

Trusts and Succession (Scotland) Bill

Financial Memorandum

Introduction

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Trusts and Succession (Scotland) Bill, introduced in the Scottish Parliament on 22 November 2022.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 21-EN);
 - a Policy Memorandum (SP Bill 21-PM);
 - a Delegated Powers Memorandum (SP Bill 21-DPM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 21-LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

The Bill

4. At its simplest, a trust is a legal relationship created when ownership of specified property held by one person ("the truster") is transferred to another ("the trustee") to be used for the benefit of another person ("the beneficiary"), before then being transferred to them at some certain point in time. The trustee who holds the property is given powers to manage the property.

5. In today's society, the trust plays a crucial part in many areas of law, including contract and general commercial law, life assurance and pensions, property law, succession and family law. The majority of the current statutory framework relating to trust law is found in the Trusts (Scotland) Act 1921. In modern trust practice the powers and duties of trustees are markedly different from those set out in the 1921 Act. 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. This is less of a problem for professional trustees who may be legally

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qualified but it is more of a problem for lay trustees who simply want to understand the extent of their powers and duties. The Bill will bring the powers and duties laid out in statute more into line with modern practice.

6. Given the versatility of the trust as a legal institution, the overall policy aim of the Bill is to reform the Scots law of trusts so that it is clear, coherent and able to respond appropriately to modern conditions, bringing together existing trusts legislation into a single statute and expressing it in modern statutory language.

7. It is difficult to identify exactly how many trusts there are currently, but the Trusts Registration Service had 198,000 trusts and estates registered in the UK up to 31 March 2022.¹ This includes taxable and non-taxable trusts, unless it is an excluded express trust. Using population estimates, this represents one trust for every approximately 339 inhabitants.² On the assumption that the number in Scotland is proportionate and using population estimates for mid-2020,³ that means there would be approximately 16,123 trusts in Scotland.

8. The Trusts and Succession (Scotland) Bill is being taken forward as part of a wider programme of implementation of Scottish Law Commission (SLC) reports. The Bill will implement the SLC's recommendations in its *Report on Trust Law*, published in 2014.⁴ It is the end result of a significant reform project undertaken by the SLC. The project took over a decade and included the publication of a total of eight Discussion Papers, two Consultation Papers, and two Reports on specific issues.

9. The Bill covers a variety of areas, and the Scottish Government does not anticipate any more than minimal costs related to the proposals. By way of an overview, the Bill:

- replaces the common law grounds for the removal of trustees with new statutory provisions that provide a trustee may be removed by the court, co-trustees or beneficiaries in relevant circumstances;
- restates the statutory provisions that govern the appointment, resignation, removal and discharge of trustees and decision-making by trustees;
- introduces a scheme to clarify the law on the duty of trustees to provide information to beneficiaries and others;
- clarifies the law on trustee delegation and nominees;
- replaces the statutory and common law power of the court to authorise advances of capital with a new provision by which trustees have power to advance up to the whole of a beneficiary's prospective share in the capital or income of the trust fund in relevant circumstances;

¹ <https://www.gov.uk/government/statistics/trust-statistics/trusts-statistics-october-2021--2>

² <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/populationestimatesforukenglandandwalesandnorthernireland>

³ <https://www.nrscotland.gov.uk/files//statistics/population-estimates/mid-20/mid-year-pop-est-20-report.pdf>

⁴ https://www.scotlawcom.gov.uk/files/4014/0904/0426/Report_on_Trust_Law_SLC_239.pdf

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- creates a new statutory power to allow for the removal of the office supplying an ex officio trustee as trustee;
- provides a default 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;
- confers on courts a new power to appoint new trustees, grant additional administrative and managerial powers in relation to the trust property on trustees, remedy defects in the exercise of trustees' fiduciary powers, and alter trust purposes to take account of a material change of circumstances that has occurred since the trust was set up, normally only exercisable once 25 years has elapsed since the creation of the trust;
- clarifies the law on breach of trust;
- provides for private purpose trusts (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); and,
- reforms the powers of the courts to create a comprehensive set of remedies that deals with problems in the administration of trusts, for the liability of trustees in the expenses of litigation, and restates and improves the legislation governing applications for the variation of trust purposes.

10. The Bill also makes one substantive change to the law of intestate succession⁵ which comes from the SLC's Report on Succession (2009).⁶ This was consulted on by the Scottish Government in 2015. The law on intestate succession provides a default position in cases where an individual dies without leaving a will. A statutory scheme for intestacy provides a default set of rules about what should happen to someone's estate when they die without a will. Currently, in cases where there are no surviving children, any surviving siblings and parents of the deceased outrank a surviving spouse/civil partner in terms of their entitlement to the net intestate estate (i.e. the remainder of the intestate estate after certain other legal rights available to the surviving spouse/civil partner and any surviving children have been deducted). The substantive provision of succession law in this Bill will amend the order of intestate succession 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; this change reflects the contemporary perception of a spouse or civil partner as a key member of the deceased's family.

Costs on the Scottish Administration

11. The proposals are not thought to have the potential to result in costs to the Scottish Administration other than those associated generally with the enactment of any

⁵ The law on intestate succession provides a default position in cases where an individual dies without leaving a will.

⁶ Accessible at <https://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf>

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new legislation. These are, for instance, printing and publication costs and which are regarded as routine running costs rather than being attributable to the Bill.

Costs on Scottish Courts and Tribunals Service (SCTS)

12. The aim of the Bill is to reform the Scots law of trusts so that it is clear, coherent and able to respond appropriately to modern conditions. Although the Bill expands the range of trusts procedures in which courts might become involved,⁷ in an area of law that has not seen substantial statutory reform for over 100 years, updating the law to provide certainty might reduce the number of cases reaching court.

13. It is difficult to quantify the potential impact of the changes to the law. Baseline figures for applications are not certain, but even so it is likely to be a very small amount of the overall work undertaken by the courts. In general, the Bill updates the law to make the legal position clearer and this might be expected to have the effect of reducing court applications where those issues are contested.

14. The SCTS have advised that applications made under trust law are low. The figures provided covers the years 2016 to 2019 in order to avoid any impact on data owing to the Covid pandemic.⁸ The information held by the SCTS is structured for operational needs rather than for statistical reporting and therefore it is possible that there may be additional applications made to the courts which have not been identified.

| Court Type | Year | | | |
|------------------|------|------|------|------|
| | 2016 | 2017 | 2018 | 2019 |
| Sheriff Court | - | 1 | 4 | 1 |
| Court of Session | 6 | 1 | 2 | 3 |

15. It is possible that initial training on the legislative changes to be brought in by the Bill will be provided to the judiciary. The Scottish Government have been unable to obtain up-to-date figures for the average daily cost (as opposed to cost per head) of providing training to the judiciary by the Judicial Institute for Scotland at its premises. Figures taken from a Financial Memorandum published in 2019 estimated the costs to be £913.66.⁹ Training in respect of the Bill would likely comprise a “one off” session which could be delivered within a day’s training on other assorted issues not directly related to the Bill.

⁷ For example, there is a new default statutory provision that confers on trustees a power to pay income to a beneficiary, although in the exercise of its nobile officium the Court of Session might authorise trustees to make such payments.

⁸ The sheriff court the data for 2016 covers the period from 31 October 2016 to 31 December 2016 given the current SCTS case management system was only implemented on 31 October 2016.

⁹<https://www.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/financial-memorandum-defamation-and-malicious-publication-scotland-bill.pdf>

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16. The provisions in the Bill related to succession law will require the SCTS to update staff guidance and training course. It is anticipated those costs will be minimal.

Costs on Local Authorities

17. The Scottish Government does not anticipate any costs related to the proposals to be borne by local authorities except insofar as local authorities might hold property on trust as trustees. If local authorities do hold property as trustee then there might be a cost associated with initial training on the legislative changes brought about by the Bill.

18. The provisions in the Bill related to succession law will not have a cost impact on local authorities as they cannot inherit under intestate succession law.

Costs on other bodies, individuals and businesses

Costs on Scottish Legal Aid Board (SLAB)

19. Currently Advice and Assistance/Assistance by way of Representation is used for appointing executor datives to a deceased's estate.¹⁰ Beneficiaries who are involved in any sort of dispute around an estate can potentially get civil legal aid, while for trustees and executors the value of the estate would be brought to account in the financial assessment.

20. The Scottish Legal Aid Board does not expect that the content of the Bill will have a significant impact on either the legal aid scheme or the legal aid fund.

Costs on individuals and businesses

21. The Bill puts forward a package of reforms that affects the general legal framework of trusts in Scots law. As such it does not single out any particular sector or group. Rather, the reforms are capable of impacting upon a broad spectrum of persons or bodies in Scotland who might wish to transfer property to a trust, act as a trustee, or be designated a beneficiary of trust property. The overarching aim of the Bill is to reform the Scots law of trusts so that it is clear, coherent and able to respond appropriately to modern conditions.

22. In modern trust practice the powers and duties of trustees are markedly different from those set out in the 1921 Act. Not only is its structure and wording old-fashioned, it has been heavily amended so that it is not easy for truster, trustees or beneficiaries to understand what their legal rights and duties are. This is less of a problem for professional trustees who may be legally qualified but it is more of a problem for lay trustees who simply want to understand the extent of their powers and duties. Setting out the statutory framework of trust law in one Bill updated in clear, modern language should be of assistance to individual trustees with no professional training.

¹⁰ Part 3 of the Bill makes clear that executors fall within the definition of trustees.

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23. No significant cost implications are anticipated to result from the commencement of the Bill. Given the versatility of the trust as a legal institution a wide range of sectors could be affected in so far as property could be transferred to trust. However, legal professionals and professional trustees are most likely to be impacted by the reform of the law as they will be significantly involved in the setting-up and ongoing administration of trusts. Anticipated costs are likely to be borne by firms in making their staff aware of the changes to the law affected by the Bill. An initial training and familiarisation cost, principally for solicitors but perhaps also for other professionals in relevant fields, would be likely. This might include, for example, banks who hold out their services as professional trustees – their staff may not be legally qualified, but would be a professional trustee and would have to be aware of their powers and duties under the new legislation. The Scottish Government expect costs would be small, and would be incurred only on first implementation.

24. Generally, familiarisation costs of any change in the law will be incurred by those providing training within legal firms. However, the provision of such training is typically already provided for within a firm's budget, with the cost of maintaining solicitors' legal knowledge being covered by the firm's fee earning income. Scottish solicitors are required to undertake 20 hours of Continuing Professional Development each year and familiarisation training on changes to the law would typically count towards this figure. Those solicitors affected could choose to spend some of their time on training in this area in the relevant year and therefore there might be no overall increased cost in doing so if they do training on this topic rather than on another topic. If there is a need for additional training on the law in this area, some firms will be able to do the training in-house (larger firms often provide some in-house training for staff) and/or solicitors could access training & CPD via other providers.

25. An indication of the Law Society for Scotland's own CPD costs for members (i.e. solicitors):¹¹ 3 hours = £115 + VAT; 6 hours = £241 + VAT. In addition, CLT Scotland is another provider of CPD – their website suggests costs for a 3 hour session are £255 + VAT (non-members).¹² Member rates are available. There are a number of other providers of CPD & training in Scotland.

26. Overall, it is therefore likely that initial training in relation to this Bill would not represent a significant additional cost to law firms.

¹¹ Non-members (i.e. non-solicitors) can attend these sessions too but at a higher rate.

¹² These figures can be accessed at <https://clt.law.ac.uk/scot>

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