

Final Business and Regulatory Impact Assessment

Title of Proposal

Trusts (Scotland) Bill ("the Bill")

Purpose and intended effect

- **Background**

For some time it has been widely recognised that the law in this important area has become badly out of date. It needs to be modernised so that Scotland keeps pace with developments in the rest of the world.

Under Scots law a trust provides a simple legal mechanism allowing property to be held by one or more persons (the trustee or trustees) for the benefit of others (beneficiaries) or in furtherance of certain specific purposes. The trustees have powers to manage the property and, usually, to dispose of it in appropriate circumstances. They must exercise those powers for the benefit of the beneficiaries in line with the trust's purposes.

Recognised by Scots law for centuries, the concept of a trust has a number of important and practical advantages. First, a trust provides protection against the insolvency of a trustee; if the trustee becomes insolvent, the trust property continues to be held for the purposes of the trust, and does not pass to the trustee's personal creditors.¹ Secondly, when property is held in trust, it receives a considerable degree of protection against any attempt by the trustee to give it away in breach of trust purposes. Thirdly, the ease with which a trust may be created has proved advantageous in practice. This explains the extensive use of trusts in commercial transactions in modern Scottish practice. Finally, the trust device provides great flexibility; for over 40 years, it has been possible for a truster to declare him or herself trustee of his or her own property.²

In modern Scots law, the trust plays a fundamental role in both estate planning and in the commercial world. With respect to the former, trusts are frequently used in connection with wills and estates, and also to regulate shareholdings of family businesses, to permit employees to take interests in a family business, and to secure the continuity of a business. It can, therefore, be seen that far from being an obscure legal technique, trusts play a vital part in everyday life for many people. In relation to the business world, trusts are used for the creation and administration of life assurance and pension policies, debt factoring and invoice discounting, securitisation, holding of collateral in project finance agreements, segregation of funds to protect against future environmental liabilities, stakeholder and similar security arrangements (escrow), and provision of security in agency agreements. For

¹ *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43. See also the Bankruptcy (Scotland) Act 1985, s 33(1)(b).

² *Allan's Trs v Lord Advocate* 1971 SC (HL) 45.

the Scottish financial services sector, trusts are especially important.

Yet, despite the prominence of trusts in Scots law, the institution is badly served by existing legislation. The main statute, the Trusts (Scotland) Act 1921, is almost a century old, and its structure and language have become antiquated. The Act has been heavily amended over the years, leading to a lack of clarity and practical difficulties for trustees and beneficiaries. It is, moreover, necessary for trustees to have regard not merely to the 1921 Act but to subsequent legislation to begin to comprehend the proper ambit of their powers and duties.

By its very nature, the trust remains a versatile legal institution. It is important that the law of trusts should be accessible to a wide range of users and their advisors. The law should be expressed clearly and coherently in modern statutory language. As Simon Mackintosh, a Partner at Turcan Connell, told us: "the international trust business is a competitive one" and whilst we do not wish "to replicate whatever structures some remote Pacific Island had thought of, we do need to recognise that there is a choice as to the system of trust law which most people can use, and we therefore need to have a set of legislation which meets modern standards. This needs to provide a suitable default system for those who choose not to draft extensively or who, perhaps, create a homemade document; but also to provide a range of powers and flexibilities which are what Settlers look for in modern trusts."

It is thus clear that this is an area where reform is not merely desirable but essential, in order to ensure that Scots law remains fit for purpose; modernisation will also mean that Scotland has the potential to develop into an attractive jurisdiction for international trust work. Financial services companies will not be drawn away from Scotland by the attractions of more modern trust laws elsewhere.

- **Objective**

The Bill implements the recommendations contained in the Report by the Scottish Law Commission ("SLC") on Trust Law which will be published at the same time as this BRIA.

It will affect all those who use trusts. The legal profession and their clients will be directly affected as the majority of trusts are drafted by solicitors. It is important to appreciate, though, that the proposed reforms will not only benefit the business or legal sectors. They will also help anyone in the running of private trusts and they will assist executors in winding up the estates of deceased persons. Charities and other public trusts, such as those used for recreational or sporting purposes, will also benefit from the modernisation and streamlining of the law.

Arguably the most significant change proposed is that trust legislation should be contained in a single, coherent statute, drafted in modern form to cater for modern conditions. In addition to updating the current law, we have made a number of innovations:

- The complex, arbitrary and unpredictable restrictions on the lifetime of private trusts, including the rules restricting accumulations and successive liferents, are abolished.
- Power is conferred on the Court of Session to alter trust purposes to take account of a material change of circumstances that has occurred since the trust was set up. This power will normally only be exercisable once 25 years has elapsed since the creation of the trust.
- Express provision is made for private purpose trusts; that is to say, private (non-charitable and non-public) trusts that do not have defined persons as beneficiaries but rather exist to achieve defined purposes, frequently of philanthropic or business nature.
- Express legislation is proposed to permit the courts to remedy defects in the exercise of trustees' fiduciary powers.
- New provisions are introduced to deal with practical problems that frequently arise in the administration of trusts which include *ex officio* trustees.
- New provisions are introduced to clarify the law surrounding the duty of trustees to provide information to beneficiaries.

Many of the provisions found in the Bill are default provisions; that is, they apply in the absence of any contrary provision in the trust deed. The legislation governing trusts invariably contains a large number of such provisions; that is true of the Trusts (Scotland) Act 1921, and also of legislation found in other jurisdictions. In selecting default rules, a policy of adopting current best practice has been pursued. In determining best practice, great assistance has been derived from consultees and advisory group members. We consider that this is an essential aspect of updating trust legislation.

Main Scottish Policy Objectives

The Bill clearly meets various Scottish policy objectives: expediency of business, keeping Scots law fit for modern commerce, and clarity and accessibility of the law. The Bill is in line with Lord Guthrie's celebrated comment in a case from 1964, that the general policy of the law should be to facilitate commercial transactions, not to create obstacles or unnecessary pitfalls in the way of solving practical problems arising out of the circumstances confronting business people,³ as it aids business expediency and removes barriers to efficient economic activity.

Policy for the Global Economy

The Bill will further the policy objective of volume and efficiency of cross-border activity, as parties in different countries will seek to capitalise on the modern trust law provided by Scots law. As Andrew Dalglish, a Consultant at Brodies LLP, told us: "other jurisdictions are updating their trust law and Scotland should not be left behind".

³ *R & J Dempster Ltd v Motherwell Bridge and Engineering Co Ltd* 1964 SC 308, 332 (IH).

- **Rationale for Government intervention**

The package of objectives outlined above can only be achieved through legislation by the Scottish Parliament. Additionally, the proposals in the Bill and Report are very much in line with two of the Scottish Government's National Outcomes,⁴ which form part of the Government's National Performance Framework.⁵ They are:

- "We live in a Scotland that is the most attractive place for doing business in Europe":⁶ as outlined above, the Bill will modernise the law of trusts in Scotland. The benefits of the Bill will be shared throughout Scotland, providing clarity for both traditional family trusts and complex commercial trusts.
- "We realise our full economic potential with more and better employment opportunities for our people":⁷ implementation of the Bill will secure and develop the already thriving trust industry which exists in Scotland. This is likely to create an increased demand for trust-related professionals.

The trust is extremely important to Scotland. Whilst it is impossible to give a figure for the total number of trusts in Scotland, some figures are available.

In relation to charitable trusts, as of 2011, the total number of Scottish charitable trusts was 4,313, representing approximately 18% of the total number of charities.⁸ Of the 4,313 charitable trusts, around 3,000 have an annual income in the £1 - £24,999 bracket, about 1,000 in the £25,000 to £99,999 bracket, and the remainder lie in the upper brackets, with a few appearing to have income of over £500,000.⁹

So far as trusts required to complete a self-assessment tax return are concerned, in the financial year 2011/2012, 163,000 trusts in the UK were known to HMRC;¹⁰ that represents one for every 388 inhabitants. On the assumption that the number in Scotland is proportionate, that means there would be approximately 13,640 such trusts in Scotland.

With respect to commercial trusts, it is more useful to concentrate on the assets held in trust rather than the number of trusts, because the amount contained in any one trust can be extremely large. Trusts over receivables, for example, are used in debt factoring or invoice discounting agreements. Receivables are considered to amount to one third of the assets of the

⁴ <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome>

⁵ <http://www.scotland.gov.uk/About/Performance/scotPerforms/NPFChanges>

⁶ <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome/business>

⁷ <http://www.scotland.gov.uk/About/Performance/scotPerforms/outcome/employment>

⁸ http://www.oscr.org.uk/media/294663/2012-02-02_scottish_charities_2011_published.pdf, p 20, table 5.

⁹ http://www.oscr.org.uk/media/294663/2012-02-02_scottish_charities_2011_published.pdf, p 21.

¹⁰ <http://webarchive.nationalarchives.gov.uk/20140206164739/http://www.hmrc.gov.uk/statistics/trusts/intro.pdf>, p 10.

average commercial company, and consequently, the potential scope of these trusts is highly significant. Figures suggest that factoring trusts in Scotland may contain assets worth approximately £5.2bn, and that all receivables trusts might contain assets amounting to £15.7bn (extrapolated from a UK figure of £173bn).¹¹ The investment industry also makes extensive use of trusts. By way of example, in conversations that we conducted in 2011 with Alliance Trust PLC, they indicated that they had assets under management held in trust of about £3-£4bn. Although a well-known group, they are by no means the largest investment managers in Scotland, and we think that the total assets held in trust in this area are likely to amount to several hundreds of billions of pounds.

Finally, all clients' money held by solicitors and other professional firms is held in trust, the amounts of which fluctuate but, in any event, remain substantial.

Prior to the publication in 1999 of our Joint Report on Trustees' Powers and Duties (LC No 260; SLC No 172), numerous stakeholders had pressed the case for root and branch reform of the Scots law on trusts. Responses to the subsequent SLC's Discussion Papers and Report were overwhelmingly in favour of modern legislation and the objectives of the Bill are firmly supported by stakeholders.

Consultation

Consultation was carried out in accordance with the SLC's established practice in conducting law reform projects.

- **Within Government**

We have kept our sponsor department, the Civil Law Reform Unit, abreast of developments and the trust project forms part of our current Programme of Law Reform.

- **Public Consultation**

The SLC first examined, jointly with the Law Commission for England and Wales, trustees' powers of investment in the late 1990s. This resulted in a Joint Report, Trustees' Powers and Duties (LC No 260; SLC No 172, 1999). Thereafter, the SLC has issued eight further Discussion Papers. They are as follows:

- Breach of Trust (DP No 123, 2003)
- Apportionment of Trust Receipts and Outgoings (DP No 124, 2003)
- Trustees and Trust Administration (DP No 126, 2004)
- Variation and Termination of Trusts (DP No 129, 2005)
- Nature and Constitution of Trusts (DP No 133, 2006)
- Liability of Trustees to Third Parties (DP No 138, 2008)

¹¹ SLC Discussion Paper on Moveable Transactions (DP No 151, 2011), Appendix C, para 3.

- Accumulation of Income and Lifetime of Private Trusts (DP No 142, 2010)
- Supplementary and Miscellaneous Issues relating to Trust Law (DP No 148, 2011)

In addition, two Consultation Papers have been published:

- Defects in the Exercise of Fiduciary Powers (2011)
- Public and Charitable Trusts: Amalgamation of Functions and Common Investment Finds (2012)

Alongside, one Report:

- Variation and Termination of Trusts (SLC No 206, 2007)

Responses have been overwhelmingly in favour of reform of Scots trust law.

In May of this year, we consulted with six stakeholders in preparation of our BRIA. Responses were unanimously positive; there remains a substantial appetite for reform.

- **Business**

From the outset of the project, we have benefited greatly from the comments and advice offered to us by those with whom we have met to discuss matters.

In producing the Discussion Papers and Reports outlined above, we have engaged with relevant practitioners in both the legal and investment sectors, academics, and judges.

In December 2011, we conducted meetings with Standard Life PLC and Alliance Trust PLC in order to discuss a variety of our proposals. Each practitioner with whom we spoke offered advice on the practical issues affected by the Bill, whilst stressing that the enactment of the Bill would be highly beneficial in terms of modernising the law and opening up Scotland to further investment.

In September 2011, Sir Grant Hammond, President of the New Zealand Law Commission, visited the SLC. This provided an invaluable opportunity to discuss our project and developments in the parallel project being undertaken by the New Zealand Law Commission. We also received assistance from Jersey in July 2011; both the Jersey Trust Law Committee and Julian Clyde-Smith, a Commissioner of the Royal Court of Jersey, were particularly generous in meeting our then Chairman, Lord Drummond Young, to discuss issues of trust law and its reform in contemporary conditions.

We have also had frequent contact by email and, in some cases, telephone with practitioners and academics throughout the lifetime of the project.

Options

Option 1 – Do nothing

Under this option, the draft Bill will not be introduced and the legislation will remain as it is. The current perception amongst stakeholders in Scotland that Scots law is not fit for purpose will persist and the benefits we detail below will not be realised.

Option 2 – Introduce the draft Bill

Under this option, the recommendations outlined in the Report and implemented through the draft Bill will be introduced, realising the changes to the law listed under 'Objective' above.

Sectors and groups affected

The Bill is intended as a replacement for existing trust legislation, other than that dealing specifically with charitable and public trusts. As any member of the public may wish to create a trust, and many do so in their will, for example, the Bill is capable of being used by anyone in Scotland.

We have concluded that the Bill will not adversely impact upon any person by virtue of their particular religion, belief, age, sexual orientation, gender, race, or ethnicity. This is because the Bill only affects those who choose to set up or administer a trust; there is no compulsion to do so. Equally, for those not wishing to be involved with a trust, there is a range of other legal devices which may be considered and which remain unaffected by this Bill.

Benefits

Option 1

We see no benefits of Option 1. The law in Scotland on trusts will remain uncertain and will continue to constitute an unnecessary hindrance to investment, resulting in a lack of stimulus for business and economic activity in Scotland.

Option 2

Economic activity

Modernisation of trust legislation in jurisdictions such as the Channel Islands has led to increased investment and related economic activity. Should the Bill pass through the Scottish Parliament, increased economic activity will undoubtedly follow.

Employment opportunities

It is important to remember that a trust is a legal vehicle used to hold property rather than an end in itself. Consequently, it is not so much the use of trusts that generates jobs; rather, trusts can be used in transactions that have that

effect. In this connection, updated modern law is of considerable importance.

If Scotland succeeds in attracting additional trust business, or at least avoids the drain of trust business to other jurisdictions (such as England and Wales), there will be an impact on jobs. In this respect, the figures of the Society of Trust and Estate Practitioners (STEP) membership are significant. Most solicitors and accountants who practise regularly in the trusts area will tend to be members of STEP, and the figures thus give a rough guide to the numbers employed in trust law in various different jurisdictions. The figures provided by STEP in 2011 are as follows; they relate to the number of members in each jurisdiction.

Scotland	397
England and Wales	6,009
Northern Ireland	145
Republic of Ireland	192
Jersey	1,171
Guernsey	692
Isle of Man	346

The very high figures in the offshore jurisdictions are a clear indication of the way that trust law can be developed. These figures are not truly comparable with Scotland, because of course these jurisdictions are tax havens, which Scotland is not (although the UK can function as something of a trust haven for those domiciled elsewhere). The number of STEP members in Scotland is proportionately less than that in England and Wales, however, and one would hope that this discrepancy could be improved in future, if the law here is set out in a clear, coherent and modern Bill.

It is worth emphasising that Scotland is already home to an established body of trust practitioners who have a high reputation for expertise and integrity. We wish to ensure that Scots law provides this important sector of the economy with modern trust legislation that is in line with best international practice.

Innovation

As noted under 'Objective' above, the Bill makes express provision for private purpose trusts. Private purpose trusts are not recognised under the law of England and Wales, but they are recognised in many other jurisdictions, including the Channel Islands. There is considerable demand for such trusts.

Reflection of Current Practice

As noted under 'Objective' above, many of the provisions found in the Bill are default provisions. In selecting default rules, a policy of adopting current best practice has been pursued.

Promotion of Scots law

The proposed changes will greatly assist the accessibility of the law to those who use it, both solicitors and others. This will bring a reduction in costs, and will reduce the need for litigation or complex legal advice by eliminating

uncertainties in the law.

In addition, it must be borne in mind that trusts are used as a means to an end rather than an end in themselves. If the Scottish trust is subject to modern legislation, it is likely to become more attractive to those who may be considering the use of a trust. In this connection, there is anecdotal evidence that some Scots are setting up trusts in England because of perceived deficiencies in Scots law. That tendency is unlikely to be stopped unless the legislation is modernised.

A useful comparison can be made with Jersey, a jurisdiction with trust law founded on principles of transparency, high levels of propriety, and accountability. It is very noticeable that Jersey makes great efforts to keep its trust law up-to-date. Trusts are governed by the Trusts (Jersey) Law 1984, and this has been revised by statutes passed in 1989, 1991, 1996, 2006, 2012 and 2013. The legislation is generally coherent and easily accessible.

Finally, it is worth noting that the Scottish law of trusts has been influential in the European context as a model for trusts in jurisdictions which do not recognise equitable ownership.¹² Should the proposed changes be implemented, Scots trusts law could become even more influential.

Option 2 will remove the perception that Scots law is not suitable for the creation and administration of modern trusts and increase the use of Scottish trusts.

Costs

Option 1

There are no immediately foreseeable cost implications of Option 1. Notwithstanding, pursuit of Option 1 will lead to a failure to realise the benefits of Option 2, and there could be reputational cost to the Scottish Government should the modernising recommendations of the SLC be ignored.

Option 2

No significant cost implications are anticipated to result from the introduction of Option 2, other than the minimal costs which will be borne by stakeholders in making their staff aware of the changes to the law affected by the Bill. These types of costs, however, result from any reform of the law. In the case of the Bill, we believe that these costs will be very small and will be massively offset by the financial benefits outlined above.

Scottish Firms Impact Test

We think that those working in law and financial investment firms are the most

¹² Scots law "may prove to be of particular interest to civilians considering the implementation of the trust in their domestic law", D J Hayton, S C J J Kortmann and H L E Verhagen (eds), *Principles of European Trust Law*, (1999), p 4.

likely to feel the immediate impact of the reforms in the Bill. As already noted, we have had extensive consultation with such stakeholders throughout the lifetime of the project and as such we felt that additional face-to-face discussions with those affected would be disproportionate and would yield no new views from business. On a wider scale, it is anticipated that the Bill will bring benefits to all parties who wish to create a trust – both members of the public and businesses – as opposed to one particular sector, market, or industry. Trusts in the commercial context, we anticipate, will enjoy important benefits from the passage of the Bill, but this is not to the exclusion of any other sector. Further, it is not anticipated that the proposals will have any significant cost implications for any markets or industries. On the contrary, the Bill will bring substantial benefits.

In terms of the Bill's overall impact on the economy, we have received only positive comments.

Competition Assessment

It is not anticipated that the Bill will have an impact on competition within Scotland. The proposals within the Bill do not create a competitive advantage for any particular business or individual within the trust industry; they simply offer prospective and equal benefits for businesses and individuals alike.

The Bill will not result in any restrictions on competition in the trust industry. The number and range of suppliers will not be affected, nor will it affect the incentive or ability of trust-related professionals to compete vigorously.

Test run of business forms

The Bill prescribes no business forms. There is, accordingly, no requirement to carry out a test run.

Legal Aid Impact Test

The Scottish Government Access to Justice team are content that the Bill will adversely affect neither the legal aid scheme nor the legal aid fund.

Enforcement, sanctions and monitoring

The Bill does not require public enforcement and imposes no sanctions. Any disputes concerning the rules in the Bill will be resolved by means of litigation by the affected parties.

Implementation and delivery plan

If passed by the Scottish Parliament, the Bill will come into force on the making of a commencement order.

As a non-controversial, strongly supported Bill, we believe it satisfies an urgent need for reform. In our view, the Bill will be a candidate for the Delegated Powers and Law Reform Committee.

- **Post-implementation review**

In accordance with the Law Commissions Act 1965, section 3(1), the SLC has a duty to “keep under review” the laws from which it is concerned, and will endeavour to stay informed of the Bill’s reception by the legal profession and wider business community. We expect that the Scottish Ministers will review the legislation within the first ten years after commencement. It is hoped that, in light of the high demand for the Bill, the operation of the reformed law will be uncontroversial.

Summary and recommendation

Dismiss Option 1

This Option would maintain the status quo and introduce no new legislation. Option 1 leaves the current law in an unsatisfactory manner and this is undesirable.

Recommend Option 2

It is recommended that Option 2 be adopted for the various reasons outlined above.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	Nil.	Reputational and other costs, e.g. potential future costs in the form of litigation required to resolve disputes resulting from the current uncertainties in the law.
2	We are not able at this stage to put a figure on the benefit but it will be substantial. Implementation of the Bill will secure and develop the already thriving trust industry which exists in Scotland. This is likely to create an increased demand for trust-related professionals and heightened economic activity.	There will be a small training cost associated with gaining familiarity with the new law. It will be negligible by comparison with the expected benefits.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:



Lord Pentland, Chairman, Scottish Law Commission

Date:

10/7/14