

## REVISED TRUSTS (SCOTLAND) BILL (PUBLISHED IN DECEMBER 2018)

### EXPLANATORY NOTE

#### *Introduction*

This Note is designed to be read alongside the revised Trusts (Scotland) Bill, which we published on our website in November 2018.<sup>1</sup> It relates to our project on Trust Law on which we published a [Report](#) and draft Bill in 2014. The Scottish Government is still considering its response to that Report.

We have taken the opportunity to revise the Bill in a number of minor and consequential ways. It is important to note, though, that the Report and all of its recommendations remain unaltered.

The main way in which the Bill has been amended is by providing for the necessary consequential amendments. Although it contains the usual power to make ancillary provision, including consequential provision, by subordinate legislation,<sup>2</sup> there is an obvious need to provide expressly for the consequences of repealing the Trusts (Scotland) Act 1921. In large measure, that is the purpose of the revisions in the revised Bill. Other minor changes have also been made, as outlined in this Note. However, we do not comment on changes which are obvious or trivial.

The Note discusses, first, the changes to the sections of the Bill before turning to the two schedules. Please also note that:

- section numbers refer to the revised Bill;<sup>3</sup>
- the Trusts (Scotland) Act 1921 is referred to as “the 1921 Act”; and
- the Trusts Report (SLC No 239; 2014) is referred to as “the Report”.

#### *Changes to the sections of the Bill*

- New section (section 33): the 1921 Act has been amended after the Report’s publication. This was done by section 23 of the Succession (Scotland) Act 2016. As the 1921 Act is to be repealed by the Bill, and in order to preserve the current position, a new section 33 has been added. It more or less restates the provision in the 2016 Act, the only differences being (i) the replacement of “person as trustee” in the second line of subsection (1) by “trustee as trustee” (so as to avoid undue repetition of ‘person’) and (ii) the recasting of subsection (4) in line with the general change regarding the use of paragraphs which is described below.
- New subsection – repeal: section 41(3)(c) (repeal of section 45 of the Conveyancing (Scotland) Act 1924) has been added. Section 45 amends section 9 of the 1921 Act so as to apply it, with conditions, to deeds dated before 31 July 1868. As it is therefore ‘spent’ and as the 1921 Act is to be repealed, it would be appropriate to repeal it too. One option might be to include the repeal in schedule 2 but, as it relates closely to the work of section 41 of the Bill, the decision was taken to place it there.
- New subsection – saving: new section 81(2), and the amendment to paragraph 6 of schedule 1,<sup>4</sup> are needed in order to preserve the proper operation of those provisions of the Trusts (Scotland) Act 1961 which are to remain in force.

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<sup>1</sup> Two versions on the revised Bill are available: one marks, in bold and italic type, the changes in relation to the draft appended to the Report and the other is a ‘clean’ one.

<sup>2</sup> See s 78 of the Bill appended to our Report, and s 79 of the revised Bill.

<sup>3</sup> This is relevant because, as noted, a new section has been added to the revised Bill.

<sup>4</sup> There is also an amendment in schedule 2 to the entry relating to the 1961 Act.

- Correction of restatement of current law: section 16(3), which aims to restate section 4(1C) to (1E) of the 1921 Act, was not successful in doing so in the form it took in the Bill appended to the Report. That has been corrected.
- Division of a subsection into paragraphs:
  - (i) First, many provisions specify that they apply to (for instance) trusts created on or after the section comes into force, or to trusts created at any time. In addition they may state that they only apply to (say) an action taken or a decision made on or after commencement. The Bill appended to the Report quite often deals with these matters in an undivided subsection. For clarity and for consistency it is felt preferable to expand the drafting by using paragraphs. As an example, section 4(4) of the Bill appended to the Report reads:
 

“(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.”

The revised Bill recasts this as:

- “(4) This section applies—
- (a) irrespective of when the trust was created, but
  - (b) only as respects an assumption which takes place, or an appointment which is made, after the section comes into force.”<sup>5</sup>

(ii) Secondly, paragraphing has been added elsewhere in order to improve clarity. For example, section 16(1) has been recast with paragraphs rather than parentheses. In the Bill appended to the Report it reads:

“(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).”

The revised Bill provides as follows:

“(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—

- (a) the trust deed, expressly or by implication, provides otherwise, or
- (b) in a case where there is no trust deed, the context requires or implies otherwise.”

Comparable changes have been made at section 64(3)(f) and in new section 6A(1) of the Court of Session Act 1988, as inserted by section 65.

- Deletion of unnecessary words: the opportunity has been taken to remove some wording which appears to duplicate what is already in the Bill. For instance, the phrase “if it thinks fit” has been omitted from section 29(2) on the basis that the concluding words, “as seems to the court to be just”, suffice.

### *Changes to schedule 1 of the Bill*

#### *Paragraph 2 of schedule 1*

Paragraph 2 deals with a reference to the 1921 Act in the Judicial Factors (Scotland) Act 1880. The Scottish Law Commission’s [Report on Judicial Factors](#) (SLC No 233; 2013) recommends

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<sup>5</sup> A change of this nature has been made in the following sections: 4(4), 5(4), 7(4), 11(4), 12(5), 20(12), 27(5), 28(3), 29(5), 30(3), 31(4), 32(2), 33(4), 34(7), 35(4), 37(4), 38(4), 39(5), 40(3) and 64(7).

the repeal of the 1880 Act in its entirety. The Scottish Government's recent Programme for Government contains an undertaking to consult on implementing that Report. This raises a question as to how the present Bill should be drafted in respect of references to judicial factors. Given, however, that no legislative proposals on judicial factors have been introduced into Parliament, we consider that the best approach is to include appropriate amendment of the 1880 Act for the time being.<sup>6</sup>

*Paragraph 3 of schedule 1*

In paragraph 3 two changes are made; both occur, in comparable situations, later in the schedule. The first, in sub-paragraph (a), is simply to amend the existing reference to the Trusts (Scotland) Act 1921 so that it refers instead to the Trusts (Scotland) Act 2018 (which is the short title of the Bill: see its section 83).<sup>7</sup>

Secondly, section 16(5)(b) of the National Parks and Access to the Countryside Act 1949 currently refers to trustees' powers under section 4 of the 1921 Act. Those powers are deemed to include the power to enter into agreements of the type described in section 16. Because the approach to trustees' powers in the Bill differs from that of the 1921 Act – in essence by granting trustees a general power (in section 13) rather than a list of specific powers – it seems appropriate to refer not to a single provision of the Bill but to Part 3 generally, which deals with powers and duties of trustees.

*Paragraph 7 of schedule 1*

The effect of paragraph 7(3) is to omit the opening words of section 6 of the Trustee Investments Act 1961. This removes the need to take into account the provisions of section 30 of the 1921 Act, which protects trustees from a charge of breach of trust where they lend money and take a security on property. As there is no direct equivalent in the Bill to section 30, there is a question as to what to do with the reference to section 30, given that it (along with the rest of the 1921 Act) will be repealed under the Bill. (It is worth noting that section 6 of the 1961 Act has itself been repealed, subject to savings,<sup>8</sup> and so is of very limited application.) One option would be to save section 30 but only for the cases in which it would require to be taken into account in the application of section 6 of the 1961 Act. But this would be both inelegant and, given the very limited application of section 6, of very dubious value in practice. The Bill therefore simply repeals the reference to section 30 without replacement.

*Paragraphs 9(b), 10(b), 11(b), 13, 14(b), 20 and 22(a) of schedule 1*

These paragraphs contain changes analogous to that outlined above in respect of paragraph 3 of the schedule.

*Paragraphs 15, 18 and 19*

These provisions are (with minor adjustments) the ones which form schedule 1 to the Bill as appended to the Report.

*Paragraph 23 of schedule 1*

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<sup>6</sup> Similarly, in para 8 of sch 1 (Land Compensation (Scotland) Act 1963) the references to the definitions of "trust" and "trustee" in the 1921 Act require to be expanded so as to include judicial factors.

<sup>7</sup> Similar changes are made in paras 4, 5, 7(2) and (4), 9(a), 10(a), 11(a), 12, 14(a), 15(2), 17, 20(a) and 22(b)(i).

<sup>8</sup> In para 4 of sch 3 of the Charities and Trustee Investment (Scotland) Act 2005, which says that the repeal is to take effect "except in so far as [the listed provisions, including s6] are applied by or under any other enactment".

Paragraph 23 makes a change to section 34(6) of the Charities and Trustee Investment (Scotland) Act 2005. This provision states that where, on an application by the Office of the Scottish Charity Regulator (OSCR), the Court of Session appoints a trustee to a charitable trust, the trustee will be treated as if having been appointed under section 22 of the 1921 Act. The reference to section 22 is replaced by a reference to section 1(1)(b) of the Bill, thus preserving the effect of section 34 of the 2005 Act.

*Paragraph 24 of schedule 1*

Paragraph 24 relates to the rules of the Scottish Parliamentary Pension Scheme in schedule 1 of the Scottish Parliamentary Pensions Act 2009. There is currently a rule to the effect that the Court of Session may only appoint a new trustee to the Scheme where a sole trustee wishes to resign. The purpose of the consequential amendment is to preserve the same effect, as section 5(2) of the Bill deals with the resignation of a sole trustee.

*Changes to schedule 2 of the Bill*

In schedule 2 a number of additions have been made to what was included in the Bill appended to the Report. The central entry is that of the 1921 Act, which is to be repealed in its entirety. In almost all cases the other entries are made because the specified provisions would become otiose following repeal of the 1921 Act.