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The Rt Hon Lady Paton
Chair
Scottish Law Commission
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23 November 2022

Dear Lady Paton

SCOTTISH LAW COMMISSION REPORTS ON TRUST LAW AND SUCCESSION

I would like to provide you with an update on the Scottish Government's consideration of the recommendations made in the SLC's Report on Trust Law (2014). As you will be aware, the Programme for Government 2022-23 included a commitment to introduce a Trusts and Succession Bill this year which will bring the law in this area up to date (the principal statute is now more than 100 years old). I am pleased to be able to let you know that the Bill was introduced yesterday and is now available on the Scottish Parliament website.

The Parliamentary Bureau will shortly determine the committee to which the Bill is allocated. It is my view that this Bill is a suitable candidate for consideration by the Delegated Powers and Law Reform Committee (DPLRC) under Rule 9.17A of the Parliament's Standing Orders and the Presiding Officer's determination under that Rule.

I have set out in the annex to this letter more detail on why I consider that the Bill meets these criteria and I am copying this letter to the convener of the DPLRC. I have also provided more information about the substantive provision on intestate succession which implements a recommendation made by the SLC in its Report on Succession (2009).

I would be grateful if you could confirm whether you are content that this slightly revised Bill gives effect to the SLC's recommendations and whether you agree that it meets the necessary criteria for consideration by the DPLRC as set out in the annex.



ELENA WHITHAM

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TRUSTS AND SUCCESSION (SCOTLAND) BILL

Assessment of the Bill against Standing Order Rule 9.17A and the criteria as determined by the Presiding Officer for qualification as a “Scottish Law Commission Bill”.

(a) The Bill must implement all or part of a report of the Scottish Law Commission*Trusts*

The SLC’s Report on Trust law made 106 recommendations of which 98 were given effect to in the draft Bill appended to the Report (recommendation numbers 3, 7, 16, 55, 75, 92, 94 and 100 did not result in any suggested legislative provision).

The Bill which the Government intends to introduce is in very similar terms to the Bill appended to the SLC’s Report, subject to various clarifications and stylistic changes and a small number of relatively minor policy adjustments. Due to the level of detail included in the SLC’s recommendations, a small number of these changes constitute slight departures from the SLC’s recommendations, but none of these changes are of a level that could be classed as significant. My officials have discussed the nature of these changes with your colleagues in the SLC and they have confirmed that they consider the changes to be minor.

The most significant difference is the Bill’s treatment of pension trusts. Trust law is part of Scots private law of property and as such is not reserved. However, it has potential to affect a number of areas of reserved law, including pensions and financial services, in which there are detailed technical rules. There are particular restrictions in the Scotland Act 1998 on the ability of Acts of the Scottish Parliament to modify the obligations of trustees of pension schemes. This creates some uncertainty about the ability of the Bill to modify general rules of Scots trust law as they apply to the trustees of pensions schemes.

While it is not established that allowing the Bill to apply to pension trusts would be outwith the legislative competence of the Parliament, it is considered that it would be preferable in the interests of legal certainty and clarity to remove pension trusts from the Bill as introduced, and to thereafter re-apply the Bill provisions to pension trusts by order made under section 104 of the Scotland Act 1998. Such an approach would also afford greater clarity as to the interaction between the Bill provisions (as they apply to trustees of pension trusts) and provision which is specific to pension trustees in pensions legislation (primarily the Pensions Act 1995 and subordinate legislation made under it). This approach would also allow for the Bill provisions to be modified in their application to pension trusts where required.

As a result, section 74 (interpretation) of the Bill has been adjusted so that the Bill will not apply to pension trusts. We will instead pursue an order under section 104 of the Scotland Act 1998 to apply the Bill provisions to pension trusts. The intention is that a section 104 order will be coordinated with the commencement of the substantive provisions of the Bill, to allow the reforms to Scots trust law in the Bill to take effect for all types of trust (including pension trusts) simultaneously.

Another change of substance worth noting, which my officials have not had an opportunity to discuss with your colleagues, is the removal of section 42(2) of the SLC’s draft Bill. Whilst section 42 only applies to private purpose trusts, subsection (2) summarised an aspect of the current law (the nature of a trust’s purpose) which applies to all trusts; we considered that this

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might lead to confusion about whether the rule only applied to private purpose trusts. It also strayed into the territory of placing restrictions on the nature of trust purposes which is not the focus of the Bill. Whilst this technically amounts to a departure from the provision in the SLC draft Bill, given that the SLC did not consider the provision necessary in legal terms (and it is acknowledged in para 14.35 of Report 239 that “a majority of respondents thought that statutory provision was unnecessary”) we do not consider that this change would impact upon satisfaction of the SLC Bill criteria.

Succession

As is clear from the Bill’s title, the Bill contains some provision on succession, which of course did not feature as part of the SLC’s Report on Trust Law. However the two provisions in the Bill on the law of succession implement recommendations from previous SLC reports.

The first is a minor amendment to section 2(2) of the Succession (Scotland) Act 2016 (the effect of divorce/dissolution/annulment on special destinations), which itself implemented recommendation 17(a)(iv) in SLC [Report No. 124](#) (para 4.45)¹. An amendment is proposed to put beyond any doubt the intended legislative effect of that provision (following a concern that has been raised about a possible interpretation of section 2 that runs counter to the stated policy intention). Evacuation of a special destination is effected in section 2(2) by treating the surviving co-proprietor as having already died before the deceased. The Bill amends section 2(2) to clarify that this is only deemed to be the case for the purposes of succession to the deceased’s interest in the jointly held property.

The second succession provision is a substantive change to the Scots law of intestate succession which implements recommendation 1 in SLC [Report No.215](#) and was consulted on by the Scottish Government in 2015.

This provision will amend the order of intestate succession (found in section 2(1) of the Succession (Scotland) Act 1964) so that a surviving spouse/civil partner’s entitlement to the whole of the net intestate estate will rank second in line behind any surviving children of the deceased.

These changes implement individual recommendations from SLC Reports and do not depart from those recommendations.

On the question of whether these isolated provisions can be regarded as “all or part of an SLC Report” for the purposes of paragraph (a) of rule 9.17A, the Scottish Government consider that the reference to ‘part’ in the Standing Orders is simply to be read as meaning that SLC Bills need not contain every single recommendation contained in an SLC Report, and may, where appropriate, combine recommendations from more than one SLC Report. It is noted that the Bill for what became the Succession (Scotland) Act 2016 was a partial implementation of the Scottish Law Commission’s 2009 report on succession: [paragraph 6 of the Policy Memorandum](#) for the 2016 Act confirms that the policy aim for that Bill was to take forward the less controversial recommendations found in the relevant SLC Report.

The Scottish Government’s view is that the changes made in the Bill are not sufficiently extensive so as to prevent the Bill from being classified as implementing the SLC’s Report on Trust Law and the relevant parts of the SLC’s reports on the law of succession (SLC [Report](#)

¹¹ This recommendation was repeated in SLC [Report No.215](#) (2009), at paragraph 6.17.

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[No. 124](#) and SLC [Report No. 215](#)). As a result, the Scottish Government considers that this requirement is met.

(b) complies with such criteria as shall be determined by the Presiding Officer

The current determination of the Presiding Officer was published in the Scottish Parliament's Business Bulletin on 24 March 2021. The key elements of this are addressed in turn below.

- *A Bill, the primary purpose of which is to: (a) simplify, modernise or improve the law to—(i) ensure it is fit for purpose, (ii) respond to developments, or address deficiencies, in the common law, or (iii) respond to other developments in the law*

The primary purpose of the Bill is to modernise and improve the law relating to trusts to ensure that it is fit for purpose and addresses deficiencies in the current law. As set out in more detail in the SLC Report and in the Policy Memorandum which will be published alongside the Bill, the current law in this area is antiquated, and legislation in this area has not kept pace with the use of trusts in modern society. Most of the current statutory framework is found in the Trusts (Scotland) Act 1921: not only is its structure and wording old-fashioned, it has been heavily amended so that it is not easy for trusters, trustees or beneficiaries to understand what their legal rights and duties are. The world has changed greatly since the 1921 Act came into force and it is widely perceived that the current legislation is out of step with modern practice.

The 1921 Act 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. In part the foregoing statutes amend the 1921 Act and in part they make further freestanding provisions. The end result is that the legislation governing trusts is complicated in form and can be difficult to locate in practice. This is not ideal for solicitors, but it is worse for lay trustees seeking to understand and implement their duties. Given the versatility of the trust as a legal institution, the overall policy aim of this Bill is to ensure that the Scots law of trusts is clear, coherent and able to respond appropriately to modern conditions. The Bill will reform the law of law trusts and bring together various pieces of trust legislation, forming a single statute framed in clear and modern language.

As regards the substantive change to the law of succession, the SLC's Report No. 215 criticised the current order of intestate succession as being out of line with public opinion and with their assessment of what most childless testators would probably provide in their wills. The SLC accordingly recommended that where a person dies leaving a spouse but no children, the surviving spouse should be entitled to the whole of the net intestate estate.

- *A Bill, the primary purpose of which is to make provision which is not likely to generate substantial controversy among stakeholders.*

Trusts

Prior to the issue of the SLC's comprehensive Report on Trust Law and the associated SLC draft Bill, the SLC's project on the law of trusts 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)

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and, secondly, on variation and termination of trusts. As explained in paragraphs 1.7 and 1.8 of the SLC's Report on Trust Law, in formulating its views and recommendations, the SLC undertook extensive comparative research, consultation (in the form of discussion papers and consultation papers) and engagement with the legal profession, financial institutions and members of a specially composed Advisory Group of experts in the area of trust law.

More recently, my officials have engaged with the Law Society of Scotland and STEP (Society of Trust and Estate Practitioners) to discuss the SLC's recommendations on reforming trust law.

The general impression of stakeholders from these meetings and recent items in professional journals is that the SLC's recommendations for reform remain valid and that trust law reform is overdue. Although the application of the Bill as regards pension trusts has been restricted as a result of legislative competence considerations (which we intend to address by means of a section 104 Order), the Scottish Government considers that the reforms of trust law contained within the Bill will be welcomed by stakeholders.

Overall, my view is that the trusts provisions will not give rise to a substantial degree of controversy. The SLC criteria on whether the provisions are controversial is directed at the substance of the provisions themselves and the underlying SLC reforms. While I am aware that there are general concerns about the manner in which trusts are utilised in some circumstances, my view is that the reforms proposed in this Bill are focused on improving the rules, applicable to all trusts, on management and administration.

Succession

The SLC consulted on succession law reform in 2007 and published a report in 2009. The substantive provision in this Bill on the order of intestate succession is a recommendation made by the SLC in that report. The Scottish Government consulted on succession law reform in 2015, including the question of the order of intestate succession. The response to that consultation included a commitment to reform the law which was re-iterated in a Scottish Government response to a separate consultation in 2019.

We have considered whether implementing the single recommendation from SLC Report 215 on the order of intestate succession could be viewed as being likely to generate substantial controversy among stakeholders on the basis that stakeholders would consider that the entire package of recommendations contained in the SLC's Report 215 ought to be, or require to be, implemented together.

There are sound reasons why the entire suite of recommendations on intestate succession contained in the SLC's Report 215 are not currently being implemented as a package (i.e. varying levels of support and conflicting views among stakeholders and the need for ongoing research). The proposed amendment of section 2 is one that can be isolated from, and does not cut across, the remainder of the recommendations. The relevant SLC recommendation (recommendation 1 in Report No. 215) was generally supported by consultees and, in the Government's view, will be welcomed, despite the fact it is not accompanied by measures implementing the remainder of the SLC's recommendations in this area.

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The Scottish Government accordingly consider that implementing this recommendation on intestate succession is not likely to generate a substantial degree of controversy among stakeholders.

No specific consultation has taken place on the proposal to clarify the legislative effect of section 2(2) of the Succession (Scotland) Act 2016 (the effect of divorce/dissolution/annulment on special destinations), however, as this provision simply clarifies, rather than changes, the legislative effect of an existing provision, it is not anticipated to generate a substantial degree of controversy among stakeholders.

- *Wider legislative proposals expected within two years beginning with the date of introduction of the Bill (or by the end of the same session if sooner), which relate closely to the same particular aspect of law*

The Scottish Government is not expecting to bring forward any wider legislative proposals on this topic within two years (or by the end of this session). While it is the Scottish Government's intention to seek a section 104 Order under the Scotland Act 1998 in connection with the Bill, such legislation could not, of course, proceed in the absence of the Bill.

(c) The Bill must not be a Consolidation, Codification, Statute Law Repeals or Statute Law Revision Bill

The Bill is not any of the Bill types listed above.

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