Scottish Law Commission

promoting law reform

(SCOT LAW COM No 239)

Report on Trust Law

report

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promoting law reform

Report on Trust Law

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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NOTES

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

SCOTTISH LAW COMMISSION

Item No 2 of our Eighth Programme of Law Reform

Report on Trust Law

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Trust Law

(Signed) PAUL CULLEN, *Chairman*
LAURA J DUNLOP
PATRICK LAYDEN
HECTOR L MACQUEEN
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*
22 July 2014

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Abbreviations

NB all of our Discussion Papers, Consultation Papers and Reports are available online at http://www.scotlawcom.gov.uk/publications/

1921 Act,
: Trusts (Scotland) Act 1921 (c. 58)

Barr et al,
: A Barr *et al*, *Drafting Wills in Scotland* (2nd edn, 2009)

CP on Amalgamation of Functions,
: Consultation Paper on Public and Charitable Trusts: Amalgamation of Functions and Common Investment Funds (2012)

CP on Defective Exercise,
: Consultation Paper on Defects in the Exercise of Fiduciary Powers (2011)

DCFR,
: Draft Common Frame of Reference: Principles, Definitions and Model Rules of European Private Law (Full Edition: Christian von Bar, Eric Clive (eds), 6 vols, 2009; Outline Edition: Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), 2009, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf)

DP No 123,
: Discussion Paper on Breach of Trust (DP No 123; 2003)

DP No 124,
: Discussion Paper on Apportionment of Trust Receipts and Outgoings (DP No 124; 2003)

DP No 126,
: Discussion Paper on Trustees and Trust Administration (DP No 126; 2004)

DP No 129,
: Discussion Paper on Variation and Termination of Trusts (DP No 129; 2005)

DP No 133,
: Discussion Paper on the Nature and Constitution of Trusts (DP No 133; 2006)

DP No 138,
: Discussion Paper on Liability of Trustees to Third Parties (DP No 138; 2008)

DP No 142,
: Discussion Paper on Accumulation of Income and Lifetime of Private Trusts (DP No 142; 2010)

DP No 148,
: Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law (DP No 148; 2011)

Gretton and Steven,
: GL Gretton and AJM Steven, *Property, Trusts and Succession* (2nd edn, 2013)

Joint Report on Trustees' Powers,
: Report on Trustees' Powers and Duties (Joint Report of Law Commission and Scottish Law Commission: LC No 260, SLC No 172; 1999)

Kessler and Grant,
: J Kessler QC and W Grant WS, *Drafting Trusts and Will Trusts in Scotland* (2013)

Law Society,
: The Law Society of Scotland (http://www.lawscot.org.uk/)

Lewin,
: *Lewin on Trusts*, J Mowbray et al (eds) (18th edn, 2008)

Mackenzie Stuart,
: A Mackenzie Stuart, *The Law of Trusts* (1932)

Menzies,
: AJP Menzies, *The Law of Scotland Affecting Trustees* (2nd edn, 1913)

OSCR,
: Office of the Scottish Charities Regulator (http://www.oscr.org.uk/)

Panico,
: P Panico, *International Trust Laws* (2010)

Report on Variation and Termination,
: Report on Variation and Termination of Trusts (SLC No 206; 2007)

SME,
: *The Laws of Scotland (Stair Memorial Encyclopaedia)*, 25 volumes

St Clair and Drummond Young,
: JB St Clair and JE Drummond Young*, The Law of Corporate Insolvency in Scotland* (4th edn, 2011)

STEP,
: Society of Trust and Estate Practitioners (http://www.step.org/)

Thomas and Hudson,
: G Thomas and A Hudson, *The Law of Trusts* (2nd edn, 2010)

Underhill and Hayton,

Underhill and Hayton: Law of Trusts and Trustees, DJ Hayton, P Matthews and C Mitchell (eds) (18th edn, 2010)

Wilson and Duncan

WA Wilson and AGM Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995)

Chapter 1 Introduction

1.1 The Scottish Law Commission's project on the law of trusts has been under way for some years, and has included the publication of a total of ten Discussion Papers and Consultation Papers, with two Reports on specific issues: first, on trustees' powers and duties (a Joint Report with the Law Commission for England and Wales) and, secondly, on variation and termination of trusts.[1] We have now reached the stage of a comprehensive Report and draft Bill. The latter is intended as a replacement for all existing trust legislation, other than that dealing specifically with charitable and public trusts. Charitable trusts are now governed by the Charities and Trustee Investment (Scotland) Act 2005; the result is that the law governing that area forms what is effectively a code of its own. Nevertheless, provisions in this Report and the attached draft Bill cover general aspects of trust law that apply equally to public and charitable and to private trusts; to that extent this Report is relevant to such trusts.

1.2 The law of trusts may at first sight appear a topic of limited and specialised interest. We think, however, that when its role is fully considered it is clear that the trust plays a crucial part in many areas of the law.[2] These include contract and general commercial law, life assurance and pensions, property law, succession and family law. The part played by the trust in commercial structures, in particular, means that trust law is of great economic importance. Furthermore, trusts are widely used vehicles for investment and financial planning. They are particularly significant for the Scottish economy, where financial services form a major sector.

1.3 It is accordingly essential that Scottish trust law should be, and should be perceived as being, suitable for use in contemporary financial and economic conditions. The need for an up to date statement of the law is recognised in a Report in 2006 from the Director of the Jersey Finance Industry Department to the Minister for Economic Development, who is responsible for trust law:

> "Trusts are one of the key products used by the Island's finance industry. […] Since 1984, the world of trusts has evolved at a rapid pace. Increasing numbers of jurisdictions have targeted the trust market. […] Legislation itself has developed apace, with jurisdictions keen to develop the concept of a trust and offer flexibility and ease of use wherever possible. […] It is important to amend the Trust Law to keep pace with these changes and so maintain and where possible enhance the Island's attractiveness as a place in which to do funds business."[3]

We think that these considerations apply equally to Scotland.

1.4 Modern technology, in particular the electronic revolution, has made it easy to transfer funds and investments from one jurisdiction to another. If the law governing investments and commercial law in one jurisdiction is perceived as being anachronistic or

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[1] See paras 1.5-1.6 below for a list of the publications.
[2] We discuss more fully the uses of trusts, and also the nature of the trust itself, in Chs 2 and 3.
[3] The Report, which argued in favour of what became the Trusts (Amendment No 4) (Jersey) Law 2006, is accessible here: http://bit.ly/Vq1iqk; there is a longer extract in para 22 of Appendix A to DP No 142.

outdated, it is very easy to move investments to another jurisdiction, or to adopt a foreign legal system that is thought to be better attuned to modern commercial requirements. This makes it all the more important that the law in areas such as trusts should be kept up to date, and reviewed regularly. In Chapter 2 we refer to the way in which the law in other jurisdictions has been regularly reviewed and kept up to date.[4] It must be said that in its contemporary form the Scottish law of trusts comes out very badly from these comparisons. It is widely perceived as seriously outdated,[5] which can lead to the use of other legal systems in transactions that are essentially Scottish. For these reasons we consider that reform of the law in this area is an urgent necessity. In the draft Bill appended to this Report we have attempted to bring the law radically up to date, addressing contemporary conditions, and we would strongly urge that it should be considered by the Scottish Parliament as soon as possible.

History of the project

1.5 The first area of law examined by the Commission, jointly with the Law Commission for England and Wales, was trustees' powers of investment. This resulted in a Joint Report on Trustees' Powers and Duties.[6] The Scottish recommendations in that Report were confined to the investment powers of trustees and their ability to purchase land, whether for investment or otherwise. The recommendations for England and Wales went further, and considered the powers and duties of trustees generally. Those recommendations were implemented by the Trustee Act 2000. The Scottish provisions, however, were not implemented until five years later, in Part 3 of the Charities and Trustee Investment (Scotland) Act 2005. The technique adopted was to amend the Trusts (Scotland) Act 1921, the basic statute that still, after more than 90 years, regulates Scottish trust law. (We refer to that Act in this Report as "the 1921 Act".)

1.6 Thereafter we have issued eight further Discussion Papers, two short Consultation Papers, and one Report. The Discussion Papers 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),
- 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:

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[4] We discuss, in particular, Jersey, New Zealand, and England and Wales: see para 2.22 below.
[5] We give some examples in paras 2.9-2.10 below.
[6] LC No 260; SLC No 172 (1999).

- Defects in the Exercise of Fiduciary Powers (2011),

- Public and Charitable Trusts: Amalgamation of Functions and Common Investment Funds (2012).

Our two Reports are:

- Joint Report on Trustees' Powers and Duties (LC No 260, SLC No 172, 1999), mentioned in the previous paragraph,

- Variation and Termination of Trusts (SLC No 206, 2007), which remains unimplemented.

Consultation and assistance

1.7 In the course of the project we have attempted a comprehensive review of the law, and have made extensive use of comparative material. This has included the law of England and Wales, jurisdictions in the United States, Canada, Australia and New Zealand. We have also had regard to the law of smaller jurisdictions where the trust has assumed economic importance, notably Jersey, Guernsey, the Isle of Man, the Cayman Islands and the British Virgin Islands. The New Zealand Law Commission undertook a review of the law of trusts at the same time as the later stages of our project, and we have derived great help from their work. In particular, Sir Grant Hammond, the President of the New Zealand Law Commission, visited us in Edinburgh in September 2011, and this provided the opportunity to discuss our two projects. We have also received particular assistance from Jersey; the Jersey Trust Law Committee were kind enough to meet our then Chairman in July 2011, as did Julian Clyde-Smith, a Commissioner of the Royal Court of Jersey, to discuss issues of trust law and its reform in contemporary conditions. In addition we should acknowledge the assistance of the Law Commission for England and Wales, in particular in the joint project on powers of investment and also in relation to powers of apportionment.

1.8 As well as looking at other legal systems, we have derived great benefit from discussions with the legal profession in Scotland. We would like to take this opportunity to thank all those who responded to our Discussion Papers and Consultation Papers. These responses were often very detailed, and were of the greatest assistance in determining what the law should be. We also met representatives of Standard Life plc and Alliance Trust plc to discuss the use of trusts in the context of fund management, pensions and life assurance; these were of great assistance. Finally, we would like to thank the members of our Advisory Groups, who have met regularly and have provided us with valuable insights into the law.[7]

General structure of the Report

1.9 As already indicated, our Report is intended to be a comprehensive review of the law of trusts together with detailed recommendations for reform. Chapter 2 is a general discussion of the role of the trust in Scots law, together with a summary of the main changes which we recommend.[8] An important point that emerges in this chapter is the manner in which the trust permeates large areas of the law. This is why the subject is of central

[7] The members are indicated at Appendix D, together with those who responded to our various consultations.
[8] See para 2.25 below.

importance. Chapter 3 deals with our Discussion Paper on the Nature and Constitution of Trusts,[9] and explains why we did not think it necessary to take action at this stage on the matters raised in that Paper. In addition, it discusses the modern use of trusts in a commercial context, a topic that we also touch on in Chapter 2.

1.10 The remaining chapters set out our detailed recommendations for reform of the law. Chapter 4 considers a range of fundamental issues, namely the appointment, resignation, removal and discharge of trustees. We also discuss what is meant by saying that a trustee (or other person connected with a trust) is "capable" or "traceable". These are concepts which occur at different points throughout the Report. Chapter 5 deals with the manner in which trustees may reach decisions. In Scots law, unlike the systems based on English equity, trustees have always been able to make decisions by a majority.

1.11 Chapters 6 to 10 discuss trustees' administrative powers and duties. These are of great practical importance, and the policy that we have followed is generally to accord trustees extremely wide powers. We would emphasise, however, that administrative powers are ancillary to the main purposes of the trust. Every trust must set out trust purposes, which may be to benefit named or identifiable beneficiaries or may be purposes of a more general nature, as with public and charitable trusts. The fundamental duty of the trustees is to give effect to the trust purposes; trustees' powers only exist to enable them to fulfil that task. Thus the powers will always be read subject to the overriding trust purposes. A further limitation on the trustees should be mentioned at this stage: all trustees are subject to fiduciary duties, which means that they must achieve the trust purposes and make use of their powers in a manner that puts the interests of the beneficiaries, or the beneficial purposes of the trust, first. Subject to strictly defined exceptions, a trustee may not act in a manner that involves a conflict between the interests of the trust and his own personal interests.

1.12 On matters of detail, Chapters 6 and 7 deal respectively with the general powers of trustees, and powers of investment; the latter chapter is derived from the earlier Joint Report on this area.[10] Chapter 8 is concerned with delegation by trustees to agents and nominees, an area that is of great practical importance, particularly in a commercial and investment context. Chapter 9 considers powers of advancement and corresponding powers to pay income to beneficiaries; this is a field where Scots law is widely perceived as being well behind other legal systems. Chapter 10 discusses the power of apportionment of trust receipts and outgoings. For reasons we explain, we consider that we are not in a position to be able to recommend the statutory power to alter the allocation of receipts and outgoings which we proposed in the relevant Discussion Paper;[11] we do, however, make recommendations for reform of the rules on time apportionment and for the repeal of certain common law rules of equitable apportionment.

1.13 Chapter 11 deals with information duties, an aspect of the law that has not figured greatly in traditional discussions. In the course of our work, however, it became apparent that it is now of considerable significance and is being addressed in other comparable jurisdictions. For this reason we thought it important that Scots law should make express provision in this area. Chapters 12 and 13 build upon the review of trustees' administrative

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[9] DP No 133.
[10] See para 1.5 above.
[11] DP No 124.

powers set out in the earlier chapters. They deal respectively with breach of trust and the liability of trustees to third parties. Chapter 12 deals with trustees who act outwith the powers conferred under the trust, or who commit breaches of their duty of care and skill, and also with breaches of trustees' fiduciary duties. These are important areas which must be properly regulated if there is to be general confidence in the system of trust law. The liability of trustees to third parties, which is the subject of Chapter 13, is a further important area: it deals with trustees' liability in contract or delict to those with whom they contract or those who may be injuriously affected by the trustees' dealings.

1.14 Chapter 14 recommends specific provision for private purpose trusts. A purpose trust is a trust set up to achieve a defined purpose, rather than to benefit a named or identifiable beneficiary. Public and charitable trusts are almost inevitably purpose trusts, and we consider that private purpose trusts also exist in Scots law at present.[12] Nevertheless, we think that it is desirable to set out the law in a manner that admits of no doubt as to the competence of such a course. We also provide for the institution of a supervisor, a person appointed to oversee and enforce the trustees' duties in order to ensure that the trust purposes are fulfilled. In addition, we discuss trusts to hold a controlling interest in a private company, and we describe the approach taken by legislation in the British Virgin Islands. Chapter 15 deals with protectors, an institution found in other legal systems but not so far expressly recognised in Scots law. The function of the protector is to oversee a trust from the perspective of the truster rather than the fulfilment of the trust purposes.

1.15 Chapters 16 to 19 deal with the powers of the court. Chapter 16 examines the powers of the court in general, and is concerned to provide simple, inexpensive and effective remedies. Chapter 17 deals with the power of the court to vary trust purposes. This is based on our earlier Report on the Variation and Termination of Trusts, published in 2007. Chapter 18 abolishes the existing restrictions on the lifetime of private trusts, and provides a power in the court to alter trust purposes in certain carefully defined circumstances. Finally, Chapter 19 confers power on the court to remedy defects in the exercise of trustees' powers, and Chapter 20 contains a list of all our recommendations.

1.16 Appendix A contains the draft Trusts (Scotland) Bill which gives effect to the recommendations in the body of the Report. Appendix B sets out the terms of section 4 of the Trusts (Scotland) Act 1921, as amended, which we reproduce to illustrate the state of the current law.[13] In Appendix C we give the text of a letter that we sent to HM Revenue and Customs (HMRC) in connection with proposals to reform the law of apportionment,[14] and Appendix D lists both those who responded to our Discussion Papers and Consultation Papers and also the members of our Advisory Groups.

Topics consulted upon but not covered by the Report

1.17 Two of the topics considered in our Discussion Papers have not been taken forward into the Report. The first of these is the Discussion Paper on the Nature and Constitution of Trusts.[15] We explain why we have not taken this matter forward in the first part of Chapter 3 of this Report. The second area that we have not taken forward is the possibility of a

[12] Unlike the law of England and Wales, where non-charitable purpose trusts are not recognised: see para 14.2 below.
[13] See para 2.20 below.
[14] See paras 10.21-10.25 below.
[15] DP No 133.

comprehensive statutory statement of trust law in Scotland, a matter discussed in Chapter 2 of the Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law.[16] We suggested that such a statement could be useful in setting out the law of trusts in a fully comprehensive form. On the other hand, we acknowledged that the drafting of such legislation would not be easy, as uncertainties would have to be resolved and a number of important policy issues would have to be decided on which further consultation would almost certainly be necessary. Moreover, we thought it likely that other areas of doubt would be discovered even after such legislation was enacted. Following consultation, we formed the view that there was no major demand for such a statement. At present, we think it better to recommend reform of the law in areas where the need for reform has been clearly demonstrated. If the draft Bill appended to this Report is enacted, it may form a good basis for a future comprehensive statement of the law. Furthermore, the preparation of such a statement might be easier once major reforms have been undertaken and have bedded down in practice. The present Report and draft Bill are designed to recommend reforms that are necessary and urgent, and should be approached in that light.

Legislative competence

1.18 Section 29 of the Scotland Act 1998 sets out the limits of the Scottish Parliament's legislative competence. Generally speaking, Scots private law is not reserved;[17] in other words, it falls within the competence of Holyrood. Whilst there are particular uses to which trusts are commonly put which are reserved, as is the case, for example, with pension trusts,[18] there are invariably specialist laws which apply in those areas. The reforms recommended in this Report and reflected in the draft Bill are not intended to alter those specialist laws but instead set out the generally applicable (and therefore devolved) Scots law of trusts. We are also of the view that the recommendations, if enacted, would not give rise to any breach either of the European Convention on Human Rights or European Union law.

1.19 On this basis, we do not consider that any issues of substance on legislative competence arise in the Report.

Crown application

1.20 Section 20(1) of the Interpretation and Legislative Reform (Scotland) Act 2010 states that an Act of the Scottish Parliament binds the Crown except in so far as the Act provides otherwise. This reversed the previous position, whereby the Crown was bound only by express statutory provision or by necessary implication. The effect of the 2010 Act on the draft Bill in Appendix A is that, if enacted in its current form, it will bind the Crown. We have not consulted on this point, but once a Bill is ready for introduction into the Scottish Parliament this is a matter on which we consider that consultation would be desirable.

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[16] DP No 148.
[17] Trust law falls within the definition of "Scots private law": see s 126(4) of the 1998 Act.
[18] "The regulation of occupational pension schemes and personal pension schemes, including the obligations of the trustees or managers of such schemes" is reserved by Section F3 of Sch 5 to the 1998 Act. But the reservation does not extend to all trusts connected with pensions: eg it does not affect a trust to which pension entitlements are transferred by the pensioner. See the discussion at para 18.30 below in the context of commercial trusts and private trusts.

Business and Regulatory Impact Assessment ("BRIA")

1.21 The Scottish Government introduced new requirements in 2010 aimed at achieving enhanced regulatory impact assessments of primary legislation, secondary legislation, codes of practice and guidance.[19] We have accordingly prepared a BRIA, which is published on our website; the main points are:

- Trusts have, for centuries, been a hugely useful and flexible part of Scots law. At one time associated with transmission and protection of family wealth, they are nowadays used increasingly, and perhaps predominantly, in commercial as well as domestic situations.

- Assets of great value (measured in hundreds of billions of pounds) are held on trust and the sector offers employment for a range of skilled professionals.

- The competition for trust business is international: technological advances and the free movement of people and assets across borders means that trust professionals need up to date tools to compete in the market.

- Scots trust law is widely considered to be out of date, and the main legislation is almost a century old.

- Competing jurisdictions have trusts laws which are modern and more comprehensive than is the case domestically.

- There is great support for reform and modernisation of trust law amongst those who use it. It is agreed that the benefits would be very wide-ranging, and would extend not only to beneficiaries but also to trustees; many of the latter are lay people and not professional trust specialists.

1.22 As all Bills introduced into the Scottish Parliament require an accompanying BRIA there is likely to be a need to update our version when a Trusts (Scotland) Bill is brought forward. It will be examined as part of the parliamentary process, especially at Stage 1. We would encourage all those who may be affected by the reforms, or otherwise with an interest in them, to consider engaging with that process at the appropriate time in the future. The task of assessing the likely impact of reform such as the present one, which in large part aims to keep long-standing legislation up to date and in line with modern demands and expectations, is no less important than the task of assessing any other legislative or regulatory proposal. Indeed, the almost self-evident utility of such updating reforms should not be allowed to become lost for want of re-stating the many advantages, both commercial and otherwise, which lay behind the initial introduction of the law so long ago and which have held good since then.

Acknowledgements

1.23 As mentioned in paragraphs 1.7 and 1.8 above, we are grateful to all those who responded to our various consultations, whose views have been of great assistance in

[19] Further information is available here: http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments.

considering what recommendations to make, and also to the invaluable contributions of our Advisory Group members and others who have assisted us. Given the length of time that the project has been under consideration within the Commission we also wish to record that various former Commissioners and members of staff have been particularly involved at earlier stages: Professor Joe Thomson, Colin Tyre QC (now Lord Tyre) and Dr David Nichols. In 2009 our then Chairman, Lord Drummond Young, took charge of the project and he has taken the lead in the preparation of this Report, serving as a consultant to the Commission after his term of office as Chairman came to an end. We are very grateful to him for devoting so much of his own time to the completion of this project. In addition, we record our gratitude to Professor George Gretton who has also continued to assist us on this project following the expiry of his term of office as a Commissioner.

Chapter 2 The trust in Scotland

The nature and advantages of a trust

2.1 A trust is in essence a legal institution whereby specified property is held by one or more persons, the trustee or trustees, for defined purposes. Those purposes will frequently be intended to benefit identified or identifiable persons, the beneficiaries, but that is not an essential feature of the trust.[1] As we discuss in detail in Chapter 3, the underlying nature of the rights and obligations involved in a trust is best described through the dual patrimony theory, put forward by Professors Kenneth Reid and George Gretton in a series of articles in academic journals and elsewhere.[2]

2.2 The trust is very widely used in practice. Its success can be gauged by the fact that at the present day the value of the property held in trust in Scotland appears to be in excess of £500 billion.[3] The great advantages of the trust mechanism are its simplicity and its flexibility. The trust provides a simple device whereby property may be held for the benefit of specified persons or classes of persons, or for specific purposes. The trustee who holds the property is given powers to manage the property and, usually, to dispose of it in appropriate circumstances. The property is held subject to two important categories of duties. First, it is subject to the trust purposes themselves, which define the uses to which the property and its proceeds, including income, must be put. Secondly, the trustee is subject to fiduciary duties. The essence of a fiduciary duty is that the fiduciary, in this case the trustee, must act in the utmost good faith in achieving the trust purposes. That means that the trustee must at all times act in the interests of the beneficiaries or the purposes of the trust, and, unless expressly authorised, may not permit any conflict to arise between his or her own interests and the interests of the beneficiaries or the trust purposes. Those duties are strictly enforced.[4]

2.3 More specifically, the trust provides the following advantages. First, it provides a straightforward means whereby one person can manage the property of another. Thus it has for many years provided the standard means whereby the estate of a deceased person is administered with a view to transferring the property to the beneficiaries. It is widely used to hold property for children and for adults subject to disability. It is also a common means of holding and managing the property of charities and other bodies set up for public purposes.

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[1] Trusts which are not for the benefit of identified or identifiable beneficiaries may take a number of forms: for instance, charitable trusts are invariably of that nature. Indeed, all Scottish public trusts, not just charitable ones, are very likely to be for defined purposes rather than for identified beneficiaries. We discuss an expansion of this into the field of private trusts in Ch 14 below.

[2] See para 3.4 below and the articles cited in its note 3.

[3] It is impossible to be exact about the figure, but certain estimates can be made. We quote some statistics in our BRIA (discussed in para 1.21 above): eg "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)." Separately, funds held in defined benefit pension schemes, which are generally set up under trust, at least in the private sector, were said to amount to over £1,000bn of assets in the UK in 2012: see the Report on Fiduciary Duties of Investment Intermediaries (LC No 350), para 2.7. This might suggest a very conservative figure of around £90bn for Scotland for the corresponding period.

[4] For recent examples see *Parks of Hamilton (Holdings) Ltd v Campbell* [2014] CSIH 36 and *Dryburgh v Scotts Media Tax Ltd (in liquidation)* [2014] CSIH 45.

In these respects the trust is the standard institution used throughout the English-speaking world. In the civil law systems found in continental European countries, notably those based on the French and German civil codes, the trust as understood in Scotland and in common law jurisdictions does not exist, and instead property is held directly by those who benefit from it.[5] Thus when a person dies his or her estate is transferred directly to the heirs, without the interposition of executors or other trustees, and the property of charitable bodies is generally held directly by the body, which will typically be incorporated as a separate legal person. Those methods of administering property clearly work in a satisfactory manner, but they illustrate the fundamentally different way in which Scots law and other legal systems in the English-speaking world arrange for the management of property that is held for other persons or defined purposes.[6]

2.4 Secondly, a trust provides protection against the insolvency of the trustee; if the trustee becomes insolvent, the trust property continues to be held for the purposes of the trust and does not go to the trustee's personal creditors.[7] This is the essence of the dual patrimony theory;[8] the trust estate forms a patrimony by itself, distinct from the trustee's own private property, and it cannot be used for payment of the trustee's own private creditors. Likewise, the trust estate is exempt from any enforcement of the trustee's private debts, by diligence or otherwise.

2.5 Thirdly, 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. Any third party who receives the property without giving value will be compelled to account to the trust for any benefit that he or she has received.[9]

2.6 The ease with which a trust may be created has proved of great advantage in practice. In particular, this explains the extensive use of trusts in commercial transactions in modern Scottish practice. In England and Wales the law frequently implies equitable interests into commercial transactions. These have almost exactly the same effect as a trust, and provide the protection against insolvency and gratuitous alienation that a Scottish trust confers. Equitable interests are not recognised in Scots law, but equivalent benefits can be obtained by the use of a trust. An example of this is the use in project financing agreements of a trust to hold the collateral for completion of the development. Another example is the use of a trust to hold a fund as security for possible future environmental liabilities following on a commercial transaction relating to land. In both of these cases a ring-fenced fund can be set up, so that it is available to meet possible future liabilities. This is a simple and flexible type of security, and is widely used in these and many other commercial contexts.

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[5] There have been moves in some civilian countries to incorporate a trust-like device. Full discussion of this topic lies beyond the scope of the present Report, but see, eg, *Trusts et fiducie, concurrents ou compléments?* (Academy & Finance, Geneva; 2008), the result of a STEP France Conference in June 2007; and also L Smith (ed), *The Worlds of the Trust* (2013).

[6] For one of the difficulties to which this may give rise, see paras 2.27-2.36 below.

[7] *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43. The rule has since been put on a statutory footing in s 33(1)(b) of the Bankruptcy (Scotland) Act 1985.

[8] See para 2.1 above and para 3.4 below.

[9] See Menzies, para 1271 ("where funds affected with a trust come into the hands of another than the beneficiary, either gratuitously or with knowledge of a breach of trust, the transferee is a constructive trustee"), which is quoted with approval by Lord President Hamilton and Lord Nimmo Smith in *Commonwealth Oil and Gas Co Ltd v Baxter* 2010 SC 156.

2.7 The flexibility of the trust is also important. It is illustrated by the commercial use of trusts, as described in the last paragraph.[10] It is also illustrated by the implied trust: in commercial transactions a trust may be implied where that appears to accord with the general intention of the parties to the transaction. In addition, a trust will be imposed by statute in certain specified situations. An illustration is where the owners of neighbouring properties require to pay for common repairs and set up a fund to meet the resulting liability. The funds in these cases are now generally subject to a statutory trust.[11] In a comparable vein, there is a statutory requirement that a solicitor who acquires client monies must deposit them in a trust account, to ensure that those funds cannot be misappropriated or used to benefit the solicitor in any way but can only be used as the client intended.[12]

2.8 In addition, the courts have in recent years made use of the constructive trust as a form of remedy.[13] Unlike an implied trust, which is implied from the contractual or other arrangements made by the parties, a constructive trust is imposed by the court as a matter of law.[14] Constructive trusts may be regarded as a form of remedy.[15] They may be imposed in various sets of circumstances: for example, where a third party acquires property as described in paragraph 2.5 above; and where a fiduciary acquires a benefit in consequence of his or her fiduciary position or from any breach of fiduciary duty. The fiduciary duties in question need not be those of trustees; others, including company directors, partners and agents, are subject to duties that are fiduciary in nature.[16]

The history of the trust in Scotland

2.9 Trusts, or at least devices similar to trusts, may well have been used in Scotland since Medieval times.[17] Trusts in the proper sense have been used since at least the early 17th century, and throughout the following centuries.[18] The first statute dealing in detail with

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[10] See also the discussion of commercial trusts in paras 3.14-3.17 below.

[11] Where the neighbours live in a tenement, the fund will be held on a statutory trust: para 3.4(h) of sch 1 to the Tenements (Scotland) Act 2004; and, where they are in a development to which the community burdens provisions of the Title Conditions (Scotland) Act 2003 apply, funds for common maintenance works are held in trust for all the depositors (by s 29(8) of that Act).

[12] In terms of Rule B6 of the Law Society of Scotland's Practice Rules 2011, which are made under the Solicitors (Scotland) Act 1980. We discuss client money in detail at paras 8.22-8.28 below.

[13] On this topic, which has been a controversial one, see GL Gretton, "Constructive Trusts" (1997) 1 Edin LR 281 and 408; P Hood, "What is so special about being a fiduciary?" (2000) 4 Edin LR 308; NR Whitty, "The 'No Profit from Another's Fraud' Rule and the 'Knowing Receipt' Muddle" (2013) 17 Edin LR 37; and L Macgregor, *Law of Agency in Scotland* (2013), paras 6.44-6.47. Gretton and Steven state, at para 22.45: "Whereas English law readily recognises constructive trusts, it is uncertain to what extent, if at all, our law does so. "I confess an almost instinctive abhorrence of the notion of constructive trusts in the law of Scotland" remarked [Lord Johnston in *Mortgage Corporation v Mitchells Roberton* 1997 SLT 1305 at 1310]. Many of the cases commonly cited as examples of constructive trust are doubtful examples, or are not Scottish cases. The strongest candidate for constructive trust is where a fiduciary, other than a trustee, comes to hold assets which he or she ought to hand over to the principal."

[14] See *Commonwealth Oil and Gas Co Ltd v Baxter* 2010 SC 156.

[15] *Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall and Partners and Ors* [2014] CSIH 18.

[16] For a discussion of fiduciary duties in connection with company directors and others, see the recent publications of the Law Commission for England and Wales (on which this Commission assisted in relation to Scots law): Consultation Paper on Fiduciary Duties of Investment Intermediaries (CP No 215; 2013), and Report of the same name (LC No 350; 2014), especially paras 3.1-3.90.

[17] Such devices were used to hold the property of the Mendicant Orders, which were well represented in Scotland from the 13th century onwards; the members of these orders were not permitted to own property themselves, and devices similar to trusts were used to hold their churches, priories and the like.

[18] Craig, *Ius Feudale*, 2.5.9; Stair, *Institutions*, IV, 6, 2; Erskine, *Institute*, III, 1, 32. See also GL Gretton, "Trusts" in KGC Reid and R Zimmermann, *A History of Private Law in Scotland*, Vol 1 (2001), pp 480-517. An early example which is still in existence is George Heriot's Trust, originally constituted in 1624; see note 7 to para 15.4 below.

trusts was the Trusts (Scotland) Act 1867. This was replaced by the Trusts (Scotland) Act 1921, which in a highly amended form is the primary statute governing the law of trusts at the present day.[19] In 1921 trusts were in use for commercial purposes, for example to hold the property of partnerships,[20] and to hold solicitors' client funds. Trusts were also used extensively for the administration of the estates of deceased persons, sometimes over substantial periods where, for example, a testator's widow enjoyed property in liferent for the remainder of her life and the fee of the property was destined to the couple's children. Trusts were also used extensively to hold landed property, to facilitate the proper professional administration of landed estates. Yet a further common use for trusts was to make good the deficiencies in the law of married women's property. Until the passage of the Married Women's Property (Scotland) Act 1920, any property that came to a married woman passed automatically to her husband. For obvious reasons this situation had for many years been perceived as highly unsatisfactory. Consequently, when a woman from a wealthy family married it was normal to enter into a marriage contract, which was a form of trust designed to hold all the property that might pass to her from her own family, in such a way that it did not pass automatically to her husband. This is a good example of the use of the trust to remedy a serious deficiency in the law.

2.10 It is obvious that the world has changed greatly since 1921. Perhaps unsurprisingly, the Act passed in that year still has a flavour of an age of landed estates and deficiencies in the law of married women's property. It now looks extremely dated, however, both in style and in content. It was amended and added to by four statutes during the 1960s: the Trusts (Scotland) Act 1961, the Trustee Investments Act 1961, and the Law Reform (Miscellaneous Provisions) (Scotland) Acts of 1966 and 1968. Further changes were effected by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and the Charities and Trustee Investment (Scotland) Act 2005. The latter Act, at sections 93 to 95, gave effect to recommendations made in the Joint Report by the Scottish Law Commission and the Law Commission for England and Wales on Trustees' Powers and Duties,[21] published in July 1999. The recommendations made in the Report were implemented in England and Wales by the Trustee Act 2000, but in Scotland nothing was done until 2005, a disappointing comparison.[22]

2.11 In part the foregoing statutes amend the 1921 Act and in part they make further free-standing provisions. The result is that the legislation governing trusts is complicated in form and can be difficult to locate in practice. This appears to us to be extremely unsatisfactory; the law of trusts is of immense practical importance, and it is simply not acceptable that it is governed by legislation of that nature. That in itself would be a good reason for restatement of the legislation governing trusts in Scotland.

Modern developments

2.12 Furthermore, important developments have taken place in the law of trusts in the course of the last 45 years. In 1971 it was held in *Allan's Trustees v Lord Advocate*[23] that it is competent for a truster to declare him or herself trustee of his own property, as long as the

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[19] It is noteworthy that 54 years divided the Acts of 1867 and 1921; 93 years have elapsed since the Act of 1921.
[20] It was doubtful under the feudal system whether partnerships could hold title in their own name; see now s 70 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.
[21] See para 1.5 above.
[22] See Ch 7 below for a discussion of investment powers.
[23] 1971 SC (HL) 45.

trust is intimated to a beneficiary or steps are taken to make it clear that the trust is intended to be legally binding;[24] what is required is that the truster should do something equivalent to delivery or transfer of the trust fund. That particular case was concerned with private trust arrangements set up in an estate planning context, but the use of truster-as-trustee trusts has become of great importance in the commercial world.

2.13 During the 1980s debt factoring and invoice discounting became important sources of finance. Invoice discounting and debt factoring agreements involve the sale of present and future book debts of a trading company (generally referred to as "receivables") to a factoring company. The factoring company pays the trader for the latter's book debts soon after they arise, and in this way the trader's cash flow is improved, with obvious commercial advantages. That leaves the factoring company exposed to the risk that the trading company will become insolvent; in the event of its insolvency, the factoring company has no direct rights against the debtors of the trading company, and payments made by those debtors will merely go to the liquidator, receiver or administrator of the trading company. A trust can be used, however, to provide the factoring company with security: the trading company declares itself trustee of the debts due by its debtors and intimates the trust to the finance company.

2.14 When arrangements of this nature were first used in England and Wales, the factoring or invoice discounting agreements were structured in such a way that the factoring company received an equitable interest (an interest akin to the rights of a beneficiary in Scottish trust) merely as a consequence of the factoring contract. That was not possible in Scots law, however, because the law does not recognise the concept of the equitable interest or any similar trust-like arrangement that arises from mere contract; in Scotland either there is a proper trust or there is nothing. The consequences for Scottish property of an invoice discounting agreement in English form were considered by the Court of Session in *Tay Valley Joinery Ltd v CF Financial Services Ltd*,[25] where it was held that the agreement was effective as a declaration of trust in Scotland. To achieve this result, however, it was essential that the proper law of the contract should be English law, because only then could an equitable interest, akin to a Scottish trust, arise. Otherwise, the more rigorous requirements for a declaration of trust in Scots law would apply.[26]

2.15 What happened thereafter was that debt factoring and invoice discounting agreements that were intended to cover Scottish assets included an express declaration of trust over the Scottish assets.[27] In this way an express trust security was created; this had all the advantages that an equitable interest created in England and Wales, and it accorded greater certainty in that the security arrangements were set out expressly in the factoring agreement.

2.16 Similar techniques spread from debt factoring to securitisation, a transaction whereby a large number of relatively small debts, usually arising out of hire purchase contracts or loans secured over heritable property, are sold to investors through the issue of loan notes. If properly used, this is an efficient means of raising funds at relatively low cost; as with debt

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[24] The issue of whether intimation is equivalent to delivery of the trust fund rather than delivery of the trust deed is discussed in KGC Reid, "Constitution of Trust" 1986 SLT (News) 177.
[25] 1987 SLT 207.
[26] Compare *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111.
[27] See St Clair and Drummond Young, para 12-21 onwards.

factoring and invoice discounting, it involves the use of a debtor's ledger, in this case of a company making consumer loans, to provide security for that company's borrowings.[28] In securitisation agreements, banks and other financial institutions make use of debts due to them under consumer loans to provide security for their own borrowings. Under Scots law they do so by creating a trust over the consumer debts due to them. The bank or financial institution in question sells debts due to it for their market value to a trustee company specially set up for the securitisation and, as instalments of the debts are paid, it passes those payments to the trustee company. The trustee company in turn sells and passes on the benefit of the debts to a further company that issues loan notes to the public. The funds obtained through the issue of the loan notes are paid to the bank or financial institution that has made the original consumer loans. This is a very effective way of raising the funds that are required to make such loans.

2.17 For arrangements of this sort to operate successfully, it is essential that the position of the noteholders should be protected against the possible insolvency of the finance company. The bank or other financial institution that is effecting the securitisation assigns the debt due to it from consumers to the trustee and the note-issuing company. That, however, creates purely personal rights in the trustee and note-issuer, and these will not afford security over the debts in favour of the two assignees. Consequently, the finance company normally declares a trust over the receivables due to it from its customers, those receivables comprising both the debts and any payments made in discharge of those debts. Such a trust affords a high level of security in favour of the various intermediaries and, ultimately, the noteholders who provide the finance. In English law, as with debt factoring and invoice discounting agreements, such security was originally provided by the use of equitable interests arising in the contractual arrangements. Scots law made use of trusts to provide equivalent protection, and thereafter the use of express trusts spread to England and Wales as well.

2.18 It has now become commonplace to use the trust as a means of providing security for commercial debts. We have already referred to their use to provide security in commercial development agreements, to ensure that funds are available to complete snagging work and meet any liabilities that may arise. The same is true of funds set up to provide security against future environmental liabilities. Trusts are also used in the same way as the escrow of English and American law, whereby a fund is ring-fenced to await the outcome of a dispute or the making of possible claims. The use of the trust, because of the separate patrimony of the trust estate, has the effect of protecting the funds against the claims of personal creditors of the person or persons who hold the funds.

2.19 Still in the commercial world, the trust is extensively used as a means of holding partnership property. It is also central to the structure of pension and life assurance arrangements and other forms of investment contract.[29] It is a simple and flexible institution,

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[28] Use of securitisation has been put forward by some critics as a major source of the financial crisis of 2008. What happened in fact was that financial institutions, in the UK, the US and elsewhere, entered into securitisation agreements over dubious debts. It was the quality of the debts that were used as security, not the model of securitisation, that was responsible for the crisis. The model itself remains a good and efficient means of raising finance.

[29] See the CP and Report cited in note 16 to para 2.8 above.

and there is almost no limit to the number of ways in which it can be used for commercial purposes. Nor is the utility of the trust confined to express trusts.[30]

Problems with the existing legislation

2.20 Thus the trust is an important and evolving institution in Scots law. Unfortunately it is badly served by the existing legislation, which is based on the 1921 Act. Its structure and wording is very old-fashioned, as can be seen by comparing its text with a modern statute, whether in Scotland or elsewhere, and it has been heavily amended, in such a way that certain parts have become seriously overloaded. This applies in particular to sections 4, 4A and 4B and 4C where the default powers of trustees are set out.[31] These are important provisions, but the structure is inelegant, to say the least, and does not make it easy for trustees to find out what their powers are. It is, moreover, necessary for trustees to have regard not merely to the 1921 Act but to subsequent legislation to discover exactly where they stand.

2.21 Because of the versatility of the trust as a legal institution, we consider it 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. In recent years there has been considerable competition among jurisdictions to attract trust business on an international basis. This is important not only for the legal profession but also for the financial and investment community, since the trust provides a modern, flexible legal vehicle that can be used to provide services that will attract international business. As a result jurisdictions that seek to attract international financial and investment business have invariably reformed their trust law to bring it into line with modern requirements.

2.22 This is apparent from a wide range of other jurisdictions. One example is Jersey, where the law of trusts is governed by the Trusts (Jersey) Law 1984. That has been revised by statutes passed in 1989, 1991, 1996, 2006, 2012 and 2013. Amendments have been worked into the basic trust law in a coherent and easily accessible form, with the result that the trust legislation is clear and up to date. We have no doubt that, in any attempt to obtain international trust business, the Jersey legislation is much more attractive than that in Scotland.[32] A further example is New Zealand, where attempts are also made to attract international trust business. The main statute there is the Trustee Act of 1956. That has been amended by further legislation passed in 1957, 1960, 1968, 1974, 1982, 1986, 1988, 1999, 2001, 2006 and 2010. Despite the frequent amendments, the resulting legislation is still reasonably coherent, but the New Zealand Law Commission has recently undertaken a full review of the 1956 Act. We note that in their introductory issues paper they state that a full review of the Act is long overdue, that it needs modernisation, and that some provisions need clarification and the removal of anomalies.[33] Even in England and Wales, where basic legislation is frequently permitted to remain in force for very long periods, the principal statute, the Trustee Act 1925, has been significantly amended by the Trustee Act 2000, and

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[30] We have seen above, eg at paras 2.7-2.8, that trusts may arise by implication, by statute, or by order of the court.

[31] We reproduce s 4 in Appendix B; it is a good illustration not only of the unwieldy nature of some of the Act's provisions but also – as can be detected from the numbering of the subsections – of the way the legislation has been amended and expanded over time.

[32] The Maltese Trusts and Trustees Act of 2004 (Chapter 331) is based on Jersey trust law.

[33] Review of Trust Law in New Zealand: Introductory Issues Paper (Issues Paper 19, Nov 2010: http://www.lawcom.govt.nz/project/review-law-trusts?quicktabs_23=issues_paper).

other aspects of the law of trusts have been altered by the Perpetuities and Accumulations Act 2009, the Trusts (Capital and Income) Act 2013, and the Inheritance and Trustees' Powers Act 2014. We note that in civilian jurisdictions, too, there has been considerable interest in the trust.[34]

2.23 These jurisdictions stand in sharp contrast to Scotland, where the basic legislation has remained in force for almost a century and looks very dated. Furthermore, the Scottish legislation is not directed to the modern use of trusts. The extensive use of trusts in pension and life assurance arrangements and other commercial contexts has taken place well after the 1921 Act was passed (and even after the reforms carried out during the 1960s).[35] Consequently we think that modernisation of the legislation is long overdue, to enable the Scottish law of trusts to respond properly to modern commercial, financial and economic conditions.

2.24 In the course of the present project, we have been very conscious of the developments mentioned above. With that in mind, we have sought to produce a single, modern, general trust statute. In doing so, we have attempted to rationalise much of the law. We have also attempted to clarify areas where the law was uncertain, and to correct anomalies that had developed over the years. The law relating to charitable trusts is now largely contained in the Charities and Trustee Investment (Scotland) Act 2005, and as a result in the present project we have not thought it necessary to consider the law peculiar to charities. Charities will still be affected by our proposals, because much of the general law of trusts applies equally to charitable trusts and to others. Nevertheless, we have confined ourselves to the general law of trusts and to matters that are relevant to non-charitable trusts, whether of a personal or commercial nature.

Major changes

2.25 Perhaps the most significant change that we propose is that the trust legislation should be contained within a single, coherent statute, drafted in modern form and with regard to modern conditions. For that reason the draft Bill appended to this Report bears little relationship to older legislation in its form and structure, although obviously it covers similar ground to the earlier legislation. In some areas, however, we have made proposals that are quite novel so far as Scots law is concerned. In most cases these have been based to a greater or lesser extent on the trust law of other jurisdictions; in this way we are confident that there is a proven need for the measures that we propose and that we have adopted practical means of addressing such need. The major changes are as follows:

1. All restrictions on the lifetime of private trusts, including the rules restricting accumulations and successive liferents, are abolished.[36] The existing rules are extremely complex, and can have arbitrary and unpredictable effects. Furthermore,

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[34] See, eg, DJ Hayton et al (eds), *Principles of European Trust Law* (1999); S Kortmann et al (eds), *Towards an EU Directive on Protected Funds* (2009); and the DCFR, Book X. Also, at a conference in 2012 organised by the Institute of Law in Jersey on the development of trust law in the Channel Islands, it was noted that nationals of several Continental jurisdictions, particularly Italy and Switzerland, use Jersey trusts, and that "The 1984 [Jersey Trusts] Law is a 'readable' statute for lawyers versed in the civilian system": see https://www.jerseylaw.je/Publications/jerseylawreview/feb13/JLR1302_Atkins.aspx.

[35] See para 2.10 above.

[36] Ch 18.

we consider that in modern economic and social conditions the justification for rules limiting the duration of private trusts has almost entirely disappeared.

2. 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.[37] The power is designed to deal with the possibility that a trust that has existed for a long time, possibly in consequence of the abolition of the rules restricting the lifetime of trusts, may require to adapt to major changes in circumstances, such as changes in the truster's family or changes in the investments held by the trust or changes in general economic circumstances. Although such power is unprecedented in other jurisdictions, it met with strong support from within the Scottish legal profession.

3. 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 a philanthropic or business nature.[38] 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. It is apparent from those other jurisdictions that there is considerable demand for such trusts. We think that they are probably already competent in Scots law, but that it is desirable to clarify the position and to set out a clear statutory framework for such trusts.

4. Express legislation is proposed to permit the courts to remedy defects in the exercise of trustees' fiduciary powers.[39] This applies to defects in the trustees' approach to exercising the power, such as failure to take account of relevant considerations or taking account of irrelevant considerations, and error in the exercise of the power. This is an area of law that has caused great difficulties recently in England and Wales.[40] We seek to clarify the law in Scotland and to provide coherent grounds on which the courts may grant redress for the defective exercise of fiduciary powers by trustees and effective remedies if such grounds are established. We hope that this will avoid the extensive litigation and serious practical difficulties that have arisen in this area of law in England and Wales over the last 40 years.

5. New provisions are recommended to deal with practical problems that frequently arise in the administration of trusts which have *ex officio* trustees.[41] In the course of the project we became aware, initially through the experience of Ms Dunlop, one of the Commissioners, as Procurator to the General Assembly of the Church of Scotland, that the use of *ex officio* trustees gives rise to very frequent practical problems, for example in a case where an *ex officio* trustee (such as the minister of a particular church, or the principal of one of the Scottish universities) is unable to attend properly to the duties of a trustee. Further problems may arise if the

[37] Ch 18.
[38] Ch 14.
[39] Ch 19.
[40] See *Pitt v Holt*; *Futter v Futter* [2013] UKSC 26.
[41] Ch 4, paras 4.33-4.43 below.

office supplying the trustee is abolished. We propose a simple procedure to enable the courts to deal with such cases in a quick and inexpensive manner.

6. In the course of the project it became apparent to us that the duty of trustees to provide information to beneficiaries and others gives rise to frequent difficulties in practice. We have proposed a scheme that seeks to clarify the law, in a manner that respects the interests both of beneficiaries who wish to know about the administration of the trust and also of trustees, who require to be protected from undue interference in their work.[42]

7. We propose a total reform of the law relating to powers of advancement.[43] In this respect, we have followed the model of English and Welsh law, as developed in Australian jurisdictions. This appears to us to have worked very successfully in practice for many years, and we think that it provides a suitable model for Scots law.

8. We have sought to create a coherent scheme to deal with trustees' liability for breach of contract and delictual liability.[44] In doing so we have attempted both to reform and clarify the law.

9. The law on breach of trust was widely considered to be unclear, and we have sought to embody it in a coherent and comprehensive statutory scheme.[45]

10. The power of trustees to delegate to agents or nominees was widely considered to be unclear, and we have sought to provide a coherent scheme to bring the needed clarity to the law.[46]

11. We considered that the powers of the courts require to be reformed in a number of respects, to provide a comprehensive set of remedies to deal with the problems that arise in the administration of trusts.[47] We have also made provision for the liability of trustees in the expenses of litigation, an area of law in which there was considerable uncertainty.[48] Finally, on the subject of court powers, we have sought to re-state and improve the legislation governing petitions for the variation of trust purposes.[49]

12. We have also attempted to reform and restate the statutory provisions that govern the appointment, resignation, removal and discharge of trustees[50] and decision-making by trustees.[51] These are areas where we consider that the law would benefit from a modern restatement, to provide clarity and certainty.

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[42] Ch 11.
[43] Ch 9.
[44] Ch 13.
[45] Ch 12.
[46] Ch 8.
[47] Ch 16.
[48] Ch 16, paras 16.22-16.37 below.
[49] Ch 17.
[50] Ch 4.
[51] Ch 5.

Policies followed

2.26 In recommending reform of the law, we have followed a number of general policies. They are as follows:

1. We have throughout sought to recognise two of the most important practical features of the trust, namely its inherent simplicity and its flexibility. For that reason we have attempted to keep legal requirements to an absolute minimum, so that the essential feature of a trust, the holding of property by one person or group of persons for defined purposes, is preserved. We have further attempted to ensure that trusts can be used in any way that the truster chooses without significant restriction, subject only to the obvious limitations based on legality, public policy and the need that trust purposes should be sufficiently identifiable to be given effect.[52]

2. We have sought at all times to recognise that the trust is an important commercial device, and to ensure that the reform of the law facilitates its use for commercial purposes.[53]

3. Many of the provisions in the draft Bill appended to our Report are default provisions, in that 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 1921 Act and also of the legislation found in other jurisdictions. In selecting default rules, we have followed the policy of adopting what we consider to be current best practice. In determining what is best practice, we have derived great assistance from those who responded to our consultations and in particular from our Advisory Groups. We consider that this is an essential aspect of bringing the trust legislation up to date.

4. Although we have made extensive provision for default rules, we have not attempted to provide styles. The 1921 Act provides some styles, but on a somewhat arbitrary and erratic basis. A number of excellent stylebooks are now available,[54] and these will meet the needs of practitioners. We do not think that it is the function of a trusts statute to furnish styles; stylebooks can do so with detailed instructions in such a way as to cover a wide range of cases, whereas trust legislation is of necessity limited in its length and would become quite unwieldy if extensive styles were provided. Furthermore, stylebooks are published more frequently, and can keep practice up to date more effectively than a statute can.

5. In relation to the powers of the court, we have attempted to provide simple remedies that allow great flexibility in their practical application. In this way the court can adapt to every sort of situation, including wholly novel problems. We do not think that this will produce significant uncertainty; in practice the correct course of action will be fairly obvious to a judge with experience of trust, property and commercial law. In addition, he or she will obviously have the benefit of submissions from counsel, which should mean that the interests of parties are fully considered.

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[52] For further discussion, see paras 14.6-14.10 below.
[53] This is reflected in particular in our recommendations relating to the general powers of trustees (Ch 6), powers of investment (Ch 7), delegation by trustees' agents and nominees (Ch 8), and private purpose trusts (Ch 14).
[54] See, eg, Barr et al; Kessler and Grant.

6. An issue that has been raised by our Advisory Groups, in particular, is that the powers that are available to the court in respect of matters such as information rights or correcting the defective exercise of fiduciary powers may induce beneficiaries who are for any reason dissatisfied with trustees' decisions to take action in court to challenge those decisions. We recognise this concern, but we think that the courts will be very conscious of this issue and will exercise their powers in such a way as to minimise the risk of vexatious claims. If, for example, a beneficiary were to bring proceedings to challenge the trustees' exercise of one of their fiduciary powers and was unsuccessful, it can be expected that the court would award expenses against the unsuccessful beneficiary. If the challenge to the trustees' decision were manifestly ill-founded, it is quite possible that expenses would be awarded on an agent and client basis. The Court of Session is well aware of the risk of "nuisance" litigation, and can be expected to take measures to curb it in the normal way, which is by an adverse finding in expenses.[55]

7. In approaching the powers available to trustees in the administration of a trust, we have followed the policy of making the powers as wide as possible: in ordinary trust administration, the trustees are given the same powers as would be available to a natural person managing his or her own affairs. This is deliberately wide. In this respect we have followed the policy followed in other jurisdictions in modern times.[56] Although these powers are wide, it is important to bear in mind that they are subject to trustees' fiduciary duties and to the trustees' duty of care and skill.[57] Both of these impose important restrictions on the manner in which trustees may exercise any administrative power. Subject to those duties, however, we consider that it is appropriate to rely on the good sense of trustees, allowing them a wide measure of discretion in how they act for the benefit of the trust. In this connection, we have recommended that an immunity or indemnity clause in a trust deed should be ineffective in relation to a liability arising from breach of fiduciary duty, although that is without prejudice to a clause authorising a particular transaction or particular classes of transaction that would otherwise be in breach of fiduciary duty (for example, solicitors' remuneration). We have also provided that, although it is possible for an immunity or indemnity clause to provide relief against negligence (breach of duty of care) on the part of the trustees, it may not provide relief or exemption from conduct that amounts to gross negligence.[58] We regard gross negligence as fundamentally inconsistent with a trustee's fiduciary position, and for that reason have recommended that it should be treated in broadly the same way as breach of fiduciary duty.

Recent developments in Europe

2.27 As we have already noted, there has been recent work at a European level in the field of trust law.[59] It seeks to present and develop a comparative understanding of how the institution of the trust, especially in its common law form, can be recognised within a civilian

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[55] See, eg, paras 4.4 and 19.35 below.
[56] The powers of investment, for which see para 1.5 above, adopt the policy of according trustees the powers of a natural person managing his or her own affairs. That is the general approach which we have attempted to follow in subsequent Discussion Papers and in the present Report.
[57] See para 1.11 above and also Ch 12.
[58] See paras 12.23-12.54 below.
[59] At para 2.22 and note 34 above.

legal system. This not only deepens the understanding of the trust in those jurisdictions in which it has taken root (as it is necessary to investigate its essential form and structure in detail and to examine its links to other areas of the law), but it also requires a sympathetic and creative approach within civilian jurisdictions in order to determine whether the trust or a trust-like arrangement could be beneficial there. It is therefore regrettable that, at the time when this Report was being completed, there were signs of unwelcome and, in our view, misconceived European activity which touches on trusts. The matter is not strictly within the limits of our current work, as it is not principally a question of Scots trust law nor within the control of the Scottish or UK Parliaments, so we touch on it only briefly.

2.28 In an effort to promote financial transparency and protect against criminality, the European Commission made a proposal in early 2013 for a Fourth Money Laundering Directive.[60] In its original form it did not give rise to difficulty in relation to trusts, but subsequent amendments by the European Parliament in March 2014 are of concern. The main difficulty lies in the proposal to set up a public central register which would require considerable quantities of information about, amongst others, trusts to be included.

2.29 Article 30 of the Commission's proposal provided as follows:

> "1. Member States shall ensure that trustees of any express trust governed under their law obtain and hold adequate, accurate and current information on beneficial ownership regarding the trust. This information shall include the identity of the settlor, of the trustee(s), of the protector (if relevant), or the beneficiaries or class of beneficiaries, and of any other natural person exercising effective control over the trust.
>
> 2. Member States shall ensure that trustees disclose their status to obliged entities [certain persons dealing with the trustees] when, as a trustee, the trustee forms a business relationship or carries out an occasional transaction above [a specified threshold].
>
> 3. Member States shall ensure that information referred to in paragraph 1 of this Article can be accessed in a timely manner by competent authorities and by obliged entities.
>
> 4. Member States shall ensure that measures corresponding to those in paragraphs 1, 2 and 3 apply to other types of legal entity and arrangement with a similar structure and function to trusts."

A proposal in those terms would not be objectionable. It is confined to express trusts, which means that the difficulties, discussed below, relating to implied, statutory and constructive trusts, would not apply. The trustees are required to hold information about the beneficiaries of the trust, or presumably the beneficial purposes if there are no named or identifiable beneficiaries. That, however, is an elementary aspect of proper trust governance; trustees who perform their duties properly must always know who the beneficiaries are and what the trust purposes are. There is a duty of disclosure, but this is confined to the national authorities concerned with preventing money laundering and persons who enter into dealings with the trustees in their capacity as trustees.

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[60] COM(2013) 45 final, available at http://bit.ly/1kBZJQa.

2.30 In the passage of the draft Directive through the European Parliament Article 30 was deleted and replaced by a very far-reaching revision of Article 29.[61] The material parts of this provision are as follows:

> "1. Member States shall ensure that companies and other entities having legal personality, including trusts or entities with a similar structure or function to trusts, foundations, holdings and all other similar, in terms of structure of function, existing or future legal arrangements established or incorporated within their territory, or governed under their law obtain, hold and transmit to a public central register, commercial register or companies register within their territory, adequate, accurate, current and up to date information on them and on their beneficial ownership, at the moment of establishment as well as any changes thereof. […]
>
> 1b. Regarding trusts or other types of legal entities and arrangements, existing or future, with a similar structure or function, the information shall include the identity of the settlor, of the trustee(s), of the protector (if relevant), of the beneficiaries or class of beneficiaries, and of any other natural person exercising effective control over the trust. Member States shall ensure that trustees disclose their status to obliged entities when, as a trustee, the trustee forms a business relationship or carries out an occasional transaction [above a specified threshold]. The information held should include the date of birth and nationality of all individuals. […]
>
> 2. The information referred to in paragraphs 1 […] and 1b of this Article shall be accessible by competent authorities ….. and by obliged entities of all Member States in a timely manner. Member States shall make the registers referred to in paragraph 1 of this Article publicly available following prior identification of the person wishing to access the information through basic online registration. […]
>
> 2b. Member States shall lay down the rules on effective, proportionate and dissuasive penalties for natural or legal persons applicable to infringements of the national provisions adopted pursuant of this Article and shall take all measures necessary to ensure that such penalties are applied."

2.31 Whilst we trust that changes will be made in the course of further consideration, it is clear to us that adoption of this text would be highly retrograde: it is doubtful whether it would achieve the stated aim of strengthening the economic prosperity of the European Union, but instead would impose unworkable and wholly disproportionate burdens on those involved with trusts. There are various reasons for saying this.

2.32 First, trusts in Scots law (and in other jurisdictions) are divided into private trusts and public ones, including charitable trusts. There is a degree of publicity required for the latter, for instance in the form of published annual returns to a regulator such as OSCR, but generally speaking the former are, as the name suggests, private.[62] The proposal appears to ignore this difference completely and would require, for *all* trusts, the publication of information which goes far beyond that currently required for charitable trusts. The subversion of private trusts into some form of public entity offends against long-held principle.

2.33 Secondly, trusts in Scots law (and, again, in other jurisdictions) do not have legal personality. Yet the opening words of Article 29.1 imply the contrary, bracketing trusts with

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[61] Available at http://bit.ly/1tNLmIb.

[62] There are obvious exceptions: eg, details must be passed to the public tax authorities, and we recommend in Ch 11 the creation of statutory duties of disclosure. But the information is confidential in all these cases.

"other entities having legal personality" such as a company or a foundation.[63] This represents a basic misunderstanding of the domestic law, and no secure edifice can be built on such shaky foundations.

2.34 Thirdly, in jurisdictions where they are part of domestic law, trusts are used in a wide variety of situations that may not always be appreciated. For example, a deceased's estate is normally held on trust, by executors or trustees.[64] Commercial trusts are increasingly prevalent, as we have explained, and some may arise by implication and perhaps even without the parties' necessarily being aware of their existence at the time.[65] There are also constructive and statutory trusts.[66] Is the intention that all of these trustees should register their trust details? That seems both unnecessary and impracticable.

2.35 Lastly, it appears that those wishing to avoid the transparency imposed under the proposals could easily do so. The regime will only apply to trusts set up in the European Union, but there are, of course, other jurisdictions where trusts, as well as entities such as companies or foundations, can be readily established and where different anti-money laundering rules will apply. Given that incorporeal property, such as investments and money, is easily transferred by electronic means anywhere in the world, it is straightforward to move it to another jurisdiction which is thought to offer conditions suiting the transferor.[67]

2.36 For these reasons we consider that there are clear and fundamental problems with the draft Directive in its present form. Leaving aside any difficulty which it may have in securing its stated objectives, it would have the capacity to destabilise the Scots law of trusts. If that were to occur, thought would urgently require to be given as to how best to neutralise any adverse effects, but that is not a matter on which we can say anything further of value at this stage, save to reiterate our hope that the proposals will be reviewed and modified so as to bring benefit rather than harm.

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[63] When we consulted on whether trusts should have legal personality, respondents were unanimous in agreeing with our preliminary view that they should not: see para 3.5 below.

[64] This contrasts with the method used in most civil law systems in continental Europe, such as under the French and German Civil Codes, where the estate passes direct to the heirs without the intervention of trustees; see para 2.3 above.

[65] See paras 2.12-2.19 above. Some of the commercial trusts may not have beneficiaries (on which, see para 14.7 below), but Art 29(1b) appears to take no account of this possibility.

[66] See paras 2.7-2.8 above. For a recent example of the difficulties which can arise over how to classify trusts (under English and Welsh law), see *Williams v Central Bank of Nigeria* [2014] UKSC 10.

[67] In addition, the Hague Convention on the Law Applicable to Trusts and on their Recognition provides, in essence, that a signatory State must recognise trusts set up under the law of any other jurisdiction. The UK is a signatory, as are a considerable number of other EU Member States and many of the prominent trust jurisdictions in other parts of the world. Thus the Scottish courts, and those of other parts of the UK, are obliged to recognise trusts set up in other jurisdictions anywhere in the world. If established in a non-EU jurisdiction, those trusts will not be subject to the system of registration proposed in the draft Directive, but they must be recognised.

Chapter 3 Nature and constitution of trusts; commercial trusts

Introduction

3.1 In October 2006 we published a Discussion Paper on the Nature and the Constitution of Trusts.[1] This covered the following matters:

- the definition and nature of a trust in Scots law;
- the rules for the creation of *inter vivos* trusts;
- the effectiveness of a trust against creditors of the truster;
- the requirements of writing;
- the rules on the constitution of *mortis causa* trusts;
- the validity of truster-as-trustee trusts;
- the validity of latent trusts of moveable property;
- the validity of latent trusts of heritable property, and in particular whether there should be a requirement that such trusts should be registered in the Land Register.

3.2 In our most recent Discussion Paper in the current project,[2] we expressed the view that it would not be necessary to implement the proposals contained in the Discussion Paper on the Nature and the Constitution of Trusts. The main reason for doing so was that the areas covered in that Paper had historically been left to the common law or other legislation such as the Requirements of Writing (Scotland) Act 1995. In general, we thought that the existing provision was satisfactory. We remain of this opinion. Nonetheless we consider that it is worth giving a brief account of the proposals and of our current views.

Comments on the questions and proposals in DP No 133

3.3 What follows is a list of the questions and proposals in the Discussion Paper on the Nature and the Constitution of Trusts together with our detailed comments on each of them.

3.4 Question 1 was as follows:

> "1. Do you agree with our provisional view that the dual patrimony theory on the nature of trust in Scots law should be placed on statutory footing?"

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[1] DP No 133.
[2] DP No 148, paras 1.8-1.11.

We have concluded that the dual patrimony theory is undoubtedly reflected in the existing common law,[3] and unless we proceed to a fully comprehensive statement of trust law[4] we do not think that there is any great benefit in setting it out in statutory form. The dual patrimony theory may be described as follows:

> "When a person becomes a trustee he acquires a second patrimony: he now has his private patrimony as before and a trust patrimony. The trust patrimony consists of the trust fund which is owned by the trustee and any obligations he has incurred in the proper administration of the trust. If as will usually be the case there are two or more trustees, the trust patrimony is owned by them jointly. Although owned by the same person the trustee's private patrimony is a separate legal entity from the trustee's trust patrimony. As Reid observes:[5]
>
> > 'The two patrimonies are distinct in law, and should also be distinct in practice, by proper labelling and accounting. The assets of one patrimony cannot normally be transferred to the other. And if an asset is sold from one patrimony, the proceeds of the sale are paid into the same patrimony, each patrimony thus operating its own real subrogation.'"[6]

A similar view of the law, albeit expressed in more traditional terms, is also found in established textbooks. For example, in Wilson and Duncan it is stated:

> "The preponderance of authority is to the effect that property is vested in the trustee … and the beneficiary has merely a right of action against the trustee".[7]

The law is expressed in terms that are fully consistent with the dual patrimony theory in the Stair Memorial Encyclopaedia.[8] The latter work approaches the issue of the rights of beneficiaries and trust creditors from a practical standpoint. It is indicated that the beneficiaries' right will be preferred to the claims of a trustee's personal creditors in the event of the trustee's sequestration and that trust property cannot be affected by the diligence of a trustee's personal creditors. Moreover, the beneficiaries' right is not defeated by alienation of trust property in breach of trust where the transferee has not given value for the property.[9] The beneficiaries' right will also not be defeated by the acts of trustees which are outwith

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[3] The theory was first put forward by GL Gretton in *Trust and Patrimony*, in HL MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of WA Wilson* (1996). For an exposition of the theory in academic writings see, eg, KGC Reid, "Patrimony not equity: The trust in Scotland" (2000) 8 European Review of Private Law 427; GL Gretton, "Trusts Without Equity" (2000) 49 ICLQ 599; and KGC Reid's inaugural lecture as Professor of Scots Law (available to view here: http://www.youtube.com/watch?v=YTFW7XXqBxY (especially from about minute 45 onwards). The dual patrimony theory is accepted as the fundamental explanation of the Scottish law of trusts in *obiter dicta* by Lord Drummond Young in *Ted Jacob Engineering Group Inc v Robert Matthew Johnston-Marshall and Partners and Ors* [2014] CSIH 18 at para 90, and is also mentioned by Lord Malcolm in *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76, in dealing with a motion for recall of a warrant for inhibition on the dependence, where he states: "In my view, the notion of a trustee's dual patrimony is helpful in understanding many of the implications and consequences of our law of trusts. […] Trust property is immune to and cannot be attached in respect of a trustee's personal debt, not because it is owned by the trust, but because the trustee owns it *qua* trustee; which is another way of saying that it falls into his trust patrimony, not his personal patrimony. We all have a bundle of rights and liabilities, in the broadest sense; but a trustee gains an additional and separate bundle, which can be regarded as his trust patrimony. That trust patrimony may include both trust property and trust liabilities incurred to trust creditors." (at paras 16 and 17).

[4] See para 1.17 above.

[5] KGC Reid, "Patrimony not equity: The trust in Scotland" (2000) 8 European Review of Private Law 427.

[6] DP No 133, para 2.18.

[7] Wilson and Duncan, para 1.43.

[8] SME, Vol 24, paras 9, 49 and 50.

[9] See paras 13.16 to 13.26 below; the matter is at present covered by s 2(1) of the Trust (Scotland) Act 1961, and we propose modified provisions to broadly similar effect in s 38 of our draft Bill.

their powers.[10] That statement of the law is entirely in accordance with the effects that the dual patrimony theory has in practice.[11]

Judicial statements of the law to the same effect are found in *Inland Revenue v Clark's Trustees*, where Lord Moncrieff stated:

> "In my view, the right of property in the estate of trust is vested in the trustees to the exclusion of any competing right of property, and the right of the beneficiary … is merely a right *in personam* against the trustees to enforce their performance of the trust. It is true that, in the assertion of that right, a beneficiary will in certain cases obtain the aid of the Court to enable him to use the names of the trustees, but it is only as representing the trustees in such a case that he can attach or assert any property right over the assets of the trust."[12]

Finally, in what is perhaps the leading case on the effect on a trust of the insolvency of the trustee, Lord Watson, referring to the rights that a trustee has in trust property on his insolvency, stated:[13]

> "That which, in legal as in conventional language, is described as a man's property is estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud."

That statement of the law appears to us to assume the dual patrimony theory. Against that background we are of opinion that the law is clearly established. It is also of importance that no other plausible theory has been advanced to explain the nature of a Scottish trust. In these circumstances we are firmly of the view that the dual patrimony theory represents the true nature of a trust in Scots law, and we can see no immediate need to put it on a statutory footing. Nevertheless, we draw attention to the helpful discussion of the dual patrimony theory by Professors Reid and Gretton in a number of publications.[14]

3.5 Question 2 was as follows:

> "2. Are we right in our preliminary view that we should give no further consideration on whether under Scots law a trust should be an entity with legal or juristic personality separate from that of the beneficiaries and trustees?"

On consultation, respondents were unanimous in agreeing with the Commission's preliminary view. We also note that, so far as we can discover, in no legal system in which the trust is used is it given separate legal or juristic personality. We are accordingly of opinion that no further action should be taken.

3.6 Questions 3 to 5 formed a single package and were as follows:

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[10] See paras 13.27 to 13.29 below, and s 33(5) and (6) of our draft Bill.
[11] A similar practical explanation of the law is found in St Clair and Drummond Young, at paras 12.01-12.04.
[12] *Inland Revenue v Clark's Trs* 1939 SC 11, 26.
[13] *Heritable Reversionary Company Ltd v Millar* (1892) 19 R (HL) 43, 49-50. The rule in that case has since been put on a statutory footing in s 33(1)(b) of the Bankruptcy (Scotland) Act 1985.
[14] See note 3 above. See also GL Gretton, "Up there in the *Begriffshimmel*?" in L Smith (ed), *The Worlds of the Trust* (2013), pp 524-545; and MJ de Waal, "In search of a Model for the Introduction of the Trust into a Civilian Context" (2001) 12 Stellenbosch LR 63-85. Additionally, the dual patrimony theory is the focus of a comparative discussion of the Scottish trust and the common law trust in L Smith, "Scottish Trusts in the Common Law" (2013) 17(3) Edin LR 283.

"3. Should there be a statutory rule under which a standard *inter vivos* trust is created when a declaration of trust is communicated to the potential trustee(s) and the trustee, or at least one of the trustees, accepts office?

4. If not, what statutory rule should be adopted for the creation of a standard *inter vivos* trust?

5. If a rule on the basis of that set out in (3) was adopted, should there be a statutory statement that the property which is to constitute the trust fund remains vulnerable to the claims of the truster's personal creditors until the ownership of that property has been transferred from the truster's private patrimony into the trust patrimony of the trustee(s)?"

We have concluded that this area of the law does not give rise to significant problems in practice and that it is unnecessary to say anything about it in the draft Bill. Our view, which accords with that of consultees such as the Judges of the Court of Session, is that the law is already reasonably clear. We note that is has been suggested that a trust cannot exist unless at least some assets have vested in the trustees.[15] On this matter, we are of opinion that a distinction must be drawn between the existence of a trust as an abstract entity on one hand and whether any particular property is subject to a trust on the other hand. A trust will have no practical effect unless there is trust property, appropriately vested in the trustees. Nevertheless a "trust" may continue to exist as an abstract entity during periods when there is no property in it, and the trust takes practical effect once again when property is made over to the trustees. An example is a solicitor's client account, which the solicitor is under a statutory requirement to create and use for clients' money.[16] Monies enter and leave the account, and it is possible in theory that for a time there might be no funds in the account. In that event the "trust" still exists as an abstract entity, but without practical effect. The same result would in our opinion apply to an account used by, say, an accountant or property factor to hold clients' funds, which we consider would normally be subject to an implied trust or a trust imposed under statute. In such a case the whole of the monies in the account might from time to time be paid out for the benefit of the clients, with the bank account continuing in existence to await the receipt of new clients' funds. In that case the account would continue to be a trust account, but it would be of no practical application until funds were actually paid into it. Provided that this distinction is borne in mind, we consider that the law is reasonably clear.

3.7 Questions 6 and 7 ran together and read:

"6. Should a declaration of a standard *inter vivos* trust have to be in writing subscribed by the truster in order for the trust to be validly constituted?

7. If there is to be a requirement of writing for a standard *inter vivos* trust, should it be subject to sections 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995?"

This suggestion obtained some support from consultees. Nevertheless, the question relates to a "standard" *inter vivos* trust, and we are concerned as to how precisely such a trust

[15] See Gretton and Steven, para 22.37 and authorities cited therein.
[16] See para 2.7 above.

should be defined. In particular, the use of trusts for commercial purposes has become very common,[17] and such trusts are frequently constituted by contractual arrangements that are not necessarily written documents "subscribed by the truster".

3.8 The increasing use of trusts for commercial purposes illustrate an important feature of the trust: its flexibility as a means of holding property in a distinct fund immune from claims that may be made against the trustee who holds and manages that fund. We think that this flexibility is of critical importance if the law of trusts is to develop, especially commercially, and we would be very reluctant to do anything that hinders the flexibility and versatility of the trust concept. Consequently we can see no advantage in laying down any further requirements that trusts should be constituted in writing.[18]

3.9 Question 8 was as follows:

> "8. Should it be a requirement for a standard *inter vivos* trust to be effective that a trust deed should be registered in the Books of Council and Session or a new register of trusts?"

This option was not favoured by consultees, generally in rather strong terms. We agree. In passing, we note the difficulty of defining what is a "standard" *inter vivos* trust.[19]

3.10 Questions 9 and 10 both dealt with *mortis causa* trusts and read:

> "9. Do you agree that the existing rules on the constitution of *mortis causa* trusts are satisfactory? If not, what rules should be changed?
>
> 10. Do you agree that the rules on the constitution of *mortis causa* trusts should be put into statutory form?"

Consultees considered that the existing rules were satisfactory. We accordingly do not think that any legislation is required in this area.

3.11 Question 11 asked for views on truster-as-trustee trusts:

> "11. (a) Should truster-as-trustee trusts no longer be valid? or
>
> (b) Should truster-as-trustee trusts continue in their current form? or
>
> (c) Should truster-as-trustee trusts be valid only if registered in a public register?"

Consultees were opposed to any change in the law relating to truster-as-trustee trusts, in some cases in strong terms. On considering this matter further we are of the view that any change to the existing law would be highly undesirable. Such trusts have been in existence for 40 years or thereby,[20] and no evidence of abuse has been brought to our attention.

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[17] See paras 3.14-3.17 below.
[18] It follows question 7 is superseded.
[19] See para 3.7 above.
[20] Their validity was expressly recognised in *Allan's Trs v Lord Advocate* 1971 SC (HL) 45; in the course of his opinion in that case Lord Reid referred to Menzies (2nd edn, 1913) and Mackenzie Stuart (1932). See also above at paras 2.12 onwards.

Moreover such trusts have come to be extensively used in a range of commercial transactions. They are, for example, the fundamental basis that enables debt factoring, invoice discounting and securitisation to operate in Scots law. As noted in Chapter 2, they are frequently used to isolate funds for particular commercial purposes, for example to secure the completion of a major commercial development or to provide funds to deal with possible future environmental liabilities. Any attempt to restrict the use of such trusts would have disastrous consequences for the credibility of Scots law as an effective commercial system. We accordingly consider that no change should be made to the law.

3.12 Proposal 12 was as follows:

> "12. Where there is a latent trust of moveable property, the trust fund should continue to remain immune from the claims of both the truster's and trustee's *personal* creditors. But there should be an exception to this rule in respect of a truster-as-trustee trust of moveable property, when the creditor of the truster/trustee:
>
> (a) had been a creditor of the truster before the trust was formed;
>
> (b) had entered into a personal obligation with the truster/trustee after the trust was formed, and
>
> (c) had not been told by the truster/trustee that the property had been transferred from his private to his trust patrimony."

Consultees, including the Law Society and the Judges of the Court of Session, were opposed to any change in the law. On reconsidering this issue, we are not persuaded that there is a case for restricting latent trusts in the manner suggested; the law has worked reasonably well for a very significant period.

3.13 The final set of questions was as follows:

> "13. Should the rule laid down in *Heritable Reversionary Co Ltd v Millar* in respect of the recognition of latent trusts of heritable property be abolished?
>
> 14. Should there be a rule that until it has been registered in the Land Register as trust property, heritable property should not become part of the trustee's trust patrimony for the purposes of any diligence affecting land, or for sequestration, liquidation, receivership, administration or voluntary winding up arrangements?
>
> 15. Should the changes in Proposal 14 be restricted to truster-as-trustee trusts?
>
> 16. Should the changes in Proposal 14 only apply in the case of a person who was the truster's personal creditor before the truster-as-trustee trust was established and continued to undertake personal obligations with the trustee after the truster-as-trustee trust was created?"

The basic proposal here is that the rule laid down in *Heritable Reversionary Co Ltd v Millar,*[21] which recognises latent trusts of heritable property, should be abolished. This was opposed

[21] (1892) 19 R (HL) 43.

by the Law Society and the Judges of the Court of Session, and we now agree that it would not be desirable to abolish the rule. There is no evidence to suggest that problems arise in practice in this area. In the Discussion Paper we stated that the difficulties raised by the rule in *Heritable Reversionary Co Ltd v Millar* must be kept in perspective,[22] and drew attention to remarks made by Lord McLaren in his dissenting opinion in the Inner House:

> "Creditors on guard do not give credit to a bankrupt in reliance on any supposed presumption that property standing in his name is his private property. Unless they are going to advance money on heritable security they know nothing of his title deeds, and trust only to his personal credit."[23]

We think that this is clearly correct. Consequently, so far as the law of trusts is concerned, we can see no clear justification for altering the law. We are aware that concern has been expressed about the lack of information concerning the ownership of land in Scotland. In response, the Scottish Ministers set up a Land Reform Review Group which published its Report on The Land of Scotland and the Common Good in May 2014.[24] The issues raised by that Review, however, are concerned with obtaining full and detailed information about the ownership of land in Scotland, essentially from a public law standpoint. In determining who owns areas of land, problems arise not merely from trusts, but also from the use of companies and possibly other legal entities. If the law is to be reformed in this area, it is desirable that it should be done comprehensively, so that companies, nominees, partnerships and other forms of legal entity or relationship are all considered. That type of review is, we think, clearly outwith the terms of reference of the present project.

Commercial trusts

3.14 The use of trusts in a commercial setting is not a new phenomenon: the late 19th century case of *Heritable Reversionary Company Ltd v Millar*, which has just been discussed,[25] is an example. In recent years, though, trusts have come to be used extensively in a wide range of commercial contexts. As a result, the trust has come to be of immense practical importance.

3.15 The primary advantage of a commercial trust is that it can protect specified assets from the risk of insolvency of a party to a transaction; on the insolvency of a trustee, the trust assets remain subject to the purposes of the trust and do not pass to the trustee's personal creditors.[26] A further advantage is that a trust protects assets from the risk of alienation in bad faith. Moreover, the trust involves a very simple structure, whereby one person holds assets for the benefit of others. Almost nothing is required in the way of formalities beyond the requirement that, when a person declares him or herself trustee of his own property, the declaration of trust must be in writing.[27] The trust is very adaptable, a feature which follows from its simplicity and informality. All these factors have contributed to trusts being used in a large range of commercial transactions.

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[22] DP No 133, para 4.36.
[23] *Heritable Reversionary Co Ltd v Millar* (1891) 18 R 1166, 1174.
[24] http://www.scotland.gov.uk/Resource/0045/00451597.pdf. See also the Scottish Affairs Committee's recent investigations: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmscotaf/877/87702.htm.
[25] See paras 3.4 and 3.13 above. In that case an agent held property for his principal. Other examples include unit trusts, trusts set up to hold partnership property, trusts in life assurance and pension arrangements, and trusts constituted to hold the client's money of a professional firm or a stockbroker.
[26] *Heritable Reversionary Company Ltd v Millar*, cited in note 13 to para 3.4 above; Wilson and Duncan, chs 1 and 10; *SME*, Vol 24, paras 49-52; St Clair and Drummond Young, para 12.01.
[27] Requirements of Writing (Scotland) Act 1995, s 1(2)(a)(iii) and s 2.

3.16 Examples of such transactions include the following:[28]

(1) As an investment vehicle, for example in the case of a unit trust.

(2) As the legal structure of a life assurance or pension policy. In this respect the trust that constitutes the policy, in which the life assurance company or other pension provider is the truster, should be distinguished from any trust that the beneficiary may set up over the proceeds of the policy; the former must be regarded as a commercial trust, whereas the latter is an ordinary private trust.

(3) For the purposes of debt factoring and invoice discounting agreements.[29]

(4) For the purpose of securitisation agreements.[30]

(5) To hold property for a partnership.

(6) To arrange for the holding of property within a group of companies, with one company in the group holding particular assets for the benefit of one or more related companies.

(7) To isolate a fund for a specific purpose in a commercial transaction. This corresponds to the concept of escrow found in England and Wales and other common law jurisdictions.[31] A commonly encountered example is a trust set up by parties to a commercial development to ensure that funds are available to ensure completion of the development in the event that any of those participating should encounter financial difficulties. Yet another example is a trust set up to provide funds to meet possible future environmental liabilities.

(8) As a general means of providing security for the performance of commercial contracts.[32] Thus under a contract for the sale of goods or performance of services, if it is desired to provide security for payment in advance of delivery of the goods or actual performance of the services, the price can be transferred into a trust to make payment to the supplier once it has carried out its side of the bargain by providing the relevant goods or services. In this way the supplier is confident of payment, even in the event of the purchaser's insolvency, but the purchaser is protected against the risk of non-performance; in the event of non-performance, the obligation of the trustee to pay the supplier is not enforceable, and the assets are held on a resulting trust (whether express or implied) for the purchaser.

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[28] A useful list of further examples is found in Gretton and Steven, paras 22.16-22.26.
[29] *Tay Valley Joinery Ltd v CF Financial Services Ltd* 1987 SLT 207. See also N Ruddy, S Mills and N Davidson (eds), *Salinger on Factoring* (4th edn, 2005) which includes substantial material on Scots law written by Bruce Wood WS.
[30] St Clair and Drummond Young, paras 12.21-12.22.
[31] An escrow is a legal arrangement whereby money or other property is held by a third party to await the occurrence (or possible occurrence) of a future event. When the event happens, the money or other property is paid by the third party to the person who is then entitled to it. The Scottish solution, involving the use of a trust, has the advantage that the funds are wholly protected against insolvency, including that of the party who holds them.
[32] See Thomas and Hudson, paras 1.71-1.73.

(9) In common law jurisdictions, notably in the United States, the law of escrow has been developed over the last 30 years to create arrangements to hold rights in internet and other electronic material. The Scottish trust can be used in the same way, to hold rights of any sort in such material. The fact that the material is virtual rather than physical is of no relevance; provided that some sort of right exists, it can be made subject to the purposes of a trust.

3.17 The unifying feature running through all of these cases is that the trust provides a simple and flexible protection against insolvency. We think it clear that the use of trusts for commercial purposes will if anything increase in future. It is therefore essential that the law should where necessary accommodate the existence of a wide range of different types of commercial trust. That is a policy that we have attempted to take into account throughout the present Report. One instance of this is found in Chapter 14, dealing with private purpose trusts. Many commercial trusts can be categorised more readily as private purpose trusts than as trusts for identified beneficiaries, as in example (7) of the previous paragraph. Consequently we are conscious that provisions made by the law for private purpose trusts should allow for both commercial and non-commercial trusts. Yet another example relates to information duties, which we discuss in Chapter 11. The duties that are appropriate for a traditional private trust may not suit every form of commercial trust. A third example relates to the powers and duties of trustees, where flexibility is required to cover the different forms of commercial trust that may arise. The specialities of commercial trusts are dealt with in the individual chapters dealing with these aspects of the law.

Chapter 4 Appointment, resignation, removal and discharge of trustees

Introduction

4.1 In our Discussion Paper on Trustees and Trust Administration we considered the appointment, resignation and removal of trustees.[1] Those topics form the subject of paragraphs 4.2 to 4.32 below. Separately, we asked whether there was a need to clarify the law on the power of *ex officio* trustees to assume new trustees.[2] We found on consultation that the position of *ex officio* trustees raised a number of distinctive and important issues, and accordingly we treat that matter in paragraphs 4.33 to 4.43. Then we discuss the discharge of trustees in paragraph 4.44 and finally, in the remaining paragraphs of this Chapter, we examine the meaning of two concepts which are used at various points in this Chapter and elsewhere, namely capacity and traceability (as in, for example, whether a trustee is capable or traceable).

Assumption or appointment of trustees

Assumption by trustees

4.2 Section 3(b) of the 1921 Act contains a default power in the trustees to assume new trustees. The power is framed as follows:

> "3. All trusts shall be held to include the following powers and provisions unless the contrary be expressed (that is to say):- […]
>
> > (b) Power to the trustee, if there be only one, or to the trustees, if there be more than one, or to a quorum of the trustees, if there be more than two, to assume new trustees;"

That power appears to operate well in practice, and we made no proposals about it in our Discussion Paper; accordingly, we have retained it, updating the statutory wording, in section 3 of our draft Bill.[3]

Appointment by the court

4.3 A further power to appoint new trustees exists under section 22 of the 1921 Act.[4] In our Discussion Paper we took the view that the court's power to appoint new trustees could

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[1] See Pt 4 of DP No 126.
[2] At para 4.4 of DP No 126; see also Ch 8 of DP No 148.
[3] See para 4.2 of DP No 126. In addition, s 3 of our draft Bill includes provision for the situation in which a protector directs the existing trustee or trustees to assume an additional trustee. We discuss protectors in Ch 15 below, and see also s 48(3)(d) of our draft Bill.
[4] Section 22 provides as follows: "When trustees cannot be assumed under any trust deed, or when any person who is the sole trustee appointed in or acting under any trust deed is or has become insane or is or has become

usefully be simplified, so that such a statutory power would exist in any case where that was necessary for the administration of the trust.[5] It was thought that such a development would enable the court to appoint new trustees in all the situations that are presently dealt with under either section 22 or the common law. The procedure could not, however, be used by a minority of trustees to compel the appointment of additional trustees against the wishes of the majority; that would not satisfy the requirement that the appointment should be necessary for the administration of the trust, unless the majority had failed in their duties to such a degree that they ought to be removed to secure its continued administration. We accordingly made the following proposal:

> "11. The powers of the courts to appoint new trustees at common law or under section 22 of the Trusts (Scotland) Act 1921 should be reformulated in a new statutory provision along the following lines:
>
> > The court should have power, on the application of one or more of the trustees or any person with an interest in the trust estate, to appoint a trustee where this is necessary for the administration of the trust."[6]

4.4 On consultation, this proposal attracted general support from consultees. There was one exception, who thought that it could lead to the possibility that disaffected beneficiaries or trustees might unnecessarily raise actions for the appointment of other trustees. This represents a theme that we have commonly encountered on consultation: a concern that, if beneficiaries or others are given power to challenge the trustees or their decisions in any way, that power is likely to be used by disaffected individuals in such a way that life is made difficult for the trustees. We think that this question must be addressed at a general level. If a beneficiary or any other person connected with a trust suffers a legal wrong, it is essential that he or she should be able to challenge that wrong. This is an elementary aspect of the rule of law: where a legal right is conferred it must be capable of enforcement.[7] Any power to raise legal proceedings may be abused. This observation is not confined to trusts; for example the right to seek judicial review of administrative action may easily be abused by a person who is disgruntled by the decision of a public authority. Nevertheless, the courts are well aware that the right to raise court proceedings can be used vexatiously, or in circumstances where there is no arguable case. The sanction is a finding in expenses. In a case where the court action is clearly an abuse of process, these may be awarded on an agent and client basis.[8] In addition, the particular power that we propose for the appointment of new trustees can only be exercised if such appointment is shown to be expedient for the administration of the trust or where there is no capable or traceable trustee. We think that that should be sufficient to avoid any significant risk of unnecessary or

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incapable of acting by reason of physical or mental disability, or being absent continuously from the United Kingdom for a period of at least six months, or by having disappeared for a like period, the Court of Session or an appropriate sheriff court may, upon the application of any party having interest in the trust estate, after such intimation and enquiry as may be thought necessary, appoint a trustee or trustees under such deed…". This provision is based on s 12 of the Trusts (Scotland) Act 1867.

[5] DP No 126, para 4.7.

[6] DP No 126, para 4.8.

[7] In the words of the traditional maxim, *ubi jus, ibi remedium*.

[8] This is the higher of the two bases on which expenses are commonly awarded, the other being on a "party/party" basis. An "agent/client" award would essentially see the paying party settling the other party's legal bills, subject to some modifications. A "party/party" award, on the other hand, is somewhat less onerous for the paying party.

vexatious applications made by disaffected beneficiaries or others with an interest in the trust.

4.5 We therefore make the following recommendation:

1. The powers of the courts to appoint new trustees at common law or under section 22 of the Trusts (Scotland) Act 1921 should be replaced by a provision under which the court has power, on the application of one or more of the trustees or any person with an interest in the trust property, to appoint a trustee where this is expedient for the administration of the trust or where no capable trustee exists or is traceable.

(Draft Bill, section 1)

We discuss what is meant by a trustee being "capable" and "traceable" in paragraphs 4.45 to 4.52 below.

Appointment by the truster in private trusts

4.6 We also mentioned a further method of appointing trustees, which is confined to private trusts.[9] The truster while alive has, by implication of law, power to appoint new trustees to the trust if there are no acting trustees.[10] This power may be useful on occasion, and we think that it would be helpful if it were set out in statutory form. We accordingly make the following recommendation:

2. In a private trust, if no capable or traceable trustee exists, the truster may appoint a new trustee or new trustees. This power is subject to contrary express or implied provision in the trust deed.

(Draft Bill, section 2)

Appointment by beneficiaries

4.7 We raised the issue of whether beneficiaries should be able to appoint new trustees.[11] This is permitted in England and Wales.[12] Our provisional view was that such a power should not be introduced. We thought that it was important that the administration of the trust should remain in the hands of trustees, and we thought that a power of appointment might enable the beneficiaries to appoint sufficient new trustees to outvote the existing trustees; that would be tantamount to removing the latter. We did, however, raise the possibility that there should be exceptions to that rule in three specific situations. These were the cases where a sole trustee has died, has been certified as being incapable, or has been convicted of a crime involving dishonesty, and there is no other person entitled to act as trustee and no other person entitled under the trust deed to appoint a new trustee. On consultation, there was unanimous agreement with a proposal that the present law should continue whereby beneficiaries are not entitled to appoint new trustees unless such power is

[9] DP No 126, para 4.3.
[10] *Glentanar v Scottish Industrial Musical Association Ltd* 1925 SC 226.
[11] DP No 126, para 4.10.
[12] Trusts of Land and Appointment of Trustees Act 1996, ss 19-21.

conferred by the trust deed. Opinions varied on whether there should be exceptions in the three cases described above. The weight of opinion, however, favoured not making such exceptions; that was the view taken by the Faculty of Advocates, the Trust Law Sub-Committee of the Law Society and the Trustees and Trust Administration Group of the Law Society. The Faculty considered that an application to the court was the safest and most appropriate route, as any non-judicial process, although perhaps quicker and cheaper, might be open to abuse by stronger-minded or more influential beneficiaries. The Trust Law Sub-Committee thought that such a power might create problems of lack of impartiality, particularly where trustees have discretionary powers. The Trustees and Trust Administration Group thought that the ability to apply to the court was sufficient.

4.8 In the light of the foregoing responses, we are of opinion that the present law should continue, and that no exceptions should be made. We accordingly recommend as follows:

3. (1) The present law should continue whereby beneficiaries are not entitled to appoint new trustees, unless such power is conferred by the trust deed.

(2) No exceptions should be made to this general rule in cases where a sole trustee has died, has been certified as being incapable, or has been convicted of a crime involving dishonesty, and there is no other person entitled to act as trustee and no other person entitled to appoint a new trustee.

Operation of appointment or assumption as general conveyance of trust property

4.9 At present, if the existing trustees assume a new trustee, there needs to be a deed of assumption and a deed of conveyance, which is usually done as a single deed.[13] The rule that an assumption, or an appointment, does not of itself convey the trust property from the existing trustees to themselves and the new trustee(s) is inconvenient and should, in our view, be done away with. This should be not only in respect of court appointments, but in respect of all appointments and assumptions which, if valid, should operate as a general conveyance.[14] We therefore recommend:

4. Any appointment or assumption of a trustee under the draft Bill should operate as a general conveyance of the trust property in favour, jointly, of the additional trustee and the existing trustees (or, where there are no existing trustees, in favour of the new trustee). This should apply to all trusts, whenever created, but only in respect of an appointment or assumption taking place after commencement.

(Draft Bill, section 4)

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[13] See s 21 and s 22 of the 1921 Act and its Sch B; see also, generally, Wilson and Duncan, paras 19.14-19.21 and 19.24; Kessler and Grant, para 30.6; and Gretton and Steven, para 22.55. We expect that assumptions will continue to be in writing.

[14] We include any appointments of *ex officio* trustees: see discussion of this topic from para 4.33 below. On "general conveyance", see GL Gretton and KGC Reid, *Conveyancing* (4th edn, 2011), para 24.03. It is one which does not have a specific description of the property; an example is the appointment of a trustee in sequestration, which operates as a general conveyance to the trustee of all the bankrupt's non-exempt property.

Resignation of trustees

4.10 At common law trustees had no general right to resign but statutory powers of resignation were conferred on gratuitous trustees by a series of statutes, starting with section 1 of the Trusts (Scotland) Act 1861.[15] The current power is contained in section 3 of the 1921 Act; section 3(a) provides that all trusts shall be held to include a power to any trustee to resign the office of trustee. There are four exceptions to this rule:

(1) a sole trustee who has not assumed new trustees,[16]

(2) a judicial factor[17] or an executor dative,[18]

(3) a trustee "who has accepted any legacy or bequest or annuity expressly given on condition of the recipient thereof accepting the office of trustee",[19] and

(4) a trustee "appointed to the office on the footing of receiving remuneration for his services".[20]

We gave detailed consideration to the last two of these exceptions, on which there is relatively little authority.[21] Where a trustee has accepted any legacy or bequest or annuity expressly given on condition that the recipient should accept the office of trustee, such trustee is not entitled to resign office unless there is express power to do so in the trust deed. Likewise, under the same proviso, any trustee appointed on the footing of receiving remuneration for his services is not entitled to resign office in the absence of express power. In all such cases, however, it is competent for the court, on the petition of any relevant trustee, to grant authority to such trustee to resign office on such conditions, if any, with respect to repayment or otherwise of the legacy as the court may think just. We noted that there were very few cases on this provision, and that this might be a consequence of the common practice of including a clause in trust deeds reserving the right of resignation to any trustee or executor who receives a benefit such as a legacy or remuneration for acting as such. We then considered proposals for reform. We supported the general rule in section 3 whereby there should be default power entitling trustees to resign unless the contrary is expressed in the trust deed. Nevertheless we thought that proviso (2), which requires trustees who are remunerated or who accept a legacy to apply to the court for authority to resign, was in need of reform. We were of the view that such trustees should be entitled to resign in the same way as any other trustees; unwilling trustees should not be compelled to continue to act. In addition, the trust might well suffer if a trustee were unable for personal reasons to give proper attention to its administration. We considered that the question of repayment of any legacy or other remuneration should be left to the law of unjustified enrichment. We therefore proposed that proviso (2) to section 3 of the 1921 Act should be repealed.

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[15] DP No 126, paras 4.13-4.20.
[16] Section 3, proviso (1).
[17] Ibid, proviso (3). Generally speaking we do not deal in this Report with judicial factors, who are the subject of our recent Report on Judicial Factors (SLC No 233; 2013).
[18] Succession (Scotland) Act 1964, s 20.
[19] Section 3, proviso (2) of the 1921 Act.
[20] Ibid.
[21] DP No 126, paras 4.15-4.20.

4.11 On consultation this proposal met almost unanimous support. The one exception suggested that, if jurisdiction in applications by trustees for authority to resign were conferred on the sheriff court as well as the Court of Session, the procedure would be rendered less restrictive. Despite this exception, we remain of opinion that our proposal was appropriate. We accordingly recommend:

5. Proviso (2) to section 3 of the Trusts (Scotland) Act 1921 (a trustee who has accepted a legacy, bequest or annuity conditional on accepting office and a trustee who was appointed on a remunerated basis not entitled to resign without prior judicial approval) should be repealed.

(Draft Bill, sections 5 and 79 and schedule 2)

Removal of trustees

4.12 We pointed out, in our discussion of this issue,[22] that resignation is preferable to removal when the aim is that a trustee should leave a trust. In practice, resort to procedure for removal is relatively rare. In some cases, however, removal may be the only option; an example is where a trustee refuses to resign or is unable to resign on account of mental incapacity. At present there are three ways in which trustees can be removed. First, power to remove trustees is available at common law under the *nobile officium* of the Court of Session. The test for exercise of this power is that the court should be satisfied that the beneficiaries would be prejudiced or the trust purposes obstructed if the trustee were to continue in office; minor irregularities or technical illegalities are not generally sufficient.[23] Persistent disregard of duties may be a ground for removal.[24] A conflict between the trustee's personal interests and fiduciary duties will usually result in removal.[25]

4.13 In addition to the common law power, a statutory power to remove trustees is found in section 23 of the 1921 Act.[26] This empowers the court to remove a trustee who is or becomes insane or incapable of acting by reason of physical or mental disability, or who is absent from the UK continuously for at least six months, or who has disappeared for the same period. In the case of insanity or mental or physical incapacity, removal is automatic once the ground is established. In the case of an application on the ground of absence or disappearance for at least six months, removal is at the court's discretion.

4.14 Thirdly, power to remove a trustee may be conferred by the trust deed on the truster, the trustees or some other person. Such a power is rare in family trusts, but it is said to be common in commercial trusts.[27]

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[22] DP No 126, paras 4.21-4.52.
[23] *Orr Ewing's Trs v Orr Ewing* (1885) 13 R (HL) 1, per Lord Blackburn at 23; *Gilchrist's Trs v Dick* (1883) 11 R 22 at 24 per Lord President Inglis; *Shariff v Hamid* 2000 SLT 294.
[24] *Walker* (1868) 6 M 973; *MacGilchrist's Trs v MacGilchrist* 1930 SC 635.
[25] *Fleming v Craig* 1863 1 M 850; *Cherry v Patrick* 1910 SC 32.
[26] For a fuller discussion, see Wilson and Duncan, paras 22.40-22.41.
[27] For a recent example, see Lord Doherty's decision in *The Moness Country Club v First National Trustee Co Ltd* [2013] CSOH 188: "There is no doubt that a trust deed may competently include an express power to remove a trustee without an application to the Court (Wilson and Duncan, para 22.44). Such a power would indeed be unusual in an ordinary private trust, but in my opinion it is much less surprising where the trust is an administrative trust and the trustee is a commercial trustee who is remunerated." (at para 28). (The trust in that case is described as an 'administrative trust' because the pursuer, as a voluntary association, could not hold title to heritable property and therefore a trust was set up for that purpose.)

Judicial removal

4.15 We went on to consider proposals for reform. In relation to the judicial removal of trustees, we expressed the view that the present powers of the court to remove trustees, as found at common law and in section 23 of the 1921 Act, were not satisfactory.[28] We thought that statutory provisions relating to judicial removal should deal with all possible grounds of removal, and it was potentially misleading for section 23 to present only part of the picture. We proceeded to consider the grounds of removal found in a number of other jurisdictions, in particular South Africa and the United States, and the grounds on which sheriffs, sheriffs principal and officers of court are liable to be removed for misconduct. We concluded that it would be preferable for the grounds for judicial removal to be set out in fairly general terms rather than the detailed lists that are sometimes encountered.

4.16 Against that background, we proposed that section 23 of the 1921 Act and the common law grounds for the removal of trustees should be replaced by new statutory provisions. These should provide that a trustee may be removed by the court, on application, if it is satisfied that the trustee is unfit or unable to continue to act as trustee in the trust, or the trustee has neglected his or her duties as trustee. Such an application should be capable of being made by any one or more of the trustees, any beneficiary or any other person with an interest in the trust property. We further asked whether the court should also have power to suspend a trustee from office on the above grounds for a definite period or until further order.[29]

4.17 On consultation, all respondents agreed with the general policy underlying the proposal, although suggestions were made about matters of detail. The Faculty of Advocates thought that the test for removal should simply be either unfitness or inability; past neglect should be a factor in determining whether either of these tests is met, rather than a separate criterion. In our view, it would be useful to leave this matter to the discretion of the court, for consideration in any particular circumstances which may arise. The Trust Law Sub-Committee of the Law Society thought that further definition was required as to what is meant by "unfit" or "unable" to continue to act as trustee. As to the former, we prefer to leave it to the court to determine what falls within the term, but consider that some additional guidance might be useful in the legislation;[30] on the notion of what it means to be "unable", we give some precision in our general recommendation on capacity.[31] As to those entitled to petition, the Sub-Committee thought that the definition of other persons "with an interest" should be clarified; there was some concern about the position of a disappointed beneficiary, especially in a discretionary trust, who might use such a provision to put pressure on a trustee.

4.18 Our question regarding a possible power to suspend a trustee from office met with very mixed reactions. Some respondents thought that it might be useful, albeit in a small number of cases, whereas others thought that such a power would give rise to considerable practical problems. In view of the mixed responses we have reached the conclusion that this matter should not be taken further, and we make no recommendation regarding suspension.

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[28] DP No 126, paras 4.29-4.38.
[29] DP No 126, para 4.38, proposal 15 and question 16.
[30] See recommendation 6(2)(b) below.
[31] See paras 4.45-4.50 below.

4.19 In relation to removal, we have taken account of the comments of respondents. In the light of those, we make the following recommendation:

> **6. (1) Section 23 of the Trusts (Scotland) Act 1921 and the common law grounds for the removal of trustees should be replaced by new statutory provisions.**
>
> **(2) These should provide that a trustee may be removed by the court, on application, if the court is satisfied that the trustee:**
>
> **(a) is unfitted to carry out the duties of a trustee,**
>
> **(b) purports to carry out those duties but does so in a way that is inconsistent with, or might be inconsistent with, a trustee's fiduciary duty,**
>
> **(c) has neglected his or her duties as trustee,**
>
> **(d) is incapable, or**
>
> **(e) is untraceable.**
>
> **(3) An application for such removal of a trustee should be capable of being made by another trustee, a beneficiary, or any person with an interest in the trust's estate.**
>
> (Draft Bill, section 6)

4.20 We have two comments on this recommendation. First, the power conferred on the court is deliberately framed in fairly general terms, and confers a degree of discretion. We think that this is sensible, so that all cases where the removal of a trustee is clearly desirable are covered. Because the court is involved, it can be assumed that the power will be exercised only in cases where it is appropriate. In particular, if a disappointed or disaffected beneficiary attempted to use the power to put pressure on the trustees, it can be assumed that the court would refuse the application, and impose the sanction of a finding in expenses against the unsuccessful applicant.

4.21 Secondly, the power of removal on the ground of untraceability results from a suggestion made on consultation by one of our respondents, Standard Life plc. They referred to the practical problem that arises where a trustee goes missing, for example because family trustees lose touch with one another. This can cause difficulties where the trust holds a term assurance policy and the trustees are not normally in contact with one another to consider investment matters, as occurs in other types of private trust. It was suggested that it would be helpful to have a process that could deal easily with that problem. It was accepted that if the process were to be non-judicial there might be a risk of misuse. Consequently a simple court procedure was suggested. We were impressed by this reasoning and concluded that it was appropriate to make a recommendation along these lines. We would emphasise that the court will have full control over any such application to remove a trustee, and in particular will have to decide whether reasonable efforts to find the relevant person have in fact been made. This should avoid any significant risk of misuse.

Non-judicial removal

4.22 We went on to consider whether Scots law should have procedures, similar to those available in many other jurisdictions, for removing trustees without the making of an application to the court.[32] Some trust deeds reserve to the truster the power to remove or replace trustees, or confer such a power on other persons. The present question is whether there should be a default power to remove trustees in a manner that does not require an application to the court. The advantage of non-judicial procedure is that it is likely to be faster and less expensive than an application to the court, and avoids publicity. The risk, however, is that it fails to protect the interests of the trustee removed.

Automatic termination

4.23 We first considered the possibility of the termination of trusteeship by operation of law.[33] At present that occurs on the death of a trustee. We expressed the provisional view that automatic termination of trusteeship on the occurrence of certain specified events should not be introduced.[34] The complexity of the necessary provisions would outweigh the advantages, and other non-judicial procedures could be introduced to address more effectively the removal of unfit trustees. We were concerned in particular with a number of practical questions, in particular the effect that automatic cessation of trusteeship might have on acts that have already been carried out by the trustee in question. We accordingly proposed that there should be no automatic termination of trusteeship by reason of the trustee's insanity, incapacity, bankruptcy, conviction for a crime involving dishonesty, or any other event indicative of unfitness for office.

4.24 On consultation, the foregoing proposal was supported by all but one of the respondents. The exception thought that there should be automatic termination only in cases where disqualification should self-evidently follow from other proceedings, such as conviction by a UK court for a crime involving dishonesty. In view of the general tenor of the responses, we adhere to our earlier proposal. We accordingly make the following recommendation:

7. There should be no automatic termination of trusteeship by reason of the trustee's insanity, incapacity, bankruptcy, conviction of a crime involving dishonesty, or any other event indicative of unfitness for office.

Removal by trustees

4.25 We expressed the view that termination of a trustee's tenure of office by a resolution of the remaining trustees should be confined to certain easily provable fact-based situations.[35] These should not involve subjective value judgements or the resolution of disputed questions of fact. To the extent that an alleged breach of trust is involved, the matter should be dealt with by the courts.

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[32] DP No 126, paras 4.39-4.52.
[33] Compare the effect of s 18 of the Solicitors (Scotland) Act 1980 on a solicitor's practising certificate; and also the disqualification of persons as charity trustees under s 69 of the Charities and Trustee Investment (Scotland) Act 2005.
[34] DP No 126, para 4.47.
[35] DP No 126, para 4.48.

4.26 We considered the grounds on which such a power might be conferred on trustees. Our conclusion was that trustees should be given a discretionary power to remove a trustee on becoming aware that the trustee either has been certified as being mentally disordered or mentally incapable of acting as a trustee, or is the subject of an order grounded on certified mental disorder, or has been convicted of a crime involving dishonesty or imprisoned.[36]

4.27 This proposal met with a mixed response on consultation. Strong support was expressed by Standard Life plc and also by the Trust Law Sub-Committee of the Law Society and certain firms of solicitors. On the other hand the Faculty of Advocates was opposed to the proposal on the basis that the removal of trustees was a matter best left to the court. The Trustees and Trust Administration Group of the Law Society thought that the proposal was dangerous, owing to the ease with which a trustee could be victimised.

4.28 We can see some force in these criticisms. Nevertheless, we think that, provided that the power of trustees to remove one of their number is confined to cases where the ground of removal is established by objective means, the dangers should be minimal. We are also impressed by the emphasis in Standard Life's response on the practical difficulties that can arise, especially in long-term trusts, where trustees become incapable of acting. We accordingly make the following recommendation:

> **8. A majority of the remaining trustees may remove from office a trustee who is:**
>
> **(a) incapable,**
>
> **(b) untraceable,**
>
> **(c) convicted of an offence involving dishonesty,**
>
> **(d) sentenced to imprisonment on conviction of an offence, or**
>
> **(e) imprisoned for contempt of court or non-payment of a fine.**
>
> (Draft Bill, section 7(1))

4.29 There are two other matters. First, we have considered but rejected the possibility of bankruptcy as a basis for removal of a trustee by fellow trustees.[37] We concluded that bankruptcy, which may be the result of bad luck rather than bad judgement, is not inevitably a ground that would justify removal. Consequently the power to remove a trustee who becomes bankrupt should be left to the court, on the ground (if made out) that the trustee is unfit out to carry out his or her duties as trustee.

4.30 Secondly, we proposed that where trustees decide to remove a fellow trustee and choose to record this by executing a deed of removal,[38] the deed should be signed by a majority (discounting, for that purpose, the trustee who is to be removed).[39] This met with

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[36] Expressed in proposal 19 at para 4.52 of DP No 126.
[37] This was canvassed in para 4.49 of DP No 126, though we were not in favour of it. We also considered – but rejected – it as a ground for automatic removal (at para 4.44).
[38] We consider that methods other than a deed of removal would be valid, such as a simple note of the removal decision in the minutes of the relevant trustees' meeting.
[39] See para 4.50 and proposal 20 (at para 4.52) of DP No 126.

unanimous approval on consultation, but on further consideration it appears to us to raise a more general issue, namely about how trustees execute documents. We consider that this is a subject on which statutory clarification would be useful. So, whilst we adhere to the particular proposal in relation to deeds of removal, we now deal with the general topic of execution of deeds elsewhere: see paragraphs 13.30-13.33 below. Accordingly, we have no specific recommendation at this point.

Removal by beneficiaries

4.31 We further considered the question of whether beneficiaries should be empowered to remove trustees, in the form of a default provision;[40] there is of course nothing to prevent a truster from conferring such a power in a trust deed. In England and Wales beneficiaries absolutely entitled to the trust property and acting unanimously have specific statutory power to direct a trustee to resign or to direct the trustees to appoint a specified person as a new trustee in replacement for another trustee.[41] Our provisional view was that the beneficiaries should not have any such power to remove a trustee from office, or to direct the trustees to take such a step. We thought that the administration of the trust should remain in the hands of the trustees, and that permitting beneficiaries to direct trustees confused the roles of each of them. Beneficiaries have other remedies to deal with unfit trustees, notably an application to the court. We accordingly proposed that the beneficiaries should not be empowered to remove (or to direct the trustees to remove) a trustee from office.

4.32 On consultation this proposal met with universal support. It has occurred to us, however, that in a case where all of the beneficiaries are absolutely entitled to the trust property and are of full age and full capacity and they act unanimously, they may compel the trustees to make over the whole of the estate to them.[42] In such a case, it is arguable that the whole of the beneficiaries, acting together, could take less drastic steps in relation to the trust. One of these would be to replace the existing trustees with trustees of their own choosing. We think that this is probably the law at present, on the authority of *Miller's Trustees* and *Yuill's Trustees*, but we have concluded that it should be put on a statutory footing. For this reason we make the following recommendation:

> **9. A trustee may be removed from office by the beneficiaries provided that they are absolutely entitled to the trust property and are all at least 18 years old and of full capacity, and that the removal from office is agreed by all of them.**
>
> (Draft Bill, section 8)

Problems arising from the existence of *ex officio* trustees

4.33 During our consideration of the trust project our attention was drawn to problems that can arise from the appointment of *ex officio* trustees. We considered this matter somewhat briefly in our Discussion Paper on Trustees and Trust Administration,[43] where we asked whether there was a need to clarify the law on the power of *ex officio* trustees to assume

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[40] DP No 126, para 4.51.
[41] Trusts of Land and Appointment of Trustees Act 1996, s19. A similar power applies to mentally incapable trustees under s 20.
[42] *Miller's Trs v Miller* (1890) 18 R 301; *Yuill's Trs v Thomson* (1902) 4 F 815.
[43] DP No 126, para 4.4.

new trustees, and if so whether legislation was required. Respondents to the consultation indicated overwhelmingly that there was a need for legislation to clarify the law in this area. Consequently we returned to the matter in Chapter 8 of the Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law.[44]

4.34 In the latter Discussion Paper, we noted that *ex officio* trustees feature in a large number of trusts, where the truster has provided that the holder of a specified office should be a trustee.[45] The holder of that office from time to time then acts as trustee in accordance with the terms of the trust deed. *Ex officio* trustees vary widely; examples include the principals and other office holders in the Scottish Universities, judges, sheriffs, and local holders of religious office, such as the minister of a parish. In such cases the trust deed is likely to provide that the trustee is to be holder of the office for the time being rather than the individual incumbent when the trust was set up. When there is a change in the office holder, therefore, there is a change of trustee. We suggested that the use of *ex officio* trustees in this way might create problems. The holder of an *ex officio* trusteeship might consider the duties unduly burdensome in addition to his or her other duties, and accordingly might not be in a position to perform them adequately. Moreover, the specified office might disappear, for example through dissolution or merger, leaving the trust without a trustee.

4.35 We set out both the current law and the problems that appeared to arise from it.[46] We noted the remedies that exist at present: a *cy-près* petition for public trusts, the trust variation procedure for private trusts, and an application to the Office of the Scottish Charities Regulator (OSCR) under section 17 of the Charities and Trustee Investment (Scotland) Act 2005 in the case of a charitable trust. The last of these provides a rapid and simple method for removing an *ex officio* trustee; this is not so for non-charitable trusts.

4.36 We accordingly advanced a number of proposals to provide simpler and clearer procedures in this area of the law. First, however, we thought it desirable to obtain information about the use of *ex officio* trustees in Scottish trusts. We therefore began by asking the following questions:

> "18. How common are *ex officio* trustees in Scottish trusts? To what extent are problems involving *ex officio* trustees common in the administration of trusts? Have consultees experienced issues surrounding the resignation or removal of the office of the *ex officio* trustee?"

4.37 Respondents to the consultation, including the Law Society, the Faculty of Advocates, the Keeper of the Registers of Scotland, the Charity Law Research Unit at the University of Dundee and individual solicitors agreed that the use of *ex officio* trustees in Scottish trusts is still common, particularly in 19th and 20th century private trusts, public trusts, and educational endowments. Our Advisory Group agreed. Particular instances that were cited to us were educational endowments related to the Scottish Universities and property held on trust for the purposes of the Church of Scotland.

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[44] DP No 148.
[45] See para 8.5 of DP No 148.
[46] At, respectively, paras 8.8-8.10 and 8.11-8.12 of DP No 148.

4.38 The great majority of respondents also agreed that problems with *ex officio* trustees were common in practice and that the law governing them would benefit from clarification. They gave examples of a number of practical problems. These included the following:

- Offices which are historic and are not filled.
- Offices which are vacant.
- Reorganisation of the constitution of the relevant body, resulting in one or more offices' no longer existing or being subsumed into another office.
- The absence of formal evidence of appointment of the office bearers (such as minutes of the meeting appointing an *ex officio* trustee).
- Reluctance of an *ex officio* trustee to become involved in the trust, leading to poor governance.
- Alternatively, an *ex officio* trustee who feels a sense of duty to become closely involved, even when this is not useful to the trust.
- Incompetence of *ex officio* trustees, as they are not selected for their abilities.
- Inability to attend meetings because of the pressure of the office held by the *ex officio* trustee, with the result that other trustees become demotivated.
- Sometimes *ex officio* trustees can dominate a body of trustees, thus skewing decision-making away from the trustees selected for their interest and ability.
- The appointment of an *ex officio* trustee lapses but no successor is put in post, with the result that the body of trustees becomes inquorate.

On the basis of these responses, we are quite satisfied that *ex officio* trustees do give rise to frequent problems in practice, which can often be serious. One respondent noted that in practice common sense solutions are often adopted to avoid such difficulties, but these could include risks for both the trustees and the trust. All respondents were agreed that a statutory scheme for handling such problems would be preferable.

Further proposals for reform

4.39 We therefore asked three more specific questions about the reform of the law. These were as follows:

> "19. Are consultees in favour of a new statutory power in relation to non-charitable trusts to allow for (i) the removal of an office as trustee (where the office-holder is an *ex officio* trustee); (ii) the replacement of such an office with another office, the holder of which is to act as an *ex officio* trustee; and (iii) a power for an *ex officio* trustee to resign in favour of a nominated replacement individual or office-holder?
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> 20. If so, are there any reasons for such a statutory power to differentiate between public/private and charitable trusts, except to the extent that the power would be exercised by the courts, and OSCR respectively?

21. Are there are any other issues surrounding *ex officio* trustees which the Commission might usefully address?"[47]

4.40 On consultation, respondents were in favour of a power as described in question 19. The majority thought that the powers set out in heads (i) and (ii) of that question should be exercised only by the courts, or OSCR if the trust were charitable, and not by the other trustees as a body. Respondents recognised that the exercise of such a power would depart significantly from the original intentions of the truster, and would therefore merit consideration by the courts, or OSCR in the case of charitable trusts. The Judges of the Court of Session noted that a simple, non-technical court procedure could cover cases of this nature. In relation to head (iii), a substantial number of respondents felt that such a power could be overseen and approved by a majority of trustees. Despite this, we think that the practical difficulties of permitting that might be considerable, and it would certainly lead to complicated legislation with a power of review by the court. In Chapter 16 we recommend that simple and expeditious procedures should be available in the courts for trust applications. Applications for the appointment or removal of trustees may be brought in either the Court of Session or the sheriff court.[48] In these circumstances we consider that the recommended powers should, for all trusts, require the involvement of the court, although OSCR should also retain its jurisdiction in the case of a charitable trust.[49]

4.41 In relation to question 20, the overwhelming majority of respondents saw no need for a difference in treatment between public/private and charitable trusts, except to the extent that with charitable trusts the power would be exercisable by OSCR rather than the courts. The Judges of the Court of Session considered that it might be possible to make OSCR responsible for the exercise of such a power in respect of public trusts as well as charitable trusts. We did not think that this was a great problem, especially if a simplified court procedure is used. Indeed, in our view it might be desirable for applications in respect of charitable trusts to be capable of being heard in the courts, as well as by OSCR; this might be particularly convenient where trustees wish to combine such an application with an application about another aspect of the trust, or where they consider that the matter is especially suitable for decision by a judge. Other respondents raised the question of who might raise proceedings if an existing *ex officio* trustee were unwilling or unable to do so. A similar problem might exist if the office giving rise to *ex officio* trusteeship had ceased to exist and there were no other trustees. In these circumstances we are of opinion that the matter is catered for by the existing law; any person with an interest in the enforcement of the trust would be able to bring court proceedings. In the case of a public trust, the Lord Advocate may raise such proceedings.

4.42 It was also suggested that it might be useful to state what the liability of *ex officio* trustees is and whether it attached to the office or the individual. We consider the liability of trustees in Chapter 13, and we are of opinion that the liability of an *ex officio* trustee would be exactly the same as any other trustee: the liability would attach to the individual who becomes a trustee, not to the office. The liability of a trustee is essentially personal, except to the extent that there may be a right of reimbursement from the trust property.

4.43 In the light of the foregoing responses, we make the following recommendation:

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[47] At para 8.17 of DP No 148.
[48] See recommendation 76(2) and para 16.21 below.
[49] See para 4.35 above.

10. (1) New statutory powers should be introduced to allow for:

(a) the removal of the office supplying an *ex officio* trustee as trustee, and the replacement of that office with another office, the holder of which is to act as an *ex officio* trustee; and

(Draft Bill, section 62)

(b) an *ex officio* trustee to resign in favour of a nominated replacement individual or office holder.

(Draft Bill, section 61)

(2) These powers should be exercisable either by the Court of Session or any sheriff court having jurisdiction over the trust, and should apply to both public and private trusts.

(Draft Bill, section 74(1) and (2))

Discharge of trustees

4.44 The 1921 Act currently provides a power whereby trustees who resign may be discharged, either by the remaining trustees or by the court.[50] The effect of this is that any remaining liability of that person as a trustee is brought to an end.[51] The representatives of a deceased trustee may similarly be discharged. This power should clearly be retained, and we include a re-enacted provision to that effect in section 10 of the draft Bill in Appendix A. In addition we see value in the power being expanded to cover all situations in which a trustee may cease to hold that office. The draft provision therefore also covers a trustee who is removed from office by the court, the co-trustees, or the beneficiaries. As this is largely a restatement of the current law we do not make a formal recommendation.

Meaning of "capable" and "traceable"

4.45 We have referred at various points in this Chapter to a trustee being "capable" or "traceable" (or, more commonly, the opposite: "incapable" and "untraceable").[52] Both of these terms, or terms which are identical in meaning, are found in the current law. An example is in section 23 of the 1921 Act, which permits the court to remove a trustee who is:

> "insane or incapable of acting by reason of physical or mental disability or being absent from the United Kingdom continuously for a period of at least six months, or having disappeared for a like period […]".

4.46 We are conscious that the law on capacity, in particular, has developed a great deal since 1921.[53] For example, references to insanity have no place in modern thinking, and

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[50] In ss 4(1)(g) and 18 respectively. See also Wilson and Duncan, paras 27.31-27.54.
[51] Resignation by itself does not remove any liability already incurred; this position is confirmed in our draft Bill at s 9. That section re-enacts, with modification, the final sentence of s 3 of the 1921 Act.
[52] Similarly, elsewhere we speak of the capacity or traceability of beneficiaries, protectors and others.
[53] Eg see our DP on Adults with Incapacity (DP No 156; 2012) where both domestic and comparative definitions of capacity are explored.

there is increasingly a need for precision and detail in describing what is meant by capacity or its absence. This is in part due to developments in medical science and other relevant disciplines. In connection with trustees, there may be thought to be a particular reason to consider capacity in detail: trustees, especially lay trustees and executors, are likely to include a considerable number of more elderly people, which is the segment of the population most likely to be troubled by conditions such as dementia.[54] To a lesser extent, the world of 1921 is very different to contemporary times in respect of keeping track of trustees. Whilst still a considerable problem in some areas,[55] there is no longer any reason to consider that (for example) six months' absence from the UK is a reason to remove a person as a trustee. We therefore propose to re-enact the current requirements as to capacity and traceability in terms which are more suited to the current times.

Capacity

4.47 The definition of "incapable" and "capable" which is given in section 75 of the draft Bill appended to this Report is based on that in section 1 of the Adults with Incapacity (Scotland) Act 2000. We considered that to be a suitable starting point, as it is both recent and already widely used in the domestic legal field. We have, however, made a number of minor adjustments to the 2000 Act definition.[56]

4.48 We are alive to the fact that levels of capacity vary, not only over time but also in respect of other factors such as the complexity of the decision to be made.[57] Some forms of physical incapacity may be alleviated by the availability of mechanical devices which allow the person to communicate his or her thoughts and decisions;[58] equally, certain mental conditions are amenable to relief by way of medication. Further, there is a need to consider the decision which is being taken. For example, Sam, who is an executor of her late (and wealthy) partner's estate, might well be incapable of making investment decisions concerning the testamentary trust fund but, at the same time, may be fully capable of contributing to a discussion and decision about whether to advance some trust property to her deceased partner's nephew, who is a beneficiary.

4.49 In recognition of the fact that incapacity can often be a fluid and mercurial term, we have made overlapping recommendations about the removal of a trustee on the ground of incapacity. We recommend that the trustees have power to remove one of their number on the ground that he or she is incapable, and also that the court has a similar power.[59] We consider that this will provide useful and realistic flexibility in practice, and that a court application will be used wherever there is a question of significant doubt.

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[54] The Paper cited in the previous note states, at para 1.4, that the "largest group of people who lose capacity do so due to dementia. In Scotland in 2012, there are estimated to be 84,000 adults with dementia, a number projected to increase significantly over the next few decades."

[55] See para 4.21 above.

[56] Eg the definition of "mental disorder" is based on the definition in England and Wales in s 1 of the Mental Health Act 1983, as amended by the Mental Health Act 2007; also we make no reference to whether a person is incapable of "acting" (in s 1(6)(a) of the 2000 Act).

[57] This is already recognised in other pieces of legislation: eg incapacity in the 2000 Act is to be measured in respect of a specific decision or action, meaning that at any one time a given individual may be both capable and also incapable. Also, people under 16 have no general contractual capacity but "shall have legal capacity to enter into a transaction (a) of a kind commonly entered into by persons of his age and circumstances, and (b) on terms which are not unreasonable": s 2(1) of the Age of Legal Capacity (Scotland) Act 1991.

[58] In this way we have the work of people such as the scientist Professor Stephen Hawking and author Christopher Nolan.

[59] See recommendations 8 and 6, respectively, above.

4.50 In other instances where we refer to capacity or incapacity in our recommendations and in the corresponding provisions of the draft Bill, we expect that a similarly flexible approach will be taken to the meaning of the term. We anticipate that due regard will be given to the particular circumstances in which the question arises. In the light of this we recommend:

> **11. A person is to be regarded as "incapable" if he or she is incapable of one or more of the following:**
>
> **(a) making decisions,**
>
> **(b) communicating decisions,**
>
> **(c) understanding decisions, or**
>
> **(d) retaining the memory of decisions,**
>
> **and such incapacity is (either or both) because the person is mentally disordered (that is, has any disorder or disability of the mind, however caused or manifested) or, because of physical disability, has an inability to communicate.**
>
> **But if a lack or deficiency in the faculty of communicating decisions can be made good by means of human or mechanical aid then it is to be disregarded.**
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> (Draft Bill, section 75)

Traceability

4.51 Trustees sometimes go missing. So do others, such as beneficiaries,[60] protectors or supervisors.[61] This can give rise to real problems for the administration of trusts and so we consider that there is merit in making specific statutory provision about those who are untraceable. What, though, does that term mean? What steps must be taken before a person counts as untraceable? As circumstances will vary – for example, a missing trustee of a small trust which has many other trustees is in a rather different position from the missing sole trustee of a large, complex trust – we suggest that the test for untraceability should take account of the particular situation. Generally speaking, we recognise the need to strike a balance between making some enquiries about a person whose whereabouts are unknown and making exhaustive efforts, costing much in time and money, to try to locate him or her. Provided that reasonable and proportionate efforts are made to locate the missing person then, if those efforts come to nothing, the person is to be considered untraceable. The identity of the person or people who determine what is reasonable and proportionate will vary: in some situations it is appropriate that the remaining trustees are to be satisfied as to the steps which have been taken whereas in different situations it will be a matter for the court, or for others. The draft Bill sets out the position in this regard in specific detail.

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[60] See, eg, para 11.30 below.
[61] Supervisors and protectors are discussed below in Chapters 14 and 15 respectively.

4.52 We therefore recommend:

12. A person is to be regarded as "untraceable" if he or she has not been traced after reasonable steps have been taken in that regard.

(Draft Bill, section 76)

Chapter 5 Decision-making by trustees

5.1 The means whereby trustees make decisions involving the trust is clearly of fundamental importance. This is the subject of Part 2 of our Discussion Paper on Trustees and Trust Administration,[1] where we considered two matters: first, the requirements on trustees in relation to consultation prior to the holding of meetings and the making of decisions; and, secondly, what constitutes a majority or quorum of trustees.

Consultation and meetings

5.2 We indicated that trustees are appointed to act as a body and are under a duty to consult one another in relation to trust business, even though their decision on any particular matter may be made by a majority or quorum.[2] Every trustee has a right to take part in the decision-making process: authority for this approach is found in *Reid v Maxwell*[3] and *Wyse v Abbott*.[4] It is sufficient that all trustees should be given either an opportunity to attend a meeting of trustees, with intimation of the business to be transacted at such meeting, or an opportunity to put forward their views. It is not necessary that the trustees should actually receive the opinions of all of their number. In cases where intimation and consultation are impossible or highly impracticable, they may be dispensed with.[5] We further expressed the view that consultation, insofar as reasonably practicable, is required for all trustees' decisions, including routine management decisions.[6] The latter may, however, be delegated to agents, who may also be trustees.

5.3 In the 19th and early 20th centuries it was generally assumed that an actual meeting of trustees was required as an essential feature of trust business.[7] More recently, though, the view has been expressed that consultation by telephone or letter would usually be acceptable.[8] We indicated that in current practice many decisions are made otherwise than as a result of face-to-face meetings, with communication being effected by letter, email or telephone. Skype and other Internet-based methods of video communication are also readily available, and it is impossible to predict what new technologies may emerge. If a written record is required the trustees will be invited to sign a resolution, or a minute is prepared.

5.4 We concluded that the position as to meetings was unclear. There was a conflict between 19th century cases and several textbooks to the effect that trustees have a duty to meet and the more recent statement found in Wilson and Duncan that meetings are not

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[1] DP No 126.
[2] DP No 126, paras 2.4-2.11.
[3] (1852) 14 D 449, 449.
[4] (1881) 8 R 983, 984.
[5] *Malcolm v Goldie* (1895) 22 R 968, 972, per Lord Kinnear, a case where a trustee had moved permanently to Australia and it was held that intimation to that trustee was unnecessary. We pointed out that the decision would not necessarily be the same today, in view of the availability of modern means of communication.
[6] DP No 126, para 2.7, disagreeing with Wilson and Duncan, paras 23.22-23.23.
[7] *Wyse v Abbott* (1881) 8 R 983, 984; Menzies, para 173; Mackenzie Stuart, p 61.
[8] Wilson and Duncan, para 23.18 ("Circumstances may, of course, render meetings impracticable if not impossible and in such cases consultation by written or telephonic communication would usually be acceptable".) A contrary view is found in KMcK Norrie and EM Scobbie, *Trusts* (1991), p 96.

essential;[9] modern practice accorded with the latter view. We thought that legislation might usefully provide a clear statement of rules and that these should reflect current practice. The essential point seemed to us to be that all of the trustees should be given an opportunity to put forward their views on the subject that has to be decided. Modern methods of communication allow this to be done by means other than face-to-face meetings. We accordingly proposed that legislation should be enacted providing that, before a decision binding the trustees can be made, all trustees must (so far as is reasonably practicable) be given adequate prior notice of the matters to be decided and an opportunity to put forward their views, by attending a meeting of the trustees or in any other manner. We envisaged that this should be a default rule, subject to any contrary provision in the trust deed.

5.5 On consultation, subject to certain points of detail, this proposal met with universal support. In particular, consultees supported our interpretation of current practice. By way of example, Pagan Osborne stated that increasingly trustee decisions will be taken by conference telephone calls, exchanges of emails or the equivalent; they thought that it should not be necessary to make formal provision for such procedures, except by allowing decisions to be made in a manner which is convenient for all of the trustees and compatible with good trust governance for the particular trust in question. We agree with that view. Standard Life plc pointed out that where, for example, papers require to be signed by the trustees before the proceeds of a life policy can be paid out, it would be expected that this would be dealt with by post rather than at a meeting of the trustees.[10] The Trust Law Sub-Committee of the Law Society thought that there should be a definition of adequate prior notice so as to avoid any disputes about the period of notice given. We thought, however, that it would be very difficult to prescribe any particular period. The circumstances of trusts vary greatly, and indeed the circumstances of individual trustees vary; for example, a trustee may be on holiday or travelling on business and hence unavailable for a limited period. Equally, decisions to be made by trustees vary greatly in their level of urgency, and we would not wish to compel trustees to delay urgent decisions as a result of a general time limit. In all the circumstances we think that a test of reasonableness is adequate. If a dispute arises in any particular case, it is a matter for the court to decide what is reasonable, in the light of its knowledge of ordinary legal and business practice.

5.6 Against that background, we make the following recommendation:

13. Subject to any contrary express or implied provision in the trust deed, before a decision which binds the trustees can be made, all the trustees must, so far as is reasonably practicable, be given:

(a) adequate notice of the matters to be decided, and

(b) an opportunity to put forward their views, either by attending a meeting of the trustees or in any other manner.

(Draft Bill, section 11)

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[9] See note 8 above.

[10] Under the recommendations in our recent Report on Formation of Contract: Execution in Counterpart (SLC No 231; 2013), it would be competent for such documents to be signed in counterpart (ie by each trustee signing his or her own copy of the document) and then delivered electronically. The Scottish Parliament is currently considering draft legislation to give effect to this: the Legal Writings (Counterparts and Delivery) (Scotland) Bill, available at http://www.scottish.parliament.uk/parliamentarybusiness/Bills/76414.aspx.

Majority and quorum

5.7 A "quorum" is the number of persons who must be present at a meeting for it to be valid and able to transact business.[11] In trust law, a quorum is the number out of the whole body of trustees who may make an effective decision without the consent or concurrence of the others, subject always to the duty of consultation.[12]

5.8 The statutory provision specifying the default rule for what amounts to a quorum is in section 3(c) of the 1921 Act: "a majority of the trustees accepting and surviving shall be a quorum". This is a re-enactment of section 1 of the Trusts (Scotland) Act 1861, which was considered to be declaratory of the common law.[13] Despite doubt in earlier times, it is accepted today that a majority or quorum of trustees may make an effective decision on any matter, including acts of extraordinary administration.[14] Conversely, no effective decision can be made unless it is agreed by a quorum.[15]

5.9 Because of the terms of section 3(c) of the 1921 Act, majority and quorum are generally synonymous. If a trust deed departs from that provision by stipulating that the quorum is to be a larger or smaller number of acting trustees, then it is the quorum that may make an effective decision, not the majority.[16] If a decision is to be made by a quorum, all of the trustees making up that quorum must concur.[17]

5.10 Three exceptions exist to the above general rules.[18] First, where one or more of the trustees is appointed on a *sine qua non* basis, the concurrence of any such trustee to any act of trust administration must always be secured. In effect, a *sine qua non* trustee has a right of veto over decisions made by the remaining body of trustees. Such appointments are rare in modern practice because of the administrative inconvenience that they may cause, and are used only in special circumstances. One example is where one of the trustees is the legal representative of a child beneficiary; and in some cases a bank that is appointed as a trustee of a testamentary or other family trust may insist that it is a *sine qua non* trustee.

5.11 Secondly, it is competent to appoint more than two trustees and to provide in the trust deed that they are to act jointly.[19] In such a case, the trust deed disapplies the rule in section 3(c) of the 1921 Act, and all the trustees must agree to every trust decision.[20] The result is that every joint trustee is a *sine qua non* trustee. Joint trusteeship is virtually unknown in current practice.

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[11] DP No 126, para 2.12, quotes the dictionary definition of "quorum": "a fixed minimum number of members whose presence is necessary to make the proceedings of a meeting, society, etc. valid".
[12] *Alexander's Trs v Dymnock's Trs* (1883) 10 R 1189, per Lord President Inglis at 1195.
[13] J McLaren, *The Law of Wills and Succession* (3rd edn, 1894), Vol II, para 1666.
[14] DP No 126, para 2.15; Mackenzie Stuart, p 61; KMcK Norrie and EM Scobbie, *Trusts* (1991), p 98.
[15] *Wolfe v Richardson* 1927 SLT 490.
[16] Eg *Cambuslang West Church v Bryce* (1897) 25 R 322, where the quorum was four out of nine trustees. Providing for a quorum which is less than a majority may be appropriate in public trusts with a large number of trustees, where it may be difficult to ensure that a majority attend meetings; at the same time, the large number of trustees ensures that a wide range of interests are represented. In that case, however, the smaller quorum might be overruled by the other trustees who would be in the majority. In these circumstances the best solution may be to have a small number of executive trustees coupled with a larger advisory board: see DP No 126, p 8, note 40.
[17] Wilson and Duncan, para 21.25; *Lynedoch v Ouchterlony* (1827) 5 S 358. Thus if a better quorum is present at a meeting it cannot make an effective decision by a majority of those present; instead, those in favour of any decision must amount to the quorum.
[18] These are discussed at paras 2.17-2.21 of DP No 126.
[19] This should not be confused with the rule that trustees are the joint owners of the trust estate.
[20] Wilson and Duncan, para 23.18.

5.12 Thirdly, a number less than a majority or quorum may make a particular decision if one or more of the trustees is disqualified from acting in that matter owing to an adverse interest.[21] Where an adverse interest exists, the principle that a majority of trustees is a quorum refers to a majority of the disinterested trustees, not the total number. It is competent, however, for a trust deed to provide that a trustee may participate in a decision even though he or she has a personal interest; this is in fact frequent in pension trust deeds, which authorise employer-trustees to participate in distribution decisions even though they will be among the class to benefit.[22]

5.13 We suggested that the use of the word "quorum" in trust law was potentially misleading in view of the fact that trustees may make effective decisions otherwise than at meetings.[23] We thought that it would be better to replace section 3(c) of the 1921 Act by a provision that did not use the concept of a quorum. The new statutory provision should also deal with *sine qua non* trustees, joint trustees and interested trustees where the simple majority rule does not apply. We accordingly proposed that section 3(c) should be replaced by new statutory provisions which provided that, for a decision to bind trustees, it must be made by a number of trustees at least equal to the majority of the trustees then acting,[24] but that a trustee with a personal interest in a decision was not for that purpose to be counted as an acting trustee and should be disqualified from participating for the purposes of such decision. We further proposed that the foregoing rule should apply in the absence of any contrary provision in the trust deed.

5.14 On consultation, our proposal met with general assent. One respondent thought that the need for such a statutory provision in place of section 3(c) was not clear, but conceded that if it helped to define procedures it would do no harm. The Trustees and Trust Administration Group of the Law Society observed that the definition of "personal interest" needed to be clarified. We have come to the opinion that there is some force in that observation, and that somewhat more specific provision should be made.

5.15 We think that the main difficulty relates not so much to the definition of personal interest as to what consequences it should have. Usually it will be very clear whether an individual trustee has an interest in his own right that is distinct from his position as a trustee. For example, the trustee may also be one of the beneficiaries, possibly a beneficiary under a discretionary trust. Alternatively the trustee may be a solicitor whose firm provides remunerated services for the trust. Many other examples can be imagined, although usually they will take the form either of interest as a beneficiary or interest as a person who contracts with the trustees. In addition, connection with a person falling into one or other of the two latter categories may count: a trustee may be the husband or wife or parent of a beneficiary, or may be a partner in a firm, or a shareholder in a company, that contracts with the trustees. In every case, however, we think that the existence of a contrary interest should be reasonably clear. No doubt in some cases the connection may be so small that it may be disregarded. For instance, a trustee who is the father of a beneficiary can reasonably be taken to have a contrary interest, whereas if the trustee is a beneficiary's

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[21] Wilson and Duncan, para 23.22; Menzies, para 181; *Shanks v Aitken* (1830) 8 S 639; *Blisset's Trs v Hope's Trs* (1854) 16 D 482; *Neilson v Mossend Iron Company* (1885) 12 R 499, especially per Lord Shand at 516-517.
[22] Compare *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32.
[23] DP No 126, para 2.22.
[24] Compare the rule in the DCFR: "If there are several trustees, their powers and discretions are exercised by simple majority decision unless the trust terms or other rules of this Book provide otherwise" (X.-5:102).

second cousin his interest may reasonably be disregarded, especially if there are many other members of the family involved with the trust.

5.16 We think, though, that provision should be made for cases where the truster appoints a trustee in the knowledge that the trustee might be personally interested. This would apply in particular to a case where the trustee is a member of the family benefited by the trust, or where he or she is a partner in the firm of solicitors acting for the trust. We have accordingly made provision for this possibility. In addition, we have made provision for the possibility that all of the beneficiaries know of the personal interests of a trustee and consent to his or her acting. This represents the existing law, but we think that it should be made clear in the legislation.

5.17 In the light of the foregoing, we make the following recommendation:

14. Section 3(c) of the Trusts (Scotland) Act 1921 should be replaced by a new statutory provision to the following effect:

(a) a decision should bind the trustees only if it is made by a majority of those for the time being able to make it;

(b) for the purposes of paragraph (a), the following are not to be regarded as able to make a decision:

(i) any trustee who has a personal interest in the decision,

(ii) any trustee who is untraceable, and

(iii) any trustee who is incapable;

(c) the prohibition in paragraph (b)(i) should be disregarded if either (i) all of the beneficiaries know of the trustee's personal interest and consent to his or her acting, or (ii) the truster appointed the trustee in the knowledge that such a decision might require to be taken and that the trustee would have a personal interest in it (or the trustee must be taken to have appointed the trustee in that knowledge);

(d) the rule in paragraph (a) should be subject to the terms, express or implied, of the trust deed.

(Draft Bill, sections 12 and 79 and schedule 2)

Chapter 6 Powers of trustees: general powers

6.1 At common law, the management powers of trustees were confined to those expressed in the trust deed or such as could be implied from the purposes of the trust.[1] This proved unsatisfactory in practice, as it was frequently far from clear what powers should be implied into a trust. As a result, the Trusts (Scotland) Act 1867 conferred a range of powers over the trust property on trustees in all trusts;[2] they were of a default nature and so could be excluded or supplemented by the trust deed. That Act was subsequently amended, and was replaced entirely by section 4 of the 1921 Act. This section has itself been heavily amended, most recently by the Charities and Trustee Investment (Scotland) Act 2005.[3] The latter Act also made major changes to the powers of investment conferred on trustees, which are discussed in Chapter 7 below.

6.2 Against that background, the powers of trustees fall into four categories: first, those expressly given by the trust deed; secondly, those implied from the trust deed and trust purposes; thirdly, those conferred by section 4 of the 1921 Act;[4] and, fourthly, those conferred by the court under statutory and common law powers.[5] In this Chapter we consider the reform of the third and fourth of these categories: the statutory default management powers of trustees and the ability of the court to confer other powers.

Statutory default power

6.3 Section 4 of the 1921 Act, as amended, is set out in Appendix B. It is a notoriously lengthy provision. For present purposes, two features are important. In the first place, it is a default provision, only applying when there is no contrary provision, express or implied, in the trust deed. That appears from the opening words of subsection (1), which confers power to do the specified acts "where such acts are not at variance with the terms or purposes of the trust". In the second place, the structure of the section is to provide a large number of specific powers. Some of these, such as the power of sale in paragraph (a), the power to borrow contained in paragraph (d), and the power to make any kind of investment of the trust property conferred by paragraph (ea),[6] are expressed in general terms, and are accordingly of wide application. Nevertheless, the structure is still relatively complex.

6.4 We observed that it is common for trust deeds to grant wider powers of management and administration than those contained in section 4 of the 1921 Act.[7] Even for short-lived executry trusts it is common to give the executors full powers as if they were absolute beneficial owners. In this way, the trustees are able to achieve the trust purposes without any administrative impediment. We further observed that in longer trust styles it is common

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[1] Bell, *Commentaries on the Law of Scotland*, I, 37.
[2] Section 2.
[3] Section 93.
[4] Or by certain other statutes; see para 3.35 of DP No 126, and in particular note 67.
[5] See paras 6.18-6.24 below.
[6] A power added in its present form by the Charities and Trustee Investment (Scotland) Act 2005, s 93(2)(a).
[7] DP No 126, para 3.40. See also Barr et al, paras 7.2-7.32.

not only to give trustees full powers as if they were absolute beneficial owners, but also to give a list of specific powers without prejudice to the scope of the general power. These specific powers frequently extend beyond those in section 4(1) of the 1921 Act; examples include powers to hire moveable property, wide powers of investment, a power to insure, wide powers of management of the heritable estate, power to carry on a business, power to lend money with or without security or to borrow without security, and power to allow beneficiaries to use any part of the trust property.

6.5 We went on to consider two possible options for reform.[8] The first was to amend the current list of powers by adding new powers and widening existing powers. The second was to confer on the trustees a general power to take any steps or perform any actions that owners could take or perform in relation to their own property. We considered that the first approach, described as the list option, had the advantage of continuity with past practice, but we thought that its disadvantage was its inflexibility; it was not possible to include every power that trustees were likely to need, even in ordinary trusts. Moreover, over the lifetime of a trust new situations or new ways of carrying out transactions might emerge for which the listed powers were inadequate. By contrast, if the second approach were adopted and a general power was conferred, the management powers of trustees would develop in accordance with contemporary practice. Nevertheless, even on the latter approach, trustees would be subject to fiduciary duties and a duty of care towards beneficiaries, and their exercise of the powers would be constrained by these. They would also be constrained by their fundamental duty to further the purposes of the trust.[9]

6.6 We accordingly put forward two alternative proposals.[10] The first involved replacing section 4(1) of the 1921 Act with a power to administer, invest and generally deal with the trust property as if the trustees were the beneficial owners, subject to any contrary provisions in the trust deed. In the exercise of that power the trustees would be bound by their duty of care, their fiduciary duties and the terms and purposes of the trust. In the event that such an approach were adopted, we further asked whether the legislation should for the avoidance of doubt confer certain specific powers and, if so, which powers. We also raised the possibility that the legislation conferring a general power might exclude specific powers and, if so, we asked which powers should be excluded. The alternative proposal was to amend the list of powers set out in section 4(1) of the 1921 Act by including additional powers; if so, we invited views as to which additional powers should be added.

6.7 Of those who responded to the consultation, all but two favoured a general power. The Keeper of the Registers of Scotland preferred specific powers, but did not give reasons. The Faculty of Advocates also favoured specific powers, guaranteeing certainty and building on a structure that had been used by trustees for many years. Otherwise respondents were clear in their support for a general power. Those respondents included all those representing solicitors, who are of course the persons generally responsible for the drafting of trust deeds. In particular, the Trust Law Sub-Committee of the Law Society and the Society's Trustees and Trust Administration Group both favoured a general power.

6.8 In the course of our further work on the project, including discussions with the Advisory Group, it has become apparent that contemporary best practice in the drafting of

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[8] DP No 126, paras 3.41-3.51.
[9] See para 1.11 above.
[10] DP No 126, para 3.51, proposals 9A and 9B.

trust deeds is to provide a very general power of management, designed to supersede the multiplicity of powers in section 4 of the 1921 Act. Such a power will typically confer all the powers that a natural person would have in respect of his or her own property. The exercise of such a power is obviously still constrained by trustees' general fiduciary duties and duties of care, and also by the trust purposes. Nevertheless, it is clear that among solicitors practising in this field a general power is seen as preferable to a large number of specific powers. It is easy to see why this is so. Determining whether a trust deed confers power to carry out a particular act is very much easier if the existence or otherwise of the power is simplified; in that event the main focus of an adviser's attention is whether the trustees' fiduciary duties and duties of care are satisfied.

6.9 This view is strengthened by the approach taken by modern trust statutes in other jurisdictions. An excellent example is the Trusts (Jersey) Law 1984. The section of the law dealing with the powers of trustees, article 24, is very short, providing as follows:

> "Powers of trustee
>
> 24 (1) Subject to the terms of the trust and subject to the trustee's duties under this Law, a trustee shall in relation to the trust property have all the same powers as a natural person acting as the beneficial owner of such property.
>
> (2) A trustee shall exercise the trustee's powers only in the interests of the beneficiaries and in accordance with the terms of the trust.
>
> (3) The terms of a trust may require a trustee to obtain the consent of some other person before exercising a power or a discretion.
>
> (4) A person who consents as provided in paragraph (3) shall not by virtue of so doing be deemed to be a trustee."

An even shorter provision is found in the Trusts (Guernsey) Law 2007. Section 30 of this statute provides as follows:

> "Powers of trustees in relation to property
>
> 30. Subject to the provisions of this Law and to the terms of the trust, a trustee has, in relation to the trust property, all the powers of a beneficial owner."

In jurisdictions such as Jersey and Guernsey the law of trusts is of considerable economic importance, and great effort is put into keeping the law up to date. As a general rule, the default statutory provisions in those jurisdictions are designed to conform to contemporary best practice. We have already discussed why we consider that this is a sound policy for Scots law.[11]

6.10 The most substantial objection to a general power came from the Faculty of Advocates, who were concerned that it lacked certainty. On considering this matter, however, we think that a general power if anything confers greater certainty; it permits trustees to do anything that a natural person could do, subject only to the general restrictions that are placed on trustees as result of their fiduciary duty and duty of care and the

[11] See paras 1.3 and 2.26 above.

restrictions inherent in the trust deed itself. We are accordingly of opinion that a general power should be conferred as a default provision.

6.11 The further question arises as to whether, if a general power were conferred, specific powers should nevertheless be enumerated or, as an alternative, excluded.[12] There was considerable support for this, but the contrary view was also expressed. In favour of an additional list of specific powers was the fact that such a list might make the legislation easier for lay trustees to use. Against this, it was emphasised that any list of powers should not detract from the generality of the principal power, possibly through use of the *ejusdem generis* principle of construction.[13] On balance, we are inclined not to favour any list of specific powers. The default statutory power that we propose is entirely general in its application, using the standard of a natural person of full age and capacity acting in relation to his or her own property. That is intended to be as wide a power as it is possible to confer (although, as mentioned, it is of course subject to trustees' fiduciary duties and duties of care and to the provisions of the trust deed). We do not think that a list of specific powers adds anything to the import and intelligibility of the general power.

6.12 As we have noted, a general power of the sort recommended is contemporary best practice. We do not think that it would be helpful to the administration of trusts to retain the complex system of powers in section 4 of the 1921 Act for existing trusts. For that reason we consider that the new general power should be implied into all trusts, regardless of when they were created, subject only to an exception for trusts which expressly provide otherwise. This will not, however, have retrospective effect, so that acts already performed by trustees will not be affected by it.

6.13 We therefore recommend:

15. (1) Section 4(1) of the Trusts (Scotland) Act 1921 should be repealed and replaced by a provision that confers on trustees in their dealings with the trust property power to exercise all of the powers of administration and management that a natural person of full age and capacity would have in respect of his or her own property.

(2) In the exercise of such a power, the trustees will be bound by their fiduciary duties and duty of care, and will also be bound by the terms and purposes of the trust.

(3) Except in so far as the trust deed expressly provides otherwise, the new power will apply to all trusts, whenever created, but it will not apply to acts of trustees performed prior to the commencement of the provision.

(Draft Bill, sections 13 and 79 and schedule 2)

6.14 At this point we emphasise that the provision in question is merely a default power, and can be overruled by any truster who wishes to do so. We further emphasise that the

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[12] DP No 126, para 3.51, proposal 9A(2) and (3).

[13] This principle holds that words which, when read in isolation, have a wide meaning are to be read more narrowly because of their particular context. It is presumed to apply unless there is some contrary indication. See, generally, O Jones, *Bennion on Statutory Interpretation* (2013), pp 1105-1119.

second part of the recommendation, namely that the general power is subject to the standard constraints on trustees' actings, is of great importance. Nevertheless, the power that is contemplated by recommendation 15 is wide, and would include the appointment of agents and the delegation of functions to agents.[14]

Amalgamation of functions of public and charitable trusts

6.15 In 2011 we published a short consultation paper which raised the possibility that a specific power might be conferred on public and charitable trusts to amalgamate their functions; it was thought that in this way they would be able to simplify their administration and reduce their expenses. The Consultation Paper asked whether Scots law should provide a statutory facility to enable charitable and other public trusts to amalgamate a range of administrative functions, identified in the Paper. Slightly more than half of the responses were in favour of such a power. The remainder, generally speaking, expressed the view that such a facility was not necessary, as the amalgamation of administrative functions would be permitted under existing Scots law.

6.16 Following the consultation responses, we formed the view that such a power was plainly desirable and could be of considerable utility to smaller charities in particular. Nevertheless, by that stage we had decided that trustees should be given a very wide general administrative power, as described in recommendation 15. This power would include power to appoint agents and to delegate functions to such agents as default powers in all trust deeds.[15] We thought that this would allow trustees to take the steps envisaged in the Consultation Paper, to delegate administrative functions to one another or to appoint agents to carry out those functions on a collective basis. For that reason we did not think that any specific legislative provision was necessary. The consultation paper had raised the possibility of the introduction of statutory styles to assist in drafting formal agreements to amalgamate functions. We consider, however, that in the light of the width of the default power of administration that we propose such styles would not be necessary. In any event, to the extent that styles are required, we have taken the general view that they should be contained in style books rather than in legislation.

6.17 On that basis we make the following negative recommendation:

> **16. Beyond the power specified in recommendation 15, it is not necessary to make any provision for the amalgamation of functions of public and charitable trusts.**

Granting additional management powers

6.18 Although we envisaged that the default power of administration conferred on trustees by the trusts legislation should be framed in very general terms, and likewise that the power of investment should be in wide terms,[16] in some cases trusters may choose to confer more limited power on trustees. Similarly, many existing trusts involve more limited powers.[17] In these cases it is found on occasion that useful powers may have been inadvertently omitted, or powers that appeared unnecessary when the trust was set up may have become

[14] See Ch 8 for a discussion of this topic.
[15] See paras 8.3-8.10 below.
[16] See Ch 7 for a discussion of investment powers.
[17] And the wording of the deed may be such that the general power in recommendation 15 is not applicable.

necessary. Likewise, the legal or factual background may change in ways that were not imagined by the truster. In such a case it may be desirable that additional powers, going beyond those in the trust deed, should be conferred on the trustees.

6.19 In considering this issue, we outlined the existing ways in which such powers can be conferred by the court.[18] In the first place, section 5 of the 1921 Act permits the court, on the petition of the trustees, to grant them authority to do any of the acts mentioned in section 4 of that Act, notwithstanding that such act is at variance with the terms or purposes of the trust. Before granting authority, the court must be satisfied that the act is, in all the circumstances, expedient for the execution of the trust. In view of our recommended repeal of section 4 and its replacement with a general power of administration, a provision along the lines of section 5 will obviously be inappropriate.

6.20 In the second place, the *nobile officium* of the Court of Session may be used to give trustees greater powers than they enjoy under the trust deed. We expressed the view that the scope of the *nobile officium* in this context is uncertain, and that the jurisdiction of the court in such cases has been narrowly circumscribed.[19] We referred to *Hall's Trustees v McArthur*[20] where the view was taken that, in relation to trusts, resort to the *nobile officium* has been confined in practice to cases where something administrative or executive is wanting in the trust deed in order to enable the trust purposes to be carried out effectually. If no such executive or administrative provisions are wanting, the court will not interfere, because the Court of Session, unlike the Chancery Division in England and Wales, does not undertake the administration of trusts. Consequently the court will not generally grant the trustees higher powers than those contained in the trust deed; it will only intervene in relation to powers which the trustees already enjoy but which have been limited in some way. In addition, the court will only interfere with the trust powers in cases of necessity or strong expediency; mere expediency is not enough.[21] It follows that the *nobile officium* is of limited utility in dealing with administrative powers that prove inadequate.

6.21 In the third place, trustees' powers may be altered in the course of a trust variation, either at common law or under the Trusts (Scotland) Act 1961. The common law power is limited, however, to revocable *inter vivos* trusts. The statutory power to vary the administrative powers conferred by a trust deed is used frequently, but it requires the consent of all of the beneficiaries who are of full age and capacity. It is also essential that the court should consent on behalf of all beneficiaries who are not of full age or capacity, and if such consent is to be obtained the court must be satisfied that the proposed alterations to the powers in the trust deed are not prejudicial to any of those persons.[22]

6.22 In the fourth place, in the case of public trusts, additional administrative powers can be conferred by means of a *cy-près* application or, in appropriate cases, an application under section 105(4A) of the Education (Scotland) Act 1980.[23] In such a case the court must

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[18] DP No 126, paras 5.30-5.38.
[19] DP No 126, para 5.32.
[20] 1918 SC 646, 650.
[21] *Scot's Hospital Trs* 1913 SC 289; *Gibson's Trs* 1933 SC 190.
[22] Trusts (Scotland) Act 1961, s1(1). A reported example is found in *Henderson, Petrs* 1981 SLT (Notes) 40. We discuss the 1961 Act in Ch 17 below.
[23] *University of Glasgow, Petrs* 1991 SLT 604; *Governors of Dollar Academy Trust v Lord Advocate* 1995 SLT 596.

be satisfied that alteration is expedient for the administration of the trust.[24] Remedies of this nature are useful in practice but they are confined to public trusts, including charitable trusts.

6.23 We expressed the view that, in cases where the trustees' powers are limited, whether by the trust deed or otherwise, it should be possible for the trustees to petition the court to obtain additional powers.[25] We considered the existing methods to be unsatisfactory. We suggested that a procedure analogous to that available in England and Wales under section 57 of the Trustee Act 1925 might be attractive. That section provides that, where a transaction is expedient but the trustees lack power to carry it out, the court may confer the power, either generally or in that particular instance, and may impose such conditions as it thinks fit. Similar procedures exist in many Commonwealth jurisdictions.[26] We accordingly proposed that the court should have power, on application by the trustees, to confer additional administrative and managerial powers in relation to the trust property, provided that it is satisfied that such powers would be of benefit to the future administration of the estate. We further proposed that such an application should be intimated to all of the beneficiaries, who would be entitled to object. Nevertheless, it should be possible for the court to grant additional powers notwithstanding such objections. Finally, the court should have power to attach conditions to the order as it might think fit.

6.24 On consultation, this proposal attracted universal support, although the Faculty of Advocates stated that they were not persuaded that the problem addressed was a major one; they were not aware of many cases where the existing ability to enlarge powers had been found inadequate in deserving cases. Despite this observation, we are of opinion that a statutory provision along the lines of our proposal is clearly desirable, to deal with cases where the trustees' powers are restricted but it is expedient that additional powers should be conferred, either generally or in a specific case. We emphasise that the test should be expediency or benefit, and not anything more demanding. In these circumstances we make the following recommendation:

17. (1) The court should have power, on application by the trustees, to grant an order conferring additional administrative and managerial powers in relation to the trust property on them, if satisfied that the order would be of benefit to the future administration of that property.

(2) The application should be intimated to all the beneficiaries and others whom the court may specify, who would have an opportunity to object. An order should be capable of being granted notwithstanding the objections of some beneficiaries.

(3) The court should have power to attach such conditions to the order as it thinks fit.

(Draft Bill, section 14)

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[24] See, eg, *RS Macdonald's Trs, Petrs* [2008] CSOH 116.
[25] DP No 126, paras 5.37-5.38.
[26] The relevant law in these jurisdictions and in England and Wales is set out in Appendix A to DP No 126.

Chapter 7 Powers of investment

Earlier work on investment powers

7.1 Trustees' powers of investment were the subject of a Joint Report by the Scottish Law Commission and the Law Commission for England and Wales,[1] published in July 1999. The Report made important recommendations for reform of the law regulating trustee investments in both jurisdictions; in both, the principal statute that had previously governed the matter was the Trustee Investments Act 1961. The recommendations made in the 1999 Report were implemented in England and Wales by the Trustee Act 2000. In Scotland, however, nothing was done until 2005, when the Commission's recommendations were eventually enacted as sections 93 to 95 of the Charities and Trustee Investment (Scotland) Act 2005.[2] It is disappointing that implementation of the Commission's recommendations took so long in Scotland. The modernisation of investment powers was widely perceived at the time as a matter of great importance, and the failure to update Scots law contributed towards a widespread perception that the law of trusts in Scotland was old-fashioned and ill-suited to contemporary demands.

7.2 Nevertheless, the law has now been updated, and we are of opinion that the recommendations in the 1999 Report remain entirely valid. For this reason we have followed the scheme of the 2005 Act in our draft Bill.

Consideration of investment powers and general powers

7.3 Sections 93 to 95 of the Charities and Trustee Investment (Scotland) Act 2005 took effect by amending the 1921 Act.[3] Section 4 of that Act, which, as we have seen,[4] also contains the general powers of trustees, was heavily amended, and new sections 4A, 4B and 4C were added into the Act. Our general policy is to consolidate all of the legislation governing Scottish trusts into one statute, which will supersede the 1921 Act in its entirety. Accordingly, the investment provisions introduced by the 2005 Act require to be restructured. We consider that, rather than following the current approach of having a section providing for all powers, including those of investment, it is preferable to group together the investment powers and duties separately from the provisions governing the general powers and duties. That is the structure adopted in our draft legislation.[5]

Investment powers

7.4 The reasons for the alteration of the law and the relative recommendations are set out in detail in Chapter 2 of the Joint Report on Trustees' Powers. It may be helpful, however, to summarise the essential provisions here. The starting point was to note that the

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[1] Report on Trustees' Powers and Duties (LC No 260, SLC No 172; 1999). We refer to this as the "Joint Report on Trustees' Powers".
[2] The draft legislation appended to the Report contained separate draft clauses for Scotland (in Appendix B).
[3] They added s 4(1)(ea) and (eb), (1A)-(1F) and ss 4A, 4B and 4C into the 1921 Act.
[4] At para 6.3 above.
[5] Trustees' general powers and duties are in ss 13 to 15 of the draft Bill, and the investment powers and duties follow in ss 16 to 17.

trustees of most modern trusts have adequate powers to invest trust assets in order to maximise their returns; the reason was that wide investment powers were invariably included in the professionally drawn trust, so that the trustees might make any investment that they could make if they were the absolute owners of the assets.

7.5 Problems, therefore, related to older trusts, including many charities, which lack such wide investment powers, and also to trusts and wills made without professional advice. The default regime of the Trustee Investments Act 1961 applied to them, and the Act was subject to criticism.[6] It required trustees who wished to adopt wider powers of investment to divide their investments into two categories, narrower range and wider range, and restricted wider range investments to half the trust fund. Investments in shares and unit trusts were wider range investments. Narrower range investments were mainly fixed-interest securities, including those issued or guaranteed by the UK and other European governments. The result was that trustees who had the powers under the 1961 Act were significantly limited in the investments that they could make. Furthermore, the requirement to divide the trust fund into two parts was generally regarded as a crude and administratively burdensome attempt to regulate the degree of risk to which trustees might expose the trust property. Even the definition of wider range investments was quite restrictive; it did not include land and excluded certain shares. Overall, the view of the Commissions was that the 1961 Act imposed unwarranted burdens affecting both beneficiaries and trustees. It probably had an adverse effect on the value of trust assets and increased administrative and dealing costs.

7.6 Against that background, the Joint Report recommended that the 1961 Act should be repealed and replaced by legislation reforming the law governing the investment powers of trustees.[7] That legislation should confer on trustees the same power to make an investment of any kind as if they were absolutely (or beneficially) entitled to the assets of the trust.[8] The power was, however, subject to the expression of a contrary intention in the instrument creating the trust; it represented a default power. The Commissions noted that, in an earlier consultation by the Treasury, a similar proposal had received overwhelming support from respondents,[9] and that section 34 of the Pensions Act 1995 had made special provision for the investment powers of trustees of occupational pension schemes in a similar manner.[10]

7.7 Notwithstanding the basic recommendation, the Commissions considered it important to bear in mind that trustees are not unqualified owners of the assets under their control, and that beneficiaries need protection from the risk that trust funds will be lost or dissipated in unwise investments.[11] An absolute owner may, if he or she feels so inclined, invest heavily in a wildly speculative venture, but it would seldom if ever be appropriate for trustees to do that. The Commissions' proposals did not affect the general duties imposed by law that trustees should act in the best interests of the trust and avoid any conflict between their duties as trustees and their personal interests. It was recommended, however, that the legislation conferring wider default powers of investment should also set out specific duties which would apply to trustees in the performance of their investment function. It was thought that two such duties should be of general application: a duty to have regard to the need for

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[6] Joint Report on Trustees' Powers, paras 2.16-2.18.
[7] Ibid, para 2.22.
[8] Ibid, para 2.26.
[9] Ibid, para 2.24.
[10] Ibid, para 2.25.
[11] Ibid, para 2.30.

diversification and suitability of investments, and a duty to obtain and consider proper advice where appropriate.

7.8 The first of these was carried forward from the Trustee Investments Act 1961. The Commissions thought that such a requirement was in conformity with modern portfolio theory, which emphasised that investments are best managed by balancing risk and return across the portfolio as a whole, rather than by looking at each investment in isolation.[12]

7.9 As to the duty to obtain and consider proper advice the Commissions pointed out that it was generally accepted that this was necessary if trustees were to manage the trust fund to best effect.[13] The 1961 Act adopted a very cautious approach to the issue: apart from a very restricted class of narrower range investments, trustees were required to obtain and consider proper advice as to whether the investment was satisfactory, which had to be given or confirmed in writing. To impose an unqualified statutory requirement for trustees to take advice before making *any* investment, however small or secure, would place an unnecessary and disproportionate burden on them. In addition, it was not necessary to impose specific restrictions on those who should be eligible to give advice, or to retain a requirement that the advice should be given or confirmed in writing.

7.10 On the foregoing basis, the Commissions made the following recommendation:

> "(1) Before exercising the proposed powers of investment, trustees should obtain and consider proper advice about the way in which those powers should be exercised, having regard to the need for diversification of investments of the trust, and the suitability to the trust of the proposed investments;
>
> (2) Trustees should review the trust portfolio from time to time and consider whether the investments in the portfolio should be varied, again having regard to the need for diversification and to the suitability of investments;
>
> (3) The requirement to obtain advice in (1) should not apply if the trustees reasonably conclude that in all the circumstances it is unnecessary or inappropriate to do so."[14]

7.11 One important restriction on the foregoing provisions was recommended in the Joint Report.[15] The Commissions considered that their proposals should apply to most trusts, including charitable trusts. They indicated, however, that a statutory regime already existed to govern the investment function of pension trustees, and it was not desirable to replace this with a different scheme. In addition, unit trusts were governed by a statute that made special provision for investment by trustees.[16] It was accordingly recommended that the proposals for reform of the law relating to trustees' powers of investment should apply to all trusts except trusts whose trustees are given special statutory powers of investment by or under other enactments. We consider that this policy should be maintained.

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[12] Ibid, para 2.31.
[13] Ibid, para 2.32.
[14] Ibid, para 2.34.
[15] Ibid, para 2.49.
[16] Pensions Act 1995, s 34; Financial Services Act 1986, s 81.

7.12 Overall, therefore, we are of opinion that the detailed recommendations in Chapter 2 of the Joint Report on Trustees' Powers and Duties remain appropriate. As we have already noted,[17] we take the view that it would be preferable to re-order the provisions but this does not alter their effect. In the light of this, we recommend:

18. The investment provisions recommended in the Joint Report on Trustees' Powers and Duties (LC No 260; SLC No 172), as enacted by sections 93 to 95 of the Charities and Trustee Investment (Scotland) Act 2005, should be re-enacted.

(Draft Bill, sections 16, 17 and 18(2) and (6))

[17] See para 7.3 above.

Chapter 8 Delegation by trustees to agents and nominees

Introduction

8.1 We have looked at the topic of agents and nominees at various times since the late 1990s and some of our recommendations have now been incorporated into legislation. By way of a brief chronology:

- In 1999 the Law Commission and the Scottish Law Commission published a Joint Report entitled Trustees' Powers and Duties.[1] Amongst other topics it dealt with agents and nominees, but only in respect of England and Wales.[2] The recommendations relating to Scotland were confined to trustees' powers of investment.

- In 2000 the Joint Report's recommendations were enacted in England and Wales by the Trustee Act 2000. The Act contains provisions on agents and nominees.

- In December 2004 we consulted on reform of the law relating to delegation by trustees to agents: see Part 3A of the Discussion Paper on Trustees and Trust Administration.[3] Part 3A dealt with agents, Part 3C with nominees, and Part 3D with custodians.

- In 2005 the investment powers recommended in the Joint Report of 1999 were enacted by the Charities and Trustee Investment (Scotland) Act 2005, which inserted section 4(1)(ea) and (eb) into the Trusts (Scotland) Act 1921, along with section 4(1A) to (1F) and section 4A.[4]

- The 2005 Act also enacted provisions on agents and nominees.[5] Sections 4B and 4C of the 1921 Act, which are inserted by the 2005 Act, provide for methods of exercising the new powers of investment and deal, respectively, with the appointment of nominees and the authorisation of agents. These sections did not appear in the Bill as it was introduced into the Scottish Parliament, but were inserted at stage 3 and were drafted in consultation with the SLC.[6] The Stage 1 Report set out the reasons for their inclusion.[7]

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[1] LC No 260, SLC No 172. This is discussed, in relation to powers of investment, in Ch 7 above.
[2] This was deliberate, for reasons set out in para 1.16 of the Report which were, essentially, that the SLC's Fifth Programme of Law Reform contained a review of trust law (a review which the present Report concludes).
[3] DP No 126.
[4] See ss 93 and 94 of the 2005 Act.
[5] See s 94 of the 2005 Act.
[6] Official Report, 9 June 2005, col 17864.
[7] "In evidence to the [Communities] Committee, Simon Mackintosh of the Charity Law Association noted that difficulties might arise 'when a trust deed contains no specific power or a trust deed's general terms are not wide enough to allow delegation' of investment management. He elaborated: 'The risk for trustees is that if they do not have a specific power and the general powers are not wide enough, they commit a breach of trust if they undertake sensible financial management by giving an investment manager a policy to act within and the

- In 2011 we consulted again on questions relating to nominees and custodians.[8] One of our concerns was that, in certain UK legislation,[9] there was a requirement that funds constituting "client money" were, in all parts of the UK other than Scotland, to be held by a nominee on trust but that, in Scotland, such money was to be held by the nominee as agent. Our view, on which we sought comments, was that a nominee should always hold property on trust under Scots law.

8.2 In this Chapter we discuss, first, the use of agents and we then turn to nominees. Although the distinction between an agent and a nominee will often be plain, in some cases it may be harder to discern in practice;[10] we do not, however, intend to dwell on this question. But one distinctive feature of nominees for present purposes is that they take possession and ownership of another person's property (which will generally be trust property in the current context),[11] whereas this is not a normal feature of agency. Particular consequences flow from this for nominees. Finally, we have a brief discussion of custodians at the end of the Chapter.

Agents

8.3 Trustees already have the power, both under statute and at common law, to appoint an agent.[12] The statutory power is in section 4(1)(f) of the 1921 Act, which provides that trustees may "appoint factors and law agents and … pay them suitable remuneration".[13] There are corresponding duties: trustees must only appoint an agent where it is reasonable to do so, the particular agent must be suitable for the proposed task, trustees should exercise periodic reviews of the agent's work, and so on.[14] We took the view, however, that the statutory power could be improved, as it is framed in old-fashioned terms, perhaps reflecting an era in which solicitors (or "men of business") were expected to carry out work which is now generally done by others, such as accountants and fund managers; there was no reason, in our opinion, for the power to be limited to only certain professional services.[15] We therefore sought views on the following proposal:

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requirement to report to trustees quarterly or every six months. That is a perfectly sensible way to manage a trust fund's investments, but the concern is that Scots law prevents trustees from acting in that way. The general principle of extending investment powers – which a Joint Report of the Law Commission and the Scottish Law Commission suggested and which has been applied in England – is to be supported.'" (SP Paper 301, Communities Committee, 1st Report, 2005 (Session 2), para 231).

[8] In Ch 5 of DP No 148.

[9] Principally the Financial Services and Markets Act 2000 but also the Estate Agents Act 1979: see paras 8.23-8.24 below.

[10] On occasion an agent will also be a nominee: eg a solicitor is an agent when acting on the client's behalf but may be considered a nominee in respect of funds received from the client (other than sums due to the agent for services provided). We discuss client monies at paras 8.22-8.28 below. For a recent discussion of agency, see L Macgregor, *The Law of Agency in Scotland* (2013).

[11] In this way, nominees are identical to trustees insofar as both are vested with property which is distinct from their personal property. See para 3.4 above for an explanation of "dual patrimonies". We note also that, without using the term "nominee", the DCFR provides a power for trustees to transfer trust assets to a third party but requires that such party is a person who "undertakes to be a trustee in relation to the assets" (X.-5:204(1)).

[12] See para 3.4 of DP No 126. Indeed there may be an obligation to exercise this power, eg where trustees are to carry out tasks which are beyond their skills and qualifications: Menzies, para 193.

[13] By s 4(1) the power applies except where it would be "at variance with the terms of purposes of the trust".

[14] See para 3.6 of DP No 126.

[15] In Jersey, an expressly expansive approach is taken: by Art 25(2)(b) of the Trusts (Jersey) Law 1984, as amended, a trustee may (subject only to specific contrary provision in the trust deed) "employ accountants, advocates, attorneys, bankers, brokers, custodians, investment advisers, nominees, property agents, solicitors and other professional agents or persons to act in relation to any of the affairs of the trust or to hold any of the trust property".

"3. Section 4(1)(f) of the Trusts (Scotland) Act 1921 should be replaced by a provision empowering trustees to appoint agents and pay them suitable remuneration."

8.4 All those who commented were in favour of such a provision. As is the case under the current law, we take the view that this power should be subject to express contrary provision in the trust deed. We therefore recommend:

19. Section 4(1)(f) of the Trusts (Scotland) Act 1921 should be replaced by a provision which, in the absence of express contrary provision in the trust deed, empowers trustees to appoint an agent and to pay the agent suitable remuneration.

(Draft Bill, section 18(1), (3) and (4))

We consider in Chapter 12 whether the agent may be one of the trustees. In making a recommendation to that effect,[16] we recognise that it raises two particular issues: first, as to the applicable standard of care in respect of the agent's actings and, secondly, whether payment for services as agent would conflict with the trustee's fiduciary duty.[17]

8.5 Having considered the general power to appoint an agent, we went on to discuss the extent of permissible delegation.[18] We explained, by reference to decisions such as that of the First Division in *Scott v Occidental Petroleum (Caledonia) Ltd*,[19] that the traditional view is that ministerial or administrative functions may be delegated but that trustees may not delegate discretionary functions. *Scott*, which concerned damages payable to a widow and her two young children in respect of her husband's death in the 1988 Piper Alpha disaster, illustrated where the line lies between what may and may not be delegated, though it may not be so readily discernible in all situations. We also discussed comparative law, in particular in England and Wales and in certain provinces of Canada. In order to ascertain views we asked:

"4. Is the existing common law on the extent to which trustees may delegate their powers to agents satisfactory or would it be better to have new statutory provisions?"

8.6 Various different views were expressed, though there was a strong preference on the part of practitioners for the current law to be clarified. There was some support for a model based on section 11(2) of the Trustee Act 2000 in England and Wales.[20] This sets out, for non-charitable trusts, the powers and functions which the trustees, acting collectively, may not delegate.[21]

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[16] Recommendation 54 in para 12.73 below.
[17] These are discussed, respectively, at paras 12.8-12.22 and 12.65-12.73 below.
[18] See paras 3.7-3.14 of DP no 126.
[19] 1990 SC 201.
[20] That Act was based on the Joint Report mentioned in the first bullet point of para 8.1 above; the Report and the Consultation Paper on which it was based (CP No 146; 1997) contain much useful information on the provisions of the Act.
[21] It is subject to any restriction or exclusion in the trust instrument: see s 26 of the 2000 Act and Lewin, para 36.27. There is separate provision for delegation by an individual trustee: see Lewin, paras 29.95-29.105, and also the start of Part IV (Trustees' Powers of Delegation) of the Joint Report cited in note 1 above. Individual delegation under the law of England and Wales is regulated by the Trustee Delegation Act 1999; we considered, but rejected, an equivalent scheme in the course of this project: see paras 3.17-3.19 of DP No 126.

8.7 In considering this issue in the light of consultation responses, we began by recalling the basic principle that trustees, both individually and collectively, have an inalienable duty to fulfil the trust purposes within the terms of the trust. They may, of course, be able to resign, or may be removed, but while in office they must not neglect their personal and onerous duties. Those duties are, however, subject to express contrary provision in the trust deed.[22] In the light of that, our view is that the approach of section 11 of the 2000 Act has several points to recommend it. Not only does it mean that there is no need to distinguish between types of function such as fiduciary, dispositive and administrative,[23] which brings conceptual simplicity, but it also provides a list of specific powers which will not normally be capable of being delegated. We think that that offers a useful guide for trusters and others. But, importantly, it recognises the underlying freedom of the truster, which is a central principle of our own reform. In an extreme case, the truster may choose to authorise the trustees to delegate all of their functions to an agent if they consider it appropriate to do so. If, in such a case, the trustees decide to delegate all, or substantially all of their functions without justification, this would constitute a breach of trust for which they would continue to be held responsible in spite of the delegation. In this way, the beneficiaries would be able to seek redress if a broad power to delegate were used extravagantly.

8.8 Summing this up, our preference is to set out a core list of functions which will not normally be expected to be delegable,[24] but also to provide that this is subject to the power of an individual truster to narrow that list, or remove it entirely, if desired. We therefore recommend:

> **20. Subject to any express restriction or exclusion in the trust deed or in legislation, trustees may delegate to an agent any of their powers other than:**
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> **(a) any function relating to whether or in what way any assets of the trust should be distributed;**
>
> **(b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;**
>
> **(c) any power to appoint a person to be a trustee of the trust; and**
>
> **(d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.**
>
> (Draft Bill, section 18(1), (5) and (7))

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[22] "The law is not that trustees cannot delegate: it is that they cannot delegate unless they have authority to do so": *Pilkington v IRC* [1964] AC 612, 639 per Viscount Radcliffe. Although this is an English case there is no principled reason to doubt that the same rule applies under Scots law. According to Kessler and Grant (at para 20.48), it is recommendable to consider such provision.

[23] For a brief discussion of these functions see Kessler and Grant at para 20.48. The authors take a broad view as to what may be delegated, though this is largely in the context of individual delegation by a single trustee (but is also applicable to collective delegation): "[o]n balance … it seems worthwhile to include a power to delegate trustees' functions generally and not restrict the power to the collective delegation of administrative/ministerial functions only". Inclusion of such a power would be effective as "whatever is permitted by the trust deed cannot be a breach of trust" (para 20.48, and note 121).

[24] We note that the DCFR takes a similar approach: see X.-5:203, especially para (3) which reserves to trustees the exercise of certain powers.

8.9 We consulted on two further topics, on neither of which we recommend any changes. We therefore deal with them briefly. The first was whether, as in some jurisdictions, trustees should be allowed to delegate their discretionary powers in relation to foreign property.[25] We took the view that this was not necessary, given both the speed of modern communications, which would allow discretionary decisions to be taken at a distance,[26] and also the ability to delegate administrative functions. Secondly, we discussed whether there should be power for a trustee to appoint a substitute, as is permitted in England and Wales.[27] On consultation, mixed views were expressed and some of those who supported the idea suggested that not all powers should be capable of delegation to a substitute. On further consideration we have reached the view that such a power would not be desirable. We say this in part because planned temporary absences – for example, for visits abroad or for medical treatment – can be accommodated by other means, such as by scheduling important decisions to be taken when trustees are available or by using video-conferencing. And unexpected absences or illness (including loss of capacity) cannot, by their very nature, be met by an ability to delegate powers in advance.

8.10 Before leaving the subject of agents we should mention investment powers. Although that topic is considered in detail in Chapter 7,[28] it is also relevant here: in many cases trustees will engage agents either to give professional advice or execute transactions, or both. (For pure execution, a nominee may be more appropriate than an agent.[29]) For that reason we consider that it would be beneficial to restate the current position, as contained in section 4C of the 1921 Act. We do so, however, within a general provision on the appointment of agents rather than as a separate provision.

Nominees

8.11 As already mentioned, we consulted on the use of nominees to hold trust property on two occasions, first in late 2004 and then in the spring of 2011.[30] In the interim, the Charities and Trustee Investment (Scotland) Act 2005 was passed and came into force, which made significant changes in this area.[31] For this reason, and also because of some high-profile litigation in the intervening period on the use on nominees in the context of an insolvency, the focus of our enquiry shifted somewhat between our first and second consultations. Nonetheless, the general issue remains one of considerable importance for trust law and for trustees in particular.

8.12 A potential source of confusion arises in connection with the definition of a nominee. In some situations, nominees are simply a species of trustee, but this is not universally applicable.[32] As we said in our later consultation, a crucial question is whether the trustees'

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[25] See paras 3.15-3.16 of DP No 126.
[26] See also paras 5.2-5.5 above where we discuss how trustees can consult each other and hold meetings at a distance.
[27] See paras 3.17-3.19 of DP No 126. We noted that such a power south of the border may be justified on the basis that trust decisions need to be taken by all of the trustees rather than a majority.
[28] See especially recommendation 18 in para 7.12 above.
[29] We discuss this at paras 3.23-3.24 of DP No 126 and paras 5.4-5.6 of DP No 148.
[30] See para 8.1 above and, respectively, paras 3.20-3.31 of DP No 126 and paras 5.3-5.12 of DP No 148.
[31] See para 8.1 above.
[32] "Nomineeship is just a special sort of bare trust": D Francis, "Personal injury trusts - the PITs? (Pt 2)" 2011 SLT (News) 16, 95, 100. On the other hand, we heard from our specialist Advisory Group on this topic that in certain situations, eg fund management, the contractual element of a nominee's relationship with the principal may be influential in determining the nature of that relationship. In part, this difference is due to the fact that, for financial

use of a nominee creates a further relationship of trust or whether it is a relationship of a different sort (such as agency or another form of contractual relationship). This is especially relevant, we noted, in the event of the nominee's insolvency,[33] but the first question to be asked is not about the nature of the trustee-nominee relationship but whether such a relationship is a permissible one at all. That is the starting point of our examination in our first consultation. We began by setting out the current law,[34] noting that trustees are under a duty to ingather and become the owners of the trust assets. Thereafter they are under a duty to keep the trust property under their own control and will be liable for any losses arising out of a breach of this duty. We cited *Ferguson v Paterson*[35] in which a law agent for the trust realised a bond on the trustees' behalf and lodged the substantial proceeds in his firm's bank account pending a permanent use for it. The trustees later directed the agent to put the sum on deposit receipt, and he did so in his own name for behoof of the trustees. On learning of this, the trustees demanded that the money be put on deposit receipt in the names of all of the trustees but this was not done. Later, the agent uplifted the money for his own use before becoming bankrupt. The court held the trustees liable for the resulting loss.

8.13 We also cited the more recent case of *Tibbert v McColl*,[36] where the trustees of a company pension fund paid into the company's overdrawn bank account a cheque payable to them in respect of money due to a retiring employee. The company went into liquidation before the employee was paid the money; the trustees were held liable for breach of trust by putting the funds out of their control and so were liable for the loss.

8.14 We went on to discuss the growing desirability to allow trustees to transfer trust property to other people, for investment and other purposes, and we noted decisions of over a century ago show that this is permitted in certain conditions: for example, the amount of the transfer must be appropriate and the arrangements under which the property is held must be kept under review, or the transfer must be for a very short period.[37] We listed arguments for and against a relaxation of these conditions, citing in particular the increasing use of nominees in financial investment transactions. We also noted developments in other jurisdictions such as England and Wales, Guernsey and the USA. In our view, the balance of the arguments lay in favour of permitting trustees to pass property to nominees provided that they take appropriate care in selecting a suitable nominee. We were not minded to limit such a reform to marketable securities, as happens in some jurisdictions, but preferred a broader scope.[38]

8.15 Separately, we discussed whether a nominee needed to meet particular requirements such as being a person who provides nominee services in the normal course of business.[39] In order to gauge views, we made a proposal and asked a supplementary question:

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investment, there is a highly complex and specific regulatory regime in which general principles of trust law may not always be clearly visible.

[33] See para 5.3 of DP No 148.
[34] See paras 3.20-3.22 of DP No 126.
[35] (1900) 2F (HL) 37, also known as *Wyman v Paterson*.
[36] 1994 SC 178.
[37] See para 3.22 of DP No 126.
[38] See paras 3.23-3.28 of DP No 126.
[39] See paras 3.29-3.30 of DP No 126.

"6. Trustees should, unless the trust deed provides otherwise, have a new statutory power to transfer ownership of trust property to a person who would hold it as a nominee of the trustees.

7. Should such a nominee be restricted to one providing nominee services in the normal course of its business? Should there be any other restrictions and if so what?"

8.16 Those responding to proposal 6 were broadly in favour. The Trustees and Trust Administration Group of the Law Society added that it considered that the benefits included a reduction in costs for the trust. The Faculty of Advocates indicated that the class of property which may be transferred to a nominee should be limited to marketable securities and bank accounts, and two respondents argued that the new rule should be available for existing as well as new trusts. The Keeper of the Registers of Scotland added that there would be concern if a transaction by a nominee were to held to be *ultra vires* under section 2 of the Trusts (Scotland) Act 1961. In response to question 7 there was a range of views but the majority favoured restricting nominees to those who provide nominee services in the normal course of their business. In addition, the Faculty of Advocates indicated that the nomineeships "should be permitted only on the basis that they are constituted as express trusts".

8.17 Events which occurred after our first Discussion Paper was published, which was in December 2004, caused us to take the view that further consultation was needed. They included the passing of the Charities and Trustee Investment (Scotland) Act 2005 which, as already narrated, inserted a provision on nominees into the 1921 Act.[40] In addition, the litigation flowing from the collapse of Lehman Brothers in 2008 prompted us to review matters and, in the course of that work, we came across what appeared to be an anomalous provision in the Financial Services and Markets Act 2000.

8.18 For all these reasons we returned to the topic in 2011.[41] As we have already mentioned,[42] we regarded the critical question as being whether a nominee who holds trust property must do so as trustee or whether other legal relationships can be used in such a situation. It is no coincidence that insolvency gave rise to some of the cases we had considered in our first consultation on this topic,[43] since it is in such circumstances that the competing interests of the trustees, on the one hand (and, through them, the beneficiaries), and the insolvent party's creditors, on the other, are brought into stark relief. The fall-out from the Lehman Brothers' failure shone a bright light on the capacity in which a nominee holds assets which have been transferred to it by other parties.[44] (In that regard, it was not relevant whether the assets were previously held by trustees or by parties in their own right: the consequences were identical.)

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[40] See para 8.1 above; s 4B of the 1921 Act provides for the appointment of nominees in connection with the exercise of the trustees' power of investment. There was some doubt as to whether the power would apply to all trustees, and in particular to those with restricted powers of investment: see A Eccles, "Investing in the Future", 2006 SLT (News) 5, 23, 27. Our recommendation 21(1) at para 8.28 below makes clear that the power is generally applicable, subject only to contrary express provision in the trust deed.

[41] In Ch 5 of DP No 148.

[42] See para 8.12 above.

[43] *Ferguson v Paterson* (1900) 2F (HL) 37, and *Tibbert v McColl* 1994 SC 178: see paras 8.12 and 8.13 above.

[44] See in particular *Re Lehman Brothers Intl (Europe) (In Administration) and Re the Insolvency Act 1986* [2012] UKSC 6, on appeal from [2010] EWCA Civ 917 and [2009] EWHC 3228 (Ch), which we discuss at paras 8.25-8.26 below.

8.19 We took the view, which was supported both by those who responded to our earlier consultation and also by our Advisory Group, that the relationship between a trustee and a person called a nominee (to whom trust property is transferred) should always be one of trust.[45] If the parties wish to create a different sort of relationship, for example one governed by contractual agreement, they should be free to do so, but should not use the term "nominee". This point has most force when the nominee is appointed outwith the confines of the statutory provision in section 4B of the 1921 Act,[46] which applies only where trustees are exercising the power of investment. There are many other situations in which trustees may transfer trust property to a person for legitimate trust purposes. For example, where trustees decide to instruct solicitors to buy a flat for use by a beneficiary (ie not for an investment purpose), then the purchase price will typically require to be transferred to the firm in advance of settlement. Regardless of whether those funds are held by the firm as agent or as nominee, they should be held in either case on trust.[47]

8.20 We will return shortly to the general question which arises here, namely the treatment of client money, but we should first record that, when we consulted on whether the relationship between a trustee and a person called a nominee should always be one of trust, there was near unanimous support.[48] Dr Carr raised the question of whether the mere use of the word "nominee" would be fatal where the parties' express intention was to create a contractual or other type of relationship. In our view, this is a sound point and illustrates the difficulty of an overly rigid rule. Nonetheless, we consider that the use of the word should be considered as a powerful indication of a trust relationship and that clear evidence of contrary intent will be needed to displace it. Dr Carr also asked whether such a trust would be a statutory one (i.e. would arise automatically) or whether any arrangements expressly set up by the parties must be under trust. He acknowledged that there is probably little difference, but the issue could be important in some cases. We agree. In our view, the safer course is to provide that the trust is to be a statutory one; but if parties create an express trust – as we consider would be good practice – then its terms would prevail. The creation of a statutory trust would therefore operate as a "back stop" provision so that a failure to constitute an express trust would not be to the trustees' detriment.

8.21 The sole dissent came from the Law Society who said:

> "The committee does not agree that the relationship between a trustee and a nominee should always be considered to be one of trust. Despite the fact that a nominee has certain duties of trust, these can vary from case to case and cannot be presumed."

Whilst we agree that there will be variation in the situations in which a nominee is used,[49] our view is that parties should not use that term if the express intention is to create a relationship

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[45] We were advised that there are, broadly, two types of nominee company which might be used, either an "in house" one or an external, commercial one: see paras 5.4-5.6 of DP No 148.

[46] Or its equivalent, s 19, in our draft Bill (though that provision is broader than s 4B: see note 40 above).

[47] It would be possible to analyse this as either a beneficiary trust or a purpose trust (as discussed in Ch 14 below, the purpose being to apply the funds to the purchase of the property). We discuss in what follows the reasons for the money being held on trust.

[48] The relevant question is in para 5.9 of DP No 148.

[49] Currently, s 4B of the 1921 Act restricts the use of nominees to the exercise of the trustees' power of investment. Whilst, in practice, this encompasses a wide range of situations, we do not consider that it is necessary or desirable to confine the use of nominees in this way. There are parallels with the recommendation in para 8.8 above: the new power to appoint an agent includes but is not restricted to investment management

other than one of trust. There are, in our view, important benefits in clarifying the role of a nominee in relation to property held by it on behalf of another person and so we consider that, in the absence of express contrary provision, a nominee should hold property entrusted to it on trust. A clear example of this is to be found in the treatment of client money, to which we now turn.

Client money

8.22 How should funds belonging to a principal, whether a trustee or not, be treated when in the hands of a nominee? Generally, such funds are termed "client monies" and there are varied and detailed rules about their treatment depending on the nature of the person in whose hands they are held. For solicitors, the common law establishes that client money is held on trust, and detailed obligations are set out in the Practice Rules made under the Solicitors (Scotland) Act 1980.[50] When we consulted on whether there would be value in setting the law out in statute there was no dissent, although the Judges of the Court of Session considered it unnecessary on the basis that "this has been clearly established by case law".[51] The Charity Law Research Unit at the University of Dundee was of the same view.

8.23 Estate agents are also subject to legal requirements relating to client money, by sections 12 to 17 of the Estate Agents Act 1979.[52] In particular, section 13(1) and (2) provides for the treatment of such money across the UK:

> "(1) It is hereby declared that clients' money received by any person in the course of estate agency work in England, Wales or Northern Ireland—
>
> > (a) is held by him on trust for the person who is entitled to call for it to be paid over to him or to be paid on his direction or to have it otherwise credited to him, or
> >
> > (b) if it is received by him as stakeholder, is held by him on trust for the person who may become so entitled on the occurrence of the event against which the money is held.
>
> (2) It is hereby declared that clients' money received by any person in the course of estate agency work in Scotland is held by him as agent for the person who is entitled to call for it to be paid over to him or to be paid on his direction or to have it otherwise credited to him."

It is immediately apparent that there is a distinction between client money held in Scotland, which subsection (2) requires to be held under agency arrangements, and such money held

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functions. Whilst it seems likely that nominees will generally be used in connection with the exercise of the power of investment, we do not intend to make this a statutory requirement. We do, though, intend that the current obligations on trustees who appoint a nominee should be retained: see para 8.28 below.

[50] See para 5.10 of DP No 148; the current version (2011) of the Practice Rules is at https://www.lawscot.org.uk/rules-and-guidance/table-of-contents. The Rules define a "client account" as one whose title includes "the word 'client', 'trustee', 'trust' or other fiduciary term" (rule 6.1.1); in our view this supports our contention that the use of a term like "nominee" is especially significant. Just as the labelling of a client account is important so too is the fact that parties have chosen to describe a person as a nominee.

[51] See question 11 in para 5.10 of DP No 148, which covered client money held not only by solicitors but by any professional firm; no respondent drew any distinction between solicitors and others.

[52] Section 16 (Insurance cover for clients' money) has not been commenced.

elsewhere in the UK, which is to be held on trust. Until very recently, the same differential treatment was mirrored, in a context in which considerably greater sums of client money were likely to be involved, in legislation relating to the financial services sector.

8.24 The statutory framework for the rules regarding client money in regulated financial institutions is contained in the Financial Services and Markets Act 2000.[53] Until recent amendment, the relevant provision was similar in its approach to the estate agents' legislation set out just above. Its subsection (1) said that "[r]ules relating to the handling of money held by an authorised person in specified circumstances ("clients' money") may … make provision which results in that clients' money being held on trust in accordance with the rules." Subsection (3) read:

> "In the application of subsection (1) to Scotland, the reference to money being held on trust is to be read as a reference to its being held as agent for the person who is entitled to call for it to be paid over to him or to be paid on his direction or to have it otherwise credited to him."

8.25 The rules made under this section, and their application to client money, were closely considered in some of the litigation raised after the collapse of Lehman Brothers.[54] The money at issue ran into the billions of dollars. Before discussing the UK Supreme Court's judgment it is worth noting that the 2000 Act has now been amended so that there is no longer a distinction between client money in Scotland and elsewhere in the UK. The Act now provides, in section 137B:

> "(1) Rules relating to the handling of money held by an authorised person in specified circumstances ("clients' money") may—
>
> > (a) make provision which results in that clients' money being held on trust in accordance with the rules, …"[55]

This topic is discussed in more detail in our earlier publication, where we also reproduce a letter sent by Lord Drummond Young, then lead Commissioner on this project, to the Advocate General for Scotland which highlighted what we saw as an anomalous and potentially prejudicial treatment of client money in Scotland.[56] We are grateful for the consideration given to our representations within the UK Government and we support the amendments which have since been made to the relevant legislation.[57] In our view, the UK-wide requirement that client money is to be held in trust, in place of the earlier requirement that it be held, in Scotland, by the nominee as agent, is a welcome protection in this jurisdiction. In addition, it is a fitting recognition of the role and function of the trust in Scots law, a value which was at best obscured (if not, denied) under the earlier statutory provision.

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[53] We recognise that the subject of this Act is a reserved matter for the purposes of the Scotland Act 1998, as amended. Whilst we consider that the analysis we put forward for the treatment of client money would hold good in reserved situations as it does in those which are devolved, we confine our recommendation (in para 8.28 below) to client money which is transferred to a nominee by a body of trustees. This falls within the devolved matter of trust law (as mentioned in para 1.18 above).

[54] See note 44 to para 8.18 above.

[55] The amendment was effected by s 24(1) of the Financial Services Act 2012.

[56] See paras 5.7-5.8 of DP No 148 and its Appendix A (which sets out Lord Drummond Young's letter).

[57] See note 56 above.

8.26 In that connection, it is noteworthy that Lord Hope, who presided over the court which heard the Lehman Brothers litigation in the Supreme Court,[58] devoted a considerable amount of his judgment to the question of how client money would have been protected in Scotland by rules made under the then-current powers in the 2000 Act, as set out in paragraph 8.24 above. In other words, would the protection have been different if the money had required to be held by the authorised person as agent rather than as trustee? Lord Hope considered that the short answer to this question was no;[59] referring to the letter from Lord Drummond Young, which had been drawn to the court's attention, he concluded:

> "The question raised by the Scottish Law Commission as to whether the same level of client protection is available in Scotland as elsewhere in the United Kingdom may not have been entirely resolved by the way the questions before us in this appeal have been answered. But it respectfully seems to me that the direction in section 139(3) of the 2000 Act that the reference to money being held on trust is to be read as a reference to its being held as agent offers a level of protection that is no less effective. This is because it is to be assumed that the relationship between the agent and the client is a fiduciary relationship of the kind identified in *Jopp v Johnston's Trustee* and *Council of the Law Society of Scotland v McKinnie*. It is worth noting too that I have found it helpful to examine the problems that this case gives rise to by assuming that the relationship between LBIE [the Lehman Bros entity under consideration] and its clients was indeed one of agency. The clarity with which the effect and consequences of that relationship has been described is compelling. As it is to be assumed that the protection given by the trust approach was intended to be just as effective, I think that the Scottish approach provides strong support for the conclusions that Lord Walker has reached in accordance with the direction in section 139(1) of the Act that applies to England and Wales."[60]

8.27 The issue of whether the agency route would have offered as good a protection as the trust one is no longer likely to be live in this context, given the recent amendments to the 2000 Act and to the rules made under it.[61] Nonetheless, we remain of the view that it is preferable to have – as we now do – a uniform approach across the UK which is based on the trust.[62] We also consider that there is merit in making the position plain by including a statutory provision that client money is to be held on trust. Not only will this put the matter beyond doubt, but it will also serve as a pedagogic reminder to trustees, nominees and others of the important need to treat client money carefully.

8.28 So, in concluding our discussion of nominees, we recommend that:

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[58] *Re Lehman Brothers Intl (Europe) (In Administration) and Re the Insolvency Act 1986* [2012] UKSC 6. Lord Hope's speech is a partly dissenting one.

[59] As the question was a hypothetical one from the perspective of the litigants, this part of the speech is obiter.

[60] [2012] UKSC 6, para 22. The cases of *Jopp v Johnston's Tr* (1904) 6F 1028 and *Council of the Law Society of Scotland v McKinnie* 1991 SC 355 (in which Lord Hope, as Lord President, presided) are discussed earlier in his Lordship's speech and are footnoted in our discussion of client money at para 5.10 of DP No 148. For a discussion of the decision from a comparative law perspective, including an examination of comparable rules on client money in Belgian, Dutch, French and German law, see D Gruyaert and S van Loock, "UK Supreme Court Decision on Lehman Brothers Client Money: Equity or Lottery?" (2014) 22(2) ERPL 217.

[61] But the Estate Agents Act 1979, quoted in para 8.23, remains unamended and so the issue might arise there.

[62] We note that doubts were raised by some of the Justices as to whether the statutory trusts which arose under the 2000 Act rules were on a par with traditional express trusts. For instance, Lord Collins said that "it does not follow that, when the word 'trust' is used, that brings with it the full range of trust indicia associated with a traditional private law trust, particularly so when the trust is imposed by statue and is in the context of the exercise of a public function" (at para 189). We do not consider this issue further here as it is not germane to the discussion of nominees and arises in connection with the Anglo Welsh law of trusts.

21. (1) Trustees have the power to appoint a nominee for the purpose of exercising any of their powers and to transfer the title of trust assets to that nominee. This is subject to express contrary provision in the trust deed.

(2) Where title to assets is transferred to a nominee by trustees, the nominee holds those assets, including client money, on trust for the transferor.

(Draft Bill, section 19(1), (3) and (4))

The important obligations on trustees, both at the time of appointing a nominee and subsequently, which are contained in section 4B of the 1921 Act are carried forward into the new legislation.[63]

Custodians

8.29 The final topic is that of custodians. We asked for views as to whether the law relating to custodians should be reformed.[64] Our opinion was that it was satisfactory and that no reform was needed. Those who responded almost all agreed, as did the members of our *ad hoc* Advisory Group. We learned that custodians are rarely used in modern practice and that if a trust asset is to be held in custody it is not uncommon for the third party custodian to require title to be transferred to it (in which case the person is essentially a nominee). We therefore make no recommendation for change in this area.

[63] See s 4B(2) and (3)-(6) of the 1921 Act, and s 19 of our draft Bill.
[64] At paras 3.32-3.33 of DP No 126 and para 5.13 of DP No 148.

Chapter 9 Powers of advancement

Background

9.1 We have considered the question of powers of advancement at two points in our discussion papers. First, the Discussion Paper on Trustees and Trust Administration[1] made proposals in relation to the advancement of capital by trustees to beneficiaries. In summary, the proposal was to replace the current rules on advances with a new, wider, statutory power. We returned to the matter in Chapter 9 of our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law.[2]

9.2 In the Discussion Paper on Trustees and Trust Administration[3] we considered the existing law, and in particular section 16 of the 1921 Act, which provides as follows:

> "The court may, from time to time under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined either absolutely or contingently to beneficiaries who at the date of the application to the court are not of full age, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries or any of them, and that it is not expressly prohibited by the trust deed, and that the rights of such beneficiaries, if contingent, are contingent only on their survivance."

We observed that the power granted by section 16 is narrowly drawn, and appeared unduly restrictive for a number of reasons. First, it limited advances of capital to beneficiaries who are not of full age. We considered that this was unduly restrictive, since adult and in particular elderly beneficiaries might require advances of capital if they had insufficient resources of their own. Secondly, advances of capital may only be made for the "maintenance or education" of beneficiaries. We considered that this was too restrictive; it might not cover such cases as a beneficiary who required a capital payment for setting up or expanding a business, or an elderly beneficiary who might require to alter his or her home. Thirdly, section 16 specifies that an advance of capital must be "necessary". We thought that this standard was too high, and was out of step with other jurisdictions with comparable provisions. Fourthly, while section 16 permits advances to contingent beneficiaries, this is only possible if their rights to capital are contingent only upon their survivance. Other contingencies, such as marriage or graduation, are not covered; in this respect section 16 differs from the law in England and Wales and other jurisdictions.

9.3 Fifthly, an important limitation is that court authorisation is required before advances of capital may be made. This appeared to us to be unduly restrictive. The cost of a court application might easily deter use of the power, especially if the sum proposed to be advanced were relatively small. It was also, we thought, arguable that trustees were in a better position than the court to assess the needs of particular beneficiaries.

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[1] DP No 126.
[2] DP No 148.
[3] Pt 6, paras 6.2-6.19.

9.4 In view of the foregoing restrictions, we considered that reform of the law was necessary. Discussion of the subject in the Discussion Paper on Supplementary and Miscellaneous Issues proceeded on the same hypothesis. In the Discussion Paper on Trustees and Trust Administration we put forward the following proposals and questions:[4]

> "26. (1) Section 16 of the Trusts (Scotland) Act 1921 and the Court of Session's common law powers to authorise advances of capital should be replaced by a new statutory provision along the following lines:
>
> Trustees should have power to advance capital to a beneficiary where:
>
> (a) the trust deed does not expressly prohibit an advance;
>
> (b) at the date of the advance the beneficiary has a right to all or part of the capital of the trust estate which is vested, is vested subject to defeasance or diminution by the occurrence of some uncertain future event, or will vest provided some uncertain future event occurs.
>
> (c) the advance would be, in their view, for the maintenance, education or benefit of the beneficiary.
>
> (d) every person with a prior life or other interest who would be prejudiced by the advance consents.
>
> (2) The trustees should be entitled to place the sum advanced in a new trust for the beneficiary, although others may also gain incidental benefit.
>
> (3) The court should continue to have power, on application, to authorise an advance where a person with a prior life or other interest who would be prejudiced by the advance:
>
> (i) is incapable of consenting; or
>
> (ii) is withholding consent unreasonably.
>
> (4) Should the trustees' power to advance be limited to a specified proportion of the value of the beneficiary's prospective share and, if so, what should that proportion be?"

9.5 The consultation responses to the foregoing proposals was generally favourable, with a majority of respondents favouring the replacement of section 16 of the 1921 Act by a new power to advance capital along the lines suggested. The responses to the final question, as to whether there should be a cap on the trustees' power to make advances of capital, were mixed. Suggestions ranged from a cap of one third of the value of the beneficiary's prospective share to no cap at all. The Law Society thought that a cap could assist trustees in resisting excessive requests for advances, but others thought that maximum flexibility was desirable. In this connection, we note that an Act has recently been passed to amend the law in England and Wales so as to remove the limit of one half of a beneficiary's prospective

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[4] DP No 126, para 6.19.

share.[5] We discussed this development[6] at a meeting with our Advisory Group held in June 2011. The members of the Group stated that this area can be contentious in practice and arises frequently. Differing views were expressed as to whether the administration of a trust can be eased if a restriction on advancement is in place. There appear to be general acceptance, however, that a cap of one half might be appropriate in a default provision such as is proposed.

Discussion Paper on Supplementary and Miscellaneous Issues

9.6 In the light of the consultation responses to the earlier Discussion Paper, we re-visited the question of advancement in our Discussion Paper on Supplementary and Miscellaneous Issues. We were concerned that the earlier proposals might be too wide in that they conferred an unlimited power on trustees to favour some beneficiaries at the expense of others without court approval. While that would be entirely acceptable if it were the considered wish of the truster, we thought that it might go too far as a default provision. Furthermore, we had conducted additional research into comparative provisions in other jurisdictions. It appeared to us that the provision dealing with powers of advancement in the law of England and Wales had been extremely successful in practice.[7] It had been followed in Australian jurisdictions, with certain additional features, and we considered that these were well drafted provisions that could usefully serve as a model for Scots law.[8] We were particularly attracted by the provisions in Queensland and Western Australia, which cap the amount of trust capital that can be advanced but also include a power to impose conditions upon advances. We thought that such a power would be a useful addition in Scotland.

9.7 We accordingly made certain revised proposals to the effect that section 16 of the 1921 Act should be replaced by a provision modelled on the legislation currently in force in Queensland and Western Australia, itself modelled on section 32 of the Trustee Act 1925 in England and Wales. In doing so, we proposed that there should be a cap of one half of a beneficiary's prospective share. Our proposals were as follows:[9]

> "22. Section 16 of the Trusts (Scotland) Act 1921 and the Court of Session's common law powers to authorise advances of capital should be replaced by a new statutory provision along the following lines:
>
> Trustees should have power to advance up to half of a beneficiary's share in the capital of the trust fund where:
>
> (a) the trust deed does not expressly prohibit advancement of capital;
>
> (b) at the date of the advance the beneficiary has a right to all or part of the capital of the trust estate which is vested, is vested subject to

[5] The cap in s 32 of the Trustee Act 1925 will be removed by s 9 of the Inheritance and Trustees' Powers Act 2014 when it is commenced. This follows a recommendation of the Law Commission for England and Wales: see the CP on Intestacy and Family Provision Claims on Death (CP No 191 (Supplementary); 2011) and the subsequent report of the same name (LC No 331; 2011).
[6] In the form of the Law Commission's Consultation Paper cited in the note above.
[7] Trustee Act 1925, s 32; Underhill and Hayton, which states, at para 63.2, that the statutory power represents the power that was previously inserted in well drafted settlements.
[8] See paras 9.13-9.14 of DP No 148.
[9] At para 9.15 of DP No 148.

defeasance or diminution by the occurrence of some uncertain future event, or will vest provided some uncertain future event occurs;

(c) the advance would be, in their view, for the maintenance, education or benefit of the beneficiary;

(d) every person with a prior life or other interest who would be prejudiced by the advance consents.

The power would be a default power, and would be superseded by any contrary provision in the trust deed.

23. The court should continue to have power, on application, to authorise an advance where a person with a prior life or other interest who would be prejudiced by the advance:

(a) is incapable of consenting and a reasonable person in his or her position would have consented; or

(b) is withholding consent unreasonably.

24. The trustees should have authority to impose any condition upon the advance, whether as to repayment of the sum advanced, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustees should be entitled, either wholly or in part, to waive the condition or release any obligation undertaken or any security given by reason of the condition.

25. The trustees should be entitled to place the sum advanced in a new trust for the beneficiary, even if others may thereby gain incidental benefit."

9.8 On consultation, respondents were broadly in agreement with proposal 22, although differing views were again expressed on whether a cap on the amount that might be advanced was required. Some respondents were of opinion that the whole amount of a beneficiary's prospective share should be capable of advancement, particularly if trustees were given power to impose conditions, as envisaged in proposal 24. The majority view was that, if a cap were to be imposed, the most appropriate level would be half of the value of the prospective share, as in England and Wales under the then current legislation. The Law Society suggested that it should be possible to advance more than half of a beneficiary's prospective share with the authorisation of the court. They further commented that they found proposal 22(c) too restrictive. We have accepted this suggestion, and we consider that it should be sufficient for an advance to be made that it should be for the benefit of the beneficiary; we consider the words "maintenance" and "education" to be comprehended within the notion of benefit, and leaving out reference to those words makes it clear that the word "benefit" is intended to be of the widest signification. Nevertheless, there are obviously limits to what is permitted; as we observed in our Discussion Paper on Trustees and Trust Administration,[10] it could not be said that an advance was for the benefit of a beneficiary who was too young or a spendthrift or a drug addict.

[10] At para 6.12 of DP No 126.

9.9 A further matter raised by our Advisory Group was whether, in proposal 22(d), the expression "every person with a prior life *or other* interest" might be too wide, embracing all possible beneficiaries. It is obviously not intended that it should embrace all possible beneficiaries. Thus we think that the words "or other" should be deleted, to make clear that it is only those with a prior interest who must consent, subject to the court's power to give its consent in place of a beneficiary who is withholding consent unreasonably (under proposal 23(b)). Lastly, the question was raised as to what would happen where an advance is made to a person whose right, in the words of proposal 22(b), "is vested subject to defeasance or diminution by the occurrence of some uncertain future event, or will vest provided some uncertain future event occurs" if, as events later unfold, the right becomes subject to defeasance or diminution or does not in fact vest. The answer is that the person to whom the advance is made remains entitled to it. But one should remember that, in any case of this nature where an advance is contemplated, there will almost certainly be other people with a prior interest who would be prejudiced if the advance were made; under proposals 22(d) and 23, no advance may be made unless they consent or have their consent supplied by the court. The trustees may also impose a condition of repayment to take account of the future uncertainties (under proposal 24), though in the typical situation that should not be necessary in view of the need for the consent of those who would be prejudiced.

9.10 As we have already indicated, by far the most contentious issue was whether there should be a cap on the amount that may be advanced. It is probably fair to say that a majority of respondents favoured a cap of one half of a beneficiary's prospective share. Since the Discussion Paper on Supplementary and Miscellaneous Issues was published,[11] the Law Commission for England and Wales has recommended that the cap be removed.[12] We considered that there is some force in this. We are also conscious that, if Scotland is seen to be adopting a version of the law in England and Wales, without regard to proposed changes to it, the impression may be created that Scots law is failing to keep up to date with current developments. Finally on this issue, we consider it important that the relevant provision is only a default provision. If a truster wishes to restrict the power of advancement by imposing a cap, he or she may readily do so, if necessary by using wording similar to the statutory provision but with the addition of appropriate words of limitation. Indeed, if a truster wishes to exclude any power of advancement, the statutory default provision can be excluded.[13] For those reasons we consider that the default provision should not include a cap on the amount of any advance.

9.11 In relation to proposal 23, respondents to the consultation were generally in broad agreement. The Law Society suggested that there might be scope to clarify the respective roles of the courts and designated guardians of people who lack legal capacity. They suggested that, where an individual was incapable of consenting, the court should not generally exercise its power to supply consent in lieu of a designated guardian who could consent on the individual's behalf, and any statutory power should not undermine the importance of appointing a guardian to consent on the individual's behalf. It is accepted, however, that in some situations in relation to family trusts a parent might not be able to separate his or her own interest from that of a child on whose behalf he or she might otherwise make decisions, and that the court might require to intervene in such a case.

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[11] In April 2011.
[12] And indeed legislation to that effect has subsequently been passed, though not yet commenced: see note 5 to para 9.5 above.
[13] As is the case with s 16 of the 1921 Act.

While we can see some force in the Law Society's observations, we are concerned that the statutory power of advancement should not be unduly complicated. If provision were made for a guardian or attorney to supply consent in a case of either youth or mental incapacity, there is a clear risk that conflicts of interest might arise, possibly without being properly appreciated by those involved. If account were to be taken of the possibility of conflicts of interest in the legislation, there is a danger that the statutory provisions would become unduly complex, and they might not satisfactorily cover every case where a conflict of interest arose. In these circumstances, we consider that it is better to rely on a power in the court to supply consent in cases where the beneficiary in question is incapable, whether through youth or incapacity. We consider it axiomatic that in such a case the court would give due weight to the views expressed by the beneficiary's guardian or attorney, but would obviously also take into account any actual or potential conflict of interest. We do not think that the expenses of such an application should be great; as discussed elsewhere in this Report, we consider that with modern forms of electronic communication court procedures should be easy to use, inexpensive, and rapid. In relation to the powers of the court, the Faculty of Advocates suggested that the sanction of the court should be required more generally than we proposed; in particular, they suggested that it should be required in cases where the advance was for the "benefit" of a beneficiary, as opposed to his or her "education" or "maintenance". While we understand the concerns that may underlie this suggestion, we consider that it is appropriate to follow the models that are available in England and Wales and the various Australian jurisdictions. In those jurisdictions, the expression "maintenance, education or benefit" has traditionally been used, without any apparent difficulty. As we have indicated,[14] we think that the references to maintenance and education may reasonably be removed. Our intention is that there should be a wide power of advancement if the default provision is used.

9.12 In relation to proposal 24, respondents were broadly in favour of the proposal. A number of members of the Advisory Group raised the question of whether any conditions would cease to be binding when the matter that they addressed had been resolved. The Law Society also suggested that greater clarification might be provided by, for example, extending the provision to cover loans as well as advances. (We considered that by imposing conditions on an advance it would be possible to restrict it in such a way that it was in effect converted into a loan rather than an outright transfer.) They were also concerned about a possible interaction between the imposition of the conditions and the power of the court to supply consent where a beneficiary was incapable of consenting. While we can see some force in these suggestions, it seems to us that conditions will take effect according to their terms. Thus whether a condition continues to bind when the situation that it was designed to deal with has ceased to exist will depend on the way in which the condition is framed. In this connection, we note that a general power to impose conditions is available in certain Australian jurisdictions, and does not appear to have caused any difficulties there. If a condition is imposed, it is obviously important that care should be taken in how it is framed, with a view in particular to identifying circumstances in which the condition will cease to be binding. As to the interaction of conditions with the court's power to provide consent, in accordance with proposal 23(b), we think that this is a matter that will have to be considered by the court on a case-by-case basis. Clearly the imposition of conditions may be a highly relevant factor in deciding whether or not a beneficiary is withholding consent unreasonably. Once again, however, we note that the power to impose conditions does not appear to have

[14] At para 9.8 above.

given rise to significant difficulties in Australia. With respect to the relationship between conditional advances and loans, we acknowledge that a conditional advance might amount in practice to the same thing as a loan, if it is repayable on a specified event. Nonetheless, we do not think that this should cause any difficulties in practice; what is involved is the advancement of funds for a limited period, which in some circumstances may be an entirely reasonable way to proceed. Once again, we would emphasise that any condition must, if necessary, be enforced according to its terms.

9.13 In relation to proposal 25, respondents were broadly in agreement that the trustees should be entitled to place a sum advanced in a new trust for the beneficiary, although a number expressed misgivings at allowing other persons to gain an incidental benefit from the creation of a new trust. The Law Society noted that many modern trust deeds provide a power to this effect, but that it might not be appropriate in a default power owing to the inherent dilution of benefit that might result. Members of our Advisory Group also indicated that it is common in practice in Scotland for advances of capital to be placed in trust, although this is obviously in cases where there is an express power in the trust deed. Despite these concerns, we think that we should adhere to our proposal. While we can see some force in the concern expressed by the Law Society, we note that the use of trusts in such a situation is reasonably common in practice and does not appear to give rise to practical difficulties. In an extreme case, where the bulk of the benefit would inevitably inure to persons other than the beneficiary concerned, we consider that it could not be said that the advance was made for the "benefit" of the beneficiary in question. On that basis there would be a breach of trust.

9.14 In light of the consultation responses and the foregoing discussion, we recommend:

22. Section 16 of the 1921 Act and the Court of Session's common law powers to authorise advances of capital should be replaced by a new provision by which trustees have power to advance up to the whole of a beneficiary's prospective share in the capital of the trust fund where:

(a) the trust deed does not expressly prohibit advancement of capital;

(b) at the date of the advance the beneficiary has a right to all or part of the capital of the trust property which is vested, is vested subject to defeasance or diminution by the occurrence of some uncertain future event, or will vest provided some uncertain future event occurs;

(c) the advance would be, in their view, for the benefit of the beneficiary; and

(d) every person with a prior life interest who would be prejudiced by the advance consents.

(Draft Bill, section 20(1), (4), (5)(a))

23. The court should continue to have power, on application, to authorise an advance where a person with a prior life interest who would be prejudiced by the advance:

(a) is incapable of consenting and a reasonable person in his or her position would have consented; or

(b) is withholding consent unreasonably.

(Draft Bill, section 20(5)(b))

24. The trustees should have authority to impose any condition upon the advance, whether as to repayment of the sum advanced, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustees should be entitled, either wholly or in part, to waive the condition or release any obligation undertaken or any security given by reason of the condition.

(Draft Bill, section 20(2) and (3))

25. The trustees should be entitled to place the sum advanced in a new trust for the beneficiary, even if others may thereby gain incidental benefit.

(Draft Bill, section 20(9) and (10))

Payment of income

9.15 In our Discussion Paper on Trustees and Trust Administration we considered the question of whether Scots law should include statutory provisions authorising trustees to pay income for the maintenance or education of beneficiaries.[15] We pointed out that there are no such provisions at present, although in the exercise of its *nobile officium* the Court of Session might authorise trustees to make such payments. An application to the court to that effect must be made where the beneficiary's share is not vested or income is to be accumulated until the date of payment of the share arrives. We discussed a number of cases where such applications had been made. We further pointed out that in England and Wales under section 31 of the Trustee Act 1925 trustees are empowered to make payments out of income for the maintenance, education or benefit of contingent beneficiaries. Similar provisions are found in the legislation of Australian states.[16]

9.16 We indicated that, if a broad default power of advancement such as discussed earlier in this Chapter were provided, it would be possible to deal with the Scottish cases where an application had been made to the *nobile officium* by making periodic advances of capital. Nevertheless, we thought that there were situations where a power to pay income to a prospective beneficiary who was in need would be useful. We thought, however, that trustees should not have a statutory power to disregard the plain terms of the trust deed. We accordingly made the foregoing proposal:

> "(1) There should be new statutory provisions authorising trustees to pay to a beneficiary income arising from his or her prospective share where they consider the payment is required for the beneficiary's maintenance, education or benefit. At the

[15] Paras 6.20-6.25 of DP No 126.
[16] See para 99 of Appendix A to DP No 126.

date of payment the beneficiary's prospective share should have to be vested, be vested subject to defeasance or diminution by the occurrence of some uncertain future event, or would vest provided some uncertain future event occurred.

(2) Trustees should have no statutory authority to pay if the trust deed directs that income be accumulated, but should be entitled to apply to the court for authority to make payments."[17]

9.17 On consultation, the majority of respondents agreed with this proposal. We consider that a power along these lines would be useful in practice in a number of cases. We are conscious that a similar power exists under the Trustee Act 1925 in England and Wales, and we understand that it is regarded as valuable. What is proposed is much less radical than a power of advancement, as the trust capital is left intact and only income is affected. The 1925 Act power appears to have worked well in practice, and what we propose is modelled broadly on that power, along with the equivalent powers found in Australian states. In these circumstances we consider that our proposals should implemented. We consider, however, that the reference in the proposal to the payment's being required for a beneficiary's "maintenance, education or benefit" should be modified in the same way as the same expression was modified in relation to the default power of advancement. In this way the reference will only be to the benefit of a beneficiary. We consider that the concepts of "maintenance" and "education" are both included within the notion of "benefit", and we consider that there is an advantage if the same wording is used. While this is possibly a widening of the power, we are conscious that the power to make payments from income is only applicable in carefully defined circumstances, and we do not think that it will result in any undue disregard of the terms of trust deeds. In any event, the power is a default power, and can, if desired, be excluded by a truster. We accordingly make the following recommendation:

26. (1) There should be new statutory provision authorising trustees to pay to a beneficiary income arising from his or her prospective share where the trustees consider that the payment is required for the beneficiary's benefit. At the date of payment the beneficiary's prospective share must be destined to vest either unconditionally, or subject to defeasance or diminution on the occurrence of some uncertain future event, or if some uncertain future event occurred.

(2) If the trust deed directs that income be accumulated, the trustees must seek authority from the court before they are able to exercise the power referred to in paragraph (1).

(Draft Bill, section 24)

[17] Proposal 27 in para 6.25 of DP No 126.

Chapter 10 Apportionment of trust receipts and outgoings

Introduction

10.1 In September 2003 we published a Discussion Paper on the Apportionment of Trust Receipts and Outgoings.[1] We suggested that the law in this area was badly in need of reform, and made certain proposals that were designed to bring it into line with current best practice. These were favourably received in discussions with our Advisory Groups.

10.2 We indicated that allocation and apportionment between income and capital is important whenever a truster creates a liferent, with the liferenter entitled to the income from the trust property and the fiar to the capital.[2] Further issues can arise at the start or termination of a liferent, where sums received by the trustees relating to a period which includes the start or termination date have to be apportioned on a time basis so that each interested person gets the appropriate fraction of the total. Time apportionment may also be necessary on the purchase and sale of income-producing investments.

10.3 We stated that the law in this area is largely to be found in the common law.[3] No general rule exists to govern the question of whether a particular receipt should be treated as capital or income. Attempts had been made to formulate such a rule,[4] but they had not been successful because of the breadth and complexity of the situations in which it would have to be applied. Additionally, new types of receipts and outgoings frequently arise, particularly in connection with company distributions or reorganisations; thus, the utility of any comprehensive set of rules or guidelines would diminish with time. It is also clear that the existing rules are unwarrantably complex and can often produce inequitable results for one or other class of beneficiary. Many trust deeds now contain an express provision, typically in the form of a discretionary power, designed to avoid the problems arising from the common law rules. Our proposals were based on such provisions, which we considered represented current best practice.

Proposals in DP No 124

Allocation of trust receipts and outgoings

10.4 Against the foregoing background, we made three main proposals. The first was in the following terms:

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[1] DP No 124.
[2] Ibid, para 1.10. Gretton and Steven define liferent as "the right to use somebody else's property for life. It is a subordinate real right, encumbering the other party's ownership" (at para 21.1). The person enjoying the right is called the liferenter (and we use that term to denote both men and women, though "liferentrix" is sometimes used for women); the fiar is the person whose ownership is encumbered. See further para 18.4 below.
[3] At para 1.11.
[4] Eg by Lord McLaren in *Ross's Trs v Nicoll* (1902) 5 F 146, 149.

"1. Trustees should have a new statutory power to alter the allocation under the existing statutory or common law rules of a receipt or an outgoing to income or capital or to alter the apportionment of a receipt or an outgoing between income and capital in order to maintain a fair balance between the income and capital beneficiaries of the trust. This power should be subject to any contrary provisions in the trust deed."[5]

10.5 This proposal was designed to bring the default rule in this regard into line with current best practice. This would benefit trusts that made no express provision. That is a policy that we have generally followed throughout this Report. Our discussions with our Advisory Groups indicated that clauses along these lines were standard, and were generally successful in providing a solution to the serious and frequent problems of allocation and apportionment that arise under the common law rules. The critical point of the proposal was that, in allocating trust receipts, trustees should be under a general duty to act fairly. This obviously involved an element of discretion, but one which had to be exercised in a particular manner: to strike a fair balance between income and capital beneficiaries in such a way as to fulfil the basic purposes of the trust.

10.6 In this way, the power was intended to be fiduciary in nature, and also subject to the trustees' duties of care. It would therefore have to be used for its proper purpose, striking a fair balance between different classes of beneficiaries. If it were used to alter the interests of the beneficiaries, in such a way that it encroached on the trust purposes, that would be a clear breach of fiduciary duty and consequently a breach of trust. Thus such a power could not be used to convert the trust into a discretionary trust; the overriding requirement in the power that the trustees should strike a fair balance would prevent that. Furthermore, trustees' exercise of the power to alter the allocation of receipts and outgoings would be subject to judicial control. Thus if trustees attempted to use the power in a manner at variance with the trust purposes, as by converting a liferent trust into a form of discretionary trust, they could be held to account by the beneficiaries.

Time apportionment

10.7 The second proposal that we made in the Discussion Paper related to time apportionment. At common law, instalments of annuities, rent and interest on heritable bonds did not vest until the time for payment arrived. By contrast, interest on personal bonds and the profits of business enterprises were regarded as accruing from day to day and were therefore apportionable. The common law was changed by the Apportionment Act 1870, which provided that all rents, annuities, dividends and other periodical payments in the nature of interest should be considered as accruing from day to day. The result is that they are apportionable between liferenter and fiar on that basis. In Scottish trust practice time apportionment is also carried out on the sale and purchase of income producing investments.[6]

10.8 Time apportionment at the beginning and end of a liferent can produce results that are quite different from the expectations of most trusters.[7] Dividends, interest and other periodical payments that accrue before the liferent comes into being form part of the capital

[5] At para 2.42.
[6] At para 3.5.
[7] At para 3.7.

of the trust property even if they are paid after the liferent begins. Dividends, interest and other periodical payments that accrue and are paid after the beginning of the liferent must be apportioned if part of the period in respect of which they are due falls before the start of the liferent. The result of this is that liferenters may receive little or no income in the initial stages of a liferent. That may, however, be a time when they are most in need of it, notably in the case of widows who have lost husbands on whom they were financially dependent. A corresponding problem arises at the end of a liferent, when dividends and other payments that relate to a period during part of which the liferent was in existence are apportioned so that the liferenter's estate receives a proportion.

10.9 We pointed out that time apportionment on the sale and purchase of income bearing investments involves a great deal of work for very little substantial benefit.[8] Apportionment on purchase and sale is usually neutral overall.[9] We indicated that no apportionment on purchase and sale occurs in England and Wales unless non-apportionment produces a glaring injustice.[10] It had further been thought by the Trust Law Committee, in a Consultation Paper on Capital and Income of Trusts,[11] that a general discretionary power to allocate or apportion receipts as between income and capital would address this problem. We referred to the practical difficulties that arose from time apportionment, and we referred to a practice found in many modern trust deeds of including a provision declaring that there will be no apportionment as between capital and income on any occasion.

10.10 We did not propose the repeal of the Apportionment Act 1870 because its applicability was not limited to trusts. We thought that the options were to have legislation providing either that there should be no apportionment on any occasion or that trustees should have discretionary power not to apportion in circumstances where they would otherwise be required to do so. We were inclined to favour the second option; we thought that a no-apportionment provision would provide too rigid a rule. We referred to cases that might arise, for example on the sale of a company shareholding with a very large dividend entitlement, where fairness required apportionment in order to preserve a proper balance between income and capital beneficiaries. We also indicated that apportionment is required for income tax purposes on the purchase and sale of certain fixed interest securities.

10.11 Against that background, we made the following proposal:

> "4. Trustees should have a new statutory power, exercisable on a discretionary basis, not to apportion dividends and other periodical payments on a time basis when they would otherwise be required to do so in terms of the Apportionment Act 1870 or any rule of law.".

We further asked whether there should be a statutory list of factors that trustees must take into account in exercising such a discretionary power, and if so what factors should be listed.

10.12 On consultation this proposal met with universal support, and it was also supported by our Advisory Groups. It was generally thought that there was no need to have a statutory

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[8] At para 3.8.
[9] Barr et al, para 7-28.
[10] At para 3.9.
[11] http://www.kcl.ac.uk/law/research/centres/trustlawcommittee/consultationpaperspdfs/TLCJMspaper19111.pdf (1999); see para 6.7 of the CP in particular.

list of factors that require to be taken into account; in practice such a power is regularly included in trust deeds, and its application does not give rise to significant difficulties.

Rules of equitable apportionment

10.13 The third area where we considered reform of the law relates to the rules of equitable apportionment. A number of specific rules dealing with the apportionment of receipts and outgoings have been developed in English equity. These have to some extent been adopted in Scots law, although the precise extent to which they represent Scots law is not always clear. The principal rules of equitable apportionment are as follows:

1. The rule in *Howe v Earl of Dartmouth*.[12] If a trust is created over moveable property which comprises wasting assets or unauthorised investments,[13] such property must generally be sold and the proceeds invested in authorised securities. The rule is founded on the need to balance the interests of income and capital beneficiaries. Wasting assets may not outlive the liferent, and unauthorised investments historically were likely to produce a high income but with a serious risk to capital. A second branch of the rule deals with a situation where the wasting assets or unauthorised investments have not been sold: in that event the trust property is treated as between income beneficiaries and capital beneficiaries as if the property in question had been sold and the proceeds invested in proper investments. The income beneficiaries are then entitled to a "fair equivalent" of the sums that such assets would have yielded on sale.

2. The rule in *Re Earl of Chesterfield's Trusts*.[14] This rule applies where a truster is entitled to future or reversionary property, moveable in nature and not currently yielding income, and directs it to be sold but leaves the time of sale to the discretion of trustees, who decline to sell it until it falls into possession. In that event, a number of complex calculations must be undertaken. Essentially the trustees are to ascertain the sum which, with accumulations of compound interest (assuming yearly rests and after deducting tax), would, on the day when the reversion falls in or is realised, amount to the sum actually received. The sum ascertained in that way is treated as capital.

3. The rule in *Allhusen v Whittell*.[15] This is the corresponding rule relating to debts, liabilities and other charges payable out of trust property. The general rule requires that, as liferenters are entitled to the profits of the trust property, they must also bear the burdens attending the liferented subjects, including debts payable in respect of those subjects. This may include repairing and similar obligations.

10.14 All of the foregoing rules appear to have been incorporated into Scots law to some extent at least,[16] but they can be excluded by the trust deed. We raised the question of whether the various rules dealing with equitable apportionment should be abrogated.[17] We

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[12] (1802) 7 Ves 137. See paras 2.11-2.16 of DP No 124.
[13] Unauthorised investments are those which are outwith the trustees' powers: see Gretton and Steven, para 23.19 and Lewin, paras 25.84-25.85.
[14] (1883) 24 Ch 643. See paras 2.17-2.20 of DP No 124.
[15] (1867) 4 Eq 295. See paras 2.21-2.24 of DP No 124.
[16] The relevant case-law is discussed at paras 2.17-2.24 of DP No 124.
[17] At para 2.41 of DP No 124.

thought that they were of little use at the present day as they require complex calculations to be made and generally affect the rights of the beneficiaries to a minor extent only. There was, moreover, some doubt as to whether and to what extent they were part of Scots law at all. We thought that if they were not expressly abrogated there was a danger that trustees would feel obliged to work out results using these rules before deciding on the respective interests of the liferenters and fiars.

10.15 Against that background, we asked the following question

> "3. Should the rules of equitable apportionment contained in the cases of *Howe v Earl of Dartmouth*, *Re Earl of Chesterfield's Trusts* and *Allhusen v Whittell* be expressly abrogated?"

Those who responded to the consultation, as well as the members of our Advisory Groups, were unanimously of the view that all of these rules should be expressly abrogated (assuming that they are all currently part of Scots law). They produce little positive benefit, and the calculations required to apply the rules are extremely laborious and, consequently, costly. We agree.[18]

Subsequent developments

10.16 Following the publication of our Discussion Paper, the Law Commission for England and Wales considered this area of the law. In 2004, they published a Consultation Paper on Capital and Income in Trusts: Classification and Apportionment,[19] and consulted further on the matter. Their original proposals were broadly comparable to those put forward in our Discussion Paper. As a result, however, of further consultations, particularly with HM Revenue and Customs, the Law Commission altered their recommendations significantly, as published in their 2009 Report.[20] That Report has now been implemented in the form of the Trusts (Capital and Income) Act 2013.

10.17 In their 2004 Consultation Paper, the Law Commission for England and Wales proposed for private trusts a scheme of simplified classification rules supplemented by a new power of allocation for trustees. The power would provide flexibility in order to mitigate any failings which resulted from the application of the classification rules. The consultation carried out in 2004 indicated that there was widespread dissatisfaction with the existing rules relating, in particular, to the classification of corporate receipts, and most respondents supported the provisional proposal for a primary cash/non-cash rule to determine the allocation between income and capital, but supplemented by a power of allocation. The Commission re-opened this matter in 2008. At that time, HMRC raised a number of issues and, as a result, the proposal for a power of allocation was withdrawn.

10.18 Three main objections were taken by HMRC.[21] First, HMRC were concerned that the power might offer opportunities for tax avoidance by allowing trustees to treat as income what HMRC viewed as capital and vice versa. Secondly, HMRC considered that if the exercise of the power had the effect of changing the nature of the receipt, the result might be that two identical corporate receipts would be classified differently, depending on whether

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[18] See recommendation 27 at para 10.30 below.
[19] CP No 175; 2004.
[20] Report on Capital and Income in Trusts: Classification and Apportionment (LC No 315; 2009).
[21] Ibid, paras 5.4 and following.

they were paid to an individual or a trustee. This was considered contrary to HMRC's Trust Tax Modernisation Programme, which sought to reduce any tax distinction between assets held by trusts and those held by individuals. Thirdly, HMRC warned that exercise of the power to allocate corporate receipts might cause an interest in possession trust to lose its status as such for income tax and inheritance tax purposes, thereby increasing the income tax and inheritance tax liabilities of the trust.

10.19 Extensive discussions then took place between the Law Commission for England and Wales and HMRC about the tax consequences of the reform of the law in this area. On that basis, the Commission considered that the potential tax consequences of their original proposals were unacceptable, and they accordingly followed another route. In their place, they recommended a classification rule based on the provisions of the Income and Corporation Taxes Act 1988. If a distribution fell within sections 213(2) or 213A of that Act (and hence was an exempt distributions by section 218), it should be classified as capital for trust law purposes. In that event, the trustees should have power to make a payment of capital to beneficiaries interested in income where otherwise there would be prejudice to those beneficiaries. Provisions to that effect are found in sections 2 and 3 of the Trusts (Capital and Income) Act 2013.[22]

Consequences for Scotland

10.20 HMRC's response to the Law Commission for England and Wales, and the latter's recommendations in the light of that response, caused us to reconsider our initial proposal. We consulted further with our Advisory Group, who remained of opinion that our first proposal in the Discussion Paper was appropriate, and represented good contemporary practice.[23]

10.21 Consequently, we wrote to HMRC in Scotland to discover their views about our original proposals; a copy of the letter is found at Appendix C. In the letter we set out our proposals numbered 1 and 4 in the Discussion Paper.[24] With the letter we sent copies of our Discussion Paper and prospective sections of a draft Bill to give effect to these proposals. We then referred to the experience of the Law Commission for England and Wales, and to the objections that had been taken to them by HMRC.

10.22 We responded to the three objections that had been taken by HMRC. As to the first, which is that the power might offer tax avoidance opportunities, we indicated that the power that we envisaged had a relatively limited scope and must be exercised subject to important fiduciary constraints. For that reason we did not think, and do not think, that there is any substantial risk that it would be used for tax avoidance purposes, at least no more than on a very minimal scale. As to the second objection, that if the exercise of the power of allocation had the effect of changing the nature of the receipt, the result might be that two identical corporate receipts would be classified differently, depending upon whether they were paid to an individual or to a trustee, we indicated that we did not envisage that the exercise of the power proposed in our Discussion Paper would have the effect of changing the nature of the receipt as income or capital. The power was only intended to operate as between those with

[22] These provisions came into force on 1 October 2013.
[23] See para 10.4 above.
[24] See paras 10.4 and 10.11 above.

income interests and those with capital interests within the trust. Thus the second objection should not apply.

10.23 As to the third objection, we expressed the opinion that the powers of allocation and apportionment set out in proposals 1 and 4 of our Discussion Paper, and the corresponding provisions in our draft Bill, would not have the effect of converting an interest in possession trust into a discretionary trust. We advanced this proposition for four reasons. In the first place, the proposed power did not form any part of the trust purposes. It assumed those purposes, and was designed mainly to ensure that the purposes were fulfilled properly, by striking a fair balance between the different classes of beneficiary. Indeed, it could be said that the suggestion that the power would convert an interest in possession (liferent) trust into a discretionary trust flies in the face of the fundamental distinction between trust purposes and trust powers.

10.24 In the second place, the power concerned was an administrative power; this followed from the fact that it did not form any part of the trust purposes. An administrative power simply cannot convert a liferent trust into a discretionary trust, as the power is of a wholly ancillary nature. In the third place, the exercise of such a power would be subject to the trustees' fiduciary duties and their duty of care to the beneficiaries. The trustees' fiduciary duties require that such a power should be used for its proper purpose, that is to say, striking a fair balance between different classes of beneficiaries, and for those purposes only. If it were used to alter the interests of the beneficiaries, in such a way as to encroach upon the trust purposes, that would clearly amount to a breach of fiduciary duty and breach of trust.

10.25 In the fourth place, the exercise of the power of apportionment would be subject to judicial control. This means that the fiduciary duties of the trustees would be enforced, if necessary by proceedings brought by beneficiaries. This would ensure that the power was only used to strike a fair balance between those with income interests and those with capital interests under the trust purposes. In this event, proper effect would be given to the trust purposes. If, by contrast, the power were used to turn the trust into, in effect, a discretionary trust, that would be a breach of trust, with consequential liability on the part of the trustees. That might involve an order that the trustees correct any decision made by them, or that they should pay damages. It would also permit the exercise of the court's power to correct defects in the exercise of trustees' fiduciary powers.[25] Whatever remedy were used, the court would ensure that the power was confined to its proper use, namely striking a fair balance between classes of beneficiaries, and not to convert a liferent or interest in possession trust into a discretionary trust.

10.26 Although we think that the foregoing arguments are powerful, we have not yet had a response from HMRC. In view of the position taken by HMRC in relation to a comparable power that was suggested in England and Wales, we do not think that we can safely make a recommendation based on proposal 1 in our Discussion Paper.[26] The power that we proposed was to function as a default power and, if HMRC were to take a similar attitude in Scotland, there would be a serious danger that a trust that relied on the default power would be subjected to taxation as if it were a discretionary trust, with adverse consequences for the beneficiaries. While we think that such a claim would probably be resisted successfully, the consequent uncertainty, and the time and cost of legal proceedings, would be plainly

[25] Discussed at length in Ch 19 below.
[26] See para 10.4 above.

undesirable. For this reason we have come to the conclusion that we cannot make a recommendation based on proposal 1.

10.27 As we have indicated, our Advisory Group was strongly in favour of such a proposal. Furthermore, we understand that comparable powers are regularly inserted into trust deeds, and styles are available in the standard style books.[27] If, when a trust is set up, it is considered desirable to have such a power, it should be inserted expressly and, in the event of a challenge by HMRC, the arguments set out above and in our letter at Appendix C should be deployed.

Rules of equitable apportionment and time apportionment

10.28 By contrast, our proposals in relation to the rules of time apportionment and equitable apportionment continue to attract support. Our Advisory Group was strongly of opinion that these rules were unhelpful and should be abrogated, for the reasons set out in our Discussion Paper. As for time apportionment, our Advisory Group indicated that Apportionment Act 1870 is radically out of step with trust practice and is generally excluded as a matter of course. In relation to the rules of equitable apportionment, there was equal support for reform, though there is some doubt as to whether all of them are in fact part of Scots law.[28] As we do not wish to suggest in the draft legislation that that question is settled, we simply recommend that, whatever their current status, the rules should no longer hold good in Scots law. For this reason, the provision in our draft Bill is deliberately drafted without referring to the specific rules by name; its effect is that, to the extent that any or all of those rules currently apply, they are no longer to do so once the new provision comes into force.[29]

10.29 We note that, in relation to the effect of the reforms on existing trusts, the Law Commission for England and Wales, in their 2009 Report, recommended that the first part of the rule in *Howe v Earl of Dartmouth* should not apply to any future trusts,[30] and that, subject to any contrary provision in the trust instrument, the equitable rules of apportionment and section 2 of the Apportionment Act 1870 should not apply to any future trusts.[31] In relation to these recommendations, no adverse view was expressed by HMRC.

10.30 Accordingly, we make the following recommendations:

> **27. The rules of equitable apportionment contained in the cases of *Howe v Earl of Dartmouth*, *Re Earl of Chesterfield's Trusts* and *Allhusen v Whittell* should be abrogated.**
>
> (Draft Bill, section 23)

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[27] See, eg, Barr et al; Kessler and Grant.
[28] See, eg, Kessler and Grant, para 20.47.
[29] See s 23 of the draft Bill; s 1 of the Trusts (Capital and Income) Act 2013 names the rules but, if we were to follow that approach, it would strongly – and perhaps inevitably – point to the existence of the rules as part of Scots law, since otherwise there would be nothing to disapply.
[30] LC No 315 (cited in note 20 above), recommendation 9.4.
[31] Ibid, recommendations 9.5 and 9.6.

28. Insofar as the trust deed does not expressly provide otherwise, trustees should have a new statutory power, exercisable on a discretionary basis, not to apportion dividends and other periodical payments on a time basis when they would otherwise be required to do so in terms of the Apportionment Act 1870.

(Draft Bill, section 22)

10.31 The two foregoing recommendations should apply to all trusts, whenever created. We note that the corresponding English provision, in section 1 of the Trusts (Capital and Income) Act 2013, does not apply to existing trusts.[32] We have taken the view, however, that the relevant rules relating to equitable apportionment and time apportionment have little practical effect, and are very laborious to apply in practice. Consequently we can see strong practical advantages in applying our proposed reform to all trusts, whenever created. The practical effect on the rights of individual beneficiaries of existing trusts should be minimal. Moreover, so far as time apportionment is concerned, we contemplate a power which need not be exercised (and indeed should not be exercised) if any substantial unfairness would result.

The Powers of Appointment Act 1874

10.32 As a final point, in the course of our project we were alerted by William Grant, a member of our Advisory Group, to a possible difficulty concerning the Powers of Appointment Act 1874. The Act provides that trustees who appoint funds in such a way that a particular beneficiary takes nothing or next to nothing are not, by that mere appointment, exercising their power improperly. The difficulty is that it is not certain whether it applies to Scotland.

10.33 In England and Wales the Act was repealed and re-enacted by the Law of Property Act 1925.[33] The question of whether it applies to Scotland is discussed in Kessler and Grant, where the relevant cases and other materials are cited.[34] Notwithstanding this uncertainty, many professionally drafted trust deeds permit trustees, either expressly or by implication, to make appointments in a way which would otherwise be sanctioned by the Act. Problems might arise where the deed is silent. We expect that a truster who wishes a certain beneficiary or class of beneficiaries to take a minimum sum or proportion of the trust assets would make this clear in the deed or perhaps in a letter of wishes. In the absence of such an express provision it seems reasonable to allow the trustees to have full discretion, subject to their fiduciary duties and duty of care.[35] This is particularly so where a deed provides for a deliberately broad class of beneficiaries including those who have only a remote possibility of ever benefiting.

10.34 We therefore consider that we should take the opportunity to make the law on this point clear, as it is unsatisfactory that there is doubt as to whether the 1874 Act applies or not in Scots law. In addition, we take the view that the re-enacted provision should be a default one, which is to apply unless express contrary provision is made in a trust deed.

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[32] Its subs (5) defines a "new trust" as "a trust created or arising on or after the day on which this section comes into force (and includes a trust created or arising on or after that day under a power conferred before that day)".
[33] See s 158 of the Law of Property Act 1925.
[34] See Kessler and Grant, para 10.3 and its note 11.
[35] See para 1.11 above.

That fits with our general approach in the project of seeking to make the law accessible and coherent, and also to bring it into line with current best practice.

10.35 We therefore recommend:

29. (1) The Powers of Appointment Act 1874 should be repealed.

(Draft Bill, section 79 and schedule 2)

(2) Insofar as the trust deed does not expressly provide otherwise, no exercise of a trustee's power to appoint funds is invalid only because a beneficiary takes either a negligible share or nothing.

(Draft Bill, section 21)

Chapter 11 Information duties

11.1 In this Chapter we examine the duty on a trustee to pass information to a beneficiary, which was the subject of Chapter 10 of our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law.[1] As we will see, the duty is bound in with the power of the beneficiary to hold the trustee to account for the proper administration of the trust. That power cannot exist without there being an obligation on the trustee to make appropriate trust information available and to do so at an appropriate time. Whilst that is a generally uncontroversial view,[2] what counts as appropriate information or an appropriate time is open to lively debate.

11.2 We will explore the topic by addressing a series of questions. The first is a fundamental one concerning the legal analysis of the nature of the duty. It appears at first sight to be more theoretical than practical but in fact the answer turns out to act as a useful guide for identifying what is required in a particular situation.

11.3 We then divide our consideration of the duty into two distinct phases. There is a duty at an initial stage to tell a person of their status as a beneficiary and to give them other basic information. Thereafter the focus shifts to what a trustee must subsequently disclose to a beneficiary in response to a request from the beneficiary. This forms the second phase. In the course of this we consider a number of questions in relation to each phase:

- Who is a "beneficiary" for the purposes of the duty?
- When is information to be passed?
- To whom is the information to be disclosed when the beneficiary is a child under 16 or an adult with incapacity?
- Can the duty be limited by the trust deed and, if so, to what extent?
- What is the remedy for failure to exercise the duty properly?
- Does the duty apply to existing trusts?

11.4 Before turning to these questions we should mention that certain types of trust have their own rules on disclosure of information.[3] Thus, for example, trustees and beneficiaries of occupational pension schemes can look to a statutory instrument for their rights and duties,[4] and charity trustees are also subject to statutory provision.[5] The trusts we are

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[1] DP No 148. In some situations the duty is owed to third parties: see paras 11.55-11.70 below.

[2] The New Zealand Law Commission's recent Review of the Law of Trusts (NZLC R130, available at http://www.lawcom.govt.nz/project/review-law-trusts?quicktabs_23=report) states: "There cannot be any obligation, and hence there cannot be any trust, if the trustee does not owe a duty to account to any beneficiary. To be able to hold a trustee to account, beneficiaries need to know that they are beneficiaries of the trust and need to be able to be provided with trust information on request" (para 5.46, note omitted).

[3] In addition, the Data Protection Act 1998 may be relevant; for example, s 7 provides individuals with the right to make a request of a data controller in respect of personal information which is being processed by the controller.

[4] The Occupational Pension Schemes (Disclosure of Information) Regulations (SI 1996/1655), as amended.

concerned with in this Chapter are those which are not currently subject to any such special regime. As will be seen, our recommendation is that a statutory framework should be put in place for them too. We should also emphasise that the duties we discuss are equally applicable to executors, whether nominate or dative, as they are to trustees.[6]

Summary of current law

11.5 There is little authority in Scots law on the duty to provide information to beneficiaries. The same was also said about English law in a case in the 1950s;[7] there, as will become clear, it is only in much more recent times that this position has changed, and then only to a limited degree.[8] This is somewhat surprising given that the duty on a trustee to disclose information to a beneficiary will arise in all trusts. Regardless of whether the relative lack of case law is due to the fact (if it be such) that the vast majority of trustees fulfil their duties in a satisfactory manner, it is not satisfactory for an important aspect of trust law and practice to remain in the shadows.

11.6 As regards Scots law, we cited in our Discussion Paper a decision from the early 1840s in which the court held that beneficiaries are entitled to see the relevant vouchers as well as the trust accounts.[9] Further, Wilson and Duncan state: "There is a duty [on trustees] to give intimation to the beneficiaries of the provisions in their favour", adding a footnote reference to a decision from a century ago.[10] In their response to our Discussion Paper the Faculty of Advocates wrote:

> "The absence of clear authority is reflected in the treatment of the subject by legal authors. Thus Menzies (The Law of Scotland affecting Trustees (2nd edn, 1913)) states at paragraph 553: 'There is no absolute duty on the trustees to volunteer information, though such a duty may be implied by the circumstance of the case.' Mackenzie Stuart (The Law of Trusts (1932), at page 216) puts matters the other way round, but seems to end up in much the same place; he says: 'It is the duty of a trustee to intimate legacies or other benefits conferred by the trust to the beneficiaries. But it is only an imperfect obligation. There seems to be no obligation to which a direct sanction is attached to give notice to a legatee, or to any one else who is entitled to claim against the estate, of benefits conferred on him by the trust deed …'"

11.7 In our view the relative paucity of legal guidance in respect of a trustee's duty to pass information to a beneficiary, and the corresponding lack of clarity as to what a beneficiary is

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[5] Charities and Trustee Investment (Scotland) Act 2005, s 23.

[6] In our draft Bill "trustee" is defined as including an executor: see s 74(1). An executor nominate is one appointed by the testator and an executor dative is appointed by the court.

[7] *Hawkesley v May* [1956] 1 QB 304, 314-315 per Havers J: "There has been acute controversy between the parties as to the duties which the defendants … as trustees … owed to the plaintiff …. I regret that these questions, which are peculiarly within the province of the Chancery Division, should fall to be determined by me, especially as I am told by counsel who have made an exhaustive search that there is a lack of authority upon some of them."

[8] This is a topic in which international influences have been strongly felt. We discuss some in what follows, and see also Ch 10 of DP No 148.

[9] *Tod v Tod's Trs* (1842) 4 D 1275; see para 10.2 of DP No 148. In the particular circumstances of *Tod* the court held, by a majority of 5-4, that the trust deed did *not* permit the beneficiary to demand sight of the vouchers. Neither was she permitted to see the accounts in draft before they were audited by an accountant. The clear implication is, however, that if the deed had been silent then the beneficiary would have enjoyed sight of the draft accounts and the vouchers.

[10] Wilson and Duncan, para 23.02; the reference is to *Rodger's Trs v Allfrey* 1910 SC 1015.

entitled to expect or request, is sufficiently unsatisfactory as to merit reform. Given the variety of uses to which trusts are put nowadays,[11] the importance of transparency as to the roles of those involved in trusts and the fact that other jurisdictions are including provision on the duty to inform in their trust legislation,[12] the current lack of relevant material in Scots law requires review. This is compounded by the fact that we recommend elsewhere in this Report that private purpose trusts be given unequivocal recognition in Scots law and, as we explain later in this Chapter, the duty on a trustee of such a trust will be different from that applicable to a trustee of a "beneficiary trust".[13] It is therefore all the more important that the duties in respect of beneficiary trusts, which play a vital role in so many situations, are set out in a clear and accessible way. As a general proposition, which we develop in the rest of this Chapter, we therefore recommend:

30. There should be legislative provision setting out the duty on a trustee to provide information to beneficiaries and others.

(Draft Bill, sections 25 and 26)

Nature of the duty to inform: competing theories

11.8 Even from the scanty state of the current law it is clear that a trustee must take steps to inform a beneficiary of certain facts in certain situations. We will explore later in the Chapter the boundaries of what this involves, but first we ask the question: on what basis is the trustee under a duty to inform the beneficiary? Or, put another way, what is the source of the beneficiary's right to be informed by the trustee? There are three main answers which have been advanced at different times and in different legal systems, which may be termed the proprietary basis, the jurisdictional basis, and the fiduciary basis.[14]

11.9 The proprietary basis, which is termed the "orthodox view" by a leading English law textbook,[15] is based on the proposition that the trust documents are part of the corpus of trust property. Thus the beneficiary has a proprietary interest and is entitled to see them. This analysis views the beneficiary as having a right, from which the trustee's duty flows directly. As it depends, however, on the English doctrine of equity it will not do for Scots law, under which the beneficiary does not have any proprietary right to any of the trust property but instead has a personal right against the trustee.[16]

11.10 Secondly, the jurisdictional basis holds that "the right to seek disclosure of trust documents [is] one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of the trust".[17] This view was put forward by Lord Walker who was giving the judgment of the Privy Council in an appeal from the High Court of the Isle of Man. It is from a section of the judgment headed "Disclosure to discretionary beneficiaries: a proprietary basis?" which is heavily influenced by the position taken in Australia. We turn to that below, but it is sufficient for now to mention that, once more, the

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[11] See paras 2.9-2.19 above.
[12] We specifically mention, later in this Chapter, the USA Restatement and the proposals by the New Zealand Law Commission.
[13] See paras 11.66-11.70.
[14] See paras 10.6-10.12 of DP No 148 for a fuller discussion; we only touch very briefly on them here.
[15] Thomas and Hudson, ch 12. The evolution away from the proprietary basis and towards the jurisdictional one is discussed in Lewin, paras 23.15 and following.
[16] See para 10.8 of DP No 148.
[17] *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, para 51.

jurisdictional explanation does not hold good for Scots law. This is for two reasons: doctrinally, Scots law does not share the approach of the English courts of equity in relation to the court supervision of trusts, and from a practical point of view we do not wish to encourage the notion that court applications are required other than where necessary.[18]

11.11 The third basis is the fiduciary one. We consider this to be the appropriate analysis for Scots law. In contrast to the other two, in which the duty to disclose is rooted in, respectively, the proprietary rights of the beneficiary and the supervisory role of the courts, the third option views the trustee's fiduciary character as paramount.[19] In other words, the trustee, as a fiduciary, is seen as having an obligation to keep the beneficiary informed, through the provision of accounts and other relevant information, in order that the beneficiary is able to satisfy him or herself about the proper administration of the trust and its property. In a sense, therefore, the trustee's duty is the corollary of the well-recognised power in the beneficiary to hold the trustee to account for the proper administration of the trust. The two are in a symbiotic relationship, and neither can exist and flourish without the other.[20] In our view, this characterisation of the trustee's duty to inform is the one which is most suited to the Scots law of trusts. Not only that, but – as we will see later on – several contentious disputes over the *content* of the duty can be resolved by bearing in mind the fiduciary nature of the duty and the fact that it exists, in part, to ensure that the beneficiary's power to hold the trustee to account is properly exercisable.

The two phases of the duty

11.12 Having argued for an appropriate basis for the duty we are now in a position to discuss some of the issues which flow from it. At this stage it is useful to recognise that the obligation on a trustee has two distinct phases: first, there is an initial stage at which the trustee is to inform a person that he or she is a beneficiary and to provide basic information about the trust. That alerts the person to their interest (which may be immediate or may be remote) and lets them know who is administering the trust property in which they are interested. Following that there is a separate and continuing duty on the trustee to provide certain information on request.

11.13 When we turn to the detail of what the trustee's duty entails, it is likely that the most frequent questions will be: what is to be disclosed?, to whom?, and when? In addition a number of other practical issues may also arise, such as the extent to which the truster may limit or expand the duty of disclosure and how a trustee should balance this duty with the other responsibilities of trusteeship. The paucity of guidance in this area from case law and other sources does not make the trustee's job easy.

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[18] See para 10.10 of DP No 148.

[19] See paras 10.11-10.12 of DP No 148. A similar point, in a slightly different context, is made by L Smith, "Constructive trusts and the no-profit rule" (2013) 72(2) CLJ 260, 262: "Subject to some exceptions, information about the sphere of fiduciary management is attributed to the beneficiary, and this is translated as a legal duty to provide information. This explains not only the basic duties of trustees to provide information about the trust, and the accounting duties of many fiduciaries, but also the duty that falls upon a fiduciary to disclose that he is in a conflict of self-interest and duty."

[20] We have been focussing so far on the need for information to be provided so that the beneficiary can effectively perform his or her role (in holding the trustee to account). But the converse is also true: a trustee cannot properly perform his or her duties without giving a beneficiary sufficient information. To take an example, when the trust comes to an end the trustee will wish to seek a discharge from the beneficiary, but the latter ought only to grant it if he or she has sufficient grounds for doing so. This presupposes that the beneficiary has been given sufficient trust information.

(I) Duty to inform a person of status as beneficiary

11.14 Leaving aside for a moment the question of who is classified as a "beneficiary", the current position in Scots law is that a trustee is under a duty to inform a person of his or her status as a beneficiary.[21] The information should be passed promptly. This emerges both from principle and from the (scanty) decisions. For example, in a case involving a testamentary provision under which specified individuals would inherit a share of the deceased's estate only if they returned to live in Scotland within 3 years of his death the court held that this condition required to be intimated to the potential beneficiaries.[22] And, viewed at a general level, the fiduciary basis of the duty, which we have already explored, clearly renders it incumbent on a trustee to act in a way which respects and promotes the beneficiary's interests.[23] This requires the trustee to inform the beneficiary of his or her status and to do so at a time when that information can be used to full effect. Without such basic information (and assuming, as we must, that the beneficiary does not learn of their status from another source) the beneficiary is wholly unable to exercise their power to hold the trustees to account. Further, in order to hold the trustee to account, a beneficiary also needs to know the identities and contact details of all of the trustees. That too should therefore be communicated promptly, along with an indication that, if desired, a request may be made from time to time to a trustee for additional information.

11.15 This leads to a second point. It may be that the initial information described above becomes out of date while the trust is still in place. Trustees may resign or die and be replaced, or may move house or change email address. In addition, the beneficiary's interest may alter over time. To take an example, suppose that Angela and Brian are to inherit the estate of their deceased uncle, subject to his (surviving) wife's lifetime interest. Looking just at Angela's position the trustee of the liferent trust should, on her uncle's death, inform Angela of her interest,[24] by telling her that she is a fiar under the trust and that her aunt holds a liferent interest. She should probably also be told that she shares the fee equally with her brother. When the aunt dies (or if she disclaims her interest), the trustee should inform Angela accordingly. Equally if, during the aunt's lifetime, a challenge is made to the uncle's will by someone claiming to be his child (and who would therefore be entitled to legal rights) this should be intimated to her because a successful challenge would affect the funds available to her as fiar under the trust.

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[21] In this Chapter we assume, for simplicity, that the beneficiary is a natural person, but where the beneficiary is a legal person the information will need to be passed to someone in a position of control or management of that person. We deal below with cases where the natural beneficiary is a child under 16 or otherwise lacks capacity: see paras 11.27-11.29.

[22] *Rodger's Trs v Allfrey* 1910 SC 1015. Where the fulfilment of the condition is to be measured at the time of death rather than at a future date there is no such requirement: *Barker v Watson's Trs* 1919 SC 109 (testamentary bequest to the deceased's daughter which was payable if she was living with her husband "as man and wife" at the testator's death). The related issue of an executor's duty to inform a person of his or her legal rights is discussed in an article by John Kerrigan in the Journal of the Law Society of Scotland (19 Nov 2007; at http://www.journalonline.co.uk/Magazine/52-11/1004700.aspx); this issue also formed the background to a recent disciplinary hearing, *Law Society v Campbell* (11/3/2013), whose details can be seen at http://www.ssdt.org.uk/findings/finding_item.asp?LTfindingID=555. In that case the Tribunal heard a number of expert witnesses, whose evidence is summarised in the findings, though the focus was on professional standards more than on the content of the relevant law. We understand that questions about executors' information duties are relatively common in practice and can give lead to difficulties.

[23] There is, though, no need for a trustee to offer an explanation as to the legal effect of the interest, nor to give any advice relating to it. (The same applies when information is supplied at a later stage: see para 11.38 and note 44 below.)

[24] If she is not of full capacity, either by reason of age or otherwise, then information should still be passed promptly but it should be given to a guardian or other responsible adult. We deal with this situation in more detail later in the Chapter.

11.16 In relation to practical details, the extract from *Lewin on Trusts* which we quoted in our Discussion Paper bears repeating as a succinct description of the obligation:

> "[T]he information that needs to be given is the existence of the settlement and the beneficiary's interest under it. We consider that information about the general nature of the beneficiary's interest should be given, including […] conditions attached to the beneficiary's interest. But the trustees need offer no advice or explanations about the legal implications or effect of the beneficiary's interest […]. Unless it is self-apparent from the trustees' communication, sufficient information about the identity of the trustees should also be provided to enable the beneficiary to seek further information from the trustees on demand. We do not consider that the trustees have to provide the beneficiary with copies of any accounts or trust documents without demand – if the beneficiary wants further information or access to accounts or trust documents it is up to him to seek it from the trustees."[25]

11.17 By way of comparison (and allowing for the fact that other legal systems may give a different answer to the question about the nature of the duty to inform)[26] the approach which we have put forward has parallels elsewhere in the legal world. To take just two examples, the American Law Institute's *Restatement of the Law of Trusts (Third)* contains a duty which is very much along the lines we have discussed. As we will make further reference to it later in the Chapter it is worth setting it out in full. Section 82 provides:

> "Duty to Furnish Information to Beneficiaries
>
> (1) Except as provided in §74 (revocable trusts) or as permissibly modified by the terms of the trust, a trustee has a duty:
>
> (a) promptly to inform fairly representative beneficiaries of the existence of the trust, of their status as beneficiaries and their right to obtain further information, and of basic information concerning the trusteeship;
>
> (b) to inform beneficiaries of significant changes in their beneficiary status; and
>
> (c) to keep fairly representative beneficiaries reasonably informed of changes involving the trusteeship and about other significant developments concerning the trust and its administration, particularly material information needed by beneficiaries for the protection of their interest.
>
> (2) Except as provided in §74 or as permissibly modified by the terms of the trust, a trustee also ordinarily has a duty promptly to respond to the request of any beneficiary for information concerning the trust and its administration, and to permit

[25] Lewin, para 23.12 (with footnotes omitted), quoted at para 10.4 of DP No 148.
[26] See paras 11.8-11.11 above.

beneficiaries on a reasonable basis to inspect trust documents, records, and property holdings."[27]

Secondly, the Draft Common Frame of Reference (DCFR) has a provision to broadly similar effect.[28]

11.18 Bringing this part of the discussion together, it is important in our view that there be a statutory acknowledgement and specification of the duty on a trustee to provide initial information to a beneficiary as to the latter's status. In addition, information is to be provided so that the beneficiary knows the identity and contact details of the trustees. This is the minimum which is needed so that the beneficiary has the opportunity to involve him or herself in the operation of the trust. It is also likely to be good practice to inform the beneficiary that he or she may wish to contact the trustees periodically to request information about the running of the trust.[29]

11.19 Lest this be easier said than done, we consider that the statutory duty needs to be carefully formulated so as to give as much detailed guidance and practical assistance to trustees and beneficiaries as is consistent with a general rule. We understand that two major questions in practice concern the identification of who qualifies as a beneficiary for present purposes (ie to whom is the duty owed) and, to a lesser extent, when the initial information must be passed to such a person. This is our starting point for the next section in our discussion.

Who is a "beneficiary"?

11.20 This is a question of the highest importance for trustees. To whom do they owe the duty we are discussing? As we have already seen, the duty arises in all trusts which have beneficiaries,[30] and so there is considerable value in having a clear answer to this question. In some cases the answer will be obvious. If we take the example in paragraph 11.15 above, where the trust has a liferentrix and two fiars, it is clear that these three individuals are all beneficiaries and that the trustees should inform them of this fact. But a trust of this type may very well have a "long stop" beneficiary, such as a more remote family member or a charity, in order to prevent a lapsed trust from occurring. But does that mean that information as to their status as beneficiary needs to be passed – and, if so, when?

11.21 It would be expected that those with a vested or contingent right to a share of the trust fund should be told, and told immediately, of their status. For those with a more remote interest there is greater scope for debate: relevant variables will include factors such as what the likelihood of the person acquiring a vested or contingent interest is, what value the interest is likely to have, and so on. These considerations are of particular relevance to

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[27] *Restatement of the Law of Trusts (Third)*, Vol 3 (2007), Section 82. Helpfully, the published volume contains General Comments, Comments (of a more specific nature) and Illustrations; see para 11.23 below for further discussion.

[28] X.-6:104; the two subsequent Articles are also relevant, dealing with the obligation to keep trust accounts and to permit inspection and copying of trust documents. The DCFR has been prepared by an academic group for the European Commission as the first stage for what is seen as a possible pan-European project on contract and other topics of private law, including trust law. The DCFR would either be a legislative "toolbox" for the European Commission (as an aid to better and more consistent European Union legislation on relevant areas of law) or as an "optional instrument" for use by parties contracting in the EU in place of national law.

[29] We discuss this aspect of the duty of disclosure below, from para 11.34.

[30] Ie it does not apply to private purpose trusts, for which there is a separate regime (see paras 11.66-11.70), nor to public trusts.

discretionary trusts which are common in practice and where the class of beneficiaries may encompass a large number of individuals. It was forcefully pointed out to us by members of our Advisory Group that an obligation to inform many (or all) of these individuals would be both administratively onerous and with no obvious benefit, particularly for small trusts with a wide pool of beneficiaries, and could perhaps even be damaging, especially if some recipients of the information were to misinterpret it so as to think that their chance of sharing in the trust property was greater than it really was. On the other hand, one member of the group made a powerful case in his written response to our consultation for not categorising and compartmentalising beneficiaries in an overly rigid way. The effect of such an approach in the present context would be to take a broad view of what value the information as to beneficial status might hold for the recipient. In his response James McNeill QC wrote:

> "[I]t may be important to recollect that in *Re Manisty's Settlements* [1974] Ch 17, 25, Templeman J indicated that there was an entitlement in a beneficiary to have trustees consider exercising a power in his favour. And in *Re Murphy* [1999] 1 WLR 282, albeit with caution and proceeding upon a concession, Neuberger J indicated that in his view a potential beneficiary of a discretionary trust was entitled to information and, in consequence, that the court had jurisdiction to order a third party to make disclosure of the identity of the trustees so that the claimant could communicate to the trustees his circumstances and claims to be considered as a potential beneficiary."

11.22 There is, therefore, evident danger in a trustee trying to second-guess what value the information about beneficial status might have for a particular individual. This chimes with views expressed by others who responded to our consultation. We were told that "trustees should have the discretion to act depending on the facts of each individual case" (the Law Society) and that "in the case of discretionary trusts … trustees should not be under any requirement to disclose the existence of a settlement to all objects of a fiduciary power in all circumstances" (Deloitte LLP). The Faculty of Advocates, who were sceptical about the benefit of enacting a general rule even if it were only a default one which may be countered by the trust deed, illustrated the difficulty of framing such a rule by asking:

> "If beneficiary P, in good health and aged 21, enjoys a liferent of a fund with Q having the fee, whom failing R, must the trustees inform Q and R of their status, and if so when?"

11.23 We set out below our recommended approach as to who qualifies as a beneficiary (after considering the related topic of when such a beneficiary should be given the relevant information). But we wish to draw attention to a possible alternative approach, which is the one adopted by the American Law Institute. The relevant provision is quoted at paragraph 11.17 above. This approach requires a trustee to inform "fairly representative beneficiaries" of the existence of the trust and other details. The General Comment states that "the trustee's duty … is to make a good-faith effort to select and inform a limited number of beneficiaries whose interests and concerns appear fairly representative of – ie likely to coincide with – those of the trust's beneficiaries generally, thereby affording a reasonable opportunity for monitoring the trustee's duty of impartial … as well as faithful, prudent … administration of the trust". It adds that this approach seeks to balance "considerations of practicality for trustees and the importance in most trusts of reflecting the diversity of the beneficial interests and beneficiary concerns", and explains what this means in practice:

> "A trustee's duty … to provide information to fairly representative beneficiaries usually can be satisfied simply by providing the required information (i) to those beneficiaries who are then either entitled or eligible to receive distributions of income or principal and (ii) to those who would be entitled or eligible to receive distributions of income or principal if either the trust or current interests referred to in (i) above were then to terminate."

As will be seen shortly, this leads to substantially the same outcome as our recommended scheme but it does so by a slightly different route. In particular, we are doubtful that the phrase "fairly representative beneficiaries" would, without more, offer sufficient guidance as to whom a trustee owes a duty to provide information. The US Restatement benefits from extensive commentary, with examples, but the way in which our own legislation is presented is rather different in this regard. We therefore take an approach which, we believe, will be of greater assistance in practice. But before setting that out we briefly discuss the point at which the duty to inform a beneficiary is to be performed.

Timing and method of passing information

11.24 As foreshadowed by the Faculty of Advocates' question quoted in paragraph 11.22 above, there may very well be questions about *when* to inform a beneficiary. One can easily imagine situations in which the timing of when a person is told of their beneficial interest will potentially have far-reaching and significant consequences. We have already seen, in paragraph 11.14, an example of a situation in which early disclosure would be highly desirable.[31] Given that the truster had stipulated that a person would only become entitled to a share of the trust property if they met a certain condition on the third anniversary of his death, it is not hard to see how delays in making the person aware of the condition would seriously affect his or her ability to make an informed choice. In a different situation, say in a family trust, a trustee may plausibly worry that a potential beneficiary might be "spoiled" if told early in his or her adult life of a trust entitlement. If the trustee also happens to be a parent of the potential beneficiary, which is not an implausible situation, a parallel can be drawn between the trust scenario and that in which the parent is considering making a gift to the child of equivalent value to the trust entitlement. The timing of the gift would, of course, be entirely of the parent's choosing; should the existence of the trust rob the parent of *all* choice in respect of timing and require information to be passed to the child when reaching 16? Or is there some flexibility, and if so within what limits?

11.25 Another issue is the way in which information is to be passed. Is there a requirement for writing? Can electronic means be used? We consider that this is a matter for trustees, and we do not recommend any statutory requirement. In many cases it will be advantageous to have a permanent record of what information was passed and when this occurred. This can be done if the information is either on paper or in electronic form. But in other cases, perhaps with family trusts or executries where all parties are close to each other, trustees or executors may prefer to convey information orally.

Drawing the strands together

11.26 Who is a beneficiary? And when should a trustee provide information to him or her? In our view these questions are best approached by recalling that the trustee's duty to

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[31] *Rodger's Trs v Allfrey* 1910 SC 1015.

provide information is, as we have seen, both fiduciary in nature and bound in with the beneficiary's right to hold the trustee to account. The hallmark of a fiduciary duty is that, to a greater or lesser extent, it involves a discretionary judgment which must be exercised for the benefit of the person to whom the duty is owed. For this reason we consider that the best approach is a flexible one, based on the proper exercise of the trustee's discretion in each case. Furthermore, the fact that the primary aim of the duty is to allow the beneficiary to hold the trustee to account suggests to us that the flexibility enjoyed by the trustee should be narrowly drawn here, and in that regard we consider that any beneficiary with a vested interested should be considered a beneficiary for these purposes. We will consider later in the Chapter the extent to which detailed trust information should be made available on request but here we are concerned only with the bare information as to a person's status as a beneficiary of a particular trust and who the trustees are. Without that information it is almost impossible to see how a person who is a beneficiary, but is ignorant of that fact, can hold the trustee to account. That said, the interest of a remote beneficiary is not the same as that of a person with a present entitlement and so there will often be legitimate scope for the exercise of discretion as to who is entitled to information, and when. To provide an appropriate duty in statute we therefore recommend:

31. Trustees have a duty, which is fiduciary in nature, to inform a person of (i) his or her status as a beneficiary and (ii) the identities and contact details of the trustees. This duty must be performed within a reasonable period, taking all circumstances into account. Subsequent changes to the information, ie to the person's status or to the trustees' identities or contact details, must also be communicated.

32. In deciding, in exercise of this duty, who is to be informed of their status as a beneficiary, trustees must take account of all the circumstances (including the likelihood of the person becoming entitled to a share of the trust property and at what point in time such an entitlement is likely to occur); but any person who has a vested interest in the trust property is to be regarded as a beneficiary.

(Draft Bill, section 25)

What if the beneficiary is a child or an incapable adult?

11.27 Ordinarily, information which is due to be given to a child under the age of 16 should be provided to the child's parent, failing which to his or her guardian. We presume that it would be good practice to indicate that the parent or guardian is not obliged to pass on the information to the child immediately but that they may wish to consider when is best to do so. Further, it might be good practice for the trustee to consider, shortly before the child's 16th birthday and perhaps after consulting the parent or guardian, whether to provide information directly to the child soon after his or her birthday.

11.28 In respect of an adult who lacks capacity, a trustee is deemed to have fulfilled their duty upon informing the beneficiary's attorney[32] or guardian.[33]

[32] See Pt 2 of the Adults with Incapacity (Scotland) Act 2000.
[33] Ibid, Pt 6.

11.29 Accordingly we recommend:

33. Where a trustee has a duty under recommendation 31 above in respect of (i) a beneficiary who is under the age of legal capacity, or (ii) an adult beneficiary who lacks capacity, the duty is performed when the trustee conveys the relevant information to, respectively, the beneficiary's parent or guardian, or the beneficiary's attorney or guardian.

(Draft Bill, section 25(1))

What efforts must a trustee make to identify or trace a beneficiary?

11.30 In discussing the trustees' duty to inform a beneficiary of his or her status we have assumed that the beneficiary has been identified and that the trustees have an address of some description so that information can be given. In many cases, both of these assumptions will be justified – in a family trust, for example, the trustees will normally be expected to know the identities and whereabouts of the members who stand to benefit from the trust – but there will be instances in which the identification of a beneficiary is unknown,[34] and others in which the beneficiary, once identified, cannot easily be traced. At a practical level, these situations will be problematic.[35] What are the trustees to do? As they are under a duty to provide information, the task of identifying and tracing those to whom the information must be given is a part of that duty. It would be a breach of duty to make no effort to identify or trace the beneficiaries, but equally there will come a point at which it is disproportionate to devote any further resources to the task. As a general rule, we consider that trustees should take such steps to identify or trace a beneficiary as are appropriate in the circumstances of the case. In order to reinforce this, we consider that it should be included in any legislation to follow on this Report. We therefore recommend:

34. Trustees should take such steps to identify or trace a beneficiary as are appropriate in the circumstances of the case.

(Draft Bill, section 25(3))

Can the duty be limited by the trust deed?

11.31 Many of the provisions of the draft legislation annexed to this Report are default provisions. They represent what we understand to be good practice in the drafting of trust deeds and will apply in the absence of evidence to the contrary. But if a particular truster wishes to depart from them then, generally speaking, he or she is free to do so. Some of the provisions, however, are mandatory. This applies only where we consider that the particular provision goes to the heart of trust law and where a departure would call into question whether a trust could exist at all. The duty on a trustee to inform a beneficiary of his or her status is, in our view, just such a provision.[36] Dilution of this duty is inconsistent with there

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[34] To take an example, pension trustees need to identify those who are to be considered for a death in service payment under a pension plan; see the Pension Ombudsman's decision PO-1758, available at http://bit.ly/1crEZkl, for a case where this was not done properly.

[35] We deal elsewhere with the parallel case of a trustee who is untraceable: see paras 4.51-4.52 above.

[36] This applies equally to testamentary trusts as to other types of trust. In response to our consultation the animal charity PDSA said: "Without this obligation [ie the duty to inform beneficiaries of their status] it would be open to unscrupulous trustees to hide the trust's existence from the beneficiaries, and thus be at liberty to misapply the

being a trust (other than in the special case where a protector has been appointed).[37] It would allow a trustee to administer the trust with insufficient checks and balances.[38] We therefore recommend:

35. The duty to inform a beneficiary of his or her status and of the identities and contact details of the trustees is mandatory and may not be limited by the trust deed.

(Draft Bill, section 25)

What is the remedy where a trustee does not comply with the duty?

11.32 Non-compliance is a breach of trust and the remedies generally applicable in such circumstances are available. The peculiarity here is that in many cases where a trustee does not comply with the duty this fact will be known to only a very limited number of people. Particularly in the case of deliberate breach, many (and perhaps all) of those people will have no interest in seeking to enforce compliance. And where the breach is inadvertent or negligent the mere failure to pay due regard to the duty is likely to mean that no attention is paid to enforcement. That said, there may be cases where non-compliance is either known or suspected. One example might be where someone considers that it is probable that they are a beneficiary and wishes to seek confirmation of the position from a person who is thought likely to be a trustee.[39] If the person from whom confirmation is sought fails to act reasonably then this might found a court application for exercise of the power we describe in Chapter 19.[40]

Does the duty apply to existing trusts?

11.33 Our intention is that, so far as reasonably possible, all of our recommendations should extend to all trusts, whenever created. The question here, therefore, is whether it is reasonable that the regime we have recommended so far in this Chapter should apply to existing trusts as well as to those created in the future. We consider that the answer is, yes. We say this for a number of reasons:

- In the great majority of cases we expect that trustees are, in practice, already informing beneficiaries in a way which meets the recommended statutory duty. In other words, we expect that what we are recommending is already good practice.

- Where a trustee of an existing trust has *not* acted in a way which would meet the recommended statutory test, all that is required is that he or she does so promptly after the test comes into force. We see no good reason why beneficiaries (nor trustees) of existing trusts should be subject to a different regime.

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funds for their own benefit. Even where there is no question of malpractice, regular communication as between trustees and beneficiaries can often assist with trust administration."

[37] See paras 11.62-11.65 below for a discussion of information duties in relation to protectors.

[38] A truster may express opinions as to how the trustees exercise this (or any other) duty, either in a "letter of wishes" or in some other way which is not integral to the trust deed. But where this occurs a trustee must still exercise full fiduciary discretion when deciding whether (or when) to inform a person of their beneficial status. It is a breach of trust simply to follow the truster's letter of wishes without full and independent consideration of the question.

[39] See the English case of *Murphy v Murphy* [1999] 1 WLR 282 (though the claim there was against the settlor rather than the trustees).

[40] And see s 63 of the draft Bill in Appendix A.

- Developing the previous point: where a trustee of an existing trust has acted in a way which might or would be a breach of trust if the recommended duty were in force, the fact that the duty comes into force at a future date does not thereby render past conduct actionable. If, however, the trustee does not comply with the duty within a reasonable time after it comes into force then such a breach *will* be actionable. (In determining what constitutes a reasonable time account should be taken of the need for the trustee to inform him or herself about the new regime and consider what action to take; if those steps are undertaken with reasonable despatch then we see no cause for a breach of trust having occurred.)

- It would be unsatisfactory to have one rule applying to existing trusts and another one applying to future trusts. Not only is the current law both unclear and hard to determine, making it impractical to ask some trustees to have to continue to apply it, but there may well be individuals who hold the office of trustee in respect of a number of different trusts at the same time (and some of those trusts may be related to each other by dint of having overlapping sets of beneficiaries), in which case it will not be efficient for them to have to apply different regimes to different trusts. The respective beneficiaries would not be well served in that scenario either.

Accordingly we recommend:

36. The duty on a trustee to provide initial information to a beneficiary should apply to all trusts, whether created before or after the coming into force of the legislation.

(Draft Bill, section 25(7)(a))

(II) Duty to provide further information

11.34 We move now to the second phase, which covers the obligation to provide information to beneficiaries after they have initially been told of their status. There may also be instances when a trustee has to provide information to a person other than a beneficiary, either because of a "derivative right" which that person has obtained by virtue of the beneficiary's own right or because a protector or (in the case of a private purpose trust) a supervisor has been appointed.[41] And we should recall that the same applies to an executor of a deceased's estate.

11.35 Where a person has been told of their beneficial status, as described above, it is assumed that they will wish to continue to be informed about the trust for the duration of their interest in the trust property. The amount and type of information they may wish to have might vary, depending (for example) on whether they have a present or a future entitlement, and indeed on factors such as the degree of confidence they have in the trustee. Our concern in this part of the Chapter is the extent to which a trustee must supply information, on request, to meet the beneficiary's need. This includes an examination of the limits which may be placed on what information is to be provided, limits which either the trustee has a discretion to set or which are contained in the trust deed.

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[41] See the discussion beginning at para 11.55 below.

11.36 We start by assuming that, at this stage of the process, there is no real doubt as to who is and is not a beneficiary. That is a matter which we have already discussed above, where we examined the initial phase of the trustee's duty to provide information.[42] In making this point we should, of course, not be understood as implying that a trustee is always obliged to pass exactly the same information to all beneficiaries under a particular trust. That is not at all the case. Rather, what we are saying here is that the task of identifying and making contact with the beneficiaries belongs to an earlier stage of the process than the one we are now examining.[43] Thus, by the time we reach the current stage a trustee knows who merits consideration for the purpose of the duty to supply further information.

What information falls within the trustee's duty?

11.37 Now that the beneficiary has learned of his or her interest in the trust, and knows how to contact the trustees, the path is clear for two way dialogue about the operation of the trust. Both the trustee and the beneficiary have a responsibility to conduct that dialogue in an effective and efficient manner. There are clear dangers in too little information (or the wrong type of information) being transmitted, and equally there will be disadvantage in too great a quantity of information, or irrelevant information being passed. It is trite to say that a middle course must be sought: what does that involve and on whom does any onus lie?

11.38 Before examining what a beneficiary may wish to see, or what a trustee may be under an obligation to pass on, we make two preliminary points. First, the obligation is to provide information but that does not require a trustee to provide an explanation or advice. If a beneficiary requires advice as to what particular information means or what he or she might want to do in response, the trustee is under no obligation to provide it.[44] Secondly, a trustee is primarily under a duty to provide information (not documents). Thus it is not generally necessary to transmit, or provide access to original trust documents, though that may be appropriate in some situations, for example if there is a dispute as to their existence or veracity. But in general a trustee will fulfil his or her duty if the beneficiary is given information contained in a document. If a beneficiary requests that a document be copied and the trustee agrees to do so, the costs may be charged to the beneficiary.[45]

11.39 We can now discuss the substantial question which arises under this heading, namely: what information is a trustee to disclose? In our Discussion Paper we proposed that a number of specific types of information, including trust accounts, investment reports and certain legal advice, would be expected to be disclosed and that other information, such as agendas and minutes of trustees' meetings and letters of wishes from the truster, should not normally be disclosed. This would all be subject to the general law, for example the rules on non-disclosure of confidential information and the requirements of the data protection

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[42] See paras 11.20-11.23 above.

[43] It may well be that the job of identifying the beneficiaries needs to be undertaken periodically. That would certainly be the case where a discretionary trust has a class of beneficiaries which has not closed. But it may also arise in other situations.

[44] Indeed, depending on the particular circumstances, it may be wrong for the trustee to do so. His or her primary duty is to the trust and a duty is owed to any individual beneficiary only in so far as ensuring that the latter's entitlement to their share of the trust property is respected.

[45] See para 10.16 of DP No 148 and its note 40. The trustee may refuse to do so, eg because the relevant page of the document contains some information to which the requesting beneficiary is entitled and some to which he or she is not entitled.

legislation. Furthermore, where there was a doubt it would be open to a trustee to seek court directions.[46]

11.40 Those who responded to our consultation were, on the whole, broadly supportive of this approach but raised a number of points of detail. One such point was whether it was right that professional advice, including legal advice, received by trustees in the course of their administration of the trust, should be statutorily expected to be disclosed on request. Whilst we remain of the view that such disclosure should generally be unobjectionable,[47] there were dissenting voices to this proposal, which were also heard when we subsequently discussed this issue with our Advisory Group. This has caused us to reconsider certain elements of our proposal. In this context we also find a comment made by the Law Society to be helpful: "whether information should be disclosable or not will vary depending on what is relevant to each individual beneficiary".[48]

11.41 We prefer now to start not with a statutory list of information which will be expected to be disclosed but instead to take a more general approach. It is grounded in what we have seen above to be the essentially fiduciary nature of the trustees' duty of disclosure, which must be exercised with an eye to allowing a beneficiary to have sufficient information to be able to hold them to account. We consider that such an approach will be better suited to permit individual trustees to decide what ought to be done in the context of the particular trust for which they have responsibility.[49] As we point out below, this does not mean that there is no place for a list of what is generally disclosable, and another of what ought generally not to be disclosed.[50] But we do not think that it would be beneficial to put those lists in statute. For one reason, this might tend to cause trustees to take a formulaic, "tick box" approach; instead, we wish to encourage thought to be given to each request for information. Secondly, the lists cannot be tailored so as to produce a desirable outcome in every conceivable situation: there will always be exceptions and hard cases and the mere fact that the lists are in a statute might cause some trustees, including perhaps lay trustees, to give undue weight to them. Thirdly, if any adjustments to the lists were thought desirable after enactment then, however major or minor they may be, a further legislative process would be needed to effect them.

11.42 Therefore what we now recommend is a statutory statement that a trustee must give careful consideration to all requests by a beneficiary for trust information.[51] "Trust

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[46] See paras 10.13-10.15 of DP No 148.

[47] This is also the view in Lewin, paras 23.45-23.49, for England and Wales. We distinguish legal and other professional advice sought by trustees for certain specific purposes, eg the defence of legal proceedings threatened against them by the requesting beneficiary; such advice is generally not disclosable on request.

[48] The Law Society was one of those who raised concerns about our proposal that certain types of information should be expected to be disclosed.

[49] For instance, where the ultimate beneficiary of an estate which is subject to a liferent is a charity, it may have an interest in knowing about the liferenter's likely life expectancy (eg so it can plan on the basis of when it might receive property, and so it can value its assets); trustees may be prepared to entertain such a request but may be reluctant to do so where the beneficiary is a natural person.

[50] Although we have said that it was controversy over what should be on the list of generally disclosable items that prompted us to reconsider our approach, it is no less important to consider what should be on the list of what is generally *not* disclosed: see para 10.14 of DP No 148. That list is important in order to set clear boundaries as to what a beneficiary may and may not expect to see. Our proposals in that area have not been the subject of any contrary views.

[51] We have already mentioned that it would be good practice at the initial stage for a trustee to let a beneficiary know of the opportunity to request trust information: see para 11.18 above. Depending on the circumstances it might be felt desirable to repeat this periodically, or indeed for the trustee to volunteer certain basic information from time to time. We do not consider that this duty should be put into statute; at its core it depends on a proper exercise of the trustee's fiduciary duty to inform the beneficiary so that the latter can hold the trustee to account.

information" is to be understood in a broad sense. Requests for relevant information should be met unless the trustees consider it inappropriate to do so, and if so the reason should generally be communicated to the beneficiary. If a trustee is in doubt as to whether it is appropriate to disclose the requested information then we imagine that he or she will wish to discuss this with the beneficiary so as to make an informed decision.[52]

11.43 Although this approach means that there will be no lists in the trusts legislation of types of information which is, or is not, generally to be disclosed on request, we expect that appropriate lists will be contained in guidance to which trustees, and particularly lay trustees, may have access. And trustees who regularly deal with requests for information will no doubt wish to construct lists of their own to guide them in their practice, and may also wish to share and discuss them in the course of business. Consistency in trust administration is important: that was a factor behind our proposal in the Discussion Paper to specify in statute what should generally be disclosed on request.[53] In addition, the availability of a list of what is generally disclosed or withheld promotes not only consistency but also transparency: beneficiaries have ready access to the sorts of information to which they are generally entitled, and trustees are on clear notice as to what their duty is. But, as we have set out above, we are not persuaded that legislation is the most appropriate place for such lists to be set out. Instead we consider that textbooks, guidance from bodies such as STEP, professional blogs and the like will be more suitable vehicles.

11.44 Summarising this part of the discussion we recommend:

> **37. Where a beneficiary makes a request for trust information (with that term being interpreted broadly), a trustee should meet the request unless it would be inappropriate to do so.**
>
> (Draft Bill, section 26(1))

11.45 Although we have said that we do not favour a statutory list of types of information which will generally be disclosed, for the reasons set out above, we consider that there is merit in saying what will generally *not* be disclosable. We have in mind information which falls under one of the following descriptions:[54]

- information as to trustees' deliberations or reasons for their decisions;
- information relating to another beneficiary or third party; and
- letters of wishes.

In general, information falling within these three categories is not disclosable under the comparable trusts jurisdictions which we have examined. On consultation there was no

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[52] We discuss below what happens if the doubts cannot be resolved, but one element of what is reasonable is the time at which the request is made. The New Zealand Law Commission's recent paper cited at note 2 to para 11.1 above recommends a presumption that trustees must "provide trust information to a beneficiary who requests it within a reasonable time". We aim to incorporate this element of timeousness within the overall requirement of reasonableness, but the timing of a request is certainly a factor which, in our view, a trustee should take into account.

[53] See paras 10.13-10.17 of DP No 148, and especially the opening sentences of para 10.13 and the associated footnotes.

[54] See para 10.14 of DP No 148 for a short discussion of these three categories.

dissent to our discussion of this issue. From a practical point of view we consider that it would be useful to spell out in the legislation that information within these specific categories will generally not be disclosed. We believe that this will assist both those making, and those dealing with requests. Of course we should not be understood as saying that there will not be other types of information which it is also inappropriate to disclose. And indeed there may be situations in which disclosure of information falling within the bullet points above is appropriate.

Can the duty be limited by the trust deed?

11.46 We have already discussed whether the truster should be able to limit the duty to provide initial information and concluded that this is not permissible.[55] But what about a trustee's duty to provide further trust information on request: can that be limited, and if so to what extent? In seeking views on this question we also asked another one: if some limitations were permitted, should the court be able to review them under the power we recommend in Chapter 17?[56] Those who responded had divergent views on the first question, but there was unanimous support for the suggestion that, if limitations were permitted, they should be subject to review by the court.

11.47 In our view, the answer to the question of whether a trust deed may validly limit the duty to supply information to a beneficiary on request depends on the view one takes about the balance between the interests of the truster and the trustees. In this we agree with the Faculty of Advocates whose response states:

> "[T]his question [29(a) of DP No 148] highlights potential conflicts between rights and freedoms of trusters, interests of beneficiaries and public policy. In our view it would clearly be inappropriate to say that no such stipulation could ever be effective; to do so would be to entrench too far into a truster's right to do as he pleases with his own property. On the other hand, allowing trusters the right to impose blanket secrecy with no prospect of challenge at any time and under any circumstances is unappealing in this day and age."

11.48 How to balance the wishes of trusters and the interests of beneficiaries was a topic which we discussed at length in our Discussion Paper on Accumulation of Income and Lifetime of Private Trusts.[57] We concluded that a truster should have a degree of freedom to stipulate how he or she wishes the trust to operate but that the court should have a supervisory role which was carefully circumscribed but could not be ousted. We favour a similar approach here: we consider that a truster should be permitted to make an express statement in the trust deed[58] limiting the duty of trustees to disclose specified information to specified beneficiaries. This respects the wishes of the truster, which is an essential feature of a trusts regime, and is also in line with the current law.[59] But we recommend two counterbalancing measures. First, as mentioned above, any express limitations should be subject to the court power discussed in Chapter 18. In this way those with an interest in the trust will be able to seek to keep the trust purposes in line with any material changes which

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[55] See para 11.31 above.
[56] See q 29(a), (b) and (c) in para 10.19 of DP No 148.
[57] DP No 142, especially para 5.16 onwards. Our focus in that DP was the extent to which a truster may tie trust property up for the future but essentially the same considerations apply here.
[58] But not in a "side document" such as a letter of wishes which would not normally be disclosable on request.
[59] See, eg, *Tod v Tod's Trs* (1842) 4 D 1275, discussed in note 9 to para 11.6 above.

may have occurred or be in prospect. However, this will not be sufficient on its own: we see a need to guard against unreasonable or capricious restrictions. Therefore, secondly, we recommend that the court may, at any time, be asked to rule on whether an express limitation of the trustees' duty to provide information is likely to undermine to a fundamental extent the ability of a particular beneficiary (or the beneficiaries as a whole) to hold the trustees to account. A court application may be brought either by a trustee or an affected beneficiary, ie one who claims that his or her ability to hold the trustees to account would be fundamentally undermined. The court will have power to order that the express limitation be read as narrowly as is required to respect the beneficiary's right to hold the trustees to account. If that is not possible then the court may strike the limitation down. The way the court approaches its task will be influenced by the way in which the limitation has been drafted in the particular case in question. We therefore expect that those drafting trust deeds of this nature will take care to do so in a way which is most likely to strike the correct balance between the interest of the truster and the beneficiary.

11.49 So far we have discussed instances of a truster who wishes to restrict the default duty on trustees to provide information. There may, of course, be trusters who wish to expand the duty. We see no objection to that. In the unlikely event that the expansion causes difficulties for the trustees – for example, were the duty to extend to providing a transcript of all trustees' meetings – the trustees can hardly complain if they accepted office knowing that this duty was imposed by the deed. And if, in extreme though highly improbable cases, the expansion makes the trust unworkable or impractical to administer there are existing remedies.[60]

11.50 Accordingly we recommend:

> **38. (1) A truster may, by express provision in the trust deed, limit or expand the trustees' statutory duty to provide information to a beneficiary on request.**
>
> **(2) Where a truster limits the duty, the limitation is subject to review by the court:**
>
> **(a) under its power to alter trust purposes on a material change of circumstances in section 60 of the draft Bill, or**
>
> **(b) on the ground that the limitation is such as to undermine in a fundamental way the ability of a beneficiary (or of the beneficiaries as a whole) to hold the trustee to account.**
>
> **(3) A challenge under (2)(b) may be brought at any time after the trust's creation by a trustee or by an affected beneficiary; the court may direct that the trust deed be read as narrowly as is required for it to permit the beneficiary to be able to hold the trustees to account (or, if that is not possible, to strike down the limitation in its entirety).**
>
> (Draft Bill, section 26(9)-(11))

[60] Eg see para 18.14 below.

Application to existing trusts

11.51 We made a recommendation above that the initial duties should apply to all trusts, whether constituted before or after the coming into force of the legislation.[61] Those initial duties will be relatively easy to fulfil in respect of existing trusts (though in saying this we are aware that in certain cases, perhaps because of the relationships between individual trustees and beneficiaries, there may be considerable friction). On the other hand, the duty to pass information at a subsequent stage may be relatively complex. Trustees of existing trusts might, for example, suddenly face numerous requests in a short space of time after implementation, or requests for considerable quantities of information.

11.52 We therefore see the force of an argument that not all trusts should be treated alike. But we are not persuaded that it would be equitable to exempt existing trusts and to apply the statutory duty only to trusts created after the legislation comes into force. That would be to create a two-tier system based on the (arbitrary) date of creation of the trust and would not serve to improve the law, particularly in respect of existing trusts, which may last for decades to come and would continue to be governed by the current vague and unclear rules. Instead, we are persuaded by the approach taken recently by the New Zealand Law Commission who recommend that the information duties should apply to existing trusts only after the lapse of two years following commencement.[62] This means that there is, in effect, a period of grace during which it will no doubt be good practice for trustees of existing trusts to comply with the new rules but it only becomes mandatory to do so after the law has been in force for two years. In our view this sort of approach strikes a practical balance. However, we think that two years is too long for the Scottish situation,[63] and we prefer a period of one year. Accordingly we recommend:

39. The duty on a trustee to provide information to a beneficiary on request should apply from the date of commencement of the legislation to any trust created on or after that date, and it should apply to a trust created before that date only once a year has elapsed following commencement.

(Draft Bill, section 26(12)-(14))

Option of seeking court directions

11.53 We recognise that there will be cases when the trustee and beneficiary cannot agree on what is a reasonable request for relevant information.[64] There may also be other cases, perhaps more rarely, where a trustee is in doubt about whether to send certain information to

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[61] See recommendation 36 above.
[62] See para 5.54 of Vol 1 of the publication cited in note 2 to para 11.1 above.
[63] One relevant factor is that the number of trusts *per capita* in New Zealand far exceeds that in the UK. It is estimated that the respective figures are one trust for every 18 people in NZ and one for every 294 in the UK: see para 1.13 of the New Zealand Law Commission's Introductory Issues Paper, accessible at http://www.lawcom.govt.nz/sites/default/files/publications/2010/11/ip19_review_of_trust_law_in_new_zealand.pdf
[64] A request may also be unreasonable if it is vexatious or is a repeat of a recent request. We understand from practitioners on our Advisory Group that this is a matter of concern. There is specific provision for this in other fields, eg s 14 of the Freedom of Information (Scotland) Act 2002. In our view, however, such an approach would not be suitable in the (private) law of trusts. The FOI regime is part of public law and is different in important respects from what we recommend for trusts. In addition, there are options for trustees who face what they consider to be repeated or vexatious requests: in relatively minor cases these might include a requirement that the requester pay the costs incurred in meeting the request, and in more serious situations there is the option of seeking court directions as described in the text which follows.

a beneficiary without there having been a request.[65] In our Discussion Paper we proposed that in these situations the trustee may wish to make a court application, generally by way of a petition for directions. We adhere to this approach.

11.54 Equally we consider that if a beneficiary is dissatisfied with the trustee's response to a request then he or she may also, as a last resort, apply to the court either for a direction to the trustee to disclose such information as the court may specify or for a finding that the trustee has exercised his or her fiduciary power in a defective manner (under the power discussed in Chapter 19). Accordingly we recommend:

> **40. Where a trustee is uncertain as to whether particular information should be disclosed, either on request or otherwise, he or she should consider whether to apply to the court for directions. Equally if a beneficiary is dissatisfied with the trustee's response to a request for information he or she may apply to the court either for a direction to the trustee to make disclosure or for an appropriate order where the trustee has exercised the fiduciary power in a defective way.**
>
> (Draft Bill, section 26(7))

We deal elsewhere with the court power to give directions,[66] and see no need for a specific statutory statement here in the context of the duty to provide information.

Duty owed to a person deriving a right from a beneficiary

11.55 There are a number of situations in which a trustee must, on request, consider providing trust information to a person other than the beneficiary. Other than in two cases, concerning the duties owed to a protector and a supervisor (with which we deal below), the obligations owed by the trustee do not, in our view, require any statutory provision. We nevertheless list some of the situations in which a trustee may be required to pass information to a person other than a beneficiary.

11.56 First, it has long been accepted that a solicitor may request information on behalf of a client who is a beneficiary, thereby triggering an obligation on the trustee to consider the request as if it had been made by the beneficiary.[67] This is perhaps sufficiently obvious to go without saying but it is likely, in practice, that requests for information will be made relatively frequently by solicitors (or other professional agents) and parents, guardians or those with a power of attorney. In our view they should all be treated in the same way and the trustee should respond as if the request had come directly from the beneficiary.

11.57 Secondly, a beneficiary may assign, in whole or part, his or her interest in the trust property and in that case the assignee takes the same rights as the beneficiary had (but no greater rights). The leading case is *Salamon v Morrison's Trustees*.[68] It concerned a request by Mrs Salamon, to whom two beneficiaries of the trust had assigned the whole of

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[65] It will be open to a trustee to pass information to a beneficiary other than on request (except to the extent that the trust deed expressly provides otherwise).
[66] See paras 16.5-16.12 below.
[67] See para 10.16 of DP No 148 and its note 39.
[68] 1912 2 SLT 499; see also Wilson and Duncan, para 10.43.

their interest, to see trust accounts of Mr Morrison's testamentary trust. Lord Skerrington opened his opinion in this way:

> "This case raises a question of general importance to persons who lend or borrow money on the security of beneficial interests in trust estates, viz. whether the assignee of a beneficiary as distinguished from a person who is himself an actual or prospective beneficiary is entitled as of right to see the accounts of the trust in the absence of some special reason to the contrary."[69]

11.58 The court held that Mrs Salamon was entitled to have her request granted. A beneficiary is free to assign his or her interest, and denying the assignee the independent right to see accounts would be to make the trust entitlement "less marketable and consequently less valuable to the beneficiary".[70] It was pointed out that assignation may consequentially impose additional burdens on the trustees and hence on the trust fund, particularly if a beneficiary makes partial assignations of his or her interests to a number of different assignees, but the court was not persuaded that this was a relevant argument as to why an assignee should be refused access to the accounts. Despite this adverse finding, the trustees were allowed their expenses as "there is very little authority in regard to the rights of assignees".[71]

11.59 This raises the question of whether the duty owed to the assignee is in addition to, or supersedes the duty owed to the beneficiary-assignor. We have not been able to trace any domestic cases which are directly in point, either in Scots or English law; there are suggestions, however, in *Salamon v Morrison's Trustees* that the duty is cumulative.[72] There are, though, two relevant South African cases. In *Moodley v Moodley*[73] the court held that a beneficiary who cedes the whole of his or her interest in the estate loses the right to demand the trust accounts. And in *Moola v Estate Moola*[74] it was held that a beneficiary who cedes his or her interest as security for a debt loses the right to sue the trustees for an account. Although this was not a topic on which we consulted, we consider it worth making clear what duties trustees have towards both an assignee and an assignor in relation to information. In this regard *Salamon v Morrison's Trustees* remains good law and, in our view, represents a fair policy balance too. The South African decisions (which may turn on niceties of property law which do not translate directly into Scots law) lead to a potentially and unnecessarily complex situation, both for trustees and beneficiaries. The provision of information following assignation to both an assignor and an assignee should not be unduly burdensome, but if it should prove to be so then the trustees will be able to use their discretion as to how to exercise their fiduciary duty and, of course, they may seek directions from the court, if necessary.[75]

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[69] 1912 2 SLT 499, 500.
[70] Ibid at 501.
[71] Ibid at 502.
[72] The position of the assignor was not at issue but the judge notes that "there is no averment that the original beneficiary has ever exercised the right of inspection *which admittedly belongs to him*": 1912 2 SLT 499, 510 (with emphasis added).
[73] 1953 (3) SA 860 (N).
[74] 1957 (2) SA 463 (N).
[75] There may be very unusual cases where information duties are not transferrable on assignation: see the Australian decision *Global Custodians Ltd v Mesh* [1999] NSWSC 624, and Lewin, para 23.76.

11.60 Thirdly, a creditor of a beneficiary may have a right to be considered by a trustee for the provision of relevant information as if the request had been made by the beneficiary.[76]

11.61 We conclude this Chapter with a consideration of two further situations in which a trustee may have a duty to provide trust information to a person other than a beneficiary. As we have already mentioned, they concern trusts in which a protector has been appointed and, secondly, private purpose trusts.

Protectors

11.62 We discuss our recommended regime for protectors in Chapter 15 and, for brevity, we do not rehearse any of the details here. As regards the duty to provide information, we made a specific proposal about the duty on a trustee to provide information to a protector,[77] to which those who responded gave their broad support. Our proposal was in these terms:

> "If a protector is appointed to a trust, he or she should have a right to examine all documents, of any sort, kept by or on behalf of the trustees. This right will be subject to modification only if the trust deed provides otherwise."

The intention is that a protector should have the fullest access to trust documents and information, entitling them to see material which does not fall within the trustees' duty in respect of a beneficiary or a supervisor. This is because the role of the protector is to police the trustees' actions and decisions, which can only be done if they are permitted full access to the trust documents and other information.

11.63 We proposed that the only limitation on the protector's power to see trust materials was to be found in the trust deed. Given that a protector could only be appointed if the deed so provided it should, in our view, be open to the truster to limit the protector's powers, if desired. All respondents who expressed a view on this supported the proposal. One respondent added that the protector's right of examination was not to be exercised unreasonably; whilst we agree with that we think that it is implicit in the recommended requirement that the duties of the protector are fiduciary and that a protector is subject to a duty of care.[78] In our view this gives a basis for any unreasonable request for trust information to be properly resisted by the trustees.

11.64 We therefore recommend:

> **41. A protector who is appointed to a trust should have a right to examine all documents, of any sort, kept by or on behalf of the trustees. This right will be subject to modification only if the trust deed provides otherwise.**
>
> (Draft Bill, section 48(4))

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[76] *Moola*, discussed in para 11.59 above, is an example. Compare also, in English law, *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 and *Revenue and Customs Commissioners v Parissis and Ors* [2011] UKFTT 218 (TC).
[77] At para 10.24 and q 32 of DP No 148.
[78] See paras 15.10-15.11 and recommendation 72 below.

11.65 In considering whether this recommendation should be stated to apply only to trusts created after the corresponding legislative provision comes into force, we weighed up two arguments. The first, in favour of such a limitation, is that the statutory regime for protectors is an innovation in the Scottish statute book and it would therefore be somewhat odd to have an express statement which implied that protectors are already a part of the legal landscape. The contrary argument is that, if the information duty applied only to new trusts, there could be a legal black-hole for some existing trusts. It is not impossible, first, for an existing Scots law trust to provide for a protector or someone performing a substantially similar role: simply because the office is not provided for by statute does not make it incompetent.[79] Secondly, an existing trust created in a jurisdiction which already expressly provides for the appointment of a protector might, on the protector's direction, become subject to Scots law. If so, it would be unfortunate if there were doubt as to the protector's right to trust information. We are therefore persuaded that the preceding recommendation should apply to all trusts, whenever created, and accordingly we recommend:

42. The right of a protector to examine all trust documents applies regardless of when the trust came into existence.

(Draft Bill, section 48(9))

Private purpose trusts

11.66 We discuss private purpose trusts in Chapter 14. Of special relevance is our recommendation that the office of supervisor be created. We will not repeat the details here but simply discuss the particular application to private purpose trusts of a trustee's duty to provide information about the trust.

11.67 In practice, a private purpose trust may be set up purely for the promotion of one or more purposes, to the exclusion of any trust beneficiaries. In such a case no question arises about a duty on the trustees to pass information to a beneficiary, but instead the duty is owed to the supervisor (if one has been appointed). This is in line with the policy that the role of a supervisor is to enforce the proper administration of the trust by the trustees, and that is not possible without access to relevant trust information. The trustees' duty to provide such information cannot be excluded or diluted by the trust deed.

11.68 But it is equally competent for there to be a mixture of purposes and beneficiaries. As mentioned in the previous paragraph, there is good reason for any supervisor to be given access to trust information. But should a trustee also have a duty to provide information to a beneficiary? Or does the presence of a supervisor mean that the beneficiary's rights in this regard are over-written? If so, should that be a default rule, or a mandatory one? These questions were posed in our consultation,[80] and those who responded were in support of the provision of information to the supervisor but divided as to the position of a beneficiary. In the light of this, and in order to allow trusters a due measure of flexibility, we are inclined to favour a default rule which provides that, subject to the trust deed, the appointment of a supervisor does not affect the duty of a trustee to provide information to a beneficiary. We

[79] As we mentioned in DP No 148, the rise of the protector in recent decades owes a good deal to the fact that – for fiscal and other reasons – trusts may be set up in jurisdictions far from the truster's home: see its para 11.3 and especially the text to note 2.

[80] See qq 30 and 31 in para 10.23 of DP No 148.

say this for two main reasons: first, we expect that a truster who sets up a private purpose trust with the intention of denying any beneficiaries the right to see trust information will be a sophisticated person and is likely to have access to legal advice, in which case there is no obstacle to the deed setting out the desired position. Secondly, the contrary rule (that is, one saying that a supervisor alone should have access to the trust information) may lead to difficulties in practice, for example if the supervisor is a natural person who loses capacity through a condition such as dementia. It may take some time for this to become apparent and to reach a stage where a replacement can be appointed,[81] during which time there will be no effective oversight of the trustee's actings.

11.69 Accordingly we recommend:

43. A trustee of a private purpose trust has a duty to provide any supervisor with such information about the trust as a trustee of a private trust which is not a private purpose trust would have to provide to a trust beneficiary. This duty cannot be weakened by the trust deed.

(Draft Bill, section 45(1))

44. In addition, a trustee of a private purpose trust has a duty to inform any beneficiary of his or her status as beneficiary and, unless the trust deed provides otherwise, to provide such further information about the trust which a beneficiary of a private trust which is not a private purpose trust would be entitled to receive under recommendation 37 above.

(Draft Bill, sections 25(7)(b) and 26(12)(b))

11.70 Should the recommendation above apply to all trusts, whenever created, or only to those created after the relevant legislation comes into force? Although Scots law does not currently provide in statute for private purpose trusts, we consider that they are already competent and indeed may be in relatively frequent use in certain situations.[82] With that in mind, we consider that there is merit (and no harm) in stating that the recommendation should apply to existing trusts as it does to newly created ones. We therefore recommend:

45. The right of a supervisor to be informed about the trust applies regardless of when the trust came into existence.

(Draft Bill, section 45(5))

[81] See s 44(5)(b) and (6)(b) of our draft Bill.
[82] See paras 1.14 and 2.25(3) above, and para 12.2 of DP No 148.

Chapter 12 Breach of trust

Introduction

12.1 We considered the question of breach of trust in the first Discussion Paper we published in the current project.[1] Generally speaking our proposals were received favourably on consultation. On one aspect, however, the formulation of a trustee's duty of care, mixed views were expressed, and we eventually decided that this aspect of the law, which is clearly of fundamental importance, should be the subject of further consultation. Consequently, we revisited it in a later Paper.[2]

12.2 We discuss the following topics in this Chapter:

- *Ultra vires* breach of trust (paragraphs 12.3 to 12.7),
- *Intra vires* delictual breach of trust, including the standard of care required of lay and professional trustees (paragraphs 12.8 to 12.22),
- Immunity and indemnity clauses, and the abridging of trustees' duties (paragraphs 12.23 to 12.54),
- Breach of fiduciary duty (paragraphs 12.55 to 12.64),
- Trustees' remuneration (paragraphs 12.65 to 12.79),
- Indemnity insurance at the trust estate's expense (paragraphs 12.80 to 12.88),
- Judicial relief from liability for breach of trust (paragraphs 12.89 to 12.94),
- Liability for co-trustees (paragraphs 12.95 to 12.98),
- Transitional provisions (paragraph 12.99).

Ultra vires breach

12.3 The personal liability of trustees for *ultra vires* breaches of trust was considered in Part 2 of our Discussion Paper on Breach of Trust. We concluded that the present law was not clear, which in itself was a reason for reform.[3] In addition to that, we thought that the present near absolute liability of trustees for an *ultra vires* breach of trust was too heavy a burden on them. We gave the example of prudent investment that turned out disastrously which was reasonably but mistakenly thought to be within the trustees' powers. In that event, trustees would be personally liable, whereas if the making of the investment was authorised by the trust deed there would be no such liability. While it was possible for trustees to apply to the court for clarification before acting, the need for legal proceedings

[1] DP No 123.
[2] DP No 148, Ch 6.
[3] See para 2.12 of DP No 123.

with their attendant delay and expense seemed to us to be a disproportionate solution to the problem. We accordingly proposed that there should be a less strict rule of personal liability, and that trustees should be personally liable for an *ultra vires* breach of trust only if they acted in bad faith or without due care. Thus, provided that the trustees took all reasonable steps, both to ascertain their power to act and as to the prudence of their action, such as taking appropriate expert advice, and made full enquiries, they ought to escape personal liability without the necessity of an application to the court. We did not think that strict liability was necessary to ensure that trustees kept to the powers conferred on them by trust deed or statute.

12.4 We further expressed the view that no distinction should be drawn between *ultra vires* acts arising out of errors of law and those arising out of errors of fact. We considered that such a distinction served no useful purpose. Moreover, in recent cases, the distinction between errors of law and errors of fact had been rejected in the field of unjustified enrichment.[4] We considered that a similar approach should be taken in relation to the *ultra vires* acts of trustees.

12.5 We indicated that the release of trustees from strict liability would not necessarily be at the expense of the beneficiaries.[5] In the case of wrongful distribution, the trustees would be entitled to recover trust property distributed in error from a wrongful recipient.[6] Even if the trustees declined to take action themselves, they would be required to lend their names to an action by the correct beneficiary, subject to obtaining an indemnity for expenses. Thus the beneficiary's right of recovery did not require strict liability as between beneficiary and trustee. Our proposed new rule would prejudice beneficiaries in the case of an unauthorised investment, but we did not see this as a substantial disadvantage. Most trust deeds now confer extremely wide powers of investment, and the concept of an unauthorised investment would virtually disappear if our recommendation that trustees should be able to make any kind of investment open to a natural person were implemented.[7] We therefore made the following proposal:

> "1. Trustees should not be personally liable for any losses arising out of an action amounting to an *ultra vires* breach of trust provided they acted in good faith and after taking all reasonable steps and making all reasonable enquiries believed that such action was within their powers. This should not prejudice any right of recovery by the beneficiaries from persons other than the trustees or the trustees' right of recovery of wrongfully distributed property."

12.6 On consultation, all but one of the respondents supported this proposal. The Occupational Pensions Regulatory Authority disagreed, on the ground that the adoption of the proposal would reduce trustees' liabilities in Scotland in comparison with the remainder

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[4] Eg *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151.
[5] See para 2.15 of DP No 123.
[6] The beneficiaries may be able to take action themselves: see *Armour v Glasgow Royal Infirmary* 1909 SC 916, where the trustees were joined as defenders along with the recipient of what the court held to be a wrongful payment of trust property. See also the recent dictum of Lord Tyre in *Moir v Moir* [2013] CSOH 177 (at para 16): "Where […] the transferee has not given value for the trust property (and regardless of whether he or she is in good faith), it appears that in certain circumstances the transferee's title may be reduced in an action at the instance of the beneficiary: *Armour v Glasgow Royal Infirmary* 1909 SC 916; *Bertram, Gardner & Co's Trustee v King's Remembrancer* 1920 SC 555, Lord Skerrington at p 562. (For a fuller discussion, reference may be made to Professor J M Thomson, "Unravelling Trust Law: Remedies for Breach of Trust" 2003 JR 129.)".
[7] We discuss investment powers in Ch 7.

of the UK. This was said to contrast with the increased standard of care expected of pension trustees. We are of course concerned with the whole field of trusts rather than specifically pension trusts; if a stricter rule is thought desirable for the latter it should be introduced through pensions legislation. It seems to us that discrepancies in the law of trusts have always existed between the different parts of the UK, and do not give rise to any great difficulty. Furthermore, what we proposed did not reduce trustees' duty of care; what was removed was a form of strict liability that can operate in an arbitrary and inconsistent manner and can produce harsh results. For these reasons we consider that our proposal should be implemented, subject to two modifications. First, we are of opinion that the exemption of trustees from personal liability should be granted through a power exercisable by the court on application by a trustee. Secondly, we consider that the requirement of good faith is, in effect, encompassed within the need to take all reasonable steps and make all reasonable enquiries as to whether the action is within the trustees' powers. It is therefore not necessary to make express reference to good faith. We accordingly recommend:

> **46. The court should have power, on application by a trustee, to hold that the trustee is not personally liable for any losses arising out of an action amounting to an *ultra vires* breach of trust provided that, after taking all reasonable steps and making all reasonable enquiries, he or she believed that such action was within the trustees' powers; the court may make such order as seems just. This should not prejudice any right of recovery by the beneficiaries from persons other than the trustees or the trustees' right of recovery of wrongfully distributed property.**
>
> (Draft Bill, section 29)

12.7 We went on to consider the effect of immunity clauses in dealing with *ultra vires* breaches of trust, and asked whether, if our first proposal were not accepted, there should be new clarifying legislation dealing with such clauses.[8] Because we have adopted our first proposal as a recommendation, this matter is no longer relevant.

Intra vires delictual breach: standard of care

12.8 We considered the consequences of an *intra vires* delictual breach of trust in Part 3 of our Discussion Paper on Breach of Trust. The primary issue that was raised in this connection was the standard of care that should apply to trustees. As we have already mentioned,[9] this was the subject of subsequent consideration in our Discussion Paper on Supplementary and Miscellaneous Issues. In the original Paper we reviewed the existing law in detail, and also the law in a range of other jurisdictions.[10] We indicated that the general rule in Scots law is that a trustee is required to exhibit "the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs".[11] We stated that there is some uncertainty as to whether trustees who act as such in the course of their business or have relevant special skills are expected to show a higher standard of diligence and knowledge than the basic objective standard of an ordinarily prudent person.

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[8] See paras 2.17-2.18 of DP No 123.
[9] See para 12.1 above.
[10] See paras 3.2-3.3 of DP No 123, together with paras 5-10 of its Appendix A.
[11] *Raes v Meek* 1889 16 R (HL) 31, 33 per Lord Herschell; see also *Knox v Mackinnon* 1888 15 R (HL) 83, 87 per Lord Watson; and *Tibbert v McColl* 1994 SC 178.

12.9 We suggested that a higher standard of care should be required of "professional" trustees, and that legislation would be required to achieve this as the existing position in Scots law was uncertain. We thought that a minimum standard applicable to all trustees was necessary, as without that beneficiaries would be at the mercy of lazy, ignorant or incompetent trustees. That minimum standard must be objective; a subjective standard, based on the way in which trustees would act in relation to their own private affairs, might be too low and would present great difficulties in determining whether a breach of trust had occurred. We ultimately favoured a standard that is used in South Africa, that a trustee should use the same care and diligence as an ordinarily prudent person would use in managing the affairs of others.[12] We thought that that formula emphasised the fact of trusteeship: trustees administer the trust property not for themselves but for the beneficiaries. Conscientious people are, if anything, more careful and diligent in relation to the affairs of others than they are in relation to their own, and would be likely to adopt a more cautious and careful approach with other people's property and entitlements.

12.10 In relation to "professional" trustees, we pointed out that solicitors, accountants and banks put themselves forward for appointment as trustees on the basis that they offer a superior standard of service to that of untrained amateurs. It was therefore not unreasonable for the law to hold them to a higher standard. In that event the standard would be the appropriate professional standard of care: negligence would be established only if the trustee followed a course of action that no ordinarily competent member of the profession would have adopted if acting with ordinary care.[13] We considered that the higher, professional standard should only apply where the trustee acts in the course of business; in this respect we attached some significance to the formulation found in section 1(1) of the Trustee Act 2000 in England and Wales.[14] We did not favour using the criterion of payment for the imposition of a higher standard of care; we thought it sufficient that a professional person should act in the course of his or her business, even if no remuneration were charged. Correspondingly, in a case where a trustee is left a modest legacy or gift as a token of appreciation for services to be rendered, we thought that that should not result in any higher standard.

12.11 On that basis, we made the following proposal:

> "3. Unless otherwise provided by statute, in carrying out their trust duties –
>
> (a) Every trustee should have to use the same care and diligence that a person of ordinary prudence would use in managing the affairs of others.
>
> (b) A trustee who acts as such in the course of his or her business or profession should in addition have to use any special knowledge or expertise that it is reasonable to expect of a member of that business or profession."

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[12] Trust Property Control Act 1988, s 9(1): "A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another."

[13] *Hunter v Hanley* 1955 SC 200.

[14] This section provides that a trustee:

> "… must exercise such care and skill as is reasonable in the circumstances, having regard in particular –
> (a) to any special knowledge or experience that he has or holds himself out as having, and
> (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession."

12.12 On consultation, respondents agreed generally with the first paragraph of this proposal, but were divided on the second. One view was that Scotland should broadly follow section 1(1) of the Trustee Act 2000 in England and Wales,[15] on the basis that major differences between the two systems could undermine the provision of professional trustee services in Scotland. Another view was that, if a trustee was appointed on the basis of holding him or herself out as having particular knowledge or expertise, the standard of a person who had such knowledge or expertise should apply, whether or not the trustee was acting in the course of a business. That is in fact close to the English rule. A third view, expressed by the Law Society, was that it might become increasingly difficult to find persons willing to take on the burden of becoming a trustee unless obligations were kept to reasonable levels; this was particularly relevant to pension trustees and trustees of private trusts.

12.13 On considering matters further, we concluded that additional consultation was needed.[16] In particular, we were concerned by two matters relating to professional people who acted as trustees. First, we thought it very important not to discourage such persons from accepting office as trustees. Secondly, we were concerned about the position of a trustee who happened to have professional qualifications but did not act as trustee in a professional capacity; such trustees are commonly asked to provide professional advice on an informal basis, without proper instructions and without payment. That creates an obvious hazard for them, as the legal status of such advice would often be far from clear.

12.14 Against those considerations, we were conscious that professional trustees are frequently appointed on the basis that they offer a superior standard of service; that would apply in particular to professional corporate trustees and banks' trustee departments. In many cases, too, solicitors and accountants market their services as professional trustees. In cases of this nature, it seemed to us to be appropriate to hold the trustee to a professional standard of service.

12.15 With other trustees, however, we were of opinion that they should be subject only to the general standard of care, that is to say, the standard of care and diligence of a person of ordinary prudence managing the affairs of others. That should apply whether or not the trustee was a member of a profession. Thus a solicitor who had accepted office as a trustee would ordinarily only be subject to the general standard of care. That would apply to informal legal or other professional advice given by such a trustee. The higher, professional, standard of care would only apply to such a trustee if he or she were expressly instructed to provide professional advice to the trust. In this way we thought that the hazards arising from informal requests for professional advice could be reduced. That seemed to us to be fair, because trustees are normally unremunerated, and it did not seem reasonable to expect a gratuitous trustee to employ full standards of professional diligence in a case where there were no proper instructions and no remuneration.

12.16 The position was different, however, if professional work were instructed by the trust. In that case the ordinary standard of professional skill and care should apply. While remuneration might be paid in such a case, we did not regard this as an essential criterion for liability. Instead we considered that the existence of professional instructions should be the criterion. We noted that, in cases where proper instructions are given, the trustees'

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[15] See the preceding note.
[16] In Ch 6 of DP No 148.

professional indemnity insurance will normally operate, but that might not be the case if advice were given on an informal basis.

12.17 In addition, as noted above, we thought that a higher standard of care should apply to trustees who provide professional trustee services and charge for those services. Because they are paid for acting as trustees, and indeed usually market their services on the basis of a superior standard, we think that they should be subject to the appropriate professional standard of care and skill.

12.18 On that basis, we made the following proposal:

> "15. Unless otherwise provided by statute, in carrying out their trust duties –
>
> (a) Every trustee should have to use the same care and diligence that a person of ordinary prudence would use in managing the affairs of others.
>
> (b) An unremunerated trustee who has professional qualifications or business experience should be subject only to the foregoing duty unless he or she is instructed to provide professional or other specialised advice to the trust. In the latter event, the trust will be required to use any special knowledge or expertise that it is reasonable to expect of a member of his or her profession or business.
>
> (c) A trustee who provides professional trust services and is remunerated for doing so should be required to exercise the level of skill and care that it is reasonable to expect of a member of his or her profession or business."

12.19 On consultation, respondents were generally in agreement, subject to some matters of detail. Deloitte LLP suggested in relation to paragraph (c) of the proposal that, if a professional trustee held itself out as having particular and higher skills, those should be measured against that standard of expertise rather than against the level of skill and care that it would be reasonable to expect of a general member of that profession or business, where the level of skill and care would otherwise be lower. We see force in this observation, in cases where specific skills are claimed. We think, however, that the concept of the level of skill, care and diligence that it is reasonable to expect from a member of the profession in question is essentially flexible; if the person appointed trustee holds him or herself out as having particular expertise in trust law, that will be the appropriate standard; whereas if he or she is merely a solicitor in general practice the standard required may be lower. The concept of reasonable care and skill is essentially flexible, and will vary according to particular circumstances.[17]

12.20 Dr Carr queried whether immunity clauses could excuse a trustee from gross negligence or fraud.[18] We take the view that the ability to contract out of the duty of care should be limited,[19] and we have included provision to that effect in our draft Bill. Our Advisory Group raised the question of the protection of professional trustees who were unremunerated. In this case, we think that the need for instruction in a professional capacity

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[17] Compare the requirements set out in s 17(4) of the draft Bill which apply to those giving investment advice to trustees (as discussed in Ch 7 above).
[18] By reference to *Lutea Trs Ltd v Orbis Trs Guernsey Ltd* 1997 SC 255; see also para 12.25 below.
[19] See paras 12.23-12.30 below.

to trigger the higher standard of care is important. A solicitor who is appointed as trustee is not instructed to provide professional services or advice to the trust, but merely to act as a trustee. It is only if the body of trustees expressly instruct him or her to provide professional services or advice to the trust that the higher standard of care comes into operation (and this is so regardless of whether the trustee-solicitor is also entitled to remuneration for his or her professional actings). In this way we consider that the position of an ordinary professional person should be dealt with on a fair and reasonable basis. Of course, if trustees want to obtain professional advice, they must give instructions to that effect. In this way we think that the administration of trusts may be improved from a practical standpoint, with trustees carefully formulating what they want their professional advisers to do and giving appropriate instructions.

12.21 A further issue raised by our Advisory Group was the kind of specialised knowledge that would be required for a trustee to be subject to the higher, professional, standard of care. We do not think that this should cause very much difficulty in practice, as the trustees in question will usually be solicitors, accountants, fund managers or the like. The requirement of instruction by the body of trustees seems to us to indicate quite clearly the situations where the higher standard will be required. It may be that marginal cases arise, but that is true of almost any legal rule, and we do not think that greater specification can be provided without unduly complicating the relevant legislation.

12.22 In the light of the foregoing considerations, we make the following recommendation:

47. In carrying out their trust duties –

(a) Every trustee should have to use the same care and diligence that a person of ordinary prudence would use in managing the affairs of others.

(b) A trustee who has professional qualifications or business experience should be subject only to the foregoing duty unless he or she is instructed to provide professional or other specialised advice to the trust. In the latter event, the trustee will be required to use any special knowledge or expertise that it is reasonable to expect of a member of his or her profession or business.

(c) A trustee who provides professional trust services and is remunerated for doing so should be required to exercise the level of skill and care that it is reasonable to expect of a similarly experienced member of his or her profession or business.

(Draft Bill, section 27(1)-(3))

Immunity clauses restricting trustees' liability

12.23 In our Discussion Paper on Breach of Trust we considered the effects of immunity clauses which purport to relieve the trustees of personal liability for delictual breach of trust.

We reviewed the existing law in Scotland.[20] An example of a typical immunity clause for a testamentary trust is as follows:

> "My trustees shall not be liable for depreciation in value of the property in my estate, nor for omissions or errors in judgment, nor for neglect in management, nor for insolvency of debtors, nor for the acts, omissions, neglects or defaults of each other or of any agent employed by them."[21]

Despite the width of such a clause, the protection provided by it is limited. In particular, Scots common law makes it clear that a trustee who is guilty of gross negligence, or *culpa lata*, is not protected by an immunity clause. The relevant principle was expressed in *Seton v Dawson*:[22]

> "… the general principle of our law is, that neither the protecting clause which occurs in this particular deed, nor any of the usual clauses framed for the same object, can be held to liberate trustees from the consequences of such gross negligence as amounts to *culpa lata*."

A statement of principle to similar effect is found in the speech of Lord Watson in *Knox v Mackinnon*:[23]

> "I see no reason to doubt that a clause conceived in these or similar terms will afford a considerable measure of protection to trustees who have *bona fide* abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust and of the persons whom it concerns; but it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or of gross negligence on his part, or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees who, from motives however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer."

That statement of law was approved in the later case of *Raes v Meek*.[24] In *Clarke v Clarke's Trustees* Lord President Clyde expressed a similar view:

> "It is difficult to imagine that any clause of indemnity in a trust settlement could be capable of being construed to mean that the trustees might with impunity neglect to execute their duty as trustees, in other words, that they were licensed to perform their duty carelessly. There is at any rate no such clause in this settlement."[25]

Finally, in the most recent Scottish case, *Lutea Trustees Ltd v Orbis Trustees Guernsey Ltd*, Lord McCluskey stated:[26]

> "I can, however, find nothing in the terms of the trust deed that would exclude the defenders from incurring liability to the trust in respect of the loss resulting from grossly negligent intromission with the trust estate. Indeed, counsel for the

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[20] At paras 3.13-3.17.
[21] Barr et al, style 5.11.
[22] (1841) 4 D 310, 316-317 per Lord Cockburn.
[23] (1888) 15 R (HL) 83, 86.
[24] (1889) 16 R (HL) 31, 35 per Lord Herschell, who expressly found that *culpa lata* existed in that case and that the exemption clause was therefore ineffective. See also *Ferguson v Paterson* (1900) 2 F (HL) 37: trustees liable as they were guilty of a positive breach of trust and gross negligence.
[25] 1925 SC 693, 707.
[26] 1997 SC 255, 264.

defenders and reclaimers expressly accepted that neither the terms of the trust deed nor the common law would enable the trustees to avoid liability for the consequences to the trust estate of *culpa lata*."

12.24 We nevertheless noted that comments made in an English case, *Armitage v Nurse*[27] might have cast doubt on whether the position outlined in those statements of the law remains accurate.[28] In that case the Court of Appeal considered that there was no prohibition in Scotland of a clause that exempted trustees from being liable for negligence or gross negligence. Millett LJ considered that each of the Scottish cases on this matter was merely a decision on the proper construction of the particular clauses under consideration which were at the time in common form. In particular, he thought that the comments made by Lord President Clyde in *Clarke v Clarke's Trustees*[29] emphasised the need for an immunity clause excluding liability for negligence to be in clear and unambiguous words, but did not purport to deny the efficacy of such a clause on the ground of public policy.

12.25 A similar approach to the exclusion of gross negligence in Scots law is found in the opinion of Lord Mance in a recent appeal to the Privy Council from Guernsey, *Spread Trustee Co Ltd v Hutcheson*.[30] Lord Mance reviewed the Scottish cases at some length, with an elaborate analysis of each, concentrating on details of the wording of the opinions according to the literal meaning of that wording. On *Knox v Mackinnon,*[31] he observed that the basis of the decision is to be found in the second sentence of the passage quoted above;[32] the trustees in that case had acted in plain violation of their duty to the beneficiaries. We observe that it is not entirely clear that this was regarded by Lord Watson as a separate duty; it may be that he considered acting in plain violation of duty to the beneficiaries to be equivalent to gross negligence or conduct inconsistent with *bona fides*. In relation to *Raes v Meek,*[33] Lord Mance attached importance to the use of the word "construction".[34] A similar attitude is taken to the other decisions cited. In general, the approach to the analysis of these cases is that they turn either on particular facts, involving extreme conduct on the part of the trustees, or turn on the construction of the particular exemption clause that is used.[35] *Lutea Trs Ltd v Orbis Trs Guernsey Ltd*[36] is discussed at some length and the conclusion apparently reached is that the case fell short of an endorsement of any idea that it was as a matter of public policy or law impossible to exclude liability for gross negligence.[37] That appears correct, but it should be noted that, in that case, both parties accepted that the exemption clause that was used would provide no protection against *culpa lata*.[38]

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[27] [1998] Ch 241.
[28] At para 3.16.
[29] See para 12.23 and note 25 above.
[30] [2011] UKPC 13.
[31] At paras 90-91.
[32] At para 12.23.
[33] (1889) 16 R (HL) 31.
[34] At para 92. In *Raes v Meek*, Lord Herschell stated, after quoting the terms of the exemption clause: "Such a provision … is a common one, and is to be found in many trust deeds. It does not now come before the courts for construction for the first time": (1889) 16 R 31, 35. Lord Watson's statement of the law in *Knox v Mackinnon*, quoted at para 12.23 above, was then cited with approval.
[35] Lord Mance refers, at para 98, to *Ferguson v Paterson* (described as *Wyman v Paterson*) 1900 2 F (HL) 37, where the Lord Chancellor, the Earl of Halsbury, stated that he had "great difficulty in weighing the exact amount to what is described as negligence". This appears to indicate a reluctance, found in other English cases, to draw any distinction between negligence and gross negligence. See also para 12.27 below.
[36] 1997 SC 255.
[37] [2011] UKPC 13 at paras 100-101.
[38] 1997 SC 255, 264 per Lord McCluskey, and 268 per Lord Justice-Clerk Cullen.

12.26 The fundamental problem with this analysis of the Scottish cases is that, by concentrating on details of the wording used, where reference is frequently made to the terms of the particular immunity clause under consideration, and the precise (and often singular) facts of the individual cases, it loses sight of the fundamental principle *culpa lata dolo aequiparatur*: gross negligence is treated by the civil law and systems based on the civil law as equivalent to fraud or lack of good faith. Thus when in *Knox v Mackinnon* Lord Watson refers[39] to the effect of an immunity clause, he refers to the fact that "such a clause" (words which are not confined to the particular clause under consideration, but clauses of a similar type) is ineffectual to protect a trustee against *culpa lata*, gross negligence, "or of any conduct which is inconsistent with *bona fides*". This clearly equiparates gross negligence and bad faith as far as the effect of an immunity clause is concerned. It is this principle that runs through the 19th century Scottish cases, which frequently contain references to conduct inconsistent with *bona fides*. Thus in the 19th century there can have been little doubt that no immunity clause would have protected the trustees against gross negligence. The same attitude, sometimes at a tacit level, clearly runs through the cases in the 20th century.

12.27 In the Discussion Paper we expressed the view that the Scottish law on immunity clauses remained as stated in the 19th century cases, and that gross negligence or gross breach of duty is regarded as tantamount to dole or fraud and cannot be excused: *culpa lata dolo aequiparatur*.[40] We remain of this opinion. It is not clear why English judges have in recent years sought to negate any suggestion that in Scots law gross negligence cannot be excused by an immunity clause.[41] It is possible that they have been influenced by hostility in English law to the concept of gross negligence, perhaps dating back to the often cited remark of Rolfe B that he "could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet".[42] We note that the late Tony Weir disagreed strongly with this proposition: "It is nothing of the sort: it is no more difficult to say whether a person fell far below the acceptable standard than whether he fell below it at all. There is no real difficulty in saying whether conduct is more or less negligent …".[43] Millett LJ relied on the remarks of Lord President Clyde in *Clarke v Clarke's Trustees.*[44] In doing so, however, he possibly failed to note the element of meiosis, and indeed irony, that is to be found in the passage quoted above.

12.28 In the Discussion Paper we further considered whether gross negligence was a workable concept, and concluded that it was.[45] We indicated that the concept had been applied without obvious difficulty in a number of Scottish cases. The concept, frequently under the name *culpa lata*, is used fairly widely in civilian systems. It is found in Jersey and Guernsey, both of which have amended their trust laws to deny validity to immunity clauses where the trustees have been grossly negligent.[46] This was done in order to ensure that

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[39] (1888) 15 R (HL) 83, 86.
[40] *Seton v Dawson* (1841) 4 D 310, 331 per Lord Moncrieff; *Lutea Trs Ltd v Orbis Trs Guernsey Ltd* 1997 SC 255, 264 per Lord McCluskey.
[41] The same is true of the law of Guernsey, as is clear from the decision in *Spread Trustee Co Ltd*, discussed at para 12.25 above.
[42] *Wilson v Brett* (1843) 11 M & W 113, 116. We also note that Rolfe B, as Lord Chancellor Cranworth, was responsible for the notorious remarks on the relationship between Scots and English law found in *Bartonshill Coal Company v Reid* (1858) 3 MacQueen 266, especially at 285.
[43] T Weir, *Tort Law* (2002), p 65.
[44] 1925 SC 693; see paras 12.23-12.24 above.
[45] Paras 3.23-3.30 of DP No 123.
[46] Trusts (Jersey) Law 1984, art 26(9), amended in 1989; Trusts (Guernsey) Law 1989, s 34(7), amended in 1990. See Appendix A to DP No 123, para 17.

there was no slippage in standards in an important part of the islands' financial services business. We also noted that the concept is found in the state law of New York.[47]

12.29 On that basis we concluded that gross negligence was a workable concept. The courts in Scotland had been using it in the field of trust law for well over 150 years without significant difficulties. It was acknowledged that it is impossible to draw a hard and fast line between negligence and gross negligence,[48] but difficulties in establishing boundaries occur throughout the law. Consequently, this should not be an objection.

12.30 Apart from the considerations explicitly addressed in the Discussion Paper, it seems to us that providing immunity against gross negligence is fundamentally at variance with the concept of trust. A trustee is appointed to take a responsible attitude towards the assets under his or her charge, and to permit the trustee immunity from serious lack of attention to the affairs of the trust or serious mismanagement of its affairs appears to us to negative that fundamental aspect of the position. It is not enough to enumerate a trustee's detailed duties and to state that any of these may be excluded by a truster if he or she so wishes. The present objection goes to the very essence of trusteeship, and seems to us to be so fundamental that exclusion of liability for gross negligence, and obviously fraud, cannot be permitted. In this respect we disagree entirely with the attitude that has been taken in cases such as *Armitage v Nurse* and *Spread Trustee.*[49]

Professional and lay trustees: a possible distinction

12.31 In the Discussion Paper we went on to consider arguments for and against restricting the effect of immunity clauses in general, and in particular whether a distinction should be drawn between professional trustees and lay trustees; we thought that the considerations were not the same for each of the two categories.[50] We set out the arguments against allowing an immunity clause to exclude liability arising out of trustees' negligence, obviously including gross negligence. In summary, trustees are appointed to carry out the trust purposes and to act in the interests of all of the beneficiaries, and there is a public interest in the proper administration of trusts. The standard of care with which the trustees must comply is laid down by law, and this should not be subverted by contrary provisions in the trust deed. An effective immunity clause puts the interests of the beneficiaries at risk from acts or defaults of trustees. If loss occurs as a result the beneficiaries are unable to sue the trustees and will have no redress. Insurance by beneficiaries against this risk would present great difficulties. Moreover, statutory provisions deny effect to immunity clauses in debentured trusts, unit trusts and pension funds.[51]

12.32 We then set out the arguments for allowing immunity clauses to have effect except in relation to fraud. First, the principle of freedom of settlement entails that trusters should be entitled to set out in the trust deed the powers and liabilities of the trustees. Nevertheless, the trust is set up for the beneficiaries, and they bear the risk of loss caused by breaches of

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[47] Under reference to *The Hellespont Ardent* [1997] 2 Lloyd's Rep 547.
[48] Lord Herschell in *Raes v Meek* (1889) 16 R (HL) 31, 35 said "It is impossible to draw any hard and fast line between the want of that care which a man of ordinary prudence would display in the management of his own affairs and that high degree of negligence which is termed *culpa lata*".
[49] See paras 12.24-12.25 above.
[50] Paras 3.31-3.40 of DP No 123.
[51] See para 3.35 of DP No 123. The relevant provisions are: in relation to debenture trust deeds, s 750 of the Companies Act 2006; in relation to unit trusts, s 253 of the Financial Services and Markets Act 2000; and in relation to pension funds, s 33(1) of the Pensions Act 1995.

trust by the trustees if the trust contains a generous immunity clause. We also thought it doubtful whether trusters consciously apply their minds to immunity clauses or the terms of such clauses. Frequently these are provided by institutional trustees on a non-negotiable basis. In these circumstances the "freedom" is that of the trustee, not the truster.

12.33 Secondly, in commercial trusts, it might be said that immunity clauses can be seen as a means of allocating the risk of negligence among the business entities involved. As such they may be no more objectionable than other risk-shifting mechanisms, such as contracting out of liability for latent defects in goods. Moreover, institutional trustees with large trust funds under their charge may find it impossible to obtain insurance at a reasonable cost, and immunity clauses thus provide a necessary protection.

12.34 Thirdly, the beneficiaries are generally the recipients of the truster's bounty. Thus it is reasonable that they should be subject to any immunity clauses and other conditions imposed by the truster.

12.35 Fourthly, it has been suggested that denying effect to generous immunity clauses might result in professional trustees' becoming unwilling to act. This had been emphasised in papers published by other law reform bodies.[52]

12.36 Fifthly, narrowing the effectiveness of immunity clauses could increase the cost of trust administration through increased charges. In Scotland, that argument would only apply to denying effectiveness to immunity clauses in respect of ordinary negligence, as against gross negligence; at present, liability for gross negligence cannot be excluded.[53]

Provisional conclusion on the scope of immunity clauses

12.37 We expressed the view that, on grounds of public policy, immunity clauses should receive only a limited effect. We considered that professional trustees should be liable for breaches of their duty of care whatever the terms of the immunity clause.[54] Professional trustees are appointed on the basis that they can provide a better standard of service than ordinary untrained trustees, and hold themselves out as specialists. Solicitors, accountants, bankers and the like do not generally act for clients in other areas of work on the basis that they are to be immune from claims for negligence. It is not easy to see why trust work should be any different. If loss to the trust property arises from a breach of trust, it must be borne by either the trustees or the beneficiaries, and professional trustees can readily obtain insurance against negligence claims; some, such as solicitors and accountants, are obliged to do so in order to practise.

12.38 In relation to lay trustees, however, we thought that the position was different. We considered that the present law, that an immunity clause may protect trustees against negligence but not gross negligence, might strike an appropriate balance. Liability for negligence *per se* might be regarded as too heavy a burden for untrained trustees, and thus it should be competent for the trust deed to alleviate this by means of an effective immunity clause. On the other hand, it might be said that the standard of care required of the trustees is not particularly high, and specialist help is available, from solicitors and other professional

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[52] See para 3.39 of DP No 123.
[53] See para 12.27 above.
[54] Para 3.41 of DP No 123.

persons. In practice such help is almost invariably sought when a problem arises. We considered, though, that it was not appropriate to permit liability to be excluded for gross negligence, even in the case of lay trustees.[55] The Law Commission for England and Wales rejected the use of gross negligence in this context on the ground that the term was imprecise.[56] Nevertheless, in Scotland, together with other civil law jurisdictions, the concept has been used for many years without undue difficulty. For that reason it is difficult to see that there is any force in this argument so far as Scots law is concerned.[57]

12.39 After weighing up all of these considerations, we expressed the view that a distinction should be drawn between professional trustees and lay trustees. We did not think that this would cause problems in trusts where there were both types of trustee. In a case where both lay and professional trustees were negligent, this would mean that a lay trustee could shelter behind the clause but not a professional trustee. Nonetheless, this did not seem inappropriate. A comparable distinction might exist at present if, as seems likely, the standard of care is different for each type of trustee.[58] Similarly, we did not think that there was any risk that a professional trustee, on being found liable, might seek to recover a rateable share of the damages from the lay trustees on the ground of joint and several liability of the trustees as a body. That would negate the purpose of an immunity clause, and we think that such a clause would be given effect even in proceedings for contribution on the ground of joint and several liability.[59]

12.40 On the basis of the foregoing considerations, we made the following proposals:

> "4. A clause in a trust deed purporting to relieve trustees acting in the course of their business or profession from liability should be regarded as ineffective in so far as the liability arises from the trustees' failure to exercise the degree of care, diligence and skill required by law.
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> 5. There should be no change in the present law regarding the effectiveness of immunity clauses in trust deeds in relation to lay trustees. Accordingly, an immunity clause should continue to be effective in excluding liability for negligence but not for gross negligence."

12.41 We further explored whether the concept of excluding or restricting liability should be given an extended meaning, to cover such matters as making the enforcement of liabilities subject to restrictive or onerous conditions, excluding or restricting any right or remedy in respect of the liability, subjecting any person to prejudice in respect of pursuing any such right or remedy, or excluding or restricting rules of evidence or procedure.[60]

12.42 In the light of these considerations, we asked the following question:

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[55] Para 3.43 of DP No 123; and see also paras 12.23-12.30 above.
[56] See para 3.43 of DP No 123. At the time of writing our DP, the Law Commission had published its Consultation Paper on Trustee Exemption Clauses (CP No 171; 2003). It subsequently published a Report of the same name (LC No 301; 2006), of which paras A43-A48 of Appendix A are relevant.
[57] The same is true of Jersey and Guernsey, whose legal background is more in civil than common law; see para 12.28 above.
[58] See para 12.8 above.
[59] See paras 3.47 and 3.48 of DP No 123 for a more detailed discussion.
[60] This wording is based on s 33 of the Pensions Act 1995, and is derived from s 13 of the Unfair Contract Terms Act 1977. See para 3.49 of DP No 123.

"6. Should any new statutory provision rendering ineffective terms in a trust deed relieving trustees from liability in respect of negligence or gross negligence also render ineffective any terms making the exercise or enforcement of beneficiaries' rights in this area more difficult?"

12.43 A majority of those who responded to our consultation agreed with proposal 4. One respondent suggested that a discretionary approach might be preferable to a concrete statutory provision, giving the court flexibility in determining whether or not a trustee in a given case should be permitted to rely on such a clause. We thought, however, that such an approach would necessitate a court application in any case where a clause was relied on, which would produce additional delay and cost. For that reason we did not think that it was appropriate. In the light of the general responses we consider that proposal 4 should be implemented, subject to the requirement that the trustee be instructed by the trust in order for the professional standard of care to apply. Thus an immunity clause may be effective in excluding liability for negligence (but not gross negligence) in respect of trustees, whether or not they have professional qualifications or business experience, unless they are instructed to provide professional or other specialised advice to the trust.

12.44 In relation to proposal 5, respondents to the consultation agreed generally with the proposal. Some expressed doubts over the meaning of the expression "gross negligence". An alternative test was suggested by one respondent, who thought that a distinction might be drawn between advertent and inadvertent risk-taking. We thought, however, that this was too subjective; it seemed to us to be important that the test applied should be objective, in the same way as with ordinary negligence. Furthermore, in relation to the definition of gross negligence, the concept has been used in this context for well over 150 years, and in the form of *culpa lata* it is used in other civilian systems.[61] We further considered that a definition of gross negligence would be very difficult. Under the straightforward expression, while borderline cases will obviously exist, it seemed to us that most cases of serious negligence could be recognised. In any event, borderline cases may exist under almost any legal definition.

12.45 The Law Society proposed that immunity in relation to gross negligence should be available to lay trustees only, and not to trustees acting in a professional capacity. They were concerned that lay trustees might be deterred from acting if their immunity were confined to negligence only. They further suggested that the proposed reform could lead to trusts' being set up under the law of other jurisdictions which provided greater immunity to trustees. In relation to these comments, we consider that there are fundamental public policy reasons for not allowing immunity from gross negligence; to do so would favour the trustees at the expense of the beneficiaries and would not promote effective trust administration; furthermore, it seems to us to be fundamentally at variance with the basic concept of trust.[62] In relation to the possibility of using other jurisdictions, we think that this is most unlikely. We note that both Jersey and Guernsey, jurisdictions which rely heavily on attracting trust business from elsewhere and both of which are well known for keeping their trust law up to date and under constant review, specifically prohibit the exclusion of gross negligence in relation to both professional and lay trustees.[63]

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[61] See paras 12.23 and 12.28 above.
[62] See paras 12.23-12.30 above.
[63] See para 12.28 above.

12.46 It was also suggested, by the Occupational Pensions Regulatory Authority, that this proposal could create difficulties for lay trustees of pension schemes who are connected with the employer who establishes the pension scheme. It was suggested that such trustees might be granted immunity as a matter of course. We do not think that this is a substantial objection. The basic point is that a trustee, *qua* trustee, cannot avoid liability for gross negligence. If, through some entirely separate arrangement, the employer agrees to indemnify an employee who has acted as a trustee against the consequences of being grossly negligent, we do not see that that is struck at by our proposals.

12.47 In relation to question 6, almost all respondents to the consultation answered it in the affirmative. We agree that there are good reasons for extending the meaning of an immunity clause in the manner suggested.

12.48 In the light of the foregoing responses, we consider that our proposals were well founded and that question 6 should be answered in the affirmative. We accordingly make the following recommendations:

48. A clause in a trust deed purporting to relieve trustees from liability should be regarded as ineffective in so far it relates (i) to a trustee falling within recommendation 47(b) and who is instructed as mentioned in that recommendation, or (ii) a trustee falling within recommendation 47(c).

(Draft Bill, section 27(4)(b))

49. Otherwise there should be no change in the present law regarding the effectiveness of immunity clauses in trust deeds. Accordingly, in such cases an immunity clause should continue to be effective in excluding liability for negligence but not for gross negligence.

(Draft Bill, section 27(4)(a))

50. New statutory provision rendering ineffective terms in a trust deed relieving trustees from liability in respect of negligence and, separately, gross negligence, should also render ineffective any terms making the exercise or enforcement of beneficiaries' rights in this area more difficult.

(Draft Bill, section 27(4)(d), (f), (g) and (h))

Abridging the trustees' duties

12.49 Another way in which the potential liability of trustees may be limited is by excluding certain duties. Clearly a trustee cannot commit a breach of trust in failing to carry out a particular duty if that duty has been expressly excluded by the trust deed. We noted that there did not appear to be any reported Scottish decisions on this area of law, but we mentioned cases in England and Wales[64] and in the Privy Council on appeal from Hong

[64] *Wilkins v Hogg* (1861) 31 LJ Ch 41.

Kong.[65] We also noted that, where trustees are major shareholders in a family company, the trust deed may provide that the trustees are to have no duty to oversee or interfere with the management of the company unless they become aware that the directors are acting dishonestly. It may also be noted that in some cases a trust may be set up for the specific purpose of preserving a controlling shareholding in a company; in such a case the duty to consider the possible sale of shares, if that appears prudent from an investment prospective, may be expressly excluded.[66] We noted that the Trust Law Committee had considered introducing a statutory restriction of abridgement clauses. They considered that this would result in very complex legislation, and accordingly rejected any such suggestion.[67] In our Discussion Paper we agreed with that view. We considered that there was not the same public policy objection to limiting the trustees' duties as there was to licensing them to carry out their duties carelessly.

12.50 We nevertheless asked the following questions:

> "8. Should new statutory provisions be introduced in order to render ineffective terms in a trust deed which negative or abridge any duty that, in the absence of such a term, would be incumbent on the trustees? If so, should the court have power to disregard any such term that was not reasonable in the circumstances or consistent with the trust purposes?"

On consultation, a majority of respondents answered this question in the negative. The Law Society and James Chalmers, then of the University of Aberdeen, suggested that a statutory provision was unnecessary in view of our proposals relating to the statutory standard of care and the restriction on immunity clauses.

12.51 We agree with the negative responses to the question. We consider that there are often good reasons for provisions that abridge or negative trustees' duties, as the examples given in our Discussion Paper indicate.[68] Thus a truster may want to exclude interference in the affairs of a family company, or to exclude any need to consider the sale of a controlling interest in such a company. A truster may likewise wish to ensure that a house is retained as a home for his or her relatives for the remainder of their lives, and therefore to exclude any duty on the part of trustees to consider the sale of that home.

12.52 For the foregoing reasons, we are of opinion that there is no need for any new statutory provisions in order to render ineffective terms in a trust deed which negative or abridge any duty that, in the absence of such a term, would be incumbent on the trustees. Accordingly we make no recommendation.

Indemnity clauses

12.53 Finally, in our Discussion Paper we expressed the view that indemnity clauses in trust deeds should be ineffective to the same extent as immunity clauses, and made a proposal to that effect.[69] An indemnity clause provides that trustees who incur personal

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[65] *Hayim v Citibank NA* [1987] AC 730, an appeal from Hong Kong decided on English law as no evidence was led as to Hong Kong or American law.
[66] See the discussion at paras 14.41-14.47 below.
[67] See paras 3.57-3.58 of DP No 123.
[68] At paras 3.54-3.56 of DP No 123.
[69] Para 3.61 of DP No 123 and proposal 9.

liability for negligence in connection with the trust are entitled to be reimbursed from the trust property. In this way the liability is effectively recycled back to the beneficiaries. We understood that such clauses were used on occasion in commercial trusts. We thought, however, that they have the same effect as immunity clauses, and must be treated in a similar manner. In the case of commercial trusts, there is no reason that a party to the commercial arrangements should not provide an indemnity to the trustee as a matter of contract; that does not involve an indemnity from the trust fund.

12.54 On consultation, all consultees agreed with this proposal. Professor Gretton suggested that immunity and indemnity clauses should be considered together in a draft Bill, and we agree with that view. Accordingly we recommend:

51. Indemnity clauses in trust deeds should be ineffective to the same extent as immunity clauses.

(Draft Bill, section 27(4)(e))

Breach of fiduciary duty

12.55 In Part 4 of our Discussion Paper on Breach of Trust we considered breach of fiduciary duty. We began by summarising the current law in Scotland,[70] and then went on to consider whether the rules on breach of fiduciary duty were too strict. We expressed the view that in general there is a clear need for trustees to be subject to rules against self-dealing and conflicts of interest.[71] We considered it arguable, however, that the current rules were too strict and inflexible. Transactions which represented good value for the trust were struck at as well as those which were disadvantageous. Furthermore, where a trustee has to make over to the trust all of the profits gained in the transaction, inadequate account may be taken of the trustee's own work and efforts in producing that profit. By way of example we cited the case of *Cherry's Trustees v Patrick*,[72] where one of the trustees was a licensed wholesaler who had supplied the deceased's business and, after his death, carried on supplying the retail outlets now owned by the deceased's trustees. The trustee/supplier gave a discount on beer that was equivalent to the highest discount that any other wholesaler would have given, and supplied at prices equal to or less than the trustees would otherwise have had to pay. He was nevertheless held bound to pay to the trust all of the profits that he had made over several years from these transactions.

12.56 We set out the arguments for and against the rule in its present form.[73] Against the rule it could be said that the rule is penal and unnecessarily strict in its effect, as *Cherry's Trustees* illustrates. Even if the trustee has been honest, done his or her best for the trust and transacted on terms that were favourable to it, the trustee may nevertheless be compelled to disgorge all profits that he or she makes. A trustee can sometimes avoid the rule by resigning, but this is not always the case, and resignation may not in any event be in the best interests of the trust. Finally, the court has no power, as it does in some other jurisdictions,[74] to sanction in advance a transaction by a trustee in breach of the rule *auctor in rem suam*. Section 32 of the 1921 Act empowers the court to grant relief for breaches of

[70] Paras 4.2-4.6 of DP No 123. The law is considered at some length in *SME*, Vol 24, paras 170-188.
[71] Para 4.7 of DP No 123.
[72] (1911) 2 SLT 313.
[73] See paras 4.8-4.9 of DP No 123.
[74] See paras 21-22 of Appendix A to DP No 123, discussing the position in England and Wales, and Australia.

trust, but we were not aware of any cases where it has been used to relieve a trustee who was *auctor in rem suam* or in breach of fiduciary duty.

12.57 The arguments for retaining the current rule were as follows. It is difficult for the court to discover the background and facts of a transaction, and a complicated inquiry would be required to decide whether a particular transaction was fair. Furthermore, the rule removed the temptation for trustees to abuse their position, since they know that any advantage gained will be forfeited to the trust. There is, moreover, a need to maintain public confidence in trusteeship, and loyalty to the trust is properly to be expected. There will always be a suspicion that a trustee has got a good bargain by virtue of inside information. Thus, in summary, the current rules are clear and simple to apply.

12.58 We considered a number of options for reform.[75] We formed the view that any general statutory relaxation sanctioning transactions in breach of fiduciary duty would go too far, as it would encourage trustees to misuse their office for personal advantage. On the other hand, it would be very difficult to specify in legislation the cases where relaxation was appropriate. We considered that the types of transaction that involve breach of fiduciary duty are too varied to adopt a rule-based approach. Thus if there were to be any relaxation of the rules it should be done by the courts on a case-by-case basis.

12.59 We discussed problems that may arise under section 16 of the Succession (Scotland) Act 1964, which empowers an executor to transfer the deceased's interest as tenant under a lease to a person with an interest in the estate. It had been held that an executor-dative who transferred the interest to himself as an individual had acted as *auctor in rem suam* and hence held the lease and the sum received for its renunciation for behoof of the beneficiaries of the estate.[76] We had indicated in our Report on Succession that conflicts of interests are very likely in such a situation.[77] Overall, in executries or family trusts it might be difficult or impossible to avoid transactions in breach of fiduciary duty. Resignation of the trustee or executor in question might be damaging to the functioning of the trust, especially as it would have to be for an extended period of uncertain length.[78]

12.60 We observed that the courts could be given a discretionary power to authorise in advance a proposed transaction that would be in breach of the trustees' fiduciary duties and to approve retrospectively a completed transaction. We thought that it was doubtful whether the facility of prospective approval would be used to any great extent, owing to considerations of time and expense. We further expressed the view that the terms on which the transaction in question had been carried out would be critical, and thought that the court should uphold a transaction only if satisfied that the terms were at least as favourable to the trust property and the beneficiaries as those of an arm's length transaction with an unconnected third party. The onus of satisfying the court by means of documentary and other evidence would lie on the trustee who benefited. A further question was whether the trustee should also have to show that he or she had acted in good faith or honestly; we thought that this was more problematic as it would exclude a transaction that had conferred benefits on the trust estate but where the trustee had carried it out in the full knowledge that a breach of fiduciary duty was involved. We thought that a new provision was appropriate

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[75] At paras 4.10-4.17 of DP No 123.
[76] *Inglis v Inglis* 1983 SC 8.
[77] See paras 8.40-8.46 of SLC No 124; 1990.
[78] See para 4.11 of DP No 123.

rather than an amendment to section 32 of the 1921 Act. We accordingly put forward the following proposals and question:

> "10. (1) Where the court is satisfied that a transaction by a trustee in breach of fiduciary duty:
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> (a) had been of benefit to the trust estate and the beneficiaries as a whole, and
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> (b) the terms of the transaction were at least as favourable to the trust estate as those likely to be contained in a comparable arms-length transaction,
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> it should have the power to make an order wholly or partly relieving the trustee of the consequences of the transaction having been in breach of fiduciary duty.
>
> (2) Should it also be a requirement for the exercise of the above power that the trustee had acted reasonably and in good faith?
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> 11. Without prejudice to clauses in trust deeds authorising transactions by the trustees that would otherwise be in breach of their fiduciary duty, an immunity or an indemnity clause in a trust deed should be ineffective in relation to any trustee's liability arising out of a breach of fiduciary duty."

12.61 On consultation, respondents generally agreed with proposal 10(1). It was suggested that recourse to the court might not be necessary. This could be done if a rule were provided in the legislation to the effect that certain situations would not be treated as a breach of fiduciary duty. While we can see some force in this suggestion, we are concerned that stating any such rule would dilute the content of the basic fiduciary duties, and we are anxious that this should not occur. We note, furthermore, that a court power is the method used in England and Wales and in Australian jurisdictions.[79] For this reason we remain of opinion that a court power is the appropriate manner in which to proceed. We note that, with simplified procedures and the use of electronic means of communication,[80] any such application should be dealt with expeditiously and inexpensively.

12.62 In relation to question 10(2) respondents to the consultation were divided in their opinions. Some favoured a requirement of good faith or reasonableness. In this connection, an analogy was drawn with public trusts, and it was also indicated that, without a requirement of good faith, trustees could carry out a transaction in full knowledge that they are in breach of fiduciary duty and still have it authorised retrospectively by the court. In such a case, however, if it is in the best interests of the beneficiaries, it is difficult to see why, all else being equal, the court should not grant such authorisation. The Law Society answered question 10(2) in the negative. They indicated that a trustee might in some circumstances deliberately commit a breach of trust in the belief that it was in the interests of the beneficiaries; that should not be penalised, at least if the beneficiaries were advantaged. This point was echoed by Turcan Connell.

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[79] See paras 21-22 of Appendix A to DP No 123.
[80] See para 16.16 and recommendation 76 at para 16.20 below.

12.63 In relation to proposal 11, all respondents to the consultation were in favour.

12.64 In the foregoing circumstances, we are of opinion that proposals 10(1) and 11 should be implemented, but that it should not be required for the exercise of the power in proposal 10(1) that the trustee had acted reasonably and in good faith. In relation to the latter point, we are impressed by the arguments put forward by the Law Society and Turcan Connell to the effect that a trustee who acts in the best interests of the beneficiaries but in the knowledge that his or her acts are in breach of fiduciary duty may well deserve authorisation by the court. Because the court is involved, account can be taken of any relevant factor, including the existence of a breach of fiduciary duty and the relevant trustee's knowledge of that breach. Nevertheless, if there is a demonstrable benefit to the trust, we think that the court should still be able, in an appropriate case, to sanction the breach and grant relief. It should also be noted, lest this reform be seen as an invitation to trustees to breach their fiduciary duty without fear of sanction, that the basic rules against self-dealing and conflicts of interest still apply, and that what is under consideration is a discretionary and limited relaxation. In all these circumstances, we make the following recommendations:

52. (1) Where the court is satisfied that a transaction by a trustee in breach of fiduciary duty:

(a) has been of benefit to the trust property and the beneficiaries as a whole, and

(b) the terms of the transaction were at least as favourable to the trust property as those likely to be contained in a comparable arms-length transaction,

it should have the power to make an order wholly or partly relieving the trustee of the consequences of the transaction having been in breach of fiduciary duty.

(2) It should not be a requirement for the exercise of the above power that the trustee has acted reasonably and in good faith.

(Draft Bill, section 31)

53. Without prejudice to clauses in trust deeds authorising particular transactions, or particular classes of transaction, by the trustees that would otherwise be in breach of their fiduciary duty, an immunity or an indemnity clause in a trust deed should be ineffective in relation to any trustee's liability arising out of a breach of fiduciary duty.

(Draft Bill, section 30)

Trustees' remuneration

12.65 In our Discussion Paper on Breach of Trust we considered the present state of Scots law in relation to the payment of remuneration to trustees.[81] The gratuitous nature of

[81] See paras 4.18-4.20 of DP No 123.

trusteeship is seen as an aspect of the fiduciary duties of a trustee and the principle *auctor in rem suam*; these prohibit trustees from profiting personally from their position. Trustees are entitled to reimbursement of out-of-pocket expenses. Until 1841 Scots law allowed trustees to appoint one or more of their own number to act as factors or agents at the usual rate of remuneration,[82] but this was altered by the House of Lords in *Home v Pringle*;[83] the English rules, which were stricter than the existing Scottish rules, were imposed on Scottish trustees. Since then, accordingly, work undertaken by trustees in managing a trust and its property must be undertaken gratuitously unless payment is authorised either by an express provision in the trust deed or by the consent of the beneficiaries. In practice, professionally prepared wills and trust deeds nearly always contain a "charging clause", which permits payment of remuneration to the trustees for acting as solicitor or agent or in any other capacity.

12.66 We observed that the complexity of many trusts means that trustees require to have functions carried out for them by professionally qualified persons.[84] They can obtain and pay for assistance from persons such as solicitors and factors; the issue for present purposes is whether the trustees should be able to provide such services themselves on a remunerated basis in the absence of a charging clause or without obtaining the consent of the beneficiaries. We noted that in some jurisdictions, notably South Africa and most provinces in Canada, all trustees are entitled by statute to remuneration in such cases.[85] We considered, however, that trusteeship should not be turned into a paid office; there exists in Scotland a tradition of gratuitous trusteeship, especially in relation to family and public trusts.[86] We thought that a better way to proceed would be a new statutory provision authorising trustees to appoint one or more of their number as their agents on a remunerated basis. The result would be that the default position was a statutory charging clause, which would apply unless the trust deed provided otherwise. In reaching this view, we were influenced by the almost universal use of charging clauses in trust deeds, even in public trusts. We thought that it would usually be less expensive and easier for trustees with the necessary skills to carry out the work themselves rather than employing an outsider. In addition, the confidentiality of trust affairs would be protected if no outside agents were employed. We were not aware of any dissatisfaction with current styles of charging clause under which a Scottish trustee might charge for work that could be done by outside professionals. We therefore thought it unnecessary to legislate along the lines of section 28 of the Trustee Act 2000 in England and Wales.[87]

12.67 We set out the arguments in favour of a new statutory provision.[88] In summary, it would bring the law into line with current practice; it would shorten trust deeds as it would meet the needs of the parties in the great majority of cases; and it would assist in cases where there was no charging clause owing to an oversight or because the trust had arisen by operation of law. We further set out the arguments against: trustees might become more concerned with providing services and generating fees rather than giving proper consideration to the trust affairs; trustees could abuse their entitlement to remuneration by creating remunerative work or charging excessive fees; and trusters should have to consider

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[82] *Montgomery v Wauchope* June 4 1822 FC; *Miller's Trs v Miller* (1848) 10 D 765.
[83] (1841) 8 Cl & Fin 264.
[84] At para 4.21 of DP No 123.
[85] See paras 23-32 of Appendix A to DP No 123 for the comparative material.
[86] For a recent affirmation of this, see Kessler and Grant, para 5.33.
[87] See para 24 of Appendix A to DP No 123.
[88] At para 4.24 of DP No 123.

the issue of trustees' remuneration.[89] We noted that we did not find the arguments against to be persuasive. We had been informed that overcharging occurs very occasionally,[90] but we were not aware of any evidence that trustees abused their position under current charging clauses to any substantial extent by creating work or charging excessive fees. Furthermore, we had considered separately whether there should be independent scrutiny of trustees' fees.[91] So far as trust deeds are concerned, a lawyer preparing a trust deed is under a duty to explain its import to the client; that would include any statutory remuneration provision.

12.68 As to the form of statutory charging clause, we provisionally favoured a provision along the lines of the current styles that are in use. These were succinct and did not seem to give rise to any significant difficulties. Trustees are of course required to consider, by virtue of their duty of care, whether it is necessary or prudent to appoint an agent to carry out trust business and if so whether one of their number has the appropriate skills and experience. We understood that the appointment of agents is generally the subject of a formal minute. Trustees are paid for the work that they do properly as agents, whether or not that comprises professional tasks.

12.69 We thought that our proposed new statutory charging provision should not apply to sole trustees, as in that event the identities of principal and agent would be merged.[92] Thus a sole trustee could not appoint himself or herself as a paid agent of the trust.

12.70 In the light of the above considerations, we asked the following questions:

> "12. (1) Should there be a new statutory provision (which would apply in the absence of any contrary intention expressed in the trust deed) authorising the trustees to appoint one of them as their agent and to allow the appointee reasonable remuneration for the services provided as agent?
>
> (2) Should this new statutory provision apply to public trusts?
>
> (3) If there is to be a new statutory charging provision, in fixing the reasonable remuneration of a trustee appointed as agent the trustees should take into account any other benefit the trustee is to receive in terms of the trust deed."

12.71 With one exception, all of the respondents to the consultation were in favour of a statutory provision. The dissenter thought that both the trustees and the truster must be clear about the position, which would best be achieved by a clause in the trust deed. On consideration of the arguments, we are in agreement with the majority view and favour a provision as described in question 12(1). Such a provision merely sets out the standard type of clause that is found in well-drafted contemporary trust deeds.

12.72 On question 12(2), a small number of respondents replied to the consultation, but there was unanimous agreement that the provision should apply to public trusts. We accordingly consider that the statutory provision should so apply. On question 12(3), the responses were mixed. Turcan Connell, who opposed the proposal, suggested that a

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[89] At para 4.25 of DP No 123.
[90] See para 12.74 below.
[91] This is discussed more fully in paras 12.74-12.79 below.
[92] At para 4.27 of DP No 123.

trustee who is to be appointed as agent and who is also a beneficiary is often in a better position to act as agent than an independent agent. They further considered that the proposal would seriously affect the administration of trusts where a beneficiary who is also a trustee acts in a professional capacity. While we accept that there are contrary arguments, we are inclined to think that there is no need to have an express provision that trustees should take into account the other benefit that a trustee appointed as agent is to receive under the trust deed. If, of course, trustees wish to take that consideration into account, there is nothing to prevent them from doing so.

12.73 We accordingly recommend:

54. (1) There should be a new statutory provision (which would apply in the absence of any contrary intention expressed in the trust deed) authorising the trustees to appoint one of them as their agent and to allow the appointee reasonable remuneration for the services provided as agent.

(2) The new statutory provision should apply to public trusts.

(3) In fixing the reasonable remuneration of a trustee appointed as agent the trustees should not be expressly required to take into account any other benefit that the trustee is to receive in terms of the trust deed.

(Draft Bill, section 18(1), (3) and (4))

As the section represents standard current practice we consider that it should apply to all trusts, whether created after the provisions come into force or which are already in existence at that time.

Policing trustees' remuneration

12.74 In the Discussion Paper we noted that we had been made aware of occasional instances of overcharging by trustees in their capacity as agents, although we understood that the problem was not widespread.[93] We accordingly considered what measures, if any, were necessary to ensure that abuses did not occur. We noted that at present the first level of control lies with the other trustees, who are under a duty to supervise their agents and satisfy themselves that any remuneration claimed is properly charged and reasonable in amount. Trustees would be failing in their duty of care if they allowed excessive charges to be debited against the trust fund. The second level of control lies with the beneficiaries, as the trustees are under a duty to account to them, and they may challenge any remuneration or outlays that they consider excessive or unnecessary. In relation to charities a third level of control exists, through the Office of the Scottish Charities Regulator.

12.75 We considered that the current position seemed satisfactory if the co-trustees or the beneficiaries are sufficiently motivated to challenge a trustee's charges, if necessary by court action. We wondered, however, whether there should be some machinery for making an independent check in the absence of any formal challenge. We noted that in the 19th and

[93] See paras 4.30-4.34 of DP No 123 for our discussion of this topic (but since it was published the quoted provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 have been repealed by the Charities and Trustee Investment (Scotland) Act 2005, sch 4(1), para 7).

early 20th centuries a trustee who acted as law agent had to have any business account taxed by the Auditor of the Court of Session before it could be charged against the trust fund. While this had ceased to be general practice, we wondered whether it might be appropriate to revive a similar procedure. We also drew attention to the powers of sheriffs principal in relation to officers of court, and to the powers of the Public Guardian, Mental Welfare Commission for Scotland and local authorities in relation to incapable adults.[94]

12.76 Against this background, we asked the following question:

> "13. Should:
>
> (a) an account of remuneration and outlays claimed by a trustee who is appointed as an agent be subject in every case to taxation by an auditor of court or certification by the professional body of which the trustee is a member before being chargeable against the trust fund, or
>
> (b) an auditor of court who becomes aware of circumstances suggestive of over-charging have power to require the trustees to submit the account for taxation, or
>
> (c) the law be left as it is?"

12.77 On consultation, we found strong support for (c), that the law should be left as it is. In this connection we considered that there was relatively little difference in practice between options (b) and (c). We accordingly favour option (c), and do not propose legislation on this matter.

Courts' powers in relation to remuneration

12.78 We indicated that the courts will determine any dispute between beneficiaries and trustees in relation to the remuneration of the latter, but the Scottish courts do not have any inherent power to award remuneration if the trust deed fails to provide for this, or any power to vary the level of remuneration provided for in the trust deed.[95] In other jurisdictions the courts have a more proactive role and can award reasonable remuneration or can vary the level of remuneration from that provided in the trust deed. We did not favour the Scottish courts' having to fix the remuneration of all trustees; we thought that they should confine themselves to determining disputes that cannot be resolved by other means. On the other hand, we thought that power to vary the level of remuneration fixed by the trust deed might be useful, especially where the deed provided for such an inadequate level that the trustees would not accept office or were unwilling to carry on. We accordingly proposed that the court should have power, on application by any trustee or beneficiary, to increase or decrease the level of remuneration provided for trustees by the trust deed.[96]

12.79 Those who responded to this proposal offered unanimous support for it. Nevertheless, on further consideration we take the view that there is likely to be no need for this proposal, as remuneration clauses will almost invariably contain flexibility as to

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[94] See para 4.34 of DP No 123 (but note that some of the statutory provisions cited there have since been amended or repealed).
[95] At para 4.35 of DP No 123.
[96] See proposal 14 in para 4.36 of DP No 123.

quantum.[97] At other points in this Report we have favoured making recommendations whose effect is to make the default position the same as that of a standard professionally drawn trust deed. In this instance, though, we do not find such an approach to be persuasive as the tradition in Scotland of gratuitous trusteeship still prevails. So, where the deed makes provision for particular remuneration but does not permit it to be varied, we consider that that should be one of the factors on the basis of which a prospective trustee should accept or decline office. We accordingly recommend:

55. The courts should not have the power to increase or decrease the level of remuneration provided for trustees by the trust deed.

Indemnity insurance at trust estate's expense

12.80 In our Discussion Paper on Breach of Trust we gave consideration to the issue of insurance by trustees against personal liability incurred through their acting as trustees and charging the relevant premiums against the trust estate.[98] Such insurance is taken out to protect the trustees rather than the trust estate and the beneficiaries. There is no real problem about the latter type of insurance: trustees have a common law power to insure trust property, and their duty of care applies in relation to such insurance, so that they would be liable for failure to insure if a reasonably prudent person would have taken out insurance in the same circumstances. Trustees are required to have insurance in some circumstances, for example in respect of employer's liability. In such a case the premiums would be a proper charge on the trust estate. Indemnity insurance against the trustees' liabilities would cover both their personal liability to third parties and their personal liability to beneficiaries as a result of any breach of trust.

12.81 We noted that immunity and indemnity clauses are similar to indemnity insurance in that they seek to relieve trustees of personal liability. Nevertheless, substantial differences exist between the two, which justify separate examination and a different approach. An immunity clause negates liability and prevents any claim by the beneficiaries; consequently, the beneficiaries will suffer financially if the trustees commit a breach of trust which has adverse effects on the trust estate. Likewise, with an indemnity clause, the trustees are entitled to reimburse themselves from the trust estate. By contrast, indemnity insurance benefits the beneficiaries as well as protecting the trustees; if a loss occurs within the scope of the policy, the insurers must pay.

12.82 So far as the trustees' liability to third parties is concerned, an immunity clause in the trust deed would be ineffective to bar a claim by a third party against the trustees. It might, however, enable trustees to claim relief from the trust estate. On occasion trustees have no right of relief, and are then personally liable to the full extent of the third party's claim. Examples of this are the expenses of unnecessary and unsuccessful litigation, and *ultra vires* contracts.[99] Indemnity insurance thus has an important role to play where the trust is such that the trustees enter into contracts with third parties or carry out activities which could possibly result in injury to third parties. Such insurance protects the trustees from potentially ruinous claims and protects the trust estate in cases where the trustees have a right of relief

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[97] We note that Kessler and Grant, at para 5.33, suggests a style remuneration clause for trustees who act in a professional capacity (but not as agent for the trustees) which allows for "reasonable remuneration". Such a clause would not need a court power as proposed.
[98] See Pt 5 of DP No 123.
[99] See, respectively, paras 16.22-16.34 and 13.27-13.29 below.

against it. We noted, though, that indemnity insurance does not cover liability arising out of dishonest, fraudulent or criminal conduct on the part of the trustees.

12.83 We summarised the current law in Scotland. Trustees may pay for liability insurance out of their own pockets, but there is no statutory power permitting them to do so. Trust deeds commonly contain a power to enable trustees "to maintain and acquire policies of whatever description; and to insure any property on whatever terms they think fit including on a first loss basis".[100] The power is not intended to authorise personal liability insurance.

12.84 We further considered whether the Court of Session had power to authorise such insurance, but concluded that it was doubtful whether it did. We also considered the case of *Governors of Dollar Academy Trust, Petitioners*.[101] In that case it had been argued on behalf of the Lord Advocate that to allow the trustees to purchase insurance out of trust funds would breach the principle of *auctor in rem suam*. The court nevertheless allowed a power that permitted such insurance. We further noted that insurance was available against personal liability, but might be expensive.

12.85 In relation to possible reform, we stated that we agreed with the views expressed in the *Dollar Academy* case that the power of the court to relieve trustees of personal liability under section 32 of the 1921 Act was not an adequate substitute for insurance.[102] We noted, however, that insurance might have serious limitations in practice. The problem relates to lay trustees, since professional trustees may simply include the cost of any indemnity insurance in the fees which they charge to the trust estate. We understood that it was now standard practice to include in public trust deeds a clause along the lines of that approved in the *Dollar Academy* case, authorising trustees to obtain personal liability insurance at the trust estate's expense.

12.86 Against this background, we asked the following questions:

> "15. (1) Should the law be changed so that trustees would have a power to insure themselves at the expense of the trust estate against any personal liability arising out of their position as trustees in the absence of consent by the beneficiaries or any express power in the trust deed?
>
> (2) If so, should such a power be conferred on all trustees by statute which would be available unless the trust deed prohibited it, or should there be a simple procedure whereby the court could, on application by the trustees, authorise the trustees to obtain insurance?"

12.87 On consultation, there was a strong consensus among respondents in favour of a change in the law to accommodate a power of insurance as suggested in the first question. In relation to the second question, a majority of respondents favoured a statutory power, but the Faculty of Advocates and Turcan Connell suggested that a court power would be preferable, on the ground that this would operate as a control against unreasonable and disproportionate use of the power. While we recognise the strength of those arguments, we have concluded that a statutory default power is appropriate. We consider, though, that the

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[100] See para 5.6 of DP No 123.
[101] 1995 SLT 596.
[102] See para 5.13 of DP No 123.

power should merely be to obtain such insurance as it is "reasonable" to take out against personal liability. We think that this will serve as an express restriction on the power.

12.88 We accordingly make the following recommendation:

> **56. Subject to any contrary provision in the trust deed, any trustee should have power to obtain such insurance as it is reasonable to take out against personal liability arising from the trustee's actings in carrying out the duties of a trustee, and to do so at the expense of the trust property.**
>
> (Draft Bill, section 15)

Judicial relief from liability for breach of trust

12.89 In the Discussion Paper on Breach of Trust we gave consideration to the provisions that permit the courts to provide relief from liability for breach of trust.[103] At present, these are found in sections 31 and 32 of the 1921 Act. Section 31 is in the following terms:

> "Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it shall think fit, make such order as to the court shall seem just for applying all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

Section 32(1) provides as follows:

> "The concurrence of a beneficiary in a breach of trust must be clear and direct to raise a claim of indemnity in favour of the trustees by whom the breach was committed …"

12.90 In the Discussion Paper we expressed the view that section 31 serves a useful purpose and has not given rise to difficulties in the few cases in which it had been used. We therefore made no proposals for its amendment.

12.91 We noted that the courts had not adopted a generous approach to section 32; they had in practice been reluctant to relieve trustees from personal liability. In particular, the courts had refused relief to negligent trustees, and we expressed the view that this was correct; granting relief to negligent trustees would encourage a careless attitude to trust administration. Furthermore, we now recommend that trustees should not be personally liable for an *ultra vires* act if, after having taken all reasonable steps, they believe that the act is within their powers.[104] Section 32 would not give trustees any additional protection. Trustees who have not taken all reasonable steps have been careless and do not deserve judicial relief.

12.92 We accordingly made the following proposal:

> "16. If Proposals 1 and 10 restricting respectively trustees' liability for *ultra vires* acts and breaches of fiduciary duty are implemented, then section 32 of the Trusts

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[103] See Pt 6 of DP No 123.
[104] See recommendation 46 in para 12.6 above.

(Scotland) Act 1921 (judicial relief for trustees who have acted honestly and reasonably and who ought fairly to be excused) should be repealed as unnecessary."[105]

12.93 On consultation, a majority of respondents agreed with this proposal, although the Faculty of Advocates disagreed on the basis that section 32 ought to be retained as a safety net where relief might not otherwise be available. Despite this submission, we remain of the view that section 32 ought to be repealed as serving no useful purpose.

12.94 We therefore make the following recommendation:

57. (1) Section 32 of the Trusts (Scotland) Act 1921 (judicial relief for trustees who have acted honestly and reasonably and who ought fairly to be excused) should be repealed as unnecessary.

(Draft Bill, section 79 and schedule 2)

(2) Section 31 of that Act should be re-enacted.

(Draft Bill, section 28)

Liability for co-trustees

12.95 Section 3(d) of the 1921 Act provides that, unless the contrary be expressed, all trusts shall be held to include a provision that:

> "… each trustee shall be liable only for his own acts and intromissions and shall not be liable for the acts and intromissions of co-trustees and shall not be liable for omissions …".

We considered this provision in the Discussion Paper.[106] We noted that, while on the face of it section 3(d) appeared to grant immunity against liability arising out of an omission by a trustee or out of any act by the other trustees, an omission to carry out some act expressly laid down in the trust deed will give rise to liability, as will negligent failure to perform duties such as safeguarding the trust property or investing it properly. These are regarded as positive breaches of duty, rather than omissions, and hence are not within the scope of the statutory immunity clause.

12.96 Furthermore, trustees are generally required to act as a body. This creates a duty on each trustee to monitor the actions of the other trustees. Liability may exist if they do not fulfil this duty.

12.97 We expressed the view that the content of the present law is satisfactory. The notion of collective responsibility is embedded in the law of trustee liability, and we thought that it should be expressed in any statutory reformulation of section 3(d). Trustees ought to be liable for their own acts and omissions and in some circumstances for any acts or omissions of their co-trustees. We thought, however, that section 3(d) was misleading in view of the

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[105] Proposals 1 and 10 are set out, respectively, at paras 12.5 and 12.60 above.
[106] At paras 7.2-7.7 of DP No 123.

limitations on liability mentioned in the last two paragraphs. We consequently expressed the view that it should be replaced by a new clearer provision.

12.98 We thought that a possible model for such a provision could be found in section 62(6) of the Adults with Incapacity (Scotland) Act 2000 and made a proposal to that effect. On consultation, respondents agreed unanimously with it. We therefore recommend:

> **58. Section 3(d) of the Trusts (Scotland) Act 1921 should be replaced by a provision to the effect that, subject to contrary provision in the trust deed, each trustee should be liable for any loss caused to the beneficiaries arising out of:**
>
> **(a) his or her own acts or omissions; or**
>
> **(b) his or her failure to take reasonable steps to ensure that a co-trustee does not commit a breach of trust or a breach of fiduciary duty.**
>
> (Draft Bill, section 32)

Transitional provisions

12.99 We expressed the view that any legislative reform of trustees' powers and duties in relation to breach of trust should be prospective in effect.[107] This would avoid the retrospective imposition of liability on trustees. Nevertheless, we considered that the new rules should apply in respect of trusts created prior to commencement as well as trusts created after commencement, although obviously only in respect of acts following commencement. We considered that it would be undesirable to have two different sets of rules, especially as the situation could persist for a very long time. We made a proposal to this effect, which met with very broad support. We accordingly make the following recommendation:

> **59. The legislation implementing the proposals dealing with breach of trust (sections 28 to 32 of the draft Bill) should apply to all trusts, whether or not created before its date of commencement, but only in relation to any breaches of trust occurring on or after that date.**
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> (Draft Bill, sections 28(3), 29(5), 30(3), 31(4) and 32(2))

[107] See para 7.12 of DP No 123.

Chapter 13 Liability of trustees to third parties

13.1 In 2008 we published a Discussion Paper on Liability of Trustees to Third Parties.[1] Certain issues raised in that Paper were the subject of subsequent consultation.[2] In this Chapter we summarise the relevant issues, set out the consultation responses, and explain our recommendations. We begin by examining contractual liability in respect of *intra vires* and *ultra vires* contracts (in paragraphs 13.2 to 13.29) before turning to the execution of deeds (in paragraphs 13.30 to 13.39) and delictual liability (in paragraphs 13.40 to 13.60).

Contractual liability of trustees: *intra vires* contracts

13.2 When trustees enter into a contract on trust business with a third party the presumption is that they are personally liable; thus the third party may claim against the trustees' private patrimonies.[3] To avoid liability of their private patrimonies, trustees have to make the position clear to the third party, to the effect that they are contracting only as trustees.[4] Entering into a contract "as trustee" or "*qua* trustee" will generally prevent personal liability, although the mere addition of "trustee" after a party's name will not. Nevertheless, the meaning of such words has to be construed in the context of the contract entered into, the capacities of the parties, and the background circumstances. Where trustees are liable only in respect of their trust patrimony, the creditor has to claim against the present trustees. In such a case, the creditor faces the risk that the trust patrimony will become insolvent, in which case the creditor can only rank for a dividend in its sequestration.

13.3 If the trustees do not confine liability to the trust patrimony, they are personally liable to the other party to the contract. Provided, however, that the contract is one that they may properly enter into, the trustees have a right of relief against the trust property.[5] In such a case the right of relief is a relief of obligation, with the result that the trustees are entitled to use the trust patrimony to settle the creditor's claim.

13.4 We expressed the view that the present law is arguably too ready to impose personal liability on trustees who enter into contracts without expressly limiting liability to the trust patrimony.[6] The trustees are potentially liable to pay from their private funds should the trust property prove insufficient. That means that trustees may be putting their personal funds at risk even where they are carrying out their duties properly. Creditors, by contrast, benefit from the present law in that they have recourse to both the trust property and the trustees' private patrimonies. It was thought that this was a disincentive to acceptance of office as a trustee. Insurance against such a liability is difficult to obtain, and even when it is available the cover is often limited.

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[1] DP No 138.
[2] In Ch 3 of DP No 148.
[3] See Ch 3 above, and para 3.4 in particular, for a discussion of the dual patrimony theory involving the trustee's trust patrimony and personal patrimony.
[4] See paras 2.3-2.8 of DP No 138.
[5] See paras 2.9-2.12 of DP No 138.
[6] See para 2.13 of DP No 138.

13.5 We further doubted whether the present law reflects the expectations of creditors. Creditors who contract with trustees, especially in the case of substantial trusts, probably regard themselves as contracting with "the trust" and look to be paid from the trust property. We referred to the law in Jersey, Guernsey, South Africa and the United States of America Uniform Trust Code;[7] under these systems trustees are not personally liable to a third party on a contract that they have properly entered, provided that the third party was aware that the trustees were acting in a representative capacity. Personal liability arises only where the trustees' representative capacity was not disclosed or where the trustees expressly undertook personal liability. We noted that the position would be similar to section 67(4) of the Adults with Incapacity (Scotland) Act 2000.[8] In Jersey and Guernsey personal liability is negatived not only where trustees inform the third party that they are acting as trustees but in cases where the creditor was aware that the trustees were acting as such. We thought that the advantage of using such an "awareness" criterion outweighed the disadvantages. Trustees or their agents will frequently contract with the same party on two or more occasions, and if full disclosure is made in the first transaction it seems unduly formalistic for the law to require this to be done in every subsequent transaction.

13.6 The traditional justification for imposing personal liability on trustees was that third parties did not know the extent of the trust property, and therefore relied on the personal credit of the trustees and their assurances about the trust property's value. We noted, however, that where trustees, whether negligently or fraudulently, misrepresent the size of the trust property and so lead the third party to accept that only that property would be liable, the third party would have a claim in delict for fraud or negligence against the trustees personally. Furthermore, trustees owe a duty of care to the beneficiaries, and knowingly entering into a contract which would deplete the trust property substantially would usually be regarded as a breach of that duty and would subject the trustees personally to a claim by the beneficiaries for damages. In both of these situations the trustees would have no right of relief against the trust property.

13.7 Third parties would, of course, be entitled to stipulate that trustees were to be personally liable.

13.8 Against the foregoing background, we made the following proposal:

> "1. Where trustees enter into a contract with a third party which is within their powers in the course of administering the trust and either:
>
> (a) the fact that the trustees are acting in a representative capacity on behalf of a specified trust is disclosed at that time to the third party; or
>
> (b) the third party was otherwise aware that the trustees were so acting,
>
> then the third party's rights under the contract should be enforceable only against the trustees' trust patrimony, unless the contract provides otherwise."

13.9 On consultation, all respondents agreed with this proposal. The Faculty of Advocates suggested that the third party ought to have actual as opposed to constructive

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[7] Paras 2.15-2.16 of DP No 138.
[8] Quoted at para 2.15 of DP No 138.

knowledge that the trustee is acting in a representative capacity. We were not convinced that this was a useful addition to the rule, as it might lead to distracting disputes as to whether knowledge is actual or not. Furthermore, we do not think that it is clear that constructive knowledge should automatically be excluded.

13.10 In the light of the consultation responses, we make the following recommendation:

> **60. Where trustees enter into a contract with a third party which is within their powers in the course of administering the trust and either (a) the fact that the trustees are acting in a representative capacity on behalf of a specified trust is disclosed at that time to the third party; or (b) the third party was otherwise aware that the trustees were so acting, then the third party's rights under the contract should be enforceable only against the trustees' trust patrimony, unless the contract provides otherwise.**
>
> (Draft Bill, section 33(1)-(2))

13.11 We noted that, even if the foregoing recommendation were implemented, there would be cases where the trustees became personally liable under a contract, although those should be much less common than at present.[9] *Cuningham v Montgomerie*[10] established that trustees faced with personal liability were entitled to use the right of relief from the trust patrimony to meet their personal liability before having to make payment out of their private patrimonies. Furthermore, strong *obiter dicta* in that case from Lord Deas and Lord Shand indicated that a creditor is entitled to an assignation from the trustees of their right of relief against the trust property, and Lord Shand suggested that diligence against the trustees' private patrimonies would attach their right of relief against their trust patrimony.

13.12 We thought that the consequences of these views were not entirely certain, and that the law should be put on a more definite basis, so that a third party creditor had a more direct method of recovery from the trust patrimony; it is the trust patrimony that is ultimately liable where trustees have been acting within their powers. We canvassed that a possible solution would be to follow the rule on the undisclosed principal in agency, so that the third party could elect to proceed against either the trustees personally or against the trust property, but not both. That would diminish the existing rights of creditors. The alternative option was to make the trust patrimony and the trustees' private patrimonies potentially cumulatively liable. This would enhance rather than diminish the rights of a third party creditor, who could attempt to recover from either and, if unsuccessful, could recover the balance of the debt from the other.

13.13 In order to resolve this issue, we asked the following questions:

> "2. Where the trustees' private patrimonies are liable under a contract with a third party but the trustees have a right of relief in respect of that liability against their trust patrimony:

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[9] See para 2.21 of DP No 138.
[10] (1879) 6 R 1333.

(a) should the third party have a direct right of recovery from the trust patrimony; and

(b) if so, what is the best way of achieving this?"

13.14 On consultation, respondents agreed unanimously with the suggestion in paragraph (a), that the third party should have a direct right of recovery from the trust patrimony. Responses were divided on paragraph (b). Two respondents, the Faculty of Advocates and STEP, favoured joint and several liability, whereas in detailed responses Dr Patrick Ford and the late Professor M C Meston preferred cumulative liability. On balance, we have come to the conclusion that joint and several liability would be appropriate. We are conscious that this will apply to a relatively small proportion of cases, and we think that the certainty of joint and several liability may be of assistance. It is always open to trustees to exclude personal liability, in accordance with the previous recommendation.

13.15 By way of example, suppose that there are three trustees of a trust, who enter into a contract with T Ltd. In the course of the contract they incur personal liability under it, but they also enjoy a right of relief against the trust property. If T knows this, it may elect to pursue any or each of the three trustees in respect of their personal patrimonies and in addition (or alternatively, at the third party's election) the trust patrimony. This maximises the chances of recovery for T, and the question of how the liability is divided up between the trust patrimony and the three personal patrimonies is considered later in this Chapter.[11] We accordingly make the following recommendation:

61. Where the trustees' private patrimonies are liable under contract with a third party but the trustees have a right of relief in respect of that liability against the trust patrimony, the third party should have a direct right of recovery from the trust patrimony; and the liabilities of the trustees personally and the trust property should be joint and several.

(Draft Bill, section 33(3)-(4))

Contractual liability of trustees: *ultra vires* contracts

13.16 We considered the liability of trustees in respect of *ultra vires* contracts, with particular reference to section 2 of the Trusts (Scotland) Act 1961,[12] whose first two subsections provide:

> "(1) Where, after the commencement of this Act, the trustees under any trust enter into a transaction with any person (in this section referred to as "the second party"), being a transaction under which the trustees purport to do in relation to the trust estate or any part thereof an act of any of the descriptions specified in paragraphs (a) to (eb) of subsection (1) of section four of the Act of 1921 (which empowers trustees to do certain acts where such acts are not at variance with the terms or purposes of the trust) the validity of the transaction and of any title acquired by the second party under the transaction shall not be challengeable by the second party or any other person on the ground that the act in question is at variance with the terms or purposes of the trust:

[11] See paras 13.56-13.60 below.
[12] See paras 2.25-2.34 of DP No 138.

Provided that in relation to a transaction (other than a transaction such as is specified in paragraph (ea) of that subsection) entered into by trustees who are acting under the supervision of the Accountant of Court this section shall have effect only if the said Accountant consents to the transaction.

(2) Nothing in subsection (1) of this section shall affect any question of liability between any of the trustees on the one hand and any co-trustee or any of the beneficiaries on the other hand."[13]

13.17 We pointed out that the purpose of section 2(1) is to obviate the need for third parties to be satisfied as to the trustees' powers, and that in consequence the section should not be read as applying only where the trustees expressly or impliedly have power to carry out the specified transactions. The result of the section is that, although the transaction itself cannot be avoided by the beneficiaries, they remain entitled to sue the trustees for any losses to the trust property arising out of the *ultra vires* contract. We further indicated that there is no express requirement that the parties to the transaction be in good faith. Consequently, a sale of trust property would be unchallengeable although the trustees knew that this was not authorised, or even that it was expressly prohibited, by the trust deed. The same would be true if the third party was fully aware of the *ultra vires* nature of the transaction.

13.18 We stated that it is arguable that the lack of a requirement of good faith is beyond what is necessary to protect third parties. It is out of step with the general law that a transaction is avoidable where one contracting party was aware of an antecedent contract or obligation affecting the other party's ability to carry out the transaction.

13.19 As a result, one option would be to amend section 2 of the 1961 Act in such a way as to target the mischief more precisely. We referred to the position of company directors, and in particular section 40 of the Companies Act 2006.[14] That section provides that a person dealing with a company is not bound to enquire as to any limitation on the powers of the directors to bind the company or to authorise others to do so, and is presumed to have acted in good faith unless the contrary is proved. Furthermore, such a person is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution. We thought, however, that it would not be appropriate to provide that persons are in good faith even if they know that directors or trustees have no power to carry out the transaction. It had been suggested that an additional element was necessary to turn knowledge into bad faith, but we regarded that distinction as over-subtle.

13.20 On the other hand, we indicated that the lack of any requirement of good faith protects those buying from, selling to and lending to trustees. It prevented any argument that a third party who has some knowledge of the trust deed or trustees' powers was not acting in good faith. In some cases, third parties or their agents may carry out a cursory check on the trust deed into, for example, the names and designations of the trustees, but the question then arises as to whether they have knowledge of further provisions of the deed. We thought it better to avoid these uncertainties by continuing with the present simple rule that good faith was not required, in any form. This would not normally harm the beneficiaries. The unchallengeable transactions are all onerous, so that the trust property

[13] As amended by s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 and para 3 of sch 3 to the Charities and Trustee Investment (Scotland) Act 2005.
[14] Set out at para 2.29 of DP No 138.

should not have suffered any substantial financial loss through such a transaction. Any other losses might be recoverable on a delictual basis from the third party who had transacted in bad faith. A transaction at a substantial undervalue carried out in bad faith could amount to fraud. Finally, we pointed out that section 2 of the 1961 Act in its present form appeared to have worked well in practice for more than 40 years.

13.21 We could see no basis for extending the protection of section 2 to gratuitous *ultra vires* transactions. We thought that those were and should remain challengeable as the trustees have no power to give trust property away except as directed by the trust deed. To make such gifts unchallengeable would weaken the position of the beneficiaries to a substantial extent. On the other hand, we thought that there was no reason for restricting the onerous transactions that were unchallengeable to sale, lease, excambion, borrowing money on the security of trust property, acquiring property as an investment and acquiring heritable property other than as an investment.[15] It would be simpler to include all onerous transactions within the protection of the section.

13.22 Section 2 of the 1961 Act does not extend protection to third parties who are co-trustees or beneficiaries. We thought that co-trustees ought to be aware of their powers, so that their exclusion was justified. Beneficiaries, however, might have little information as regards the scope of the powers of the trustees, and therefore should not be expected to undertake detailed investigations.

13.23 On the basis of the foregoing, we put forward the following proposals and questions:

> "3. (1) Section 2(1) of the Trusts (Scotland) Act 1961 should be amended so that all onerous transactions relating to the trust estate between the trustees and a third party are unchallengeable on the ground that the transaction was at variance with the terms and purposes of the trust.
>
> (2) Should good faith on the part of the third party be made a requirement for the protection in section 2(1)? If so, how should good faith be defined?
>
> (3) The protection in section 2(1) should continue to be unavailable to a third party who is one of the trustees, but should it be available to a third party who is a beneficiary?"

13.24 In relation to proposal 3(1), respondents to the consultation were unanimously in favour. The Faculty of Advocates considered that the protection should only apply where the transaction is for full value, but the concept of an onerous transaction is in our opinion confined to transactions at full value, or what reasonably appears to the parties to be full value. In relation to question 3(2), responses varied. On this point, we recognise that under the pre-1961 law good faith was a requirement for the validity of transactions. This led to uncertainty in practice, however, and that is why section 2 was enacted. We think that, provided the transaction is onerous, good faith should not be a necessity; the onerous character of the transaction should ensure that the trust property is not prejudiced. In this connection, we intend that the word "onerous" should mean that the transaction is for full consideration or at least a reasonable estimate of full consideration. The advantage of not

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[15] Ie the categories specified in s 4(1)(a)-(eb) of the 1921 Act, as referred to in s 2(1) of the 1961 Act.

having a requirement of good faith is the protection of third party purchasers and lenders. In practice, section 2 does not appear to have had any adverse impact.

13.25 On question 3(3), respondents to the consultation were divided. We have come to the conclusion that, provided a clear requirement of onerosity is imposed, protection may be extended to beneficiaries. We recognise that there may be cases where a 'dominant' beneficiary exercises undue influence, but on balance we think that trustees must be relied upon to resist pressure from any such person.

13.26 We accordingly recommend:

> **62. (1) Section 2(1) of the Trusts (Scotland) Act 1961 should be repealed and re-enacted with a modification so that all onerous transactions relating to the trust property between the trustees and a third party are unchallengeable on the ground that the transaction was at variance with the terms and purposes of the trust.**
>
> **(2) Good faith on the part of the third party should not be made a requirement for the protection accorded by the new provision.**
>
> **(3) Such protection should continue to be unavailable to a third party who is one of the trustees, but should be available to a third party who is a beneficiary.**
>
> (Draft Bill, section 38)

Trust patrimony not liable in ultra vires contracts

13.27 We considered a further possible defect in the present law, namely that a third party creditor has no recourse against the trust property for loss due to breach of contract by the trustees if the contract was one that was outwith the trustees' powers.[16] If a contract is *ultra vires*, trustees are personally liable without any right of relief against the trust patrimony. That is so whether or not they describe themselves as trustees or purport to contract solely in their capacity as trustees. Thus the third party's recourse is limited to the private estate of the trustees. Section 2(1) of the 1961 Act merely prevents the transaction from being challenged on the ground that it is *ultra vires*; consequently, neither the trustees nor the third party can have the transaction set aside on this ground.

13.28 We considered the argument that third parties who transact with trustees should be able to claim against the trust property as well as the trustees' private patrimonies, unless the third parties were in bad faith. The present law protects the beneficiaries at the expense of third parties, who have to take the risk that the transaction may turn out to be *ultra vires* of the trustees and that the trustees have insufficient private patrimonies to meet the claim. We pointed out that this sort of situation is rare in practice; questions of *ultra vires* contracts are likely to resolve themselves into disputes between the trustees and the beneficiaries. We thought that the present law was right in providing that any loss arising out of an *ultra vires* contract should fall on the trustees personally rather than being passed onto the trust property and hence the beneficiaries. Third parties who enter into contracts voluntarily

[16] See paras 2.35-2.38 of DP No 138.

should have to run the risk that the transaction is *ultra vires* and that the trustees have insufficient private funds to meet a claim. The beneficiaries by contrast are not parties to the contract and will probably have little knowledge of the contracts being entered into. They are, therefore, more deserving of protection.

13.29 We accordingly advanced the following negative proposition:

> "4. A third party who acted in good faith in an onerous contract with the trustees which was outwith the powers of the trustees should continue to be restricted to claiming against the trustees' private patrimonies and should not be entitled to claim against the trustees' trust patrimony."

On consultation, all respondents but one agreed that trust beneficiaries should not be prejudiced by third party claims against the trust patrimony for breach of contract by the trustees when the trustees did not have power to enter the contract. In view of this response we remain of the same view. We accordingly make the following recommendation:

> **63. A third party who acted in good faith in an onerous contract with the trustees which was outwith the powers of the trustees should continue to be restricted to claiming against the trustees' private patrimonies and should not be entitled to claim against the trustees' trust patrimony.**
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> (Draft Bill, section 33(5)-(6))

Execution of deeds by trustees

13.30 A further topic we considered is the execution of deeds by trustees implementing transactions between them and third parties.[17] The word "deeds" was used in a general sense, and was not confined to heritable property. The critical question was how the deed should be executed in such a way as to implement the underlying transaction. It has long been settled in Scots law that as a matter of business and administrative convenience unanimity among trustees is not required in every decision relating to trust property.[18] A decision by a majority or quorum of trustees will usually be sufficient to deal with the business of the trust, except where there is a joint or *sine qua non* appointment.[19] Nevertheless, a distinction has been drawn between, on the one hand, the powers of trustees in relation to making a decision and, on the other, the actual implementation of the decision by means of a juridical act. While it is clearly established that decisions may be made by a majority, there is doubt as to the rule for executing a disposition or other deed.

13.31 We considered the present law in some detail, having regard both to court decisions and to section 7 of the 1921 Act. The latter section on its face appears to permit execution by a majority of trustees, but there has been no case law interpreting it and its meaning is generally regarded as unclear.[20] To take the example of a deed relating to land, one view is that it should be drafted in the name of all the currently acting trustees of the trust and

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[17] See paras 2.39-2.48 of DP No 138. More generally, we made recommendations on execution of documents in our Report on Formation of Contract: Execution in Counterpart (SLC No 231; 2013) : see note 10 to para 5.5 above.
[18] We discuss decision-making by trustees in Ch 5.
[19] See paras 5.10-5.11 above for a discussion of *sine qua non* trustees and joint trustees.
[20] See GL Gretton and KGC Reid, *Conveyancing* (4th edn, 2011), para 25.19.

executed by a majority of those trustees. The alternative view is that execution must be by all trustees with a registered title,[21] which would mean that majority execution would not be generally valid. If, however, a third party is acting onerously and in good faith and a deed is executed by a majority of trustees, the deed will not then be challengeable. Further uncertainty remains, though: whether the majority should be a majority of the trustees or a majority of the trustees with a registered title, and whether good faith relates only to procedural irregularities or whether it means that the grantee believes that all of the trustees are acting and signing.

13.32 We expressed the view that the present position is unsatisfactory and that clarification would benefit practitioners and trustees alike.[22] We suggested that a deed should run in the names of all of the currently acting trustees but would require to be signed only by a majority of them in order to be formally valid. This would be without prejudice to the existing law which permits trustees to delegate administrative tasks, such as the execution of deeds, to agents. No distinction should be drawn between trustees with a registered title and other trustees. We considered that majority execution should follow from the general principle of majority decision-making. It further seemed that, in relation to execution, any distinction between trustees with a registered title and other trustees was unnecessary if the basic rule is that a majority of trustees can decide the substance of the transaction. We noted that public trusts often have a large number of trustees, with the result that obtaining signatures from all of them can be time-consuming.[23] Problems can also arise with property held on trust for a partnership, where it can be difficult to obtain the signature of a former partner who departed from the firm in acrimonious circumstances.

13.33 We made a proposal to the foregoing effect.[24] On consultation, respondents agreed unanimously with it. We accordingly recommend:

64. A deed bearing to be granted by all the acting trustees should be formally valid if it is executed by a majority of them as defined by law or in the trust deed.

(Draft Bill, section 39)

Although, in general, the question of how deeds and other documents are to be executed lies beyond the scope of this Report, we consider that there is one further statutory reform which would be beneficial for trustees. The Requirements of Writing (Scotland) Act 1995, which regulates the way in which documents are to be executed so as to make them formally valid or probative under Scots law,[25] currently provides special rules for execution by partnerships, companies, limited liability partnerships, local authorities, other bodies corporate and Ministers of the Crown and office holders.[26] The addition of an equivalent

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[21] Ie those whose title is registered in the Register of Sasines or the Land Register; formerly these were known as infeft trustees.
[22] See paras 2.46-2.47 of DP No 138.
[23] We discuss this (in relation to commercial transactions, though similar practical issues are likely in public trusts too) in the Report cited in note 10 to para 5.5 above; see especially its para 1.15.
[24] Proposal 5 at para 2.48 of DP No 138. Our proposal used "quorum" rather than "majority"; for the reasons set out in para 5.13 above, we prefer the latter term.
[25] See ch 30 of Gretton and Steven for a discussion of the execution of documents. We also touch on it in our DP on Formation of Contract (DP No 154; 2012) at paras 7.16-7.29. The 1995 Act has been amended on a number of occasions.
[26] See paras 2-6 of Sch 2 to the 1995 Act.

provision for trustees would, in our view, be beneficial. We have therefore included an appropriate section into our draft Bill.[27] Should the 1995 Act be reviewed in the future, the amendment which we recommend will mean that due account will be taken of the position of trust documents in any such review, a position which might not be so certain without express mention of trustees in the Act.

Other issues with section 7 of the 1921 Act

13.34 We gave detailed consideration to the provisions of section 7 of the 1921 Act, which provides protection against procedural irregularities in relation to the granting of a deed by a quorum of trustees.[28] Persons who, dealing onerously and in good faith, take a deed executed by a quorum of trustees are protected from any allegation that any trustee was not consulted in the matter, or was not present at any meeting of trustees where the matter was considered, or did not consent to or concur in the granting of the deed. They are likewise protected against any other omission or irregularity of procedure on the part of the trustees. The protection is not extended to grantees who are co-trustees or beneficiaries.

13.35 We expressed the view that these provisions served a useful purpose and should be retained and indeed extended. We considered that third parties transacting with trustees should not be required to investigate the internal administration of the trust. They should be entitled to assume that, when an *ex facie* formally valid deed is tendered, the trustees have complied with all of the necessary requirements of internal procedure. At present these apply only where a deed is signed by a quorum of the trustees. We took the view that onerous grantees should be protected regardless of the manner in which the deed was executed. The section should therefore be expressed more generally.

13.36 At present only a third party grantee in good faith is protected. That requirement was inconsistent with section 2 of the Trusts (Scotland) Act 1961;[29] the latter section applies irrespective of whether the party transacting with the trustees is in good faith. We thought that good faith should be required in both provisions or in neither.[30] Section 7 of the 1921 Act, like section 2 of the 1961 Act, does not extend protection to grantees who are co-trustees or beneficiaries. We considered that the exclusion of co-trustees from statutory protection was justified, as they ought to be aware of procedural irregularities. The case for excluding beneficiaries seems weaker, as they may have little information as regards the scope of the powers of the trustees or the internal administration of the trust.

13.37 We accordingly put forward a proposal that section 7 should be replaced by a new statutory provision whereby a deed in favour of an onerous grantee validly executed by or on behalf of trustees should not be void or challengeable on the ground of any omission or irregularity of procedure on the part of trustees in relation to the transaction implemented by the deed. We asked whether good faith of the grantee should be required, and if so how it should be defined. We proposed that the protection should continue to be unavailable to a co-trustee, but asked whether it should be available to a beneficiary.

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[27] See s 72, which adds a new para 2A into Sch 2 to the 1995 Act. To make a deed executed by trustees probative, it will be enough to have it attested in accordance with s 3 of that Act.
[28] At paras 2.49-2.53 of DP No 138.
[29] See para 13.16 above.
[30] See the discussion at paras 13.17-13.26 above on good faith, and s 2 of the 1961 Act.

13.38 On consultation, respondents unanimously agreed that section 7 should be replaced along the lines suggested. On the questions of the requirement of good faith and whether the protection should be available to co-trustees and beneficiaries, the answers received from respondents mirrored those in relation to the proposals that resulted in recommendation 62.

13.39 In the light of the foregoing responses, we make the following recommendation:

> **65. (1) Section 7 of the Trusts (Scotland) Act 1921 should be replaced by a new statutory provision whereby a deed in favour of an onerous grantee validly executed by or on behalf of trustees is not to be void or challengeable on the ground that there was any omission or irregularity of procedure on the part of the trustees or any of them in relation to the transaction implemented by the deed.**
>
> **(2) Good faith on the part of the grantee should not be required for protection.**
>
> **(3) The protection referred to in paragraph (1) should be unavailable to a grantee who is a co-trustee but should be available to a grantee who is a beneficiary of the trust.**
>
> (Draft Bill, section 38)

Liability for delict and other wrongs

13.40 We considered the liability of trustees for delict and other wrongs in the Discussion Paper on Liability of Trustees to Third Parties, and then again in the Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law.[31] In the first, we considered ordinary delictual liability,[32] and we pointed out the lack of authority in this area. The most recent case indicated that, when trustees make payment of a delictual claim, they are *prima facie* liable as individuals.[33] They are, however, entitled to relief out of the trust property.[34] While that is the *prima facie* rule, it could be modified by the form of decree that is taken against the trustees. If the trust property is insufficient, the form of decree becomes important: if the decree is against the trustees "as trustees", it is limited to recovery out of the trust property; if, however, it is against the trustees as individuals, it is not so limited and recovery is possible from the trustees' own property. If the trustees have themselves been negligent, it is possible for damages to be awarded against them personally without relief from the trust property.

13.41 We thought it clear that trustees should be responsible for delicts committed by them or by their agents or employees, and that the important question was the extent to which damages should be payable from the trust property or from the trustees' own assets. We thought that it was wrong that trustees should be personally liable in all situations where their employees or agents had been negligent, and we noted that there was evidence that people

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[31] See, respectively, Pt 3 of DP No 138 and Ch 3 of DP No 148.
[32] At paras 3.2-3.9 of DP No 138.
[33] *Mulholland v Macfarlane's Trs* 1928 SLT 251. In that case, the defenders had been designated as trustees and so damages were payable only from the trust estate.
[34] Mackenzie Stuart, p 335.

were becoming increasingly reluctant to act as trustees because of the financial risks involved. We expressed support for a rule, found in the American Uniform Trust Code,[35] whereby trustees are only personally liable if they have been personally at fault. We thought that if, by contrast, a person suffered loss without any trustee's being personally at fault, the trustees should be sued in a representative capacity, with the result that damages would only be payable from the trust property.

13.42 We further thought that the court should have power to apportion damages between the trust property and the personal assets of a trustee who had been personally at fault. We thought that might be appropriate where, for example, the damage was caused partly by the trustee's own fault and partly by the fault of an employee of the trust.

13.43 Finally, we suggested that a trustee who is at fault and therefore personally liable should not be entitled to seek relief or indemnity from the trust property; and a trustee who was at fault could not be said to have behaved reasonably and within his or her powers. Against that background, we made the following proposals:

> "7. (1) Where a person suffers loss as a result of some act or omission of the trustees (or anyone for whom they are responsible) in the course of administering the trust, damages should generally be payable from the trustees' trust patrimony. Damages should be payable from a trustee's private patrimony only if, and to the extent that, he or she was personally at fault.
>
> (2) It should be competent for the court to award damages partly from the trustees' trust patrimony and partly from the private patrimony of a trustee who was at fault."

13.44 We then discussed the delictual consequences arising out of the ownership and occupation of property.[36] Trustees may incur civil liability in respect of contaminated land, either as the persons who actually pollute the land or as the owners or occupiers of contaminated land. This can represent a major potential liability. The relevant legislation defined the owner in such a way as to cover trustees, but did not specify the capacity in which the trustees are liable We observed that the American Uniform Trust Code excludes personal liability of trustees except in cases where a trustee is personally at fault.[37] The official comment on the relevant section states that protection from personal liability for environmental law violations had been included because it was a matter of particular concern to trustees. We indicated agreement with this approach.

13.45 In addition we considered the Occupiers' Liability (Scotland) Act 1960, which imposes a duty of care on those occupying or controlling premises towards persons entering the premises.[38] The Act does not deal expressly with trustees, and it is not clear whether they are liable personally or only in a representative capacity. We thought that the approach should be similar to that taken in relation to environmental liability.

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[35] Section 1010(b): "A trustee is personally liable for torts committed in the course of administering a trust, or for obligations rising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault."
[36] See paras 3.10-3.13 of DP No 138.
[37] See para 13.41 above and its note 35.
[38] See para 3.13 of DP No 138.

13.46 We accordingly made the following proposal:

> "8. (1) Where liability arises out of the trustees' ownership or control of trust property or under environmental legislation only the trustees' trust patrimony should generally be liable. A trustee's private patrimony should be liable only if, and to the extent that, he or she was personally at fault.
>
> (2) It should be competent for the court to award damages partly from the trustees' trust patrimony and partly from the private patrimony of a trustee who was at fault."

Consultation responses and subsequent consultation

13.47 These proposals met with broad support on consultation. Certain of the comments made by respondents, however, caused us to reconsider details of our proposals. The Faculty of Advocates thought that the limitation that we proposed on trustees' personal liability could be considered unfair, and that it would give trustees greater protection than individuals, partners and members of unincorporated associations. They thought that this might have the effect of opening up the trust vehicle to abuse because of the limitations on the liability of trustees. As an alternative, the Faculty suggested a provision modelled on section 1157 of the Companies Act 2006;[39] this allows the court to grant a company officer relief against the company if the officer acted honestly and reasonably and ought fairly to be excused. By contrast, STEP considered that fixing liability on trustees who were "personally" at fault might go too far: the word "personal" was, they thought, unhelpful. STEP considered that personal liability of trustees should be confined to three cases: where the trustee was the actual wrongdoer; where the trustee was a supervisor of the wrongdoer and failed to take reasonable care to devise, institute or maintain a safe system; and where the trustee failed to show the prudence of an ordinary man of business. The last of these, it was suggested, would cover the possibility that trustees failed to take out adequate insurance.

13.48 We gave careful consideration to these submissions, and concluded that on balance our original suggestions were broadly correct, subject to certain modification. We accepted the Faculty's comments that trustees will be given a degree of protection not given to partners, at least of an ordinary partnership, but such protection is available to those who carry on business through the medium of a limited company or limited liability partnership. Abuse might occur, but we thought that the existence of liability where a trustee is personally at fault would deal with nearly all such cases. We were also concerned at the suggestion that potential trustees might be discouraged from accepting appointment because of the risk of personal liability.

13.49 In relation to STEP's suggestion as to how the circumstances in which personal liability will arise should be defined, we took the view that we should retain the concept of personal fault, but that our Report should indicate the sort of circumstances where personal liability is likely to be incurred. Cases where the trustee is the actual wrongdoer would be clear. In cases where a safe system was required and a particular trustee was responsible for devising such a system, we thought that personal fault would be established. A trustee who was not personally responsible for devising such a system, by contrast, would not be subject to personal liability. The third of STEP's suggested categories, a trustee who fails to

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[39] We set out this provision in note 10 to para 3.6 of DP No 148.

show the prudence of an ordinary man of business, seem to us to go to the standard of care rather than the incurring of personal liability. In a case where a trustee is personally responsible for a particular aspect of a trust's activities, however, a failure to exercise the ordinary standard of care would on our approach give rise to personal liability.

Further issues: basis of raising proceedings, and liability between the trustees

13.50 We nevertheless thought that our recommendations should deal with the precise manner in which proceedings for delict can be raised against trustees. Two separate issues arose: the basis on which the injured party could raise proceedings, and the manner in which the trustees as a body and the individual trustees could settle their liability *inter se*.[40]

13.51 In relation to the first issue, it would be possible for the injured party to sue the trustees as a body, leaving them with a right of relief against any individual trustee who is personally at fault. An alternative, which we were inclined to prefer, was that the injured party had a right to sue either the trustees as a body or any trustee averred to be personally at fault or the body of trustees and the individual trustee jointly and severally. We thought that the advantage of the second approach was that the injured party would be able to obtain a remedy against the trustee who was personally at fault at the outset, without the need to sue the trustees as a body first. If the trust property were inadequate to meet the award of damages, it would enable an effective remedy to be obtained at the outset, although only in cases where a trustee was personally at fault. Such a procedure would in addition enable the court to apportion damages between the trustees as a body and any delinquent trustee who was personally liable. It seemed to us that this was procedurally a more effective remedy, leading to a speedier and fuller resolution of the substantive issues. We accordingly made the following proposal:

> "3. Where a person suffers loss as a result of some act or omission of the trustees (or anyone for whom they are responsible) in the course of administering the trust, the trustees as a body will be liable to make reparation for such loss. In addition, any individual trustee who is personally at fault will be liable jointly and severally with the trustees as a body, and in that event any damages awarded against the individual trustee will be payable out of his or her private patrimony. In all such cases, however, it should be essential that the claim, so far as directed against an individual trustee, is on the basis that he or she was personally at fault."

13.52 On consultation all respondents were in favour of this proposal. A number of respondents and our Advisory Group suggested that great care was required in formulating the precise wording of the level and duty of care required to be met by trustees. It was necessary to be clear precisely how far the exception in the last sentence of the proposal was intended to go, especially as a balance had to be struck between not discouraging people from being trustees but at the same time making them aware of their responsibilities in the role.

13.53 In view of the comments made by STEP as to the definition of the circumstances in which a trustee would incur personal liability, we also put a further proposal as follows:

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[40] See paras 3.10-3.13 of DP No 148.

"4. It is not necessary to provide a statutory definition of "personal" liability, or of the circumstances in which personal liability is incurred. That matter should be left to the judgment of the court, but our report should contain a more detailed discussion of the circumstances in which such liability will be incurred."

13.54 On consultation, all respondents agreed. The Advisory Group suggested that care was needed as to the circumstances in which personal liability would arise, and in particular whether this incorporated ordinary negligence or a higher standard such as gross negligence. By contrast, the Law Society thought that it should be left to the courts to decide what constituted "personal liability" and the circumstances in which it is incurred.

13.55 We asked for comments as to the criteria that might be useful in a definition of personal liability, should such a definition be preferred. In the light of the view that no statutory definition was required, however, we do not require to consider this matter further, although we note that the Law Society thought that it would be extremely difficult to provide any definition. The Faculty of Advocates suggested that the criteria that might be useful were acting in bad faith; acting dishonestly; or gross neglect of fiduciary duties.

13.56 The further question that arose was how the trustees as a body and any individual trustee who was at fault could settle their liability *inter se*. Two questions arose, both involving rights of relief: could the trustees as a body recover any sum that they were compelled to pay from the trustee who was personally at fault, and could a trustee who was personally at fault and found liable to pay damages recover from the trust property the sum that he or she had paid? We expressed the view that the normal consequences of joint and several liability should apply: the trustees as a body and the individual trustee who was personally at fault were joint wrongdoers, and each should have a right of relief against the other.[41] In the enforcement of those rights of relief, the provisions of section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 should apply,[42] so that the court could apportion liability as between the body of trustees and the individual trustee.

13.57 We accordingly made the following proposal:

"6. The body of trustees and any individual trustee who is personally at fault should each have a right of relief against the other, that right being subject to the power of apportionment in section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940."

13.58 On consultation, substantial agreement was indicated by a number of respondents. The Judges of the Court of Session, however, thought that it was not wholly clear why a trustee who had been found personally liable to a third party should have a right of relief against the trustees as a body, that is to say, against the trust property. In such a case the fault would lie with the individual trustee and not with the body of trustees. On this matter,

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[41] See para 3.13 of DP No 148.

[42] Section 3(1), as amended, provides:
"Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable *inter se* to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just:
Provided that nothing in this subsection shall affect the right of the person to whom such damages or expenses have been awarded to obtain a joint and several decree therefor against the persons so found liable."
It is subject to s 3(3).

we would point out that determination of the amount that should be paid by way of relief would be a matter for the court under the 1940 Act, and in some cases the question of fault as between the individual trustee and the body of trustees may not be wholly clear-cut. We would expect the court to attach importance to the respective fault of the individual trustees concerned, and in a case where the sole fault was that of the trustee seeking relief such relief would probably be denied.

13.59 The Law Society was also concerned that innocent trustees should be protected from personal exposure as far as possible. They were further concerned that the proposal contradicted our earlier one, as quoted above in paragraph 13.51, which seemed to imply that, if one trustee were personally at fault, the trust would not be liable. Our intention was that the responsibilities suggested in proposal 3 should be given effect in the present proposal, with apportionment under the 1940 Act as necessary. But in view of these comments, we consider that the gist of the proposal should be modified so as to read:

> "Where no trustee is personally liable for loss caused by the trustees in administering the trust, each trustee should have a right of relief against the other subject to the power of apportionment in section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940."

This covers the situation in which there is no personal fault on the part of any of the trustees but the trust property is insufficient to meet the full award made by the court. In those circumstances, we consider that there should be apportionment under the 1940 Act.

13.60 Accordingly, we make the following recommendations:

66. (1) Where a person suffers loss as a result of some act or omission of the trustees (or anyone for whom they are responsible) in the course of administering the trust, damages should generally be payable from the trustees' trust patrimony. Damages should be payable from a trustee's private patrimony only if, and to the extent that, he or she was personally at fault.

(2) It should be competent for the court to award damages partly from the trustees' trust patrimony and partly from the private patrimony of a trustee who was at fault.

(Draft Bill, section 34)

67. Where a person suffers loss as a result of some act or omission of the trustees (or anyone for whom they are responsible) in the course of administering the trust, the trustees as a body will be liable to make reparation for such loss. In addition, any individual trustee who is personally at fault will be liable jointly and severally with the trustees as a body, and in that event any damages awarded against the individual trustee will be payable out of his or her private patrimony. In all such cases, however, it should be essential that the claim, so far as directed against an individual trustee, is on the basis that he or she was personally at fault.

(Draft Bill, section 35)

68. Where no trustee is personally liable for loss caused by the trustees in administering the trust, each trustee should have a right of relief against the other subject to the power of apportionment in section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

(Draft Bill, section 36)

69. (1) Where liability arises out of the trustees' ownership or control of trust property or under environmental legislation only the trustees' trust patrimony should generally be liable. A trustee's private patrimony should be liable only if, and to the extent that, he or she was personally at fault.

(2) It should be competent for the court to award damages partly from the trustees' trust patrimony and partly from the private patrimony of a trustee who was at fault.

(Draft Bill, section 37)

We do not consider that it is necessary to provide any statutory definition of "personal" liability for this purpose.

Chapter 14 Private purpose trusts

14.1 In our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law, we considered the private purpose trust.[1] This is an institution that has appeared in recent years in a number of jurisdictions, in the form of a non-charitable purpose trust. By "purpose trust", what is meant is a trust that does not have defined persons as beneficiaries but rather exists to achieve a defined purpose, frequently of a philanthropic or business nature. We pointed out that legislation to permit such trusts first appeared in Bermuda,[2] and that that model has been followed in a number of other jurisdictions. A major development occurred in 1997 when the Cayman Islands enacted the Special Trusts (Alternative Regime) law; this permitted a type of purpose trust that has come to be known as a STAR trust.[3] The STAR model has been followed in other jurisdictions notably Guernsey,[4] Bermuda[5] and the Bahamas.[6] The Cayman Islands STAR legislation has generally been regarded as the paradigm for the development of this area of the law, and consequently our Discussion Paper centred on that model; we considered, however, that the Guernsey legislation was somewhat shorter and simpler than the Cayman Islands legislation, and that it might serve as an alternative model for reform.

Competence

14.2 We pointed out that the non-charitable purpose trust is already recognised in Scotland, in that nearly all, if not all, non-charitable public trusts fall into that category. Such a trust may be enforced in the public interest by the Lord Advocate. For this reason we did not think that there was any conceptual reason that private purpose trusts should not be recognised in Scotland. In English law non-charitable purpose trusts are not recognised.[7] The view taken in England and Wales is that for a trust to be valid it must be for the benefit of identifiable persons or for charitable purposes, in the technical sense of the latter expression. That principle underlies the whole of English law in this area. In Scotland, however, we could see no reason for the application of any similar principle.

14.3 Since the publication of the Discussion Paper we have had the benefit of valuable discussions with Dr Patrick Ford of the University of Dundee Law School, in the light of which we have reached the conclusion that it is already competent to establish a private purpose trust in Scots law. Indeed considerable numbers already exist, especially in a commercial context.[8] We have also reached the conclusion that Scots law, in particular through its concept of interest to sue, already provides mechanisms for the enforcement of such a trust.[9] For this reason our views have been modified to a significant extent.

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[1] Ch 12 of DP No 148.
[2] In Pt II of the Bermudian Trusts (Special Provisions) Act 1989.
[3] "STAR" is the commonly used abbreviation of Special Trusts (Alternative Regime). The legislation is now found in the 2009 revision of the Cayman Islands Trust Law; the relevant provisions are in Appendix B to DP No 148.
[4] Trusts (Guernsey) Law 2007, s 12.
[5] Trusts (Special Provisions) Amendment Act 1998, s 12A.
[6] Purpose Trusts Act 2004.
[7] *Morice v Bishop of Durham* (1804) 9 Ves Jr 399, 404-405 per Sir William Grant MR. For a fuller discussion, see Panico, paras 12.02 onwards.
[8] See para 14.7 below.
[9] See para 14.9 below.

Nevertheless, we remain of opinion that it is important that Scots law should have express legislation dealing with private purpose trusts, to make it clear beyond doubt that they are competent.

Objections in principle to private purpose trusts

14.4 We noted that four principal objections to private purpose trusts have been identified in other jurisdictions.[10] They are as follows:

(i) the rule against perpetuities;

(ii) uncertainty;

(iii) public policy; and

(iv) lack of an adequate enforcement mechanism.

Perpetuities

14.5 In Scots law, the first of these objections is easily dealt with. The rule against perpetuities has never been part of Scots law and, as discussed elsewhere in this Report, we do not recommend that any such rule should be enacted.[11]

Uncertainty

14.6 We did not think that there was any fundamental problem in relation to uncertainty in Scots law. We observed that there is an onus on trusters and those drafting trust deeds to ensure that trust purposes are sufficiently clear and definite, as a matter of both substance and form. In some cases trust purposes might fail for uncertainty, but in this respect there did not appear to us to be any fundamental difference between public and private purpose trusts. In the case of public trusts, there is a requirement that there should be sufficiently definite trust purposes. We envisaged that similar principles would be applied to private purpose trusts.

14.7 We observed that private purpose trusts may well exist already, in certain commercial trusts. By way of example, we mentioned a trust under which assets are held to facilitate a particular financing transaction, for example in relation to a commercial or residential development, where numerous parties are involved and further parties will become involved following the sale or letting of the development. In such cases, assets are held as collateral for the completion and disposal of the development, but the identity of the those who will benefit from that collateral cannot be known. Thus the interest of the initial developer may be sold to another party or other parties, frequently by means of a complex series of arrangements involving sales and leases, and sometimes less formal intra-group transfers. The finance for such a development is likely to come from outside sources, banks or other investors, and they are likely to take security over the interests of other parties. The trust of collateral, as described above, is designed to ensure that security is available for any party who suffers loss as a result of the non-completion or defective completion of the development. We noted that such a trust can possibly be forced into the model of a trust for

[10] See paras 12.5-12.18 of DP No 148. See also Panico, ch 12, in particular para 12.21.
[11] See recommendation 94 below.

identifiable beneficiaries, although the identity of many will be unknown when the trust is set up, but that it is perhaps more realistic to consider it as a trust set up for the purpose of providing security against the risk of non-completion or defective completion of the development. We also noted that another example of a purpose trust is found in a securitisation transaction, where receivables are used as collateral for loan notes sold to the public.

Public policy

14.8 As to the objection to purpose trusts based on public policy, it is clear that in Scots law, if it is to be valid, any trust must give rise to an identifiable benefit.[12] This principle would apply to private as well as public purpose trusts, but we did not think that it would be a fundamental barrier to the recognition of private purpose trusts; it merely emphasised that such a trust must produce practical benefits. We remain of that opinion. We also recognise that any trust purposes must be legal and not otherwise contrary to public policy. These are existing principles, and we do not see any difficulty arising from their application.

Enforcement

14.9 We recognised that the most significant of the four objections to the recognition of private purpose trusts was the lack of an adequate enforcement mechanism. As we said at the outset of this Chapter, our proposals centred on the STAR trust as found in the legislation in the Cayman Islands and, in a simplified form, in Guernsey. An important feature of the legislation in those jurisdictions is the institution of the "enforcer", who is a person with power to enforce the trust purposes. That is considered important in any system based on English law, because one of the fundamental objections taken to a private purpose trust is that there is no identifiable beneficiary who can enforce the trust purposes. We took the view that an institution such as the enforcer found in those jurisdictions would be necessary to ensure that enforcement of the trust purposes would be possible. On reflection, however, we think that such an institution is not necessary. A Scottish public trust may be enforced at the instance of any person who can show an interest to sue, namely anyone who has a practical concern with ensuring that the trust purposes are duly performed. The expression "interest to sue" is a general expression used in Scottish procedure, and its meaning is quite clear.[13] Thus we do not think that there should be any difficulty in using this concept to permit enforcement of the trust purposes.

14.10 Despite the existence of a general enforcement mechanism in Scots law, we consider that it is desirable to have a facility in legislation specifically directed towards the enforcement of private purpose trusts. We noted that in some jurisdictions which provide for enforcers it is not mandatory to appoint one.[14] Although we indicated in our Discussion Paper that it should be compulsory to appoint a person who can take action against the trustees, for the reasons discussed in the previous paragraph we are now persuaded that this is not so. The default position will therefore be that any private trust can be enforced according to existing legal principles but it will also be possible to provide for a specific power of enforcement. We note, however, that the word "enforcer" drew adverse comment

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[12] Eg *McCaig v Glasgow University* 1907 SC 231; this topic is discussed in DP No 142 at paras 2.59-2.76. See also *SME*, Vol 24, para 86.
[13] Although of course there may be marginal cases which cause difficulty.
[14] The Cook Islands, Cyprus, Mauritius and Labuan.

on consultation,[15] which we fully understand. For that reason we propose replacing it with the word "supervisor", which we think conveys the general meaning quite accurately.[16] We should note at this point that a supervisor, as applied to a private purpose trust, is distinct from a protector, a concept discussed in Chapter 15 below. The function of a supervisor is to ensure that the trust purposes are properly implemented, from the standpoint of those who may benefit from the trust. The function of a protector, by contrast, is to ensure that the interests and wishes of the truster are properly taken into account. There is no reason why the two should not co-exist.

Further issues in relation to purpose trusts

14.11 We raised a number of further issues that arose in relation to private purpose trusts.[17] We summarise them here.

Formalities for setting up the trust

14.12 Under the Cayman Islands legislation, a written instrument is required, with a declaration that the relevant part of the Trusts Law (dealing with STAR trusts) is to apply. We thought that such a provision would be desirable in Scotland. Nevertheless, on further consideration, we have come to the conclusion that an express provision to that effect is probably not necessary. In the first place, in order to provide sufficient certainty the trust purposes of a private purpose trust will require careful drafting, and it is inconceivable that this would not be done in writing. In the second place, we think on balance that private purpose trusts are already competent in Scots law.[18] If that is so, the law appears to function on a completely satisfactory basis without any express provision requiring writing. It is notable, of course, that in practice all such trusts are created in writing. Thirdly, it is conceivable that an implied purpose trust might arise in some cases. We would not want to preclude that possibility. Detailed consideration of when that might occur, however, is beyond the scope of the present report; it is a matter that the Court of Session must deal with as and when cases arise.

The cy-près doctrine

14.13 We noted that under the STAR trust legislation express provision was made for the application of the *cy-près* doctrine to such trusts. We noted the parallel with the *cy-près* doctrine as applied to Scottish public trusts, and also to charitable trusts in other jurisdictions. We expressed the view that provision should be made for the application of the *cy-près* principle to private purpose trusts. We remain of the view that this is essential.

Identity of trustee

14.14 We noted that under the STAR trust legislation in the Cayman Islands the trustee of such a trust must be a trust corporation licensed to conduct business under relevant local legislation. We asked whether comparable provisions should be enacted in Scotland.

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[15] Several respondents observed that in some parts of Scotland the word "enforcer" is a term used to denote certain persons in the criminal underworld, in particular in relation to organised crime.

[16] Indeed, in Scotland it may be said that the critical feature of such an office is to ensure that the trust is properly performed; the need for specific *enforcement* powers is less because of the possibility of enforcement of a purpose trust by any person having an interest to do so.

[17] See paras 12.19-12.33 of DP No 148.

[18] See para 14.7 above.

14.15 On consultation mixed views were expressed. The Law Society and the Judges of the Court of Session were generally opposed to any such provision, although the latter indicated that in practice most trustees would be professional persons or trust companies. The Faculty of Advocates thought that at least one trustee should be drawn from one of a number of stipulated professions. We have concluded that it is not necessary to make any such provision. In practice, we think that outside the commercial field at least one trustee would normally be a professional person or trust company, but this should not be essential. We are particularly conscious of the fact that commercial trusts may frequently be private purpose trusts, and in those cases it will often be a commercial concern that declares itself trustee of its own property; that will apply, for example, to a securitisation trust or to a trust set up to hold collateral for completion and remedial work in a commercial property development. Against that background, any specific requirement as to who might be a trustee would be unduly restrictive.

14.16 We indicated that the provisions of section 105(1)(b) of the Cayman Islands Act governing STAR trusts would be useful. This provision requires trustees to keep at a specified office a documentary record of the terms of the trust, the identity of the trustee and enforcers, all settlements of property into the trust and the settlors' identities, the amount of property subject to the trust at the end of each accounting year, and all distributions or applications of the trust property. We thought that this would avoid the risk that a purpose trust might, because of uncertainty in its administration, disappear into some kind of black hole. On further consideration, however, we have decided not to adopt any such provision. The fundamental argument against doing so is the fact that, as mentioned just above, many commercial trusts are private purpose trusts, and it would be quite unrealistic to expect those setting up such a trust to designate an office and keep the various documents referred to. We think that in practice it is quite sufficient to rely on trustees, and commercial concerns which may set up purpose trusts, to keep adequate documentation to show what is happening. If they do not do so, the trust purposes cannot be enforced, and that should be quite sufficient sanction. We accordingly make no recommendation in this respect.

Requirements for valid trust purposes

14.17 We observed that it was essential that the trust purposes in any private purpose trust should be set out with sufficient clarity to be enforced. We noted that, with that in mind, several jurisdictions in which private purpose trusts are permitted have included in their legislation a declaration of the requirements for valid trust purposes. The Cayman Island STAR trust legislation provided an example, and a somewhat different version was found in Bermuda and certain other jurisdictions. In Guernsey, the validity of a non-charitable purpose trust depended only on the existence of an adequate enforcement mechanism, although the possible illegality of trust purposes was addressed by a separate provision that required that trusts should do nothing that was illegal, immoral or contrary to public policy. We thought that legislation should say something about the certainty of trust purposes. On consultation, however, a majority of those responding thought that no such provision was required, as Scots law already dealt adequately with this issue. On reflection, though, we consider that a brief reference should be made to the requirements that trust purposes should be lawful, not contrary to public policy and sufficiently certain.[19]

[19] We discuss this at para 14.35 below; see also recommendation 70(2).

Use of purpose trusts

14.18 We indicated that private purpose trusts might be very useful in practice, in a number of different situations.[20] This included the use of such trusts for commercial purposes, where they already appear to be in common use. They might also be useful in the estate planning field, where evidence from other jurisdictions suggested that the availability of flexible arrangements was regarded as important. We remain of the view that such trusts will prove extremely useful in practice, and will be attractive to a wide range of potential trusters, in both the commercial and the estate planning fields.

Miscellaneous issues

14.19 A number of further issues in relation to private purpose trusts were considered in our Discussion Paper.[21] First, we concluded that there was no theoretical objection to the existence of private purpose trusts on the ground that the duties of a trustee are not owed to any identifiable persons. We remain of that view, although we are now of opinion that in Scots law persons with an interest in the performance of such a trust would be able to compel performance of the trustees' duties, and thus it can be said that in a sense those duties are owed to such persons.[22]

14.20 Secondly, we referred to the fact that in the Cayman Islands a STAR-type trust may have named or identified beneficiaries as well as purposes. We consider that this should be possible in Scots law. Indeed, the fact that purpose trusts already appear to be permitted under Scots common law suggests that it has always been competent for a truster to include purposes of a private nature in a trust, and on that basis there can be no objection to including further provisions in the trust that benefit identified or identifiable beneficiaries.

14.21 Thirdly, we observed that under the STAR trust legislation the beneficiaries, even if of full age and full capacity, cannot collectively bring the trust to an end. (The power to bring a private trust to an end in such circumstances is based on the rule in *Miller's Trustees v Miller*.[23]) This did not seem to us to cause any problems, and we have made provision for the exclusion of the *Miller's Trustees* rule. We observe that exclusion of that rule is inevitable with a purpose trust, because the nature of such a trust makes it impossible to determine who the whole beneficiaries are. Moreover, one of the rule's pre-conditions is that there is no surviving trust purpose, but with a private purpose trust this can never be the case unless performance of the trust purposes becomes impracticable, in which case the *cy-près* jurisdiction will operate.

14.22 Finally, we noted a possible objection to private purpose trusts, that they might be used to defeat the interests of creditors. We considered that there was no substance in this objection. The law relating to gratuitous alienations was designed to prevent abuse by trusters to defeat their creditors. So far as the creditors of beneficiaries were concerned, a beneficiary of a STAR-type trust would be in essentially the same position as the beneficiary of a discretionary trust; creditors would be unable to attach any interest because the

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[20] See paras 12.34-12.35 of DP No 148.
[21] See paras 12.36-12.39 of DP No 148.
[22] See the discussion at para 14.9 above.
[23] (1890) 18 R 301; see paras 17.2-17.3 below for a summary.

beneficiary has no right to anything. We remain of opinion that the possible disadvantage to creditors is not a serious objection to private purpose trusts.

Consultation responses

14.23 We concluded that it was desirable to have legislation to give private purpose trusts a secure basis in Scots law.[24] There were no theoretical or conceptual objections, and such trusts were likely to be of great utility. We then asked a number of questions about the introduction of such trusts. In order to give our recommendations a proper context we set out the questions below and summarise the results of our consultation.

14.24 The first question was:

> "35(a) Is it desirable to have legislation expressly permitting the setting up of private purpose trusts (purpose trusts other than the existing category of public trusts) in Scotland?"

All respondents to the consultation agreed, though two of them – the Charities Law Research Unit of the University of Dundee, and the Faculty of Advocates – thought that it might be difficult to fit the new proposed private purpose trust within the current conceptual framework of Scots law, and that consequently there should be an entirely new addition to Scottish trusts, with its own legislative scheme.

14.25 We agree that legislation should be introduced to authorise the setting up of private purpose trusts in Scots law. Our further discussions, however, particularly with Dr Patrick Ford of the Charities Law Research Unit, suggest to us that existing features of Scots law, in particular the concept of interest to sue to enforce trust purposes, are easily adaptable to the institution of the private purpose trust. We think however that express provision is required to that effect. We are conscious that historically the House of Lords showed a tendency at times to assume that Scots law should be the same as English law: "The law as established in England is founded on principles of universal application, not on any peculiarities of English jurisprudence, and unless therefore there has been a settled course of decision in Scotland to the contrary we think it would be most inexpedient to sanction a different rule to the north of the Tweed to that which prevails to the south."[25] We think it important to ensure that no attempt is made to impose the principles of *Morice v Bishop of Durham*[26] on Scots law in such a way as to deny the possibility of a private purpose trust. We accordingly support legislative provision for the creation of private purpose trusts in Scotland. This makes clear that the purpose need not be charitable or public in nature. Also such a trust should not be capable of being constituted for the benefit of the trustee alone; we think that this is inherent in the fundamental nature of any trust. Enforcement of private purpose trusts may be effected by any person who has an interest in the trust purposes. We think that this reflects the existing state of Scots law, but we consider it desirable to have an express statement to that effect. Power to enforce the trust is also conferred on any supervisor who may be appointed in respect of a trust.

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[24] See paras 12.40-12.42 of DP No 148.
[25] *Bartonshill Coal Co v Reid* (1858) 20 D (HL) 13, 14, per Lord Chancellor Cranworth (who also asked "but if such be the law of England on what ground can it be argued not to be the law of Scotland?"). More recent examples of this tendency are found in *Sharp v Thomson* 1997 SC (HL) 66 and *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213.
[26] See para 14.2 and note 9 above.

14.26 The second set of questions was as follows:

> "35(b) If so, would legislation broadly along the lines of the Cayman Islands STAR legislation, or alternatively the Guernsey trust law, be appropriate? In particular, is it desirable that such legislation should permit trusts that allow for both purposes and identifiable beneficiaries, along the lines of the STAR legislation? Alternatively, is it sufficient merely to provide for private purpose trusts, leaving conventional trusts to deal with all cases where a trust is set up for identifiable beneficiaries?"

A majority of consultees favoured legislation along the lines of the Cayman Islands STAR trust model; many noted that it was "gold standard" at an international level, and would be attractive to potential trusters. The Law Society, however, inclined towards the Guernsey Trust Law. Overall, we have come to the view that it is unnecessary to follow any model slavishly, provided that the essential features of legislation such as the Cayman Islands STAR trust legislation, and the equivalent legislation in jurisdictions such as Guernsey, is achieved. We think that our draft Bill achieves this result.

14.27 As to the question of whether the legislation should permit trusts that allow for both purposes and identifiable beneficiaries, we consider it useful to have a legislative provision to the effect that it is immaterial, for the purposes of the existence of a private purpose trust, whether the trust property is also held by the trustee for the benefit of any person, whether or not ascertained and whether or not yet in existence. That permits combined purpose and beneficiary trusts.

14.28 The third question was as follows:

> "35(c) In particular, is it desirable that such legislation should include the institution of enforcer? If so, should enforcers be subject to fiduciary duties along the lines of the Cayman Islands STAR trust legislation?"

All respondents were in favour of such an institution, although, as we have mentioned, we have adopted the term "supervisor".[27] We think that this accurately conveys the nature of the office.

14.29 In relation to the second part of the question, we consider that the duties of the supervisor are fiduciary in nature; we think that this is inherent in the nature of such an office. Furthermore, the supervisor should be subject to a duty of care. As an additional point, it should not be competent to appoint a trustee to be a supervisor or a supervisor to be a trustee; this is because the duty of the supervisor is to ensure that the trustees fulfil their obligations properly, and it is important to avoid any conflict of interest in this respect. We also think that it is competent for there to be more than one supervisor.

14.30 We base our recommendations as to the rights of a supervisor and the remedies that a supervisor may exercise on the legislation in the Cayman Islands and Guernsey. The supervisor is to be empowered to bring an action or make an application to the court in respect of the trust. This provision is quite general in nature, and would apply to any form of enforcement proceedings. It is to be further provided that the supervisor has a right to be informed by trustees of the terms of the trust deed, to receive information concerning the

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[27] See para 14.10 and note 16 above.

trust deed and its administration from the trustees, and to inspect and take copies of trust documents. Clearly it is important that a supervisor who is to perform the supervisory duties properly must have full information about the trust. We also think it important to provide that a supervisor has the same rights as a trustee would have to protection and indemnity, and to make applications to the court for opinions, advice or direction, or relief from personal liability. In the event of a breach of trust, the supervisor is to have the same remedies against the trustees or any third party as a beneficiary of a beneficiary trust would have. This is to enable proper enforcement by a supervisor of the trust purposes in the event of a breach of trust.

14.31 As for removal or resignation we consider that, so far as practicable, a supervisor should be in broadly the same position as a trustee.[28] The same applies (where there is more than one supervisor) to the way in which meetings are conducted and decisions taken. We consider that these measures will deal with possible difficulties that may occur in practice.[29]

14.32 Finally, we deal with trustees' duty to provide information to supervisors.[30] As we have indicated, we think that it is important that a supervisor should have full information about the trust. Indeed, one reason for the appointment of a supervisor might be to prevent the need for beneficiaries to be given full information about the trust; consequently, in cases where a supervisor is appointed we allow for the reduction or removal of the information rights of beneficiaries.

14.33 The fourth question was this:[31]

> "35(d) If private purpose trusts were introduced, should the legislation contain each of the following requirements:
>
> (i) A requirement that the trust purposes should be set out in writing, and should contain a declaration that the special regime for private purpose trusts is to be applicable?
>
> (ii) A statement of the limitations on such trusts, for example that the trust purposes should be specific, reasonable and possible, and should not be unlawful or contrary to public policy? In relation to illegality and public policy, is it sufficient to rely on the existing Scottish principles, including the principle that a trust to be valid must produce an identifiable benefit? Alternatively, should specific provision be made in the legislation incorporating that principle?
>
> (iii) Specific provision for the *cy-près* jurisdiction?
>
> (iv) Restrictions on who may be a trustee? In this connection, if restrictions are appropriate, what categories of persons should be authorised to be

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[28] By s 47(3) of the draft Bill, a resignation purportedly given by a supervisor in order to facilitate a breach of trust is ineffective; this is substantially comparable to the situation applying to trustees: see Wilson and Duncan, para 22.15 and its note 54 (which notes the lack of Scots authority but argues by analogy with English and Welsh law).
[29] See s 46 of the draft Bill.
[30] See paras 11.66-11.70 above for a fuller discussion.
[31] Certain words which are not relevant for present purposes have been omitted.

trustees? We have in mind in particular solicitors and chartered accountants and trust companies controlled by them and trust companies controlled by authorised banks, but we would welcome comments on other categories that might be appropriate.

(v) The exclusion of the rule in *Miller's Trustees v Miller*?"

14.34 We take these in turn. In relation to requirement (i), respondents answered in the affirmative. Nevertheless, for reasons that we have already discussed,[32] we consider that it is not necessary to set out that the trust purposes should be in writing. We are likewise of opinion that it is not necessary that, for a valid private purpose trust to exist, there should be a declaration that the special regime for private purpose trusts is to be applicable. As already explained, our view is that such trusts probably already exist in Scots law, especially in commercial contexts.[33] When such commercial trusts are declared, there is rarely, if ever, a declaration that a private purpose trust is involved; the trust purposes are simply set out. We would not want to preclude such use of private purpose trusts in Scots law. Furthermore, as we have pointed out,[34] Scotland does not have the difficulty experienced in jurisdictions such as the Cayman Islands with an English background in trust law. Nevertheless, we think that it would be useful to provide a statutory definition. We would emphasise that the definition is intended to be wide-ranging, and provided that there is sufficient certainty in the purposes we would envisage that the Court of Session will enforce purpose trusts of every sort.

14.35 In relation to requirement (ii), a majority of respondents thought that statutory provision was unnecessary and that it would be possible to rely on the existing rules of Scots law. We agree generally with that view, but think that it may be of assistance to set out in summary form what the Scottish rules are; accordingly, we see value in a provision that any purpose of a private purpose trust must be lawful, not contrary to public policy, and not in terms so uncertain as to make it either unattainable or not reasonably attainable. We think that this should serve as a useful reminder to trusters and their advisers of the limitations on any trust. In saying this, we are mindful that Scottish private purpose trusts may be attractive to persons outside the jurisdiction, and the need to set out the basic principles in summary form may be especially important in such cases.

14.36 In relation to requirement (iii), all respondents agreed that specific provision for the *cy-près* jurisdiction should be made. We consider that section 104 of the Cayman Islands Trusts Law provides a useful model.[35] It sets out the situations when the trustees or a supervisor may apply to the court to reform the trust. We consider that such an application may be made if executing the trust in accordance with its terms becomes impossible or impracticable, or unlawful or contrary to public policy, or inappropriate because, by reason of changed circumstances, to do so would no longer accord with the general intent of the trust. It is intended that these provisions should be widely construed: the approach to *cy-près* applications in respect of public trusts should apply to such applications.[36] We also wish to provide for the powers that the court will have on a *cy-près* application in relation to a private

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[32] See para 14.12 above.
[33] See para 14.7 above.
[34] See para 14.2 and note 7 above.
[35] Section 104 (2009 revision) is set out at p 113 of DP No 148. The Trusts Law has since been amended but this provision remains unchanged.
[36] See, eg, *RS Macdonald's Trs, Petrs* [2008] CSOH 116.

purpose trust. These are intended to be wide. The court of course has a discretion, and whether the powers are applied in any particular case will depend on the particular circumstances. Finally, it is to be competent for the truster to make provision for the reform of trust purposes by the trustees should the existing trust purposes become impossible or difficult or undesirable, and our intention is that such provision should be given full effect.

14.37 In relation to requirement (iv), respondents varied in their views. It was generally thought that solicitors, chartered accountants and trust companies controlled by them, and trust companies controlled by authorised banks, should fall within any category of authorised person. The Judges of the Court of Session, however, commented that it was unnecessary to be prescriptive in this respect.

14.38 We are persuaded that it is not necessary to restrict the categories of persons who may be trustees. In general, a truster can appoint any natural or legal person to be a trustee, and it is left to the good sense of the individual truster to decide who would be an appropriate trustee. We are not aware that this causes any difficulty in practice. We think that exactly the same would be true of private purpose trusts.

14.39 Finally, in relation to requirement (v), respondents agreed that the rule in *Miller's Trustees* should be excluded in respect of private purpose trusts. As we have already noted,[37] we think that this is inevitable given the nature of a purpose trust, because the beneficiaries cannot be ascertained in such a way that it is possible to say that all those with an interest have concurred in the winding up of the trust.

Recommendations

14.40 For the foregoing reasons we make the following recommendations:

70. Legislation should provide for the existence of private purpose trusts. Such legislation should contain the following provisions:

(1) A private purpose trust should be held to exist where trust property is held by a trustee for the furtherance of a specific purpose which is not a charitable or other public purpose, and the trust is not constituted for the benefit of the trustee alone.

(2) The purpose must be lawful and must not be contrary to public policy or in terms so uncertain as to be unattainable or not reasonably attainable.

(Draft Bill, section 41)

(3) Any person with an interest in the purpose of a private purpose trust, including any supervisor, should be entitled to apply to the court for an order requiring steps to be taken for the fulfilment of that purpose.

(Draft Bill, section 42)

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[37] See para 14.21 above.

(4) If the execution of a private purpose trust becomes wholly or partly impossible or impracticable, or unlawful or contrary to public policy, or inappropriate because, by reason of changed circumstances, doing so would no longer accord with the general intent of the trust, the trustees or any supervisor should be entitled to apply to the court to reform the trust; and in that event the court should have power:

(a) to direct that part or all of the trust property should be held for such other purposes as it considers to be consistent with the spirit of the truster's directions or

(b) if the trust cannot be reformed consistently with the spirit of those directions, to direct that the property or part thereof should be disposed of as though the trust had failed, either as a whole or in relation to that part.

(5) The foregoing power should not apply if the trust can be reformed in accordance with its own terms.

(Draft Bill, section 43)

71. (1) The truster may make provision in a private purpose trust for the appointment of a supervisor to oversee the fulfilment by the trustees of the trust's specific purpose.

(2) The duties of supervisor should be fiduciary in nature, and the supervisor should be subject to a duty of care.

(3) It should not be competent to appoint a trustee to be supervisor or a supervisor to be trustee.

(4) Where provision is made for the appointment of a supervisor, the court should have power to make such an appointment where:

(a) it is impossible, difficult or inexpedient to do so without the courts' assistance, or

(b) a supervisor lacks legal capacity, or is unwilling or unfitted, to carry out the duties of the office;

and the court may exercise such power on the application of the trustees, a supervisor, or any other person with an interest in the trust.

(Draft Bill, section 44)

(5) A supervisor should have power to bring court proceedings in respect of the trust, to be informed by the trustees of the terms of the trust deed, to receive information concerning the trust and its administration from the trustees, and to inspect and take copies of trust documents.

(6) A supervisor should have, in the performance of his or her duties, the same rights as a trustee would have to protection and indemnity and to make applications to the court for an opinion, advice, or relief from personal liability.

(Draft Bill, section 45)

(7) A supervisor have power to resign office by notice in writing delivered to the trustees.

(Draft Bill, section 47)

Trusts to hold the controlling interest in a company

14.41 In our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law, we discussed the use of a trust to hold a controlling interest in a private company.[38] Although such a trust could be created as a beneficiary trust, it could alternatively take the form of a private purpose trust and it is therefore convenient to discuss the issue at this point. We indicated that, from the point of view of estate planning, a trust for the purpose of holding a controlling interest in a private company might be the most sensible way of holding such a shareholding. Nevertheless, the use of a trust for this purpose presented a number of fundamental problems, arising principally out of the obligation imposed on trustees to act with ordinary prudence in their management of trust property, and the trust investments in particular. That duty has two important practical consequences in relation to private companies.[39] First, it obliges the trustees to monitor the conduct of the directors of the company, and to take action if that is necessary to protect the company's business, for example if the directors proposed that the company should enter a highly speculative venture. Secondly, the duty obliges the trustees to deal with the shareholding in such a way as to maximise the beneficiaries' financial advantage, and that might require the trustees to sell their shareholding in a private company and to invest the proceeds in more diversified investments, or to accept a takeover bid for the company. In such cases there was a possible conflict between the interests of the beneficiaries, which are normally paramount, and the interests of the company, and the result might be that the company's interests were seriously prejudiced by a decision that the trustees felt compelled to make in the beneficiaries' interests.

14.42 We further identified a number of particular issues that may arise in relation to such trusts.[40] Thus the owner of an established business might view it in terms of its long-term development, rather than purely as an investment. He or she might be concerned to secure employment for his or her descendants, or to protect the interests of employees or the community in which the business is conducted. Furthermore, the owner might wish to leave important decisions regarding the running of the business to the directors without interference from the trustees. In the case of entrepreneurial businesses, having a higher level of risk than the classic balanced investment portfolio, it can be difficult to give precise content to the trustees' duties, and it is not clear what ordinary prudence would involve such a case. The trustees' obligation to monitor the directors and intervene when necessary

[38] DP No 148, at Ch 13.
[39] For a discussion of comparable issues under English and Welsh law, see Lewin, paras 34.49-34.50.
[40] Para 13.3 of DP No 148.

could create conflict if the truster wished to remain in charge of the company as a director and to nominate further directors. Furthermore, especially with companies carrying on business in highly specialised areas, such as newly developed technology, the trustees will usually lack the knowledge and skill that is required to assess business decisions made by the directors; thus their interference in the company's affairs may be ill-judged or ill-informed.

14.43 We indicated that it is possible for a truster to set up a trust that takes these problems into account, and in particular to limit or modify the trustees' duty of care in relation to the trust's shareholding in a private company.[41] That would be significantly facilitated if private purpose trusts were recognised in the manner that we now recommend. We indicated that it is also possible to structure the company itself to limit the possibility of intervention by the trustees, for example by splitting its shareholding into voting and non-voting shares. Making use of appropriate provisions in the trust deed and the constitution of the company could deal in a satisfactory manner with the majority of cases where a trust was the preferred means of holding shares in a private company.

14.44 Such solutions can have difficulties in themselves,[42] and they require complex drafting. For that reason we raised the possibility of setting up a specific statutory form of trust that was designed to deal with the problems of a shareholding in a private company. The paradigm example of a trust designed to hold the controlling interest in a company is found in the Virgin Islands Special Trusts Act 2003 ("VISTA").[43] It enables trusts, known as VISTA trusts, to be created in terms that are designed to avoid the problems that arise when a conventional trust owns a controlling shareholding in a company. The Act is discussed in detail in Chapter 13 of our Discussion Paper.

14.45 We asked whether the trustees' duty of prudence in relation to investments gave rise to practical difficulties in respect of controlling shareholdings in private companies, and if so whether it would be desirable for Scots law to adopt a form of trust based, with modifications, on the VISTA legislation.[44] On consultation, some support was expressed for legislation along the lines of the VISTA regime. The Law Society of Scotland, in particular, and the Faculty of Advocates both thought that such legislation would be useful. Other respondents thought that it would be possible to achieve comparable results by means of an appropriately drafted trust deed. It was recognised, however, that care would be required in drafting any such deed.

14.46 On further consideration, we have come to the conclusion that enactment of provisions analogous to the VISTA regime is not necessary in Scotland. We have reached this conclusion for two reasons. First, we are of opinion that the creation of a trust to hold a controlling interest in a company can be catered for adequately by using a private purpose trust as envisaged in Part 6 of the draft Bill appended to this Report. It should be noted,

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[41] Para 13.4 of DP No 148.
[42] Para 13.5 of DP No 148.
[43] Paras 13.6-13.16 of DP No 148; the 2003 Act is set out in its Appendix B, though it has since been amended by the Virgin Islands Special Trusts (Amendment) Act 2013. For an outline of VISTA trusts and their uses, and the changes made by the 2013 Act, see C McKenzie, "A new and improved VISTA: May 2013 amendments to the Virgin Islands Special Trusts Act" (2013) 19 (10) Trusts and Trustees, 996; see also a briefing note by the same author at http://www.onealwebster.com/files/uploads/2014/03/REVISED-Memorandum-Trust-law-and-trustee-services-an-overview.pdf.
[44] Question 36. We also raised the possibility that any difficulty could be dealt with by means of a purpose trust in appropriate terms: this is raised in question 37, by reference to the Bahamian Purpose Trusts Act 2004. We have not thought it necessary to take the latter suggestion further.

though, that such a trust presents a number of potential drafting issues that must be addressed if it is to be successful in practice.[45] Secondly, we consider that a detailed regime of such a specialised nature as the VISTA legislation is close to providing a style,[46] and we have decided that it is not appropriate for trust legislation to provide styles; if there is any demand this is a matter that is better left to the books of trust styles that are readily available.[47]

14.47 We consider that the private purpose trust regime will be of importance for three main reasons. First, in the draft Bill provision is made for the enforcement of such trusts by any person with an interest in the purpose of the trust, including by a supervisor.[48] This may be of great importance in any trust to hold a controlling interest in a company.[49] Secondly, the private purpose trusts regime permits applications to the court to reform a trust, along the lines of a *cy-près* application in a public trust.[50] Thirdly, the rule that beneficiaries of full age and capacity may call upon the trustees to make over the trust property to them does not apply to private purpose trusts.[51]

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[45] The drafting issues are discussed in detail in Ch 13 of DP No 148.
[46] Section 4 of that legislation effectively restricts VISTA trusts to shares in companies incorporated in the British Virgin Islands, but there is no need for any corresponding restriction so far as Scots law is concerned. A Scottish private purpose trust designed to hold a controlling interest in a company may be used for any company, wherever incorporated, subject only to possible restrictions under the law of the state of incorporation.
[47] See note 54 to para 2.26(4) above.
[48] See s 42.
[49] Compare s 10 of the Virgin Islands Special Trusts Act 2003.
[50] See s 43 of the draft Bill, and compare s 11 of the Virgin Islands Special Trusts Act 2003 which deals with the possibility that the retention of the relevant shares is no longer compatible with the wishes of the settlor.
[51] See para 14.21 above, and ss 8(4)(a) and 53(4)(b) of the draft Bill. Compare s 12 of the Virgin Islands Special Trusts Act 2003.

Chapter 15 Protectors

Introduction

15.1 In our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law,[1] we noted that we wanted to ensure that the Scottish law of trusts should keep up to date with developments in other parts of the world that have proved useful to the financial and investment sectors.[2] We thought that this was important to ensure that Scotland would not be left behind other jurisdictions in these highly competitive areas.

15.2 One institution that had proved successful in attracting and retaining investment in financial business in other jurisdictions was the protector. We indicated that we would like views on whether it was appropriate for Scotland to make statutory provision for protectors, or possibly advisory trustees, another institution that serves a somewhat similar function. We noted that protectors have been found regularly in offshore trusts since the 1980s. Their function was "to ensure that the trustee of [an offshore] trust, so many miles away from the settler and vested with the settler's property, was actually and efficiently discharging the various trustee duties".[3] This allowed the settler, or truster, to exercise a degree of control, or at least influence, over the trustees, and might give him or her some assurance as to whether the trust was being properly administered. We noted that the protector was frequently given power to dismiss or appoint trustees, and that protectors had recently started to appear in trust deeds in more mainstream jurisdictions. The matter had been considered in a helpful Issues Paper published by the New Zealand Law Commission, to which we were indebted for information about the institution.[4]

15.3 We indicated that the powers exercised by protectors can vary significantly. Ultimately the definition of the role was a matter for individual trusters, but the legislation found in jurisdictions that made express provision for protectors provided useful checklists.[5] We noted that in legislation dealing with protectors it is normal to find a provision to the effect that the protector must not be regarded as a trustee. That is generally seen as essential, to prevent the protector from being regarded as a co-trustee or the sole real trustee; if that were to happen it could have very serious tax or estate planning consequences. Nevertheless, protectors' powers can still be regarded as fiduciary, and different jurisdictions have taken different approaches to the question of whether the duties of a protector are fiduciary in nature.[6]

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[1] DP No 148; protectors are discussed in Ch 11.

[2] Although more commonly found in private or commercial trusts, protectors are also sometimes used in charitable trusts: see F Quint, "Quis custodiet? The use of a protector in a charity context" (2013) 6 PCB 334.

[3] D Waters, "The Protector: New wine in old bottles?" in A Oakley (ed), *Trends in Contemporary Trust Law* (1997), p 63.

[4] Review of Trust Law in New Zealand: Introductory Issues Paper (Issues Paper 19, Nov 2010: http://www.lawcom.govt.nz/project/review-law-trusts?quicktabs_23=issues_paper), paras 2.57-2.60.

[5] At para 11.4 of DP No 148 we quoted British Virgin Islands legislation which includes power to remove and appoint trustees, exclude any beneficiary from the trust, include any person as a substitute or additional beneficiary, and withhold consent from actions of the trustees, either conditionally or unconditionally.

[6] At para 11.5 of DP No 148 we referred to the legislation in the Cook Islands and Guernsey, where the duties are not fiduciary; the British Virgin Islands, where a degree of protection is conferred on protectors if they

Current position

15.4 We consider that it is almost certainly competent at present for a Scottish truster to appoint a protector by express provision in a trust deed. The institution of protector is clearly wholly compatible with the underlying policy of the law of trusts in Scotland.[7] Nevertheless, this is not commonly done, we think for two reasons. First, there is no legislation dealing with protectors, which means that a truster must set out expressly the whole of the rights, duties, powers and liabilities of a protector in the trust deed. That is not necessarily an easy task if the truster's legal advisers are starting from scratch. Moreover, it is probably fair to say that the legislation in other jurisdictions that authorises protectors is not well known in Scotland; thus there is an absence of precedents. Secondly, some aspects of the position of protector, notably the fiduciary or non-fiduciary nature of their powers and duties, calls for the exercise of careful judgement, and it may be thought that devising a suitable scheme is simply too difficult when a trust deed (which may contain other complex matters of a more substantive nature) is being drafted.

Reform

15.5 For both of these reasons, we thought that there might be advantage in having express legislation in Scotland that permits the appointment of protectors. It is very difficult at this stage to say whether the institution would be widely used; we can only comment that it does appear to be popular in other jurisdictions. It is particularly adapted for use in offshore trusts. Nevertheless, if Scottish trust law is brought up to date, it is not inconceivable that offshore trusts might come into existence in Scotland. Moreover, the institution may be of more general assistance, in giving a truster a certain level of control over a trust, but in such a way that the trustees' fundamental responsibilities are not infringed.

Protectors to be put on a statutory footing

15.6 When we asked whether there should be statutory provision for either protectors or advisory trustees, a majority of respondents supported the idea in respect of protectors.[8] By contrast, there was little enthusiasm for the introduction of advisory trustees. Our Advisory Group and several respondents pointed out that the introduction of protectors would serve to ensure that Scotland could be marketed as an international trust jurisdiction, and that this was the primary motivating factor in providing for the institution.

15.7 We agree with these responses, and we consider that legislation should make express provision for the institution of protector to oversee the exercise by the trustees of their functions. We think that this is the fundamental purpose of such an appointment. In

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exercise their powers *bona fide*; Belize and Nevis, where the powers and duties of protectors are expressly made fiduciary; and St Kitts, where a protector must act honestly and in good faith with a fiduciary duty to the beneficiaries of the trust or to the purpose for which the trust is created, and is also bound by the duties of care and skill; the latter duties are mandatory.

[7] George Heriot's Trust, by which the school of that name in Edinburgh was established, as originally constituted in 1624 had a group of "overseers", which included the Archbishop of St Andrews, the Lord Chancellor, the King's Treasurer, the Lord President of the Court of Session and the Lord Advocate, together with the "Ministeris and ordinar preachours of the Burgh of Edinburgh". These were described as "oversiearis inspectouris and visitouris". They were charged with ensuring that Heriot's trustees, the Town Council of Edinburgh, fulfilled his charitable purposes.

[8] See question 33(a) in para 11.7 of DP No 148.

our view the truster may require the trustees to obtain the consent of the protector before exercising functions. We do not consider that provision should be made in respect of advisory trustees.

Powers of a protector

15.8 The truster may confer powers on the protector in the trust deed. We asked whether legislation should list the powers that may be conferred on protectors, adding that the list found in the legislation of the British Virgin Islands might be appropriate.[9] The responses indicated in general that the legislation should be facilitative rather than excessively prescriptive. Consequently, most respondents were in favour of adopting the general approach found in the British Virgin Islands, which allows protectors to have such powers as might be specified in the trust deed. The Faculty of Advocates and the Judges of the Court of Session were opposed to a comprehensive list of powers in the statute, preferring instead to provide that a protector may be competently appointed to a trust governed by Scots law, with such powers as might be specified in the trust deed.

15.9 We agree that the legislation should be facilitative. It seems to us, however, that, because the institution is for practical purposes a novelty in Scots law, it would be helpful to trusters and their legal advisers to have a list of powers that may be included. It is entirely up to the individual truster whether any particular power should be included in respect of any particular protector. The list which we have included in the draft Bill is designed to be wide, simply because it is in the nature of a list of powers that a truster might like to consider. We should also draw attention to a provision which permits the truster to require the trustees to obtain the consent of the protector before exercising their functions in the trust deed.[10] Particular functions can be specified for this purpose; the requirement does not need to be imposed on a universal basis. Moreover, the particular circumstances in which the exercise of a function will require the consent of the protector may be specified in the trust deed. The objective of this provision is to give trusters as much freedom as possible in conferring powers and duties on protectors.

Are a protector's duties fiduciary in nature?

15.10 We then asked whether a protector's duties should be made expressly fiduciary in nature, and whether a protector should be subject to an express duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[11] These are important issues in determining the scope of a protector's responsibilities and obligations. A narrow majority of respondents was in favour of making a protector's duties expressly fiduciary. It was also appropriate that such a person should be subject to an express duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The Judges of the Court of Session doubted the value of express provision to that effect.

15.11 We have come to the conclusion that it would be desirable to make the duties of a protector fiduciary in nature. It can be said of the responsibilities typically conferred on a protector that they are for the benefit of others. That is the fundamental criterion for fiduciary

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[9] See question 33(b)(i) in para 11.7 of DP No 148.
[10] See s 48(1)(b) of the draft Bill.
[11] See question 33(b)(ii) in para 11.7 of DP No 148.

responsibilities. We therefore think that express provision should be made. We also consider that a duty of care should be mentioned, if only to avoid argument that the inclusion of an express fiduciary duty excludes by implication the existence of a duty of care. In relation to the comments of the Judges, however, we do not think that it is necessary to say anything in detail; Scots law in this area is well developed, and it can be expected that the duties of care of protectors will, when necessary, be developed by analogy with the corresponding duty of trustees.

Role of the court

15.12 We asked whether it was desirable that specific provision should be made for the control of protectors by the court.[12] For example, should a protector be entitled to apply to the court for directions? Should the truster, or any other person, have power to apply to the court to remove a protector, or to compel him or her to take action in furtherance of his or her responsibilities? All respondents agreed that this was desirable and we ourselves agree too.

Ancillary matters

15.13 We raised three other ancillary matters.[13] The first of these related to the removal or replacement of protectors other than by application to the court. We thought that this could normally be left to the provisions of the individual trust deed, but that the default rule should be that a truster has power to appoint or replace a protector. We remain of that opinion.

15.14 The second issue was whether a protector should be entitled to remuneration. We indicated that, if the office were made fiduciary, the default position would be that he or she was not entitled to remuneration, in accordance with the usual rule. Of course that could be superseded by contrary provision in the trust deed. We have decided that the office should be fiduciary, and consequently that will be the default rule.

15.15 The third issue that we raised was whether the trustees' liability should be limited in the event that a protector intervenes in the administration of the trust. We indicated that when statutory provision is made for protectors the almost invariable practice is to provide that the trustee should be not be liable for breach of trust for any acts carried out following protectors' advice, consent or directions. We referred to section 15 of the Trusts (Guernsey) Law 2007 which provides that a trustee who acts in compliance with the valid exercise of any power conferred on a protector "does not by reason only of such compliance, act in breach of trust".

15.16 We thought that, as a general principle, the default rule should be that either the trustee or the protector should be liable to beneficiaries for any decision that does not meet the appropriate standard of care. We were inclined to favour a fairly robust rule to the effect that, if trustees act in accordance with a direction by the protector, they are immune from any claim for breach of trust, but that the protector should be liable to beneficiaries for the consequences of his or her act. This assumed that the office of protector was fiduciary, which we consider should be the position.[14] We thought, however, that that should be a

[12] See question 33(b)(iii) in para 11.7 of DP No 148.
[13] At paras 11.8-11.9 of DP No 148.
[14] See paras 15.10-15.11 above.

default rule, and if a truster wished to appoint a protector who was not subject to personal liability we could not see any fundamental objection.

15.17 When we asked for views on this question, all respondents agreed that the proposal was desirable. We therefore consider that, where a trustee complies timeously and correctly with a protector's direction (and assuming that it is a direction which the protector has power to give), the trustee is to incur no personal liability for any resultant harm. By contrast, such liability will fall on the protector. This is to be subject, though, to any contrary provision in the trust deed. Our objective is that, in every case of breach of fiduciary duty or breach of trust, including failure to exercise proper skill and care, either the protector or the trustees should be liable. We think that this maintains protection for the beneficiaries whilst striking an appropriate balance in respect of the allocation of liability as between the trustees and a protector.

15.18 In the light of the above, we make the following recommendations:

72. **(1) Express provision should be made in the trust legislation for the appointment of a protector to oversee the exercise by trustees of their functions.**

(2) A truster who appoints a protector should be empowered to require the trustees to obtain the consent of the protector before exercising such of their functions as may be specified, either generally or in particular circumstances.

(3) The truster may, by the trust deed, confer powers on the protector, which may include the powers that are now specified in section 48(3) of the draft Bill appended to this Report.

(4) Subject to any provision in the trust deed to the contrary, a protector shall have power to inspect trust documents.

(5) A protector should be subject to fiduciary duties and a duty of care in the exercise of his or her office.

(6) It should not be competent for a trustee to be protector or vice versa, but a truster should be entitled to appoint himself or herself as protector.

(7) Provision should be made for the appointment of a new protector, the removal from office of a protector and the resignation from office of a protector.

(8) Where a trustee complies timeously and correctly with a protector's direction, given in accordance with the protector's powers, in so far as such compliance is a breach of duty owed to a beneficiary or third party, the protector and not the trustee should incur personal liability for any resultant harm, subject to any contrary provision in the trust deed.

(Draft Bill, Part 7)

Chapter 16 Powers of the court: general

16.1 We have considered the powers and jurisdiction of the court, at a general level, on two occasions. First, in our Discussion Paper on Trustees and Trust Administration, we made proposals relating to a number of topics: interference with trustees' discretion,[1] court directions,[2] granting additional management powers,[3] and allocation of trust applications among the courts.[4] Then, in our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law, we reconsidered a number of the topics discussed in the earlier Paper, in particular the court's power to give directions to trustees,[5] and to confer powers in relation to a trust;[6] and also the jurisdiction of the Court of Session and sheriff court.[7]

16.2 We noted that trusteeship, even in private trusts, is to some extent a public office:[8] there is a public interest in ensuring the effective, prudent and honest management of trusts. In that context, the court had a crucial role and therefore required to have a number of powers, both facilitative and regulatory. We remain strongly of that view; if there is to be public confidence in the Scottish trust it is essential that an effective system of regulation should exist. Such a system of regulation need not lay down a large number of express requirements; normally what is required for the effective, prudent and honest management of a trust is obvious as a matter of common sense. Nevertheless, it is important that the court should be able to ensure that trusts are properly administered, and that any dishonesty, impropriety or negligence on the part of trustees should be effectively dealt with. It is also essential that there should be relatively simple and informal methods of resolving any difficulties or disputes that may arise in the administration of trusts. We have approached the powers of the court with these important considerations in mind.

Interfering with trustees' discretion

16.3 In Scotland trustees are usually given a discretion as to whether or not to exercise any of the powers granted in the trust deed and as to the manner in which those powers are exercised.[9] The Scottish courts have been reluctant to review the exercise of those discretionary powers; in this respect that is a distinct contrast with the Chancery Division in England and Wales, which is much more willing to give directions to trustees as to how to exercise powers. We reviewed the case law in this area,[10] and noted that the court was able to interfere in cases where it could be shown that the trustees considered the wrong question, or did not properly apply their minds to the correct question, or perversely shut their eyes to the facts, or did not act honestly or in good faith.[11] We also considered that a decision might be set aside if it was one that no sensible body of trustees could have

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[1] DP No 126, paras 5.2-5.8.
[2] Ibid, paras 5.9-5.29.
[3] Ibid, paras 5.30-5.38.
[4] Ibid, paras 5.39-5.59.
[5] DP No 148, paras 7.2-7.5.
[6] Ibid, paras 7.6-7.10.
[7] Ibid, paras 7.11-7.19.
[8] DP No 126, para 5.1.
[9] Ibid, para 5.2.
[10] Ibid, paras 5.3-5.8.
[11] *Dundee General Hospitals v Bell's Trs,* 1952 SC (HL) 78, 92 per Lord Reid.

reached. We expressed the view that the existing grounds of review were generally satisfactory, and so we proposed no change to the law on the power of the courts to review decisions made by trustees in the exercise of their discretionary functions.

16.4 We subsequently returned to this issue following the developments in English law considered in the conjoined cases of *Pitt v Holt* and *Futter v Futter*,[12] first in our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law,[13] and then in a Consultation Paper on Defects in the Exercise of Fiduciary Powers.[14] We concluded that a specific remedy should be made available in Scots law to deal with defects in the exercise of trustees' powers, as discussed in Chapter 19 of this Report.

Court directions

16.5 We moved on to consider the extent to which the courts were able to assist trustees by providing guidance, directions and advice where trustees encounter problems relating to the administration of the trust or the rights of the beneficiaries and other parties involved.[15] We gave particular consideration to the three main ways in which trustees may obtain guidance from the court: a petition for directions under section 6(vi) of the Court of Session Act 1988, the presentation of a special case, and an action of multiplepoinding. We summarised the existing law on these procedures. We noted that, in relation to petitions for directions, the court will not consider applications that relate to complex issues of fact or other questions that require a full hearing and comprehensive submissions by all parties. It had been suggested that the petition for directions had been designed for the summary disposal of urgent requests by trustees, and should not be used to decide cases that could be determined using other existing procedures. In relation to the special case, agreement among all the interested parties as to the facts was essential. Both a petition for directions and a special case proceed straight to the Inner House. Multiplepoinding procedure is available where the issue is one of competing claims to the same fund or property.

16.6 We then considered options for reform of the law.[16] We expressed the view that the current procedures that might be used to provide trustees with advice and guidance seemed broadly satisfactory. The petition for directions was a useful and relatively informal mechanism to give trustees advice on pressing administrative difficulties. It appeared to operate relatively quickly and efficiently. More complex and serious problems could be resolved by a special case. The stricter rules of representation that apply to the latter procedure provided trustees and beneficiaries with additional protection, especially as difficult legal questions are often involved. We considered whether a procedure should be introduced akin to *Benjamin* orders in English and Welsh law, whereby trustees can be authorised by the court to distribute the trust property on a particular footing, for example that a particular person predeceased the testator without issue.[17] Such judicial authority protects trustees against being personally liable if it is shown later that the true situation is not as was presumed by the court, but it does not affect the beneficiaries' underlying rights.

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[12] [2011] EWCA Civ 197; [2013] UKSC 26.
[13] See Ch 14 of DP No 148.
[14] 2011 (unnumbered).
[15] DP No 126, paras 5.9-5.29.
[16] DP No 126, paras 5.24-5.29.
[17] The procedure derives from *Re Benjamin* [1902] 1 Ch 723, where the court was reluctant to declare that a potential beneficiary had predeceased the testator but authorised trustees to proceed on that basis. See paras 73-75 of Appendix A to DP No 126 for a brief discussion of such orders. There is further detail in Lewin at paras 27.15-27.17.

The remedy of declarator in Scots law affects the parties' rights and binds the beneficiaries, whereas a *Benjamin* order merely provides immunity to the trustees, with the result that courts are more willing to grant them.

16.7 We also thought that there might be a need for a procedure to deal with contingencies, events that might or might not happen in the future. The trust property might otherwise have to remain undistributed to the current beneficiaries because of a remote chance that some other person would become entitled to it, if the trustees were not prepared to take the risk of being personally liable should the contingency arise and the recipients of the trust funds be unable to pay the true beneficiaries. Special cases had been used to some extent in this area.[18] We also referred to the more recent case of *Neilson's Executors, Petitioners*,[19] where the executors of a man who had been a Lloyd's Name were reluctant to make over his estate to legatees because of the possibility that reinsurance arranged in respect of his Lloyd's liabilities might prove inadequate. The court, following English case law, authorised distribution without retention or other provision for the contingency. The risk that the reinsurance might prove inadequate was very remote, and the injustice of holding up distribution for many years was greater than the injustice of depriving the creditors of recourse against the executors personally. The court also granted the executors relief from any personal liability arising out of distribution of the estate in accordance with its directions. A Court of Session Practice Note was subsequently issued to regulate procedure concerning petitions for directions relating to the distribution of the estates of deceased underwriting members of Lloyd's.[20]

16.8 We further noted that in our Discussion Paper on Breach of Trust we had proposed that a trustee should not be personally liable for wrongful distribution of the trust property provided that they had acted in good faith and had taken all reasonable steps to find out who were the correct beneficiaries.[21] We indicated that this proposal would not deal with a case where the trustees were aware of the uncertainty as to past events or a future contingency. We thought that it might be useful to introduce a procedure giving the court an express power to authorise distribution of the trust property and to relieve the trustees of personal liability. We thought that the power should be framed in general terms and should be available where it was very likely, but not certain, that a particular event had or had not happened or where there was a remote chance that the present beneficiaries' entitlements might be defeated by some future event. We accordingly proposed that the court should have power to grant orders of that nature, and that trustees who acted in accordance with the order should not be personally liable;[22] nevertheless, the freeing of the trustees from personal liability should not prejudice any right of the true beneficiaries to recover the trust property from those to whom it had been distributed. We further asked whether any other changes should be made to the law or procedure relating to petitions for directions or special cases.

16.9 The proposal that a new procedure of this nature should be introduced met with support from all respondents, though the Faculty of Advocates had some reservations;[23] in

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[18] Eg *G v G's Trs* 1936 SC 837, and *Munro's Trs v Monson* 1965 SLT 314; also *McPherson's Trs v Hill* (1902) 4 F 921, 924 per Lord Justice-Clerk Macdonald.
[19] 2002 SLT 1100.
[20] No 2 of 2002.
[21] DP No 123, proposal 1 in para 2.16.
[22] DP No 126, proposal 22 in para 5.28.
[23] We summarise the responses at paras 7.2-7.5 of DP No 148.

particular, the Trustees and Trust Administration Group of the Law Society indicated that they were strongly in support of the proposals. In relation to the question about changes to the law or procedure relating to petitions for directions or special cases, the Faculty indicated that the ability to present a petition for directions should be extended to executors who are not trustees acting under a trust deed; they indicated that the absence of such a power had caused repeated difficulty in cases arising out of the problems of Lloyd's.[24] In their response to the consultation on Chapter 7 of the Discussion Paper on Supplementary and Miscellaneous Issues, they noted that in *Chisholm, Petitioner*[25] the First Division had expressed the view that "trustees" in section 6(vi) of the Court of Session Act 1988 included executors nominate, but the court reserved its opinion of whether an executor-dative could competently present a petition for directions. The Faculty thought that that procedure should be available for all executors.

16.10 In the light of the responses to our consultation, we make the following recommendation:[26]

> **73. (1) The Court of Session should be empowered, on application by the trustees or others with an interest in the trust property, to grant an order authorising the trustees to make payments from the estate on the basis that a specified event has or has not happened or will or will not happen. The court may make such an order subject to such conditions as it thinks fit.**
>
> **(2) Trustees who act in accordance with the authorising order will not be personally liable should the basis on which the court made the order turn out not to be correct, unless they concealed facts or acted fraudulently in the application. The freeing of the trustees from personal liability will not prejudice any right of the true beneficiaries to recover the trust property from those to whom it has been distributed.**
>
> (Draft Bill, section 67)

16.11 We have also decided that the Faculty of Advocates' suggestion just mentioned should be given effect.[27] Furthermore, we consider that it should be competent for either a supervisor appointed in respect of a purpose trust or a protector to petition for directions. Equally, trustees of a charitable trust should be able to take advantage of the procedure. In these circumstances we are of opinion that section 6(vi) of the Court of Session Act 1988 should be repealed and replaced with a new section that permits not only trustees but also executors of any sort or a supervisor or protector to obtain directions from the court on any of the matters covered at present by section 6(vi). We think that a new section is desirable as an aid to clarity in what has become a relatively complex provision. Moreover, the enactment of the power to apply for a petition for directions in a free-standing section will emphasise the importance and practical utility of this remedy. We accordingly recommend:

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[24] See para 16.7 above.
[25] 2006 SLT 394.
[26] The recommendation is in line with paras (1) and (2) of proposal 22 in DP No 126.
[27] See para 16.9 above.

74. Section 6(vi) of the Court of Session Act 1988 should be replaced by a new section that (i) re-enacts the current provision in relation to trustees but also (ii) permits all executors, whether nominate or dative, to obtain the direction of the court on questions relating to the investment, distribution, management or administration of the estate, or the exercise of any power vested in, or the performance of any duty imposed on, the executor notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction; and (iii) permits protectors and supervisors to have the same power as trustees to obtain directions from the court.

(Draft Bill, section 64)

16.12 Subject to the foregoing amendments, we are of opinion that the power to apply to the Court of Session for directions is important for trustees. There are indications that the somewhat restrictive attitude that was taken towards the corresponding power as contained in earlier legislation would not be repeated today.[28] Thus the power may be used on a very general basis by trustees who are confronted with legal difficulties of any sort in the administration of a trust. For that reason we would strongly encourage the extensive use of this power by any trustees who wish to obtain authoritative guidance. Further, we envisage that the Rules of Court dealing with court procedure will be amended in order to provide for effective case management procedures and informality in respect of pleadings and hearings. In this way we hope that the expenses of such applications will be kept to a minimum.

Jurisdiction of the court

16.13 We considered the allocation of trust petitions among the courts in our Discussion Paper on Trustees and Trust Administration,[29] and again in our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law.[30] In the latter, we discussed the Court's power to give directions to trustees, as we have already mentioned.[31] We noted in particular the detailed response given by the Trustees and Trust Administration Group of the Law Society, who made a number of interesting points in response to our proposal on this matter.[32] They indicated that the major complaint in relation to court proceedings is the time taken to obtain a decision. This applied in particular to pension cases, where there is a commercial requirement for expeditious disposal. Further concerns were expressed that there was a lack of sufficient understanding of trust law in sheriff courts. It was suggested that a possible solution would be to create a procedure similar to that in the Commercial Court with similar case management procedures. We noted that such procedures are used in practice in trust cases in the Outer House, albeit on an informal basis. We expressed the view that it would be useful to have those procedures formalised to some extent in the Rules of Court, and we made a proposal to that effect.[33] That proposal met with general support. We accordingly make the following recommendation:

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[28] DP No 126, para 5.12, referring to *Taylor, Petr* 2000 SLT 1223.
[29] See paras 5.39-5.59 of DP No 126.
[30] See Ch 7 of DP No 148.
[31] See paras 16.5-16.12 above.
[32] Proposal 22 of DP No 126, in terms similar to recommendation 73 above.
[33] Proposal 16 in para 7.5 of DP No 148.

75. Provision should be made in the Rules of Court for case management procedures in trust cases in the Outer House. These should be modelled on the existing procedures used in the Commercial Court.

16.14 In the Discussion Paper on Supplementary and Miscellaneous Issues we reconsidered the allocation of trust business among the courts.[34] We did so in view of the Scottish Civil Courts Review, published in September 2009, which recommended that the Court of Session should retain exclusive jurisdiction in relation to a number of more complex matters. While nothing was said expressly about trusts, we thought it clear that trusts involved issues of some complexity, requiring a specialised knowledge of the law; in that respect they were analogous to corporate and exchequer cases, where it was recommended that the Court of Session should retain exclusive jurisdiction. In addition, we observed that, while the Bill giving rise to the Charities and Trustee Investment (Scotland) Act 2005 was being considered by the Scottish Parliament, a policy of extending jurisdiction in respect of charitable trusts to the sheriff courts was departed from.[35] On reconsideration, we concluded that there was considerable force in the argument that simplification of court remedies is important and that there should, generally speaking, be a single court to which all applications relating to trusts are made.

16.15 We further noted that certain comparative jurisdictions confer a major discretion on the court; this applied in particular to the trust variation jurisdiction,[36] and the proposed jurisdiction to alter trust purposes to deal with a change in circumstances.[37] In these cases we thought it essential that the court's discretion should be exercised in a consistent and principled manner in all cases. That can best be achieved by allocating all such cases to a single court, which for practical reasons can only be the Court of Session.[38]

16.16 We also commented that court procedures have developed substantially in recent years. Trust applications in the Outer House are subject to case management procedures, albeit on an informal basis. The "electronic revolution", involving the use of email communication in particular, made it easy for solicitors outside Edinburgh to make applications to the Court of Session without the difficulty and expense of going through Edinburgh correspondents. Electronic procedures have been significantly developed, especially in the Commercial Court, and we considered that similar developments could easily take place for trust applications. We thought that that would be particularly useful if most trust applications were transferred to the Outer House, thereby enabling a designated clerk to be appointed who could develop procedures modelled on those used by the commercial clerks.[39]

16.17 Trust law is a technical and specialised area, requiring considerable expertise not merely at a judicial level but among those who present cases in court and those who may be appointed as reporters in cases where the facts require to be investigated. We doubted

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[34] See paras 7.11-7.19 of DP No 148.
[35] DP No 148, para 7.13.
[36] See Ch 17 below.
[37] See Ch 18 below.
[38] See our Report on Variation and Termination of Trusts (SLC No 206; 2007), paras 5.33-5.44 and recommendation 14 (to the effect that petitions for approval of an arrangement varying or terminating private trusts should be presented in the Outer House, subject to a power to remit the application to the Inner House in any case of particular difficulty); see also para 5.34 and proposal 6 DP No 142, where we proposed that the jurisdiction to deal with the change of circumstances should only be available in the Court of Session.
[39] In practice, Outer House trust applications tend to be dealt with by one of the designated commercial clerks.

whether those features would be available in most sheriff courts. We considered whether a small number of sheriffs might be designated as trust sheriffs, but concluded that this would involve considerable administrative difficulties, with the result that the clarity and simplicity that were thought desirable in relation to charitable and public trusts would be largely absent. We also noted that the hearings of trust applications are frequently extremely short, and it would not make sense to have a sheriff make a substantial journey to hear an application that might take only 15 or 20 minutes.

16.18 Against that background, we considered that the best scheme for trust litigation was as follows. First, jurisdiction in all trust applications should be exercisable by the Court of Session. Secondly, they should normally be dealt with in the Outer House, and would (as at present) be heard by a designated trust judge. Thirdly, case management procedures modelled on Commercial Court procedures should be used. In that connection, we thought that in the majority of trust cases it should not be necessary to obtain a report. These were perceived as expensive and productive of delay. We understood that current procedure in the Outer House did not require a report unless it was plainly necessary to ascertain doubtful facts; we thought that such practice should continue. Fourthly, we considered that a system should be developed whereby trust applications to the Court of Session might be made electronically by solicitors anywhere in Scotland. Fifthly, we viewed the petition for directions as a useful procedure, as had been confirmed in our earlier consultation in the Discussion Paper on Trustees and Trust Administration. We accordingly considered that a simple, non-technical procedure should be devised to allow trustees or other interested parties to raise such proceedings. Sixthly, we thought that no change should be made to the law relating to special cases; where that is the appropriate procedure, one of its advantages is that an issue of law can be taken directly to the Inner House. We thought, however, that the great majority of trust applications on doubtful questions of law would take the form of a petition for directions.

16.19 We consulted on a proposal based on the foregoing approach.[40] It met with general agreement. The Law Society thought that it was desirable that remedies for some of the more straightforward issues should be available in the sheriff court. We agreed, and have modified our recommendation accordingly in such a way that the sheriff court has concurrent jurisdiction with the Court of Session in applications: for the appointment and removal of trustees; relating to *ex officio* trustees; and to enable a beneficiary to complete title. These are all likely to be relatively frequent and routine applications; they neither require a specialised knowledge of trust law, nor do they involve a major discretionary element, which means that the requirement for consistency across Scotland is less important. We should emphasise, however, that our recommendations relate to certain specific categories of petition that are designed to provide remedies for issues that arise during the administration of trusts. Those recommendations do not relate to other forms of remedy, such as an action for declarator or payment, that may be of use in a dispute affecting a trust. Remedies of the latter sort are competent in both the Court of Session and the sheriff court.

16.20 We accordingly make the following recommendation:

76. (1) The Outer House of the Court of Session should have exclusive jurisdiction in relation to applications:

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[40] Proposal 17 at para 7.19 of DP No 148.

(a) under the legislation replacing the Trusts (Scotland) Act 1921;

(b) relating to endowments under Part VI of the Education (Scotland) Act 1980;

(c) dealing with the administration of trusts or the office of trustee, including *cy-près* applications; and

(d) for directions in relation to the administration of a trust.

(2) The Outer House of the Court of Session and the sheriff court should have concurrent jurisdiction to hear applications for the appointment or removal of trustees applications relating to *ex officio* trustees, and applications to enable a beneficiary to complete title.

(Draft Bill, section 74(1) and (2))

(3) Petitions under the legislation replacing section 1 of the Trusts (Scotland) Act 1961 (variation of trusts) should be presented to the Outer House rather than, as at present, to the Inner House.

(4) The rules of the Court of Session should provide that in all of the foregoing categories of case the Lord Ordinary should have power to remit the application to the Inner House in any case of particular difficulty; and that where appropriate a reclaiming motion against the Lord Ordinary's decision should be competent.

(5) The part of section 26 of the Trusts (Scotland) Act 1921 which requires the Inner House to settle a draft scheme by the Lord Ordinary for administration of a charitable or permanent endowment should be repealed without re-enactment.

(Draft Bill, section 79 and schedule 2)

(6) A simple non-technical procedure should be devised whereby applications relating to trusts and their administration may be made by trustees or by any other interested party. Such applications would be heard in the Outer House, with the possibility of reclaiming to the Inner House.

We continue to think that it is unnecessary to make a formal recommendation in relation to the use of electronic communications and other devices in relation to Outer House trust applications; we think that these can be developed as appropriate by the Court of Session. Their utility is very obvious.

16.21 Where the sheriff court has jurisdiction, by paragraph (2) of the recommendation above, we provide in our draft Bill as to which court or courts may competently decide

applications.[41] This provision is based on that in the 1921 Act,[42] but we have made some modifications to the current position: first, we base jurisdiction on residence rather than domicile,[43] secondly, we focus on the residence of the trustees rather than of the truster,[44] and lastly we make no special provision for marriage contracts.[45]

Liability for litigation expenses

16.22 We considered the liability of trustees for litigation expenses in Part 4 of our Discussion Paper on Liability of Trustees to Third Parties.[46] We indicated that the nature of trustees' liability depends on the form of the interlocutor awarding expenses. If the award is against the trustees "as trustees", the trustees are liable in their representative capacity only and the expenses are payable out of the trust property. If that is insufficient, it is impossible to recover the balance from the trustees personally. Alternatively, the interlocutor may award expenses against named trustees personally. The effect of that is that the named trustees must pay the expenses out of their private property without any right of reimbursement or relief from the trust property. We gave examples of cases where trustees had been found personally liable, including cases where trustees engaged in unnecessary litigation, or unsuccessfully opposed their removal or replacement, or where litigation arose as a result of the trustees' neglect of duty.[47] The normal form of award, however, is an interlocutor against named trustees without further qualification. This has the effect of making the trustees personally liable to pay the expenses to successful opponents but preserves the right of relief against the trust estate. The general rule is that trustees have such a right of relief provided that the expenses are necessarily, properly and reasonably incurred in the discharge of their duty. If trustees litigate following the advice of counsel, they will normally be entitled to reimbursement of legal expenses from the trust property.

16.23 We indicated that the advantage of the present scheme is that it discourages trustees from indulging in rash litigation, in that they might then be personally liable for expenses. Furthermore, successful litigants who raise or defend proceedings against trustees have a right to recover from the trust estate and, if that is insufficient, from the trustees' own private property. We nevertheless thought it arguable that the present system was too discretionary and potentially onerous for trustees.[48] Normally trustees litigate responsibly, and in that event they should not have to put their private property at risk when they are simply performing their duties properly. On that basis we thought that it might be appropriate to set out the rules regarding expenses in legislation, to lessen the risk of personal liability in expenses and to create greater certainty.

16.24 The scheme that we put forward was as follows. We thought that the basic rule should be that trustees who litigate as such should not be personally liable in expenses. The

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[41] See s 74(2) of the draft Bill.
[42] In s 24A.
[43] This is in line with our recent Report on Judicial Factors (SLC No 233; 2013): see s 1(4) of its draft Bill.
[44] Our main reason for this is that, especially for long-term trusts, the residence of the truster becomes increasingly less relevant and, over time, may even be problematic to determine. The residence of the trustees. on the other hand, is both more relevant and easier to ascertain.
[45] For a discussion of marriage contracts, see EM Clive, *The Law of Husband and Wife in Scotland* (4th edn, 1997), ch 17. Although no longer common, they continue to be legally permissible and enforceable and there may well be a number still in existence; we consider, however, that our recommended general rule as to the appropriate sheriff court, governed by the place of residence of the trustees, will operate satisfactorily in practice.
[46] DP No 138.
[47] Ibid, para 4.5.
[48] Ibid, para 4.9.

expenses would be awarded against the trustees as trustees and would be paid by them out of the trust property. If that proved insufficient the balance would not be payable by the trustees out of their private property. The legislation would, however, list situations where the trustees would be personally liable without recourse to the trust estate. That list would be modelled on the current law; expenses would be awarded against trustees personally:[49]

(a) where they engaged in unnecessary litigation, either as pursuers or defenders;

(b) where the trustees unsuccessfully opposed their removal or their replacement by a judicial factor;

(c) where the litigation had arisen owing to the trustees' neglect of duty;

(d) where a minority of trustees unsuccessfully pursued an action in the name of the trustees without consulting their co-trustees; where a minority defended an action, relief would be allowed against the trust estate only if the trust had benefited from the intervention;

(e) where the trustees had unsuccessfully opposed the reduction of the trust deed, although in that case relief might be allowed where the character of the trustees had been impugned or where they defended the deed in good faith, particularly if they acted on the advice of counsel.

16.25 On that basis we asked whether trustees' liability for litigation expenses should be set out in new litigation along the lines of the scheme outlined in the previous paragraph. On consultation, there was considerable agreement with the proposal, but two respondents disagreed with it. The Faculty of Advocates opposed general personal immunity on the basis that it would give an unfair advantage to trustees of insufficiently funded trusts. They suggested that the trustees should either seek an indemnity from the beneficiaries or be required to obtain caution (and, in exceptional circumstances, the court could grant personal indemnity without caution). STEP made broadly similar comments.

Further proposals

16.26 In view of these comments, we reconsidered the issue of expenses in detail in our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law.[50] On our earlier proposal, an award of expenses would normally only be enforceable against the trust property with no personal liability on the part of the trustees. The main difficulty would then arise if a trust had insufficient assets to meet the award, and a successful litigant would be left without any payment of expenses. In addition, there might be uncertainty on the part of the trustees as to their ultimate position if there was any doubt about the propriety of bringing or defending proceedings.

16.27 We considered that a helpful analogy could be drawn with proceedings raised by companies, where the law is set out in section 726(2) of the Companies Act 1985.[51] If a

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[49] Ibid, para 4.5.
[50] DP No 148, paras 4.7-4.14.
[51] The terms of this provision are set out in note 9 to para 4.8 of DP No 148; it is one of the few provisions of the 1985 Act not to be repealed by the Companies Act 2006.

company raises an action but has inadequate assets, the same problem arises as with trustees. If there is a significant doubt about a company's ability to pay any award of expenses, it is competent for the other party to the litigation to apply to the court for an order that the company should be ordered to find caution or other security for expenses. This provision is frequently used in practice, and appears to be effective in ensuring that awards of expenses against unsuccessful pursuers can be met. It also serves to prevent companies from being used as a vehicle for litigating without fear of the financial consequences. The section only applies to pursuers, not companies that are defenders. The mischief aimed at is the raising of an action by a company that lacks adequate assets. Where an action is raised against a company, by contrast, that is the voluntary act of the pursuer, and it is up to the pursuer to ascertain whether the company is worth suing.

16.28 We nevertheless indicated that one important difference exists between a company and a trust in this respect. Companies are obliged to lodge annual accounts, which can readily be used to determine whether there is reason to believe that the company will be unable to meet an award of expenses. These are regularly referred to in applications to the court under section 726(2). In the case of trustees, it is obviously impossible to use published accounts as a starting point.[52] Thus a defender will have no obvious source of knowledge of the trust's financial position. While in some cases the Land Register might be of assistance, we did not think that it was reasonable to expect a defender to search the Land Register for the purpose of determining a trust's financial position. We thought that the most satisfactory solution was to have a basic rule that the trustees who raise an action are personally liable for the expenses of a successful defender but also to entitle them to apply to the court for an order that they should not be so liable. To obtain such an order, they would require to establish by credible testimony that the trust property would be sufficient to pay the defender's expenses if the pursuers were unsuccessful in the action. To that end, the trustees would normally have to lodge the trust accounts, possibly supported by valuations of trust assets or certificates relating to trust liabilities. We thought that the problems were evidential and that the basic structure would be quite workable in practice.

16.29 We did not propose that there should be any statutory power of the court to order pursuer trustees to find caution or other security, as occurs with companies. Instead, the sanction used to prevent a trustee from litigating without adequate resources is the personal liability of the trustees, which would be removed only if they satisfied the court that the trust had adequate resources to finance the litigation. Personal liability might be removed if the trustees provided some other form of security for the payment of expenses, and that might include caution. The critical point, however, was that adequate resources to pay for the litigation had to be found.

16.30 Where an action was raised against trustees, we thought that the scheme set out above should apply.[53] The result would be that trustees would only be personally liable in cases where they engaged in unnecessary litigation, or unsuccessfully opposed their removal or replacement, or where the litigation had arisen owing to their neglect of duty, or in other narrowly defined circumstances relating to the validity of the trust deed. In all such cases, whether there was personal liability would be a matter for the discretion of the court. We emphasised that the power to impose personal liability would be exceptional. The

[52] This is subject to an exception for charitable trusts, which are obliged to launch annual accounts with OSCR: s 44(1)(d) of the Charities and Trustee Investment (Scotland) Act 2005.
[53] See para 16.24 above.

reason for treating defenders differently would be the same as for companies: the mischief aimed at is the raising of an action by the trustees with inadequate trust assets, and the purpose of the legislation is to protect a defender who has been brought involuntarily into the action. Those considerations do not apply to pursuers who raise actions against trustees. Indeed, if proceedings were raised against trustees who did not have substantial trust assets, it is likely that they would point this out to the pursuer, with vouching if necessary, because the lack of assets is an obvious disincentive to continuing with proceedings.

16.31 We proposed that, in exceptional cases, the court should have a residual power to dispense with the basic rule that pursuer-trustees should be personally liable. We had in mind a case where the trustees of a trust lacking significant assets raised proceedings against the party who was alleged to have defrauded the trust of its assets or to have embezzled those assets. In such a case it would be quite unfair to expect the trustees to assume personal liability for expenses as a condition of raising proceedings. We accordingly proposed that the court should have power to dispense with personal liability in any case where such liability would be inequitable or unfair.

16.32 On consultation, respondents, including the Faculty of Advocates and the Judges of the Court of Session, agreed with the general structure of our proposals, but the Law Society was concerned that imposing personal liability on trustees in the first instance would mean in practice that trustees would hardly ever dare to litigate; they thought that exclusion of personal liability should be the norm. Our Advisory Group indicated that it should be made clear that currently trustees normally have a right of relief against the trust estate if they are found liable for litigation expenses, and that this should be made clear in the Report.

16.33 In the light of the comments made by the Law Society and our Advisory Group we have revised our proposed scheme so that a trustee does not normally incur personal liability for the expenses of litigation to which the trust is a party. We consider that the following recommendations deal with the concern expressed by our Advisory Group that (as under the present law) a trustee should normally have a right of relief against the trust estate if he or she is found liable for litigation expenses. The normal position under the foregoing scheme is that a trustee does not incur personal liability, but will only do so if a court order is made to that effect. In the latter situation, it will normally be inappropriate for the trustee to have any right of recourse against the trust estate. Nevertheless, express power is given by recommendation 77(4) below to allow the trustee relief against the trust property. Furthermore, under recommendation 77(5) the court is given a residual power to relieve a trustee of personal liability for expenses.

16.34 We accordingly make the following recommendation:

77. (1) Subject to the following paragraphs, a trustee should not incur personal liability for the expenses of civil litigation in which the trust is a party.

(2) If, in an action brought by the trustees, the expenses of litigation are found to be recoverable from the trust but, where the trust property is insufficient to meet them, the excess will be recoverable from the personal property of the trustees on a joint and several basis.

(3) In any litigation to which the trustees are party, the court may nevertheless find a trustee personally liable, in whole or in part, for the expenses of civil litigation to which the trust is party if:

(a) the litigation is in the opinion of the court unnecessary;

(b) the litigation relates to the trustee's opposing his or her removal from office and the appointment of a judicial factor to administer the trust, and the trustee is unsuccessful in doing so;

(c) the litigation relates to the trustee's opposing the reduction of the trust deed and the trustee is unsuccessful in doing so;

(d) the trustee has brought about the litigation through his or her own breach of duty;

(e) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, pursued the litigation unsuccessfully and without consulting the other trustees who are both capable and traceable;

(f) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, defended the litigation without any benefit to the trust and without consulting the other trustees who are both capable and traceable.

(4) Where a trustee is found personally liable for the expenses of litigation to which the trust is party by virtue of the provisions of the foregoing paragraph, the court should be entitled to allow the trustee relief against the trust property if and in so far as the court considers it appropriate to do so.

(5) The court should have power, on the application of a trustee, to relieve him or her of personal liability for the expenses of litigation, including expenses that have not yet been incurred, in any case where such liability would be inequitable or unfair.

(Draft Bill, section 65)

16.35 The result of this recommendation will be that, if trustees are brought into an action as defenders, they will not incur personal liability (in accordance with paragraph (1) of the recommendation) unless one of the criteria in paragraph (3) applies. We would emphasise that the situations covered by paragraph (3) are exceptional; the only one of general application is that in subparagraph (a). The criterion in that subparagraph is that the litigation is "unnecessary", which is intended to be a high hurdle.

16.36 If trustees raise an action relating to the trust, they must normally ensure that the trust has adequate resources to pay the expenses of proceedings; if they do not do so, they

may incur personal liability under paragraph (2). This is joint and several liability; thus the trustees as a body must ensure that there are adequate resources. Our recommendation nevertheless recognises that in some cases the general rule in paragraph (2) will not produce a fair result. An example is a case where proceedings are brought against an investment or other advisor whose alleged negligence or fraud has deprived the trust of most of its assets. In such a case paragraph (5) applies, and the trustees can, immediately after proceedings are raised, apply to the court for relief in advance from personal liability. Obviously the defender must have a right to be heard on any such motion, but it can be expected that the court will grant relief in cases such as that described, and in any other case where the result would be inequitable or unfair if such an application were not granted.

16.37 As a final point on this topic, general questions of expenses in relation to an application made under legislation giving effect to the recommendations in this Report are, in our view, a matter to be determined by the court. We consider that the court should be given express power to direct that any such expenses should be paid out of the trust property, if it considers it reasonable to do so. To give effect to this we recommend:

78. Any question of expenses in relation to an application under the Act giving effect to the recommendations in this Report is to be determined by the court. The court is to have power to direct, if it considers it reasonable to do so, that such expenses be paid out of the trust property.

(Draft Bill, section 66)

Re-enacted provisions

16.38 Lastly, there are a number of existing court powers in the 1921 Act which we consider should be retained. It is for this reason that we have included sections 68 to 70 in the draft Bill. The first two deal with the situation in which a beneficiary becomes absolutely entitled to trust property which remains in the hands of a trustee who has died or has become incapable. In each case, provision is made for a court power to order the transfer of title or vesting of the property, where appropriate. Section 68 provides for the transfer of title to heritable or incorporeal moveable property and is a re-enactment, with modifications, of section 24 of the 1921 Act. Section 69 provides for a warrant whereby corporeal moveable property vests in the beneficiary and is modelled on section 31(4) of the Bankruptcy (Scotland) Act 1985.

16.39 Section 70 provides for superintendence orders by which the court may order the Accountant of Court to intervene in certain trust affairs, as currently provided by section 17 of the 1921 Act. We consulted the Accountant in Court's office and received confirmation that, whilst applications under the current law are infrequent, they are made from time to time and that it would therefore be appropriate to re-enact the current law. We have therefore done so.

16.40 In sections 68 and 69 both the Court of Session and the sheriff court have jurisdiction, but only the Court of Session may order the Accountant of Court to intervene under section 70.

Chapter 17 Powers of the court: variation of trust purposes

Introduction

17.1 We have already covered the topic of variation and termination of trusts in a Report prepared in the course of our review of trust law.[1] The reasons for our recommendations are set out at length in that Report, and reference should be made to it on any question of detail. The present Chapter merely summarises the main changes in the law that are recommended, and is structured is as follows:

- present law, both at common law and statute (paragraphs 17.2-17.7),
- policy questions (paragraphs 17.8-17.11),
- extra-judicial variation and termination (paragraphs 17.12-17.25), and
- judicial variation and termination (paragraphs 17.26-17.56).

The relevant provisions are in Part 8 of our draft Bill and they follow the draft legislation appended to our earlier Report.

Private trusts: the common law

17.2 The existing law relating to the variation and termination of trusts was considered in Part 2 of our earlier Report. It is possible for the beneficiaries of a trust, provided that they are all of full age and full capacity, to bring the trust to an end. In the leading case, *Miller's Trustees v Miller*, two distinct rationales for the rule were put forward. First, Lord President Inglis stated:

> "There is, in my opinion, a general rule, the result of a comparison of a long series of decisions of this Court, that where by the operation of a testamentary instrument the fee of an estate or parts of an estate, whether heritable or moveable, has vested in a beneficiary, the Court will always, if possible, relieve him of any trust management that is cumbrous, unnecessary, or expensive. Where there are trust purposes to be served which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator. But I am not aware of any case in which the mere maintenance of a trust arrangement without any ulterior object or purpose has been held to be a trust purpose in the sense in which I have used that term."[2]

Lord McLaren, by contrast, preferred to focus on the nature of a right of fee. He stated:

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[1] Report on Variation and Termination of Trusts (SLC No 206; 2007), following a DP of the same name (DP No 129; 2005). The Report dealt not only with private trusts but also with certain public trusts; we do not deal with the latter aspect in the present Report and this Chapter is therefore confined to a consideration of private trusts.

[2] *Miller's Trs v Miller* (1890) 18 R 301, 305, Lord Justice-Clerk Macdonald, Lord Rutherfurd Clark and Lord Adam concurring.

> "It seems to me that a beneficiary who has an estate in fee has by the very terms of the gift the same right of divesting the trustees, and so putting an end to the trust, which the truster himself possessed, because under a gift in fee the grantee acquires all the rights in the property which the truster had to give. It seems to me to be not only an unsound proposition in law, but a logical impossibility, that a person should have an estate in fee, and that some other person should at the same time have the power of withholding it."[3]

Lord McLaren went on to refer to the exceptions to the general rule, which were founded on civil disability. At present, that means youth or mental incapacity.[4]

17.3 The law was reconsidered by the whole court in *Yuill's Trustees v Thomson*, where the principle was stated as follows:

> "The principle of that decision [*Miller's Trustees v Miller*] is that when a vested, unqualified and indefeasible right of fee is given to a beneficiary of full age, he is entitled to payment of the provision notwithstanding any direction to the trustees to retain the capital of the provision, and to pay over the income periodically, or to apply the capital or income in some way for his benefit. The proposition is qualified in the opinion of Lord President Inglis by the addition that, where there are trust purposes to be served which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator."[5]

The foregoing formulation has come to be accepted as authoritative.[6]

17.4 In our earlier Report we went on to consider the question of whether trusts can be varied extra-judicially by the beneficiaries. We concluded that such variation was possible in Scots law, provided that the beneficiaries were all of full age and full capacity; this followed from the fact that the beneficiaries together were entitled to bring the trust to an end. We thought that the same would apply to a variation that affected only part of the trust fund, provided that all of the beneficiaries entitled to that part consented. Extra-judicial variation is not competent, however, in the case of an alimentary liferent.[7]

Trusts (Scotland) Act 1961

17.5 Section 1 of the Trusts (Scotland) Act 1961 makes provision for the judicial approval of arrangements for the variation and termination of trusts.[8] It deals with two situations where beneficiaries are incapable of consenting to the variation or termination of a trust. The first, in subsection (1), is where beneficiaries are incapable, unborn or unascertained. The court may consent to the arrangement on behalf of such persons provided it considers

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[3] Ibid, 310.
[4] At the time when *Miller's Trs* was decided, married women were also under a similar incapacity.
[5] *Yuill's Trs v Thomson* (1902) 4 F 815, 819 per Lord President Balfour and Lords Adam, McLaren and Kinnear; Lords Kyllachy, Stormonth Darling and Low and Lord Justice-Clerk Macdonald concurred.
[6] The equivalent rule in English equity is known as the rule in *Saunders v Vautier* (1841) Cr & Ph 240.
[7] We describe alimentary liferents at paras 2.8-2.9 of our earlier Report; see also Gretton and Steven, para 24.16.
[8] Discussed at paras 2.10 to 2.17 of our earlier Report. The original provisions of s 1 have been varied by the Age of Majority (Scotland) Act 1969 and the Age of Legal Capacity (Scotland) Act 1991; these amendments permit persons aged 18 and over to consent to arrangements to vary or terminate trust provisions, but following the reduction in the age of legal capacity to 16 by the 1991 Act the age at which a beneficiary might consent to such arrangements was not reduced, and it was merely provided that the court must take account as appropriate of the beneficiary's attitude to the arrangement.

that carrying it out would not be prejudicial to them. All ascertained beneficiaries of full age must consent to the scheme, however; otherwise it cannot proceed. What the court does is to supply the consent of individual beneficiaries who are incapable of consenting. It is accordingly not required to consider whether the arrangement as a whole is desirable; the beneficiaries of full age and full capacity are left to reach their own judgement on that matter.

17.6 Secondly, by section 1(4) the court may authorise an arrangement on behalf of an alimentary liferenter provided that (i) it considers that it is reasonable to do so, having regard to the amount of the liferenter's income from all sources and such other factors as are considered material, and (ii) the alimentary beneficiary consents or, if incapable of consenting, the court approves of the arrangement on his or her behalf under section 1(1).

17.7 The power in section 1 has been used extensively.[9] Initially many of the arrangements approved by the court had the object of bringing the trust to an end by dividing the fund on an actuarial basis between the liferenter and prospective fiars; the reason was usually mitigation of tax. When estate duty was extended to discretionary trusts in 1969, a large number of schemes converted discretionary trusts into other legal forms. Capital transfer tax was introduced in 1975, and in the years after that many trusts were converted into accumulation and maintenance trusts, which at that time enjoyed significant tax benefits under the capital transfer tax legislation. A further series of variations have been designed to achieve the benefits of capital gains tax hold-over relief.

The policy issue: whose wishes prevail?

17.8 In Part 3 of our earlier Report we considered one of the fundamental issues in this area of law, namely whether the will of the truster or the will of the current beneficiaries ought to prevail. At common law this question was settled in favour of the current beneficiaries by the decisions in *Miller's Trustees v Miller* and *Yuill's Trustees v Thomson*,[10] and that policy decision is reflected in section 1 of the Trusts (Scotland) Act 1961. In a petition under section 1, the truster is entitled to be heard but has no power to veto the beneficiaries' proposed scheme. A similar policy is followed in England and Wales.[11]

17.9 Other legal systems, notably those in the United States, do not follow the same policy. Instead, they apply what has come to be known as the "material purpose" rule.[12] This may be stated as follows: a trust cannot be terminated prior to the time fixed for termination, even though all the beneficiaries consent, if termination would be contrary to a material purpose of the truster. This rule is of particular significance in relation to so-called "spendthrift trusts", that is, trusts containing provisions intended to protect beneficiaries against their own lack of financial responsibility. Such trusts to some extent perform the same function as alimentary liferents under Scots law, but they differ in that the trustee has a discretion as to how much, if any, of the income should be paid to the beneficiary, and an interest in fee can in most States be subject to a spendthrift restriction. A spendthrift provision is generally regarded as a material purpose of a trust, and therefore may not be varied or terminated with the consent of all of the beneficiaries.

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[9] See para 2.16 of our earlier Report.
[10] See paras 17.2-17.3 above.
[11] At paras 3.2 and 3.3 of our earlier Report we referred to the decision in *Goulding v James* [1997] 2 All ER 239, where the wishes of a testatrix were manifestly overridden.
[12] The rule originated in the decision of the Supreme Judicial Court of Massachusetts in *Claflin v Claflin* 20 NE 454 (Mass 1889), discussed at para 3.4 of our earlier Report.

17.10 We pointed out that there is some common ground between the Scottish and American approaches,[13] in that neither grants an absolute preference for one interest over the other; in Scotland the alimentary liferent is a case where the truster's wishes must prevail, whereas in the United States not all purposes are regarded as "material" for the purposes of the material purpose rule. We therefore considered whether, as a matter of policy, there should be further restrictions on the circumstances in which trusts may be brought to an end or modified following agreement among beneficiaries. In our Discussion Paper we expressed a provisional view that there was no need for any such further restrictions.[14] In particular, when all possible beneficiaries are of full age and capacity, that is a strong indication that the trust purposes have run their course and that there is no merit in prolonging the existence of the trust unnecessarily. A further argument was that, if a trust has been created for the benefit of a group of people of full capacity, they should be free to re-arrange their affairs as they wish. While a truster might wish to protect a beneficiary's interest against him or herself or against the risk of loss to a third party such as a creditor or former spouse, we thought that the law provided some degree of protection against that risk.

17.11 On consultation, there was very little support for the statutory importation into Scots law of the "material purpose" doctrine. The Judges of the Court of Session observed in their response that if such a rule were introduced it would probably become normal practice in well drafted trusts to stipulate that the trust purposes could be varied by agreement among the beneficiaries without recourse to the truster. Against that background, we decided against recommending the introduction of a rule along the lines of the "material purpose" doctrine. We accordingly made the following recommendation,[15] which we repeat here:

> **79. It should remain competent:**
>
> **(a) for a trust to be varied or terminated by agreement among beneficiaries (where all are of full age and capacity); or**
>
> **(b) for the court to approve an arrangement varying or terminating a trust on behalf of incapable, unborn or unascertained beneficiaries,**
>
> **regardless of whether the variation or termination is inconsistent with a material purpose of the trust.**
>
> (Draft Bill, sections 53, 54(2) and 55)

Extra-judicial variation and termination of private trusts

17.12 In Part 4 of our earlier Report we considered a number of issues relating to the extra-judicial variation and termination of trusts, and made recommendations in respect of them.

Statutory expression of the common law rule

17.13 First, we gave consideration to whether the rule in *Miller's Trustees* should be given statutory expression.[16] On consultation, most respondents considered that this would be

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[13] See para 3.6 of our earlier Report.
[14] DP No 129, paras 4.1-4.9.
[15] Recommendation 1 in our earlier Report.
[16] See also paras 4.31-4.32 above.

desirable, although the Judges of the Court of Session thought that we should make clear that we did not regard this as a change to the existing law. We confirmed that it was not our intention to change the law, provided that the wider interpretation of the rule in *Miller's Trustees* is understood as the present law. We thought that beneficiaries of full age and capacity should be entitled to agree that the powers of the trustees to manage or administer the trust estate should be enlarged or restricted in accordance with the beneficiaries' agreement. We further thought that, as under the present law, there should be no requirement that the truster consent to any variation or termination unless he or she is also a beneficiary. Against that background we made the following recommendation,[17] which we now repeat:

> **80. It should be confirmed by statute that where every person with an interest, whether vested or contingent, in property held in trust is of full age and capacity or is not a natural person, those persons may agree, without the need to obtain court approval of the agreement:**
>
> **(a) to vary the purposes for which the trust property is held;**
>
> **(b) to terminate the trust in whole or in part;**
>
> **(c) to direct the trustees to make over the trust property to other trustees to hold for new trust purposes; or,**
>
> **(d) to enlarge or restrict the powers of the trustees to manage or administer the trust property.**
>
> (Draft Bill, sections 53 and 54(2) and (3))

Consent to extra-judicial variation on behalf of a child

17.14 We further considered the question of whether a parent or legal representative should have capacity to consent to an extra-judicial variation on behalf of a child up to the age of 16.[18] Under the Children (Scotland) Act 1995 a parent acts as the legal representative of his or her child.[19] In that capacity, the parent has power to administer any property belonging to the child and to act in or give consent to any transaction where the child is incapable of acting or consenting on his or her own behalf. "Transaction" includes the giving of any consent having legal effect, and the taking of any step in civil proceedings.[20] Despite these statutory provisions, the practice in applications under section 1 of the 1961 Act is that approval is sought from the court on behalf of children under 16; we are not aware of any variations which have proceeded extra-judicially using a legal representative's powers under the 1995 Act.

17.15 In our Discussion Paper we suggested that there was no qualitative distinction to be made between this type of "transaction" and others to which a legal representative has power to consent, and that power to consent to a trust variation could be seen as the natural

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[17] Recommendation 2 in our earlier Report.
[18] Paras 4.5-4.16 of our earlier Report.
[19] Section 1(1)(d); s 1(2)(a) provides that, in this context, "child" means a person under the age of 16.
[20] Children (Scotland) Act 1995, s 15(1), referring to s 9 of the Age of Legal Capacity (Scotland) Act 1991.

consequence of the reforms affected by the 1995 Act.[21] Nevertheless, we accepted that the principal objection to such a course was that in many schemes for the variation or termination of a trust there is a conflict of interest between the parent and the child. A common example is a variation intended to release capital from the trust fund to the parent in his or her individual capacity. While the protections in sections 9 and 10 of the 1995 Act would operate,[22] we thought that something more might be required to protect the child. We suggested a number of possible approaches.[23]

17.16 On consultation, opinions among respondents were significantly divided. A majority considered that legal representatives should be given power to consent to a variation or termination of a trust on behalf of a child, in order to save unnecessary court procedure. Others, however, including the Judges of the Court of Session and the Faculty of Advocates, regarded the problem of conflict of interest as an insuperable obstacle to granting power to a legal representative to consent on a child's behalf. These difficulties would, it was suggested, be particularly acute if the child had to establish some years later that there had been a breach of duty by his or her legal representative.

17.17 In addition, none of the respondents to the consultation supported the view that there was no need to protect the child against the risk of loss due to conflict of interest, but there was no clear preference for any particular solution. Moreover, we considered that the possible forms of protection other than an application to the court raised severe practical problems. The simple fact is that in most applications for variation or termination of a trust which involve children there is at least a potential conflict of interest. If that is not addressed, the problem may emerge much later, when the evidence as to the propriety of the transaction is much less clear and when any remedy against the parent may be worthless. Thus some form of independent adjudication is essential, and the court is the obvious means of providing it. We accordingly concluded that it was not appropriate to provide for any form of extra-judicial variation of trusts in cases where a child's entitlement was involved. We noted that no other jurisdiction with a similar model of trust variation had gone that far.

17.18 We nevertheless thought that some doubt existed as to whether the 1995 Act currently permitted a legal representative to consent to a variation on behalf of a child. We accordingly concluded that it should be made clear that applications for variation or termination of a trust are a specific exception to the powers of legal representatives under the 1995 Act. That will require an appropriate amendment to be made to the 1995 Act. We accordingly recommended as follows,[24] and we adhere to the recommendation:

> **81. The powers of a parent or guardian in exercise of the responsibility to act as a child's legal representative should not include power to approve a variation or termination of a trust on the child's behalf.**
>
> (Draft Bill, schedule 1, paragraph 3)

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[21] DP No 129, para 4.12.

[22] The 3 main protections are: (i) an obligation to seek a direction from the Accountant of Court as to the administration of a capital sum in excess of £20,000 which requires to be made over to a parent to be held on behalf of a child; (ii) the specification of the standard of care required of the legal representative (which is to act as a reasonable and prudent person would act on his or her own behalf); and (iii) the obligation to account to the child on demand after the child has attained 16. See para 4.8 of our earlier Report.

[23] Summarised at para 4.9 of our earlier Report.

[24] Recommendation 3 in our earlier Report.

17.19 We then considered the position of beneficiaries aged 16 or 17, who now have legal capacity in Scots law.[25] In the Discussion Paper we raised the question of whether beneficiaries aged 16 and 17 should be given capacity to consent to applications for the variation or termination of a trust.[26] The opinions of those who responded to the consultation were divided. A majority, however, was not in favour of giving 16 and 17 year olds full capacity to consent. Some respondents considered that the issues were too technical and complex, and others were concerned about the risk of improper influence by a parent with a conflicting interest in the proposed variation. We shared the latter concern. We were also concerned that the possibility of challenge by a beneficiary after attaining the age of 18 would create formidable practical difficulties. We accordingly recommended,[27] and we adhere to the recommendation:

82. A person aged 16 or 17 should continue to be deemed to be incapable of agreeing to the variation or termination of a trust, but the court is required to take such account as it thinks appropriate of the beneficiary's attitude to the arrangement.

(Draft Bill, sections 54(5)(a) and 58 and schedule 1, paragraph 2)

Consent to extra-judicial variation on behalf of adult beneficiaries with incapacity

17.20 Section 1 of the 1961 Act provides for court approval of a trust variation on behalf of any beneficiary who is incapable of assenting "by reason of nonage or other incapacity". The court may therefore approve of an arrangement on behalf of an adult who lacks the capacity to give consent. Since the entry into force of the Adults with Incapacity (Scotland) Act 2000, alternative methods of obtaining consent on behalf of an incapable adult have been available. An order appointing a guardian may confer power to deal with particular matters in relation to the property, financial affairs or personal welfare of the adult, or power to manage his or her property or financial affairs more generally, and the guardian has power to act as the adult's legal representative. A further possibility created by the 2000 Act is that an intervention order might be granted authorising the appointee to take such action in relation to the adult's property, financial affairs or personal welfare as is specified in the order.[28] Either of these methods could be used to enable consent to be given to a variation on behalf of an incapable adult without the need for an application under the 1961 Act.

17.21 At the same time, it remains competent for court approval to be sought under the 1961 Act on behalf of an adult with incapacity. We thought that there might be particular situations where that was appropriate. These included a case where a guardian unreasonably refused consent, where a guardian reasonably refuses consent on the ground that the decision whether or not to consent is narrow and he or she would prefer not to be accountable for it, and where a guardian is reluctant to take responsibility for granting consent because of a conflict of interest.

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[25] Age of Legal Capacity (Scotland) Act 1991, s 1.
[26] DP No 129, paras 4.20-4.21.
[27] Recommendation 4 in our earlier Report.
[28] Section 53(1) and (5).

17.22 Against that background, we recommended as follows,[29] and we adhere to the recommendation:

> **83. It should continue to be competent for approval to be given to a variation or termination on behalf of an adult with incapacity.**
>
> (Draft Bill, section 54(4) and (5)(b))

Extra-judicial variation or termination of alimentary liferents

17.23 At present an alimentary liferent or other alimentary interest may not be varied or terminated after the liferenter has entered into possession without the authorisation of the court under section 1(4) of the 1961 Act.[30] We considered whether to propose that such authorisation should no longer be required. The effect of doing so would be to render alimentary protection revocable at the will of the beneficiaries, which would often be contrary to the wishes of the truster who thought that the liferent or other interest should be alimentary when the trust was created. In the Discussion Paper we expressed the view that such a change was not desirable, and indeed one of our reasons for recommending that Scots law should not follow the "material purpose" doctrine found in the United States was that a Scottish truster is able to create an alimentary liferent if it is wished to protect a beneficiary from creditors or a former spouse or, indeed, the beneficiary's own folly.

17.24 On consultation, none of the respondents expressed disagreement with this conclusion. Nevertheless, there is one exceptional case where we consider that it would be desirable to permit variation or termination without court approval. This relates to the power that a woman had prior to 1984 to create an alimentary liferent in her own favour in an antenuptial marriage contract. The rationale for that power has long been obsolete, and the right of a woman to create an alimentary liferent in her own favour was abolished in 1984.[31] In these circumstances, we think that there is no benefit in requiring court authorisation of the variation or termination of an alimentary liferent created by a wife in favour of herself. Most of our consultees agreed.

17.25 In these circumstances we recommend:

> **84. (1) Where a woman who, prior to 1984, created an alimentary interest in her own favour in an ante-nuptial contract of marriage wishes to vary or terminate that interest, authorisation by the court under section 1(4) of the Trusts (Scotland) Act 1961 (or any statutory replacement of it) should no longer be required.**
>
> **(2) There should be no other change to the existing law under which the variation or revocation of an alimentary interest after the beneficiary has entered into possession of it requires the authorisation of the court.**
>
> (Draft Bill, section 57)

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[29] Recommendation 5 in our earlier Report.
[30] See paras 2.8-2.9 of our earlier Report.
[31] Law Reform (Husband and Wife) (Scotland) Act 1984, ss 5 and 10(2); the relevant date is 24 July 1984.

Judicial approval of variation or termination of private trusts

17.26 We considered the issue of judicial approval of variation or termination of private trusts in Part 5 of our earlier Report. We concluded that section 1 of the Trusts (Scotland) Act 1961 had brought about a very useful and successful reform but that some further reform was desirable. In certain respects the existing procedure had proved inflexible, especially when addressing remote theoretical contingencies. In addition, in addressing the question of absence of prejudice the Court of Session had looked solely to economic prejudice, whereas the English courts had construed the corresponding requirement, that the arrangement should be for the "benefit" of the person on whose behalf approval is sought, more broadly.

17.27 The result of these deficiencies is that applications under the 1961 Act are sometimes reduced to an intellectual exercise in which possible courses of action must be discarded because of risks of a theoretical nature. An example given is where the potential "prejudice" would arise in the event of the birth of further issue to, say, a 75-year-old man.

Highly improbable events

17.28 As already mentioned, section 1 of the 1961 Act was enacted on the basis of the common law rule in *Miller's Trustees*,[32] which had been interpreted as permitting variation of trust provisions by agreement only where *all* persons with an interest in the trust, however remote and improbable, consented to the variation. In an application under section 1, the court supplies approval on behalf of beneficiaries who are incapable of giving agreement. The definition of "beneficiary" in section 1(6) reflects the common law background, and includes "any person having, directly or indirectly, an interest, whether vested or contingent, under the trust". This has the practical consequence that there are cases where, because of the risk that an improbable series of events may occur, the court cannot be satisfied that there is no possibility of prejudice to a person upon whose behalf approval is sought. This problem has been exacerbated in recent years by the withdrawal from the market of all the life companies who had in the past been willing to underwrite the occurrence of remote contingencies through a single premium insurance policy.

17.29 Arrangements in trust variation petitions usually involve the adjustment of the respective rights of the persons most immediately interested in the trust capital and income. Nevertheless, the court will be concerned to ensure that there is no prejudice to other interests that are remote or have not yet emerged and may never emerge. Account is therefore to be taken of the risk of one or other of two scenarios occurring: (i) the risk of a death or series of deaths causing a remote interest to emerge, and (ii) the risk of an interest being brought into existence, for example by issue being born.[33] We consider each in turn.

(i) remote interest in existence

17.30 As to the possible emergence of a remote interest, the Court of Session has adopted a pragmatic approach. In *Phillips and Others, Petitioners*[34] it was held that section 1(6) "must be given a reasonable construction and it can never have been intended to include persons whose interest is so remote as to be negligible. If parties choose to make an

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[32] *Miller's Trs v Miller* (1890) 18 R 301, discussed at paras 17.2-17.3 above.
[33] Another scenario would be the possibility of a person marrying, if that is an event on which an interest in the trust is to arise: see para 5.20 of our earlier Report.
[34] 1964 SC 141, discussed at para 5.7 of our earlier Report.

arrangement outside the scheme for the protection of this group of persons, they are of course free to do so".[35] The decision in *Phillips* has proved useful because it enables arrangements to be approved without the need to intimate the proceedings to, and obtain the consent of, distant relatives with negligible interests.[36] Nevertheless, we thought that the solution provided by *Phillips* was not entirely satisfactory. First, at a linguistic level it is not easy to reconcile the decision with the statutory wording, which refers to "any person having, directly or indirectly, an interest, whether vested or contingent, under the trust". Secondly, the court does not actually approve the arrangement on behalf of any of the persons with the remote interests; it simply finds it unnecessary to approve on behalf of such persons. This leaves the trustees unprotected in the admittedly unlikely eventuality that these interests may emerge in future. Some trustees take the view that this exposure is unacceptable, especially in view of the non-availability of insurance. We accordingly concluded that a more transparent and straightforward approach to the problem of very remote interests would be desirable.

17.31 In considering reforms, we pointed out that there might be a large number of beneficiaries with remote interests at the time when the application to the court is made.[37] Service of the petition upon all of them and appointment of curators *ad litem* to those under age could give rise to considerable inconvenience with no real practical utility. One option was to give the court power to approve an arrangement on behalf of a beneficiary whose interest was so remote as to have negligible value, but we thought that this might involve difficulties under Article 1 of the First Protocol to the European Convention on Human Rights. Our preferred solution was to give the court power to exonerate the trustees from future claims by persons with interests which have negligible value at the time of the court hearing. Exoneration is not equivalent to approval of the arrangement on behalf of the remote beneficiary in that it does not cut off the possibility of a future claim by the beneficiary for his or her entitlement under the original trust provisions if the contingency should emerge. The effect of exoneration, however, is that the risk of answering such a claim passes from the trustees to the persons who benefit from the variation. We consider that this is a reasonable solution, as the risk of such a claim cannot be eliminated entirely.

17.32 We accordingly recommended that we should give statutory effect to the decision in *Phillips* by permitting the court to approve of an arrangement without satisfying itself either (a) that the arrangement is not prejudicial to any beneficiary upon whose behalf approval of the court would otherwise be required, or (b) that a beneficiary of full age and capacity has consented to it, provided in each case that the court is satisfied that the interest of the beneficiary in question is of negligible value. We further recommended that we should elaborate upon *Phillips* by empowering the court to exonerate the trustees from liability in the event that such an interest should emerge. We thought that the question of whether an interest is sufficiently small that it may be described as "negligible" should be left to the court. This met with enthusiastic approval from almost all of those who responded to our consultation. The Judges of the Court of Session, in particular, regarded it as appropriate to meet a practical difficulty that required legislation for its solution.

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[35] Ibid at 150-151, per Lord President Clyde.
[36] In this respect, Scots law stands in contrast to English law, where even very remote possibilities have been held sufficient to prevent the approval of an arrangement: see paras 5.6 and 5.7 of our earlier Report.
[37] See paras 5.13-5.18 of our earlier Report.

17.33 Against that background, we made the following recommendation,[38] to which we now adhere:

> **85. (1) The court should be empowered by statute to approve an arrangement varying or revoking trust purposes without requiring to be satisfied either:**
>
> **(a) that the arrangement is not prejudicial to any beneficiary upon whose behalf approval of the court would otherwise be required, or**
>
> **(b) that a beneficiary of full age and capacity has consented to it,**
>
> **provided in each case that the court is satisfied that the interest of the beneficiary in question is of negligible value.**
>
> **(2) In such circumstances, the trustees should be relieved by statute of liability for any loss sustained by a beneficiary, whether or not of full age and capacity, whose interest was determined to be of negligible value but which subsequently emerges.**
>
> (Draft Bill, section 56)

(ii) interest not yet in existence

17.34 The second problem relates to the risk of the birth of issue who, if born, would have an interest in the trust. This cannot be actuarially calculated and so has never been insurable. It has therefore often amounted to a block on possible variation.[39] An example is where property is held in an accumulation and maintenance trust for a person's children, with capital vesting at age 40, subject to a destination over to another branch of the family if none of the children should attain that age. (We use the name Chris, deliberately not wanting to indicate whether the person is male or female.) Chris has three adult children, who wish to bring the trust to an end, subject to making appropriate provision for the contingency that one or more might die prior to attaining 40. The latter contingency may be addressed by retaining a fund at least equivalent to the actuarial value of the interest of the persons who would become entitled to shares of the fund should any of the children fail to attain 40. It is not possible, however, to deal with the possibility that further children, who would also be entitled to shares of capital, might yet be born to Chris. Consequently the trust could not be terminated. How great this risk is will depend on Chris' age at the time, and in some cases, if he or she is old, it may be negligible.

17.35 There is currently no presumption that a man attains an age at which he ceases to be a potential parent.[40] On the other hand, it is presumed that a woman aged 53 or more will

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[38] Recommendation 7 in our earlier Report.

[39] Discussed at paras 5.8-5.11 (from where the example which follows is taken) and 5.19-5.22 of our earlier Report.

[40] Contrast *Munro's Trs v Monson* 1965 SC 84, where the court construed a testamentary provision on the basis that the possibility of issue to two males aged 81 and 76 was minimal, and thus a test of "high improbability" was satisfied: see para 5.9 of our earlier Report. The case is of limited assistance in the context of the judicial variation of trust, and the test of "high improbability" has never been used in that context.

not have a child.[41] We pointed out that this may no longer be justified in present times, especially given the possibility of adoption at any age.[42] We accordingly concluded that the powers of the courts in relation to disregarding the possibility of a future birth require to be clarified and, to a certain degree, extended to permit judicial variations to proceed in circumstances in which the risk of prejudice from such a birth is negligible.

17.36 In contrast to the question of remote interests which we discussed above,[43] we considered that there was no "possession" for the purposes of Article 1 of the First Protocol to the European Convention on Human Rights. Accordingly we were of opinion that the current legislation could be amended to permit the court to approve an arrangement varying a trust despite the theoretical possibility of the birth of a person who would or might become entitled to an interest which would defeat or diminish other interests in the trust. We saw practical advantages in such an amendment, because this particular problem cannot be dealt with by means of a retained fund or an insurance policy. It may therefore constitute an insuperable obstacle to a proposed variation.

17.37 The risks covered by our proposal would include possible prejudice to unborn or unascertained persons, provided that the court was satisfied that there was no reasonable likelihood that the interests of such persons would come into existence. Other risks might include the possibility that a person would marry, for example in a case where the person concerned is very old or lacked mental capacity to marry. We thought that the expression "no reasonable likelihood" struck an appropriate balance by way of guidance to the court which is called upon to access the chance that the interest will come into existence.

17.38 All those responding to our consultation on this proposal supported it. Most were content with the formulation "no reasonable likelihood", and no-one considered that there was a need for detailed guidance as to the criteria for satisfaction of the test. We further discussed the evidence that might be required to satisfy the test.[44]

17.39 Against that background, we made the following recommendation,[45] to which we now adhere:

> **86. The court should have power to approve an arrangement notwithstanding the possibility of prejudice to an unborn or unascertained person, provided that the court is of the opinion that there is no reasonable likelihood that the interest of that person will come into existence.**
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> (Draft Bill, section 55(2))

Definition of "prejudice"

17.40 As we have already mentioned,[46] there is a difference in wording between the Scottish and English legislation in relation to the matter upon which the court is required to

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[41] *G's Trs v G* 1936 SC 837.
[42] Discussed at para 5.10 of our earlier Report.
[43] At paras 17.30-17.33 above.
[44] See para 5.22 of our earlier Report. Possibilities included medical evidence of infertility and affidavits explaining why there was no reasonable likelihood of the birth or adoption of issue.
[45] Recommendation 8 in our earlier Report.
[46] At para 17.26 above; see also the discussion at paras 5.23-5.29 of our earlier Report.

be satisfied. The proviso to section 1(1) of the (English) Variation of Trusts Act 1958 reads as follows:

> "Provided that … the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit *of* that person."

The proviso to section 1(1) of the Trusts (Scotland) Act 1961 is as follows:

> "Provided that the court shall not approve an arrangement under this subsection on behalf of any person unless it is of the opinion that the carrying out thereof would not be prejudicial to that person."

17.41 The Scottish provision affords greater flexibility than the English one in that there is no need to demonstrate positive benefit to persons upon whose behalf the court is asked to approve of the arrangement; it is sufficient that they are no worse off. This can be useful where the arrangement provides for a "trade-off" between two interests, leaving neither of them better or worse off. Nevertheless, the difference in expressions has led to a difference in interpretation in respect of which the English courts have taken a more expansive view. The English cases make it clear that, in deciding whether an arrangement is for the benefit of a person, the court is entitled to consider more than purely material benefit.[47] Conversely the English courts have refused to approve of arrangements which were clearly to a beneficiary's economic advantage on the ground that this was outweighed by educational and social disadvantage.[48]

17.42 While there is little Scottish authority on the interpretation of the proviso to section 1(1) of the 1961 Act, certain *dicta* tend to indicate that the court will look only to the presence or absence of economic prejudice.[49] The usual practice is to address only the question of economic prejudice. The Scottish courts would probably take the view that the notion of "prejudice" allowed postponement of vesting to protect an irresponsible beneficiary, on the basis that that would not be to his or her financial prejudice in the longer term. Nevertheless, the court might well refuse sanction to a scheme which, although to a beneficiary's financial disadvantage, provided a longer term benefit such as increased opportunities for long term tax and estate planning for the beneficiary and his or her unborn issue as a family. It might be argued that the use of the word "prejudice" tends to a narrower interpretation than the word "benefit" as used in the English legislation. Most jurisdictions that have enacted trust variation legislation have followed the English wording.[50]

17.43 On consultation we asked whether the Scottish legislation should be amended to make clear that, in assessing the question of prejudice, the court may have regard to factors other than economic advantage or disadvantage to the beneficiary in question. We cited the Tasmanian legislation as a possible model. The majority of our consultees were of opinion that an amendment along these lines was desirable, although the Judges of the Court of Session and the Faculty of Advocates doubted whether there was a need for amendment.

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[47] See *Re Towler's Settlement Trusts* [1964] Ch 158; *Re CL* [1969] 1 Ch 587; *Re Remnant's Settlement Trusts* [1970] Ch 560.
[48] *Re Weston's Settlements* [1969] 1 Ch 223, 245.
[49] *Young's Trs, Petrs* 1962 SC 293, 301 per Lord President Clyde; *Pollok-Morris & Others, Petrs* 1969 SLT (Notes) 60.
[50] See para 5.26 of our earlier Report.

17.44 Our final view was that it was desirable for the court to have power to take non-economic considerations, including the welfare of members of the family of the beneficiary in question, into account, and that it was not sufficiently clear that they could do so under the current legislation. We accordingly made the following recommendation,[51] to which we adhere:

> **87. In assessing the question of prejudice, the court should have regard to the following factors in addition to economic advantage or disadvantage to the beneficiary in question:**
>
> **(a) any non-economic benefit or detriment to the beneficiary;**
>
> **(b) the welfare of any member of the beneficiary's family; and**
>
> **(c) such other matters as seem to the court appropriate.**
>
> (Draft Bill, section 55(3))

17.45 As a consequence of this recommendation, we are of opinion that the basic provision empowering the court to approve of an arrangement should be reformulated. Section 1 of the 1961 Act is framed in terms of conferring a discretion ("…the court may, if it thinks fit,… approve…any arrangement…") on the court to approve of an arrangement if satisfied that it would not be prejudicial to any person upon whose behalf approval is required. If the foregoing recommendation is enacted, such a general discretion will not be required, and our draft Bill accordingly removes the existing unfettered discretion and requires the court to give approval if satisfied that the arrangement is not prejudicial to any such person.[52]

Approval on behalf of untraceable beneficiaries

17.46 At present the court has no power under section 1 of the 1961 Act to approve of an arrangement on behalf of untraceable beneficiaries. In some cases this will not be an insuperable barrier to variation of trust purposes; thus it may be possible to establish that an interest is of negligible value so that the court may dispense with service and find it unnecessary to approve of the arrangement on behalf of the person in question.[53] Nevertheless, this is not satisfactory from the standpoint of the trustees as they are left unprotected should the claim later emerge.

17.47 The most significant difficulty occurs where there is an untraceable beneficiary whose identity is ascertainable and who is of full age, with the result that the court has no power to approve of the arrangement on his or her behalf, and who has a non-negligible interest which would be affected by the variation. In such circumstances, as the law stands, the other beneficiaries could not proceed with an application. Our suggestion was that it would be helpful to amend the existing law in order to permit the court to approve an arrangement on behalf of such a person, provided that the court is satisfied that the scheme was not prejudicial to that person's interests. It would be for the petitioner to satisfy the court that there would be no such prejudice, using the same methods as are currently used in relation to the interests of persons who are incapable of consenting on their own behalf. That might,

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[51] Recommendation 9 in our earlier Report.
[52] Section 55(1) of the draft Bill.
[53] See *Morris, Petr* 1985 SLT 252.

for example, involve retaining a fund equivalent to the actuarial value of the beneficiary's interest.

17.48 The effect of such approval would be to remove the possibility of future challenge if the beneficiary were to reappear and claim to have been prejudiced by the arrangement. Power to approve on behalf of an untraceable beneficiary exists or has been recommended for introduction in various other jurisdictions.[54] We propose to follow recommendations made in such jurisdictions by providing that the court would require to be satisfied that reasonable steps had been taken to trace the whereabouts of the beneficiary in question. We do not think that it is necessary in the statute to specify precisely which steps require to be taken to trace the beneficiary.

17.49 On consultation, respondents agreed with these proposals. Accordingly we made the following recommendation,[55] to which we now adhere:

> **88. The court should have power to approve an arrangement on behalf of a person who has not been traced, provided that it is satisfied that:**
>
> **(a) reasonable steps have been taken to trace the person; and**
>
> **(b) the proposed arrangement would not be prejudicial to that person's interests.**
>
> (Draft Bill, sections 54(5)(e) and 76(1)(b)(i))

Approval on behalf of adult beneficiaries who decline to consent

17.50 Another situation where a variation may be prevented from proceeding is where a beneficiary of full age whose consent is required withholds that consent, notwithstanding that he or she would sustain no prejudice as a result of the scheme. In some jurisdictions the court is permitted to approve of an arrangement on behalf of such a non-consenting beneficiary.[56] In Scotland, however, the theoretical basis underpinning court approval of a variation is the rule in *Miller's Trustees*, and the court supplies approval on behalf of beneficiaries who are incapable of giving agreement.[57] It would be inconsistent with this underlying rationale of consensus to allow the court to supply approval on behalf of non-consenting adult beneficiaries, even in cases where they would sustain no prejudice.

17.51 We invited comment on whether it should remain necessary to obtain the consent of all ascertained and traceable beneficiaries of full age and capacity with a non-negligible interest in the trust. There was no consensus among respondents to the consultation, but the majority were not in favour of giving the court power to approve of a scheme on behalf of a non-consenting beneficiary. It was mentioned that to do otherwise could be regarded as expropriation of the non-consenting beneficiary's property. We also formed the impression that refusal of consent by adult beneficiaries is not a common problem in practice.

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[54] Ireland (Law Reform Commission, *Report on the Variation of Trusts*, LRC Report No 63; 2000) and British Columbia (British Columbia Law Institute, *Report on the Variation and Termination of Trusts*, BCLI Report No 25; 2003).
[55] Recommendation 10 in our earlier Report.
[56] Eg the US Uniform Trust Code makes such provision at Section 411(e).
[57] See para 17.28 above.

17.52 On further consideration, we accepted the views of the majority and decided not to propose any change in the law. We remain of that opinion, and we adhere to the recommendation made in our earlier Report:[58]

> **89. It should remain necessary to obtain the consent of all ascertained and traceable beneficiaries of full age and capacity provided that they have a non-negligible interest in the trust.**
>
> (Draft Bill, section 54)

Consent of the truster

17.53 We expressed the view that it should be made clear that the consent of the truster (in such capacity) to the proposed arrangement is not required.[59] We considered that was consistent with our recommendation that adoption of material purpose should not be introduced.[60] We do not intend to alter the current practice whereby the truster is entitled to receive notice of the petition and to be heard on the question which is being addressed by the court, namely possible prejudice to beneficiaries upon whose behalf the court's approval is sought. We accordingly made the following recommendation,[61] to which we now adhere:

> **90. It should be confirmed by statute that consent of the truster in that capacity to the proposed arrangement is not required.**
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> (Draft Bill, section 59)

Miscellaneous procedural aspects

17.54 Finally, we considered a number of miscellaneous procedural aspects. We concluded that most of these did not require further action.[62] Two questions did result in recommendations, however. First, we thought that it was desirable that a variation may take the form of a resettlement of the trust property. We accordingly made the following recommendation,[63] to which we adhere:

> **91. It should be confirmed by statute that an arrangement may take the form of the creation of a new trust in relation to the whole or part of the trust property.**
>
> (Draft Bill, section 53(1)(d))

17.55 The other matter concerned the allocation of trust variation hearings within the Court of Session. We proposed the transfer of such applications from the Inner House to the Outer House on the ground that the business was not necessarily so complex or important that it justified being heard by three judges and that the volume of appeals in relation to trust variations would not be large enough to negate the benefit of the applications being handled in the Outer House. The Judges of the Court of Session agreed; they regarded this as the

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[58] Recommendation 11 in our earlier Report.
[59] See para 5.38 of our earlier Report.
[60] See para 17.11 and recommendation 79 above.
[61] Recommendation 12 in our earlier Report.
[62] At paras 5.39-5.44 of our earlier Report.
[63] Recommendation 13 in our earlier Report.

procedural matter most urgently in need of reform, and pointed out that transfer to the Outer House with a power to remit to the Inner House in any case of particular difficulty would bring the rules for private trust variations in line with those generally followed now for reorganisation of public trusts.

17.56 In our earlier Report we accepted that suggestion, and made the following recommendation,[64] to which we adhere:

> **92. The Rules of the Court of Session should be amended in order to permit a petition for approval of an arrangement varying or terminating private trusts to be presented in the Outer House, subject to a power given to the judge to remit the application to the Inner House in any case of particular difficulty.**

[64] Recommendation 14 in our earlier Report.

Chapter 18 Accumulation of income and the lifetime of private trusts: power of the court to alter trust purposes

Introduction

18.1 In January 2010 we published a Discussion Paper entitled Accumulation of Income and Lifetime of Private Trusts.[1] Its purpose was to consider the limitations that presently exist in Scots law on the duration of a private trust, and in particular whether those limitations are justified in contemporary circumstances. In particular, we considered whether the permitted duration of trust purposes should be restricted by law, and if so what form that restriction should take.

18.2 This might appear to be an issue of limited and specialised interest. Nevertheless, we considered that it was of general interest and importance for two reasons.[2] First, it raised a fundamental policy issue, namely the extent to which the present generation can tie up property long into the future, thus removing the freedom of future generations to do as they wish with that property. This is the so-called problem of "dead hand" control.

18.3 Secondly, we considered that the issue is of economic importance. Trusts are used extensively as a vehicle for investment and financial planning. They are of significance for the Scottish economy, where financial services form an important sector. We therefore thought it imperative that Scottish trust law should be suitable for use in contemporary financial and economic conditions, and that it should be perceived as such.[3] We considered that the existing Scottish rules could be seen as anachronistic.

Note on terminology

18.4 In this Chapter we are concerned with both *inter vivos* trusts (that is those set up by a truster which come into force during his or her lifetime) and testamentary trusts (that is those established by a testator in his or her will and which come into force on death). We generally refer only to trusters, but, unless the context clearly suggests otherwise, this should be understood as including testators. We make frequent references to liferents; these broadly correspond to life interests in common law systems, and may either be set up by trust ("trust liferents", sometimes known as "improper liferents") or not ("proper liferents").[4]

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[1] DP No 142.
[2] Ibid, para 1.3.
[3] We drew attention in DP No 142 (at para 1.4) to a Report from 2006 on the subject of trust law which was submitted to the Minister for Economic Development in Jersey; it makes important economic points, and remains relevant today. We have therefore quoted it again in the present Report: see para 1.3 and note 3 above.
[4] See Gretton and Steven, para 21.15. One difference is that a proper liferent involves only two parties (liferenter and fiar) whereas a trust liferent also involves a third, the trustee.

The present law

18.5 The existing restrictions on the duration of trusts in Scots law are discussed in detail in Part 2 of our Discussion Paper. For details of the law, reference should be made to that material. What follows is a very brief summary, designed to explain the policy that we have adopted and our decision to repeal a number of existing legislative and common law provisions.

Accumulations of income

18.6 Income from trust assets must be distributed, retained as income, or accumulated. If it is accumulated, it becomes additional capital of the trust.[5] Until 1800, the question of whether accumulation could take place over an extended period hardly appears to have been noticed in Scots law. In England and Wales the law was heavily affected by the rule against perpetuities;[6] the classic statement is:

> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[7]

The rule against perpetuities has never been part of Scots law, however. Accumulation of income for a prolonged period was not prohibited in either system. Nevertheless, following the case of *Thellusson v Woodford,*[8] concern was expressed that accumulation for a very long period might lead to the accumulation of large quantities of capital, with unfortunate economic and indeed political, consequences. Parliament therefore passed the Accumulations Act 1800,[9] under which accumulations could only be lawfully directed for one of four periods:

(i) the life of a grantor (or their lives, if there was more than one); or

(ii) 21 years from the death of the grantor(s); or

(iii) the minority, or respective minorities, of any person(s) alive or in the womb at the time of the death of the grantor(s); or

(iv) the minority, or respective minorities, of any person(s) who would, if of full age, be entitled to the accumulations.

Directions which infringed the rule were void: the income was to be paid to whomever would be entitled to it had no direction been made.

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[5] "Accumulation to my mind involves the addition of income to capital, thus increasing the estate in favour of those entitled to capital and against the interests of those entitled to income": *Re the Earl of Berkeley* [1968] Ch 744, 772 per Harman LJ.

[6] The original statement of the common law rule is found in *Re Duke of Norfolk's case* (1682) 3 Ch Cas 1. The rule was modified by the Perpetuities and Accumulations Act 1964: see para 2.5 of DP No 142. Further modification has since been made by the Perpetuities and Accumulations Act 2009. There are, therefore, currently three different regimes in England and Wales, each applying to different trusts depending on their date of creation. The 2009 Act applies to trusts created on or after 6 April 2010 (and, for testamentary trusts, to those created by testamentary writing executed on or after that date).

[7] J C Gray, *Rule against Perpetuities* (4th edn, 1942), p 191.

[8] *Thellusson v Woodford* (1805) 11 Ves Jr 112.

[9] Frequently known as the Thellusson Act; the history of the Act is discussed in paras 2.5-2.14 of DP No 142; the Act itself at paras 2.15-2.18; and the subsequent history of the legislation at paras 2.19-2.34.

18.7 The 1800 Act extended only partially to Scotland, and as a result accumulations of income from heritable property in Scotland were subject to the common law alone. This was altered, however, by section 41 of the Entail Amendment Act 1848.[10] The result was that all accumulations in Scotland were struck at by the 1800 Act. The Accumulations Act 1892, while not amending the text of the 1800 Act, restricted its application in respect of accumulations of income for the purchase of land only: such an accumulation is valid solely if restricted to the minority or respective minorities of any persons who would if of full age be entitled to the income.[11]

18.8 The law was then consolidated by the Trusts (Scotland) Act 1961, which repealed the 1800 Act and restated the permitted accumulation periods.[12] Not long afterwards, the 1961 Act was modified by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 which introduced two additional periods of accumulation.[13]

Restrictions on creation of future interests

18.9 The law also imposes two types of restriction on the creation of future interests. The first, a creature of statute, restricts the creation of successive liferents,[14] while the second is a common law rule dating from two 18th century cases (though the rule has now largely been restated in legislation).[15]

(i) successive liferents

18.10 Although there was legislation in this field from at least the 17th century, we begin our brief summary in the mid-19th century with the Entail Amendment Act 1848, which was intended to loosen many of the restrictions that then applied to entails in Scots law.[16] Sections 47 to 49 of the Act attempted to prevent what was seen as a potential abuse, namely the creation of what would amount in effect to an entail by means of other devices: trusts, liferents or leases. Because the Act was concerned with the law of entail, these restrictions applied only to land. Similar restrictions were extended to moveable property in 1868,[17] and the law was consolidated by the 1921 Act.[18] The law was further altered by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, whose section 18 is designed to re-state the general restrictions on the creation of liferents, although it only applies to deeds executed after the date when the Act came into force.

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[10] Often known as the Rutherford Act; its main purpose was to modernise the Scots law of entail.
[11] See para 2.22 of DP No 142.
[12] Section 5 of the 1961 Act is set out in para 2.26 of DP No 142.
[13] The relevant provision, s 6, is set out in para 2.28 of DP No 142.
[14] See paras 2.35-2.46 of DP No 142 for full details.
[15] See 2.47-2.58 of DP No 142.
[16] For a brief account of entails (or tailizies) see Gretton and Steven, para 29.30; there is a fuller account in GL Gretton, "Fideicommissary Substitutions: Scots Law in Historical and Comparative Perspective" in KGC Reid, MJ de Waal and R Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007), pp 156, 163-167.
[17] Section 17 of the Entail Amendment (Scotland) Act 1868 contained a provision restricting the creation of successive liferent interests in moveable property, whether by way of proper liferent or trust.
[18] See s 9 of the 1921 Act, which is set out at para 2.42 of DP No 142.

(ii) common law rules: Frog's Creditors and Newlands

18.11 The second category of restrictions on the creation of future interests is found in the common law rule stated in two 18th century cases, *Frog's Creditors v His Children*[19] and *Newlands v Newlands' Creditors*.[20] The effect of the rule in *Frog's Creditors* can best be approached by recalling two familiar rules of property law:[21]

> (i) It is not possible to transfer ownership to a non-existent or unidentifiable person.[22] Any attempt to do so would result in ownership lying *in pendente*, or in limbo, until the person is born or becomes identifiable. This rule applied as much in 18th century Scots law as it does nowadays (thereby confirming that it is not a technical aspect of feudal law, since it has survived the abolition of feudal tenure).
>
> (ii) In general, where ownership is ostensibly transferred to a non-existent or unidentifiable person the conveyance fails. If X transfers ownership to nobody, nobody acquires ownership from X who therefore remains owner.[23]

Frog's Creditors affirmed the first rule but created an exception to the second one by holding that a conveyance to a non-existent or unascertainable person with a liferent interest to a living individual results in that individual becoming owner. Where we refer to the rule in *Frog's Creditors* it should be understood as a reference to this exception. Further, although that case did not involve the use of a trust the rule has since been extended to include such situations.[24]

18.12 The rule in *Frog's Creditors* was widely regarded as unsatisfactory, and it was substantially displaced towards the end of 18th century. In *Newlands v Newlands' Creditors*, the disposition was in very similar terms but the property was described as being for the liferent use "allenarly" (that is, only) of the truster's son. The court was unanimously of the opinion that the disponer's intention was to restrict his son's interest to that of a liferenter and not fiar, and also that the fee could not be left hanging. This is in effect the first of the rules described in the paragraph above. Nevertheless, the disponer's son did not take the full fee, but was held to be a fiduciary fiar; that is to say, a person who was technically vested in the fee but which excluded the power of disposal, either onerously or gratuitously. The result was that the fiduciary fiar had a right that was substantially no more than a liferent.

18.13 The rule in *Newlands* has in part been put on a statutory basis by section 8 of the 1921 Act. Section 8(1) provides that, unless a contrary intention appears in the deed, where heritable or moveable property is conveyed (by means of a deed taking effect during life or on death) in fee to persons who, when the conveyance comes into operation,[25] are either unborn or cannot be ascertained, with a liferent interest to another person (who, necessarily, must be living), the liferenter "shall not be deemed to be beneficially entitled to the property

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[19] (1735) Mor 4262; 3 Ross' Leading Cases 602.
[20] (1794) Mor 4289; 3 Ross' Leading Cases 634. The House of Lords' decision of 1798 is reported at Mor 4289, 4294; 3 Ross' Leading Cases 634, 649; 4 Pat 43.
[21] See para 2.48 of DP No 148.
[22] More widely, it is far from clear that the common law permits a proper liferent to be created in favour of such a person: see note 66 to para 3.33 of DP No 142 .
[23] Eg *Colvile's Trs v Marindin* 1908 SC 911.
[24] See para 3.45 of DP No 142.
[25] The final sentence of s 8(1) deems this to be the date on which the liferenter first becomes entitled to receive the rents or income of the property.

in fee by reason only that the liferent is not expressed in the deed to be a liferent allenarly".[26] So, unless a contrary intention appears in the deed, the liferent interest is to have effect as if it had been declared to be a liferent allenarly.[27]

Further restrictions on lifetime of private trusts

18.14 In Scots law, long-term or perpetual trusts have never been unlawful *per se*.[28] A number of other common law rules, apart from those discussed in the preceding paragraphs, can have the effect of limiting the duration of trusts.[29] In particular, the unintelligibility or impracticability of trust purposes may be a reason for striking them down.[30] In addition, if a bequest can be considered to be unreasonable in all the circumstances, it may be struck down as being contrary to public policy. This is the rule that was recognised in the *McCaig* cases.[31] The general rule is that:

> "however, if a testator's directions reach a certain pitch of grotesqueness, of extravagance, of wastefulness, or of futility, then the testator's act may be regarded as going beyond the right of *testamenti factio*. There are, of course, unwise and even eccentric people who leave behind them unwise and eccentric wills. These are entitled to respect just as much as the wills of wise and sober-minded people. But the principle seems (if I may state it in a popular way) to be that, just as a mad person cannot make any will, so a sane person cannot make a mad will."[32]

Criticisms of the current law

18.15 A number of criticisms of the current law have been made over the years,[33] related principally to issues of complexity, uncertainty and inconsistency. For instance, significant problems have arisen as to what an "accumulation" is, what amounts to a "direction" to accumulate, what the duration of the permitted periods of accumulation is, and to the application of the rule restricting accumulations in a commercial context. We drew attention to a number of cases in which the arbitrary and unpredictable effects of the current rules are well illustrated. The rule restricting successive liferents had similarly been subject to criticism, as had the rules in *Frog's Creditors* and *Newlands* and in section 8 of the 1921 Act.

18.16 We also considered the policy justification for rules restricting the duration of trusts.[34] Historically, four main arguments have been advanced to justify such rules. First, it was suggested that the use to which income would be put while it was being accumulated would be different to its use once distributed, and that this would tend to have an adverse effect on the general economy. The first part of this supposition we thought justified, but we had considerable doubt about the second; we thought that it was most unlikely at the present day that the funds being accumulated by trustees at any given time would form a sufficiently significant part of the overall economy.

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[26] Subsection (1) applies only to conveyances which came into operation on or after 19 August 1921. By contrast, subs (2) applies to all conveyances in liferent and fee of the type described in s 8.
[27] Other provisions of section 8 of the 1921 Act are discussed in paras 2.54-2.58 of DP No 142.
[28] This is a very different approach from the English rule against perpetuities.
[29] See paras 2.60-2.76 of DP No 142.
[30] Ibid, paras 2.66-2.67.
[31] *McCaig v University of Glasgow* 1907 SC 231; *McCaig's Trs v Kirk-Session of United Free Church of Lismore* 1915 SC 426. For a detailed discussion see paras 2.69-2.76 of DP No 142.
[32] *MacKintosh's JF v Lord Advocate* 1935 SC 406, 410-411 per Lord President Clyde.
[33] See Pt 3 of DP No 142.
[34] Ibid, paras 3.53-3.74.

18.17 The second justification is the prevention of the accumulation of a "vast fortune" for a beneficiary who, at the time of the trust's creation, was not yet born. On this, we indicated that in order for a trustee to be able to accumulate a sum that is disproportionate to the amount originally bequeathed he or she must be in a position to out-perform other investments almost all the time. That does not happen in practice, however, and in any event the accumulation of wealth by trustees is controlled at the present day by the system of taxation.

18.18 Thirdly, it was suggested that the rules are justified in order to prevent the disinheritance of living family members in favour of future generations. We thought, however, that the present rule is too blunt and inflexible, and could prevent perfectly reasonable family arrangements from taking place.

18.19 Fourthly, it was said that the rules prevent "dead hand" control over property far into the lifetimes of future generations. We considered this argument at some length,[35] from both an economic and a moral standpoint. While we saw some merit in the moral arguments, in particular, we did not think that they justified the current, relatively inflexible and frequently arbitrary, restrictions on the lifetime of private trusts. Instead, we thought that the moral arguments pointed in a different direction, which we considered in Part 5 of the Discussion Paper.

Comparative law

18.20 We considered in some detail the approaches taken to the lifetime of trusts in a number of other legal systems.[36]

Reform of the law

18.21 In Part 5 of the Discussion Paper we considered the question of what restrictions the law should impose on the duration of trust purposes. In our view this raised two fundamental questions. First, are the present Scottish rules satisfactory; secondly, if they are not, what should be put in their place? The second question raised two further issues: is any rule or procedure required to restrict the duration of trust purposes, and if so what form should it take?

Commercial transactions

18.22 First, we considered the extent to which rules restricting the duration of trust purposes should apply to commercial transactions.[37] We were concerned in particular with a wide variety of commercial transactions that might potentially be affected by the rule restricting accumulation. These included pension schemes, life assurance policies, partnership agreements, unit trusts and other trust-based investment schemes. All of these involve transactions that are set up in order to achieve specific commercial objectives. They are far removed from the traditional form of family trust. It is in the context of the traditional family trust, however, that the rules restricting accumulation and successive liferents came into being. We could see no justification for the application of those rules to transactions that

[35] Ibid, paras 3.64-3.74.
[36] Ibid, Pt 4 and Appendices A and B.
[37] Ibid, paras 5.2-5.5.

are designed to achieve commercial objectives. In particular, transactions in the latter category are almost inevitably set up by a contract involving more than one party, and it must be assumed that the parties will negotiate an appropriate bargain designed to achieve their commercial objectives.[38] These are not cases where a truster attempts to set up by dynastic trust or to tie up property far into the future; to the extent that property is tied up, that is merely the bargain that the parties have concluded. Consequently, it seemed to us that the essential rationale of the rules restricting accumulations and successive liferents did not apply in these commercial cases.

18.23 There was, moreover, some doubt as to whether the rules restricting accumulation and successive liferents applied to commercial transactions; it seemed likely that they did not, but the matter was not clear. Overall, we considered the situation to be unsatisfactory. We thought that any uncertainty in this area of the law should be removed completely, in order that parties might have total freedom to negotiate the arrangements that best suit their commercial purposes. We pointed out that the trust has proved to be an enormously flexible legal institution, and that in commercial transactions it can be a simple and convenient device for having property held by one person for the benefit of another. We considered that anything that inhibited the use of trusts in commercial transactions was highly undesirable. We accordingly proposed:

> "1. Any rules restricting the duration of trust purposes should not apply to any commercial trust. This should be made clear by an express statutory provision."

18.24 This proposal met with universal support from those who responded to our consultation. Its significance, however, is affected by certain other proposals that we made which also attracted widespread support and on which we make recommendations in this Report. The result is that there is no longer any need for specific legislation.

18.25 The first of these other proposals is one to abolish the rules restricting the duration of private trusts in their entirety.[39] This means that a specific exception for commercial trusts is not necessary as such. We further recommend, however, that a power should exist to alter the purposes of a private trust where there has been a material change of circumstances and a period of 25 years has elapsed since the creation of the trust.[40] We do not think that this power should extend to commercial trusts, for two reasons. First, commercial trusts are usually contractual in origin, or are set up with a view to use in a commercial context, and our proposed power to alter trust purposes is not appropriate for alteration or amendment of contractual arrangements, as against trusts set up to hold private property. The parties to such arrangements are of course free to alter the trust as a matter of contractual agreement. Secondly, the deeds that set up commercial trusts will frequently contain provisions designed to permit alteration of the trust purposes in the future; this may happen, for example, in trusts designed to facilitate life assurance arrangements. If the parties think that future alteration may be desirable, that is the course that they should follow. Nevertheless, the abolition of all restrictions on the duration of trust purposes will mean that parties are free to enter into any trust arrangements that they wish.

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[38] We thought that this applied even where, for example, a life assurance company offered a standard type of policy that could be taken up by members of the public; every time that policy is taken out there is a contract between the company and the policyholder that is designed to achieve specific commercial objectives, which should be understood by the policyholder.

[39] See paras 18.42-18.44 below.

[40] See recommendation 95 in para 18.77 below.

Definition of "commercial trust"

18.26 So, although there is no longer any need for a statutory exception from the rules on the duration of trust purposes for commercial trusts, we still need to define that term. In our discussions of this question we indicated that two possible approaches could be taken.[41] The first was to rely on the fact that the expression "commercial" has a meaning that is generally understood in the context of trust law. The alternative was to adopt as the essential criterion for a commercial trust that it is set up in terms of or in connection with a bilateral (or multilateral) contract. In each case we thought that the trust was one resulting from a commercial bargain concluded by the parties, the trust being designed to give effect to that bargain. That is what excludes the rationale of the rules restricting the duration of trust purposes.

18.27 We thought that the first approach might put too much weight on the ordinary meaning of the word "commercial", although we did not think that that would present any difficulty in the great majority of cases. The difficulty with the second approach is that family trusts that include a contractual element might fall within the definition. We thought that whichever approach was taken, the normal categories of commercial trust should be quite clear. Trusts set up as part of life assurance policy or pension scheme, unit trusts and other trust-based investment schemes would be commercial trusts. So would trusts set up to facilitate the working of a commercial contract or security arrangement, such as a debt factoring agreement or a securitisation agreement, although we thought that the non-application of the existing rules was probably already clear in such cases. Partnership agreements, we thought, might be somewhat more complex. Nevertheless, we thought that where a family farm was held on trust for a partnership within the family, the fundamental relationship was that of partnership, and the trust was essentially a device to facilitate the holding of property for the use of the partnership. The fact that the partners were members of the family did not matter; the arrangement was still a commercial one: the partnership was the fundamental relationship, and the trust was essentially ancillary. Thus we thought that all trusts set up in terms of or in connection with a partnership agreement should be treated as commercial trusts. We further suggested that the relevant definition might be expanded by stating that it extended to, but was not restricted to, specified categories, including pension scheme trusts, life assurance policies, unit trusts and other trust-based investment schemes, and also partnership agreements.

18.28 We asked which of the two approaches to the definition of a commercial trust should be adopted, and whether any particular definition could be modified.[42] The majority of respondents favoured the first option, relying on the ordinary meaning of the word "commercial". Reservations were expressed by the Faculty of Advocates and Standard Life plc. The former suggested the formula: "a trust forming part of or deriving from one or more commercial arrangements, whose purposes are intended to give effect to those arrangements in full or in part". Standard Life made a valuable comment in relation to pension trusts, pointing out that a trust constituting a policy will generally be commercial in nature, but that the policy that so results may well be held on a private trust. We agree that it is important to distinguish these two situations.

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[41] See para 5.5 of DP No 142.
[42] Ibid, questions 2 and 3 in para 5.5.

18.29 After considering these responses, we took the view that the first of our suggested approaches, relying on the ordinary meaning of the word "commercial", was preferable. We thought that relying on the notion of a contract might be too restrictive, and that in the great majority of cases the notion of a "commercial" trust would be perfectly clear. We considered, however, that a number of relevant factors might usefully be set out in the legislation. The result is that we exclude any "commercial trust" from the court's power to alter trust purposes, but we include certain indicators of whether a trust is or is not commercial. The first of these is whether a trust is set up under a contract, be it bilateral or multilateral, of a commercial nature. In this way the second of our suggested approaches is brought in as an indicative factor as to whether or not a trust is commercial. The second indicator is whether the truster has settled property into the trust for value. The significance of this can obviously vary, but it is obvious that in many commercial trusts the value will have been given to the truster.

18.30 We have also provided specifically for certain categories of trust that will invariably be commercial trusts. These include authorised pension trusts, life assurance policies, unit trusts or any other trusts based investment schemes, and trusts created under or comprised in a partnership agreement. In relation to pension trusts, we have specified personal and occupational pension schemes within the meaning of the Pension Schemes Act 1993, if established under a trust. That means that any trust set up to hold the policyholder's interest in such a scheme will be a private trust and will be subject to the ordinary provisions of the new power to alter trust purposes which we recommend later in the Chapter.[43]

Existing rules restricting the duration of trust purposes

18.31 We then asked whether the existing Scottish rules restricting the duration of trust purposes were satisfactory.[44] The criticisms are summarised in the following terms:

(i) The rules are highly technical and complex. They are properly understood by a relatively limited number of practitioners, and detailed and careful advice is required in any case where they may apply. This inevitably imposes costs on both trusters and trustees. It also makes it difficult for the average family solicitor to give definitive advice on the validity of a trust if there is any possibility that it might infringe either rule.

(ii) Since 1800 the rule restricting accumulation, in particular, has given rise to a large amount of litigation. The same is true, albeit to a lesser extent, of the rule restricting successive liferents. That again indicates the financial cost of the rules.

(iii) The application of the rules is frequently uncertain; this is clearly illustrated by the large amount of case-law that has been generated.

(iv) Because of the complexity of the rules, it is relatively easy for a trust to infringe them inadvertently. This can have serious consequences, both in frustrating the truster's wishes and in imposing tax charges on the trust.

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[43] See recommendation 95 in para 18.77 below.
[44] See paras 5.6-5.21 of DP No 142; the existing rules, and criticisms of them, are discussed in Pt 3 of the DP.

18.32 We discussed a further line of criticism. The original reasons for the rules restricting accumulation and successive liferents appear to us to be no longer valid, to the extent that they ever were valid. In this connection, we made the following points.

(i) In relation to accumulations, the Thellusson Act was a reaction to one particular will and the ensuing litigation.[45] One of the main concerns appears to have been the possibility of building up large landed estates, with the political and economic power that the ownership of land accorded at the end of the 18th century. Economic conditions have changed enormously (and indeed were changing rapidly even in 1800), and the ownership of landed estates can no longer be regarded as a source of power, or indeed as a major source of wealth; shares and other forms of incorporeal property have clearly replaced land as the main form in which wealth is held.

(ii) Moreover, such empirical evidence as there is relating to trusts for long-term accumulation suggests that they are not particularly successful in building up wealth. That is true of Thellusson's trust; it is also true of the more or less contemporaneous accumulation trusts set up in Pennsylvania by Benjamin Franklin.[46] The fundamental point is that there is no reason that assets held in trust should out-perform the rest of the economy, and indeed it is extremely difficult to maintain substantial growth over long periods. Thus the fears that actuated the 1800 Act have not proved substantial.

(iii) It has been argued, although more with hindsight than at the time when the Accumulations Act was passed, that the result of accumulation is to inhibit or even prevent the proper economic exploitation of assets. That in turn is said to have an effect on the general economy. At a time when trustees' investment powers were severely limited there might well have been some force in this argument. At the present day, however, the investment powers of trustees have been greatly extended.[47] Moreover, it is standard practice in modern trust deeds to confer on trustees a power to invest the trust property "as if they were the absolute beneficial owners thereof". In these circumstances it seems most unlikely that the existence of a long-term accumulation trust would significantly impair the proper economic exploitation of trust assets.

(iv) A further argument used at the time when the Accumulations Act 1800 was passed was that it prevented trusters from disinheriting living descendants in order to favour later, unborn, generations. While we agree that some sort of balance has to be struck between the present and future generations,[48] we consider that the current formulation of the rule restricting accumulation is too

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[45] It seems, however, that a number of other testators were considering wills in similar terms: see paras 2.15-2.16 of DP No 142.

[46] Benjamin Franklin died in 1790, leaving two accumulation trusts, both for charitable purposes and each endowed with £1,000. He directed that income was to be accumulated for 200 years, with a payout after a century. When the trusts were wound up in 1990 one had amassed just less than $5m and the other had achieved less than half of that sum. See para 54 (note 127) of Appendix A to DP No 142.

[47] Eg by the Trustee Investments Act 1961, as amended by sch 3 to the Charities and Trustee Investment (Scotland) Act 2005; see Ch 7 above for a fuller discussion of this.

[48] See paras 5.16-5.21 of DP No 142.

blunt and inflexible, and can prevent perfectly reasonable trust arrangements from being made.

(v) In relation to successive liferents, it is noteworthy that the prohibition has its origins in the Rutherfurd Act of 1848 as an anti-avoidance measure in the legislation on entails. That is a strange source for what is now a free-standing rule. Entails have now been abolished by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.[49]

(vi) While the rule against successive liferents can be regarded as a mechanism to prevent the creation of a perpetual trust, it cannot be said to have achieved this result in anything like a comprehensive manner. Thus annuities fall outwith the rule, and other anomalous cases have arisen.[50] As with the rule restricting accumulation, the rule against successive liferents is blunt and inflexible in its operation.

18.33 We further considered developments in other jurisdictions.[51] We indicated that in a number of jurisdictions, notably Manitoba, South Australia, Jersey and Guernsey and certain states within the United States, restrictions on the duration of trusts had been all but removed. We noted that South Africa had never had rules restricting accumulation, and that in the Irish Republic, following recommendations of the Law Reform Commission, both the rule against perpetuities and the rule restricting accumulations were removed by the Land and Conveyancing Law Reform Act 2009. Even in England and Wales, the Perpetuities and Accumulations Act 2009 abolished the rule restricting accumulation and provided for a single perpetuity period of 125 years. We expressed the view that such a duration was unlikely to impose any practical restriction on the average truster.[52] In the jurisdictions where rules limiting the duration of trusts have been abolished, there do not appear to have been any adverse consequences. It seemed clear from the experience of those jurisdictions that trusters very rarely set up trusts of very long duration, for the simple reason that they nearly always wish to benefit their families in a sensible manner, and passing over immediate descendants in order to favour later generations simply does not make sense.[53] Consequently we thought it was possible for the law to rely on the general good sense of the typical truster,[54] and this view has been subsequently reinforced on consultation.

18.34 We then considered the disadvantages of the fixed rules restricting the duration of trust purposes.[55] We suggested that the rules restricting the duration of trust purposes were inflexible and liable to produce arbitrary results.[56] We further indicated that on occasion the

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[49] Before that, the creation of new entails was prohibited by s 8 of the Entail (Scotland) Act 1914; very few remained even prior to the 2000 Act.
[50] See paras 3.35-3.37 of DP No 142.
[51] Ibid, paras 5.8 and 5.9.
[52] We note that, according to Kessler and Grant, "in practice, most trusters do not look beyond benefiting those two or three generations ahead" (at para 8.2).
[53] This is obviously subject to tax considerations; for example, within the UK it will often be desirable to pass some property from a truster's estate directly to grandchildren, but that is clearly a reasonable disposal of property.
[54] We agreed with the Manitoba Law Reform Commission whose 1983 Report on Perpetuities stated: "We also cannot believe that even an eccentric would choose an accumulation trust in today's conditions for the attempted purpose of building a fortune for an unknown heir sometime in the remote future. In an era of corporate enterprise, diversification and take-over acquisitions leading to multi-national corporate activity, the accumulation trust wears more the appearance of the horse and buggy."
[55] At paras 5.10-5.15 of DP No 142.
[56] See, eg, paras 3.17, 3.23, 3.26-3.27, 3.30, 3.35-3.38 and 3.41 of DP No 142.

rules restricting accumulation and successive liferents can prevent perfectly reasonable arrangements from taking effect, sometimes with serious tax consequences; we gave the example of *McIver's Trustees v Lord Advocate*.[57] We considered that any rule that set fixed periods for the duration of trust purposes was likely to be inflexible and, largely because of that inflexibility, arbitrary in its practical operation. We thus thought that there were significant disadvantages in having any fixed rule restricting the duration of trust purposes. The justification in modern conditions might be a policy of ensuring that property is passed on through successive generations, so that a truster's immediate descendants were not passed over in favour of more distant descendants; in that way family responsibilities might be encouraged. If that were so, however, we thought that the existing rules of Scots law were quite disproportionate to the desired end. They are technical and complex, frequently uncertain, and often arbitrary and inflexible in their operation. At the same time, they do little to compel a truster to benefit his or her immediate descendants, who can readily be passed over. Furthermore, apart from alimentary obligations and the entitlement of a spouse, civil partner or issue to legal rights or legal share, a person can disinherit his or her family entirely. If it is considered important that the owner of property should bequeath a significant part of it to his or her immediate descendants, that could be achieved through the rules relating to legal rights or legal share.

18.35 We further pointed out that the Scots common law was not hostile to trusts of long duration. We also noted that, in view of the recent reforms carried out in jurisdictions such as Jersey, Guernsey, the Isle of Man and, most importantly, England and Wales, there was a danger that Scots law was perceived as outdated and that trust business would simply move out of the jurisdiction to other more accommodating jurisdictions within the British Isles. In addition we referred to the Court of Session's jurisdiction to reduce trust purposes on the ground that they are unreasonable. This provides a method of controlling the most extreme cases.

Policy considerations that remain relevant today

18.36 We thought that, of the policy considerations that remain relevant today, the most important, by some margin, was the "dead hand" argument developed by Professor Lewis M Simes, notably in an article, "The Policy against Perpetuities".[58] This was explained, in relation to the rule against perpetuities, as follows:

> "First, the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy. […] But, in my opinion, a second and even more important reason for the Rule is this: it is socially desirable that the wealth of the world be controlled by its living members and not by the dead. I know of no better statement of that doctrine than the language of Thomas Jefferson, contained in a letter to James Madison, when he said: 'The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct.'"[59]

18.37 Simes used this argument as a justification for the rule against perpetuities in the form that it took in most US states during the 1950s. We were firmly of the view that there

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[57] 1973 SC 189; we discussed this case at para 5.11 of DP No 142.
[58] (1955) 103 U Pa L Rev 707. See paras 5.16-5.21 of DP No 142 for a fuller discussion.
[59] (1955) 103 U Pa L Rev 707, 723.

would be no demand in Scotland for the introduction of the rule against perpetuities. On consultation that view was unanimously endorsed.

18.38 Nevertheless, it seemed to us that there was a point in Simes' argument: the law must strike some balance between the absolute freedom of a truster to do as he or she wants with his or her own property and the freedom of future generations to use the world's resources as they think best. We described this as a fundamental conflict. The main problem appeared to us to be that circumstances might change from those that obtained when the trust was set up. For example, a breadwinner might have died prematurely, leaving a surviving spouse and young children in dire need of financial support; or a descendant of the truster might be severely handicapped, necessitating financial support throughout his or her life. Those changes would not have been foreseen, and indeed might have been, in objective terms, unforeseeable.

18.39 Alternatively, the trust's financial circumstances might have changed. As an example, we referred to a case where the main asset of a trust had been shares in a company that operated a malt whisky distillery.[60] The value of the company, which owned one of the few remaining independent distilleries, rose dramatically and, ultimately, the company was sold to an international group of companies, greatly increasing the value of the trust fund. We indicated that changes of that nature might require fundamental reconsideration of the uses to which the funds were put: long term trust purposes that are perfectly reasonable for a fairly modest fund invested predominantly in a single family asset might become wholly inappropriate when the trust came to own liquid assets of a vastly greater amount.

18.40 Yet a third possibility was that the financial circumstances of the family or individual members of the family might change, in respect of either needs or resources. By way of example, we mentioned the possibility that a family member might lose his job just at the time when he required significant funds to enable his daughter to go to university, or a member of the family required funds urgently to set up a business. We referred to the examples provided by the recession that began in 2008. In all of these cases the needs of the current generation might come into genuine conflict with the wishes of the truster, and we thought that the fundamental question was how that conflict could be reconciled.

18.41 In that connection, we made two points which we still consider important. First, the type of trust where such a conflict is liable to arise will almost invariably be set up for the benefit of a family. Thus, in attempting to devise a practical solution, it was important to treat the family trust as the paradigm. Secondly, the "freedoms" of the truster, on one hand, and of future generations, on the other, are not precisely equivalent. The freedom of the truster to do as he wishes with his own property[61] is a liberty, or more strictly a power[62] recognised by Scots law.[63] The freedom of future generations, on the other hand, cannot be regarded as more than a moral freedom; it is not a liberty (or a power) in the legal sense.

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[60] See para 5.17 of DP No 142, and *RS Macdonald Charitable Trust Trs v Scottish Society for the Prevention of Cruelty to Animals* 2009 SC 6.
[61] Subject of course to claims of creditors, obligations of aliment, legal rights or legal share, and the like.
[62] See WN Hohfeld, "Fundamental Legal Conceptions" (1913) 23 Yale LJ 16, especially at 45 ("X [the owner of an item of corporeal movable property] has the power to transfer his interest to Y, – that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest.") In Hohfeld's analysis, a legal power is the opposite of a legal disability.
[63] Stair, *Institutions of the Law of Scotland* III, 4, 2.

Consequently, in a legal context, the freedom of the truster is primary, and the question becomes how far that freedom should be restricted in the interests of future generations.

Our suggested solution

18.42 We expressed the view that the time had come to address that issue,[64] and we give only a short summary here. We thought that the starting point was the power of the owner of property to dispose of it in any manner that he thinks fit. That was the traditional starting point of Scots law, and it was reflected in the absence at common law of any restrictions on the duration of trust purposes. We thought that fixed legal rules were not a satisfactory method of restricting that freedom. On that basis we made the following proposals and asked the following questions:[65]

> 4. The existing rules restricting accumulation and successive liferents should be repealed, with the result that a trust containing purposes of any duration is permissible.
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> 5. (a) Scots law should not adopt any rule, such as the rule against perpetuities, that restricts the duration of trust purposes to a fixed period or requires that vesting should take place within a fixed period.
>
> (b) Alternatively, if a rule restricting the duration of the trust purposes or vesting to a fixed period is thought desirable, what form should the relevant rule take, and what should be the relevant period? In particular, should Scots law adopt the proposed English rule that requires vesting within a fixed period of 125 years?

18.43 The repeal of the existing rules restricting accumulation and successive liferents met with universal support, subject to one qualification expressed by Dr Ford. He pointed out that public and charitable trusts were in a different position, in that there was a risk that a truster might direct long term accumulations for the fulfilment of grandiose charitable purposes which would not materialise for many years. That would create undesirable uncertainty. He pointed out that the reforms in the Perpetuities and Accumulations Act 2009 in England and Wales made special provision for charitable trusts. We consider that this point is well made, and we accordingly propose that public and charitable trusts should be excluded from the abolition of the rules restricting accumulation and successive liferents. We do not think that this will cause any difficulty; in practice trusters who set up public or charitable trusts almost invariably wish the benefits to be provided immediately. The restriction of successive liferents has, of course, no application to the purposes of a public or charitable trust *per se*. Proposal 5(a) set out just above, that Scots law should not adopt the rule against perpetuities or anything similar, met with universal support. On that basis question 5(b) did not arise.

18.44 For the foregoing reasons, we make the following recommendations:

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[64] See paras 5.22-5.57 of DP No 142.
[65] Ibid, para 5.57 and proposals 4 and 5.

93. (1) The existing rules restricting accumulation and successive liferents should be repealed, with the result that a trust containing purposes of any duration is permissible.

(2) Such repeals are not to apply to charitable trusts.

(Draft Bill, section 40)

94. Scots law should not adopt any rule, such as the rule against perpetuities, that restricts the duration of trust purposes to a fixed period or requires that vesting should take place within a fixed period.

18.45 We then considered a possible solution to the problem of reconciling the wishes of the truster with the needs of future generations in changed circumstances.[66] We suggested that an appropriate mechanism might be to provide that, after a private trust had been in existence for a set number of years, possibly 25, the Court of Session would have power to alter the trust purposes to the extent that such alteration was clearly expedient in order to take account of any material changes in circumstances that had occurred since the trust was created. The power would be exercisable on the application of either the trustees or any one or more of the members of the truster's family, whether or not they are beneficiaries.

18.46 We made this proposal on the basis that the underlying mischief of long term trusts was that the original trust purposes had become inappropriate in the light of a material change of circumstances. We emphasised that that mischief was not confined to long term accumulation trusts or trusts that provided for a long sequence of successive liferents; it applied to all long term private trusts of every sort (other than commercial trusts, as already discussed).[67] We accordingly thought that our proposed jurisdiction should not apply only to trusts that would have infringed the existing rules restricting accumulation and successive liferents.

18.47 We went on to consider in detail a number of aspects of such a jurisdiction. First, a material change of circumstances must be demonstrated. We thought that the relevant categories of change of circumstances would at least extend to changes in the personal or financial circumstances of one or more members of the truster's family or changes in the nature or amount of the trust property. We asked whether the relevant categories of change of circumstances should be defined on a comprehensive basis, or whether the general concept of a change in the circumstances of the trust should be used. We return to this matter below when we consider the details of our recommendation.[68]

18.48 Secondly, we proposed that the court should be subject to the constraint that the alterations to trust purposes be restricted to those that were clearly expedient in order to deal with the relevant changes in circumstances. In this connection, the court should have regard to the intentions of the truster. Those intentions should not, however, be binding on the court.

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[66] See paras 5.25 onwards of DP No 142.
[67] See paras 18.22-18.30 above.
[68] See para 18.72 below.

18.49 Thirdly, we considered the position of trustees, beneficiaries and members of the truster's family. We were of opinion that the court should be expressly empowered to disregard any provision ousting the proposed jurisdiction. The proposed jurisdiction was an attempt to deal with the "dead hand" problem. That involved a significant element of public policy: a truster should not be entitled to tie up property for a long period in a manner that, through change of circumstances, failed to meet the reasonable needs and wishes of the living generation. Consequently, the jurisdiction should apply regardless of the wishes of the truster. We thought that the consent of all of the beneficiaries should not be required, and that it should be competent for the court to alter trust purposes despite the opposition of one or more beneficiaries, or of the trustees. We emphasised that in that respect the jurisdiction was quite distinct from the existing power under section 1 of the Trusts (Scotland) Act 1961, or the corresponding jurisdiction discussed in Chapter 17 of this Report. We thought, however, that the courts should be required to have regard to the extent to which existing beneficiaries and trustees had consented to the proposed alterations, and whether the proposed alterations could be considered fair, objectively speaking, as among the existing beneficiaries and members of truster's family and the children, including subsequently born children, of existing beneficiaries and members of the truster's family. These requirements were intended to avoid the possibility that a minority of beneficiaries might attempt to force through changes that were beneficial to them but detrimental to the remaining beneficiaries. Nevertheless, the requirement of fairness only extended to existing beneficiaries and their children; there was no requirement to take into account later generations. That was a frank recognition of the underlying rationale of the court's power: to take account of the requirements and wishes of the current beneficiaries, even where that might conflict with the interests of generations yet to be born.

18.50 Fourthly, we suggested that a period should elapse before the proposed jurisdiction could be exercised. We thought that such a period was necessary for three main reasons. First, the jurisdiction was designed to deal with a mischief that exists in long term trusts, and the requirement that a trust should have been in existence for a substantial period emphasised that important feature. Secondly, we thought that the requirement should help to avoid the risk that family members who are unhappy with a trust will mount an early application to have its terms altered before any material change of circumstances has occurred. Thirdly, the proposed jurisdiction did not require the consent of all of the beneficiaries, and we thought that that fairly radical step should be counterbalanced by a requirement that a substantial period should have elapsed before the jurisdiction can be exercised. Our provisional view was that a period of 25 years should elapse before an application could be made.

18.51 Additionally, we thought that, for the avoidance of doubt, it should be made clear that the power to alter trust purposes included power to bring the trust to an end, in whole or in part, to provide for immediate vesting, and to postpone vesting. We further proposed that the new jurisdiction to alter trust purposes should be exercised exclusively by the Court of Session. This accorded with the existing law relating to trust variations under section 1 of the Trusts (Scotland) Act 1961 and petitions for the approval of *cy-près* schemes. We thought that this was desirable for three reasons. First, the proposed jurisdiction conferred a considerable measure of discretion on the court, and it was essential that this should be exercised in a consistent and principled manner. That could best be achieved if a single court were responsible for exercise of the jurisdiction. Secondly, it was important that the jurisdiction should be exercised by a court with a detailed and comprehensive knowledge of trust law. That is a specialised area, and we thought that the Court of Session was the most

appropriate court on that basis. Thirdly, those interested in a trust may reside in different parts of Scotland, and indeed in other parts of the world. Problems of jurisdiction would be avoided if the Court of Session alone had power to alter the purposes of a Scottish trust.

18.52 We then considered who should be parties to proceedings. In our view, a wide class of potential petitioners (and respondents) would be desirable, but we expected that the court would in general look more favourably on applications made by beneficiaries or by members of the truster's family closely related to beneficiaries, for two reasons. First, the court was required to have regard to the truster's intentions, which were to benefit one particular part of his or her family. Secondly, the court was directed to ensure fairness across the family, and in that regard it could be said that the interest of members closely related to beneficiaries is, at least in a moral sense, greater than that of those with a more peripheral connection.

18.53 We also gave consideration to a number of comparable jurisdictions: the *cy-près* jurisdiction affecting public trusts; the trust variation jurisdiction under section 1 of the Trusts (Scotland) Act 1961; and the power under section 5 of the 1921 Act to grant authority to trustees to exercise administrative powers. We considered too the power to vary trust purposes found in section 13 of the Trust Property Control Act 1988 in South Africa. We indicated that all of these were distinct in certain respects from the proposed jurisdiction.

18.54 We put forward a number of proposals and questions for comment, which we set out again here at length; this will allow readers to see at a glance what we were proposing, and it will also permit reference to be made later in this Chapter to specific items. These, therefore, are the proposals and questions on which we invited comment:[69]

> "6. When a private trust has been in existence for 25 years or longer, the Court of Session should have power to alter its purposes in order to take account of any material changes of circumstances that have occurred since the trust was created. In relation to such power:
>
> (a) The permitted alterations should be those that are clearly expedient in order to deal with the relevant changes in circumstances.
>
> (b) The relevant categories of change of circumstances should at least extend to:
>
> (i) changes in the personal or financial circumstances of one or more members of the truster's family (or the family that is intended to be benefited by the trust);
>
> (ii) changes in the nature or amount of the trust property; and
>
> (iii) changes in the tax regime.
>
> Prospective changes would also be relevant.
>
> (c) In order to justify the alteration of trust purposes, any change in circumstances would require to be material, in the sense that, considered

[69] See para 5.57 of DP No 142.

objectively, it has had or is likely to have a significant impact on the matters referred to in paragraph (b) above.

(d) In determining whether an alteration should be approved, the Court should have regard to the intentions of the truster, so far as these can be ascertained. To the extent that the truster's actual intentions cannot be ascertained, the Court should have regard to the probable intentions of a reasonable truster in the current circumstances of the trust. The intentions of the truster, or the probable intentions of a reasonable truster, are not to be binding on the Court; they are merely a factor to be taken into account in the exercise of the Court's discretion.

(e) In ascertaining the intentions of the truster, the Court may have regard both to the trust deed or testamentary writing that created the trust and to any other evidence that appears relevant to the issue.

(f) Although the Court may have regard to the intentions of the truster, it should be expressly permitted to disregard any provision in a trust deed or any other document that purports to exclude the proposed jurisdiction.

(g) The Court's power should be exercisable on the application of the trustees or of any one or more of the beneficiaries or of any descendant of the truster or of any ancestor or descendant or guardian of an actual or potential beneficiary. Any of the foregoing persons may also appear as a respondent to oppose a petition, in whole or in part.

(h) It should not be necessary that either the trustees or all of the beneficiaries consent to any proposed alteration. Nevertheless, in determining whether to authorise an alteration, the Court may have regard to the following factors:

(i) the extent to which the existing beneficiaries and trustees have consented to the proposed alterations; and

(ii) whether the proposed alterations can be considered fair, objectively speaking, as among the existing beneficiaries and existing members of the truster's family and the children, including subsequently born children, of existing beneficiaries and existing members of the truster's family.

(i) The Court's power to alter trust purposes should permit it to terminate the trust or to provide for the immediate vesting of trust property in any person, or to postpone vesting.

7. If such a jurisdiction is conferred on the Court, is it appropriate that a period of years should elapse before the jurisdiction can be exercised? (Reference is made to paragraph 5.30.) If so, is our proposed period of 25 years appropriate? If not, what period would be appropriate?

8. (a) Is it appropriate to define the categories of change of circumstances that are relevant for the exercise of the proposed jurisdiction? Alternatively, is

it preferable to rely merely on the general concept of a change in the circumstances of the trust?

(b) If it is appropriate to define the categories of change of circumstances, would a suitable definition be that in Proposal 6(b)?

(c) If the relevant categories of change of circumstances are defined, should the definition be exclusive? Alternatively, would it be preferable to refer to a change in the circumstances of the trust including the categories set out at paragraph (b) above?

(d) Should the expression 'family' be defined? If so, would it be appropriate to refer to the following categories:

(i) the descendants of the truster;

(ii) any beneficiaries named or otherwise identified in the trust deed;

(iii) the descendants of any such beneficiaries;

(iv) the spouse of any of the above persons?

Alternatively, what other definition might be used?

9. Is it appropriate that the intentions of the truster should be taken into account in the manner suggested at paragraphs (e) to (g) of Proposal 6?

10. Is it appropriate that the persons identified at paragraph (h) of Proposal 6 should be entitled to present an application to the Court or to oppose such an application? Should any of the identified categories be excluded, or should any other categories be included?

11. Are the proposals at paragraph (i) of Proposal 6 appropriate?"

Consultation responses

(i) proposed jurisdiction to alter trust purposes

18.55 A substantial majority of respondents, including the Law Society, the Faculty of Advocates and STEP, welcomed the proposed jurisdiction of the court. The Faculty and STEP thought that the jurisdiction should be exercisable from the point when the trust comes into existence; the former acknowledged that there might be some controversy about this point. In relation to the suggestion that there should be no time limit, we take the view that it should be open to trusters to specify that an application under the proposed jurisdiction can be made starting at any time from the creation of the trust up to 25 years after its creation, but that that should not be compulsory. On this point, Standard Life plc indicated that trusters who set up *inter vivos* trusts might wish to exclude the power during their lifetimes. We think that there is force in this point, and we accordingly consider that the default position should be that the jurisdiction is excluded for a period of 25 years from the creation of the trust or the truster's lifetime, if that is longer.

18.56 Some respondents suggested that the power might encourage trusters to take their business to another jurisdiction, given the uncertainty that it would produce. Against this, however, a significant majority of respondents, including the three main professional bodies, thought that the jurisdiction would be attractive, in that trusters would know that there was power to modify the trust to take account of future changes of circumstances. Reasonable trusters, they thought, would favour such a power. On this basis, we are of opinion that the power should be introduced.

(ii) criteria for exercise of the power

18.57 Among those supporting the power to alter trust purposes, there was general support for the proposition in proposal 6(a) that the permitted alterations should be those that are clearly expedient in order to deal with the relevant changes in circumstances. STEP suggested that the legislation ought not to be too heavily prescriptive, and also that only changes which are external to the deed should be considered, so that the exercise of a power of appointment would not count as a relevant change. We agree with these suggestions, and we have taken them into account in our recommendations. We note, however, that if a power of appointment is exercised, it is the position of the trust following that exercise that must be considered if there is a further external change of circumstances.

18.58 The Faculty of Advocates suggested that the expression "material change in circumstances" should be defined to include all changes in the law, including those brought about by case law. We agree that case law developments could bring about a change in circumstances, in the form of a change in the law. We think, however, that this is implicit in the notion of a change in circumstances brought about by change in the law.

(iii) categories of change in circumstances

18.59 In relation to proposal 6(b), the Law Society proposed that the list of changes of circumstances should be non-exhaustive. We agree with that view, as it is impossible to guarantee that every possible category of change of circumstances has been foreseen. The Law Society further suggested that the word "family" should be replaced with "beneficiaries". We have not adopted this recommendation. The fundamental policy intention was that we should recognise that trusts are set up to benefit a family, and in some cases a member of the family who was excluded from the trust (perhaps because he or she was thought to be well off) might be able to argue for an alteration. The fact that such a person is not a beneficiary might well be a material circumstance that weighed heavily with the court in deciding whether to exercise the jurisdiction, but we think that the possibility should exist that such a person could make an application.

18.60 STEP suggested that the relevant categories of change of circumstances should be amended to cover:

- changes in the personal or financial circumstances of one or more of the persons intended to be benefited by the trust;
- changes in the nature or the amount of the trust property;
- changes in the personal or financial circumstances of one or more members of the truster's family; and

- changes in the tax regime.

They thought that prospective changes should also qualify. We think that these suggestions are helpful, and we have adopted them. Changes in the tax regime should, we think, cover changes in the general law; the Faculty of Advocates made a suggestion to that effect.

18.61 The Faculty suggested that an express reference to a change in the circumstances of the truster should be added, and that the jurisdiction should not encompass the situation where the truster has simply made a mistake. We agree with the latter point: mistakes are dealt with by the general law,[70] and there is no need to invoke the proposed jurisdiction. As to the first issue, we are concerned that having regard to the truster's position could result in Scottish trusts being regarded as in some way revocable, and that is not our intention. For this reason we are not inclined to adopt the suggestion.

18.62 The Faculty also raised an issue about testamentary trusts: if a material change in circumstances occurs between the execution of the will and the death of the testator, is that a relevant change of circumstances? We consider that there is some force in this point; many people do not review their wills regularly, and it is obviously possible that the testator suffered from mental incapacity for much of the period after the will was executed. We accordingly consider that it should be competent for the court to take account of changes that occur after a testamentary deed has been executed, even before it has taken effect. In such cases, however, it can be expected that the court will have regard to the question of whether the testator was aware of those changes and did nothing to deal with them. Thus it is likely only to be in cases where he or she was suffering from mental incapacity, or it can be shown that he or she was unaware of the changes and their impact on the trust, that the court is likely to exercise its jurisdiction to deal with this matter.

(iv) materiality of change in circumstances

18.63 In relation to proposal 6(c), STEP suggested that, for the avoidance of doubt, the exercise by trustees of discretionary powers under the trust deed should not count as a material change of circumstances. We agree, because in such a case there is no change in circumstances that was not contemplated by the truster.

(v) relevance of intentions of truster

18.64 On proposal 6(d), STEP expressed the opinion that the court should be obliged to consult the truster (where he or she has capacity) in exercising the jurisdiction, and that letters containing the truster's wishes should be allowed to carry significant weight in ascertaining his or her intentions. We thought that the point about letters of wishes was implicit in our proposals. We further think that, if the truster is still capable, it should be necessary to intimate the petition to him or her, to allow representations to be made.

(vi) evidence relevant to exercise of court's discretion

18.65 On proposal 6(e), the Faculty of Advocates pointed out that allowing recourse to extrinsic evidence in order to ascertain the truster's intentions would add considerable complexity and costs to the application, although it was noted that judicial developments in

[70] We discuss this in Ch 19 below, especially at paras 19.19-19.28 and 19.41-19.42.

the field of contractual interpretation did not appear to have increased litigants' burdens to a dramatic extent. Questions were also raised about the procedure that might be followed: whether a reporter should be appointed, and how the court should treat a clause akin to an "entire agreement" clause. The Faculty did not favour restrictions on the evidence that might be available. We formed the view that the problems of allowing recourse to extrinsic evidence were probably fairly limited; the courts can be expected to adopt a sensible procedure to limit the scope of the inquiry. If necessary, a relatively inexpensive way of doing so would be the appointment of a reporter, which would be competent under flexible court procedures. In some cases evidence might be necessary, but it is difficult to avoid this. In general, we think that the court can be relied on to follow sensible and efficient procedures. In relation to clauses akin to "entire agreement" clauses, we think that the court should be entitled to disregard any such provision. The fundamental point of the jurisdiction is that it goes beyond the terms of the trust deed and should not be limited by anything contained in it. Nevertheless, such a provision might be relevant in casting light on the truster's intention.

(vii) disregard of provisions that purport to exclude the proposed jurisdiction

18.66 Among those who favoured the jurisdiction, proposal 6(f) met with universal support. The Faculty of Advocates thought that an attempt to exclude the jurisdiction should be treated as a factor weighing against court interference. In individual cases there might be some force in this, but we do not think that it is necessary to make provision to that effect.

(viii) parties with title to apply to court

18.67 In relation to proposal 6(g) both STEP and the Faculty of Advocates suggested that the truster should be included as a person with title to apply for exercise of the proposed jurisdiction. We agree with that suggestion. The Faculty further suggested that any judicial factor on the trust estate should have power to apply to the court. We agree: the judicial factor is essentially in the same position as a trustee. Finally, the Faculty also questioned whether the expression "potential beneficiary" included someone with an interest under a discretionary trust, or was merely confined to those with contingent interests. They suggested that both should be included. We agree that both should be included; the intention is that those who have title to apply should be as widely defined as possible. We observe, however, that it is extremely unlikely that a remote beneficiary under a discretionary trust would find that the court was willing to grant such an application. It can be expected that the court will use common sense in deciding whether the beneficiaries in question have a substantial interest in altering the trust purposes, and if they do not the application is likely to be rejected on a summary basis.

(ix) no requirement of consent by trustees or beneficiaries

18.68 Proposal 6(h) met with universal support among respondents who supported the jurisdiction. The Faculty of Advocates suggested that the list of relevant factors should be non-exhaustive, and should include two additional matters:

- whether the trust deed contains powers of amendment and resettlement; and
- the period which has elapsed since the deed was executed or, as the case may be, since the truster died.

We agree with these suggestions, and we have taken them into account.

(x) power to terminate trust, to provide for immediate vesting, and to postpone vesting

18.69 Respondents agreed with proposal 6(i).

(xi) appropriate time period before power may be exercised

18.70 A number of different views were expressed on the subject matter of question 7. STEP, the Faculty of Advocates, and Deloitte LLP considered that 25 years was too long, but were not in agreement as to what the appropriate period would be. Standard Life, as we have already mentioned, stated that trusters might reasonably wish to exclude the jurisdiction during their own lifetimes.[71] As we have indicated, we agree with these views to some extent, and we suggest that the default position should be that the power can be exercised from a date 25 years after the creation of the trust, or from the date of the truster's death (whichever is later). Nevertheless it should be possible for the truster to reduce that period or to exclude it entirely, though not to extend it.

18.71 A further suggestion was that 25 years was too short a period and that a more appropriate length would be determined by reference to the deaths of the generation of the family who were under the age of 25. We think that this would be over-complicated, and that a simple default period should be provided. We think that the court can be trusted to insist that only genuine and material changes of circumstances are taken into account, and that what is done is designed specifically to deal with those changes of circumstances. On that basis there is no great virtue in having a particularly long period. We think that the 25 year period is appropriate as the default provision, on the basis that it represents a "short" generation.

(xii) meaning of "change in circumstances"

18.72 We asked in question 8 whether it was appropriate to define the categories of change in circumstances that were relevant, or whether it was preferable to rely merely on the general concept of a change in the circumstances of the trust. A bare majority of respondents favoured reliance on the general concept of a change in circumstances; these included the Law Society and STEP. Others favoured a defined list of categories. We consider that the best solution would be a general definition, along the lines suggested in question 8(a), with a non-exhaustive list of examples.

(xiii) definition of "family"

18.73 Only three respondents dealt with question 8(d). The Law Society wanted to replace "family" with "beneficiaries"; we have rejected this for the reasons stated above.[72] The Faculty of Advocates agreed with the proposals but wanted "descendants" and "spouse" to be defined. STEP suggested that spouses should be excluded. We take the view that STEP may well be correct that trusters frequently want spouses to be excluded; there may be tax reasons for doing so. Consequently, where a trust deed excludes a spouse, it must be assumed that that is done deliberately, and that is clearly an important factor that the

[71] See para 18.55 above.
[72] See para 18.59 above.

court must take into account in exercising the jurisdiction. We do not, however, think that this requires the automatic exclusion of spouses in all cases. We gave serious consideration to the Faculty's suggestion that further definition is required. Ultimately, however, we took the view that the expressions "descendants" and "spouse" are reasonably clear as a matter of general law. Thus adopted children would count as descendants, but children accepted into the family would not, because there is no strict legal relationship. "Spouse" would not include a former spouse following divorce, again as a matter of general law. In relation to separated spouses, the relationship would still exist, but it can be expected that the court will attach great significance to the fact that the spouse in question was not living with the truster's descendant. In the event, we decided that there was no need to define "family" but we expect that considerations such as those outlined in this paragraph would be relevant for the court if the issue were to arise.

(xiv) relevance of intentions of truster

18.74 In relation to question 9, respondents unanimously agreed that the intentions of the truster should be taken into account in the manner suggested at paragraphs (d) to (f) of proposal 6.

(xv) persons entitled to make an application

18.75 In answer to question 10, respondents agreed generally that it was appropriate that the persons identified at paragraph (g) of proposal 6 should be entitled to present an application to the court or to oppose such an application. The Law Society suggested that anyone who satisfied the court that they had an interest should be entitled to present an application, and that a list of examples would be useful but should not be definitive. The Faculty of Advocates agreed with the proposal, and suggested that it should be left to the court to decide whether other parties, such as the Lord Advocate, the Advocate General, the truster and judicial factors, should receive intimation. We agree generally with these suggestions. We think that the court can be relied upon to ensure that intimation is made to those who have a substantial interest in the application. We should emphasise, however, that this does not mean that, in a case involving very wide discretionary trust purposes, every possible discretionary beneficiary should receive intimation. Intimation should be restricted to beneficiaries who can be said to have a significant interest in the trust. We do not think that anything needs to be said about this in the legislation, however; it is sufficient to rely on the Court of Session's power to regulate its own procedure. In general, it can be expected that the requirement of intimation will be severely curtailed, and that only those with a genuine interest (in the technical legal sense of that word) in the application will receive intimation.

(xvi) extent of court's power

18.76 In relation to question 11, respondents were unanimous in considering that proposal 6(i) was appropriate.

Recommendations

18.77 In the light of the foregoing consultation responses, we make the following recommendation:

95. When a private trust has been in existence for 25 years or longer, the Court of Session should have power to alter its purposes in order to take account of any material changes of circumstances that have occurred since the trust was created. In relation to such power:

(a) The permitted alterations should be those that are clearly expedient in order to deal with the relevant changes in circumstances.

(b) The relevant categories of change of circumstances should at least extend to:

(i) changes in the personal or financial circumstances of one or more members of the truster's family (or the family that is intended to be benefited by the trust);

(ii) changes in the personal or financial circumstances of one or more of the persons who are intended to be benefited by the trust;

(iii) changes in the nature or amount of the trust property; and

(iv) changes in the tax regime.

Prospective changes should also be relevant.

(c) In order to justify the alteration of trust purposes, any change in circumstances would require to be material, in the sense that, considered objectively, it has had or is likely to have a significant impact on the matters referred to in paragraph (b) above.

(d) In determining whether an alteration should be approved, the Court should have regard to the intentions of the truster, so far as these can be ascertained. To the extent that the truster's actual intentions cannot be ascertained, the Court should have regard to the probable intentions of a reasonable truster in the current circumstances of the trust. The intentions of the truster, or the probable intentions of a reasonable truster, are not to be binding on the Court; they are merely a factor to be taken into account in the exercise of the Court's discretion.

(e) In ascertaining the intentions of the truster, the Court may have regard both to the trust deed or testamentary writing that created the trust and to any other evidence that appears relevant to the issue.

(f) Although the Court may have regard to the intentions of the truster, it should be expressly permitted to disregard any provision in a trust deed or any other document that purports to exclude the proposed jurisdiction.

(g) The Court's power should be exercisable on the application of the trustees, or of any one or more of the beneficiaries, or of any descendant of the truster, or of any ancestor or descendant or guardian of an actual or potential beneficiary, or of the truster. Any of the foregoing persons may also appear as a respondent to oppose a petition, in whole or in part.

(h) It should not be necessary that either the trustees or all of the beneficiaries consent to any proposed alteration. Nevertheless, in determining whether to authorise an alteration, the Court may have regard to the following factors:

(i) the extent to which the existing beneficiaries and trustees have consented to the proposed alterations;

(ii) whether the proposed alterations can be considered fair, objectively speaking, as among the existing beneficiaries and existing members of the truster's family and the children, including subsequently born children, of existing beneficiaries and existing members of the truster's family;

(iii) whether the trust deed contains powers of amendment and resettlement; and

(iv) the period that has elapsed since the deed was executed or since the truster died.

(i) The Court's power to alter trust purposes should permit it to terminate the trust or to provide for the immediate vesting of trust property in any person, or to postpone vesting.

(j) The period of 25 years that must elapse before the jurisdiction of the court may be exercised may be reduced by the truster in the trust deed; and in an *inter vivos* trust it may be extended until the truster's death.

(k) The power of the court to alter trust purposes does not apply to commercial trusts or to public trusts.

(Draft Bill, sections 60 and 71)

The rules in *Frog's Creditors* and *Newlands*

18.78 We went on to consider the criticisms of the rules known as the rule in *Frog's Creditors* and the rule in *Newlands*.[73] We pointed out that both were of great antiquity. The rule in *Frog's Creditors* dated back to the first half of the 18th century, and the rule in *Newlands* dated from the end of that century and was in part superseded by statute in 1921.[74] We expressed the view that these rules have little relevance in modern practice.

[73] See paras 5.58-5.68 of DP No 142.
[74] For a full discussion of these rules, see paras 2.47-2.58 and 3.47-3.52 of DP No 142.

We also expressed the view that they were unjustifiable restrictions on the duration of private trusts, and that their technical and frequently arbitrary nature could create hazards for unwary trusters. Against that background, we made the following proposals which were unanimously supported on consultation and which we therefore adopt as recommendations:

96. The common law rules in *Frog's Creditors v His Children* and *Newlands v Newlands' Creditors* should be abolished and section 8 of the Trusts (Scotland) Act 1921 should be repealed.

(Draft Bill, sections 40(4) and 79 and schedule 2)

97. Where a person conveys property to Y in liferent and to Z in fee and Z is non-existent or unidentifiable at the time of the conveyance, Y should take a liferent interest (but no more) and the conveyance to Z should fail.

Application to existing trusts

18.79 We took the view that the new jurisdiction to alter trust purposes should apply to all trusts, whenever created.[75] The exercise of the jurisdiction would be decided by the court on a case by case basis; if a beneficiary would be deprived of rights that he or she enjoyed under a trust set up prior to the legislation coming into force, that is a relevant factor and one which might well cause the court to refuse the application, especially if the rights fall within the scope of Article 1 of the First Protocol to the European Convention on Human Rights. In some cases, however, such a beneficiary might be said to benefit in another way, or might consent to the alteration. Thus we could see no reason for not allowing the power to apply to all trusts.

18.80 In relation to the abolition of the rules restricting accumulation and successive liferents, however, we thought that it should apply only to new trusts, namely those created after the legislation comes into force, or (where appropriate) only to dispositions of property taking effect after such time. This is because beneficiaries of existing trusts and existing disponees might have already acquired property rights under Article 1 of the First Protocol to the European Convention on Human Rights and the effect of the abolition could be to deprive them of those rights.[76] As this area of the law is extremely technical, it would be quite impossible to predict where such cases might arise. For this reason we thought that retrospectivity was not possible and so the proposals should apply only to trusts created after the legislation is commenced. Respondents generally agreed with the foregoing proposals. Accordingly we recommend:

98. (1) Recommendations 93, 96 and 97 should only apply to trusts set up, or to other dispositions of property taking effect, after legislation implementing those recommendations has been brought into force.

(Draft Bill, section 40(5)(a))

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[75] See para 5.69 of DP No 142.

[76] We point out at para 5.69 of DP No 142 that the acquisition of the rights may, in some cases, be unintended by the truster but that does not affect the analysis of the effect of the law and of A1P1 ECHR in particular.

(2) Recommendation 95 should apply to all private trusts whenever created.

(Draft Bill, section 60(15))

Scope of reforms

18.81 We further proposed that the new jurisdiction of the court to alter trust purposes should not extend to public trusts or commercial trusts, nor to any part of a trust that was public or commercial in nature.[77] On consultation, respondents agreed unanimously with that proposal. We therefore recommend:

99. Recommendation 95 should not extend to public trusts or commercial trust, nor should it extend to any part of a trust that is public or commercial in nature.

(Draft Bill, sections 60(1) and 71)

Court's power to hold a trust purpose to be unreasonable

18.82 The court has power to reduce any provision in a trust that can be considered unintelligible, impracticable or unreasonable.[78] We considered whether it might be appropriate to extend the new jurisdiction of the court to cover such cases, but formed the view that this would unduly complicate that jurisdiction, which is concerned with changes in circumstances, not unreasonable decisions made by trusters. We therefore proposed that the court's existing jurisdiction should continue, and should not be affected by the new jurisdiction. Respondents agreed generally with that proposal, although two respondents, Dr Ford and the Faculty of Advocates, indicated that it would be helpful if the court were to have power to make a partial reduction. We can see some force in these points, but ultimately we take the view that a partial reduction should be competent under the existing common law power. On that basis we make the following recommendation:

100. The Court should continue to have power to reduce any trust purpose on the ground that it is unintelligible, impracticable or unreasonable. That power should continue to be exercisable at any time, and should not be affected by the jurisdiction described at recommendation 95.

18.83 Finally, we should indicate that Dr Nichols, who was a member of the Law Society's Trusts and Succession Sub-Committee but submitted general comments on his own behalf, suggested that it might be appropriate to expand the current common law power to reduce trust purposes that are unintelligible, impracticable or unreasonable to reduce certain types of trust, such as quasi entails and dynasty trusts. We can see some force in his suggestion. Nevertheless, the experience of jurisdictions such as Manitoba which have abolished all restrictions on the duration of trust purposes suggests that there is no appetite for setting up quasi entails or dynasty trusts. For that reason we doubt if there is a particularly serious problem here. In some, relatively extreme cases, the common law power could easily be relevant. In other cases, our proposed power to alter trust purposes on account of a material

[77] See paras 5.71-5.72 of DP No 142.
[78] Ibid, paras 2.59-2.76.

change of circumstances would strike in a fundamental manner at quasi entails and dynasty trusts. For that reason we think that Dr Nichols' concerns are taken into account adequately under our proposals.

Chapter 19 Defects in the exercise of trustees' powers

19.1 In our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law, we raised the question of the effect of errors and other defects in the trustees' exercise of discretionary powers.[1] That discussion was in part motivated by litigation that was then pending in England and Wales concerning the rule of English law that is usually known as the rule in *Hastings-Bass*.[2] Shortly before our Paper was published, the Court of Appeal had issued a decision in two conjoined cases, *Pitt v Holt* and *Futter v Futter*[3] where the rule was reviewed and restated in a greatly restricted form. Those cases have subsequently been considered by the UK Supreme Court,[4] which decided that the power in equity to grant redress for mistake ("mistake in equity") was potentially applicable and that, in one of the two cases, *Pitt v Holt*, such power was sufficient to provide redress. We do not propose to consider those decisions further:[5] it is very clear that they relate to extremely technical aspects of English law which we have no desire to incorporate into Scots law.

19.2 The line of cases following on from *Hastings-Bass* did, however, provoke some comment in Scotland, including an interesting article by Derek Francis which suggested how an analogous principle might be developed in Scotland following on from the decision in *Dundee General Hospitals v Bell's Trustees.*[6] We therefore asked whether there was support for, or opposition to, the statutory enactment of a rule which would enable the exercise of trustees' discretionary powers to be reduced or otherwise altered if the trustees were in error as to the considerations that ought to have been taken into account by them in the exercise of their power.[7]

19.3 The question was intended purely as a sounding of opinion in Scotland, and several of those who responded to the Paper declined to offer a view on this particular issue. This included the Judges of the Court of Session, who indicated that they would prefer to reserve their view on the matter until final determination of *Pitt v Holt* and *Futter v Futter*. Despite reluctance to express a view until English law had been fully determined, the route that we suggested was not to follow the English authorities but to develop a new remedy in Scots law, based largely on existing Scottish authorities. Such an approach met considerable support on consultation, although it is fair to say that there was also a considerable degree

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[1] See Ch 14 of DP No 148.
[2] *Re Hastings-Bass (Deceased)* [1975] Ch 25. The rule is summarised in para 14.2 of DP No 148, and the relevant case law is discussed at greater length in the opening paragraphs of our Consultation Paper on Defects in the Exercise of Fiduciary Powers (2011).
[3] [2011] EWCA Civ 197, 9 March 2011. The appeals are from *Pitt v Holt* [2010] EWHC 45 (Ch) and *Futter v Futter* [2010] EWHC 449 (Ch).
[4] [2013] UKSC 26. The decision of the Court of Appeal was broadly confirmed in relation to the rule in *Hastings-Bass*; in effect the rule was declared not to exist.
[5] There is a discussion of *Pitt v Holt* as it relates to "mistake in equity" by the Chancellor of the High Court, Sir Terence Etherton, in the ACTAPS Annual Lecture 2013 (20/11/2013; available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/chancellor-speech-actaps-annual-lecture-20112013.pdf), especially from para 26 onwards.
[6] 1952 SC (HL) 78; D Francis, "*Hastings-Bass* and his Scottish friends" 2008 SLT (News) 161.
[7] Question 38 at para 14.4 of DP No 148.

of opposition. The Faculty of Advocates in particular supported the development of a rule based on the *Dundee General Hospitals* case. The Law Society submitted two responses. One of these, from the Trusts and Succession Sub-Committee, was opposed to the enactment of a rule permitting relief for defects in the exercise of fiduciary powers. Their view was that all other individuals have to stand by the choices that they make for trust purposes, and trustees should be no different. The only basis for supporting such a rule would be for reasons of parity if a similar right existed in England and Wales. We note at this point that the decision of the Supreme Court in *Pitt v Holt* allows relief for mistake in equity in such cases.

19.4 The Law Society's Pensions Sub-Committee, by contrast, favoured legislation. We found their response to be powerful. The material part is as follows:

> "In the Committee's view there is a pressing requirement for a 'simple non-technical procedure' to facilitate the correction of errors or other defects which are identified in the exercise of trustees' powers in relation to pension schemes.
>
> With the best will in the world, mistakes and ambiguities frequently arise in pensions documents, particularly as amendments tend to be 'layered' on top of each other, so that changes designed to achieve one particular result can inadvertently lead to inconsistencies with other provisions in the documents.
>
> The absence of a simple non-technical forum to address such issues results in disproportionately large legal bills where employers and trustees take the view that legal certainty has to be achieved if at all possible. Alternatively, and less satisfactorily, the view is often taken that a corrective document should be signed, and the employer and trustees keep their fingers crossed that no-one will ever challenge their actions in correcting the error in this way."

The Pensions Sub-Committee's response went on to refer to English pension cases where the rule in *Hastings-Bass*[8] has been invoked.[9] Thereafter the response referred to the Scottish case of *Low & Bonar Plc v Mercer Ltd*[10] and continued:

> "It is the Committee's view that the administration of occupational pension schemes would benefit enormously from the continued development and application of a 'commercially sensible' approach to the resolution of the difficulties and doubts which can arise in interpreting and applying the provisions of pension scheme documentation, in a forum which allows the issues to be aired and examined properly, but with efficiency and as little expense and formality as is consistent with giving proper consideration to the issues in hand."

19.5 In the light of the responses from the Faculty of Advocates and the Pensions Sub-Committee of the Law Society, in particular, we decided that it was appropriate to develop a remedy along the lines suggested in the Discussion Paper. We accordingly prepared a Consultation Paper to that end.[11] At the time of publication we expressed the view that there was no point in waiting until the conclusion of the final appeals in *Pitt* and *Futter*, because the issues in those cases were peculiar to English equity. We remain firmly of that view in light of the Supreme Court's decision in those cases.

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[8] *Re Hastings-Bass (Deceased)* [1975] Ch 25.
[9] *Mettoy Pension Trs Ltd v Evans* [1991] 2 All ER 513; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch); and *Smithson v Hamilton* [2008] 1 All ER 1216, a case which is heavily criticised.
[10] [2010] CSOH 47.
[11] See note 2 above.

19.6 We have also noted that in other jurisdictions, perhaps most notably Jersey, courts have declined to follow the line given by the English courts and have developed a remedy for the defective exercise of trustees' powers. In Jersey, relief has been granted since the decision of the Royal Court in *Re Green GLG Trust*[12] where the *Hastings-Bass* principle was declared to be part of Jersey law. That approach was followed in a number of other cases,[13] and there has been recent statutory development too in the form of an amendment to the trusts legislation.[14] Parallel developments have taken place in other offshore trust jurisdictions. Together, these appear to indicate that there is a strong demand for a remedy in such cases.

19.7 In our Consultation Paper, we indicated that, although it was issued as part of our trusts project and the exercise of discretionary powers by trustees was likely to be the main area of interest, we thought that consideration should be given to the exercise of fiduciary powers of all sorts. The importance of that was illustrated by *Pitt*, which involved the exercise of a fiduciary power by a receiver acting under the (English) Mental Health Act 1983. We expressed the view that any discretion exercised under a fiduciary power should be covered; all such powers share the important feature that they must be exercised in the interests of another person or other persons, and it is this distinctive feature that informed much of our consideration of the issues. This view is now qualified, however, for the reasons set out below.[15]

The basic issue

19.8 In the Consultation Paper we referred to a number of illustrative English cases, and discussed the views of the Court of Appeal in *Pitt v Holt* and *Futter v Futter*.[16] We then moved on to what we consider to be the fundamental question in this area of law, namely whether statutory provision should be made in Scotland for challenges to the exercise of fiduciary powers, on appropriate grounds.[17]

19.9 We incline to the view that such challenge should be possible, on clearly defined grounds, for two main reasons. First, Scots law already allows unilateral acts to be challenged. With a straightforward voluntary disposition, challenge is possible on the ground of essential error, in the sense of an error but for which the disposition would not have been made. That is vouched by the decision of the House of Lords in *Hunter v Bradford Property Trust Ltd.*[18] Furthermore, in the case of the exercise of a fiduciary power by trustees, challenge is already possible on grounds that, broadly speaking, correspond to the grounds for judicial review of administrative action: consideration by the trustees of the wrong

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[12] [2002] JLR 571.
[13] *Seaton Trs Ltd v Morgan* [2007] JRC 2006; *Leumi Overseas Trust Corporation Ltd v Howe* [2007] JRC 248; *In the matter of Seaton Trs Ltd*, [2009] JRC 050, and *In the matter of the R Trust*, [2011] JRC 085; *In the matter of the Onorati Settlement* [2013] JRC 182. See also J Howard, "Hastings-Bass – Oceans apart?" (2011) 1 PCB 23, 26.
[14] The Trusts (Amendment No 6) (Jersey) Law 2013 came into force on 25 October 2013. Early indications suggest, however, that the pre-existing law is still being used: the first case to be decided after the 2013 amendment came into force, *Strathmullan Trust* [2014] JRC 056, was pled and decided on the pre-existing law relating to mistake. See Carey Olson's briefing note on the case at http://bit.ly/1iZCj2D, and also their note on a subsequent decision: http://bit.ly/1kwxPE9.
[15] See paras 19.50-19.53 below.
[16] See, respectively, paras 5-13 and 14-22 of the CP on Defective Exercise.
[17] See paras 23-27 of the CP on Defective Exercise.
[18] 1970 SLT 173. The case was decided by the House of Lords in 1960 but not reported for a decade. The Outer House decision, issued in 1957, was not published until even later: 1977 SLT (Notes) 33.

question, a failure of the trustees to apply their minds to the right question; the trustees' perversely shutting their eyes to the facts; and failure to act honestly or in good faith. That is the effect of the decision in *Dundee General Hospitals.*[19] The type of case that we were considering fell under the second of these categories, the exercise of a fiduciary power. In such a case, we expressed the view that, if there were significant defects in the exercise of the power, challenge ought to be possible. We thought that the same might be true if at the time when the power is exercised the trustees or other fiduciaries were labouring under a material error.[20]

19.10 Secondly, we indicated that the essential feature of a fiduciary power is that it is exercisable for the benefit of others, not the donee of the power. If the power is not exercised properly, it is normally not the donee, the fiduciary, who suffers the loss but the objects of the power, that is, the beneficiaries. That situation seems to us to require the possibility of challenge by the beneficiaries if there has been a defect in the exercise that has prejudiced them. That appears to us to be the reasoning that underpinned the views expressed by Lord Reid in the *Dundee General Hospitals* case.

19.11 Our consultation and researches revealed that there was considerable demand for such a power. We found the views of the Pension Sub-Committee of the Law Society, quoted above,[21] to be powerful and persuasive. We also noted that the rule in *Hastings-Bass* had been followed in a substantial number of other jurisdictions, including Jersey, Guernsey, the Isle of Man and the Cayman Islands. The indications from those jurisdictions were that the rule was regarded as extremely important.

19.12 We further noted that, while facilitating tax avoidance might not appear an especially worthy objective, that would not be by any means the only use of a ground of challenge. Pension trusts were an obvious area where the power would be important, and *Pitt v Holt* is a good example of another type of case: it concerned the wife of a seriously disabled man who was appointed his receiver and who, on incorrect advice, made an error in administering the funds that her husband received as compensation for his accident.

19.13 Finally, on the basic question, we indicated that in many cases where powers are exercised defectively the reason will be incorrect legal advice.[22] We noted that it was true that in such cases there might well be a right of action against the professional advisors for their negligence, but we thought that this was not a complete answer. In a typical trust situation, proceedings for professional negligence are far from straightforward. Establishing negligence may not be easy in cases where, for example, the relevant tax law is not clear. Furthermore, professional advice will normally be given to the trustees with the result, at least in Scots law, that only the trustees had title and interest to sue for professional negligence. They are not, however, the parties who normally suffer the loss; the loss is likely to be suffered by beneficiaries, who would lack title and interest to sue because they had no contact with the professional advisors. The defence might therefore be mounted that trustees themselves had suffered no loss and so should recover nothing.

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[19] 1952 SC (HL) 78.
[20] At para 23 of the CP on Defective Exercise.
[21] At para 19.4.
[22] At para 27 of the CP on Defective Exercise; *Pitt v Holt* (cited in note 3 above) is an example.

19.14 We thought it possible to avoid this problem using a technique, developed in the field of building contracts, whereby one party to a contract can recover for losses suffered by others but subject to an obligation to account for any damages recovered to those others.[23] Nevertheless, the fundamental point remained that proceedings for professional negligence would not be entirely easy. Furthermore, the powers in question would normally be discretionary, and in such a case the beneficiaries have no pre-existing right to any property, and only obtain property through the acts of the trustees. If, therefore, the beneficiaries receive less than they might have hoped for because of a tax liability, can it be said that their position is any worse than it was before the power was exercised? In short, the complexities involved in actions for professional negligence were such that we thought that a more direct remedy, that of reduction of the exercise of the discretionary power, was more satisfactory.

Grounds of challenge

19.15 We identified a number of possible grounds of challenge, to which we now turn.[24]

(i) defects in the fiduciary's approach to exercising the power

19.16 We indicated that, if a statutory right were granted to challenge the exercise of fiduciary powers, the grounds would require to be specified clearly. Our starting point was the list of defects mentioned by Lord Reid in *Dundee General Hospitals*:[25]

> "If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith then there was no true decision."

We thought that these grounds of challenge were somewhat more comprehensive than the grounds that had been recognised in England and Wales in the *Hastings-Bass* line of cases. They clearly bear some relationship to the grounds of challenge that are recognised in relation to the judicial review of administrative action. While the control of trustees' decisions obviously fell into a wholly different area of the law from judicial review, we thought that there were points of similarity, in that discretionary powers according fairly wide freedom of action were involved in both cases.

19.17 We then went on to generalise the grounds suggested in the *Dundee General Hospitals* case in the following terms:

> (i) Consideration of the wrong question or failure to consider the correct question;
>
> (ii) Failure by the trustees to apply their minds properly to the correct question, even though they purport to do so;
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> (iii) Perversity, whether through the trustees' shutting their eyes to the facts or in some other manner; this should probably extend to unreasonableness,[26] in the sense

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[23] *Alfred McAlpine Construction Ltd v Panatown Ltd (No 1)* [2001] 1 AC 518 (HL); *McLaren Murdoch & Hamilton Ltd v Abercromby Motor Group Ltd* 2003 SCLR 323. See also T Rosen Peacocke, "Liability of professionals retained by settlors and trustees following *Pitt v Holt/Futter v Futter*" (2011) 25(3) Tru LI 125, 138 onwards. We intend to consider the issues raised by these and other similar cases in a forthcoming Discussion Paper on Remedies for Breach of Contract.

[24] See paras 29-41 of the CP on Defective Exercise.

[25] 1952 SC (HL) 78, 92.

of a decision that no reasonable trustees, properly instructed in the facts and law, could properly have reached;

(iv) Failure to act honestly or in good faith; this would probably be sufficient to cover fraud on a power, although it is possible that that concept should be referred to expressly;

(v) As an extension of the first and second of these grounds, failure to take relevant considerations into account or taking irrelevant considerations into account.

19.18 We noted that *ultra vires* was not included in the list. If a decision by trustees is *ultra vires*, that is, beyond their powers, it is simply void; that had been recognised in English law in *Pitt*, and it was clearly in accordance with Scots law. Nevertheless, we thought that in the interests of providing a comprehensive remedy to deal with the defective exercise of trustees' and other fiduciary powers, it might be desirable to consider whether *ultra vires* should be included as a specific ground of challenge.

(ii) error

19.19 We indicated that error is recognised as a ground of challenge in other areas of the law, notably in relation to contracts, voluntary deeds and the field of unjustified enrichment. The question accordingly arose as to whether beneficiaries should be entitled to challenge a decision by trustees or other fiduciaries on the simple ground of error.

19.20 At the outset, we expressed the opinion that no distinction should be drawn between errors of fact and errors of law. That distinction, once important, became discredited in the field of unjustified enrichment during the 1990s[27] and we could see no virtue in resurrecting it in relation to fiduciary powers. We noted that if the grounds of challenge were restricted to errors of fact, the utility of any remedy would be seriously curtailed, especially in cases of defective advice, which would usually be legal in nature.

19.21 We indicated that in the case of ordinary bilateral contracts error is recognised as a ground of invalidity, but in heavily restricted circumstances. We noted the complexity of the law in this area, and expressed the view, at a very high level of generality, that error would generally only be relevant if it is common to both parties (or mutually shared by both parties), or if it is induced by representation made by one party, or where the error of one party is known to the other who takes advantage of it in concluding the contract.[28] There were clear policy reasons for restricting the relevance of error in this way. Where it was common or mutual it affected both parties, and therefore it was plainly reasonable to take it into account. Where it was induced by the misrepresentation of one party, it was only fair that the other party should be able to escape the consequences of any error so induced by reduction of the contract. Similarly, when one party to a contract was in error and the other knew of the error but said nothing, thereby taking advantage of the error, basic fairness demanded that there

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[26] Unreasonableness in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223;.

[27] See, eg, *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151; *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; our Report on *Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements* (SLC No 169; 1999).

[28] This related to the pure question of error, and ignored the law of fraudulent or negligent misrepresentation.

should be a remedy, once again reduction of the contract.[29] Apart from these cases, however, mutual contracts involved rights and obligations on both sides, and the general policy that contracts must be performed overrode any desire to take a tender attitude towards those who made mistakes. Furthermore, the general principle that contracts are interpreted and enforced according to objective criteria supported the view that an error made by one party should generally be disregarded.

19.22 We indicated that these considerations did not apply to unilateral deeds or undertakings. The most significant case in this area was *Hunter v Bradford Property Trust Ltd*, where Lord Reid stated the law as follows:

> "Then the appellants maintained that it is not the law that a gratuitous contract can be reduced by reason of essential error of only one party. There is no decision of this House to that effect, but I think that it follows from the decision of *McCaig's Trustees v The University Court of the University of Glasgow* (1904) 6 F 918. That decision followed on earlier decisions which could perhaps be explained on other grounds. But it has stood unchallenged for over half a century, and it appears to me to be reasonable and in accord with the principles of Scots law that a person should not be entitled to retain a gratuitous benefit given under essential error on the part of the person conferring the benefit."[30]

Lord Keith stated the law as follows:

> "That a gratuitous obligation entered into under a material error reasonably entertained is a ground of reduction under the law of Scotland is, I think, well settled by authority. The error may sometimes be an essential error as to the nature of the obligation undertaken. Such error is illustrated, I think, in the cases of *Purdon v Rowat's Trustees* (1856) 19 D 206, *McLaurin v Stafford* (1875) 3 R 265, and possibly *Macandrew v Gilhooley* 1911 SC 448, 1911 1 SLT 92. Material error with regard to some extrinsic deed or circumstance is illustrated, I think, in the cases of *Dickson v Halbert* (1854) 16 D 586 and *McCaig v The University Court of the University of Glasgow* (1904) 6 F 918. In the matter of gratuitous obligation entered into through error it does not, in my opinion, matter whether the error is essential error as to the nature of the deed, or error as to some extrinsic circumstance material to the granting of the deed. In either case the deed is, in my opinion, reducible. The present case appears to me to come into the latter category."[31]

19.23 As we have mentioned, the exercise of a fiduciary power by trustees is not the same as the granting of a unilateral deed or the entering into of some other gratuitous obligation. The latter case involves a voluntary act of the obligant. The exercise of a power by trustees can in some respects be regarded as a voluntary act,[32] but it is an act performed under a power that is granted by a third party, the truster. Moreover, when trustees are given a fiduciary power, there will almost invariably be a duty to consider, on a continuous basis, whether that power should be exercised. Finally, and importantly, the trustees' exercise of a power is a fiduciary act dealing with property to which others are entitled.

19.24 These are all important differences from the case of a unilateral deed or other gratuitous obligation, and we indicated that they pointed to the conclusion that the case for

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[29] *Steuart's Trs v Hart* (1875) 3 R 192; *Angus v Bryden* 1992 SLT 884; *Wills v Strategic Procurement (UK) Ltd* [2013] CSOH 26.
[30] *Hunter v Bradford Property Trust Ltd* 1970 SLT 173, 186.
[31] Ibid, 191.
[32] But in some cases, eg the exercise of a narrowly drawn power of appointment, there may be a duty to act.

interference with trustees' exercise of a power is greater than exists with mere voluntary deeds and other gratuitous obligations. Nevertheless, the policy adopted by Scots law towards voluntary deeds and other gratuitous obligations provided some support for according a remedy in the case of fiduciary powers. The considerations that apply to bilateral contracts are absent. Overall, we suggested that the fiduciary nature of the exercise of trustees' discretionary powers was a factor that strengthened the case for interference in cases of error. In such a case, the trustees have been charged by another person with exercise of a discretionary function, and if they are in error in exercising that function they are doing damage not to themselves but to the beneficiaries in whose interest they are intended to exercise the power. In that way they are failing to fulfil properly the trust reposed in them by the truster.

(iii) nature of error required

19.25 We went on to consider the nature of the error that would justify a remedy. We thought that two features were relevant. First, the error must be of sufficient materiality to justify the intervention of the court; not every trivial mistake would justify the overturning of the fiduciary's decision. In this connection we proposed that the criterion should be that the error is "material", in the sense that the fiduciary would not have made the decision but for the error. We avoided the traditional contractual terminology of "essential" error for two reasons. First, the exercise of a fiduciary power raises issues which were in some respects fundamentally different from the law of contract, and we thought that the difference would be highlighted by the different terminology. Secondly, there is some doubt in the field of contract as to what "essential error" actually means, and we were anxious to avoid such uncertainty. We noted that the notion of material error, in the sense described, would be sufficient to cover errors as to the nature of the act that was being performed by the trustees or as to its effect or consequences. In some English Chancery cases a distinction had been drawn between effects and consequences. We expressed the view that it was difficult to follow this distinction; the dictionary meanings of those words tended to be similar, and both words in their basic signification referred to the results that are achieved by an act. There might be an intention in the English cases to draw a distinction between the immediate effects and the more remote consequences, but we thought that that was a difference of degree rather than kind and that it might give rise to undue uncertainty.[33] The notion of materiality seem to us to be the important criterion, and we thought that the remedy should be available for any error as to the nature, effects or consequences of the fiduciary's act, provided that the error was sufficiently material.

19.26 The second feature that we thought should be essential before a remedy could be granted was that the error should be as to the legal or factual position at the time when it was made. The result would be that subsequent developments could not create an error retrospectively. We thought that this was implicit in the very notion of an "error". It was a feature of error in the law of contract that it must relate to present facts or law, not future developments that might take place. So far as fiduciary powers were concerned, if a

[33] In Chambers Dictionary "effect" is defined as "the result of an action"; "consequence" is defined as "that which follows or comes after as a result or inference: effect: the relationship of an effect to its causes". In the Shorter Oxford English Dictionary "effect" is defined as "something accomplished, cause or produced; a result, a consequence". "Consequence" is defined as "a thing or circumstance which follows as in effect or result from something preceding". In each case it is the primary meaning that is quoted. It is clear from these definitions that the two words are close to being synonyms. Differentiating between them is the sort of distinction that brings the law into disrepute.

development took place in the future that made the exercise of the power unwise, there might be a remedy through the trust variation jurisdiction or our proposed new jurisdiction to permit the court to alter trust purposes to take account of a material change of circumstances.[34] The remedy did not, however, seem to us to lie in the law of error.

19.27 We noted two qualifications in relation to this point. The first of these related to cases where trustees proceed on a current understanding of the law but that understanding is shown to be wrong by a subsequent court decision. The effect of the court's decision is of course that the law is declared always to have been as the court finds it to be. The result of that, we thought, was to make the trustees' decision erroneous, in the sense that we have discussed, because it relates to what is ultimately held to be the correct state of the law when the trustees' decision is made.

19.28 Secondly, an error as to present circumstances can include an erroneous belief that some event will take place in future. We gave the example of trustees who make a decision in the belief that a particular amendment to the tax legislation will come into force on 6 April the following year. It is then decided by the tax authorities that the change should be postponed or abandoned, and legislation is passed cancelling the earlier, prospective, legislation. In that situation we thought that what was involved could properly be described as an "error", because it related to the trustees' current understanding. What would not be covered is a case where trustees exercise a power of appointment and then, say, three years later, the law is altered with adverse consequences. In this case the alteration in the law would be a new matter, and it could not be said that the trustees were in error; their objectives were rather frustrated by subsequent event.[35] While this distinction is important, we expressed the view that it was covered by the basic notion of "error".

Remedy

19.29 We went on to discuss the remedy that should be available.[36] We indicated that the normal remedy for such cases in Scots law is reduction, and we thought that this should be the remedy in the type of cases that we had under consideration. We indicated that reduction is an equitable remedy (in the Scottish sense), with the result that the court can in an appropriate case refuse it, if the result appears unfair. That could apply, for example, where trustees exercised a fiduciary power in a particular manner and either the beneficiaries or third parties acted on the faith of that exercise; in that situation, reduction might be refused or granted on the condition that those who had acted on the faith of the exercise of the power were compensated.[37] We thought that these were general considerations applicable to the remedy of reduction, however, and we did not think that they had to be elaborated for present purposes. We noted that the equitable nature of the remedy did not appear to give rise to great difficulty in practice. Difficult cases could be imagined, but it is very difficult to lay down general rules, and we thought that the best course was to leave it to the courts to deal with the equitable nature of the remedy as it arose on the facts of individual cases.

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[34] The trust variation jurisdiction is discussed in Ch 17 above, and the power to alter trust purposes to take account of a material change of circumstances is the subject of Ch 18.
[35] In this respect there is a parallel with the distinction in the law of contract between error, on the one hand, and impossibility of performance or frustration, on the other.
[36] See paras 42-45 of the CP on Defective Exercise.
[37] The effect of reduction is that a legal act is annulled *ab initio*.

19.30 We also drew attention to the fact that the principles of homologation and adoption could apply to the exercise of fiduciary powers. Even where a power was invalidly exercised, where those benefiting from it adopt the exercise as valid, or otherwise homologate it, the exercise would still be treated as valid and reduction was likely to be excluded. We noted that this was the result of general principles of law, and we did not think that specific provision was required to deal with it in relation to the defective exercise of fiduciary powers.

19.31 As to the parties with a right of challenge, we thought that these would normally be the beneficiaries, but that it might be appropriate to allow the trustees or other fiduciary to have their own act reduced if they realised the error. It might also be appropriate to permit a truster, and any protector or supervisor, to seek reduction of the decision of trustees or other fiduciaries. In general, we thought that the rules about title to bring an action of reduction in this area should not be limited, and should essentially coincide with a notion of interest to sue.

Consultation

19.32 In the light of the issues raised in the Discussion Paper and the subsequent Consultation Paper, we made a number of proposals and asked a number of questions to gauge views on the matters outlined above.[38] On consultation, they received generally favourable responses. The two main objectors were HM Revenue and Customs and the Trusts and Succession Law Sub-Committee of the Law Society.[39]

19.33 HMRC conceded that, under Scots law, challenge to the exercise by trustees of fiduciary powers was already possible on the grounds indicated in *Dundee General Hospitals*. They did not object in principle to the proposal that acts of trustees should be open to challenge on the basis that in so acting they had defectively exercised their powers. They were concerned, however, to ensure that what qualified as a defective exercise of a fiduciary power by trustees was delineated with sufficient precision so that otherwise legitimate and valid acts were not liable to be impugned simply because they were perceived to give rise to undesirable tax consequences. In relation to this concern, we note that the power that we recommend is in accordance with the existing law and is, we think, quite precisely defined.

19.34 The Law Society's Trusts and Succession Law Sub-Committee indicated that some members of the Committee disagreed with the proposal in principle but could see its practical use. The Committee as a whole thought that the current proposal was too broad, and that too many people could bring a challenge. They expressed some sympathy with the views expressed by the Pensions Sub-Committee, and suggested that pension funds might be treated as a special case. In relation to this suggestion, we took the view that there was no coherent reason for limiting the application of the proposed reform to pension schemes; we do not think that they present any special features that require different treatment from other cases where a fiduciary power is exercised by trustees.

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[38] See para 46 of the CP on Defective Exercise.
[39] As already mentioned at para 19.4 above, the Pensions Law Sub-Committee of the Law Society submitted a separate response, which was favourable.

19.35 Our proposals received strong support from other respondents, including the Faculty of Advocates, STEP, the Pensions Law Sub-Committee of the Law Society, and the Judges of the Court of Session. An issue raised by one respondent was a concern that the proposed right of challenge could be abused by disgruntled beneficiaries. We think that the answer to this is that spurious challenges would be dealt with by adverse findings in expenses; in our view this would confine applications by beneficiaries to cases of some merit. Furthermore, we note that applications for exercise of the proposed power are likely to come before a specialised trust judge in the Court of Session, who can be expected to be sensitive to the need to protect trustees against unmeritious challenge.

Recommendations

19.36 In view of the level of support indicated in the last paragraph, we are of opinion that it is appropriate to introduce a statutory procedure in Scots law to deal with the defective exercise of fiduciary powers. We accordingly make the following recommendation:

> **101. A statutory procedure should be made available in Scots law to permit challenge to the exercise by trustees, including executors, of any fiduciary power on specified grounds that cover, generally, cases where the power is defectively exercised.**
>
> (Draft Bill, section 63)

19.37 The second of our proposals related to the grounds on which the exercise of fiduciary powers might be challenged. The list of grounds of challenge in our proposal, which draw on those set out in paragraph 19.17 above,[40] met with general approval, although a number of respondents made detailed comments. In particular, HMRC expressed the view that a fiduciary fulfils his or her duty to take account of relevant considerations in any case where he or she recognises that the case in hand is one in which it would be appropriate to seek professional advice before acting and obtains and acts in accordance with such professional advice. In such a case the fiduciary could not be said to have considered the wrong question or failed to consider the correct question. Any remedy would therefore lie against the professional adviser, and it should not be possible to reduce the transaction recommended by the professional adviser. We understand the point that is made here, but the simple answer to it is, as we have already mentioned,[41] that actions against professional advisers raise difficult issues that may deny the beneficiaries a remedy. Furthermore, we are of opinion that, where a fiduciary power has been exercised defectively, it is better to reduce the transaction, or otherwise unwind its effects, rather than to encourage professional negligence claims. Reduction is a much more effective remedy, and it achieves the result that should have occurred had the fiduciary fulfilled his or her duties properly in the first place. Furthermore, it is clear that Scots law already accords wide remedies in this general area; that is clear from *Dundee General Hospitals* and *Hunter v Bradford Property Trust*. We do not see why fiduciaries should be treated any differently from others.

19.38 We accordingly make the following recommendation:

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[40] The main difference is that, where the grounds in para 19.17 refer to trustees, this is replaced by a reference to fiduciaries in our proposal. We discuss this further at paras 19.50-19.53 below.
[41] See para 19.13 above.

102. Challenge to an act of a trustee should be possible on the following grounds:

(a) Consideration by the trustee of the wrong question or failure to consider the correct question;

(b) Failure by the trustee to apply his or her mind properly to the correct question, even though he or she purports to do so;

(c) Perversity, whether through the trustee's shutting his or her eyes to the facts or in some other manner; this includes unreasonableness, in the sense of a decision that no reasonable trustee, properly instructed in the facts and law, could properly have reached;

(d) Failure by the trustee to act honestly or in good faith;

(e) Fraud on a power, in the sense of the use of a power for an improper purpose;

(f) Failure by the trustee to take relevant considerations into account or taking irrelevant considerations into account.

(Draft Bill, section 63(3)(a), (b), (d), (e), (f), (h) and (4))

Ultra vires decisions

19.39 *Ultra vires* is different from the other proposed grounds of challenge in that it renders the exercise of a power void *ab initio* rather than voidable. In general, the inclusion of this ground received support, in particular from the Faculty of Advocates, STEP, and the Law Society's Pensions Sub-Committee. Those who disagreed thought that *ultra vires* acts were adequately dealt with already.

19.40 We do not doubt that *ultra vires* acts are challengeable at present, and that including them in the list of grounds of challenge would add nothing to the existing law. Nevertheless, we think that there are advantages in having a comprehensive statement of the grounds on which the acts of trustees may be challenged. For this reason we recommend:

103. The grounds of challenge should also include cases where the exercise of a power is *ultra vires* of the trustee.

(Draft Bill, section 63(3)(c))

Material error

19.41 We asked whether challenge to the exercise of a fiduciary power should be possible on the ground that at the time of exercise the fiduciary was subject to a material error. This received general support on consultation. In particular, the Faculty of Advocates, STEP, and the Pensions Law Sub-Committee of the Law Society all agreed. HMRC did not take any objection in principle to the inclusion of error, but indicated that the definition of "material" was important. They indicated that a wide test for material error would enable fiduciaries to avoid the consequences of their actions simply because another course of action would

have been more convenient or desirable, especially from a tax perspective. Consequently, it was suggested that a "material" error should be one which related either to a basic or fundamental fact in the context of the particular exercise of the fiduciary power or to one which concerned the dispositive legal effect of the exercise of the power but not its consequences. While we understand HMRC's concern that a power of this nature might be used to avoid undesirable tax consequences, we think that their suggestions are too restrictive, and would produce a power that was so hedged about with restrictions as to be almost unworkable. Moreover, such an approach to the power would severely restrict the law as laid down in *Hunter v Bradford Property Trust Ltd*.[42] Our present recommendations do not apply to fiduciaries other than trustees; errors by such fiduciaries (including directors, partners, agents and others) will continue to be governed by the common law as laid down in that case, and we do not intend that there should be any sharp distinction between the position of trustees and that of other fiduciaries.

19.42 In light of the responses received on consultation, we are of opinion that our proposals in relation to error are generally correct. We accordingly make the following recommendations:

104. (1) It should be possible to challenge the exercise of a fiduciary power by trustees on the ground that at the time of exercise they were subject to a material error.

(2) Error should be relevant for this purpose when it is "material", in the sense that but for the error the trustees would not have reached the decision that they did.

(3) To be relevant, the error may be of either fact or law.

(4) To be relevant, the error must relate to the legal or factual situation at the time when the power is exercised, but this includes any subsequent declaration by a court of the law as it existed as at the date of exercise of the power.

(5) Without prejudice to the generality of the notion of "material error", the error may relate to the nature, effects or consequences of the exercise of the power.

(Draft Bill, section 63(3)(g) and (5))

We consider that these recommendations strike a reasonable balance between the interests of legal certainty and ensuring that a remedy is available to deal with decisions reached in error. In particular, we think that the definition of "material" in paragraph (2) uses the correct criterion, that of "but for" causation. Our reasoning is set out at paragraph 19.25 above. We further consider that the requirement at paragraph (4) is important; the intention here is to distinguish errors in the proper sense from supervening events. This parallels the distinction in the law of contract between error, on the one hand, and supervening impossibility or frustration, on the other. Our reasoning on this matter is set out at paragraphs 19.26 to

[42] See para 19.9 above.

19.28 above. Paragraph (5) is intended to avoid the technical, and in our view over-fine, distinctions that have been drawn in a number of English cases following *Hastings-Bass*.[43]

Reduction

19.43 We asked whether the appropriate remedy was reduction (understood as being subject to equitable considerations, in the sense in which that concept is used in Scots law). On consultation, respondents agreed that reduction would be the primary remedy. Two further suggestions were made, though. First, it was pointed out that the remedy of reduction was only available after the event.[44] In some cases, however, persons might be aware prospectively that a fiduciary was about to exercise a discretion in a manner that would justify reduction once it had been exercised. For that reason the remedy of interdict might be appropriate in some cases. We agreed entirely with this suggestion, and we have taken it into account in our draft Bill.

19.44 The second suggestion is that in some cases rectification might be appropriate.[45] We agree with this suggestion: it seems to us that in some cases reduction might be a somewhat blunt tool, and greater precision available with rectification might be appropriate. The idea is that maximum flexibility should be built into the remedy. It was suggested that the court should be entitled, in addition to reducing the act, to "make such other order as the court shall consider appropriate in the circumstances". This might permit amendment of the decision, or permit the decision to take effect subject to stated exceptions, or at a different time or times. We see force in these comments, and we agree entirely with the proposition that the remedy should be as flexible as possible. We think, however, that the availability of rectification will suffice to achieve such a result. In effect, rectification permits any appropriate amendment to the original act. In cases of this nature, rectification is clearly an equitable remedy, and so exactly the same considerations apply to rectification as apply to reduction. Consequently, if beneficiaries or third parties have acted in reliance on a decision by trustees, any remedy of reduction or rectification may be refused or granted subject to conditions. We would emphasise that the equitable nature of these remedies means that they have maximum flexibility.

19.45 A final point is that specific consideration must be given to the impact of reduction of a deed that has been registered in the Land Register. In response to proposal 6 of our Consultation Paper on Defective Exercise, the Keeper of the Registers of Scotland wrote:

> "There are implications for beneficiaries, acquirers (including those who have acquired from the grantee in the reduced deed) and for the State guarantee of title and parties relying on the register. In the system in place under the Land Registration (Scotland) Act 1979, we suggest that – at the very least – the remedy of reduction for defective exercise of a fiduciary power would have to be backed up by an extension to the statutory exclusion of indemnity in s 12(3)(j) of the 1979 Act. If a deed is reduced by the courts, the Keeper should not be liable in indemnity to any party who suffers loss as a result of either rectification or non-rectification of the register. (The latter scenario would potentially arise if an acquirer or subsequent

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[43] See paras 37 to 41 of the CP, and para 19.25 above.
[44] This point was made by Frank Fletcher, a member of our Advisory Group.
[45] This suggestion was made in particular by the Pensions Law Sub-Committee of the Law Society and McGrigors LLP, who provided long and helpful commentary on the CP on Defective Exercise.

acquirer is a proprietor in possession and has not created an inaccuracy in the register by their own fraud or carelessness; in that event, the person benefiting from the decree of reduction would be unable to have the title restored)."

Section 12(3)(j) is to be repealed as of 8 December 2014,[46] and thus any argument in support of an amendment to this provision is superseded. In its place, section 54 of the Land Registration etc. (Scotland) Act 2012, inserting a new section 46A into the Conveyancing (Scotland) Act 1924, provides that a decree of reduction may be given effect by registration in the Land Register and, as a result, no potential for compensation by the Keeper will arise.

19.46 For these reasons, we make the following recommendation:

105. The remedies that are available should be reduction, rectification and interdict, as appropriate in the particular circumstances of the case. The remedies of reduction and rectification should be subject to equitable considerations, in the sense in which that concept is used in Scots law.

(Draft Bill, section 63(6)(a))

Persons with a right of challenge

19.47 Our original proposal was that challenge should be possible at the instance of the beneficiaries or objects of the power, the trustees or donees of the power, the truster or the granter of the power, and any other person who had a sufficient patrimonial interest in the exercise or non-exercise of the power.[47] On consultation, respondents generally agreed with our formulation. The Faculty of Advocates pointed out that, as matters stand, Scots law may not always recognise that the truster or trustees have sufficient interest to sue.[48] We accept this point, and we think that it should be made clear that in an appropriate case the truster or trustees should have a right of challenge, and likewise any supervisor or protector We do not think that this will lead to large amounts of litigation. We have already made the point that an unsuccessful litigant will normally be found liable in expenses, and we would expect that rule to be consistently applied in relation to the power that is under consideration. If the challenge is wholly without merit, it is possible that expenses might be awarded on an agent and client basis. HMRC expressed the opinion that only beneficiaries or objects of a power should have the right to challenge the fiduciary's exercise of the power, as the purpose of the statutory remedy would be to protect the beneficiaries. Despite this, we think that there is merit in permitting the trustees and the truster to bring such proceedings. We can easily envisage a situation where trustees realise that they have acted in error or in a manner that is otherwise defective and, in order to fulfil their fundamental responsibilities as trustees, wish to put matters right. So far as the truster is concerned, we would not envisage that challenge would be a common event, but a truster clearly has an interest to ensure that the

[46] The repeal is effected by para 19(2) of sch 5 to the Land Registration etc. (Scotland) Act 2012, which comes into force on the "designated day": see s 123(2)(h). The Land Registration etc. (Scotland) Act 2012 (Designated Day) Order 2014 (SSI 2014/127), art 2, provides that 8 December 2014 is the designated day.

[47] This would include both protectors and supervisors in an appropriate case.

[48] Under reference to *Gray v Gray's Trs* (1877) 4 R 378 at 383 per Lord Gifford; *Cunningham v Montgomery* (1879) 6 R 1333, 1337 per Lord President Inglis; and *Allen v McCombie's Trs* 1909 SC 710, 716 per Lord President Dunedin.

trust purposes that he has instituted are properly implemented. In general, respondents agreed with our proposals in this respect.

19.48 Shepherd and Wedderburn LLP, who provided detailed and helpful comments, emphasised that if beneficiaries were afforded a right of challenge it was important that they should not be able to frustrate routinely the wishes of the truster through the operation of such a rule. They further commented that a right of challenge should be available not merely to the full body of trustees but also to any one trustee. We agree with the latter proposal; the example given, where one trustee has knowledge that a power has been exercised defectively by one or more of the other trustees, seems to us to require a remedy. In relation to concern about possible abuse of the power, we understand entirely the point that is made. We think, however, that the Court of Session can be trusted to ensure that the power is not abused. We would further emphasise that trust applications will normally be heard by the designated trust judge, who will clearly be aware of these considerations.

19.49 In view of the responses received on consultation, we make the following recommendation:

> **106. The following persons should have a right of challenge: the beneficiaries or objects of the power; the trustees or donees of the power or any one such trustee or donee; the truster or granter of the power; any protector or supervisor; and any other person who has a patrimonial interest in the exercise or non-exercise of the power.**
>
> (Draft Bill, section 63(6)(b))

In the foregoing recommendation the range of persons who may challenge the defective exercise of fiduciary powers by trustees is deliberately wide. It is nevertheless subject to an important restriction: before anyone can challenge the exercise of a fiduciary power they must have an interest in the trust, in the sense discussed immediately above. As we have just indicated,[49] any attempt at vexatious challenge by disaffected beneficiaries is likely to be met by an adverse finding in expenses, in some cases on an agent and client basis. Furthermore, we would draw attention to the fact that specific criteria must be met before a decision by trustees can be successfully challenged, and it can be expected that the courts will pay close attention to the statutory grounds. For these reasons we do not think that any undue burden will be placed on trustees.

Extension to fiduciaries

19.50 Our proposals in the Consultation Paper extended to fiduciaries other than trustees. Fiduciary duties apply in a wide range of legal relationships apart from that of trustee and beneficiary. Executors and judicial factors are generally subject to such duties. The same is true of partners and company directors. Agents and employees are in certain circumstances regarded as fiduciaries, as are company promoters; and there is authority for the view that in some cases persons to whom confidential information is imparted will be treated as fiduciaries.[50] Our proposals were framed in such a way that they might in appropriate circumstances apply to the exercise of fiduciary powers by any type of fiduciary. The law

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[49] See also paras 2.26(6) and 4.4 above.
[50] See *SME*, Vol 24, para 172.

relating to fiduciaries has historically been treated as a consistent whole, and it seemed to us that exactly the same considerations might apply to these other categories of fiduciary as apply to trustees.

19.51 We remain of opinion that, ideally, the law and procedure would be the same in relation to all categories of fiduciary. It seems to us that the existing rules in Scots law, as laid down in cases such as *Dundee General Hospitals*[51] and *Hunter v Bradford Property Trust,*[52] apply to fiduciaries generally; we can see no basis for restricting those rules to trustees, at least so far as the common law is concerned. On further consideration, however, we are of opinion that there would be significant practical difficulties if we were to extend provisions in a Scottish Bill dealing specifically with trusts to other categories of fiduciary, such as partners and company directors. The law in both of those areas is a reserved matter, and so any amendment of it would require legislation by the UK Parliament. Furthermore, the law relating to company directors, in particular, is the subject of very detailed statutory regulation, notably in the Companies Act 2006. There are plainly sound reasons for ensuring that the whole of the law relating to company directors can be found in statutes and textbooks dealing with that subject. We therefore consider that our draft Bill should not extend to partners and company directors and promoters. Furthermore, it is specifically concerned with the law of trusts, and it therefore does not seem appropriate to extend its provisions to other categories of fiduciary such as agents. Thus we consider that the legislative provisions dealing with this matter should be confined to trustees (which, for this purpose, is defined to include executors-nominate and executors-dative).[53]

19.52 Nevertheless, we consider that the common law as discussed in our Consultation Paper and in this Chapter remains relevant to all categories of fiduciary. The legislation that we now recommend amounts in our opinion to a statutory consolidation of the existing law in relation to trustees, with little in the way of innovation on cases such as *Dundee General Hospitals* and *Hunter v Bradford Property Trust*. What is proposed is essentially procedural in nature. The purpose of the legislation is to ensure that there is a clearly defined procedure available in the Court of Session to enable the defective exercise of fiduciary powers by trustees to be challenged effectively. So far as other categories of fiduciary are concerned, the common law will continue to be relevant, and the practical result should be broadly similar to our recommendations in respect of trustees..

19.53 We should note, however, that the equitable nature of the remedies that are available in respect of the defective exercise of fiduciary powers by trustees and others, is likely to be of importance in many cases. To the extent that a fiduciary power is exercised in a commercial context, it is likely that other persons will rapidly act in reliance on the exercise of the power, with the result that reduction, at least, will not be an available remedy. That applies to trusts set up for commercial purposes, and it would also apply to any attempt to make use of the common law to challenge the exercise of fiduciary powers by partners, company directors and the like. Furthermore, in these cases the court can be expected to resist any attempt to mount a challenge on contrived or spurious grounds, and in the case of an unsuccessful challenge, as with a challenge by beneficiaries, it can be expected that an adverse finding in expenses will be made. Nevertheless, we hope that the remedies that we

[51] 1952 SC (HL) 78.
[52] 1970 SLT 173.
[53] See the definition of “trustee” in s 74(1) of the draft Bill.

recommend will prove of practical utility in dealing with the consequences of erroneous decisions by trustees in the exercise of their fiduciary powers.

Chapter 20 List of recommendations

1. The powers of the courts to appoint new trustees at common law or under section 22 of the Trusts (Scotland) Act 1921 should be replaced by a provision under which the court has power, on the application of one or more of the trustees or any person with an interest in the trust property, to appoint a trustee where this is expedient for the administration of the trust or where no capable trustee exists or is traceable.

(Paragraph 4.5; Draft Bill, section 1)

2. In a private trust, if no capable or traceable trustee exists, the truster may appoint a new trustee or new trustees. This power is subject to contrary express or implied provision in the trust deed.

(Paragraph 4.6; Draft Bill, section 2)

3. (1) The present law should continue whereby beneficiaries are not entitled to appoint new trustees, unless such power is conferred by the trust deed.

(2) No exceptions should be made to this general rule in cases where a sole trustee has died, has been certified as being incapable, or has been convicted of a crime involving dishonesty, and there is no other person entitled to act as trustee and no other person entitled to appoint a new trustee.

(Paragraph 4.8)

4. Any appointment or assumption of a trustee under the draft Bill should operate as a general conveyance of the trust property in favour, jointly, of the additional trustee and the existing trustees (or, where there are no existing trustees, in favour of the new trustee). This should apply to all trusts, whenever created, but only in respect of an appointment or assumption taking place after commencement.

(Paragraph 4.9; Draft Bill, section 4)

5. Proviso (2) to section 3 of the Trusts (Scotland) Act 1921 (a trustee who has accepted a legacy, bequest or annuity conditional on accepting office and a trustee who was appointed on a remunerated basis not entitled to resign without prior judicial approval) should be repealed.

(Paragraph 4.11; Draft Bill, sections 5 and 79 and schedule 2)

6. (1) Section 23 of the Trusts (Scotland) Act 1921 and the common law grounds for the removal of trustees should be replaced by new statutory provisions.

(2) These should provide that a trustee may be removed by the court, on application, if the court is satisfied that the trustee:

(a) is unfitted to carry out the duties of a trustee,

(b) purports to carry out those duties but does so in a way that is inconsistent with, or might be inconsistent with, a trustee's fiduciary duty,

(c) has neglected his or her duties as trustee,

(d) is incapable, or

(e) is untraceable.

(3) An application for such removal of a trustee should be capable of being made by another trustee, a beneficiary, or any person with an interest in the trust's estate.

(Paragraph 4.19; Draft Bill, section 6)

7. There should be no automatic termination of trusteeship by reason of the trustee's insanity, incapacity, bankruptcy, conviction of a crime involving dishonesty, or any other event indicative of unfitness for office.

(Paragraph 4.24)

8. A majority of the remaining trustees may remove from office a trustee who is:

(a) incapable,

(b) untraceable,

(c) convicted of an offence involving dishonesty,

(d) sentenced to imprisonment on conviction of an offence, or

(e) imprisoned for contempt of court or non-payment of a fine.

(Paragraph 4.28; Draft Bill, section 7(1))

9. A trustee may be removed from office by the beneficiaries provided that they are absolutely entitled to the trust property and are all at least 18 years old and of full capacity, and that the removal from office is agreed by all of them.

(Paragraph 4.32; Draft Bill, section 8)

10. (1) New statutory powers should be introduced to allow for:

(a) the removal of the office supplying an *ex officio* trustee as trustee, and the replacement of that office with another office, the holder of which is to act as an *ex officio* trustee; and

(Paragraph 4.43; Draft Bill, section 62)

(b) an *ex officio* trustee to resign in favour of a nominated replacement individual or office holder.

(Paragraph 4.43; Draft Bill, section 61)

(2) These powers should be exercisable either by the Court of Session or any sheriff court having jurisdiction over the trust, and should apply to both public and private trusts.

(Paragraph 4.43; Draft Bill, section 74(1) and (2))

11. A person is to be regarded as "incapable" if he or she is incapable of one or more of the following:

(a) making decisions,

(b) communicating decisions,

(c) understanding decisions, or

(d) retaining the memory of decisions,

and such incapacity is (either or both) because the person is mentally disordered (that is, has any disorder or disability of the mind, however caused or manifested) or, because of physical disability, has an inability to communicate.

But if a lack or deficiency in the faculty of communicating decisions can be made good by means of human or mechanical aid then it is to be disregarded.

(Paragraph 4.50; Draft Bill, section 75)

12. A person is to be regarded as "untraceable" if he or she has not been traced after reasonable steps have been taken in that regard.

(Paragraph 4.52; Draft Bill, section 76)

13. Subject to any contrary express or implied provision in the trust deed, before a decision which binds the trustees can be made, all the trustees must, so far as is reasonably practicable, be given:

(a) adequate notice of the matters to be decided, and

(b) an opportunity to put forward their views, either by attending a meeting of the trustees or in any other manner.

(Paragraph 5.6; Draft Bill, section 11)

14. Section 3(c) of the Trusts (Scotland) Act 1921 should be replaced by a new statutory provision to the following effect:

(a) a decision should bind the trustees only if it is made by a majority of those for the time being able to make it;

(b) for the purposes of paragraph (a), the following are not to be regarded as able to make a decision:

(i) any trustee who has a personal interest in the decision,

(ii) any trustee who is untraceable, and

(iii) any trustee who is incapable;

(c) the prohibition in paragraph (b)(i) should be disregarded if either (i) all of the beneficiaries know of the trustee's personal interest and consent to his or her acting, or (ii) the truster appointed the trustee in the knowledge that such a decision might require to be taken and that the trustee would have a personal interest in it (or the trustee must be taken to have appointed the trustee in that knowledge);

(d) the rule in paragraph (a) should be subject to the terms, express or implied, of the trust deed.

(Paragraph 5.17; Draft Bill, sections 12 and 79 and schedule 2)

15. (1) Section 4(1) of the Trusts (Scotland) Act 1921 should be repealed and replaced by a provision that confers on trustees in their dealings with the trust property power to exercise all of the powers of administration and management that a natural person of full age and capacity would have in respect of his or her own property.

(2) In the exercise of such a power, the trustees will be bound by their fiduciary duties and duty of care, and will also be bound by the terms and purposes of the trust.

(3) Except in so far as the trust deed expressly provides otherwise, the new power will apply to all trusts, whenever created, but it will not apply to acts of trustees performed prior to the commencement of the provision.

(Paragraph 6.13; Draft Bill, sections 13 and 79 and schedule 2)

16. Beyond the power specified in recommendation 15, it is not necessary to make any provision for the amalgamation of functions of public and charitable trusts.

(Paragraph 6.17)

17. (1) The court should have power, on application by the trustees, to grant an order conferring additional administrative and managerial powers in relation to the trust property on them, if satisfied that the order would be of benefit to the future administration of that property.

(2) The application should be intimated to all the beneficiaries and others whom the court may specify, who would have an opportunity to object. An order should be capable of being granted notwithstanding the objections of some beneficiaries.

(3) The court should have power to attach such conditions to the order as it thinks fit.

(Paragraph 6.24; Draft Bill, section 14)

18. The investment provisions recommended in the Joint Report on Trustees' Powers and Duties (LC No 260; SLC No 172), as enacted by sections 93 to 95 of the Charities and Trustee Investment (Scotland) Act 2005, should be re-enacted.

(Paragraph 7.12; Draft Bill, sections 16, 17 and 18(2) and (6))

19. Section 4(1)(f) of the Trusts (Scotland) Act 1921 should be replaced by a provision which, in the absence of express contrary provision in the trust deed, empowers trustees to appoint an agent and to pay the agent suitable remuneration.

(Paragraph 8.4; Draft Bill, section 18(1), (3) and (4))

20. Subject to any express restriction or exclusion in the trust deed or in legislation, trustees may delegate to an agent any of their powers other than:

(a) any function relating to whether or in what way any assets of the trust should be distributed;

(b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;

(c) any power to appoint a person to be a trustee of the trust; and

(d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

(Paragraph 8.8; Draft Bill, section 18(1), (5) and (7))

21. (1) Trustees have the power to appoint a nominee for the purpose of exercising any of their powers and to transfer the title of trust assets to that nominee. This is subject to express contrary provision in the trust deed.

(2) Where title to assets is transferred to a nominee by trustees, the nominee holds those assets, including client money, on trust for the transferor.

(Paragraph 8.28; Draft Bill, section 19(1), (3) and (4))

22. Section 16 of the 1921 Act and the Court of Session's common law powers to authorise advances of capital should be replaced by a new provision by which trustees have power to advance up to the whole of a beneficiary's prospective share in the capital of the trust fund where:

(a) the trust deed does not expressly prohibit advancement of capital;

(b) at the date of the advance the beneficiary has a right to all or part of the capital of the trust property which is vested, is vested subject to defeasance or

diminution by the occurrence of some uncertain future event, or will vest provided some uncertain future event occurs;

(c) the advance would be, in their view, for the benefit of the beneficiary; and

(d) every person with a prior life interest who would be prejudiced by the advance consents.

(Paragraph 9.14; Draft Bill, section 20(1), (4), (5)(a))

23. The court should continue to have power, on application, to authorise an advance where a person with a prior life interest who would be prejudiced by the advance:

(a) is incapable of consenting and a reasonable person in his or her position would have consented; or

(b) is withholding consent unreasonably.

(Paragraph 9.14; Draft Bill, section 20(5)(b))

24. The trustees should have authority to impose any condition upon the advance, whether as to repayment of the sum advanced, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustees should be entitled, either wholly or in part, to waive the condition or release any obligation undertaken or any security given by reason of the condition.

(Paragraph 9.14; Draft Bill, section 20(2) and (3))

25. The trustees should be entitled to place the sum advanced in a new trust for the beneficiary, even if others may thereby gain incidental benefit.

Paragraph 9.14; Draft Bill, section 20(9) and (10))

26. (1) There should be new statutory provision authorising trustees to pay to a beneficiary income arising from his or her prospective share where the trustees consider that the payment is required for the beneficiary's benefit. At the date of payment the beneficiary's prospective share must be destined to vest either unconditionally, or subject to defeasance or diminution on the occurrence of some uncertain future event, or if some uncertain future event occurred.

(2) If the trust deed directs that income be accumulated, the trustees must seek authority from the court before they are able to exercise the power referred to in paragraph (1).

(Paragraph 9.17; Draft Bill, section 24)

27. The rules of equitable apportionment contained in the cases of *Howe v Earl of Dartmouth*, *Re Earl of Chesterfield's Trusts* and *Allhusen v Whittell* should be abrogated.

(Paragraph 10.30; Draft Bill, section 23)

28. Insofar as the trust deed does not expressly provide otherwise, trustees should have a new statutory power, exercisable on a discretionary basis, not to apportion dividends and other periodical payments on a time basis when they would otherwise be required to do so in terms of the Apportionment Act 1870.

(Paragraph 10.30; Draft Bill, section 22)

29. (1) The Powers of Appointment Act 1874 should be repealed.

(Paragraph 10.35; Draft Bill, section 79 and schedule 2)

(2) Insofar as the trust deed does not expressly provide otherwise, no exercise of a trustee's power to appoint funds is invalid only because a beneficiary takes either a negligible share or nothing.

(Paragraph 10.35; Draft Bill, section 21)

30. There should be legislative provision setting out the duty on a trustee to provide information to beneficiaries and others.

(Paragraph 11.7; Draft Bill, sections 25 and 26)

31. Trustees have a duty, which is fiduciary in nature, to inform a person of (i) his or her status as a beneficiary and (ii) the identities and contact details of the trustees. This duty must be performed within a reasonable period, taking all circumstances into account. Subsequent changes to the information, ie to the person's status or to the trustees' identities or contact details, must also be communicated.

(Paragraph 11.26; Draft Bill, section 25)

32. In deciding, in exercise of this duty, who is to be informed of their status as a beneficiary, trustees must take account of all the circumstances (including the likelihood of the person becoming entitled to a share of the trust property and at what point in time such an entitlement is likely to occur); but any person who has a vested interest in the trust property is to be regarded as a beneficiary.

(Paragraph 11.26; Draft Bill, section 25)

33. Where a trustee has a duty under recommendation 31 above in respect of (i) a beneficiary who is under the age of legal capacity, or (ii) an adult beneficiary who lacks capacity, the duty is performed when the trustee conveys the relevant information to, respectively, the beneficiary's parent or guardian, or the beneficiary's attorney or guardian.

(Paragraph 11.29; Draft Bill, section 25(1))

34. Trustees should take such steps to identify or trace a beneficiary as are appropriate in the circumstances of the case.

(Paragraph 11.30; Draft Bill, section 25(3))

35. The duty to inform a beneficiary of his or her status and of the identities and contact details of the trustees is mandatory and may not be limited by the trust deed.

(Paragraph 11.31; Draft Bill, section 25)

36. The duty on a trustee to provide initial information to a beneficiary should apply to all trusts, whether created before or after the coming into force of the legislation.

(Paragraph 11.33; Draft Bill, section 25(7)(a))

37. Where a beneficiary makes a request for trust information (with that term being interpreted broadly), a trustee should meet the request unless it would be inappropriate to do so.

(Paragraph 11.44; Draft Bill, section 26(1))

38. (1) A truster may, by express provision in the trust deed, limit or expand the trustees' statutory duty to provide information to a beneficiary on request.

(2) Where a truster limits the duty, the limitation is subject to review by the court:

(a) under its power to alter trust purposes on a material change of circumstances in section 60 of the draft Bill, or

(b) on the ground that the limitation is such as to undermine in a fundamental way the ability of a beneficiary (or of the beneficiaries as a whole) to hold the trustee to account.

(3) A challenge under (2)(b) may be brought at any time after the trust's creation by a trustee or by an affected beneficiary; the court may direct that the trust deed be read as narrowly as is required for it to permit the beneficiary to be able to hold the trustees to account (or, if that is not possible, to strike down the limitation in its entirety).

(Paragraph 11.50; Draft Bill, section 26(9)-(11))

39. The duty on a trustee to provide information to a beneficiary on request should apply from the date of commencement of the legislation to any trust created on or after that date, and it should apply to a trust created before that date only once a year has elapsed following commencement.

(Paragraph 11.52; Draft Bill, section 26(12)-(14))

40. Where a trustee is uncertain as to whether particular information should be disclosed, either on request or otherwise, he or she should consider whether to apply to the court for directions. Equally if a beneficiary is dissatisfied with the trustee's response to a request for information he or she may apply to the court either for a direction to the trustee to make disclosure or for an appropriate order where the trustee has exercised the fiduciary power in a defective way.

(Paragraph 11.54; Draft Bill, section 26(7))

41. A protector who is appointed to a trust should have a right to examine all documents, of any sort, kept by or on behalf of the trustees. This right will be subject to modification only if the trust deed provides otherwise.

(Paragraph 11.64; Draft Bill, section 48(4))

42. The right of a protector to examine all trust documents applies regardless of when the trust came into existence.

(Paragraph 11.65; Draft Bill, section 48(9))

43. A trustee of a private purpose trust has a duty to provide any supervisor with such information about the trust as a trustee of a private trust which is not a private purpose trust would have to provide to a trust beneficiary. This duty cannot be weakened by the trust deed.

(Paragraph 11.69; Draft Bill, section 45(1))

44. In addition, a trustee of a private purpose trust has a duty to inform any beneficiary of his or her status as beneficiary and, unless the trust deed provides otherwise, to provide such further information about the trust which a beneficiary of a private trust which is not a private purpose trust would be entitled to receive under recommendation 37 above.

(Paragraph 11.69; Draft Bill, sections 25(7)(b) and 26(12)(b))

45. The right of a supervisor to be informed about the trust applies regardless of when the trust came into existence.

(Paragraph 11.70; Draft Bill, section 45(5))

46. The court should have power, on application by a trustee, to hold that the trustee is not personally liable for any losses arising out of an action amounting to an *ultra vires* breach of trust provided that, after taking all reasonable steps and making all reasonable enquiries, he or she believed that such action was within the trustees' powers; the court may make such order as seems just. This should not prejudice any right of recovery by the beneficiaries from persons other than the trustees or the trustees' right of recovery of wrongfully distributed property.

(Paragraph 12.6; Draft Bill, section 29)

47. In carrying out their trust duties –

(a) Every trustee should have to use the same care and diligence that a person of ordinary prudence would use in managing the affairs of others.

(b) A trustee who has professional qualifications or business experience should be subject only to the foregoing duty unless he or she is instructed to provide professional or other specialised advice to the trust. In the latter event, the trustee will be required to use any special knowledge or expertise that it is reasonable to expect of a member of his or her profession or business.

(c) A trustee who provides professional trust services and is remunerated for doing so should be required to exercise the level of skill and care that it is reasonable to expect of a similarly experienced member of his or her profession or business.

(Paragraph 12.22; Draft Bill, section 27(1)-(3))

48. A clause in a trust deed purporting to relieve trustees from liability should be regarded as ineffective in so far it relates (i) to a trustee falling within recommendation 47(b) and who is instructed as mentioned in that recommendation, or (ii) a trustee falling within recommendation 47(c).

(Paragraph 12.48; Draft Bill, section 27(4)(b))

49. Otherwise there should be no change in the present law regarding the effectiveness of immunity clauses in trust deeds. Accordingly, in such cases an immunity clause should continue to be effective in excluding liability for negligence but not for gross negligence.

(Paragraph 12.48; Draft Bill, section 27(4)(a))

50. New statutory provision rendering ineffective terms in a trust deed relieving trustees from liability in respect of negligence and, separately, gross negligence, should also render ineffective any terms making the exercise or enforcement of beneficiaries' rights in this area more difficult.

(Paragraph 12.48; Draft Bill, section 27(4)(d), (f), (g) and (h))

51. Indemnity clauses in trust deeds should be ineffective to the same extent as immunity clauses.

(Paragraph 12.54; Draft Bill, section 27(4)(e))

52. (1) Where the court is satisfied that a transaction by a trustee in breach of fiduciary duty:

(a) has been of benefit to the trust property and the beneficiaries as a whole, and

(b) the terms of the transaction were at least as favourable to the trust property as those likely to be contained in a comparable arms-length transaction,

it should have the power to make an order wholly or partly relieving the trustee of the consequences of the transaction having been in breach of fiduciary duty.

(2) It should not be a requirement for the exercise of the above power that the trustee has acted reasonably and in good faith.

(Paragraph 12.64; Draft Bill, section 31)

53. Without prejudice to clauses in trust deeds authorising particular transactions, or particular classes of transaction, by the trustees that would otherwise be in breach of their fiduciary duty, an immunity or an indemnity clause in a trust deed should be ineffective in relation to any trustee's liability arising out of a breach of fiduciary duty.

(Paragraph 12.64; Draft Bill, section 30)

54. (1) There should be a new statutory provision (which would apply in the absence of any contrary intention expressed in the trust deed) authorising the trustees to appoint one of them as their agent and to allow the appointee reasonable remuneration for the services provided as agent.

(2) The new statutory provision should apply to public trusts.

(3) In fixing the reasonable remuneration of a trustee appointed as agent the trustees should not be expressly required to take into account any other benefit that the trustee is to receive in terms of the trust deed.

(Paragraph 12.73; Draft Bill, section 18(1), (3) and (4))

55. The courts should not have the power to increase or decrease the level of remuneration provided for trustees by the trust deed.

(Paragraph 12.79)

56. Subject to any contrary provision in the trust deed, any trustee should have power to obtain such insurance as it is reasonable to take out against personal liability arising from the trustee's actings in carrying out the duties of a trustee, and to do so at the expense of the trust property.

(Paragraph 12.88; Draft Bill, section 15)

57. (1) Section 32 of the Trusts (Scotland) Act 1921 (judicial relief for trustees who have acted honestly and reasonably and who ought fairly to be excused) should be repealed as unnecessary.

(Paragraph 12.94; Draft Bill, section 79 and schedule 2)

(2) Section 31 of that Act should be re-enacted.

(Paragraph 12.95; Draft Bill, section 28)

58. Section 3(d) of the Trusts (Scotland) Act 1921 should be replaced by a provision to the effect that, subject to contrary provision in the trust deed, each trustee should be liable for any loss caused to the beneficiaries arising out of:

(a) his or her own acts or omissions; or

(b) his or her failure to take reasonable steps to ensure that a co-trustee does not commit a breach of trust or a breach of fiduciary duty.

(Paragraph 12.98; Draft Bill, section 32)

59. The legislation implementing the proposals dealing with breach of trust (sections 28 to 32 of the draft Bill) should apply to all trusts, whether or not created before its date of commencement, but only in relation to any breaches of trust occurring on or after that date.

(Paragraph 12.99; Draft Bill, sections 28(3), 29(5), 30(3), 31(4) and 32(2))

60. Where trustees enter into a contract with a third party which is within their powers in the course of administering the trust and either:

(a) the fact that the trustees are acting in a representative capacity on behalf of a specified trust is disclosed at that time to the third party; or

(b) the third party was otherwise aware that the trustees were so acting,

then the third party's rights under the contract should be enforceable only against the trustees' trust patrimony, unless the contract provides otherwise.

(Paragraph 13.10; Draft Bill, section 33(1)-(2))

61. Where the trustees' private patrimonies are liable under contract with a third party but the trustees have a right of relief in respect of that liability against the trust patrimony, the third party should have a direct right of recovery from the trust patrimony; and the liabilities of the trustees personally and the trust property should be joint and several.

(Paragraph 13.15; Draft Bill, section 33(3)-(4))

62. (1) Section 2(1) of the Trusts (Scotland) Act 1961 should be repealed and re-enacted with a modification so that all onerous transactions relating to the trust property between the trustees and a third party are unchallengeable on the ground that the transaction was at variance with the terms and purposes of the trust.

(2) Good faith on the part of the third party should not be made a requirement for the protection accorded by the new provision.

(3) Such protection should continue to be unavailable to a third party who is one of the trustees, but should be available to a third party who is a beneficiary.

(Paragraph 13.26; Draft Bill, section 38)

63. A third party who acted in good faith in an onerous contract with the trustees which was outwith the powers of the trustees should continue to be restricted to claiming against the trustees' private patrimonies and should not be entitled to claim against the trustees' trust patrimony.

(Paragraph 13.29; Draft Bill, section 33(5)-(6))

64. A deed bearing to be granted by all the acting trustees should be formally valid if it is executed by a majority of them as defined by law or in the trust deed.

(Paragraph 13.33; Draft Bill, section 39)

65. (1) Section 7 of the Trusts (Scotland) Act 1921 should be replaced by a new statutory provision whereby a deed in favour of an onerous grantee validly executed by or on behalf of trustees is not to be void or challengeable on the ground that there was any omission or irregularity of procedure on the part of the trustees or any of them in relation to the transaction implemented by the deed.

(2) Good faith on the part of the grantee should not be required for protection.

(3) The protection referred to in paragraph (1) should be unavailable to a grantee who is a co-trustee but should be available to a grantee who is a beneficiary of the trust.

(Paragraph 13.39; Draft Bill, section 38)

66. (1) Where a person suffers loss as a result of some act or omission of the trustees (or anyone for whom they are responsible) in the course of administering the trust, damages should generally be payable from the trustees' trust patrimony. Damages should be payable from a trustee's private patrimony only if, and to the extent that, he or she was personally at fault.

(2) It should be competent for the court to award damages partly from the trustees' trust patrimony and partly from the private patrimony of a trustee who was at fault.

(Paragraph 13.60; Draft Bill, section 34)

67. Where a person suffers loss as a result of some act or omission of the trustees (or anyone for whom they are responsible) in the course of administering the trust, the trustees as a body will be liable to make reparation for such loss. In addition, any individual trustee who is personally at fault will be liable jointly and severally with the trustees as a body, and in that event any damages awarded against the individual trustee will be payable out of his or her private patrimony. In all such cases, however, it should be essential that the claim, so far as directed against an individual trustee, is on the basis that he or she was personally at fault.

(Paragraph 13.60; Draft Bill, section 35)

68. Where no trustee is personally liable for loss caused by the trustees in administering the trust, each trustee should have a right of relief against the other subject to the power of apportionment in section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

(Paragraph 13.60; Draft Bill, section 36)

69. (1) Where liability arises out of the trustees' ownership or control of trust property or under environmental legislation only the trustees' trust patrimony should generally be liable. A trustee's private patrimony should be liable only if, and to the extent that, he or she was personally at fault.

(2) It should be competent for the court to award damages partly from the trustees' trust patrimony and partly from the private patrimony of a trustee who was at fault.

(Paragraph 13.60; Draft Bill, section 37)

70. Legislation should provide for the existence of private purpose trusts. Such legislation should contain the following provisions:

(1) A private purpose trust should be held to exist where trust property is held by a trustee for the furtherance of a specific purpose which is not a charitable or other public purpose, and the trust is not constituted for the benefit of the trustee alone.

(2) The purpose must be lawful and must not be contrary to public policy or in terms so uncertain as to be unattainable or not reasonably attainable.

(Paragraph 14.40; Draft Bill, section 41)

(3) Any person with an interest in the purpose of a private purpose trust, including any supervisor, should be entitled to apply to the court for an order requiring steps to be taken for the fulfilment of that purpose.

(Paragraph 14.40; Draft Bill, section 42)

(4) If the execution of a private purpose trust becomes wholly or partly impossible or impracticable, or unlawful or contrary to public policy, or inappropriate because, by reason of changed circumstances, doing so would no longer accord with the general intent of the trust, the trustees or any supervisor should be entitled to apply to the court to reform the trust; and in that event the court should have power:

(a) to direct that part or all of the trust property should be held for such other purposes as it considers to be consistent with the spirit of the truster's directions or

(b) if the trust cannot be reformed consistently with the spirit of those directions, to direct that the property or part thereof should be disposed of as though the trust had failed, either as a whole or in relation to that part.

(5) The foregoing power should not apply if the trust can be reformed in accordance with its own terms.

(Paragraph 14.40; Draft Bill, section 43)

71. (1) The truster may make provision in a private purpose trust for the appointment of a supervisor to oversee the fulfilment by the trustees of the trust's specific purpose.

(2) The duties of supervisor should be fiduciary in nature, and the supervisor should be subject to a duty of care.

(3) It should not be competent to appoint a trustee to be supervisor or a supervisor to be trustee.

(4) Where provision is made for the appointment of a supervisor, the court should have power to make such an appointment where:

(a) it is impossible, difficult or inexpedient to do so without the courts' assistance, or

(b) a supervisor lacks legal capacity, or is unwilling or unfitted, to carry out the duties of the office;

and the court may exercise such power on the application of the trustees, a supervisor, or any other person with an interest in the trust.

(Paragraph 14.40; Draft Bill, section 44)

(5) A supervisor should have power to bring court proceedings in respect of the trust, to be informed by the trustees of the terms of the trust deed, to receive information concerning the trust and its administration from the trustees, and to inspect and take copies of trust documents.

(6) A supervisor should have, in the performance of his or her duties, the same rights as a trustee would have to protection and indemnity and to make applications to the court for an opinion, advice, or relief from personal liability.

(Paragraph 14.40; Draft Bill, section 45)

(7) A supervisor have power to resign office by notice in writing delivered to the trustees.

(Paragraph 14.40; Draft Bill, section 47)

72. (1) Express provision should be made in the trust legislation for the appointment of a protector to oversee the exercise by trustees of their functions.

(2) A truster who appoints a protector should be empowered to require the trustees to obtain the consent of the protector before exercising such of their functions as may be specified, either generally or in particular circumstances.

(3) The truster may, by the trust deed, confer powers on the protector, which may include the powers that are now specified in section 52(3) of the draft Bill appended to this Report.

(4) Subject to any provision in the trust deed to the contrary, a protector shall have power to inspect trust documents.

(5) A protector should be subject to fiduciary duties and a duty of care in the exercise of his or her office.

(6) It should not be competent for a trustee to be protector or vice versa, but a truster should be entitled to appoint himself or herself as protector.

(7) Provision should be made for the appointment of a new protector, the removal from office of a protector and the resignation from office of a protector.

(8) Where a trustee complies timeously and correctly with a protector's direction, given in accordance with the protector's powers, in so far as such compliance is a breach of duty owed to a beneficiary or third party, the protector and not the trustee should incur personal liability for any resultant harm, subject to any contrary provision in the trust deed.

(Paragraph 15.18; Draft Bill, Part 7)

73. (1) The Court of Session should be empowered, on application by the trustees or others with an interest in the trust property, to grant an order authorising the trustees to make payments from the estate on the basis that a specified event has or has not happened or will or will not happen. The court may make such an order subject to such conditions as it thinks fit.

(2) Trustees who act in accordance with the authorising order will not be personally liable should the basis on which the court made the order turn out not to be correct, unless they concealed facts or acted fraudulently in the application. The freeing of the trustees from personal liability will not prejudice any right of the true beneficiaries to recover the trust property from those to whom it has been distributed.

(Paragraph 16.10; Draft Bill, section 67)

74. Section 6(vi) of the Court of Session Act 1988 should be replaced by a new section that (i) re-enacts the current provision in relation to trustees but also (ii) permits all executors, whether nominate or dative, to obtain the direction of the court on questions relating to the investment, distribution, management or administration of the estate, or the exercise of any power vested in, or the performance of any duty imposed on, the executor notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction; and (iii) permits protectors and supervisors to have the same power as trustees to obtain directions from the court.

(Paragraph 16.11; Draft Bill, section 64)

75. Provision should be made in the Rules of Court for case management procedures in trust cases in the Outer House. These should be modelled on the existing procedures used in the Commercial Court.

(Paragraph 16.13)

76. (1) The Outer House of the Court of Session should have exclusive jurisdiction in relation to applications:

(a) under the legislation replacing the Trusts (Scotland) Act 1921;

(b) relating to endowments under Part VI of the Education (Scotland) Act 1980;

(c) dealing with the administration of trusts or the office of trustee, including *cy-près* applications; and

(d) for directions in relation to the administration of a trust.

(2) The Outer House of the Court of Session and the sheriff court should have concurrent jurisdiction to hear applications for the appointment or removal of trustees applications relating to *ex officio* trustees, and applications to enable a beneficiary to complete title.

(Paragraph 16.20; Draft Bill, section 74(1) and (2))

(3) Petitions under the legislation replacing section 1 of the Trusts (Scotland) Act 1961 (variation of trusts) should be presented to the Outer House rather than, as at present, to the Inner House.

(4) The rules of the Court of Session should provide that in all of the foregoing categories of case the Lord Ordinary should have power to remit the application to the Inner House in any case of particular difficulty; and that where appropriate a reclaiming motion against the Lord Ordinary's decision should be competent.

(5) The part of section 26 of the Trusts (Scotland) Act 1921 which requires the Inner House to settle a draft scheme by the Lord Ordinary for administration of a charitable or permanent endowment should be repealed without re-enactment.

(Paragraph 16.20; Draft Bill, section 79 and schedule 2)

(6) A simple non-technical procedure should be devised whereby applications relating to trusts and their administration may be made by trustees or by any other interested party. Such applications would be heard in the Outer House, with the possibility of reclaiming to the Inner House.

(Paragraph 16.20)

77. (1) Subject to the following paragraphs, a trustee should not incur personal liability for the expenses of civil litigation in which the trust is a party.

(2) If, in an action brought by the trustees, the expenses of litigation are found to be recoverable from the trust but, where the trust property is insufficient to meet them, the excess will be recoverable from the personal property of the trustees on a joint and several basis.

(3) In any litigation to which the trustees are party, the court may nevertheless find a trustee personally liable, in whole or in part, for the expenses of civil litigation to which the trust is party if:

(a) the litigation is in the opinion of the court unnecessary;

(b) the litigation relates to the trustee's opposing his or her removal from office and the appointment of a judicial factor to administer the trust, and the trustee is unsuccessful in doing so;

(c) the litigation relates to the trustee's opposing the reduction of the trust deed and the trustee is unsuccessful in doing so;

(d) the trustee has brought about the litigation through his or her own breach of duty;

(e) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, pursued the litigation unsuccessfully and without consulting the other trustees who are both capable and traceable;

(f) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, defended the litigation without any benefit to the trust and without consulting the other trustees who are both capable and traceable.

(4) Where a trustee is found personally liable for the expenses of litigation to which the trust is party by virtue of the provisions of the foregoing paragraph, the court should be entitled to allow the trustee relief against the trust property if and in so far as the court considers it appropriate to do so.

(5) The court should have power, on the application of a trustee, to relieve him or her of personal liability for the expenses of litigation, including expenses that have not yet been incurred, in any case where such liability would be inequitable or unfair.

(Paragraph 16.34; Draft Bill, section 65)

78. Any question of expenses in relation to an application under the Act giving effect to the recommendations in this Report is to be determined by the court. The court is to have power to direct, if it considers it reasonable to do so, that such expenses be paid out of the trust property.

(Paragraph 16.37; Draft Bill, section 66)

79. It should remain competent:

(a) for a trust to be varied or terminated by agreement among beneficiaries (where all are of full age and capacity); or

(b) for the court to approve an arrangement varying or terminating a trust on behalf of incapable, unborn or unascertained beneficiaries,

regardless of whether the variation or termination is inconsistent with a material purpose of the trust.

(Paragraph 17.11; Draft Bill, sections 53, 54(2) and 55)

80. It should be confirmed by statute that where every person with an interest, whether vested or contingent, in property held in trust is of full age and capacity or is not a natural person, those persons may agree, without the need to obtain court approval of the agreement:

(a) to vary the purposes for which the trust property is held;

(b) to terminate the trust in whole or in part;

(c) to direct the trustees to make over the trust property to other trustees to hold for new trust purposes; or,

(d) to enlarge or restrict the powers of the trustees to manage or administer the trust property.

(Paragraph 17.13; Draft Bill, sections 53 and 54(2) and (3))

81. The powers of a parent or guardian in exercise of the responsibility to act as a child's legal representative should not include power to approve a variation or termination of a trust on the child's behalf.

(Paragraph 17.18; Draft Bill, schedule 1, paragraph 3)

82. A person aged 16 or 17 should continue to be deemed to be incapable of agreeing to the variation or termination of a trust, but the court is required to take such account as it thinks appropriate of the beneficiary's attitude to the arrangement.

(Paragraph 17.19; Draft Bill, sections 54(5)(a) and 58 and schedule 1, paragraph 2)

83. It should continue to be competent for approval to be given to a variation or termination on behalf of an adult with incapacity.

(Paragraph 17.22; Draft Bill, section 54(4) and (5)(b))

84. (1) Where a woman who, prior to 1984, created an alimentary interest in her own favour in an ante-nuptial contract of marriage wishes to vary or terminate that interest, authorisation by the court under section 1(4) of the Trusts (Scotland) Act 1961 (or any statutory replacement of it) should no longer be required.

(2) There should be no other change to the existing law under which the variation or revocation of an alimentary interest after the beneficiary has entered into possession of it requires the authorisation of the court.

(Paragraph 17.25; Draft Bill, section 57)

85. (1) The court should be empowered by statute to approve an arrangement varying or revoking trust purposes without requiring to be satisfied either:

(a) that the arrangement is not prejudicial to any beneficiary upon whose behalf approval of the court would otherwise be required, or

(b) that a beneficiary of full age and capacity has consented to it,

provided in each case that the court is satisfied that the interest of the beneficiary in question is of negligible value.

(2) In such circumstances, the trustees should be relieved by statute of liability for any loss sustained by a beneficiary, whether or not of full age and capacity, whose interest was determined to be of negligible value but which subsequently emerges.

(Paragraph 17.33; Draft Bill, section 56)

86. The court should have power to approve an arrangement notwithstanding the possibility of prejudice to an unborn or unascertained person, provided that the court is of the opinion that there is no reasonable likelihood that the interest of that person will come into existence.

(Paragraph 17.39; Draft Bill, section 55(2))

87. In assessing the question of prejudice, the court should have regard to the following factors in addition to economic advantage or disadvantage to the beneficiary in question:

(a) any non-economic benefit or detriment to the beneficiary;

(b) the welfare of any member of the beneficiary's family; and

(c) such other matters as seem to the court appropriate.

(Paragraph 17.44; Draft Bill, section 55(3))

88. The court should have power to approve an arrangement on behalf of a person who has not been traced, provided that it is satisfied that:

(a) reasonable steps have been taken to trace the person; and

(b) the proposed arrangement would not be prejudicial to that person's interests.

(Paragraph 17.49; Draft Bill, sections 54(5)(e) and 76(1)(b)(i))

89. It should remain necessary to obtain the consent of all ascertained and traceable beneficiaries of full age and capacity provided that they have a non-negligible interest in the trust.

(Paragraph 17.52; Draft Bill, section 54)

90. It should be confirmed by statute that consent of the truster in that capacity to the proposed arrangement is not required.

(Paragraph 17.53; Draft Bill, section 59)

91. It should be confirmed by statute that an arrangement may take the form of the creation of a new trust in relation to the whole or part of the trust property.

(Paragraph 17.54; Draft Bill, section 53(1)(d))

92. The Rules of the Court of Session should be amended in order to permit a petition for approval of an arrangement varying or terminating private trusts to be presented in the Outer House, subject to a power given to the judge to remit the application to the Inner House in any case of particular difficulty.

(Paragraph 17.56)

93. (1) The existing rules restricting accumulation and successive liferents should be repealed, with the result that a trust containing purposes of any duration is permissible.

(2) Such repeals are not to apply to charitable trusts.

(Paragraph 18.44; Draft Bill, section 40)

94. Scots law should not adopt any rule, such as the rule against perpetuities, that restricts the duration of trust purposes to a fixed period or requires that vesting should take place within a fixed period.

(Paragraph 18.44)

95. When a private trust has been in existence for 25 years or longer, the Court of Session should have power to alter its purposes in order to take account of any material changes of circumstances that have occurred since the trust was created. In relation to such power:

(a) The permitted alterations should be those that are clearly expedient in order to deal with the relevant changes in circumstances.

(b) The relevant categories of change of circumstances should at least extend to:

(i) changes in the personal or financial circumstances of one or more members of the truster's family (or the family that is intended to be benefited by the trust);

(ii) changes in the personal or financial circumstances of one or more of the persons who are intended to be benefited by the trust;

(iii) changes in the nature or amount of the trust property; and

(iv) changes in the tax regime.

Prospective changes should also be relevant.

(c) In order to justify the alteration of trust purposes, any change in circumstances would require to be material, in the sense that, considered objectively, it has had or is likely to have a significant impact on the matters referred to in paragraph (b) above.

(d) In determining whether an alteration should be approved, the Court should have regard to the intentions of the truster, so far as these can be ascertained. To the extent that the truster's actual intentions cannot be ascertained, the Court should

have regard to the probable intentions of a reasonable truster in the current circumstances of the trust. The intentions of the truster, or the probable intentions of a reasonable truster, are not to be binding on the Court; they are merely a factor to be taken into account in the exercise of the Court's discretion.

(e) In ascertaining the intentions of the truster, the Court may have regard both to the trust deed or testamentary writing that created the trust and to any other evidence that appears relevant to the issue.

(f) Although the Court may have regard to the intentions of the truster, it should be expressly permitted to disregard any provision in a trust deed or any other document that purports to exclude the proposed jurisdiction.

(g) The Court's power should be exercisable on the application of the trustees, or of any one or more of the beneficiaries, or of any descendant of the truster, or of any ancestor or descendant or guardian of an actual or potential beneficiary, or of the truster. Any of the foregoing persons may also appear as a respondent to oppose a petition, in whole or in part.

(h) It should not be necessary that either the trustees or all of the beneficiaries consent to any proposed alteration. Nevertheless, in determining whether to authorise an alteration, the Court may have regard to the following factors:

(i) the extent to which the existing beneficiaries and trustees have consented to the proposed alterations;

(ii) whether the proposed alterations can be considered fair, objectively speaking, as among the existing beneficiaries and existing members of the truster's family and the children, including subsequently born children, of existing beneficiaries and existing members of the truster's family;

(iii) whether the trust deed contains powers of amendment and resettlement; and

(iv) the period that has elapsed since the deed was executed or since the truster died.

(i) The Court's power to alter trust purposes should permit it to terminate the trust or to provide for the *immediate* vesting of trust property in any person, or to postpone vesting.

(j) The period of 25 years that must elapse before the jurisdiction of the court may be exercised may be reduced by the truster in the trust deed; and in an inter vivos trust it may be extended until the truster's death.

(k) The power of the court to alter trust purposes does not apply to commercial trusts or to public trusts.

(Paragraph 18.77; Draft Bill, sections 60 and 71)

96. The common law rules in *Frog's Creditors v His Children* and *Newlands v Newlands' Creditors* should be abolished and section 8 of the Trusts (Scotland) Act 1921 should be repealed.

(Paragraph 18.78; Draft Bill, sections 40(4) and 79 and schedule 2)

97. Where a person conveys property to Y in liferent and to Z in fee and Z is non-existent or unidentifiable at the time of the conveyance, Y should take a liferent interest (but no more) and the conveyance to Z should fail.

(Paragraph 18.78)

98. (1) Recommendations 93, 96 and 97 should only apply to trusts set up, or to other dispositions of property taking effect, after legislation implementing those recommendations has been brought into force.

(Paragraph 18.80; Draft Bill, section 40(5)(a))

(2) Recommendation 95 should apply to all private trusts whenever created.

(Paragraph 18.80; Draft Bill, section 60(15))

99. Recommendation 95 should not extend to public trusts or commercial trust, nor should it extend to any part of a trust that is public or commercial in nature.

(Paragraph 18.81; Draft Bill, sections 60(1) and 71)

100. The Court should continue to have power to reduce any trust purpose on the ground that it is unintelligible, impracticable or unreasonable. That power should continue to be exercisable at any time, and should not be affected by the jurisdiction described at recommendation 95.

(Paragraph 18.82)

101. A statutory procedure should be made available in Scots law to permit challenge to the exercise by trustees, including executors, of any fiduciary power on specified grounds that cover, generally, cases where the power is defectively exercised.

(Paragraph 19.36; Draft Bill, section 63)

102. Challenge to an act of a trustee should be possible on the following grounds:

(a) Consideration by the trustee of the wrong question or failure to consider the correct question;

(b) Failure by the trustee to apply his or her mind properly to the correct question, even though he or she purports to do so;

(c) Perversity, whether through the trustee's shutting his or her eyes to the facts or in some other manner; this includes unreasonableness, in the sense of a decision that no reasonable trustee, properly instructed in the facts and law, could properly have reached;

(d) Failure by the trustee to act honestly or in good faith;

(e) Fraud on a power, in the sense of the use of a power for an improper purpose;

(f) Failure by the trustee to take relevant considerations into account or taking irrelevant considerations into account.

(Paragraph 19.38; Draft Bill, section 63(3)(a), (b), (d), (e), (f), (h) and (4))

103. The grounds of challenge should also include cases where the exercise of a power is *ultra vires* of the trustee.

(Paragraph 19.40; Draft Bill, section 63(3)(c))

104. (1) It should be possible to challenge the exercise of a fiduciary power by trustees on the ground that at the time of exercise they were subject to a material error.

(2) Error should be relevant for this purpose when it is "material", in the sense that but for the error the trustees would not have reached the decision that they did.

(3) To be relevant, the error may be of either fact or law.

(4) To be relevant, the error must relate to the legal or factual situation at the time when the power is exercised, but this includes any subsequent declaration by a court of the law as it existed as at the date of exercise of the power.

(5) Without prejudice to the generality of the notion of "material error", the error may relate to the nature, effects or consequences of the exercise of the power.

(Paragraph 19.42; Draft Bill, section 63(3)(g) and (5))

105. The remedies that are available should be reduction, rectification and interdict, as appropriate in the particular circumstances of the case. The remedies of reduction and rectification should be subject to equitable considerations, in the sense in which that concept is used in Scots law.

(Paragraph 19.46; Draft Bill, section 63(6)(a))

106. The following persons should have a right of challenge: the beneficiaries or objects of the power; the trustees or donees of the power or any one such trustee or donee; the truster or granter of the power; any protector or supervisor; and any other person who has a patrimonial interest in the exercise or non-exercise of the power.

(Paragraph 19.49; Draft Bill, section 63(6)(b))

Appendix A

Trusts (Scotland) Bill

[DRAFT]

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Trusts (Scotland) Bill
[DRAFT]

An Act of the Scottish Parliament to make further provision as regards trusts; to amend the Court of Session Act 1988 in relation to trustees, executors and others obtaining directions of that court; and for connected purposes

GENERAL NOTE

Many of the provisions in the draft Bill are marked in these Notes as being default ones. This means that they apply except where the contrary is provided in the trust deed. In some instances, only an express contrary provision in the deed will oust the default legislative provision whereas in other cases a contrary provision may be implied. (And where there is no trust deed, the circumstances may be enough to amount to an express or an implied ouster of the default legislative provision.)

PART 1

APPOINTMENT, ASSUMPTION, RESIGNATION, REMOVAL AND DISCHARGE OF TRUSTEES

Appointment or assumption

1 Appointment of additional or new trustee by court: general

(1) The court may, as regards any trust—

(a) on the application of one or more of the trustees or of any person with an interest in the trust property, appoint an additional trustee if the court considers it expedient to do so for the administration of the trust, or

(b) if no capable trustee exists or is traceable, appoint a new trustee on the application of any person with an interest in the trust property.

(2) The court ceases to have power at common law to appoint a trustee.

(3) The making of an appointment under paragraph (b) of subsection (1) removes any incapable or untraceable trustee from the office of trustee.

(4) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 1. Subsection (1) allows for the appointment of new trustees by the court in two situations: first, where it is deemed expedient for the administration of the trust or, secondly, where no capable trustee exists or is traceable. In the latter case, the court appointment also removes the incapable or untraceable trustee from office (subsection (3)); this is done for the efficient running of the trust, which should not be burdened with trustees whom the court finds to be incapable or untraceable. References to a trustee being incapable or untraceable are to be read with sections 75 and 76 respectively. "Court" is defined in sections 74(1) and (2)) as meaning the Court of Session and the appropriate sheriff court. This provision replaces the common law (by subsection (2)) and the existing statute law (which is in section 22 of the Trusts (Scotland) Act 1921; this is repealed by section 79 and schedule 2). Section 1 applies to any trust, irrespective of when it was created (subsection (4)), and may not be ousted by the trust deed.

2 Appointment of new trustee by truster

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) if no capable trustee exists or is traceable the truster may appoint a new trustee.

(2) The making of an appointment under subsection (1) removes any incapable or untraceable trustee from the office of trustee.

(3) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a public trust.

NOTE

This section implements recommendation 2 and puts the current common law rule into statute. Subsection (1) sets out the circumstances in which the truster may appoint a new trustee. It applies only to private trusts, irrespective of when the trust was created (subsection (3)), and operates as a default provision. Where subsection (1) applies, the effect of an appointment is also to remove the incapable or untraceable trustee from office (subsection (2)): see the note to section 1(3) above.

3 Assumption of additional trustee

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees may assume an additional trustee.

(2) Subsection (3) applies where—

(a) a protector has been appointed in respect of the trust,

(b) there has been conferred on the protector, by virtue of paragraph (d) of section 48(3), the power to direct the assumption of an additional trustee, and

(c) the protector gives such a direction.

(3) An additional trustee must, without delay, be assumed by the other trustees.

(4) This section applies irrespective of when the trust was created.

NOTE

This section is a default provision and allows trustees to assume additional trustees (subsection (1)). It essentially restates the current law, as explained in paragraph 4.2 of the Report. Subsections (2) and (3) cater for specific circumstances in which a protector has been appointed; they provide that any direction by the protector that an additional trustee be assumed must be carried out. (Protectors are governed by Part 7.) This provision applies irrespective of when the trust was created (subsection (4)).

4 Operation of appointment or assumption as general conveyance of trust property

(1) The appointment under section 1(1)(a), or assumption under section 3, of an additional trustee operates as a general conveyance of the trust property in favour, jointly, of the additional trustee and the existing trustees.

(2) The appointment, under section 1(1)(b) or 2(1), of a new trustee operates as a general conveyance of the trust property in favour of the new trustee.

(3) The appointment of a trustee, on the application under section 61 of an *ex officio* trustee, operates as a general conveyance of the trust property—

(a) in favour, jointly, of the appointed trustee and the existing trustees (other than the applicant), or

(b) if there are no existing trustees (other than the applicant), in favour of the appointed trustee.

(4) This section applies irrespective of when the trust was created but only as respects an assumption which takes place, or an appointment which is made, after the section comes into force.

NOTE

This section implements recommendation 4 and amends and simplifies the current law. It is of importance where trust property requires to be conveyed to new or additional trustees following their appointment or assumption.

Subsection (1) provides that the appointment of a trustee by the court or the assumption of a trustee by the trustees operates as a general conveyance of the trust property by the existing body of trustees in favour of themselves and any additional trustee jointly. (A general conveyance is one in which there is no particular specification of the property in question, the intention being that it will cover all trust property which requires a conveyance.)

Subsection (2) provides that in the case of the appointment of a new trustee in circumstances where there is no existing capable or traceable trustee, there will be a general conveyance from the former trustee (who is incapable or untraceable) in favour the new one. References to a trustee who is incapable or untraceable are to be read with sections 75 and 76 respectively. Subsection (3) addresses the particulars of the appointment of a trustee on the application of an *ex officio* trustee under section 61.

This section applies irrespective of when the trust was created, but only with respect to an assumption or an appointment taking place after the section comes into force (subsection (4)).

Resignation and removal

5 Resignation of trustee

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) a trustee has power to resign office.

(2) But if the trustee is a sole trustee, the trustee may do so only after—

(a) an additional trustee is assumed or appointed, or

(b) a judicial factor is appointed to administer the trust.

(3) Any resignation given in breach of subsection (2) is of no effect.

(4) This section applies irrespective of when the trust was created but only as respects a resignation given after the section comes into force.

NOTE

This section implements recommendation 5 and is a default provision. Under the present law, in section 3 of the Trusts (Scotland) Act 1921, all trusts are held to include a power to any trustee to resign the office of trustee; however, in certain cases, for example where a trustee has accepted a legacy, or is appointed on a remunerated basis, he or she is not entitled to resign. These exceptions to the general rule are not re-enacted. Subsection (2) provides for the special case where a sole trustee wishes to resign and stipulates the conditions which must be satisfied before this can happen; subsection (3) states that any purported resignation failing to satisfy these conditions is of no effect. The section applies irrespective of when the trust was created but only to a resignation after the section comes into force (subsection (4)).

6 Removal of trustee by court

(1) Where a trustee—

(a) is unfitted to carry out the duties of a trustee,

(b) purports to carry out those duties but does so in a way which is inconsistent with, or might be inconsistent with, a trustee's fiduciary duty,

(c) has neglected the trustee's duties as trustee,

(d) is incapable, or

(e) is untraceable,

the court may, on the application of one or more of the other trustees, of a beneficiary or of any other person with an interest in the trust property, remove the trustee from office.

(2) The court ceases to have power at common law to remove a trustee.

(3) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 6. Replacing the common law (subsection (2)) and section 23 of the Trusts (Scotland) Act 1921 (which is repealed by section 79 and schedule 2), it provides that a trustee may be removed by the court if any of the general grounds in subsection (1) are satisfied. The power conferred on the court is deliberately framed in general terms, and confers a degree of discretion. References in paragraphs (d) and (e) of subsection (1) to a trustee who is incapable or untraceable are to be read with sections 75 and 76 respectively. "Court" is defined in section 74(1) and (2) as meaning the Court of Session and the appropriate sheriff court. This provision applies irrespective of when the trust was created (subsection (3)) and cannot be ousted by the trust deed.

7 Removal of trustee by co-trustees

(1) A trustee who is—

(a) incapable,

(b) untraceable,

(c) convicted of an offence involving dishonesty,

(d) sentenced to imprisonment on conviction of an offence, or

(e) imprisoned for contempt of court or for not having paid a fine,

may be removed from office by a majority of the other trustees.

(2) Subsection (3) applies where—

(a) a protector has been appointed in respect of the trust,

(b) there has been conferred on the protector, by virtue of paragraph (c) of section 48(3), the power to direct the removal of a trustee from office, and

(c) the protector gives such a direction.

(3) The trustee to whom the direction relates must, without delay, be removed from office by the other trustees.

(4) This section applies irrespective of when the trust was created but paragraphs (c) to (e) of subsection (1) are to be disregarded in relation to, respectively, a conviction obtained, a sentence passed or an imprisonment effected before the section comes into force.

NOTE

This section implements recommendation 8. Subsection (1) provides that a trustee may be removed from office by a majority of the other trustees if any of the specified grounds for removal are satisfied. These grounds are confined to certain easily provable fact-based situations; this is in contrast to the more subjective grounds found in section 6. Subsections (2) and (3) cater for specific circumstances in which a protector has been appointed in respect of the trust, in which case any direction by the protector that a trustee be removed from office must be carried out. (Protectors are governed by Part 7.)

This provision applies irrespective of when the trust was created but subsection (4) provides that paragraphs (c) to (e) of subsection (1) do not apply to convictions, sentences or imprisonments before the section comes into force; this is on the principle that a person convicted of an offence should not be subjected to a heavier penalty than the one that was applicable at the time the offence was committed.

8 Removal of trustee by beneficiaries

(1) A trustee may, subject to subsection (2), be removed from office by the beneficiaries provided that the removal is agreed to by them all and that at the time of reaching such agreement—

(a) they are absolutely entitled to the trust property, and

(b) each of them—

(i) has attained the age of 18 years, and

(ii) is capable.

(2) Subsection (1) does not apply while there subsists—

(a) a trust purpose which cannot be secured, or

(b) a right to be indemnified which cannot be preserved,

without the retention of some or all of the trust property.

(3) Where subsection (1) does apply—

(a) a beneficiary who is capable may require the trustees to make over the trust property (or as the case may be that part) to the beneficiary or to a person nominated by the beneficiary, and

(b) if the beneficiary is incapable, the beneficiary's guardian may require the trustees to make over the trust property (or as the case may be that part) to the beneficiary or to a person nominated by the requirer.

(4) This section—

(a) does not apply as respects a private purpose trust, but

(b) applies as respects any other trust irrespective of when the trust was created.

NOTE

This section implements recommendation 9. It enacts part of the current common law rule found in *Miller's Trustees* and *Yuill's Trustees*. (See also the note to section 53.) It provides that a trustee may be removed from office by the beneficiaries provided that (i) they are absolutely entitled to the trust property, all at least 18 years old, of full capacity, and are unanimous; and (ii) there is no continuing trust purpose which cannot be secured without the retention of some or all of the trust property (subsections (1) and (2)). Where those conditions are met, subsection (3) provides that a beneficiary may require the trustees to make over the trust property (or the relevant share of it) to him or her, or to a nominated person. Similar provision is made for a beneficiary who is incapable.

The section does not apply to private purpose trusts (see paragraph 14.21 of the Report) but applies to all other trusts irrespective of when they were created (subsection (4)). The exclusion of the provision to private purpose trusts (which are the subject of Part 6) is because the nature of such a trust makes it impossible to determine who the whole beneficiaries are. Moreover, one of the provision's pre-conditions is that there is no surviving trust purpose, but with a private purpose trust this can never be the case (unless the trust purposes become impracticable, in which case section 43 is relevant).

Saving as respects liability of trustees

9 Saving as respects liability of trustees

The appointment, or as the case may be the assumption, resignation or removal, of a trustee under any of sections 1 to 3, 5 to 8 and 61 does not affect liability incurred by the trustee or by any other trustee prior to the appointment, assumption, resignation or removal.

NOTE

This provision re-enacts, with modification, the current law, which is in the final sentence of section 3 of the Trusts (Scotland) Act 1921. As noted in paragraph 4.44 of the Report at note 51, the resignation or removal of a trustee does not affect any liability which had been incurred prior to that event. This provision puts that beyond doubt. It also provides that, where a new trustee is assumed or appointed, any liability which had been incurred by the trustee body as constituted immediately prior to that event is unaffected.

Discharge

10 Discharge where trustee has resigned, died or been removed from office

(1) Where a trustee—

(a) resigns, the remaining trustees or the beneficiaries may discharge that trustee or that trustee's representatives,

(b) dies, the remaining trustees or the beneficiaries may discharge that trustee's representatives,

(c) is removed from office under section 6 or 7, the remaining trustees or the beneficiaries may discharge that trustee or that trustee's representatives,

(d) is removed from office under section 8, the beneficiaries may discharge that trustee or that trustee's representatives,

of that trustee's acts and intromissions.

(2) If—

(a) discharge under subsection (1)(a), (b) or (c) cannot be obtained from the remaining trustees, and

(b) the beneficiaries of the trust refuse, or are unable for any reason, to grant it,

the court may, on the application of that trustee or as the case may be of that trustee's guardian or representatives and after such intimation and inquiry as the court thinks necessary, grant it.

(3) If the beneficiaries of the trust refuse, or are unable for any reason, to grant discharge under subsection (1)(d), the court may, on the application of that trustee or as the case may be of that trustee's guardian or representatives and after such intimation and inquiry as the court thinks necessary, grant it.

(4) In this section, the references to beneficiaries are, in relation to any beneficiary who has not attained the age of 16 years or is incapable, to be construed as references to the guardian of the beneficiary.

(5) This section applies irrespective of when the trust was created.

NOTE

This section essentially restates the current law, as explained in paragraph 4.44 of the Report. As a former trustee may continue to have trust liabilities even after leaving office, discharge is important as it brings any such liabilities to an end. Subsection (1) provides for discharge by either the remaining trustees or the beneficiaries; where this cannot be done, subsections (2) and (3) permit the court to grant a discharge.

PART 2

DECISION-MAKING BY TRUSTEES

11 Decisions: preliminary

(1) This section applies in relation to any decision of the trustees which is to bind them.

(2) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), in so far as is reasonably practicable, a trustee—

(a) must receive adequate notice of the matter as regards which the decision is to be made, and

(b) must be afforded an opportunity (whether or not at a meeting of the trustees) to express an opinion in the matter before the decision is taken.

(3) But a decision invalid by virtue of subsection (2) may be homologated by the trustee in question.

(4) This section applies irrespective of when the trust was created but only as regards a decision taken after the section comes into force.

NOTE

This section regulates the administrative procedure to be followed before a valid decision can be taken by trustees; it implements recommendation 13.

It is a default provision and applies to all trusts. There is a degree of uncertainty in the current law as to whether trustees require to take decisions at face-to-face meetings, or whether alternatives such as telephone conversations, written communications, or video conferencing are permissible. By subsection (2), such alternatives are allowed, provided that adequate notice is received in advance of the decision to be made. (An exception is made for cases in which the prescribed procedures are not reasonably practicable.) Subsection (3) permits a trustee to homologate (that is, agree or ratify) a decision which would otherwise be invalid for non-compliance with the earlier subsection.

12 Making of decision

(1) A decision binds the trustees only if made by a majority of those for the time being able to make it.

(2) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), for the purposes of subsection (1), a trustee is not to be regarded as able to make a decision who—

(a) has or might have a personal interest in the decision,

(b) is incapable, or

(c) is untraceable.

(3) But subsection (2)(a) is to be disregarded if (either or both)—

(a) all the beneficiaries know of the personal interest and consent to the trustee acting,

(b) the truster appointed the trustee in the knowledge that such a decision might require to be taken and that the trustee would have a personal interest in it (or must be taken to have appointed the trustee in that knowledge).

(4) In subsection (3)(a), the reference to beneficiaries is, in relation to any beneficiary who has not attained the age of 16 years or is incapable, to be construed as a reference to the guardian of the beneficiary.

(5) This section applies irrespective of when the trust was created but only as regards a decision taken after the section comes into force.

NOTE

In implementation of recommendation 14, this section provides that a decision is binding on the trustees as a whole if made by a majority of those who are able to make it. It also specifies what is meant by being "able" for these purposes. The provision is a default one and applies to all trusts.

This section updates and clarifies the present law. Scots law currently allows majority decisions to be binding (unlike other legal systems, such as in England and Wales, where unanimity is the norm). However, both "majority" and "quorum" are found in the present legislation, whereas the draft Bill avoids confusion by using only the former. In addition, the current rules about which trustees are eligible to take part in a particular decision are not always clear; on that, subsection (2) sets out the three situations in which a trustee may not be counted when calculating the majority. Paragraphs (b) and (c) – relating to a trustee who is incapable or untraceable – are explained in sections 75 and 76 respectively; the notion of personal interest, in paragraph (a), is to be read with subsection (3) which sets out two situations in which a personal interest may be discounted in the calculation of the majority.

PART 3

POWERS AND DUTIES OF TRUSTEES

Powers: general

13 General powers of trustees

(1) Except in so far as the trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees have, in relation to the trust property, all the powers of a natural person beneficially entitled to the property.

(2) But this section is without prejudice to—

(a) a trustee's fiduciary duty (including a trustee's duty to fulfil the trust purposes),

(b) a trustee's duty of care, and

(c) any restriction or exclusion imposed by or under this Act or any other enactment.

(3) This section applies irrespective of when the trust was created.

NOTE

This implements recommendation 15. Subsection (1) sets out the powers which trustees enjoy. It is a default provision, applying to all trustees unless the trust deed expressly provides otherwise or there are other statutory restrictions or exclusions (by subsections (1) and (2)(c), respectively). Trustees are given very broad powers, which are essentially those which they would have if they owned the trust property for their own benefit rather than for the benefit of the beneficiaries. This replaces the current list of specific powers set out in section 4(1) of the Trusts (Scotland) Act 1921, as amended. Importantly, however, subsection (2) is a reminder that all powers which a trustee enjoys are subject to a number of duties, notably the trustee's fiduciary duty and duty of care. The draft Bill makes further provision on both of these: for example, section 30 specifies the narrow extent to which fiduciary duties may be limited, and section 27 provides for duty of care.

14 Conferring of additional powers by court

(1) The court may, on the application of the trustees and after taking into account any objection timeously made by virtue of subsection (2), grant them additional powers of administration or management in relation to the trust property (being powers specified in the petition); but the court must be satisfied that their having the powers in question would benefit the future administration or management of the trust property.

(2) An application under subsection (1) is to be intimated to the persons mentioned in subsection (3), any of whom may object to its being granted.

(3) The persons are—

(a) any supervisor,

(b) any protector,

(c) any beneficiary who has a vested interest in the trust property,

(d) such other persons as the court may specify.

(4) The court is to consider specifying under subsection (3)(d) any beneficiary who has a contingent interest, and any potential beneficiary, under the trust but—

(a) need not specify under that subsection any such beneficiary or potential beneficiary, and

(b) may specify under it a person other than any such beneficiary or potential beneficiary.

(5) The court may, in granting powers under subsection (1), impose such conditions as to the exercise of those powers as it thinks fit.

(6) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 17. It allows the court to grant trustees additional powers of administration or management of the trust property where satisfied that that would be of benefit. Given the breadth of the default general power set out in section 13, this provision will not generally be needed. It will, however, be useful where, for example, the truster has decided to restrict the trustees' powers and it subsequently becomes clear that additional powers of administration or management would be expedient. Subsection (1) provides that the trustees may apply to the court, and the application must be intimated to such other people as provided by subsections (2) to (4). If the court is satisfied as to the benefit of the power which is sought it may grant it, subject to such conditions as it may choose to impose under subsection (5). "Court" is defined in section 74(1) as meaning the Court of Session.

15 Power to take out insurance

(1) Except in so far as the trust deed expressly provides otherwise, a trustee has power to take out such insurance as it is reasonable to take out against personal liability arising from the trustee's actings in carrying out the duties of a trustee.

(2) In subsection (1), the reference to actings is to be construed as including intentionally not acting in some matter.

(3) The expense of taking out the insurance is to be paid out of the trust property.

(4) This section applies irrespective of when the trust was created.

NOTE

This implements recommendation 56. In order to provide clarity which the current law lacks, this section provides that trustees may insure themselves, at the trust's expense, against personal liability arising from their actions as a trustee. To avoid any doubt, subsection (2) states that an intentional decision not to act is to be treated equally with an action for these purposes. This is a default provision and applies to all trusts.

Investment

16 Power of investment

(1) The trustees have the power to make any kind of investment of trust property, including an investment in heritable property, except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise).

(2) The power to act under subsection (1)—

(a) is subject to any restriction or exclusion imposed by or under any enactment, and

(b) is not conferred on trustees—

(i) of a pension scheme,

(ii) of an authorised unit trust, or

(iii) under any other trust who are entitled by or under another enactment to make investments of trust property.

(3) A term—

(a) relating to the powers of a trustee is not, if it is contained in a trust deed executed before 3rd August 1961, or

(b) restricting the powers of investment of a trustee to those conferred by the Trustee Investments Act 1961 (c.62) is not, if it is contained in any such trust deed,

to be treated as restricting or excluding the power to act under subsection (1).

(4) The reference in subsection (3)(b) to a trustee does not include a reference to a trustee under a trust constituted by a private or local Act of Parliament or a private Act of the Scottish Parliament; and "trust deed" is to be construed accordingly.

(5) In this section—

"authorised unit trust" means a unit trust scheme in the case of which an order under section 243 of the Financial Services and Markets Act 2000 (c.8) is in force, and

"pension scheme" means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993 (c.48)) established under a trust.

(6) This section applies irrespective of when the trust was created.

NOTE

This section, together with the following one, implements recommendation 18. It restates the current investment powers of trustees in section 4 of the Trusts (Scotland) Act 1921, in so far as it was amended by section 93 of the Charities and Trustee Investment (Scotland) Act 2005. It applies to all trusts, whenever created (subsection (6)).

Subsection (1) is a default provision and grants trustees wide powers of investment. Prior to the amendments made by the 2005 Act, investment powers were regulated by the Trustee Investments Act 1961. Although its purpose was to allow trustees to invest in assets, such as shares, with a greater potential for return than was hitherto permitted and it reformed and broadened the investment powers which applied up until then, the 1961 Act in turn proved to be unduly restrictive and was regularly disapplied by trust deeds. In the Joint Report on Trustees' Powers and Duties (LC No 260, SLC No 172; 1999) both the Law Commission for England and Wales and the Scottish Law Commission recommended reform of the law; this was effected in Scotland by the 2005 Act. The default powers of investment which were contained in the 2005 Act are simply carried forward into the current draft Bill.

By subsection (2) the powers under subsection (1) are subject to statutory restrictions or exclusions and are not available to trustees of pension schemes, authorised unit trusts or any other trust whose trustees have separate statutory entitlement to make investments. (Subsection (5) defines the terms "authorised unit trust" and "pension scheme".) Trustees to whom subsection (2)(b) applies will invariably have powers of investment in the relevant trust deed.

Subsection (3)(a) continues the policy in section 1(3) of the 1961 Act whereby the new investment powers are to replace contrary provisions in a trust deed executed before that Act came into force. Subsection (3)(b), which is to be read with subsection (4), provides that a deed conferring the 1961 Act investment powers on its trustees is not to be read as restricting or excluding the power in subsection (1).

17 Exercise of power of investment

(1) Before acting under section 16(1) the trustees—

(a) are to have regard to—

(i) the suitability to the trust of the proposed investment, and

(ii) the need for diversification of investments of the trust in so far as is appropriate to the circumstances of the trust, and

(b) are (except where subsection (3) applies) to obtain and consider proper advice about the way in which the power in question should be exercised.

(2) When reviewing the investments of the trust, the trustees are (except where subsection (3) applies) to obtain and consider proper advice about whether the investments should be varied.

(3) If the trustees reasonably conclude that in all the circumstances it is unnecessary or inappropriate to obtain such advice, they need not obtain it.

(4) In this section, "proper advice" means the advice of a person who is reasonably believed by the trustees, on the basis of the person's—

(a) ability, and

(b) practical experience of financial and other matters relating to the proposed investment,

to be qualified to give it.

(5) This section applies irrespective of when the trust was created.

NOTE

This section, together with the preceding one, implements recommendation 18. It is mandatory, and re-enacts section 4A of the Trusts (Scotland) Act 1921, as inserted by section 94 of the Charities and Trustee Investment (Scotland) Act 2005. It applies to all trusts, whenever created (subsection (5)).

Trustees are required to exercise a duty of care in the execution of all their functions, which is provided, generally, by section 27; this section specifies the particular duty of care which additionally applies when exercising powers of investment. One aspect of that duty is that trustees are required to consider the interests of all the beneficiaries, and in particular to balance the interests of liferenters and fiars, and to keep the trust investments under review (*Clarke v Clarke's Trustees* 1925 SC 693, 711).

Subsection (1) applies when trustees are proposing to make an investment. They are required to have regard to the suitability of what is proposed. This relates both to the kind of investment under consideration and to the particular investment as an investment of that kind. It will include considerations as to the size and risk of the investment and the need to produce an appropriate balance between income and capital growth for the trust. In addition, trustees are to take "proper advice", unless subsection (3) applies.

Subsection (2) applies to trustees when reviewing the trust investments. As under subsection (1), they are to take "proper advice", except where subsection (3) applies. By subsection (4), the person from whom "proper advice" is to be taken is a person with expertise which is related to the type of investment under consideration. Thus for investment in shares and other financial instruments, advice would normally be sought from a stockbroker or other professional investment adviser. But trustees running a farm might need advice from an agricultural expert about a proposed acquisition of a herd of cows.

By way of exception to the duty in subsections (1) and (2), subsection (3) provides that trustees need not obtain advice if in all the circumstances it would be unnecessary or inappropriate. For example, if the trust has limited funds it could be inappropriate for the trustees to get advice before placing the money in an interest-bearing account. Although there is no longer a requirement that the advice be given or confirmed in writing, as was the case under section 6(5) of the Trustee Investments Act 1961, it would nevertheless be prudent for trustees to continue the practice of obtaining written advice for all but the smallest investments.

Delegation and the appointment of agents and nominees

18 Delegation and the appointment of agents

(1) Subject to the provisions of this section and except in so far as the trust deed expressly provides otherwise, the trustees may delegate the exercise of any of their powers and in particular may—

(a) appoint an agent,

(b) authorise a person so appointed to execute a deed or other document on behalf of the body of trustees.

(2) Except in so far as the trust deed expressly provides otherwise, the trustees have (and are to be taken always to have had) the power to authorise an agent, whether or not a trustee, to exercise any of their investment management functions—

(a) at the agent's discretion, or

(b) in such other manner as the trustees may direct.

(3) Without prejudice to the generality of subsection (1), a trustee may be appointed or authorised under that subsection.

(4) Except in so far as the trust deed expressly provides otherwise, the trustees may remunerate any person appointed or authorised under subsection (1).

(5) Except in so far as the trust deed expressly provides otherwise, the reference in subsection (1) to the trustee's powers does not include a reference to a power—

(a) relating to whether or in what way assets of the trust should be distributed,

(b) relating to whether any fee or other payment due to be made out of the trust funds should be made out of capital or income,

(c) to appoint a person to be a trustee of the trust, or

(d) which is conferred by any other enactment or by the trust deed and permits the trustees—

(i) to delegate any of their functions, or

(ii) to appoint a person to act as a nominee in relation to the trust property.

(6) In subsection (2), "investment management functions" means functions relating to the management of investments of the trust property, heritable as well as moveable.

(7) Subsections (1) and (2) are subject to any restriction or exclusion imposed by or under any enactment.

(8) This section applies irrespective of when the trust was created.

NOTE

This section empowers trustees to appoint agents and to delegate certain of their functions to them. It is a default provision. Some of the provisions are intended to operate, in part, as "signposts" or reminders to users of the legislation, pointing out particular aspects which might be of value.

Subsection (1) implements part of recommendation 19 and restates the existing power enjoyed by trustees to appoint an agent. In addition, subsection (1) says that trustees may authorise an agent to execute a document on their behalf; this may be of particular assistance if the trustees are geographically spread or if it is otherwise inconvenient for them all to sign. (An alternative is for a majority of the trustees to execute the document, as provided by section 39.)

Subsections (2) and (6) restate section 4C of the Trusts (Scotland) Act 1921. Although covered by the general power in subsection (1), the provision serves to remind trustees of the option of engaging appropriate financial assistance. In addition, those familiar with the current law may be reassured to find a substantially similar provision in the draft Bill; in this way they do not have to deduce the power to appoint a financial agent from the general power in subsection (1).

Subsection (3) implements part of recommendations 19 and 54(1) and allows the trustees as a body to appoint one of their number as agent, either to sign a document on behalf of the body or for other purposes. By subsection (4), which implements part of recommendations 19 and 54(1), the trustees may remunerate an agent. The level of remuneration is to be a reasonable one; but, where the agent is also a trustee, recommendation 54(3) states that no account need be taken in this regard of any other benefit which the trustee receives under the trust deed.

Subsection (5) implements recommendation 20 and sets out four specific types of power which trustees may not delegate to an agent unless the trust deed expressly provides that they may do so. These powers will generally be reserved to the trustees, unless the deed expressly provides otherwise. This subsection is modelled on section 11(2) of the Trustee Act 2000 in England and Wales.

19 Appointment of nominees

(1) Except in so far as the trust deed expressly provides otherwise, the trustees may, for the purpose of the exercise of any of their powers—

(a) appoint a person to act as their nominee in relation to such of the trust property, heritable as well as moveable, as they may determine (in this section referred to as the "determined assets"), and

(b) take such steps as are requisite to secure the transfer of title to the determined assets to the nominee.

(2) Without prejudice to the generality of subsection (1), reference in that subsection to the powers of the trustees includes a reference to their investment management functions (as defined in section 18(6)).

(3) Determined assets held by the nominee are held on trust for the trustees by the nominee (irrespective of any purported agreement to the contrary).

(4) Determined assets title to which is transferred to the nominee may include clients' money.

(5) Without prejudice to subsection (3), subsection (1) is subject to any restriction or exclusion imposed by or under any enactment.

(6) A person is not to be appointed under subsection (1)(a) unless the trustees reasonably believe—

(a) the appointment is appropriate in the circumstances of the trust, and

(b) the person has the skills, knowledge and expertise it is reasonable to expect of one who is to act as a nominee.

(7) An appointment under subsection (1)(a) is—

(a) to be made in writing,

(b) to be subject to the trustees obtaining, as soon as is reasonably practicable, the written acknowledgment of the nominee that the determined assets are held on trust for the trustees by the nominee,

(c) to be subject to the trustees' retaining power to—

(i) direct the nominee, and

(ii) revoke the appointment, and

(d) subject to subsection (8), otherwise to be on such terms as to suitable remuneration and other matters as the trustees may determine.

(8) The trustees are not to appoint a nominee on any of the terms mentioned in subsection (9) unless they have good cause to do so.

(9) The terms are—

(a) a term permitting the nominee to appoint a substitute,

(b) a term restricting the liability of the nominee, or of any substitute, to the trustees or to any beneficiary, and

(c) a term permitting the nominee, or any substitute, to act in circumstances capable of giving rise to a conflict of interest.

(10) While a nominee continues to act for the trust, the trustees are—

(a) to keep under review—

(i) the arrangements under which the nominee acts, and

(ii) how those arrangements are being put into effect,

(b) to consider, if circumstances make it appropriate to do so, whether there is a need to exercise their power—

(i) to direct the nominee, or

(ii) to revoke the nominee's appointment.

(11) The trustees are to exercise either or both of the powers mentioned in subsection (10)(b) if they consider that there is a need to do so.

(12) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 21. It is a default provision, and is modelled on the current law in section 4B of the Trusts (Scotland) Act 1921. However, whereas that section applies only to the appointment of nominees for the purposes of the trustees' power of investment, section 19 allows nominees to be appointed in respect of any of their powers. The reference to investment management functions in subsection (2) is an express reminder that the option of using a nominee for such purposes is open to trustees; the use of a nominee will often be convenient for that.

Subsections (3) and (4) make clear that trust assets held by a nominee are, in turn, held on trust; this applies in particular to client money held by a nominee such as a solicitor or other professional agent. One effect is that, in the event of the nominee's insolvency, the assets held on the trustees' behalf will be protected as they will not be available to the nominee's personal creditors. These subsections implement recommendation 21(2).

Subsections (5) to (11) re-enact subsections (2) to (6) of section 4B of the Trusts (Scotland) Act 1921. They provide safeguards against imprudent, excessive or unnecessary appointments of nominees and require trustees to retain supervision of the activities of their nominees.

Power of advancement

20 Power to advance from capital

(1) Except in so far as the trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires otherwise) the trustees may, provided that the requirements of subsections (4) and (5) are satisfied, advance all or part of the trust capital to a beneficiary for the benefit of the beneficiary.

(2) The advance may be on such conditions (if any) as the trustees consider it reasonable to impose.

(3) But the trustees may subsequently waive or vary any condition imposed under subsection (2) if they consider it appropriate to do so.

(4) A right to the capital advanced must, as at the date on which the advance is made, be destined to vest in the beneficiary—

(a) unconditionally,

(b) subject, if an uncertain future event were to occur, to defeasance or diminution, or

(c) on the occurrence of an uncertain future event.

(5) Either—

(a) the consent must have been obtained of any person who has a prior interest as respects the trust property, being an interest which would be prejudiced were the advance made, or

(b) authorisation to make the advance must have been obtained from the court—

(i) on an application to it in that regard by the trustees or by any person with an interest in the trust property, and

(ii) on its being satisfied that any person whose consent is (but for this paragraph) required by paragraph (a) is either withholding consent unreasonably or does not have capacity to give consent.

(6) Authorisation under subsection (5)(b) may be granted subject to such conditions (if any) as the court thinks fit to impose.

(7) Any amount advanced under this section (other than an amount which has been repaid) must be brought into account by the trustees as part of the share in the trust property to which the beneficiary is, or will become, entitled.

(8) For the purposes of subsection (7), the value of the advance is its market value as at the date on which the advance is made (interest in relation to the advance being disregarded).

(9) It is not an objection to an advance to the beneficiary under this section that the advance is made by setting up a new trust for the benefit of the beneficiary and transferring the capital advanced as assets to be held in that new trust (or, without setting up a new trust, by transferring the capital advanced to assets for the time being held in any trust for the benefit of the beneficiary).

(10) Subsection (9) applies whether or not any third party gains incidental benefit from the transfer or as the case may be from the setting up of the new trust.

(11) The trustees are not liable for any loss which the trust property may incur by virtue of—

(a) a condition imposed by them under subsection (2),

(b) a condition which might have been so imposed not having been so imposed,

(c) their exercising, or failing to exercise, powers under subsection (3).

(12) This section applies irrespective of when the trust was created but only as respects an advance made after the section comes into force.

NOTE

This section implements recommendations 22-25. The basic power to make advances from capital is contained in subsection (1) and is a default power. Subsection (2) permits the imposition of conditions that the trustees consider reasonable and, by subsection (3), they may be waived or varied subsequently. The conditions for the making of an advance are found in subsections (4) and (5). In implementation of recommendation 23, subsection (5)(b) provides that the court may authorise an advance in cases where it is said that a person whose consent is required is either withholding consent unreasonably or does not have capacity to consent. Authorisation to make an advance may be granted, in accordance with subsection (6), subject to conditions. "Court" is defined in section 74(1) as meaning the Court of Session.

Subsections (7) and (8) provide that any amount advanced must be brought into account as part of the share of the trust property to which the beneficiary who receives the advance is or will become entitled. Subsection (9) permits the setting up of a new trust, although any such trust must be primarily for the benefit of the beneficiary in question; if it is not, there will be a breach of trust. By subsection (10), it is no objection that a third party gains incidental benefit from the transfer or the setting up of the new trust.

Subsection (11) provides certain limitations on the liability of the trustees for any loss that may be sustained in certain circumstances, and subsection (12) provides that the section applies to all trusts, whenever created, but only in relation to advances made after commencement.

Apportionment

21 Exercise of power to apportion between or among beneficiaries

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise, no exercise by a trustee of a power to apportion funds or other property between or among certain beneficiaries is invalid on the ground only that—

(a) an insubstantial, illusory or nominal part is apportioned to (or left to devolve unapportioned upon) one of the beneficiaries, or

(b) one of the beneficiaries is not apportioned a part.

(2) But subsection (1) is without prejudice to the grounds on which the court may grant a remedy under section 63.

(3) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 29. It re-enacts the Powers of Appointment Act 1874, which allows trustees, if they consider it appropriate to do so, to exercise their power of apportionment of trust property in such a way that a particular beneficiary receives nothing. This is described in greater detail in paragraphs 10.32-10.35 of the Report. The Act is repealed by section 79 and schedule 2 to the draft Bill.

22 Time apportionment

(1) Except in so far as the trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires otherwise), the trustees may determine that amounts mentioned in section 2 of the Apportionment Act 1870 (c.35) (which provides for rents, dividends and other periodical payments to be apportionable in respect of time) are not to be apportioned as mentioned in that section but are instead to be apportioned in such manner as appears to them to be appropriate.

(2) This section applies irrespective of when the trust was created.

NOTE

This provision implements recommendation 28. The effect is that, as a default, trustees are not bound to apply the rules of time apportionment in section 2 of the Apportionment Act 1870. (As its application extends beyond trustees, repeal is not an option in this draft Bill.) For an explanation of what time apportionment involves and of some of the difficulties it can cause, see paragraphs 10.7-10.9 of the Report.

23 Apportionment: disapplication of certain rules

(1) Any rule of law relating to the allocation and apportionment of trust receipts and outgoings ceases to have effect in relation to a trust, irrespective of when that trust was created.

(2) Subsection (1) does not affect allocation and apportionment which falls to be made before this section comes into force.

NOTE

This provision implements recommendation 27. The intention is to disapply certain 19th century common law rules which oblige trustees to make "equitable apportionment" of trust assets in particular situations. The rules are summarised in paragraph 10.13 of the Report. They have recently been disapplied in England and Wales by section 1 of the Trusts (Capital and Income) Act 2013. Since there is some doubt as to whether all of the rules are in fact part of Scots law, as explained in paragraph 10.28 of the Report, the provision does not follow the 2013 Act's technique of referring to the rules by name. The intended effect, however, is identical.

Payments from income

24 Power to make payments etc. from income

(1) Subject to subsection (8) and except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees may, provided that the requirements of subsections (4) and (5) are satisfied, pay or otherwise apply all or part of the trust income (whether as it arises or after it has accumulated) to a beneficiary for the benefit of the beneficiary.

(2) The paying or applying may be on such conditions (if any) as the trustees consider it reasonable to impose.

(3) But the trustees may subsequently waive or vary any condition imposed under subsection (2) if they consider it appropriate to do so.

(4) The income paid or applied must, as at the date on which it is paid or applied, be income from capital destined to vest in the beneficiary—

(a) unconditionally,

(b) subject, if an uncertain future event were to occur, to defeasance or diminution, or

(c) on the occurrence of an uncertain future event.

(5) The trustees must be satisfied, as at the date mentioned in subsection (4), that no person other than the beneficiary is entitled to the income paid or applied.

(6) Any amount paid or applied under this section (other than an amount which has been repaid) must be brought into account by the trustees as part of the share in the trust property to which the beneficiary is, or will become, entitled.

(7) For the purposes of subsection (6), the payment or application is to be deemed to be for a consideration equal to the market value of the payment or application as at the date mentioned in subsection (4) (interest in relation to the payment or application being disregarded).

(8) If the trust deed directs or permits the trustees to accumulate income, the authorisation of the court must be obtained under subsection (9) to any exercise of their power under subsection (1).

(9) Such authorisation may be granted by the court on an application to it in that regard by the trustees or by any person with an interest.

(10) Authorisation under subsection (9) may be granted subject to such conditions (if any) as the court thinks fit to impose.

(11) The trustees are not liable for any loss which the trust property may incur by virtue of—

(a) a condition imposed by them under subsection (2),

(b) a condition which might have been so imposed not having been so imposed,

(c) their exercising, or failing to exercise, powers under subsection (3).

(12) This section applies—

(a) irrespective of when the trust was created, but

(b) only as regards a payment, or application of income, made after the section comes into force.

NOTE

This provision implements recommendation 26. It sets out for the first time a statutory power for trustees to make payments of income to beneficiaries. Subsection (1) contains the general power, but only if the conditions in subsections (4) and (5) are met. It is a default power. Conditions may be imposed by the trustees, and subsequently varied or waived: subsections (2) and (3). Subsections (4) and (5) set out the conditions that must be met if a payment is to be made. These are demanding, and will prevent any unduly liberal payments of income to beneficiaries under this section. At the time when the income is paid or applied, the income must be derived from capital which meets at least one of the criteria in subsection (4), and in addition no person other than the beneficiary must be entitled to that income (by subsection (5)).

Under subsection (6), any amount paid or applied under the section must be brought into account by the trustees as part of the share to which the beneficiary is ultimately entitled, and subsection (7) assists in determining the value of the payment for these purposes. Subsection (8), which implements recommendation 26(2), provides that if the trust deed directs or permits the trustees to accumulate income, the court's authorisation must be obtained in order to exercise the power to pay income to a beneficiary. Subsection (9) provides that the court's power is exercisable on application by the trustees or any person with an interest. The intention is that the procedures in the Court of Session applicable to trusts should be simple and informal, and that the use of developments such as electronic communication should make any application straightforward and inexpensive. "Court" is defined in section 74(1) as meaning the Court of Session. Finally, subsection (11) provides certain restrictions on potential liability of the trustees, and subsection (12) ensures that the new provision applies to all trusts but only in so far as an payment of income is made after the section comes into force.

Duty to provide information

25 Trustees' duty to provide information other than on request

(1) It is the duty of the trustees, on becoming aware that a person is as described in subsection (2)—

(a) to inform the person (or if the person has not attained the age of 16 years, or is incapable, the person's guardian) accordingly, and

(b) to disclose with that information—

(i) the names of all the trustees, and

(ii) information sufficient to enable the person (or the person's guardian) to enter readily into correspondence with them.

(2) The persons are—

(a) a beneficiary who has a vested interest in the trust property,

(b) any other beneficiary who the trustees reasonably consider ought to be informed under subsection (1), and

(c) a potential beneficiary, the imminence of whose becoming a beneficiary appears to the trustees to be such that it would be unreasonable not to inform that potential beneficiary under subsection (1).

(3) For the purposes of this section, trustees must take such steps as appear to them to be appropriate in all the circumstances to ensure that beneficiaries and potential beneficiaries are identified and traced.

(4) The information is to be provided within such period as is reasonable in all the circumstances; except that if the person to be informed is a beneficiary who has acquired an immediate interest in the trust property the information must be provided as soon as is reasonably practicable.

(5) In providing information, or making disclosure, to any person under subsection (1), the trustees need not—

(a) give any advice to that person, or

(b) comment upon the information or disclosure in question.

(6) If information provided by virtue of subsection (1) ceases to be current, the trustees must without delay inform the beneficiary or potential beneficiary (or the guardian of the beneficiary or potential beneficiary) of such changes as are needed to update it.

(7) This section—

(a) applies irrespective of when the trust was created, but

(b) except in the case of a beneficiary who has a personal interest in the trust property, does not apply as respects a private purpose trust.

NOTE

This section implements recommendations 30 to 36, and 44. It is mandatory, and therefore applies regardless of what the deed provides (recommendation 35). It applies to all trusts, whenever created, but not to private purpose trusts except to the extent that there are beneficiaries (subsection (7); recommendation 44). This section, together with the following one, sets out the basic duty on trustees to provide information to beneficiaries and others. This is the first time in Scots law that there is a statutory duty of this nature. It is intended to reinforce the fundamental and long-standing right of the beneficiaries to hold the trustees to account.

Subsection (1) sets out the main mandatory duty, which is that the trustees must inform a person of his or her beneficial interest in the trust and, in addition, must inform him or her who the trustees are and how to contact them. The point at which the information is to be provided is set out in subsection (4), and trustees have deliberately been given a discretion in this regard. Equally, the list in subsection (2) of people who must be informed of their status has an element of discretion for the trustees. It would not be practicable to impose a rigid or prescriptive rule here as the circumstances of individual trusts will vary enormously. The section aims to strike a balance between, on the one hand, imposing a clear duty on trustees to provide timeous information to those who are entitled to it and, on the other, not burdening trustees with an undue volume of work which is inefficient and costly for the trust administration.

Subsection (3) imposes a duty on trustees to take appropriate steps to identify and trace those whom they might require to inform under subsection (1); in practical terms, this is what trustees should be doing anyway as it is a basic part of trust management to know who the beneficiaries are and how to contact them. It is included here, however, to remind trustees of their duty in the present context. The same applies to subsection (5): it removes any doubt that the duty to inform does not embrace a duty to advise. Indeed, there may be situations in which it would be inappropriate for any advice to be given by the trustees. Subsection (6) is also intended to avoid doubt, this time as to whether or not the duty to provide information is a continuing one: the subsection states that changes to the information provided under subsection (1) must be communicated without delay.

26 Trustees' duty to provide information on request

(1) It is the duty of the trustees to disclose—

(a) to a beneficiary or potential beneficiary,

(b) where the beneficiary or potential beneficiary has not attained the age of 16 years, or is incapable, to that person's guardian,

(c) where the beneficiary or potential beneficiary has attained the age of 16 years and is capable but has instructed a solicitor to act on that person's behalf, to the solicitor, or

(d) where the beneficiary or potential beneficiary has (wholly or in part) assigned the that person's interest in the trust, to the assignee,

information requested by the beneficiary (or as the case may be by the potential beneficiary, guardian, solicitor or assignee) as regards the trust unless the trustees consider it would be inappropriate, in all the circumstances, to make the disclosure.

(2) But subsection (1) is subject—

(a) to the express provisions of the trust deed, and

(b) to the following provisions of this section.

(3) The disclosure—

(a) is to be made in such a way as is appropriate in all the circumstances, and

(b) may be conditional on payment of such expenses as are reasonably incurred by the trustees in making it.

(4) Any duty arising by virtue of paragraph (d) of subsection (1) is without prejudice to any other duty under that subsection.

(5) A disclosure under subsection (1) is to be made as soon as is reasonably practicable after receipt of the request.

(6) It is to be presumed that the trustees will not ordinarily disclose under subsection (1) information requested in respect of—

(a) some other beneficiary or potential beneficiary,

(b) the trustees' deliberations or reasons for their decisions, or

(c) letters of wishes (that is to say documents in which an account is given, whether or not by the truster, of circumstances which are to be relevant to the exercise by them of a discretion).

(7) The trustees may seek a direction from the court as to the fulfilment of their duty under subsection (1) in relation to a particular request.

(8) The court may, on the application of any person to whom the trustees have declined to disclose information requested under subsection (1), direct the trustees to disclose the information (or such part of that information as may be specified by the court) to the person.

(9) At any time after the trust is created, a person mentioned in subsection (11) may apply to the court for a determination as to whether a limitation on disclosure of information as respects the trust, imposed by virtue of subsection (2)(a), is reasonable in all the circumstances.

(10) If, on an application under subsection (9) as respects such a limitation, the court determines that the limitation is not reasonable in all the circumstances it may—

(a) alter the limitation to such extent as it considers expedient having regard to the need for a beneficiary or potential beneficiary to be able to hold the trustees to account at an appropriate time, or

(b) rescind the limitation.

(11) The persons are—

(a) the trustees,

(b) in the case of an *inter vivos* trust, the truster,

(c) a descendant of the truster,

(d) a beneficiary or potential beneficiary,

(e) a guardian, descendant or ancestor of a beneficiary or potential beneficiary,

(f) a judicial factor, and

(g) unless the trust deed expressly or impliedly excludes the possibility—

(i) a protector, and

(ii) a supervisor.

(12) This section—

(a) applies irrespective of when the trust was created, but

(b) except in the case of a beneficiary who has a personal interest in the trust property, does not apply as respects to a private purpose trust.

(13) But subsection (12)(a) is subject to subsection (14).

(14) In the first year after the day on which this section comes into force, the section does not apply to a trust created before that day.

NOTE

This section implements recommendations 30, 37 to 40, and 44. Subject to a grace period as explained in the final paragraph below, it applies to all trusts, whenever created, but not to private purpose trusts except to the extent that there are beneficiaries (recommendation 44). It is a default provision, though there are particular controls on any limitations imposed in the trust deed, as explained below.

The duty on trustees complements that in the previous section, which obliges trustees to inform people of their beneficial interest in the trust. Under this section, trustees are obliged to consider requests for further information made by those with an interest. Where appropriate, they are under a duty to comply with those requests.

Subsection (1) sets out the broad duty on trustees, namely to provide trust information which is requested by anyone falling within any of the specified classes. They need not do so if they consider that it would be inappropriate to do so. This implements recommendation 37. Some guidance as to what classes of information will ordinarily not be disclosed is set out in subsection (6): this includes information about other people (which is in any case subject to data protection legislation), reasons for trustees' decisions (which are generally private to the trustees), and letters of wishes, ie documents in which a truster may set out non-binding guidance for the trustees as to how he or she would wish the powers to be exercised.

Subsection (3) allows the trustees to disclose the information in an appropriate way and to charge for any reasonable expenses.

In the event of doubt as to what information should be disclosed under this section, there is provision for the trustees to seek court direction on the matter, and also for those whose request has been declined to apply to court for a ruling (under subsections (7) and (8) respectively). In many cases it will be clear whether requested information should be disclosed or not but these procedures will be useful for the definitive resolution of any doubt or dispute.

By subsection (2)(a) the truster may, in the trust deed, limit (or expand) the duty of disclosure. However, subsections (9) to (11), which implement recommendation 38, provide that any limitation is subject to court review; this will guard against attempts to deprive beneficiaries of the basic information to which they should be entitled. The court will determine whether the limitation is reasonable in all the circumstances, and an important factor will be the extent to which it impedes the ability of the beneficiary to hold the trustees to account. If the court finds a limitation unreasonable, it may either alter it or rescind it altogether. An application may be brought at any time after the trust has been created (and, alternatively, an application under section 60 may be made, though a period of 25 years might require to have elapsed as explained in the note to that section). "Court" is defined in section 74(1) as meaning the Court of Session.

Finally, the duty in this section applies to all newly created trusts but, for those already in existence when the legislation comes into effect, there is a grace period of a year (subsections (12) to (14) and recommendation 39). This is designed to afford a transitional period during which trustees of existing trusts can prepare themselves for compliance with the statutory duty. Nevertheless, it is likely to be best practice for trustees to comply with the legislation immediately on it taking effect to the extent that, in practice, they can.

Trustees' duty of care etc.

27 Trustees' duty of care etc.

(1) Subject to subsections (2) and (3), a trustee, in managing the affairs of the trust, is required to exercise such care and diligence as any person of ordinary prudence would exercise in managing the affairs of another person.

(2) A person who in the course of business provides professional services in relation to managing the affairs of trusts is required, where appointed or assumed as a trustee and remunerated for carrying out the duties of that office, to exercise such skill, care and diligence as it is reasonable to expect from a member of the profession in question.

(3) A natural person with professional qualifications who is appointed or assumed as a trustee but is not a person mentioned in subsection (2) is—

(a) if expressly instructed by or on behalf of the trustees to provide professional services or advice to the trust, required (whether remunerated or not) to exercise such skill, care and diligence in providing those services or that advice as it is reasonable to expect from a member of the profession in question, and

(b) if not so instructed, required only to exercise such care and diligence as is mentioned in subsection (1).

(4) A provision of a trust deed is of no effect in so far as the provision purports—

(a) to lessen a requirement imposed by subsections (1) to (3),

(b) to relieve a trustee from liability arising from a failure to exercise the skill, care or diligence required of that trustee by subsection (2) or (3)(a),

(c) in the case of a trustee who is required only to exercise such care and diligence as is mentioned in subsection (1), to relieve the trustee from liability arising by virtue of the trustee's gross negligence,

(d) to exclude or restrict any right or remedy in relation to a liability arising as mentioned in paragraph (b) or (c),

(e) to indemnify a trustee for any liability arising as mentioned in either of those paragraphs,

(f) to subject a person to any prejudice in respect of pursuing such a right or remedy,

(g) to exclude or restrict any rule of evidence or procedure in its application to the pursuit of such a right or remedy, or

(h) to make a liability arising as mentioned in paragraph (b) or (c), or its enforcement, subject to restrictive or onerous conditions.

(5) This section applies irrespective of when the trust was created but only as respects managing the affairs of the trust after the section comes into force.

NOTE

This section specifies the duty of care to be exercised by trustees. Such a duty is a fundamental one for all trustees (as can be seen, for example, by its express inclusion in section 13(2)(b)). It also sets out the extent to which the trust deed can validly provide immunity from breaches of that duty, and indemnity in that regard.

Subsection (1), which implements recommendation 47(a), contains the basic duty, which is that a trustee should manage trust affairs with the care and diligence which a person of ordinary prudence would exercise in managing another person's affairs. This represents the minimum standard and subsection (4)(a) states that it may not be lessened by provision in the trust deed. It is, though, subject to two exceptions, in each of which a higher standard of care will apply. First, subsection (2) provides that a trustee who is a person – whether a natural person or a legal person such as a trust company – offering professional services in relation to trust management and is remunerated for doing so, must meet the standard of care which it is reasonable to expect from a member of that profession. This implements recommendation 47(c).

Secondly, subsection (3) provides that a trustee who has professional qualifications of any kind must exercise the standard of care reasonably expected of a member of that profession if (but only if) he or she is instructed by the trustees as a body to provide professional services. This implements recommendation 47(b). The effect of this is that, where a trustee happens to be, say, an accountant or an investment advisor, he or she is only bound to exercise a duty of care which exceeds the basic one set out in subsection (1) if the trustees instruct him or her to provide accountancy services or investment advice. The payment of remuneration is not determinative, though in many cases the acceptance of instructions, which marks the relationship out as being a formal and professional one, will be dependent on an agreement about payment for services to be rendered. Generally, the acceptance of instructions by a professional will also engage his or her professional indemnity insurance, and thus there will be some protection for the beneficiaries against professional services which turn out to be negligent.

Subsection (4) implements recommendations 48 to 50. Paragraph (a) requires that the standards of care in subsections (1) to (3) may not be reduced. Recommendation 48 is effected by paragraph (b), which states that a provision of a trust deed is of no effect to the extent that it relieves a trustee of the higher standard of care relating to professionals in certain situations. In implementation of recommendation 49, paragraph (c) provides that the trust deed may relieve a trustee who is subject to the basic duty of care in subsection (1) of negligence, but that there can be no relief against gross negligence; this would be incompatible with the trustee exercising the minimum level of care required of any person holding office as trustee. Paragraphs (d), (f), (g) and (h) implement recommendation 50 and ensure that a person seeking to enforce the trustees' standard of care is not unduly hampered in doing so. Paragraph (e) implements recommendation 51 and provides that indemnity clauses should be ineffective to the extent that immunity clauses are.

By subsection (5) this provision applies to all trusts but only in respect of managing the affairs of a trust after commencement.

Breach of duty etc.

28 Breach of fiduciary duty at instigation or request of beneficiary or with consent of beneficiary

(1) This section applies where a trustee is in breach of a fiduciary duty—

(a) at the instigation or request of a beneficiary, or

(b) with the written consent of a beneficiary.

(2) The court may if it thinks fit make such order, assigning by way of indemnity all or part of the beneficiary's interest in the trust property to the trustee or (as the case may be) to any person claiming through the trustee, as seems to the court to be just.

(3) This section applies irrespective of when the trust was created but only as respects a breach of a fiduciary duty occurring after the section comes into force.

NOTE

This section implements recommendation 57(2), which is that section 31 of the Trusts (Scotland) Act 1921 be re-enacted. It provides the court (which, by section 74(1), means the Court of Session) with discretion to order that, where a trustee is in breach of trust at the request of a beneficiary or with his or her written consent, some or all of that beneficiary's interest in the trust property is to be used to indemnify the trustee. The court will not consider granting an order unless the beneficiary knows the full facts that made the trustee's action a breach of trust.

29 Order relieving trustee of consequences of actings which are *ultra vires*

(1) This section applies where actings of a trustee are *ultra vires*.

(2) The court may, on the application of the trustee, if it thinks fit and if the condition mentioned in subsection (3) is satisfied, make such order, relieving the trustee of the consequences of those actings, as seems to the court to be just.

(3) The condition is that the trustee believes (after taking all reasonable steps and making all reasonable enquiry) that it is within the trustee's powers to act as the trustee does.

(4) Subsection (2) is without prejudice to any right of a beneficiary or trustee to recover trust property from a person, other than a trustee, to whom a payment would not have been made but for the actings in question.

(5) This section applies irrespective of when the trust was created but only as respects actings occurring after the section comes into force.

NOTE

This provision implements recommendation 46. It regulates the consequences for a trustee of acting in a way which is outside his or her power as set out in the trust deed (ie acting *ultra vires*). The current law is not wholly clear, but in general a trustee who acts beyond his or her powers is open to personal liability. By subsection (2), the court (which means the Court of Session, by section 74(1)) may relieve a trustee of the consequences of his or her *ultra vires* actings to the extent that the court considers it just to do so, provided that the condition in subsection (3) is met: namely, relief may be granted if the court is satisfied that the trustee, after making appropriate efforts in this regard, believed that the acting in question was within his or her power.

Subsection (4) preserves the right of a beneficiary or trustee to recover trust property paid out to someone other than a trustee when that payment would not have been made if the trustee had not acted *ultra vires*. By subsection (5), this section applies to all trusts but only in relation to actings occurring after commencement.

30 Provision purporting to limit liability for, or indemnify for, breach of fiduciary duty

(1) In so far as a provision of a trust deed purports generally to—

(a) limit any liability of a trustee for, or

(b) indemnify a trustee for,

the trustee's breach of a fiduciary duty, the provision is of no effect.

(2) But subsection (1) is without prejudice to any provision of a trust deed which authorises a particular transaction, or a particular class of transactions, which but for that authority would constitute a breach of a fiduciary duty.

(3) This section applies irrespective of when the trust was created but only as respects a breach of duty occurring after the section comes into force.

NOTE

This section, in implementation of recommendation 53, renders ineffective a provision in a trust deed which purports, in a blanket fashion, to limit a trustee's liability for breach of fiduciary duty, or to indemnify a trustee for such breach (ie giving the trustee a right of recovery against the trust property for any claim against his or her personal patrimony following such breach). Whilst this is true of trust provisions on general application, subsection (2) makes an exception for a provision which authorises a particular transaction, or a particular class of transactions, which would otherwise be in breach of fiduciary duty. This section applies to all trusts but only in relation to breaches of fiduciary duty occurring after commencement.

31 Order relieving trustee of consequences of entering into a transaction in breach of fiduciary duty

(1) This section applies where a trustee has entered into, or proposes to enter into, a transaction in breach of a fiduciary duty.

(2) The court may, on the application of the trustee, if it thinks fit and if the conditions mentioned in subsection (3) are satisfied make such order, relieving the trustee of the consequences of breaching that duty, as seems to the court to be just.

(3) The conditions are—

(a) that the transaction has benefited, or is likely to benefit, both the trust property and (collectively) the beneficiaries, and

(b) that the terms of the transaction are at least as favourable to the trust property as those likely to have been, or to be, obtained in a comparable commercial transaction at arms-length.

(4) This section applies irrespective of when the trust was created but only as respects a transaction entered into, or to be entered into, after the section comes into force.

NOTE

This section implements recommendation 52. It deals with situations in which a trustee enters into a transaction in breach of his or her fiduciary duty (or proposes to do so). Whilst the law should generally protect against such breaches, the current position is arguably too strict. Therefore, this section empowers the court (which means the Court of Session, by section 74(1)) to relieve a trustee from the consequences of the breach, or the proposed breach, if it considers it just to do so, provided that the two conditions in subsection (3) are met. They are, first, that the transaction has benefited the trust property and the beneficiaries (or is likely to do so) and, secondly, that the terms of the transaction are at least as favourable to the trust property as a comparable arms-length commercial transaction would have been (or would be).

This section applies to all trusts but only in relation to transactions entered into (or proposed to be entered into) after commencement.

Personal liability of trustees

32 Trustees' personal liability for beneficiary's loss

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise, a trustee has personal liability for any loss to a beneficiary which results from—

(a) the trustee's own, unreasonable, acts or omissions, or

(b) a breach of trust, or of fiduciary duty, by a co-trustee if the trustee failed to take reasonable steps to ensure that the co-trustee did not commit the breach.

(2) This section applies irrespective of when the trust was created but only as respects—

(a) an act,

(b) an omission, or

(c) a breach of trust or of fiduciary duty,

occurring after the section comes into force.

NOTE

This section, which implements recommendation 58, re-enacts section 3(d) of the Trusts (Scotland) Act 1921. It provides that, as a default provision, a trustee is personally liable for any loss to a beneficiary which arises either from the trustee's own unreasonable acts or omissions, or from a co-trustee's breach of trust or breach of fiduciary duty in circumstances where he or she failed to take reasonable steps to ensure that the co-trustee did not commit that breach. (The co-trustee will also be personally liable but the beneficiary may choose to pursue both.) By subsection (2), the section applies to all trusts, whenever created, but only in respect of acts, omissions and breaches committed after commencement.

PART 4

CONTRACTUAL RIGHTS, DAMAGES AND THE VALIDITY OF CERTAIN TRANSACTIONS AND DOCUMENTS

Contractual rights

33 Contractual rights

(1) Subsection (2) applies where, acting *intra vires*, the trustees enter into an onerous contract with a person who, at the time the contract is entered into, is aware (whether or not by virtue of having been so informed by the trustees) that they are entering into the contract in their capacity as trustees.

(2) Subject to subsections (3) and (4) and except in so far as the contract otherwise provides, any rights of the person under the contract are enforceable against the trust property only.

(3) Subsection (4) applies where—

(a) a person has a contractual right enforceable against the trustees' private property, but

(b) the trustees have a right of relief against the trust property in respect of any finding against the trustees' private property.

(4) The person may elect to enforce the right against the trustees' private property or directly against the trust property (liability being joint and several).

(5) Subsection (6) applies where, acting *ultra vires* (and whether or not purporting to be acting *intra vires*), the trustees enter into an onerous contract with a person.

(6) Any rights of the person under the contract—

(a) are not enforceable against the trust property, but

(b) if the person enters into the contract in good faith, are enforceable against the trustees' private property.

(7) This section applies irrespective of when the trust was created but only as respects a contract entered into after the section comes into force.

NOTE

This section implements recommendations 60, 61 and 63. It specifies whether a person who has contracted with trustees has rights which are enforceable against the trust property or the trustees' private patrimonies. To some extent this depends on whether the trustees had power to make the contract (in which case it is an *intra vires* contract) or did not (*ultra vires*). The section applies to all trusts but only in relation to a contract entered into after commencement.

Subsections (1) and (2) implement recommendation 60. They provide that, where trustees enter into an *intra vires* onerous contract with a party who is aware that they are acting in their capacity as trustees, then, subject to contrary provision in the contract, that party's rights under the contract are enforceable against the trust property only. In this way, the trustees' private patrimonies are not at risk. This represents an adjustment to the current law, and a clarification of it. Subsection (2) is subject to the two following subsections.

Subsections (3) and (4) implement recommendation 61. They apply to contracts in which the trustees have incurred personal liability under a contract but also have a right of relief against the trust property (ie they can seek reimbursement from it). Where the other contracting party is faced with such a situation, he or she may elect, under subsection (4), to enforce the right against the trustees' private property, or directly against the trust property, or both. This will simplify the recovery process, and will make the current law more certain.

By subsections (5) and (6), which implement recommendation 63, a party who enters into an onerous contract with trustees which is *ultra vires* cannot recover from the trust property; but, if he or she contracted in good faith, then that party may seek recovery of any losses from the trustees' private patrimonies. This puts the onus on the contracting party to investigate whether the contract is within the trustees' powers. (The alternative, whereby the trust property is liable under *ultra vires* contracts, would be detrimental to the beneficiaries, as they would suffer from the diminution in the trust property as a consequence of a contract which was both *ultra vires* and about which they may also have had no knowledge.) Subsections (5) and (6) seek to strike an appropriate balance between the competing interests of the beneficiaries, on the one hand, and contracting party, on the other.

Damages

34 Damages for loss resulting from trustee's act or omission in ordinary course of administration

(1) This section applies where—

(a) in consequence of a trustee's act or omission (or of an act or omission of a person for whom the trustees are responsible) a person other than a trustee suffers loss, and

(b) that act or omission arises in the ordinary course of administering the trust.

(2) Subject to subsection (3), any damages awarded in respect of that loss are recoverable from the trust property only.

(3) In making any award in respect of that loss the court may, if satisfied that the act or omission was in any way attributable to the trustee's failure to exercise such skill, care or diligence as is required of that trustee by section 27, determine that damages are recoverable—

(a) partly from the trust property, and

(b) to the extent of the trustee's failure, partly from the trustee's personal property.

(4) This section applies irrespective of when the trust was created but only as respects an act or omission occurring after the section comes into force.

NOTE

This section implements recommendation 66. It is concerned with the satisfaction of awards of damages for loss suffered by a third party resulting from trustees' acts or omissions in the ordinary course of administering the trust. Subsection (2) provides that the general rule is that such damages are payable only from the trust property; therefore, the trustees are not personally liable. If, however, the court is satisfied that a trustee has failed to meet the required duty of care, as specified by section 27, and the delictual act or omission was in any way attributable to that failure, then it may specify that the damages are payable partly from the trust property and partly from that trustee's personal property. "Court" is defined in section 74(1) as meaning the Court of Session. This section applies to all trusts but only in relation to acts or omissions which occur after commencement (subsection (4)).

35 Bringing of action for damages for loss resulting from trustee's act or omission

(1) This section applies where, in consequence of the act or omission of a trustee (in this section referred to as "T"), a person other than a trustee suffers loss.

(2) Any action for damages in respect of that loss may be brought—

(a) against the body of trustees,

(b) on the basis of personal liability, against T, or

(c) jointly and severally, against both the body of trustees and T.

(3) At any time before final judgement in proceedings brought as mentioned in subsection (2)(a), the court may, under rules of court, allow the body of trustees an amendment—

(a) adding T, as an additional defender, to the instance of the principal writ, and

(b) directing existing or additional conclusions or craves, averments and pleas-in-law against T.

NOTE

This section implements recommendation 67. It specifies how an injured party can raise proceedings in delict following a loss sustained as a result of the acts or omissions of one or more trustees.

Subsection (2) states that the party may choose to raise a court action against either the trustees as a body (ie against all of the trustees in that capacity) or against the individual trustee(s) at fault (or jointly and severally against both). The advantage of being able to sue the individual(s) directly is that, if the trust property is insufficient to meet the award of damages, the pursuer can enforce it against the individual(s) at fault without the need for a second court action. "Court" in defined in section 74(1) as meaning the Court of Session.

Subsection (3) permits the body of trustees, if they are sued on their own, to bring in as a defender any individual trustee so that the action lies against those considered to be personally at fault as well as against the general body of trustees. The Rules of Court will require to be amended in line with this provision.

36 Delictual liability: trustee's right of relief against other trustees

(1) Subsection (2) applies where a body of trustees incurs delictual liability but none of them incurs personal liability as respects the delict.

(2) Each trustee has a right of relief against the other trustees jointly and severally.

(3) Subsection (2) is subject to section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (c.42) (which provides for contributions to be in such proportions as are deemed just).

(4) This section applies irrespective of when the trust was created but only as respects liability incurred after the section comes into force.

NOTE

This section implements recommendation 68. Where the trustees as a body have been found liable in delict, but no individual trustee has incurred personal liability, the damages will be paid out of the trust property. If, however, the award exceeds the value of that property, the trustees themselves are liable for the excess. Subsection (2) provides that any trustee who makes a contribution to that excess enjoys a right of relief against the other trustees. Subsection (3) states that this is subject to the relief which the court may grant under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (whereby it determines the proportion of the award which each trustee must contribute). This section applies to all trusts but only in relation to liability incurred after commencement (subsection (4)).

37 Trustees' liability in relation to certain obligations

(1) This section applies where a body of trustees incurs liability in respect of an obligation under—

(a) environmental law, or

(b) the law relating to an occupier's ownership or control of heritable property,

being liability incurred in the ordinary course of administering the trust.

(2) Subject to section 27, any damages awarded in respect of that liability are recoverable from the trust property only.

(3) In making any award in respect of that liability the court may, if satisfied that the liability was in any way attributable to a trustee's failure to exercise such skill, care or diligence as is required of that trustee by section 27, determine that damages are recoverable—

(a) partly from the trust property, and

(b) to the extent of the trustee's failure, partly from the trustee's personal property.

(4) This section applies irrespective of when the trust was created but only as respects a liability incurred after the section comes into force.

NOTE

This section implements recommendation 69. It makes particular provision for liability arising from obligations under environmental law or occupier's liability. Depending on the nature of the trust property, this can be a significant source of concern for trustees, beneficiaries and any third parties who may be affected. By subsections (1) and (2), where such liability falls on trustees in the ordinary course of administering the trust, damages are payable out of the trust property only. But subsection (3) provides that, where a trustee has breached the duty of care set out in section 27, the court – which is defined in section 74(1) as meaning the Court of Session – may specify that damages are payable partly from the trust property and partly from that trustee's personal property. In this way, innocent trustees are protected from personal liability. This section applies to all trusts but only in respect of liability arising after commencement (subsection (4)).

Validity of certain transactions and documents

38 Validity of certain transactions entered into by trustees

(1) Subsection (2) applies where—

(a) the trustees enter into an onerous transaction with any person, and

(b) the transaction is one under which the trustees purport to exercise, in relation to the trust property, or to any part of the trust property, a power under section 13(1) or 16(1).

(2) The validity of the transaction, and of any title acquired under the transaction by the second party, are not challengeable by that or any other person on the ground that—

(a) the exercise of the power is at variance with the terms or purposes of the trust, or

(b) on the part of the trustees, there has been some procedural irregularity or omission.

(3) Except that, if the trustees are acting under the supervision of the accountant of court and the exercise of the power is under section 13(1), then subsection (2)(a) applies only if the accountant consents to the transaction.

(4) Nothing in subsections (1) to (3) affects any question of liability as between the trustees.

(5) This section applies irrespective of when the trust was created but only as respects a transaction entered into after the section comes into force.

NOTE

This section implements recommendations 62 and 65. The effect of subsections (1) and (2) is that the validity of an onerous transaction between the trustees and another party is not challengeable on either of two grounds: first, that the purported exercise of the trustees' power was at variance with the actual terms and purposes of the trust or, secondly, that the procedural processes adopted by the trustees were flawed. This clarifies the current law: paragraph (a) of subsection (2) replaces section 2(1) of the Trusts (Scotland) Act 1961, whilst paragraph (b) of that subsection is in substitution for section 7 of the Trusts (Scotland) Act 1921. (Both of these provisions are repealed, so far as relating to trustees, by section 79 and schedule 2.)

Subsection (3), which makes special provision for situations in which trustees are acting under the supervision of the Accountant of Court, is a re-enactment of the proviso to section 2(1) of the 1961 Act.

By subsection (4), the earlier subsections do not affect any liability of the trustees between themselves. This is the position under the current law. The current law also places beneficiaries in the same position as trustees, with the result that a beneficiary who transacts with the trustees is unable to rely on the equivalent protections to those in subsections (1) to (3). This section adopts a different approach and extends such protection to beneficiaries, on the basis that the provision is restricted to transactions which are onerous (by which it is expected that the transaction is for full consideration or at least a reasonable estimate of full consideration). The trustees will therefore have received value and so the transacting party, including a beneficiary, is worthy of protection against challenge on the grounds in subsection (2).

The current requirement, contained in section 7 of the 1921 Act, of good faith on the part of the other party is not reproduced in this section. Section 2(1) of the 1961 Act does not impose such a requirement (though it was a feature of the law before that time), and the condition of onerosity is thought to be an adequate safeguard against bad faith.

The section applies to all trusts, whenever created, but only to transactions entered into after commencement (subsection (5)).

39 Validity of certain deeds and other documents bearing to be executed by trustees

(1) Except in so far as the trust deed expressly provides otherwise, a deed, or other document, bearing to be executed by the body of trustees is valid if executed by a majority of such of the body of trustees as are both capable and traceable.

(2) Subsection (1) is without prejudice to section 18(1)(b).

(3) This section applies irrespective of when the trust was created but only as respects a document executed after the section comes into force.

NOTE

This section implements recommendation 64 and clarifies the current law on the execution of documents by trustees. It is a default rule. At present, while it is clear that a decision – for example, to sell trust property – can validly be made by a majority of the trustees, it is less clear how many trustees are required to execute the disposition or other document. Subsection (1) provides that, for the document to be validly executed, it is sufficient that a majority of the trustees have signed it; but in calculating the majority, any incapable or untraceable trustees are to be disregarded. (References to a trustee being incapable or untraceable are to be read with sections 75 and 76 respectively.) Subsection (2) is a reminder that, alternatively, the trustees may authorise an agent to execute a document on their behalf (under section 18(1)(b)). By subsection (3) the rule in subsection (1) applies to all trusts but only as respects documents executed after commencement.

PART 5

DURATION OF TRUST

40 Abolition of restrictions on accumulation and on creation of future interests

(1) Subject to the provisions of any enactment or rule of law, a trust may be constituted of whatever duration the truster elects.

(2) The following (which relate to restrictions on the accumulation of income) are repealed in relation to a trust—

(a) the Accumulations Act 1892 (c.58),

(b) section 5 of the Trusts (Scotland) Act 1961 (c.57), and

(c) section 6 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1966 (c.19).

(3) The following (which relate to restrictions on the creation of future interests) are repealed in relation to a trust—

(a) sections 47 to 49 of the Entail Amendment Act 1848 (c.36),

(b) sections 8 and 9 of the Trusts (Scotland) Act 1921 (c.58), and

(c) section 18 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 (c.70).

(4) The following rules of common law do not apply in relation to a trust—

(a) the rule known as the rule in *Frog's Creditors* (which provides that a conveyance to a non-existent or unascertainable person, with the grant of a liferent to a living individual, results in that individual becoming owner), and

(b) the rule known as the rule in *Newlands* (which provides that a conveyance such as is mentioned in paragraph (a), but with the grant in question described as being for the liferent use allenarly of the living individual, results in that individual becoming fiduciary fiar and not owner).

(5) This section does not apply—

(a) as respects a trust created before the section comes into force, or

(b) as respects a public trust which is a charitable trust.

NOTE

This section repeals or disapplies the statutory and common law restrictions on (i) the period during which trustees may accumulate income or (ii) the creation of future interests. The restrictions in each case date back to the 19th century.

Under this section, it is possible to create a trust of any duration which the truster chooses (subsection (1), in partial implementation of recommendation 93(1)). Subsections (2) and (3) further implement recommendation 93(1). Subsection (2) repeals various provisions which set out a number of upper limits on the period during which income may be accumulated before it has to be paid out. These have been in place for many years and can be complex to apply. Subsection (3) repeals a number of provisions, also of some antiquity, which restrict the creation of future interests. For example, the current law contains restrictions which prevent a land-owner creating a trust over the land with provision that it is to be held by a specified number of successive generations in liferent only; under this section, the first person who was not yet born when the trust was created and who subsequently comes to hold the land as beneficiary under the trust can, if of full age, claim absolute entitlement to the property, thus bringing the trust to an end.

Subsection (4) disapplies two long-standing rules of common law, both of which deal with conveyances of land to a person who has not yet come into existence or who is unascertainable. By way of example, in *Frog's* case (from 1735) property was conveyed to a 9 year old boy in liferent with the fee to his lawful heirs. The court decided that, as this would leave the fee hanging until any heirs were born, the boy was to take the property in fee rather than in liferent. This subsection implements recommendation 96, which is also implemented by paragraph (b) of subsection (3), in its repeal of section 8 of the Trusts (Scotland) Act 1921, which sets out a statutory version of the late 18th century rule in *Newlands*.

The effect of the disapplication of the common law by subsection (4) is described in recommendation 97: where X conveys property to Y in liferent and to Z in fee and Z is non-existent or unidentifiable at the time of the conveyance, Y should take a liferent interest (but no more) and the conveyance to Z should fail. X therefore remains owner.

It would have been an option to replace the existing restrictions on accumulation of income and creation of future interests with a new rule, such as a rule against perpetuities similar to that which applies in England and Wales. But recommendation 94 is to the opposite effect; thus, there is to be no rule restricting the duration for which a trust may run. Instead, there is a new discretionary court power, set out in section 60, which may be used, in certain circumstances, to alter the trust purposes.

By subsection (5)(a), which implements recommendation 98(1), the repeals in this section do not apply to trusts which are already in existence, as there is a risk that otherwise there may be an adverse effect on acquired rights in property. This would offend against legal principle and would breach rights under Article 1 of Protocol 1 to the European Convention on Human Rights. In addition, the repeals do not apply to charitable trusts, in implementation of recommendation 93(2). Such trusts will remain subject to the current law. In practice, those setting up charitable trusts almost invariably want the income to be made available for charitable purposes in the near future and are not interested in directing its accumulation for long periods. The current restrictions will therefore continue to apply.

PART 6

PRIVATE PURPOSE TRUSTS

Private purpose trusts: general

41 Private purpose trusts: general

(1) A private purpose trust exists where—

(a) the trust property is held by, or is vested in, a trustee for the furtherance of a specific purpose which is not a charitable or other public purpose, and

(b) the trust is not constituted for the benefit of the trustee alone.

(2) That purpose must be lawful and must neither be—

(a) contrary to public policy, nor

(b) in terms so uncertain as to make it either unattainable or not reasonably attainable.

(3) For the purposes of subsection (1), it is immaterial whether the trust property is also held by, or vested in, the trustee for the benefit of any person (whether or not a person yet ascertained or in existence).

(4) This section applies irrespective of when the trust was created.

NOTE

This section, which implements recommendation 70(1) and (2), defines a private purpose trust. Such a trust contrasts with a "beneficiary trust", which is a trust exclusively for the benefit of identified or identifiable beneficiaries. A private purpose trust, on the other hand, exists for the furtherance of a specific purpose which is neither charitable or public nor for the trustee's sole benefit (by subsection (1)(a)). An example might be a trust set up by commercial developers to cover potential future environmental costs associated with the development. Such trusts are arguably already recognised under Scots law but, with very narrow exceptions, are not permitted under English and Welsh law.

Under subsection (2) there are restrictions on the purpose (and the same restrictions apply for beneficiary trusts too). Subsection (3) clarifies that a private purpose trust may also have beneficiaries; thus an entrepreneur might transfer the shares in his or her company to trustees to hold, and to use to promote the interests of the company, for the ultimate benefit of the employees, or for future generations of the truster's family.

Applications to the court

42 Application for order requiring fulfilment of purpose of private purpose trust

(1) Any person with an interest in the purpose of a private purpose trust (including, without prejudice to the generality of section 45(1)(a), any supervisor) may apply to the court for an order requiring steps to be taken for the fulfilment of that purpose.

(2) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 70(3). One of the most powerful objections to the recognition of private purpose trusts relates to the issue of enforcement, as is discussed in paragraphs 14.9 and 14.10 of the Report. There is already a right at common law for anyone with an interest in a Scottish public trust to seek its enforcement of its purposes, and this section makes clear that the same principle applies to private purpose trusts. The "court" in subsection (1) is the Court of Session: section 74(1).

43 Application to reform trust

(1) This section applies where property is held for the specific purpose of a private purpose trust.

(2) If executing the trust in accordance with its terms becomes, whether in relation to all or only to part of the property—

(a) impossible or impracticable,

(b) unlawful or contrary to public policy,

(c) inappropriate because, by reason of changed circumstances, to do so would no longer accord with the general intent of the trust,

the trustees or (unless the trust deed expressly or impliedly excludes the possibility) a supervisor may apply to the court to reform the trust.

(3) On such application the court—

(a) may direct that the trust property, or where the application relates only to part of the trust property the part in question, be held for such other purpose as it considers to be consistent with the spirit of the truster's directions, or

(b) if it is of the opinion that the trust cannot be reformed consistently with the spirit of those directions, may direct—

(i) where the application relates to all of the trust property, that the trustees dispose of that property as though the trust has failed, or

(ii) where the application relates only to part of the trust property, that the trustees dispose of that part as though the trust has failed in relation to that part.

(4) But subsections (2) and (3) are to be disregarded if the trust can be reformed in accordance with its own terms.

(5) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 70(4) and (5). It permits the court (which, by section 74(1) means the Court of Session), on application, to reform a private purpose trust where the execution of the trust purpose has become, for example, impossible or impracticable (by subsection (2)). The remedies which the court may direct are set out in subsection (3), and are essentially twofold: either the court may direct that the property be held on trust for a different purpose, or (if that cannot be done) that it be disposed of as if the trust had failed, either in whole or in part. Subsection (4) states that the procedure is only available where the trust deed does not permit reform by other means, but otherwise the section as a whole is mandatory. It is closely based on the equivalent provision in the Cayman Islands' trust legislation for special trusts (known as STAR trusts).

Supervisors

44 Appointment of supervisor

(1) The truster may, in respect of a private purpose trust, by the trust deed make provision for the appointment of a person (to be known as a "supervisor") to oversee the fulfilment by the trustees of the trust's specific purpose.

(2) The duties of the supervisor are fiduciary obligations; and the supervisor is subject to a duty of care.

(3) It is not competent to appoint—

(a) a trustee to be a supervisor of the trust; or

(b) a supervisor of the trust to be a trustee.

(4) Subject to the terms of the trust deed, it is competent for there to be more than one supervisor of the trust at any time.

(5) Subsection (6) applies where—

(a) the terms of a private purpose trust require the appointment of a supervisor but it is impossible, difficult or inexpedient to make the appointment without the court's assistance, or

(b) no supervisor exists or is traceable who has the legal capacity, or is willing or fitted, to carry out the duties of that office.

(6) The court may appoint a person to be a supervisor of the private purpose trust—

(a) in the case mentioned in paragraph (a) of subsection (5), on the application of—

(i) the trustees,

(ii) a supervisor, or

(iii) any other person with an interest in the trust, or

(b) in the case mentioned in paragraph (b) of that subsection, on the application of—

(i) the trustees,

(ii) any supervisor other than one lacking the legal capacity, or unwilling or unfitted, to carry out the duties of that office, or

(iii) any other person with an interest in the trust.

(7) The making of an appointment under subsection (6) removes any incapable or untraceable supervisor from office.

(8) This section applies irrespective of when the trust was created.

NOTE

This section, which provides for the appointment of a supervisor, implements recommendation 71(1) to (4). The main task of a supervisor is to ensure the proper implementation of the trust purposes, from the standpoint of those who may benefit from the trust. The rights and remedies of the supervisor are set out in the following section.

By subsection (1), the truster has a choice as to whether to provide in the trust deed for the appointment of a supervisor (or, by subsection (4), two or more). In some jurisdictions it is mandatory to have a supervisor (or enforcer) for a private purpose trust but, for the reasons set out in paragraphs 14.9 to 14.10 of our Report, that is not considered necessary under Scots law.

Subsection (3) provides that the supervisor must not be a trustee, and *vice versa*. Importantly, the duties of the supervisor are fiduciary and he or she is subject to a duty of care (by subsection (2)); in this respect the supervisor is on a par with a trustee.

Subsections (5) and (6) empower the Court of Session to appoint a supervisor where one is required by the trust deed but, for one of the specified reasons, the court's assistance is considered necessary.

45 Rights and remedies of supervisor

(1) Subject to the terms of the trust deed, the supervisor of a private purpose trust has the same rights as a beneficiary would have—

(a) to bring an action, or make an application to the court, in respect of the trust,

(b) to be informed by the trustees of the terms of the trust deed,

(c) to receive information concerning the trust and its administration from the trustees, and

(d) to inspect, and take copies of, the trust documents.

(2) Subsections (3) and (5) to (8) of section 26 apply to a disclosure to a supervisor by virtue of subsection (1) as they apply to a disclosure to a beneficiary by virtue of subsection (1)(a) of that section.

(3) The supervisor has, in the performance of the supervisor's duties as respects the private purpose trust, the same rights as a trustee would have—

(a) to protection and indemnity, and

(b) to make an application to the court for—

(i) an opinion,

(ii) advice or direction, or

(iii) relief from personal liability.

(4) In the event of a breach of trust, the supervisor has, on behalf of the private purpose trust, the same remedies against the trustees or a third party as a beneficiary would have.

(5) This section applies irrespective of when the trust was created.

NOTE

This section, which is a default provision, implements recommendations 43, 45 and 71(5) and (6). Its aim is to grant the supervisor the rights and remedies which are needed for him or her to be able to perform the task properly. Subsections (1) and (2) provide the supervisor with the same rights which, respectively, a beneficiary and a trustee would have under the trust. Subsection (3) adds that, in the event of breach of trust, the remedies which would be available to a beneficiary are also available to the supervisor. This section applies irrespective of when the trust was created.

46 Application to supervisors of certain provisions relating to removal from office and to decision making

(1) Sections 6(1), 11 and 12 apply in relation to a supervisor and the duties of a supervisor as they apply in relation to a trustee and the duties of a trustee.

(2) This section applies irrespective of when the trust was created.

NOTE

The following section provides a supervisor with the power to resign and, in part, this provision is consequential on that one. Thus, the power of a court to remove a trustee (under section 6(1)) applies to a supervisor as it does to a trustee. In addition, the two provisions on decision making (sections 11 and 12) also apply to supervisors, though that will only be relevant where there is more than one of them in office at any given time. In such a situation, supervisors' decisions will be regulated in the same way as decisions to be taken by trustees.

47 Resignation of supervisor

(1) A supervisor has power to resign office by notice in writing delivered to the trustees.

(2) The resignation takes effect on the delivery of that notice.

(3) But any resignation given under this section in order to facilitate a breach of trust is of no effect.

(4) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 71(7) and provides that all supervisors have power to resign office. The resignation must be by notice in writing, which takes effect on delivery. The exception to the power of resignation in subsection (1) is where a purported resignation is in order to facilitate a breach of trust; in such a case any notice which is delivered is of no effect. This is broadly similar to the position of trustees at common law, where a resignation in order to facilitate a breach of trust is likely to result in the trustee still retaining liability flowing from the breach.

PART 7

PROTECTORS

48 Protectors

(1) The truster may by the trust deed—

(a) make provision for the appointment of a person (to be known as a "protector") to oversee the exercise by the trustees of their functions, and

(b) require the trustees to obtain the consent of the protector before exercising (or before exercising in circumstances specified in the trust deed) such of those functions as may be so specified.

(2) For the purposes of subsection (1) the truster may, by the trust deed, confer powers on the protector.

(3) Without prejudice to the generality of subsection (2), powers conferred by virtue of that subsection may include the power to—

(a) determine the law of the domicile of the trust,

(b) determine the administrative centre of the trust,

(c) direct the trustees to remove, under section 7(1), one of their number from office,

(d) direct the trustees to assume, under section 3(1), an additional trustee,

(e) direct that a person is not to enjoy a beneficial interest,

(f) direct that a person is to enjoy a beneficial interest (whether or not in consequence of a direction under paragraph (e)),

(g) withhold, whether conditionally or unconditionally, consent required by the trustees by virtue of subsection (1)(b),

(h) make an application under section 60(1),

(i) oppose any application made under that section,

(j) verify the trust accounts, or

(k) represent—

(i) an incapable person,

(ii) a person who has not attained the age of 16 years,

(iii) a beneficiary not yet ascertained,

(iv) a potential beneficiary not yet ascertained, or

(v) a person who is untraceable.

(4) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the protector may, on application to the trustees, inspect, without charge and at any reasonable time, any document held by them or on their behalf.

(5) The duties of the protector are fiduciary obligations; and the protector is subject to a duty of care.

(6) It is not competent to appoint—

(a) a trustee to be the protector of the trust; or

(b) the protector of the trust to be a trustee.

(7) It is competent for the truster to appoint the truster's own self to be the protector of the trust.

(8) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) it is competent for there to be more than one protector of the trust at any time.

(9) This section applies irrespective of when the trust was created.

NOTE

This section, which implements recommendations 41, 42 and 72(1) to (6), allows for the appointment of a protector. In essence, the function of a protector is to ensure that the trustees are discharging their duties efficiently and effectively.

By subsection (1)(a), the truster has a choice as to whether to provide in the trust deed for the appointment of a protector (or, by subsection (8), more than one). Subsection (6) provides that the protector may not be a trustee, and *vice versa*, but by subsection (7) the truster may be the protector. The truster may confer powers on the protector in the trust deed (subsection (2)). As the institution of the protector is, for practical purposes, a novelty in Scots law, a list of powers that a truster may wish to include is provided in subsection (3).

In implementation of recommendation 41, the protector has the power to inspect trust documents (subsection (4)), though this may be excluded by the trust deed. Importantly, the truster may require the trustees to obtain the consent of the protector before exercising such of their functions as may be specified, either generally or in particular circumstances (subsection (1)(b)). The duties of the protector are fiduciary and he or she is subject to a duty of care (by subsection (5)); in this respect the protector is on a par with a trustee. This provision applies irrespective of when the trust was created (subsection (9), implementing recommendation 42).

49 Appointment of new protector

(1) Subsection (2) applies where—

(a) by the trust deed, the truster appointed a protector, but

(b) no protector exists or is traceable who has the legal capacity, or is willing or fitted, to carry out the duties of that office.

(2) The truster may appoint a new protector.

(3) But if the truster has died or is incapable then, except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise) the trustees may appoint a new protector in the circumstances mentioned in paragraphs (a) and (b) of subsection (1).

(4) The making of an appointment under subsection (2) or (3) removes any incapable or untraceable protector from office.

(5) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 72(7) and provides for the appointment of a new protector.

The truster may appoint a new protector where, by the trust deed, he or she had originally appointed a protector but where no protector now exists or is traceable, or is willing and fitted to carry out the duties of that office (subsections (1) and (2)). (References to a protector who is incapable or untraceable are to be read with sections 75 and 76 respectively.) Where the truster has died or is incapable, then – unless the trust deed provides otherwise – the trustees may, by subsection (3), appoint a new protector in the circumstances specified in subsection (1). Where subsections (2) or (3) apply, the effect of the appointment is also to remove any incapable or untraceable protector from office (subsection (4)); this is for the efficient running of the trust, which should not be burdened with a protector whom the court finds to be incapable or untraceable. This provision applies irrespective of when the trust was created (subsection (5)).

50 Application to protectors of certain provisions relating to removal from office and to decision making

(1) Sections 6, 11 and 12 apply in relation to a protector and the duties of a protector as they apply in relation to a trustee and the duties of a trustee.

(2) This section applies irrespective of when the trust was created.

NOTE

The following section provides a protector with the power to resign and, in part, this provision is consequential on that one. Thus, the power of a court to remove a trustee (under section 6(1)) is to apply to a protector as it does to a trustee. In addition, the two provisions on decision making (sections 11 and 12) also apply to protectors, though that will only be relevant where there is more than one of them in office at any given time. In such a situation, decisions to be taken by the protectors will be regulated in the same way as decisions to be taken by trustees. This provision applies irrespective of when the trust was created (subsection (2)).

51 Resignation of protector

(1) A protector has power to resign office by notice in writing delivered to the trustees.

(2) The resignation takes effect on the delivery of that notice.

(3) But any resignation given under this section in order to facilitate a breach of trust is of no effect.

(4) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 72(7) and provides that all protectors have power to resign office. The resignation must be by notice in writing, which takes effect on delivery. The exception to the power of resignation in subsection (1) is where a protector's resignation is in order to facilitate a breach of trust; in such a case any notice which is delivered is of no effect. This is broadly similar to the position of trustees at common law, where a resignation in order to facilitate a breach of trust is likely to result in the trustee still retaining liability flowing from the breach.

52 Liability for compliance with protector's direction

(1) This section applies where a trustee complies timeously and correctly with a protector's direction (being a direction which the protector has power to give).

(2) In so far as such compliance comprises the breach of a duty owed to a beneficiary or third party then, except in so far as the trust deed expressly provides otherwise, the protector, and not the trustee, incurs personal liability for any resultant harm.

(3) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 72(8). It assumes that the protector has the power to direct the trustees, for example in relation to some or all of the matters mentioned in paragraphs (c) to (f) of section 48(3). Subject to any contrary provision in the trust deed, where a trustee complies timeously and correctly with the direction of a protector, the trustee will incur no personal liability for any resultant harm, provided that it is a direction which the protector has power to give; rather, such liability will fall on the protector. In every case of breach of fiduciary duty or breach of trust, including failure to exercise proper skill and care, either the protector or the trustees should be liable for any resulting harm; subsections (1) and (2) maintain protection for the beneficiaries whilst striking an appropriate balance in respect of the allocation of liability as between the protector and the trustees. This provision applies irrespective of when the trust was created (subsection (3)).

PART 8

POWERS OF THE COURT

Variation and termination of private trusts

53 Arrangements to vary or terminate a trust etc.

(1) This section applies to an arrangement which—

(a) varies the purposes of a trust,

(b) terminates a trust, whether in whole or in part,

(c) varies the powers of trustees to manage or administer trust property, or

(d) creates a new trust in relation to all or part of trust property.

(2) The arrangement may be made if agreement or approval is given in accordance with section 54 by or on behalf of each beneficiary, and of each potential beneficiary, of the trust in question.

(3) This section is subject to section 57.

(4) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a private purpose trust.

NOTE

This section makes provision for both judicial and extra-judicial variation or termination of trusts. It applies only to private trusts (section 71) but not to private purpose ones (subsection (4)(b): see paragraph 14.21 of the Report).

So far as extra-judicial variation is concerned, subsections (1) and (2) implement recommendation 79 by putting into statutory form what is thought to be the existing common law rule in *Miller's Trustees v Miller* (1890) 18 R 301 that a trust can be varied or terminated by all the beneficiaries and potential beneficiaries (as defined in section 74(1)) of the trust agreeing to that course of action.

Subsection (1) describes the ways in which a trust can be varied or terminated. Paragraph (d) gives effect to recommendation 91 by making it clear that all or part of the trust property can be resettled into a new trust. Where a beneficiary lacks capacity to agree or is not yet in existence or is presently unascertainable, an appropriate approval on his or her behalf is necessary: see section 54(4) and (5).

54 Agreement or approval for purposes of section 53(2)

(1) In this section "agreement" means agreement for the purposes of section 53(2) and "approval" means approval for those purposes.

(2) Agreement may be given by a beneficiary if the beneficiary either—

(a) has attained the age of 18 years and is capable, or

(b) is not a natural person.

(3) Approval may be given by a potential beneficiary if that person falls within subsection (7).

(4) Approval on behalf of a person who is incapable may be given by any person authorised to give it—

(a) under the Adults with Incapacity (Scotland) Act 2000 (asp 4), or

(b) under the law of a country other than Scotland.

(5) Approval may be given by the court on behalf of—

(a) a person who has not attained the age of 18 years,

(b) a person who is incapable,

(c) a potential beneficiary who does not fall within subsection (7),

(d) an unborn person, or

(e) a person who is untraceable.

(6) The powers of the court under subsection (5) are exercisable on the application of the trustees or of any of the beneficiaries.

(7) A potential beneficiary falls within this subsection where—

(a) the potential beneficiary either—

(i) has attained the age of 18 years and is capable, or

(ii) is not a natural person, and

(b) the potential beneficiary would be of the specified description, or as the case may be a member of the specified class, if—

(i) the future date were the date of the hearing of the petition for approval, or

(ii) the future event had happened at the date of that hearing.

(8) In subsection (7)(b), "specified description", "specified class", "future date" and "future event" are to be construed by reference to the definition, in section 74(1), of "potential beneficiary".

(9) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a private purpose trust.

NOTE

This section applies both to judicial and to extra-judicial variation or termination of a trust, and sets out the circumstances in which the agreement of a beneficiary or approval on behalf of a beneficiary is required.

Subsection (1) implements recommendation 89 and continues the regime of the Trusts (Scotland) Act 1961 in terms of which, with very minor exceptions, all capable beneficiaries must agree to any variation or termination; the court's role is restricted to supplying approval on behalf of those from whom agreement cannot be obtained. ("Court" is defined in section 74(1)) as meaning the Court of Session.) Subsection (2) implements recommendation 79 and, together, subsections (2) and (3) implement recommendation 80; agreement to a variation or termination can be given by a beneficiary, or approval can be given by a potential beneficiary, provided that he or she is 18 years old or over and is capable. A legal person, such as a company or a corporate charity, can also give its agreement or approval.

Subsection (4) implements recommendation 83. It confirms the existing position whereby a guardian or person authorised by an intervention order or other document under the Adults with Incapacity (Scotland) Act 2000 (or the law of a foreign jurisdiction) may provide approval on behalf of an adult beneficiary or potential beneficiary who is incapable of consenting. Such approval by an authorised person is an alternative to court approval (under subsection (5)(b)).

Paragraphs (a) to (d) of subsection (5) re-enact the existing provisions in section 1 of the Trusts (Scotland) Act 1961. Retention of age 18 in paragraph (a) partially implements recommendation 82. Paragraph (b) implements recommendation 83. Paragraph (c) and subsection (7) re-enact section 1(1)(b) of the Trusts (Scotland) Act 1961. ("Potential beneficiaries" are defined in section 74(1).) Paragraph (d) re-enacts section 1(1)(c) of the 1961 Act. Paragraph (e) is a new provision, which implements recommendation 88. It allows a variation or termination to proceed even though one or more beneficiaries who would otherwise have to agree cannot be traced; their agreement is replaced by court approval on their behalf.

Subsection (6) preserves the current law position that only a trustee or beneficiary may apply to the court under this section. Subsection (7) preserves the current law by restricting the category of potential beneficiaries on whose behalf the court can approve the arrangement. Excluded are persons who are aged 18 or over and are capable and who also fall within paragraph (b) and are identifiable persons or individuals. Such persons must agree to the arrangement themselves. To fall within paragraph (6)(b) a potential beneficiary must be identifiable as being in the relevant class or of the relevant description if the date or event that is referred to in the trust had taken place at the date of hearing the petition. One example of potential beneficiaries is the class of the heirs of an individual who has not yet died. The heirs cannot be ascertained until that individual dies with the result that they have no present interest but are merely potential beneficiaries. The court cannot approve on behalf of those who would qualify as heirs if the individual were taken to die at the date of hearing the petition but they must consent themselves. If, however, there are unborn or underage heirs then court approval on their behalf is both competent and necessary.

55 Giving of approval by court

(1) The court is to give approval under section 54(5) only if it is of the opinion that the carrying out of the arrangement in question would not be prejudicial to the person on whose behalf the approval is sought.

(2) Except that subsection (1) does not apply where the approval is sought under—

(a) paragraph (c) of section 54(5) on behalf of an unascertained person if the court is satisfied that there is no reasonable likelihood of the event taking place which would make that person a beneficiary, or

(b) paragraph (d) of that section if the court is satisfied that there is no reasonable likelihood of the person on whose behalf the approval is sought being born.

(3) In considering, for the purposes of subsection (1), whether the carrying out of an arrangement would be prejudicial to a person the court may have regard to—

(a) any economic or other benefit which the person is likely to receive from the arrangement,

(b) any economic or other detriment which the person is likely to sustain in consequence of the arrangement,

(c) the welfare of any member of the person's family, and

(d) such other factors as seem to the court material.

(4) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a private purpose trust.

NOTE

Subsection (1), in partial implementation of recommendation 79, sets out the general rule that the court is only to approve an arrangement on behalf of a beneficiary or potential beneficiary if it thinks that the arrangement would not prejudice any persons who cannot consent for themselves and on whose behalf the court is therefore giving approval. "Court" is defined in section 74(1) as meaning the Court of Session.

Subsection (2), which implements recommendation 86, provides an exception to that rule. It states that no court approval on behalf of an unborn or unascertained beneficiary will be required if the court is satisfied that there is no reasonable likelihood that the event which would make an unascertained person a beneficiary (or potential beneficiary) will occur, or that someone who, if born, would be a beneficiary (or potential beneficiary) will be born. The proposed arrangement could therefore go ahead even if it would remove such a potential interest. Thus if Tom sets up a trust for his children and he has two existing children who want to terminate the trust and be paid the capital then the court will need to approve the arrangement on behalf of Tom's unborn children and must consider whether they would be prejudiced by the arrangement. If Tom is an 80 year old widower then the court may be satisfied that the possibility of him having further children is so remote that it can be ignored. Evidence in the shape of medical and other reports may have to be presented in order to satisfy the court in less extreme cases. An example of an unascertained person who had only a theoretical possibility of becoming a beneficiary might be the potential spouse of an incapable 85 year old person. If a person was, against all expectation, born or ascertained after the arrangement was finalised, he or she will have no claim against the trustees or the other beneficiaries for any loss sustained as a consequence of the variation.

Subsection (3) extends the current law by increasing the factors which the court may consider in evaluating prejudice when deciding whether to approve an arrangement on behalf of a beneficiary who cannot consent. It implements Recommendation 87 and ensures that the court can take into account more than economic factors. For example, where Susan has created a trust in favour of her current children, who are underage, and there is a proposal to extend the trust to include an adopted child, the likelihood of this leading to increased harmony within the family can be taken into account by the court in deciding whether to approve the change on behalf of the underage children.

56 Interests of negligible value

(1) This section applies in relation to loss sustained by—

(a) a beneficiary, or

(b) a potential beneficiary

(in this section referred to as "B") as a consequence of the making of an arrangement to which section 53 applies.

(2) The trustees are not liable to B for the loss if—

(a) B was a beneficiary, or potential beneficiary, when the arrangement was made,

(b) agreement by, or approval on behalf of, B to the arrangement (being agreement or approval in accordance with section 54) was not given, and

(c) prior to the arrangement being made the court, on the petition of the trustees or of any of the beneficiaries, was satisfied either—

(i) that B's interest was so remote as to be of negligible value, or

(ii) that, in the event of B becoming a beneficiary, B's interest would be so remote as to be of negligible value.

(3) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a private purpose trust.

NOTE

This section, which gives effect to recommendation 85, enables an arrangement to proceed without the agreement of, or court approval on behalf of, a beneficiary or potential beneficiary if the court is satisfied that the person in question has a negligible interest in the trust. It gives statutory effect to the decision of the Court of Session in *Phillips and Others, Petitioners* 1964 SC 141. In contrast to section 55, the effect of the arrangement proceeding without the agreement of, or approval on behalf of, persons with negligible interests is not to remove their interests. If the unlikely event or series of events causing the interest to emerge were to occur after implementation of the arrangement, their entitlement under the trust prior to variation would remain. However subsection (2) protects the trustees from claims by such persons; instead, their right of action would lie against those who have benefited from the variation.

57 Arrangements to vary or revoke alimentary purposes

(1) Where a beneficiary under a trust has entered into enjoyment of—

(a) an alimentary liferent of, or

(b) any alimentary income from,

the trust property, or any part of the trust property, an arrangement to vary or revoke the alimentary purpose in question requires the authorisation of the court under this section as well as agreement or approval given in accordance with section 54.

(2) The court may give authorisation under this section if it considers that the carrying out of the arrangement would be reasonable having regard to—

(a) the income of the beneficiary from all sources, and

(b) such other factors as seem to the court material.

(3) The powers of the court under this section are exercisable on the application of the trustees or of any of the beneficiaries.

(4) Subsection (1) does not apply to an alimentary purpose created by a woman in her own favour prior to 24th July 1984.

(5) In this section, "alimentary purpose" means a trust purpose entitling the beneficiary to an alimentary liferent of, or alimentary income from, the trust property or any part of the trust property.

(6) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a private purpose trust.

NOTE

This section substantially re-enacts section 1(4) of the Trusts (Scotland) Act 1961 with one minor change. Implementing recommendation 84, subsection (4) provides that court authorisation is not required in respect of the variation or termination of an alimentary purpose created by a woman in her own favour before 24th July 1984. She is therefore able to agree to it herself. By sections 5 and 10(2) of the Law Reform (Husband and Wife) (Scotland) Act 1984, it has been incompetent for women to create alimentary provisions in their own favour since that date. "Court" is defined in section 74(1) as meaning the Court of Session.

58 Views of 16 and 17 year olds

(1) This section applies where the court is considering whether—

(a) to give, on behalf of a person who—

(i) has attained the age of 16 years but not that of 18 years, and

(ii) is capable,

approval under section 54(5) to an arrangement, or

(b) to authorise, under section 57, an arrangement in a case where the alimentary beneficiary is a person such as is mentioned in paragraph (a).

(2) The court is to take such account as it thinks fit of the person's attitude to the arrangement.

(3) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a private purpose trust.

NOTE

This section, which gives effect to part of recommendation 82, re-enacts the existing law whereby a person under the age of 18 has no capacity to agree to a trust variation or termination. Subsection (1), however, provides that the court will continue to have to take account of the views of a 16 or 17 year old in deciding whether or not to approve a trust variation or termination on his or her behalf. Subsection (1)(b) extends this to authorisation of a variation or revocation of an alimentary purpose.

Under subsection (1)(a)(ii), this section does not apply to a 16 or 17 year old who is incapable, though a guardian or other authorised person may agree to an arrangement on his or her behalf (section 54(4)) or the court may approve it on his or her behalf (section 54(5)(b)). "Court" is defined in section 74(1) as meaning the Court of Session.

59 No requirement for agreement of truster

(1) An arrangement such as is referred to in section 53(1) or 57(1) may be made without the agreement of the truster unless that person is, other than by virtue of being the truster, a beneficiary or potential beneficiary of the trust.

(2) This section—

(a) applies irrespective of when the trust was created, but

(b) does not apply as respects a private purpose trust.

NOTE

This section implements recommendation 90. Its purpose is to make clear that the agreement of the truster to an arrangement for variation or termination of the trust is not required (though if he or she happens to be a beneficiary or potential beneficiary, then agreement, or court approval on his or her behalf, is needed in that capacity). But for this provision it might be argued that the truster is invariably a beneficiary or potential beneficiary because of the radical right to receive the trust property if all the other trust purposes fail.

Alteration of trust purposes

60 Alteration of trust purposes on material change in circumstances

(1) Subsection (9) applies where, on the application of a person mentioned in subsection (8) in relation to any trust other than a commercial trust or a private purpose trust, the court is satisfied in the case of—

(a) an *inter vivos* trust, as to the matters mentioned in subsection (3), or

(b) a testamentary trust, as to the matters mentioned in subsection (6).

(2) Any other person mentioned in subsection (8) may oppose the application.

(3) The matters are—

(a) that there has been a material change in circumstances since the trust was created (or that such a change is reasonably to be regarded as in prospect),

(b) that the truster is dead, and

(c) that a period of at least 25 years has elapsed since the trust was created.

(4) But as respects any trust, the trust deed may provide expressly, either or both—

(a) that paragraph (b) of subsection (3) is to be disregarded,

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

(5) Instead of specifying a period of time by virtue of subsection (4)(b), the trust deed may provide expressly that paragraph (c) of subsection (3) is to be disregarded.

(6) The matters are—

(a) that there has been a material change in circumstances since the testamentary writing was executed (or that such a change is reasonably to be regarded as in prospect),

(b) that the testator is dead, and

(c) that a period of at least 25 years (or where the testamentary writing specifies for the purposes of this subsection a shorter period, that shorter period) has elapsed since the death.

(7) But where the court is satisfied that there was a period, between the change in circumstances and the date of death, during which the testator, either or both—

(a) was incapable,

(b) was unaware (or could not reasonably be supposed to have been aware) of the change and of its effect on the trust,

it may determine that paragraph (c) of subsection (6) is to apply in relation to the trust as if the period of 25 years (or as the case may be the shorter period) referred to in the paragraph were to run not from the death but from the change in circumstances or, if it thinks fit, from the commencement of the period of incapacity or unawareness.

(8) The persons are—

(a) the trustees,

(b) in the case of an *inter vivos* trust, the truster,

(c) a descendant of the truster,

(d) a beneficiary or potential beneficiary,

(e) a guardian, descendant or ancestor of a beneficiary or potential beneficiary,

(f) a judicial factor, and

(g) unless the trust deed expressly or impliedly excludes the possibility—

(i) a protector, and

(ii) a supervisor.

(9) The court may alter the trust purposes in so far as it is, in the opinion of the court, expedient to do so to offset or counter the effect, or as the case may be the prospective effect, of the change in circumstances.

(10) Without prejudice to the generality of subsection (9), in the exercise of its power under that subsection the court—

(a) is in particular to have regard—

(i) to the intentions, or probable intentions, of the truster as they appear from the trust deed or testamentary writing and from such other evidence as is available to the court (except that if those intentions, or probable intentions, cannot be ascertained the court is instead to have regard to the probable intentions of a reasonable truster in the circumstances current when the power is exercised),

(ii) to whether the beneficiaries consent to the alteration in question, and

(iii) to the fairness of that alteration,

(b) may bring the trust to an end whether in whole or in part, and

(c) may make provision as regards vesting, or postponement of vesting, of the trust property.

(11) For the purposes of subsection (10)(a), any intention, or probable intention, to exclude the exercise of the court's powers under subsection (9) may be disregarded.

(12) In this section "change in circumstances" includes (without prejudice to the generality of the expression) a change in—

(a) the nature or amount of the trust property,

(b) the personal or financial circumstances of—

(i) a member of the truster's family, or

(ii) any other person intended to be benefited by the trust, or

(c) the tax regime.

(13) In deciding, for the purposes of this section, if a trust is a commercial trust, the court is in particular to have regard to whether—

(a) the trust is set up under, or by virtue of, a contract (bilateral or multilateral) of a commercial nature, or

(b) the truster has settled property into the trust for value.

(14) For the purposes of this section "commercial trust"—

(a) means a trust which—

(i) forms part of a commercial arrangement, and

(ii) is intended to further that arrangement, and

(b) without prejudice to that generality, includes—

(i) a personal or occupational pension scheme (within the meaning of the Pension Schemes Act 1993 (c.48)) established under a trust,

(ii) a life assurance policy,

(iii) a unit trust or any other trust-based investment scheme, and

(iv) a trust created under or comprised in a partnership agreement.

(15) This section applies irrespective of when the trust was created.

(16) This section is without prejudice to section 62.

NOTE

This section creates a new court power by which the purposes of a trust may be varied in certain circumstances. However, in accordance with recommendation 99, it does not apply to commercial, public, or private purpose trusts.

In implementation of recommendations 95 and 98(2), the section permits trust purposes to be altered by the court in narrowly defined situations, but also grants a period (usually up to a maximum of 25 years) during which the power may not be exercised. The broad aim is to provide a mechanism to counterbalance, where appropriate, the freedom which trusters are to have (under section 40) to set up a trust of any duration. Trusts of very long duration may pose what is sometimes known as the problem of "dead hand control", whereby property is held for such long periods and for increasingly historic trust purposes that the balance between the desires and interests of the present generation and those of succeeding generations becomes unduly tilted in the latter's favour.

The power is exercisable by the Court of Session (see the definition of "court" in section 74(1)), on application by any of a broad range of persons specified in subsection (8). The application may be opposed by any other person so specified (subsection (2)). Subsection (1) provides that the court is to be satisfied as to different factors depending on whether the trust is created by a living truster (ie an *inter vivos* one) or is set up on death (ie a testamentary one).

For an *inter vivos* trust, subsection (3) states that the court is to be satisfied about three matters: first, that there has been a material change in circumstances since the trust was set up, or that such a change is reasonably in prospect; secondly, that the truster has died; and, thirdly, that at least 25 years have passed since the trust was created. This means that, as a default (with subsections (4) and (5) providing alternative choices), the court may not alter the purposes of a trust until it has been in existence for 25 years or for the truster's lifetime, whichever is longer. The 25 year period was selected as striking a reasonable balance between the desire of trusters to know that their wishes as set out in the trust purposes will be respected, and the benefit in keeping those purposes in line with whatever circumstances may arise in the distant future.

Subsections (4) and (5) provide that the truster may reduce the 25 year period (by subsection (5) it may be reduced to zero), and (or alternatively) may remove the stipulation that the court power may not be used during his or her lifetime. In this way, the default position in paragraphs (b) and (c) of subsection (2) represent the maximum period during which the trust is immune from alteration under this section, and the truster's only options are to reduce that period.

Subsection (6) sets out the criteria as to which the court must be satisfied before exercising its power in respect of a testamentary trust. First, there must have been a material change in circumstances since the testamentary writing (ie the will or codicil) was executed or such a change must be reasonably in prospect; secondly, the testator must have died (which is an express statement of what is already implicit, since the trust only comes into existence at that point and cannot therefore be altered before then); and, thirdly, at least 25 years must have passed since the trust was created (although the testator may specify a shorter period).

Subsection (7) provides a further special rule for certain testamentary trusts, where there was a material change in circumstances between execution of the testamentary writing and death. If, in that situation, the testator was either incapable during the period between the change and death (ie was not regarded in law as being able to alter his or her will) or, during that period, was unaware of the change and its effect on the trust (or could not reasonably be supposed to have been so aware) then the court has discretion to determine that the 25 year (or shorter) period in subsection (6)(c) is to run not from death but from an earlier date. For example, Sam made a will in year 0, with provision for a trust for family members, but began to suffer from dementia to the extent that testamentary capacity was lost by the end of year 1. The result was that Sam was unable to change the will in the light of major family changes in year 3; Sam then died in year 10. From that point (but not before), the court may be petitioned for a determination that the 25 year period (or whatever shorter period Sam may have chosen) during which the trust is unchallengeable should not begin to run in year 10 on death but either in year 3, from the date of the material change, or even in year 1, upon the loss of capacity. If, in the will, Sam had reduced the default period of 25 years to, say, 5 or 10 years, then the effect of subsection (7) is that the court power will be available either immediately following death or soon thereafter. But that subsection only applies where the testator could not reasonably have been expected to take steps of their own to alter their will in the light of material changes before their death; otherwise, the 25 year period (or whatever shorter period may have been specified) must elapse before the court's power can be exercised.

Subsection (9) contains the central court power. It confers discretion on the Court of Session to alter the trust purposes, but it may only do so to the extent it considers necessary to offset or counter the effect of the change in circumstances. This is an important constraint on the exercise of the power.

Subsection (10)(a) lists some of the factors to which the court is to have regard when deciding whether and, if so, to what extent, to exercise its power under subsection (9). They include: the intentions or probable intentions of the truster; whether the beneficiaries consent to the proposed alteration; and the fairness of that alteration. Paragraphs (b) and (c) set out some of the options which the court has in making the order: it may order that the trust be brought completely (or partially) to an end, with the beneficiaries taking their entitlements, or that the date on which trust property would otherwise vest is to be brought forward or delayed.

Subsection (11) states, in effect, that the court power under this section may not be ousted by the truster and will apply regardless of any contrary provision in the deed. This is an important aspect of the power, as otherwise long term private trusts could be created over which there is very little external supervision or control.

Subsection (12) provides some guidance as to what is meant by "change in circumstances". The phrase is to be read in a generous rather than a narrow way. Changes in the nature or amount of the trust property are included, as are changes in the personal or financial circumstances of a member of the truster's family or a beneficiary; equally, changes in the tax regime are expressly included, as that is likely to be a reason, in some cases, for trustees to apply to the court under this section. Some such changes cannot, by their nature, be predicted in advance but those which can be reasonably foreseen may be used as the basis for a court application (by paragraph (a) of subsections (3) and (6)).

Subsection (13) sets out factors which indicate whether a trust is a commercial one and, hence, whether it will be excluded from the scope of this section by subsection (1). There are some examples of commercial trusts in subsection (14), such as certain pension schemes, life assurance policies, unit trusts, and trusts linked to a partnership agreement. It is assumed that commercial trusts will contain their own provisions as to duration and it is unlikely that they will give rise to problems of "dead hand control", as outlined at the start of this note, since commercial organisations will not want to tie up property in trust to no commercial or economic advantage.

Subsection (15) implements recommendation 98(2) and provides that the section applies to any trust, including those created before the provision comes into force. It is expected that the court will be sensitive to the intentions of trusters whose trusts are already in existence (eg under subsection (10)(a)(i)).

Subsection (16) makes clear that this section is in addition to the specific power in section 62 whereby the court may alter the trust purposes so as to remove (with or without replacement) an office from the trust deed where the holder of that office is to be an *ex officio* trustee. (See the note to section 61 for an explanation of *ex officio* trustees.)

Powers in relation to ex officio trustees

61 Appointment by the court of a trustee to take the place of an *ex officio* trustee

(1) The court may, as regards any trust, on the application of an *ex officio* trustee appoint a person nominated by the applicant to be a trustee in place of the applicant if the court—

(a) considers it expedient to do so for the administration of the trust, and

(b) is satisfied that the power to make such a nomination is not, expressly or by implication, excluded by the trust deed.

(2) The making of an appointment under subsection (1) removes the applicant from the office of trustee.

(3) A person who, having been nominated under subsection (1), still holds the office of trustee as at the date mentioned in subsection (4), ceases to hold the office of trustee on that date.

(4) The date referred to in subsection (3) is the date on which the nominator ceases to hold the office by virtue of which that person was an *ex officio* trustee when the nomination was made.

(5) In subsection (1), the expression "in place of" is not to be construed as implying that the person appointed is to be in any way dependent upon, or under the direction of, the nominating trustee.

(6) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 10(1)(b) and (2). Where a truster has provided that the holder of a specified office should be a trustee by virtue of holding that office (for example, the minister from time to time of a particular parish) he or she is termed an *ex officio* trustee. Such trustees feature in a number of trusts, especially public ones. The offices which *ex officio* trustees hold vary widely; examples include the principals and other office holders in the Scottish Universities, judges, sheriffs, and local holders of religious office, such as the minister of a parish. Whilst there are sound reasons for a truster to use *ex officio* trustees, it can give rise to various problems, whose solutions in the current law are not always either clear or satisfactory.

Subsection (1) provides a default power for an *ex officio* trustee to apply to the court, nominating a person to act as trustee in his or her place, whereupon the court may grant an order whose effect is two-fold: it acts as an appointment of the nominee (subsection (1)) and a removal of the *ex officio* trustee (subsection (2)). The phrase "in place of", however, is not intended to connote that the appointed person is in any way dependent upon, or under the direction of, the nominating trustee (subsection (5)). The new trustee is to be treated on an equal footing with the other trustees and may resign, or be removed, in the same way as any other trustee. He or she automatically ceases, however, to be a trustee when the nominating person ceases to hold the relevant office (subsections (3) and (4)): so, for example, Mary, who is *ex officio* trustee of the Sunny Park Trust in her capacity as parish minister, may nominate Tom to act as trustee in her stead; but if he is still a trustee at the point when she ceases to be the parish minister then his appointment automatically terminates at that point.

The power is exercisable by the Court of Session and the appropriate sheriff court (under section 74(1) and (2)). This provision applies irrespective of when the trust was created (subsection (6)).

62 Office supplying *ex officio* trustee

(1) Where the holder of an office specified in a trust deed is (in terms of the trust deed) eligible to be a trustee by virtue only of being the holder of that office, the court may remove the specification of the office from the trust deed on the application of the trustees.

(2) Where the specified office is extant, an application under subsection (1) may also be made by—

(a) the holder, or

(b) the body of which the holder is an officer.

(3) If an application under subsection (1) seeks the specification of a different office in substitution for the specification removed, the court may make that substitution if satisfied either—

(a) that the specification sought is more appropriate to the purposes of the trust than the specification removed, or

(b) that the office removed is no longer extant.

(4) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 10(1)(a) and (2). (See the note to section 61 for an explanation of *ex officio* trustees.) Subsection (1) provides that the trustees of a trust with an *ex officio* trustee may apply to the court for the removal of the relevant office from the trust deed. Such an application may also be made by the holder of the office, or the body of which the holder is an officer, where the specified office remains in existence (subsection (2)). This section will be of particular use where an office has disappeared, perhaps because of institutional re-organisation of the underlying body; but there will also be other occasions when it may be appropriate, eg where the office no longer has the function which made it attractive for inclusion when the truster created the trust.

If an application under subsection (1) seeks the replacement of such an office with another office, the holder of which is to act as an *ex officio* trustee, the court may make the substitution provided subsection (3)(a) or (b) is satisfied. Those are either that the new office is more appropriate for the trust than the one to be removed or that the one to be removed is no longer in existence.

The power is exercisable by the Court of Session and the appropriate sheriff court (under section 74(1) and (2)). This provision applies irrespective of when the trust was created (subsection (4)).

Petition in respect of defective exercise of fiduciary power etc.

63 Petition in respect of defective exercise of fiduciary power etc.

(1) This section applies where a relevant person—

(a) considers that a trustee has taken a decision in purported exercise of a fiduciary power but that taking it was a defective exercise of the power, or

(b) reasonably apprehends that a trustee is about to take a decision in purported exercise of a fiduciary power but that taking it would be a defective exercise of the power.

(2) The relevant person may apply to the court for an appropriate remedy in respect of the decision taken or as the case may be of the decision which is about to be taken.

(3) The grounds on which the court may grant such a remedy are—

(a) that the trustee, in taking the decision, either has considered (or would be considering) the wrong question or has not considered (or would not be considering) the correct question,

(b) that the trustee, in taking the decision, either has failed (or would be failing) to take a relevant consideration into account or has taken (or would be taking) irrelevant considerations into account,

(c) that taking the decision was (or would be) *ultra vires*,

(d) that taking the decision was (or would be) fraud on a power,

(e) that in taking the decision the trustee failed (or would be failing) to act honestly or in good faith,

(f) where the application is by virtue of paragraph (a) of subsection (1), that no reasonable person, properly instructed as to the facts and the law, could have come to the decision or that in some other way the decision was perverse,

(g) where the application is by virtue of paragraph (a) of subsection (1), that it would not have been taken but for the trustee being in error as to fact or law, and

(h) where the application is by virtue of paragraph (b) of subsection (1), that to take the decision would be perverse.

(4) Where the application is by virtue of paragraph (a) of subsection (1), paragraph (a) of subsection (3) applies whether or not the trustee purported to consider the correct question.

(5) For the purposes of subsection (3)(g), the error—

(a) must relate to the factual or legal situation at the time the decision in question was taken, and

(b) need not be as to the effect or consequence of that decision.

(6) In subsection (1),—

(a) "appropriate remedy" means—

(i) where the application is by virtue of paragraph (a) of subsection (1), reduction (whether partial or full), rectification, or declarator, and

(ii) where the application is by virtue of paragraph (b) of that subsection, interdict, and

(b) "relevant person" means—

(i) the truster, a trustee, a beneficiary or a potential beneficiary,

(ii) any protector or supervisor, and

(iii) any other person if that other person has a patrimonial interest in the exercise of the fiduciary power in question (or in its not being exercised).

(7) This section applies irrespective of when the trust was created but only as regards a decision taken (or, as the case may be, which it is reasonably apprehended will be taken) after the section comes into force.

NOTE

This section provides a statutory court power, exercisable by the Court of Session, to grant a remedy, if considered appropriate, where the exercise of a fiduciary power by a trustee is challenged as being defective. This implements recommendation 101. Such challenges may currently be brought under Scots common law, particularly by reference to the decisions of the House of Lords in *Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78 and *Hunter v Bradford Property Trust Ltd* 1970 SLT 173; the law in England and Wales, however, is rather different and the recent Supreme Court decision in the conjoined cases of *Pitt v Holt* and *Futter v Futter* [2013] UKSC 26 has greatly restricted the earlier rule (known as the rule in *Hastings-Bass*).

Subsection (1) sets out the basic conditions for an application to be made, namely that a relevant person (as defined in subsection (6)(b)) either considers that a trustee has already taken a decision which amounts to a defective exercise of his or her fiduciary power or has reasonable grounds for considering that such a decision is about to be taken. Subsection (2) provides the power to apply to court (which, by section 74(1) means the Court of Session).

The grounds on which the court may grant a remedy are set out in subsection (3), which implements recommendations 102 to 104 (with recommendation 103 relating to the inclusion of paragraph (c), and recommendation 104 to paragraph (g)). Subsections (4) and (5) are consequential on two of the paragraphs in subsection (3), and they implement, in part, recommendations 102 and 104 respectively. Paragraph (g) of subsection (3) allows a challenge on the ground that the trustee has made an error as to fact or law and subsection (5)(b) provides that the error need not be as to the effect or consequence of the decision, thus avoiding certain difficulties which can arise under the current law.

Subsection (6)(a), in implementation of recommendation 105, specifies the available remedies: reduction (either partial or full), rectification, declarator and interdict. Subsection (6)(b) implements recommendation 106 and lists those who, by virtue of being a "relevant person", may make an application under subsection (2). By subsection (7) the power applies in respect of all trusts, whenever created, but only as regards a decision taken, or reasonably apprehended as being about to be taken, after commencement.

Amendment of Court of Session Act 1988

64 Amendment of Court of Session Act 1988

After section 6 of the Court of Session Act 1988 (c.36) there is inserted—

"**6A Allocation of business in relation to trusts and to the estates of deceased persons**

(1) With a view to securing that directions may be obtained—

(a) in relation to trust property, by trustees and others, and

(b) in relation to a deceased's estate, by executors,

with as little delay as possible and to the simplifying of procedure and the reduction of expense in applications to the Court for such directions, the Court shall, in the exercise of the powers conferred on it by section 5 of this Act, provide by act of sederunt for the matters mentioned in subsection (2) below.

(2) The matters are—

(a) enabling trustees, protectors or supervisors under a trust deed, or any other person with an interest in the trust property, to obtain the direction of the Court on questions relating to—

(i) the investment, distribution, management or administration of the trust estate; or

(ii) the exercise of any power vested in, or the performance of any duty imposed on, the trustees notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction;

(b) irrespective of whether there is a will trust, enabling an executor (nominate or dative) of a person who dies after the coming into force of section 64 of the Trusts (Scotland) Act 2014 (asp 00) to obtain the direction of the Court on questions relating to—

(i) the investment, distribution, management or administration of the person's estate; or

(ii) the exercise of any power vested in, or the performance of any duty imposed on, the executor notwithstanding that such direction may affect contingent interests in the estate, whether of persons in existence at, or of persons who may be born after, the date of the direction.

(3) In subsection (2)(a)—

"protector" is to be construed in accordance with section 48(1)(a) of the Trusts (Scotland) Act 2014, and

"supervisor" is to be construed in accordance with section 44(1) of that Act.".

NOTE

Implementing recommendation 74, this provision inserts a section 6A into the Court of Session Act 1988. Section 6(vi) of that Act (which is repealed by section 79 and schedule 2) currently enables the trustees under any trust deed to seek directions of the Court of Session if they consider it necessary for the carrying out of their functions; this does not extend to protectors and supervisors, nor to all executors. Given that protectors and supervisors are expressly stated to be fiduciaries (sections 48(5) and 44(2) respectively), and to ensure that both are able to carry out their functions, this provision enables such people, or any other person with an interest in the trust property, to seek court directions on questions outlined in subsection (2)(a) of the new section. ("Court" is defined in section 74(1) as meaning the Court of Session.) Allied to this, subsection (2)(b) of the new section permits executors (whether nominate or dative) of a person who dies after the coming into force of this section (ie section 64 of the draft Bill) to petition the court for directions regardless of whether the will in question involves a trust; at present the power is only open to executors where there is a testamentary trust.

Expenses

65 Expenses of litigation

(1) Subject to the following provisions of this section, a trustee does not incur personal liability for the expenses of civil litigation to which the trust is party.

(2) Subject to subsection (6), if such expenses are found to be recoverable from the trust but the trust property is insufficient to meet the expenses then the excess is recoverable from the personal property of the trustees (liability being joint and several).

(3) A trustee may be found personally liable, in whole or in part, for the expenses of civil litigation to which the trust is party if—

(a) the litigation is, in the opinion of the court, unnecessary,

(b) the litigation relates to the trustee's opposing the appointment of a judicial factor to administer the trust in place of the trustee and the trustee is unsuccessful both—

(i) in opposing the appointment, and

(ii) as regards being removed from office,

(c) the litigation relates to the trustee's opposing the reduction of the trust deed and the trustee is unsuccessful in opposing the reduction,

(d) the trustee has, by breach of duty, brought about the litigation,

(e) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, pursued the litigation—

(i) without consulting such of the other trustees as are both capable and traceable, and

(ii) unsuccessfully, or

(f) the trustee is part of a minority of the body of trustees and that minority has, in the name of the trust, defended the litigation—

(i) without consulting such of the other trustees as are both capable and traceable, and

(ii) without the defence being of any benefit to the trust.

(4) Where, by virtue of subsection (3), a trustee is found personally liable for the expenses of civil litigation to which the trust is party, the court may allow the trustee relief against the trust property if and in so far as the court considers it appropriate to do so.

(5) Subsection (6) applies where a trust is party to ongoing civil litigation.

(6) On the application of a trustee the court may, if it considers it would be unfair not to do so, relieve the trustee of personal liability for certain expenses—

(a) incurred, or

(b) yet to be incurred.

(7) This section applies irrespective of when the trust was created.

NOTE

This section implements recommendation 77. As a general rule, trustees are not to be personally liable for litigation expenses involving the trust, whether as a pursuer or defender (subsection (1)). (This provision deals with civil liability only; if a trustee is found criminally liable and is required to make a contribution to prosecution costs, these are to paid out of his or her personal patrimony.) This general rule is subject to a number of exceptions, outlined in the remainder of the provision.

If the trust property is insufficient to meet an award of expenses then the trustees' personal patrimonies are liable to meet the excess, liability being joint and several (subsection (2)). Where, however, a trust is party to litigation which is in progress, a trustee may apply to the court (which, by section 74(1), means the Court of Session) for relief from personal liability for certain expenses, including those that have not yet been incurred; the court will grant relief where personal liability would be inequitable or unfair (subsection (6)). An example might be a situation in which trustees are pursuing an investment advisor whose actions, they allege, have depleted the trust property down to a negligible level. In such a case, where it is highly likely that any expenses will exceed the value of the trust property, the trustees may raise an action against the advisor in negligence or fraud and then immediately apply to the court for personal relief from past and future expenses.

Subsection (3) stipulates that a trustee's personal patrimony is liable (whether wholly or in part) for litigation to which the trust is a party if:

- the litigation is unnecessary, in the court's view;
- the trustee unsuccessfully opposed the appointment of a judicial factor to administer the trust and his or her removal as trustee;
- the trustee unsuccessfully opposed the reduction of the trust deed;
- the trustee, by neglect of duty, brought about the litigation;
- the trustee is one of a minority of the trustees and, without consulting all of the other trustees, either (i) unsuccessfully pursued an action in the name of the trustees as a whole; or (ii) defended an action against the trustees as a whole in circumstances where the trust did not benefit from the defence.

Where a trustee is found personally liable under subsection (3), the court has discretion to allow relief against the trust property where it considers it appropriate to do so, and to the extent to which it considers it appropriate (subsection (4)). This provision applies irrespective of when the trust was created (subsection (7)).

66 Expenses of application

(1) Any question of expenses in relation to an application under this Act is to be determined by the court.

(2) Without prejudice to the generality of subsection (1), the court may, if it considers it reasonable to do so, direct that any such expenses be paid out of the trust property.

NOTE

This provision implements recommendation 78 and re-enacts section 34 of the Trusts (Scotland) Act 1921. It permits the court (which, by section 74(1) and (2), means either the Court of Session or the appropriate sheriff court) to determine all questions of expenses relating to applications under the draft Bill and, where it considers it reasonable, to direct that certain expenses are to be met out of trust property.

Miscellaneous powers

67 Authorisation to make payments on basis that an event has or has not occurred or will or will not occur

(1) The court may, on the application of one or more of the trustees or of any person with an interest in the trust property, grant an order authorising the trustees to make payments from the trust property on the basis that an event specified in the application—

(a) has, or has not, occurred, or

(b) will, or will not, occur.

(2) An order under subsection (1) may be granted on such conditions as the court thinks fit to impose.

(3) Should it be found that the basis on which the order was granted was untrue, a trustee who has acted in accordance with the order incurs no personal liability unless, in connection with the making of the application—

(a) some relevant fact was concealed from the court—

(i) by the trustee, or

(ii) by some other person and the trustee knew, or ought to have known, of the concealment, or

(b) there were fraudulent actings—

(i) on the part of the trustee, or

(ii) on the part of some other person and the trustee knew, or ought to have known, of those actings and that they were fraudulent.

(4) This section is without prejudice to any right of a beneficiary to recover trust property from a person to whom, by virtue of the order, a payment has been made or from any successor of such a person.

(5) This section applies irrespective of when the trust was created.

NOTE

This section allows trustees, or anyone with an interest in the trust, to apply to the Court of Session for authorisation to make payments from the trust property on the assumption that particular events in the past or future have, or have not occurred (or will, or will not occur). The effect of such an order, which is known as a *Benjamin* order in English and Welsh law, protects the trustees from liability if it turns out that the assumptions in question were not in fact correct. An example of a past event might be the question of whether a particular person predeceased the testator without leaving issue. If, after reasonable enquires, the trustees cannot trace any issue, they may apply to the court for authority to distribute the deceased's estate on that basis. In relation to uncertainties about future liability, one example in recent times has been over whether the reinsurance arranged in respect of a deceased's liabilities as a Lloyd's Name will prove sufficient; doubts over such matters can delay the distribution of the estate for lengthy periods. The effect of an order under this section only relieves the trustees of personal liability (unless the grounds in subsection (3) are established), but it does not affect the rights of any person if it later turns out that the assumptions on which the order is granted were in fact incorrect.

Subsections (1) and (2) implement recommendation 73(1). They allow the court (meaning the Court of Session: section 74(1)) to grant authority for the trustees to proceed with the distribution of trust property in the type of situation outlined just above. By subsection (3), which implements recommendation 73(2), the effect of a court order under subsection (1) is to remove personal liability from a trustee who acts in accordance with it; if, however, the trustee was involved in concealing relevant facts from the court or in fraudulent actings then there is no protection against personal liability.

Subsection (4) states that the position of the beneficiaries is not affected. Thus, if events turn out other than as expected when making the court order, the entitlements which actually turn out to arise will be enforceable. But if the trust property has already been distributed by that time, the entitlements will require to be enforced against those to whom distributions were made, rather than against the trustees for breach of trust.

68 Completion of title by beneficiary

(1) A beneficiary absolutely entitled to heritable or incorporeal moveable property, title to which has been taken in the name of a trustee who has died or become incapable without having executed a conveyance (or as the case may be an assignation) of the property, may apply to the court for authority to complete title to the property in the beneficiary's own name.

(2) The court may, on any such application, grant warrant for completing title to the property.

(3) Any such warrant is effectual as a conveyance (or as the case may be as an assignation) of the property in favour of the beneficiary.

(4) Reference in subsections (1) and (3) to a beneficiary includes reference to any person deriving right from a beneficiary.

(5) This section applies irrespective of when the trust was created.

NOTE

As discussed in paragraphs 16.38 and 16.40 of the Report, this provision re-enacts, with modification, section 24 of the Trusts (Scotland) Act 1921. It specifies how a beneficiary may complete title to heritable or incorporeal moveable property which is still in the name of a trustee who has either died or become incapable (within the meaning of section 75). The following section deals with the vesting of corporeal moveable property in similar situations.

Section 68 provides a mechanism by which a beneficiary (or, by subsection (4), any person deriving a right from him or her) may apply to the court to obtain title to heritable or incorporeal moveable property to which the beneficiary is absolutely entitled but which is in the name of a trustee who has died or become incapable of acting. "Court" is defined in section 74(1) and (2)) as meaning the Court of Session and the appropriate sheriff court. The court may grant warrant for completing title to the property (subsection (2)) and any warrant is effective as a conveyance or, for example, in the case of leases, an assignation of the property in favour of the beneficiary (subsection (3)). This provision applies irrespective of when the trust was created (subsection (5)).

69 Warrant to vest corporeal moveable property in beneficiary where trustee has died or become incapable

(1) This section applies where—

(a) a trustee has died or become incapable vested in corporeal moveable property to which a beneficiary is absolutely entitled, but

(b) delivery of the property to, or possession of the property by, the beneficiary is required for the property to vest in the beneficiary.

(2) The court may, on the application of the beneficiary, grant warrant for the property to vest in the beneficiary.

(3) Any such warrant is effectual to vest the property in the beneficiary, as at the date of the warrant, as if the beneficiary had taken delivery or possession of the property on that date.

(4) Reference in subsections (1) to (3) to a beneficiary includes reference to any person deriving right from a beneficiary.

(5) This section applies irrespective of when the trust was created.

NOTE

As discussed in paragraphs 16.38 and 16.40 of the Report, this section deals with the vesting of corporeal moveable property which remains vested in a trustee who has either died or become incapable (within the meaning of section 75). The previous section deals with the completion of title to heritable or incorporeal moveable property in similar situations.

This section is, in part, analogous to section 31(4) of the Bankruptcy (Scotland) Act 1985, which provides for the vesting in a trustee in sequestration of moveable property in respect of which either delivery, possession or intimation of its assignation would otherwise be required in order to complete title to it. (The assignation of incorporeal moveable property is dealt with in section 68.)

Where a beneficiary is absolutely entitled to corporeal moveable property which remains vested in a trustee who has died or become incapable of acting and for which delivery or possession would be required for re-vesting, the beneficiary may apply to the court for a warrant for the property to vest in him or her. Subsection (3) provides that the effect of the warrant is to vest the property in the beneficiary as at the date of the warrant as if he or she had taken delivery or possession on that date. Subsection (4) provides the same right for any person deriving a right from a beneficiary. "Court" is defined in section 74(1) as meaning the Court of Session. This provision applies irrespective of when the trust was created (subsection (5)).

70 Superintendence order as to investment and distribution of trust property

(1) The court may, on the application of one or more of the trustees, order the accountant of court to superintend the trustees' administration of the trust insofar as that administration relates to—

(a) the investment of trust property, and

(b) the distribution of trust property among creditors and beneficiaries.

(2) If the order (to be known as a "superintendence order") is granted, the accountant of court—

(a) must, annually, examine and audit the trustees' accounts, and

(b) may report to the court, and obtain the court's directions, on any question which may arise with regard to the administration superintended.

(3) This section applies irrespective of when the trust was created.

NOTE

As discussed in paragraphs 16.39-16.40 of the Report, this provision essentially restates section 17 of the Trusts (Scotland) Act 1921.

Subsection (1) permits trustees (as a body or any one or more of them) to apply to court for an order whereby the Accountant of Court will superintend their administration of the trust in relation to the investment of trust property or the distribution of property to creditors and beneficiaries. Such applications are relatively rare but they are occasionally made. Subsection (2) requires the Accountant to examine and audit the trustees' accounts annually; in addition, the Accountant has power to seek court directions in respect of the exercise of the superintendence. "Court" is defined in section 74(1) as meaning the Court of Session. This provision applies irrespective of when the trust was created (subsection (3)).

Saving as regards public trusts

71 Saving as regards public trusts

Sections 53 to 60 do not apply as respects a public trust.

NOTE

This section states that the provisions on the variation and termination of trusts, in sections 53 to 59, do not apply to public trusts. (Separate rules, which are not contained in the draft Bill, apply to the reorganisation of such trusts. They are subject to reform under the *cy-près* jurisdiction (as found, for example, in *RS Macdonald's Trustees, Petitioners* [2008] CSOH 116) or, for charitable trusts, under the Charities and Trustee Investment (Scotland) Act 2005 as amended by Part 9 of the Public Services Reform (Scotland) Act 2010.) This section also provides that section 60, on the alteration of trust purposes on material change of circumstances, does not apply to public trusts; this implements recommendation 95(k).

PART 9

MISCELLANEOUS AND GENERAL

Miscellaneous

72 Amendment of Requirements of Writing (Scotland) Act 1995

(1) In section 7(7) of the Requirements of Writing (Scotland) Act 1995 (c.7) (subscription and signing), after the word "partnerships," there is inserted "bodies of trustees,".

(2) In Schedule 2 to that Act (subscription and signing: special cases), after paragraph 2 there is inserted—

"*Trusts*

2A (1) Except where an enactment or the trust deed expressly provides otherwise, where a granter of a document executed after the commencement of section 72 of the Trusts (Scotland) Act 2014 (asp 00) is a body of trustees, the document is signed by that body if it is signed on the body's behalf either by a majority of the trustees or by a person (whether or not one of the trustees) authorised to sign the document on the body's behalf.

(2) Sub-paragraph (1) of this paragraph applies in relation to the signing of an alteration to a document as it applies in relation to the signing of a document.

(3) In this paragraph, "trust" has the meaning assigned to that expression by section 74(1) of that Act of 2014.".

NOTE

As discussed in paragraph 13.33 of the Report, this section amends the Requirements of Writing (Scotland) Act 1995, so as to clarify the way in which that Act applies to documents subscribed by trustees. (See also section 39 of the draft Bill, which deals with execution of documents too.) It sets out the way in which a trust document is to be regarded as validly executed for the purposes of the 1995 Act. If trustees wish their document to be probative, which is necessary in certain situations, for example where it relates to land and is to be registered, the attestation requirements of section 3 of the 1995 Act may be followed.

General

73 Application by petition

Any application under this Act is to be by petition.

NOTE

This section provides that applications under the draft Bill are to be made by petition (as opposed to other forms of court document which can be used to initiate an action, depending on the type of action in question). Detailed rules of court, for the Court of Session and for the sheriff court, will provide further specification of the procedure. Many trusts actions already require to be raised by petition under the current law.

74 Interpretation

(1) In this Act, unless the context otherwise requires—

"beneficiary", in relation to a trust, means a person having, whether directly or indirectly, a vested or contingent interest under the trust,

"the court" means the Court of Session except that in sections 1, 6, 61, 62, 66, 68 and 69 the expression includes the appropriate sheriff court,

"guardian" includes a person's continuing attorney,

"potential beneficiary" means a person (whether or not an ascertained person) who—

(a) is not a beneficiary, but

(b) may become a beneficiary on being, at a future date or on the happening of a future event, a person of some specified description or a member of some specified class of persons.

"private purpose trust" is to be construed in accordance with section 41,

"protector" is to be construed in accordance with section 48(1)(a),

"supervisor" is to be construed in accordance with section 44(1),

"trust" means any trust (whether or not constituted by deed or other writing, by or by virtue of Act of Parliament or of the Scottish Parliament, by Royal Charter, or by resolution of any corporation, public body or ecclesiastical body),

"trust deed" means any—

(a) deed or other writing,

(b) enactment,

(b) Royal Charter, or

(c) resolution of any corporation, public body or ecclesiastical body,

which constitutes any trust, and

"trustee" means a trustee under any trust but includes an executor nominate and an executor dative.

(2) In the definition of "the court" in subsection (1), "the appropriate sheriff court" means—

(a) where the sole trustee is, or a majority of the trustees are, habitually resident in a particular sheriffdom—

(i) a sheriff court of that sheriffdom, or

(ii) where a majority of the trustees consent, a sheriff court of any other sheriffdom in which at least one of the trustees is habitually resident, or

(b) where paragraph (a) is not applicable, the sheriff court at Edinburgh.

(3) In the definition of "guardian" in that subsection, "continuing attorney" is to be construed in accordance with section 15(2) of the Adults with Incapacity (Scotland) Act 2000 (asp 4) (creation of continuing power of attorney).

NOTE

Subsection (1) defines a number of terms used in the draft Bill, or refers to particular sections which are relevant for that purpose. Of especial note are the following:

"*beneficiary*" and "*potential beneficiary*": the former definition is taken from section 1(6) of the Trusts (Scotland) Act 1961 and the latter is based upon section 1(1)(b) of that Act. An example of potential beneficiaries is the class of the heirs of an individual who has not yet died. The heirs cannot be ascertained until that individual dies, with the result that they have no present interest but are merely potential beneficiaries.

"*the court*": this provision explains whether, in relation to individual sections of the draft Bill, the court means just the Court of Session or whether it also includes the sheriff court. This is in partial implementation of recommendation 76(1) and (2). Subsection (2) provides further detail about which sheriff court has jurisdiction.

"*trustee*": this expressly includes all executors, both nominate (in testate cases) and dative (in intestate cases).

Subsection (2) provides a way of identifying which particular sheriff court or courts are competent to exercise jurisdiction under certain sections of the draft Bill (as set out in subsection (1) under "the court"). This provision is based on the current law, in section 24A of the Trusts (Scotland) Act 1921, but with three main differences: first, jurisdiction is based on residence rather than domicile; secondly, the focus is on the residence of the trustees rather than of the truster; and lastly there is no special provision for marriage contracts as they are thought to be adequately provided for by the general rule.

75 The expressions "incapable" and "capable"

(1) For the purposes of this Act, a person is to be regarded as "incapable" who, for either or both of the reasons mentioned in subsection (3), is incapable of one or more of the following—

(a) making decisions,

(b) communicating decisions,

(c) understanding decisions,

(d) retaining the memory of decisions.

(2) And the expression "capable" is to be construed accordingly.

(3) The reasons are—

(a) that the person is mentally disordered,

(b) that, because of physical disability, the person has an inability to communicate.

(4) But subsection (1) is subject to subsection (5).

(5) A person is not incapable by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise).

(6) For the purposes of subsection (3)(a), a person is to be regarded as "mentally disordered" who has any disorder or disability of the mind (however caused or manifested).

NOTE

This section, which implements recommendation 11, defines what is meant by "incapable" and "capable" where those terms are used in the draft Bill. The concept of capacity is one which is the subject of much contemporary debate, and the definition in this section is based on current legislation in Scotland (the Adults with Incapacity (Scotland) Act 2000) and England and Wales, as more fully explained in paragraphs 4.47 to 4.50 of the Report.

76 The expressions "untraceable" and "traceable"

(1) For the purposes of sections 1(1)(b) and (3), 2, 6(1)(e), 7(1)(b), 12(2)(c), 39(1), 48(3)(k)(v), 49(1)(b) and (4), 54(5)(e) and 65(3)(e)(i) and (f)(i) (and without prejudice to the generality of those sections) a person is to be regarded as "untraceable" if—

(a) the person has not been traced, and

(b) in the case of—

(i) section 1(1)(b) and (3), 6(1)(e), 48(3)(k)(v), 54(5)(e) or 65(3)(e)(i) and (f)(i) the court is satisfied that reasonable steps have been taken to trace the person,

(ii) section 2, the truster is so satisfied,

(iii) section 49(1)(b), the truster is alive, capable and so satisfied (or if the truster is not alive or is not capable, every trustee who is both capable and traceable is so satisfied), or

(iv) section 7(1)(b), 12(2)(c) or 39(1), every trustee who is both capable and traceable is so satisfied.

(2) And the expression "traceable" is to be construed accordingly.

NOTE

This section defines what is meant by the terms "untraceable" and "traceable" as used in the draft Bill. It implements recommendation 12.

Trustees (and others) who cannot be traced can cause considerable difficulty for the good administration of a trust, and the aim of this provision is to outline what steps must be taken before a person qualifies as "untraceable". Subsection (1) specifies two conditions: first, and obviously, the person must not have been traced and, secondly, reasonable steps must have been taken to trace him or her. What counts as reasonable, and who must be satisfied as to the reasonableness of those steps, will vary according to the circumstances of the trust and the particular provision of the draft Bill which is in question, thus allowing appropriate flexibility for individual cases.

77 Modification of enactments

Schedule 1 makes provision for the modification of enactments.

78 Ancillary provision

(1) The Scottish Ministers may, by order, make such incidental, supplemental, consequential, transitory, transitional or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision made by, under or by virtue of this Act.

(2) An order under subsection (1) may modify any enactment (other than this Act).

(3) An order under subsection (1)—

(a) is subject to the affirmative procedure if it modifies any enactment, and

(b) is otherwise subject to the negative procedure.

79 Repeals

The enactments mentioned in schedule 2 to this Act are repealed to the extent mentioned in the second column of that schedule.

80 Saving

Nothing in any section of this Act affects proceedings commenced before that section comes into force.

81 Commencement

(1) This section and section 82 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

(3) Different days may be so appointed for different purposes and for different provisions.

82 Short title

The short title of this Act is the Trusts (Scotland) Act 2014.

SCHEDULE 1
(introduced by section 77)

MODIFICATION OF ENACTMENTS

Married Women's Policies of Assurance (Scotland)(Amendment) Act 1980 (c.56)

1 In section 4 of the Married Women's Policies of Assurance (Scotland)(Amendment) Act 1980 (application of Trusts (Scotland) Act 1980)—

(a) for the words "1 of the Trusts (Scotland) Act 1961" there is substituted "54 of the Trusts (Scotland) Act 2014", and

(b) for the words "the said section 1" there is substituted "section 54 of that Act of 2014".

Age of Legal Capacity (Scotland) Act 1991 (c.50)

2 In section 1(3) of the Age of Legal Capacity (Scotland) Act 1991 (age of legal capacity)—

(a) after paragraph (d) there is inserted—

"(da) confer on any person under the age of 18 years the legal capacity to give agreement to an arrangement mentioned in section 53(1) of the Trusts (Scotland) Act 2014", and

(b) in paragraph (f)(iii), for the words "1 of the Trusts (Scotland) Act 1961" there is substituted "54(5) of the Trusts (Scotland) Act 2014".

NOTE

Paragraph 2 gives further effect to Recommendation 82. It inserts into the Age of Legal Capacity (Scotland) Act 1991 provisions which state that those under the age of 18 continue to lack capacity to agree to a variation or termination of the trust of which they are beneficiaries.

Children (Scotland) Act 1995 (c.36)

3 In section 10 of the Children (Scotland) Act 1995 (obligations and rights of person administering child's property)—

(a) in subsection (1)(b), after the word "Act" there is inserted "and to subsection (1A) below", and

(b) after subsection (1) there is inserted—

"(1A) Subsection (1)(b) confers no entitlement to give approval on a child's behalf to an arrangement to which section 53 of the Trusts (Scotland) Act 2014 applies".

NOTE

Paragraph 3 implements Recommendation 81. It amends section 10 of the Children (Scotland) Act 1995 to make clear that a parent or guardian does not have power to approve a variation or termination of a trust on behalf of a child.

SCHEDULE 2
(introduced by section 79)

REPEALS

Enactment	*Extent of repeal*
Powers of Appointment Act 1874 (c.37)	The whole Act.
Trusts (Scotland) Act 1921 (c.58)	The whole Act.
Trusts (Scotland) Act 1961 (c.57)	Section 1. Except in so far as relating to judicial factors, section 2(1) and (2). In section 6(1), the definition of "the court".
Succession (Scotland) Act 1964 (c.41)	In section 20, the words ", and the Trusts (Scotland) Acts 1921 and 1961 shall have effect as if any reference therein to a trustee included a reference to such an executor dative".
Court of Session Act 1988 (c.36)	In section 6, paragraph (vi).
Age of Legal Capacity (Scotland) Act 1991 (c.50)	In Schedule 1, paragraph 27.

Appendix B Section 4 of the Trusts (Scotland) Act 1921, as amended

See also paragraph 2.20 of the Report

4 – General powers of trustees

(1) In all trusts the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust deed, viz.:—

(a) to sell the trust estate or any part thereof, heritable as well as moveable.

[…]

(c) to grant leases of any duration (including mineral leases) of the heritable estate or any part thereof and to remove tenants.

(d) to borrow money on the security of the trust estate or any part thereof, heritable as well as moveable.

(e) to excamb any part of the trust estate which is heritable.

(ea) to make any kind of investment of the trust estate (including an investment in heritable property).

(eb) to acquire heritable property for any other reason.

[…]

(f) to appoint factors and law agents and to pay them suitable remuneration.

(g) to discharge trustees who have resigned and the representatives of trustees who have died.

(h) to uplift, discharge, or assign debts due to the trust estate.

(i) to compromise or to submit and refer all claims connected with the trust estate.

(j) to refrain from doing diligence for the recovery of any debt due to the truster which the trustees may reasonably deem irrecoverable.

(k) to grant all deeds necessary for carrying into effect the powers vested in the trustees.

(l) to pay debts due by the truster or by the trust estate without requiring the creditors to constitute such debts where the trustees are satisfied that the debts are proper debts of the trust.

(m) to make abatement or reduction, either temporary or permanent, of the rent, lordship, royalty, or other consideration stipulated in any lease of land, houses, tenements, minerals, metals, or other subjects, and to accept renunciations of leases of any such subjects.

(n) to apply the whole or any part of trust funds which the trustees are empowered or directed by the trust deed to invest in the purchase of heritable property in the payment or redemption of any debt or burden affecting heritable property which may be destined to the same series of heirs and subject to the same conditions as are by the trust deed made applicable to heritable property directed to be purchased.

(o) to concur, in respect of any securities of a company (being securities comprised in the trust estate), in any scheme or arrangement—

(i) for the reconstruction of the company.

(ii) for the sale of all or any part of the property and undertaking of the company to another company.

(iii) for the acquisition of the securities of the company, or of control thereof, by another company,

(iv) for the amalgamation of the company with another company, or

(v) for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them,

in like manner as if the trustees were entitled to such securities beneficially; to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of, or in exchange for, all or any of the first mentioned securities; and to retain any securities so accepted as aforesaid for any Period for which the trustees could have properly retained the original securities;

(p) to exercise, to such extent as the trustees think fit, any conditional or preferential right to subscribe for any securities in a company (being a right offered to them in respect of any holding in the company), to apply capital money of the trust estate in payment of the consideration, and to retain any such securities for which they have subscribed for any period for which they have power to retain the holding in respect of which the right to subscribe for the securities was offered (but subject to any conditions subject to which they have that power); to renounce, to such extent as they think fit, any such right; or to assign, to such extent as they think fit and for the best consideration that can reasonably be obtained, the benefit of such right or the title thereto to any person, including any beneficiary under the trust.

(1A) The power to act under subsection (1)(ea) or (eb) above is subject to any restriction or exclusion imposed by or under any enactment.

(1B) The power to act under subsection (1)(ea) or (eb) above is not conferred on any trustees who are –

(a) the trustees of a pension scheme,

(b) the trustees of an authorised unit trust, or

(c) trustees under any other trust who are entitled by or under any other enactment to make investments of the trust estate.

(1C) No term relating to the powers of a trustee contained in a trust deed executed before 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1D) No term restricting the powers of investment of a trustee to those conferred by the Trustee Investments Act 1961 (c.62) contained in a trust deed executed on or after 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1E) The reference in subsection (1D) above to a trustee does not include a reference to a trustee under a trust constituted by a private or local Act of Parliament or a private Act of the Scottish Parliament; and "trust deed" shall be construed accordingly.

(1F) In this section –

"authorised unit trust" means a unit trust scheme in the case of which an order under section 243 of the Financial Services and Markets Act 2000 (c.8) is in force,

"enactment" has the same meaning as in the Scotland Act 1998 (c.46),

"pension scheme" means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993 (c.48)) established under a trust and subject to the law of Scotland.

(2) This section shall apply to acts done before as well as after the passing of this Act, but shall not apply so as to affect any question relating to an act enumerated in head (a), (b), (c), (d), or (e) of this section which may, at the passing of this Act, be the subject of a depending action.

Appendix C Letter to HMRC on apportionment

This is the text of the letter from Lord Drummond Young, the former Chairman of the Scottish Law Commission, which is referred to at paragraph 10.21 of the Report

January 2014

Dear Sir/Madam,

SCOTTISH LAW COMMISSION: TRUST PROJECT
APPORTIONMENT OF TRUST RECEIPTS AND OUTGOINGS

As you may be aware, the Scottish Law Commission is currently nearing the end of a comprehensive review of the law of trusts in Scotland. At present this is governed by the Trusts (Scotland) Act 1921. We have found that that Act is seriously outdated, and there is an urgent need to bring the law into line with the expectations of the legal and commercial world in the early 21st century. For that reason we are proposing a total overhaul of the trust legislation applicable in Scotland.

An important part of our review involves the law governing the apportionment of trust receipts and outgoings. We considered this area of law in a Discussion Paper, No 124, published in September 2003. I enclose a copy of this paper. In the paper, at paragraph 1.11, we draw attention to the fact that practitioners have long recognised that the rules governing apportionment and allocation of the receipts of trusts are unwarrantably complex and can in many cases engender inequitable results for one class of beneficiary or another. We mentioned that many trust deeds now contain specific provisions, ordinarily in the form of a discretionary power, aimed at circumventing the common law rules. In this connection we referred to a standard work on the drafting of wills in Scotland.

Our proposals for reform of the law are set out on pages 17-18 and 22. For present purposes the material proposals are the first and fourth. These are as follows:

1. Trustees should have a new statutory power to alter the allocation under the existing statutory or common law rules of a receipt or an outgoing to income or capital or to alter the apportionment of a receipt or an outgoing between income and capital in order to maintain a fair balance between the income and capital beneficiaries of the trust. This power should be subject to any contrary provisions in the trust deed.

4. Trustees should have a new statutory power, exercisable on a discretionary basis, not to apportion dividends and other periodical payments on a time basis when they would otherwise be required to do so in terms of the Apportionment Act 1870 or any rule of law.

We have subsequently discussed these proposals with our Advisory Group, which contains a number of practitioners, and they were strongly in support of the proposals. In view of that reaction, we have inserted provisions into our draft Bill that give effect to the proposals. Sections 17, 18 and 19 of the draft Bill are annexed to this letter.

We became aware, however, that the Law Commission for England and Wales has been giving consideration to the corresponding area of the law in that jurisdiction. They published a Consultation Paper (No 175) in 2004, and then consulted further. In the light of that consultation, and in particular as a result of their discussions with HMRC, they altered their recommendations significantly in the Report that was finally produced (Law Com No 315, published in May 2009). The Report has now been implemented through the Trusts (Capital and Income) Act 2013.

In the Consultation Paper the English Commission proposed, for private trusts, a scheme of simplified classification rules (as income or capital) supplemented by a new trustee power of allocation. They considered that that power would provide flexibility to mitigate any failings of the classification rules and would give trustees who wished to invest on a total return basis the opportunity to do so. In view of HMRC's reaction, however, they decided not to recommend implementation of such a scheme, because of what were said to be the tax consequences (Report, paragraphs 1.22 and 1.23).

HMRC took three principal objections to the proposed scheme. The first of these was that the power might offer tax avoidance opportunities by allowing trustees to treat as income what HMRC viewed as capital and vice versa. The second was that, if the exercise of the power of allocation had the effect of changing the nature of the receipt, the result might be that two identical corporate receipts would be classified differently, depending upon whether they were paid to an individual or to a trustee. Thirdly, if that were not so, the fact that the trustees were able to decide whether or not to pay a sum to the income beneficiary or retain it as capital might cause an interest in possession trust to lose its status as such for income tax and inheritance tax purposes.

In relation to these objections, we should state at the outset that we do not envisage that the exercise of the power contemplated in our Discussion Paper would have the effect of changing the nature of the receipt, as income or capital. Our proposed power is only intended to operate as between those with income and capital interests within the trusts, thus the second objection should not apply. As to the first objection, the power that we envisaged in fact has a relatively limited scope, and must be exercised subject to important fiduciary constraints. For that reason we do not think there is any substantial risk that it would be used for tax avoidance purposes, at least on more than a very minimal scale. The third objection, that it would have the result of converting an interest in possession trust into a discretionary trust, is the one that concerns us most. I will return to this below.

The English Commission concluded that, because of the opinion expressed by HMRC as to the tax consequences of such a power, they could not recommend reform of the law along the lines that they originally envisaged. They stated (Report, paragraph 5.10) that settlors, trustees and beneficiaries of interest in possession trusts would not find it acceptable that they should be converted into discretionary trusts, with concomitant tax disadvantages, on the basis of a provision dealing with apportionment. For that reason the English Commission recommended a much more limited reform of the law, without any power to allocate payments as income or capital.

For our part, we are extremely anxious that any default provision contained in a future Trusts (Scotland) Act should not have the consequence of converting a liferent or interest in possession trust into a discretionary trust, with the tax disadvantages that that brings. That is why I am now writing to you with a view to clarifying HMRC's position under Scots law.

For my own part, I am of opinion that the power of allocation set out in proposals 1 and 4 of our Discussion Paper on the Apportionment of Trust Receipts and Outgoings, and the corresponding provisions in our draft Trusts (Scotland) Bill, would not have the effect of converting an interest in possession trust into a discretionary trust. In the first place, the proposed power does not form any part of the trust purposes. It assumes those purposes, and is designed merely to ensure that they are fulfilled, by striking a fair balance between the different classes of beneficiary. This is made quite clear by section 17(3) of our draft Bill.

In the second place, the power concerned is an administrative power; this follows from the fact that it is not any part of the trust purposes. I have great difficulty in understanding how an administrative power could convert a liferent trust into a discretionary trust, as any such power is of a completely ancillary nature. That is perhaps another way of stating the fundamental proposition that such a power forms no part of the trust purposes.

In the third place, the exercise of such a power would be subject to the trustees' fiduciary duties, and also their duty of care to the beneficiaries, although that is perhaps of lesser importance for present purposes. The trustees' fiduciary duties require that such a power should be used for its proper purpose, that is, striking a fair balance between different classes of beneficiaries. If it were used to alter the interests of the beneficiaries, in such a way as to encroach upon the trust purposes, that would clearly be a breach of fiduciary duty (and consequently a breach of trust).

In the fourth place, the exercise of the power of apportionment would be subject to judicial control. This would ensure that the power was used in such a way as to give proper effect to the trust purposes, by striking a fair balance between those with income interests and those with capital interests under the trust purposes. In other words, the court would ensure that the power is confined to its limited function of striking a fair balance between classes of beneficiaries, and was not used in such a way as to encroach upon the trust purposes.

These considerations follow from my understanding of Scots law in this area. I am not qualified to state whether it differs from English law; it is certainly the case that in many points of detail the Scots law of trust differs quite radically from English law. Nevertheless, for the reasons stated, I am of opinion that our proposed power would not have the effect of converting a liferent or interest in possession trust into a discretionary trust.

As I have indicated, I would very much welcome your comments on this matter. If it would be helpful, I would be very happy to meet you and other representatives of HMRC to discuss the issues that arise. Clearly this is a matter of some importance; there is strong professional support for our proposals, but we would not want to implement them if the result were to create adverse tax consequences as a result of a default provision. I look forward to hearing from you.

LORD DRUMMOND YOUNG

Excerpt from draft Bill [as it stood at the time of writing in January 2014]

Allocation and apportionment

17 Allocation and apportionment of trust receipts and outgoings

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), the trustees may determine—

(a) how trust receipts and outgoings are to be allocated and apportioned as between capital and income, and

(b) for the purposes of such allocation and apportionment, what is to be regarded as capital and what as income.

(2) The power to act under subsection (1) is subject to any restriction or exclusion imposed by or under any enactment.

(3) In deciding whether, and in what manner, to exercise their powers under this section, the trustees [must, in so far as it is relevant to do so,] have regard to—

(a) the need to maintain an equitable balance as between classes of beneficiary,

(b) the nature, purpose, terms and expected duration of the trust,

(c) the intention of the truster,

(d) the identity and circumstances of beneficiaries,

(e) the need for—

(i) liquidity,

(ii) regularity of income,

(iii) the preservation of capital, and

(iv) the appreciation of capital,

(f) what appears to the trustees to be—

(i) sound business practice, and

(ii) in the best interests of the beneficiaries as a whole,

(g) the assets held in the trust and the extent to which they include—

(i) financial assets,

(ii) corporeal property,

(iii) incorporeal property, or

(iv) assets held in legal persons,

(h) any increase or decrease in the value of assets (according to market value or, where that is not readily ascertainable, the trustees' reasonable estimate as to value),

(i) such tax consequences of any apportionment as the trustees consider are to be anticipated,

(j) the effect of economic conditions, inflation or deflation on income and on capital assets (whether an actual effect or an effect the trustees consider is to be anticipated), and

(k) such other considerations as, in the circumstances, the trustees consider relevant.

(4) This section does not apply as regards a trust constituted before the section comes into force.

18 Exercise of power to apportion between or among beneficiaries

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise, no exercise by a trustee of a power to apportion funds or other property between or among certain beneficiaries is invalid on the ground only that—

(a) an insubstantial, illusory or nominal part is apportioned to (or left to devolve unapportioned upon) one of the beneficiaries, or

(b) one of the beneficiaries is not apportioned a part.

(2) But subsection (1) is without prejudice to the grounds on which the court may grant a remedy under section 12.

(3) [This section applies irrespective of when the trust was created and for the purposes of subsection (1), it is immaterial whether the power is exercised before or after the coming into force of this section.]

19 Time apportionment

(1) Except in so far as the trust deed, expressly or by implication, provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise), the trustees may determine that amounts mentioned in section 2 of the Apportionment Act 1870 (c.35) (which provides for rents, dividends and other periodical payments to be apportionable in respect of time) are not to be apportioned as mentioned in that section but are instead to be apportioned in such manner as appears to them to be appropriate.

(2) This section applies irrespective of when the trust was created.

Appendix D List of Respondents and Advisory Group members

I. RESPONDENTS

We received written comments on our various consultations from the following (whose titles and affiliations are given as at the time of the response):

DP 123, 2003: Breach of Trust

James Chalmers, University of Aberdeen
Faculty of Advocates
Dr Patrick Ford, Charity Law Research Unit, University of Dundee
Professor George Gretton, University of Edinburgh
James Hotchkis, Solicitor
Inland Revenue
The Law Society of Scotland
Occupational Pensions Regulatory Authority
Turcan Connell

DP 124, 2003: Apportionment of Trust Receipts and Outgoings

Faculty of Advocates
Inland Revenue
The Law Society of Scotland, Trust Law Sub-Committee
Turcan Connell

DP 126, 2004: Trustees and Trust Administration

Edward F Bowen QC, Sheriff Principal of Glasgow and Strathkelvin
Faculty of Advocates
Dr Patrick Ford, Charity Law Research Unit, University of Dundee
Henderson Boyd Jackson WS
Keeper of the Registers of Scotland
The Law Society of Scotland, Trust Law Sub-Committee
The Law Society of Scotland, Trustees and Trust Administration Group
Alexander F MacDonald, Solicitor
McGrigors LLP
Office of the Scottish Charity Regulator
Pagan Osbourne Limited
Scottish Law Agent's Society
The Sheriffs' Association
Standard Life plc

DP 129, 2005: Variation and Termination of Trusts

Professor Alastair Bonnington
Charity Law Research Unit, University of Dundee
Faculty of Advocates
Law Society of Scotland

Scottish Law Agents Society
Senators of the College of Justice
Turcan Connell

DP 133, 2006: Nature and Constitution of Trusts

Jane Ball, University of Sheffield
Norman Dowie, Standard Life plc
Keeper of the Registers of Scotland
Law Society of Scotland, Trust Law and Pension Law Sub-Committees (joint response)
Alexander F McDonald, Solicitor
HM Revenue and Customs
Senators of the College of Justice
Turcan Connell

DP No 138, 2008: Liability of Trustees to Third Parties

Sarah Bleichner & Professor David Carey Miller, University of Aberdeen
Norman Dowie, Standard Life plc
Faculty of Advocates
Dr Patrick Ford, Charity Law Research Unit, University of Dundee
The Law Society of Scotland
Professor Meston, University of Aberdeen
Society of Trust and Estate Practitioners (Scotland)

There was a also response in the form of an article in the Edinburgh Law Review:
David Hayton, "Liability of Trustees to Third Parties: The Scottish Law Commission's Proposals" (2008) 12(3) Edin LR 446.

DP 142, 2010: Accumulation of Income and Lifetime of Private Trusts

Deloitte LLP
Norman Dowie, Standard Life plc
Faculty of Advocates
Professor Foley, University of the West of Scotland
Dr Patrick Ford, Charity Law Research Unit, University of Dundee
The Law Society of Scotland, Trusts & Succession Law Sub-Committee
Dr David Nichols, University of Edinburgh
Society of Trust and Estate Practitioners (Scotland)
Alister Sutherland, Solicitor

DP 148, 2011: Supplementary and Miscellaneous Issues relating to Trust Law

Dr Daniel Carr, University of Dundee
Deloitte LLP
Faculty of Advocates
Dr Patrick Ford, Charity Law Research Unit, University of Dundee
Ian Gordon, Solicitor
Keeper of the Registers of Scotland
Alexander F McDonald, Solicitor
James McLean, Solicitor
James McNeill QC
The Law Society of Scotland, Trusts & Succession Law Sub-Committee
The Law Society of Scotland, Pensions Law Sub-Committee
People's Dispensary for Sick Animals (PDSA)

Senators of the College of Justice
Uganda Law Reform Commission

Consultation Paper on Defects in the Exercise of Fiduciary Powers (2011)

Bird Semple
Faculty of Advocates
HM Revenue and Customs
Keeper of the Registers of Scotland
The Law Society of Scotland, Pensions Law Sub-Committee
The Law Society of Scotland, Trust & Succession Law Sub-Committee
McGrigors LLP
Senators of the College of Justice
Shepherd & Wedderburn LLP
Society of Trust and Estate Practitioners (Scotland)

Consultation Paper on Public and Charitable Trusts: Amalgamation of Functions and Common Investment Funds (2012)

Brewin Dolphin plc
Brodies LLP
Faculty of Advocates
Dr Patrick Ford, Charity Law Research Unit, University of Dundee
The Law Society of Scotland, Charity Law Sub-Committee
The Law Society of Scotland, Trust & Succession Law Sub-Committee
Lindsays
Alexander F McDonald, Solicitor
Mitchells Roberton
Morton Fraser LLP
Office of the Scottish Charity Regulator
Shepherd & Wedderburn LLP
Turcan Connell

II. ADVISORY GROUP MEMBERS

(i) Main group

The composition of our main Advisory Group has fluctuated over the lifetime of the project, but the following individuals have been members for at least some of that time:

Alan Barr	University of Edinburgh; Solicitor
Graham Burnside	Solicitor
Robert Chill	Solicitor
Andrew Dalgleish	Solicitor
Norman Dowie	Solicitor
Frank Fletcher	Solicitor
Derek Francis	Advocate
Ruthven Gemmell	Solicitor
William Grant	Solicitor
Professor George Gretton[1]	University of Edinburgh
Nicholas Holroyd	Advocate
Norman Kennedy	Solicitor

[1] Prior to becoming a Scottish Law Commissioner in 2006.

Simon Mackintosh	Solicitor
Alexander McDonald	Solicitor
Christopher McGill	Solicitor
James McNeill QC	Advocate
Allan Nicolson	Solicitor
Professor Kenneth Norrie	University of Strathclyde
Alison Paul	Solicitor
Scott Rae	Solicitor
Mark Stewart	Solicitor
Alister Sutherland	Solicitor
Gordon Wyllie	Solicitor

(ii) Nominees

Ruthven Gemmell	Solicitor
Mark Hallam	Investment Director
Murray Mackay	Investment Director
Simon Mackintosh	Solicitor
Suzanne McConville	Solicitor
Scott Moncur	Solicitor

(iii) Apportionment

Derek Francis	Advocate
John McArthur	Solicitor
Gordon Wyllie	Solicitor

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