family Law \(Scotland\) Act 2006](#), section 29).
55. [In its response](#), the Faculty of Advocates argued that a power for the court to extend the time limit in an individual case should have been included in the Bill. It said it did not think this would be controversial. It thought the change would help grieving and vulnerable cohabitants navigating family dynamics after a death.

Other policy topics which could have been included in relation to trust and succession law

56. Various respondents identified more ambitious policy topics on trust and succession law which they would like to have included in the Bill ([Dr MacPherson and Professor Paisley, University of Aberdeen](#); [the Law Society](#); [the Law Agents Society](#)).
57. There was recognition by some respondents of the greater challenges in reaching policy consensus on more ambitious proposals. The areas that were identified are summarised in the **appendix** to this briefing.

Chapter 1: how someone becomes a trustee, and how they stop being a trustee

58. Chapter 1 [proposes reforms](#) to the ways that people or entities can become trustees, as well as changes to the ways trustees can leave that role.
59. Overall, responses from all types of respondents to Chapter 1 were very positive.

Appointing new trustees (section 1)

60. [On section 1](#), the court's power to appoint new trustees, [Yvonne Evans \(University of Dundee\)](#) and [the Law Society](#) differed over what was the right threshold which must be met for a court application to be possible (**expedient** versus **necessary**).

The court's power to remove trustees (section 6)

61. [On section 6](#), the court's power to remove trustees on various grounds, [Gillespie Macandrew LLP](#) and [the Law Society](#) thought the circumstances covered by the grounds, especially the ground, "unfit to carry out the duties of a trustee," could be clarified.
62. On section 6, [Gillespie McAndrew LLP](#), also said that, while it welcomed section 6, it would be an improvement to see reference to **mediation** in the legislation as an alternative way of resolving disputes, given the potential expense of litigation.

Removal of a trustee by co-trustees (section 7)

63. [Section 7](#), the power to remove a trustee by co-trustees, is a particularly significant provision in policy terms, giving a new power to trustees. [When the Scottish Law Commission consulted on this proposal, it had received mixed views.](#)

Support for section 7

64. Various respondents responding to the Committee's call for views expressed support for section 7, including [the Law Society](#); [the Office of the Scottish Charity Regulator](#) (OSCR); and the [Scottish Legal Complaints Commission](#). OSCR, for example, said section 7 as a "quick and affordable" route to removal.

Extended grounds

65. Two respondents said that the grounds for removal available to co-trustees should be closer to, or equivalent to, the grounds relevant for a court application under section 6 ([Alice Pringle](#); [Jones Whyte LLP](#)).

66. [Dr MacPherson and Professor Paisley \(University of Aberdeen\)](#) suggested a ground where someone was disqualified from acting as a company director or had been made bankrupt might be desirable.

The incapable trustee

67. [Gillespie Macandrew LLP](#) and [Turcan Connell](#) were concerned about the ground (under section 7) allowing removal of an **incapable trustee**. For example, [Gillespie Macandrew LLP](#) said it:

“(a) puts an unfair burden on the trustees and (b) leaves the matter open for abuse and may create more contentious trust issues...It may also be used as a tool in contentious matters by one trustee to exclude a co-trustee and allow them to make decisions by themselves, if, in their view, they could remove their co-trustee under the guise of ‘incapacity’.”

68. [Lindsays LLP](#) also noted that this ground was a more subjective one than some others.

Discharge of a trustee (section 10)

69. [The Faculty of Advocates](#) welcomed the new powers for the sheriff court in Chapter 1. However, it thought that the sheriff court should be able to **discharge** a trustee under section 10 (i.e. free from them of personal legal liabilities in respect of the trust) if the sheriff court was also the court removing the trustee (under section 6).

Trusters and beneficiaries

70. Several respondents proposed more expansive powers in Chapter 1 for the **trustee**, i.e., the individual or entity setting up the trust ([Jones Whyte LLP](#)), and **beneficiaries** ([Alice Pringle](#); [Gillespie Macandrew LLP](#); [Lindsays LLP](#)).

Executors

71. Various respondents ([Paul Brown](#); [the Law Society](#); [Yvonne Evans](#); [Brian McKenzie](#)) noted that, for most purposes in Chapter 1, a ‘trustee’ includes an **executor**, i.e., the person who winds up a deceased person’s estate. For certain provisions (sections 4, 5 and 7), these respondents raised practical points about how well the provisions would work for executors.

Interaction with charity law

72. A couple of respondents (including [the Law Society](#)) highlighted that there was an interaction between Chapter 1 of the Bill and the provisions in [the Charities and Investment \(Scotland\) Act 2015](#) relating to appointment and removal of charity trustees for charitable trusts.

73. The [Scottish Churches Committee](#) commented:

“It is not immediately clear to us how the provisions in Chapter 1 tie in with the provisions of the Charities and Trustee Investment (Scotland) Act 2005, specifically section 70A, which empowers OSCR to appoint a charity trustee. The same applies to its provisions relating to the removal of a trustee. It would be helpful for explicit reference to the relevant sections of the 2005 Act to appear within the corresponding sections in the Bill.”

74. Note that section 8 of [the Charities \(Regulation and Administration\) \(Scotland\) Bill](#), currently being considered by the Parliament, would expand OSCR’s existing administrative power to appoint a trustee under section 70A of the 2005 Act.

Chapter 2: how trustees make decisions

75. [Chapter 2 of the Bill](#) covers decision-making by trustees. Overall, there was broad support for it among those responding to the call for views. For example, [the Law Agents Society commented](#):

“The proposals contained in chapter 2 have been carefully considered by the Scottish Law Commission which issued a number of discussion papers and consulted widely. In their deliberations they were assisted by an expert group of trust practitioners. These proposals in their final report and draft bill on which this bill is based command widespread professional support.”

Decision-making: preliminary steps

76. [Section 11 of the Bill](#) aims to clarify that a meeting is not required before such a decision can be made, given modern methods of communication, such as video calling or email.
77. Section 11(2) says, prior to deciding something, trustees must be given **adequate notice** of the impending decision. They must be given an **opportunity** to express an opinion. Anderson Strathern LLP thought these terms were too vague and needed to be defined.

Majority decision-making

78. [Section 12 of the Bill](#) says that an effective decision about a trust may be made by a **simple majority of trustees** (i.e., greater than 50%).
79. This principle attracted broad support. However, [Joan Fraser](#), responding as an individual, thought that **more than a simple majority** (e.g., a two thirds majority) should be required for certain decisions which would have a significant impact on the trust.

80. [Turcan Connell](#) thought that section 12 was intended to create a default rule (able to be overridden by the legal document creating the trust) but queried whether the current drafting achieved this outcome.

Trustees with the right of veto

81. Several of those responding pointed out that, in some existing trusts, there is a trustee with a special status among other trustees, known as a **sine qua non trustee**. Such trustees have a right of veto over decisions made.
82. These respondents said that the Bill should refer to trustees with a right of veto and clarify what their status will be in future decision-making ([The Law Society](#); [Gillespie Macandrew LLP](#); [Yvonne Evans](#)).

Trustees who cannot participate in decision-making

83. Section 12(2) of the Bill sets out certain categories of trustee who are not able to participate in a decision about a trust.
84. This includes a trustee who is **incapable**. As with Chapter 1, [Gillespie Macandrew LLP](#) expressed concern about risks for this category of individual.
85. [Alice Pringle](#), responding as an individual, thought the excluded category of those who have, or might have, a **personal interest** in the decision was “unworkable” in the case of family trusts.
86. [Jones Whyte LLP](#), [Turcan Connell](#) and [the Faculty of Advocates](#) thought that the term **personal interest** should be defined. This was to avoid uncertainty; possible litigation on the meaning of the term and to make the legislation more accessible to the layperson.

Chapter 3: powers and duties of trustees

87. [Chapter 3, an important chapter in policy terms](#), covers the powers and duties of trustees.

General support

88. Several respondents commented on Part 3 wholly or mainly to offer support for the proposals contained in it. Those following into this category included [the Senators of the College of Justice](#) (senior judges); [Dr Macpherson and Professor Paisley \(University of Aberdeen\)](#), as well as the law firm, [Lindsays LLP](#).
89. For [Yvonne Evans \(University of Dundee\)](#), Part 3 was generally welcomed, although she suggested in some places the proposals could have been bolder in policy terms and the drafting clearer.

The general power for trustees (section 13)

90. [The Law Society welcomed the wide general power for trustees in section 13](#), which would replace a list of specific powers in the current legislation. The Law Society thought section 13 mirrored the way trust documents are currently drafted. It was also helpful in allowing trusts to adapt better to changes in law and technology.
91. However, the Law Society thought the power in section 13 to override the provision when drafting legal documents for a particular trust was “an important safeguard”.
92. [Jones Whyte LLP raised an issue which had also come up during the Scottish Law Commission’s consultation](#). For the large number of trustees who are not legally qualified, it might be difficult for them to understand the nature and extent of their powers following the approach under section 13. The law firm suggested the legislation could be drafted in a way that would provide extra information on this topic.

Powers of investment (sections 16 and 17)

93. [Sections 16 and 17 of the Bill](#) would restate trustees’ powers to invest on behalf of the trust, currently contained in the [Charities and Trustee Investment \(Scotland\) Act 2005](#) (“the 2005 Act”). [The Law Agents Society](#) welcomed the restatement.
94. Both [Yvonne Evans \(University of Dundee\)](#) and [the Law Society](#) also welcomed sections 16 and 17. However, they thought the increasing policy emphasis on net zero goals in Scotland might need to be reflected in the relevant sections of the Bill. The Law Society commented:
- “We welcome this wide and general provision, but it would be useful to have clarified that this could extend to adopting environmentally friendly investment policies, particularly when these might underperform compared to other investments. The provision could allow for this, but confirmation that maximising financial returns is not the only permissible criterion, especially in the modern world, would be welcome.”
95. [The Association of Pension Lawyers](#) did not want the contents of sections 16 and 17 to apply to pension trusts ([via any future section 104 order at Westminster](#)).

Agents and nominees (sections 18 and 19)*Agents*

96. [Section 18 of the Bill](#) sets out the default rule that trustees can collectively appoint and pay **agents**, i.e., a person or entity who has legal authority to act for or on behalf of another person.

97. [The Law Agents Society](#) welcomed section 18, without further comment.
98. [Jones Whyte LLP said](#) it thought the provision could more closely mirror the equivalent provisions in England and Wales. For example, it could allow delegation of any power the trustees saw fit, subject to a limit on the length of time for which the power could be delegated. In contrast, section 18(5) currently says certain powers (appearing on a statutory list) cannot be delegated.
99. [Gillespie Macandrew LLP welcomed](#) that agents could be authorised to sign documents on behalf of trustees, saying this would be useful in practice.

Nominees

100. [Section 19 of the Bill](#) says that, unless the trust deed says otherwise, trustees could use a **nominee** in respect of any of the trustees' powers. A nominee is someone to whom a trustee transfers ownership of trust property, often for investment purposes.
101. [The Law Agents Society](#) welcomed section 19. It commented:
- “The power to appoint nominees is particularly helpful in relation to securities on quoted stock exchanges in relation to changes in the body of trustees and the absence of a need to convey shares to the new trustees and also in relation to the facilitation of dealing with those securities which are generally electronic (uncertified).”
102. For [CMS Cameron McKenna Nabarro Olswang LLP](#) a key concern was that, as section 19 is currently drafted, it may not go far enough. Specifically, the firm said doubt would remain as to whether trustees can use a) **nominee custody structures**; and b) **sub-custodians**. The firm said these structures/arrangements were permitted under the Financial Conduct Authority’s Client Asset Rules (CASS) and were “commonplace” in the financial services sector. The firm argued there were increased risks to trust assets if these structures/arrangements could not be used.
103. The firm’s response sets out in detail what these structures/arrangements involve.

Power to advance to a beneficiary their share of the capital (section 20)

104. [Section 20 of the Bill](#) would change the current law relating to the situation where a beneficiary wants an advance on their share of [the capital of the trust](#), before they would otherwise be entitled to it.
105. [When the Scottish Law Commission previously consulted on this](#), a key policy issue was whether there should be a **statutory cap** on the amount of a capital share which could be advanced. Section 20 does not propose such a cap. In

response to the Committee's call for views, of the **nine respondents** who commented on section 20, no one objected to the absence of a statutory cap.

106. Various reasons were given in support of section 20, as currently drafted. This included that it replicated the position in England and Wales ([Anderson Strathern LLP](#)); created a default rule only ([Yvonne Evans](#); [the Law Society](#)); and matched contemporary drafting of legal documents relating to trusts ([Yvonne Evans](#)).
107. Of all the respondents, [the Law Agents Society](#) came closest to objecting to the absence of a cap, commenting as follows:

“It is possibly the most contentious provision in the Bill and we can see a strong case for a cap at 50% of the capital. However the matter was considered at length by the Commission, following advice from their advisory group, and, while it is not a strongly held view, we accept the arguments put forward by the Commission that there is no need for a cap.”

The trustee's duty to provide information (sections 25 and 26)

108. [Sections 25 and 26 of the Bill](#) create new duties on trustees to provide information about the trust to beneficiaries and potential beneficiaries. A range of views were expressed on these provisions in response to the call for views.
109. The [Scottish Legal Complaints Commission](#) was positive about the provisions. [It commented](#):
- “We believe that greater clarity about the duties of solicitors acting as trustees could help avoid some of the common causes of complaints. Similarly, many complaints are made because beneficiaries are not clear on what they have a right to expect (and what they don't.)
- We therefore welcome the clear provisions on the duty of trustees to pass information to a beneficiary and what the beneficiary is entitled to expect or request. It is also helpful that the Bill sets out what will generally not be disclosable, as this is often a cause of contention between beneficiaries and trustees and can result in complaints.”
110. [The Scottish Churches Committee](#) thought the Bill provides “some clarity” on what information trustees are required to supply to beneficiaries. However, it said the Bill stops short of providing **a list of documents** which it would be reasonable for trustees to provide to beneficiaries. It thought further clarification may be necessary.

111. [Turcan Connell](#) reflected on the policy underpinning the provisions as follows:

“it is clear that an attempt has been made to enhance the rights of beneficiaries while affording a degree of discretion as to the application of these duties.”

112. However, the firm thought there needed to be greater clarity about the interaction between sections 25 and 26 and the trustees’ **duty of care** in section 27 (see below) and the court’s **power to remove a trustee** in section 6 (see p 26).

113. [Anderson Strathern LLP](#) was one of those respondents expressing concerns about the provisions, commenting:

“we feel [they] have been drawn too widely and place...too onerous a duty on trustees to provide information.”

114. This firm, along with [Gillespie Macandrew LLP](#) and [Yvonne Evans](#), were concerned about the application of the provisions to **potential beneficiaries** which, for certain types of trust, could be a large category of people.

115. [Gillespie Macandrew LLP](#) thought the provisions could:

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

116. [The Faculty of Advocates](#) noted that, for the purposes of these provisions (and others in the Bill) a trustee includes an **executor**. The Faculty commented:

“this is a new statutory duty and accordingly one to which both professional and lay trustees alike will be unaccustomed...We consider that in promoting this legislation specific attention of the public should be drawn to this innovative provision imposing a new obligation, not least to executors.”

117. The [Association of Pension Lawyers](#) did not want section 25 to apply to pension trusts.

The trustee’s duty of care (section 27)

118. [Section 27 of the Bill](#) sets out the **duty of care** owed by trustees to beneficiaries in their management of the trust.

119. [The Scottish Legal Complaints Commission thought](#) that section 27 is helpful in clarifying that **professional trustees** (i.e., those providing trustee services as part of a business) must meet a **higher standard of care**. The

Commission said the Bill's approach fits with how the Commission assesses solicitors as trustees providing a professional service.

120. [OSCR also welcomed section 27](#), saying it fitted with the standard of care expected of charity trustees in managing a charity.
121. [Yvonne Evans \(University of Dundee\)](#) and [the Law Society](#) said that they didn't think it was clear what the standard of care was for two new official roles relating to trusts under the Bill. This is the role of a **supervisor** ([provided for in Chapter 6](#)) and that of a **protector** ([provided for in Chapter 7](#)). See later in the briefing on these roles at pp 35-36.

Chapter 4: the trust's relationships with the outside world

122. [Chapter 4](#) considers the legal liability of trustees towards people and organisations other than beneficiaries.
123. There was not much commentary from respondents on Chapter 4. The [Law Agents Society](#) supported it as a "very helpful statutory restatement" of the law in this area.
124. [The Law Society](#) raised some points about individual provisions. For example, **section 35** covers acts or omissions of trustees leading to a claim for financial damages by a third party. The Law Society was keen this provision was flexible enough to allow the damages to be borne entirely out of the trustee's own pocket, rather than out of the trust property, should the circumstances justify that.

Chapter 5: how long a trust can last

125. [Chapter 5](#) says that someone should be able to create a trust of any duration they like. It would also abolish various technical rules which, in practice, affect how long trusts last.
126. While there wasn't much commentary on this part of the Bill, [the Law Agents Society](#) and [Anderson Strathern LLP](#) both explicitly welcomed it.
127. On the other hand, on the proposed abolition of certain technical rules (referred to above), [Dr Alisdair MacPherson and Professor Paisley \(University of Aberdeen\)](#) commented:

"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."

128. The [Law Society](#), [Yvonne Evans \(University of Dundee\)](#) and [Turcan Connell](#) said that they thought Chapter 5 should apply to charitable trusts. It currently does not apply to them. Turcan Connell commented that it was “particularly inconsistent” to exclude only charitable trusts, not other public trusts, when charitable trusts are subject to extra regulation under charities law.
129. [Turcan Connell](#) also thought that Chapter 5 should apply to trusts created before the chapter comes into force. It currently does not apply to them.

Chapter 6: private purpose trusts & Chapter 7: protectors

130. [Chapter 6](#) would confirm that a **private purpose trust** is competent in Scots law. It is a type of private trust which does not have to have specific beneficiaries. Chapter 6 also says how such trusts should be run. It introduces a new role of **supervisor** of a private purpose trust.
131. [Chapter 7](#) would make clear that a **protector** for a trust was competent in Scots law. These are used already in various overseas legal systems, and their role is to ensure a trust is being run properly. It is possible to have both a protector and a supervisor for a private purpose trust.

Taxation of trusts

132. [The Law Agents Society](#) was not sure whether Chapters 6 and 7 would attract international trust business to Scotland, one policy aim of these chapters. The society thought the attractiveness of a particular legal system might also relate to the tax treatment of trusts (a separate issue, reserved, and so not covered by the Bill).

Pensions trusts

133. [The Association of Pensions Lawyers](#) said it thought Chapters 6 and 7 should not apply to pension trusts ([via any section 104 order at Westminster](#)).

What is a private purpose trust?

134. [Joan Fraser](#), responding as an individual, said she was not clear if the existing trust she was involved in was a private purpose trust. She thought Chapter 6 could be clearer as to which type of trusts were included in its scope.

Support for Chapter 7

135. [Anderson Strathern LLP](#) explicitly welcomed Chapter 7, commenting:

“This is something that is quite commonly seen with many offshore trusts. We imagine this will be the exception rather than the norm but the option is helpful.”

136. On a practical note, it questioned what would happen if two people or entities had created the trust and one wanted a protector but the other did not.

Detailed comments on Chapter 7

137. The Law Society offered a range of comments on Chapters 6 and 7, mainly on Chapter 7. For example:

- a protector can “determine the law of the domicile of the trust” (i.e., its permanent residence) and “determine the administrative centre” of a trust. The Law Society, [along with Dr MacPherson and Professor Paisley](#), questioned the scope of these powers, saying they were unclear (section 49(3))
- a protector can instruct trustees to remove protectors. The Law Society argued protectors should be able to remove trustees directly (section 49(3))
- a protector can represent an incapable person (section 49(3)). The Law Society said more thought needs to go into how this interacts with the powers of individuals such as [attorneys](#) and [guardians](#) in respect of such adults, under the [Adults with Incapacity \(Scotland\) Act 2000](#)
- trustees can appoint a new protector in some circumstances, and the Law Society questioned whether this was appropriate given the ‘watchdog’ role of the protector (section 50).

Chapter 8 (& others): changing or ending a private trust & the powers of courts in relation to trusts

138. [Chapter 8](#) has two parts:

- [sections 54-60 deal with the process of changing a private trust in some way or bringing it to an end](#) (both in court and out of court).
- the rest of Chapter 8 contains a range of other important powers for the courts in relation to trusts.

139. the rest of Chapter 8 contains a range of other important powers for the courts in relation to trusts.

General comments on Chapter 8

140. Several respondents expressed general support for Chapter 8. For example, [the Faculty of Advocates](#) commented:

“Chapter 8 is largely an amalgamation and re-statement of existing powers, and as such is uncontroversial.”

141. [Jones Whyte LLP](#) questioned whether the powers in Chapter 8 (with no further specification as to which powers) should be given to the court. The firm

thought a majority of trustees with capacity might be the appropriate (alternative) decision-maker.

Changing or ending a private trust (sections 54-60)

142. On sections 54-60, Anderson Strathern LLP said it thought it was “very useful to have these important rules set out clearly in statute.”
143. The firm also said that the court’s role in the process was important as the changes were going against the original wishes of the person setting up the trust.
144. [The Law Society](#) and [Yvonne Evans \(University of Dundee\)](#) made a range of detailed points relating to sections 54-60. These are discussed below.

“Benefit” to beneficiaries

145. Section 56 sets out factors the courts should have regard to when deciding whether to grant an application to vary or end a private trust. One key term is the **benefit** to beneficiaries of a successful court application.
146. Both the [Law Society](#) and [Yvonne Evans](#) thought the term **benefit** should be defined further to encourage a broad interpretation of the term by the courts.

Under 18s and incapable adults

147. The [Law Society](#) and [Yvonne Evans](#) differed on **whether 18 or 16** was the appropriate age threshold after which a beneficiary (rather than the court of their behalf) should be able to consent to a change to, or the end of, a private trust. The Law Society wanted 16, Yvonne Evans favoured 18, as currently appears in section 55.
148. Separately, section 59 would create a process to enable the courts to consider the views of (capable) beneficiaries under 18 (on changing or ending a private trust).
149. On the taking of views for those over 16, but under 18, [the Faculty of Advocates](#) said there is currently no solution in section 59 for the situation where a beneficiary is unwilling to express, or is incapable of expressing, a view.
150. More generally, the [Law Society](#) and [Yvonne Evans](#) thought there needed to be a process to ensure the views of beneficiaries who are incapable adults are obtained and considered.

Views of the person who set up the trust

151. Section 60 says that the views of the person who set up the trust (**the trustor**) do not need to be obtained in a process to alter or end a private trust. The [Law Society](#) questioned whether it was appropriate in policy terms that that person's views should be "completely irrelevant". [Yvonne Evans](#) made a similar point.

Private purpose trusts

152. The [Law Society](#) wanted to understand why **private purpose trusts** ([covered by Chapter 6](#)) are excluded from the scope of sections 54-60. It is possible for such trusts to have beneficiaries in some circumstances.

Changing the trust purposes where there has been a material change of circumstances (section 61)

153. [Section 61 of the Bill](#) applies to [private trusts](#), mainly those used by families.
154. Section 61 says after such a trust has been in existence for **25 years**, the [Court of Session](#) will have power to alter **the trust purposes**, i.e., its aims and objectives, where there has been a **material change of circumstances**.
155. Six of the twelve respondents to the Committee's call for views commenting on section 61 said they thought 25 years is too long, or that there should be no time period at all ([Alice Pringle](#); [Anderson Strathern LLP](#); [Gillespie Macandrew LLP](#); [Joan Fraser](#); [the Law Society](#); [Yvonne Evans](#)).
156. [The Faculty of Advocates](#) also described section 61 as "a significant innovation on the present law." It said, "the imposition of such a lengthy period of 25 years is notable."

Change in the tax regime

157. [Yvonne Evans](#) and [the Law Society](#) thought it was very useful that a change in the tax regime is one possible material change of circumstances.

Pension trusts

158. The [Association of Pension Lawyers](#) said they thought that the content of section 61 should not apply to pension trusts.

Trusts made in wills

159. [The Faculty of Advocates](#) said it thought section 61(7) had the potential to become "a significant source of litigation." This sub-section provides a special rule for trusts made in wills where there is a material change of circumstances between the will being made and death. In certain circumstances, the 25 year (or shorter) period is to run not from death but from an earlier date.

Ex officio trustees (sections 62 and 63)

160. An **ex officio trustee** is someone who becomes a trustee because the person setting up the trust has said that the holder of a certain post in an organisation should be a trustee for as long as they are in that post. [Sections 62 and 63 would provide new court powers relating to ex officio trustees.](#)
161. The [Law Agents Society](#) described these provisions as “long overdue reforms,” with the potential to resolve problems which occur regularly in practice. [The Faculty of Advocates](#) described section 62 as “a sensible extension of the law.”
162. The [Law Society](#) thought that more should be possible under the Bill by trustees to address the issues that can arise without the need for a court application.
163. The [Scottish Churches Committee](#) welcomed the provisions but thought they might be of limited use, in view of the expense and difficulty associated with a small trust applying to court.

Defective exercise of fiduciary power (section 64)

164. [The Scottish Legal Complaints Commission](#) welcomed [the new statutory remedy set out in section 64](#) (including for beneficiaries and potential beneficiaries) to challenge the defective exercise of a trustee’s power.
165. The Commission noted that, in many cases, where powers are exercised improperly in this regard, the reason will be defective legal advice.

Expenses of court action (sections 65 and 66)

166. While the court retains discretion in an individual case, [sections 65 and 66 provide principles to determine who pays the legal bills in trust cases](#) in the [Court of Session](#). These provisions say that legal bills will usually be paid out of the trust property but there may be circumstances in which trustees have to pay out of their own pocket.

Expenses of trust litigation (section 65)

167. Section 65 deals with legal bills in trust disputes. The [Law Society](#) expressed concern about section 65 in its current form. Its comments included:

“This is quite a radical provision. There are real issues with the default being that the trustees personally pick up liability for expenses where the trust property is insufficient unless they can show that would be unfair. This may put people off accepting office and will more than likely be a disincentive for trustees to litigate.”

168. The Law Society thought section 65 could influence trustees' behaviour in their management of the trust:

“There is also a severe danger of a conflict of interest being created between the personal interests of the trustees and those of the trust...The trustees may be tempted to compromise a [court] action for something well short of what it is worth because continuing and losing puts their own property at risk.”

169. [The Sheriff and Summary Sheriffs' Association](#) highlighted that section 65 does not apply to trust cases in the sheriff court and said that this should be revisited.

Expenses of a court application (section 66)

170. On section 66, the [Scottish Churches Committee](#) commented as follows:

“There are a large number of instances where an application to the Court is required to achieve various purposes. Section 66...provide[s] that questions of expenses...are to be determined by the court, which may, if it considers it reasonable to do so, direct that any such expenses are paid out of the trust property. This leaves considerable scope for uncertainty, particularly in the case of small trusts (or interested individuals) with very limited financial resources. It would be helpful if more guidance could be given in the legislation as to the factors which would render such a direction 'reasonable'.”

Part 2 of the Bill: succession law

171. Part 2 of the Bill contains two provisions.

Section 71: special destinations

172. [Section 71 of the Bill](#) aims to improve the drafting of section 2 of the [Succession \(Scotland\) Act 2016](#) ('the 2016 Act'), to remove possible unintended consequences of the original version. Section 2 of the 2016 Act relates to a **special destination**, a form of 'miniature will'. It can appear in the ownership documents relating to property co-owned by a couple.

173. A minority of respondents commented on section 71 explicitly. Those who did were supportive ([the Law Agents Society](#); [Dr MacPherson and Professor Paisley](#); [the Law Society](#)).

174. Section 2 of the 2016 Act and section 71 of the Bill apply to spouses and civil partners only, not couples who are living together. [Dr MacPherson and Professor Paisley](#) thought perhaps both provisions could be usefully extended to cohabiting couples.

Section 72: spouses or civil partners where there is no will

175. [Section 72 of the Bill](#) is the main provision in Part 2. It aims to improve the position of a spouse or civil partner where someone dies without leaving a will. Respondents were generally supportive of section 72.

176. However, various respondents were concerned that section 72 was unfair in one respect. It might benefit a spouse or civil partner who, at the time of death, was separated from the deceased, but no divorce had occurred, or dissolution of the civil partnership ([Paul Brown](#); [Gillespie Macandrew LLP](#); [the Law Society](#); [Yvonne Evans](#)).

Appendix: policy topics not included in the Bill

1. As noted earlier in the briefing, several respondents suggested more ambitious policy topics which they thought could have been included in the Bill.

Trust law – wide ranging topics

2. For trust law, wide ranging topics were mentioned.
3. [Dr Alisdair MacPherson and Professor Roddy Paisley](#), of the University of Aberdeen, suggested, for example:
 - reforming how trusts are treated in insolvency law, i.e., the law which applies to individuals and organisations in financial distress, and who cannot pay their debts
 - considering whether trusts (or specific classes of trust) should have their own **legal personality**, as a company does. If an entity has its own legal personality, it can, in its own name, make contracts, sue someone, or defend legal proceedings. At present, it is the trustees who do these things on behalf of the trust
 - reform relating to the extent to which a trust can be used to create a **security** over assets. A **security** is a legal arrangement whereby someone getting a loan (**the debtor**) agrees a particular asset should be legally 'earmarked'. The asset will be available to the person granting the loan (**the creditor**), should the debtor fail to keep up repayments on the loan.
4. The [Law Society](#) suggested:
 - a clear statutory basis for the definition of a trust and the nature of a trust in Scots law
 - statutory rules about how a trust can be created
 - special rules for '**truster as trustee**' trusts. These trusts are used in commerce in Scotland. With such a trust, the person or entity who puts the property in trust (**the truster**) is the same person or entity as the trustee
 - reform of **latent trusts**. A trust is latent (hidden) when it appears from a public register, such as [the property registers](#), that trust property is owned outright by someone, rather than in trust. They are possible at present in Scots law, subject to [some regulation via the new register, the RCI](#).
5. [The Law Agents Society said it wanted](#) to put the **dual patrimony theory** on a statutory footing. This is the legal theory thought most likely to underpin and explain Scottish trusts at present, but currently not set out explicitly in statute. It assumes the trustee has their own **private patrimony** (all their own personal assets, rights and liabilities), as well as a separate trust **patrimony** (the

property belonging to the trust and all the obligations properly incurred as a trustee in running the trust).

Succession law - legal rights

6. Dr MacPherson and Professor Paisley wanted to see the Bill reform the law relating to **legal rights**. Legal rights give spouses, civil partners, children (including adult children) of the deceased person a right to a fixed share of the deceased's estate. They apply even when a will purports to leave nothing to the people protected by this class of rights.
7. Legal rights only apply to moveable property, i.e., all assets **apart** from land and buildings. At one stage, as the academics refer to in their response, the Commission and the Scottish Government considered extending the protection offered by legal rights to a share of the **heritable property** too (i.e., land and buildings). [It was not possible to reach policy consensus on this on consultation.](#)

Succession law - cohabitants

8. [Anderson Strathern LLP](#) thought it was "slightly surprising" Part 2 of the Bill did not address the position of couples not married but living together, where someone dies without leaving a will. [Previously, this has been a more challenging policy topic to reach consensus on during consultation](#), compared to the proposal in section 72.

Sarah Harvie-Clark, SPICe Research

26 April 2023

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot