TRUSTS AND SUCCESSION (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these Revised Explanatory Notes are published to accompany the Trusts and Succession (Scotland) Bill, introduced in the Scottish Parliament on 22 November 2022 as amended at stage 2. Text has been added or amended as necessary to reflect amendments made at stage 2 and these changes are indicated by sidelining in the right margin.

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill as amended at stage 2. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

GLOSSARY OF TERMS USED IN THE NOTES

4. In these Notes, the following terms are intended to be read by reference to the descriptions of those terms set out below.

Agent	A person to whom trustees delegate administrative tasks required to carry out the purposes of the trust, (but not acts that require the exercise of the trustee's discretion or judgment).
Assumption of trustees	Where existing trustees add a new trustee to their number.
Declarator	An order declaring that some right exists or does not exist which has legal consequence.
Delict	A civil wrong which inflicts loss or harm.

Executor dative	A person appointed by the court to administer the estate of a deceased person, normally when the person dies intestate.
Ex officio trustee	Where the truster has provided for the holder of a certain office to be a trustee, the holder of that particular office (as may change from time to time) who acts as trustee during the period in which they hold office.
Fee	See "Liferent"
Fiar	See "Liferent"
Fiduciary duty	A duty in Scots Law under which a party (the fiduciary) is bound to prefer the interests of another (the beneficiary) over their own interests. This is in contrast to normal transactions, in which each party considers their own interests.
Interdict	A judicial prohibition or court order preventing someone from doing something.
Intestate succession	Where a deceased person dies without leaving a will or other testamentary disposition.
Inter vivos trust	A trust set up by a living truster, with the intention that it takes effect during their lifetime.
Judicial Factor	A Judicial Factor is an Officer of the Court, who is appointed by the Court in complex or difficult cases, where a particular problem has been identified and where the estate (known as the Judicial Factory Estate) is without any other legal protection or administration. Their role is to preserve and protect the estate and where appropriate, realise and distribute the estate amongst those entitled to it. A Judicial Factor is independent to the case, and is normally a professionally qualified individual, such as a solicitor or accountant.
Liferent	A liferent is, strictly, the right to use somebody else's property for life. It is a subordinate real right, encumbering the other party's ownership. The relationship exists only between the owner of the property (sometimes called the 'fiar') and the person enjoying the liferent ("the liferenter"). This arrangement is sometimes called a 'proper liferent'. In the context of trusts, there is something slightly different, variously referred to as an 'improper liferent', 'trust liferent' or 'beneficiary liferent'. For practical purposes it is very similar to a 'proper liferent' described above, but the nature of the relationship and the parties involved is different.

	A truster may transfer ownership of the property to the trustee, who will hold and administer the property on behalf of the beneficiaries. One beneficiary might be entitled to use the property as if they hold a liferent in relation to it ("the beneficial liferenter"). Upon the death of the beneficial liferenter, ownership of the property (sometimes referred to as "the fee") may then pass to a second beneficiary ("the beneficial fiar"). For example, a parent may leave a property in trust liferent to their civil partner but in fee to their child. The spouse may live in and enjoy the property for the duration of their life, but they will not own it. Upon the death of the spouse, ownership of the property will pass to the child. For the purposes of these Notes, reference to a liferent means a trust liferent, and references to "liferenters" and "fiars" are to beneficial liferenters and beneficial fiars respectively.
Liferenter	See "Liferent"
Nominee	A person appointed by trustees to hold and use trust property on behalf of the trustees, often for investment purposes.
Onerous contract	A contract is onerous when the obligations of performance exist on both sides of the agreement. (A gratuitous contract is one where the obligations of performance exist on only one side.)
Patrimony	A patrimony is the totality of a person's assets and liabilities.
Probative document	A document that is presumed to be validly executed, normally when the signature on the document bears to have been witnessed.
Professional trustee	A professional trustee is someone who represents themselves as having greater expertise in trust matters than untrained lay-persons, and who acts as trustee in the course of business.
Rectification	A court order that enables a document which does not accurately reflect the common intention of the parties to be altered retrospectively.
Reversionary property	Where an interest in trust property reverts to the truster when the prior interest of the beneficiary comes to an end. For example, if Janet transfers a house she owns into trust for use by her mother for life (see "liferent"), with ownership to revert to Janet on her mother's death. Janet has a reversionary interest in the house.
Special destination	Special destinations, also sometimes known as survivorship destinations, are conditions that commonly appear in the title of property held by more than one person, usually spouses, which

	provide that on the death of one of the joint owners their interest in the property automatically passes to the survivor.
Testate succession	Where a deceased person dies leaving a will or other testamentary disposition.
Trust assets	The property held in trust, including both income and capital.
Trust capital	Assets put into a trust when it commences, such as property, investments and cash.
Trust income	Regular returns arising from trust capital. For example, rent received in respect of heritable property, dividends paid on shares or bank interest on cash deposits.
Vest	A person is vested in property when it becomes that person's property by legal right or authority.

NOTE ON INTERPRETATION

Interpretation legislation

5. The Bill's freestanding text, that is its sections and schedules, fall to be interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010.

6. Text that the Bill inserts into other enactments falls to be interpreted in accordance with the interpretation legislation that applies to that enactment. For example, text inserted into the Succession (Scotland) Act 1964 (see section 72 of the Bill) and the Requirements of Writing (Scotland) Act 1995 (see section 73 of the Bill) falls to be interpreted in accordance with the Interpretation Act 1978.

THE BILL

Introduction and overview

7. The Bill implements Scottish Law Commission recommendations on the law of trusts and the law of succession. It has 89 sections and 2 schedules, and is organised into three Parts as follows.

Part 1 - Trusts

8. Part 1 of the Bill makes provision in relation to the following aspects of trust law:

- appointment, assumption, resignation, removal and discharge of trustees,
- decision-making by trustees,
- powers and duties of trustees,

- contractual rights, damages and the validity of certain transactions and documents,
- duration of trust,
- private purpose trusts,
- protectors, and
- powers of the court.

9. The trusts provisions of the Bill implement the recommendations contained in the Report on Trust Law published by the Scottish Law Commission[1] ("Report on Trust Law"). Any reference in these Revised Explanatory Notes to a recommendation are to a recommendation set out in the Report on Trust Law, unless otherwise indicated.

10. The Bill provisions on trusts replace all existing trust legislation, other than that dealing specifically with charitable and public trusts. Charitable trusts are governed by the Charities and Trustee Investment (Scotland) Act 2005, though provisions in the Bill cover general aspects of trust law that apply equally to public and charitable trusts and to private trusts; so to that extent the Bill is relevant to charitable and public trusts. While the Bill replaces all existing trust legislation, it does not provide a comprehensive statutory statement of trust law in Scotland. The Scots common law of trusts, where it is not altered by provision made in the Bill, will remain operative and will apply alongside the Bill provisions.[2]

Default provisions

11. Many of the trusts provisions in the Bill are default provisions, meaning that they will apply to all trusts other than those where alternative arrangements are in place. Such alternative arrangements may be set out expressly in the trust deed, but they may also be implied from the terms of the trust deed. In either case, the alternative arrangements will apply instead of the default provision in the Bill. If there is no trust deed in place, the default provisions will apply (other than in cases where the circumstances in which the trust operates require or imply the application of alternative arrangements).

Part 2 - Succession

12. Part 2 of the Bill contains three sections. The first (section 71) clarifies the effect of divorce, dissolution or annulment on a special destination (an arrangement commonly adopted when property is held in more than one name under which, on the death of one of the co-owners, another co-owner is nominated automatically to acquire the deceased's share in the property). The second (section 72) implements a Scottish Law Commission recommendation to adjust the order of priority of persons who are entitled to benefit under the law of intestate succession.[3] The third (section 72A) amends section 29(6) of the Family Law (Scotland) Act 2006 to increase from 6

[1] https://www.scotlawcom.gov.uk/files/4014/0904/0426/Report_on_Trust_Law_SLC_239.pdf

[2] The SLC gave consideration to a comprehensive statutory statement of trust law but this option was not taken forward. See paragraph 1.17 of SLC Report No 239 and chapter 2 of SLC DP No 148.

[3] Contained in its Report on Succession at https://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf.

months to 12 months the period following the death of an intestate person within which any application for financial provision by a surviving cohabitant must be made to the court.

Part 3 – Miscellaneous and General

13. Part 3 of the Bill contains miscellaneous and general provisions. It provides for the subscription and signing of documents by bodies of trustees (section 73) and requires a sheriff to refuse a petition for the appointment of a person as executor dative where they are satisfied that the person has been convicted of, or is being prosecuted for, the murder or culpable homicide of the deceased (section 73A). This Part also contains provisions usually found at the end of a Bill, namely the main interpretation provisions for the Bill, the power to make ancillary provision by way of regulations, and the sections dealing with repeal, commencement and short title.

CROWN APPLICATION

14. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or a Scottish statutory instrument unless the provision expressly exempts it. This Bill applies to the Crown in the same way as it applies to everyone else.

COMMENTARY ON SECTIONS

Part 1 - Trusts

Chapter 1 - Appointment, assumption, resignation, removal and discharge of trustees

Appointment or assumption

15. Section 1 of the Bill implements recommendation 1 in the Report on Trust Law. It is not a default provision and so cannot be overridden by the trust deed. Subsection (1) allows for the appointment of trustees by the court in two situations: first, where it is deemed necessary[4] 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)). References to a trustee being incapable or untraceable are to be read with sections 75A and 76 respectively. In section 74(1) and (2) of the Bill, "the Court" is defined as meaning the Court of Session and the appropriate sheriff court. Section 1 of the Bill replaces the common law (by subsection (2)) and the existing statute law (which is in section 22 of the Trusts (Scotland) Act 1921 (the "1921 Act"); this is repealed by section 79 and schedule 2). Section 1 applies to any trust within the meaning given by section 74(1), irrespective of when it was created (subsection (4)).

16. Section 2 of the Bill implements recommendation 2 in the Report on Trust Law and puts the current common law rule into statute. Subsection (1) sets out the circumstances in which the

[4] The SLC recommendation was "where it was deemed 'expedient' for the administration of the trust" but this was changed to 'necessary' by amendment at stage 2.

truster (the person who creates a trust) may appoint a new trustee. It applies irrespective of when the trust was created but does not apply as respects a public trust (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)). References to a trustee being incapable or untraceable are to be read with sections 75A and 76 respectively.

17. Section 3 of the Bill is a default provision and allows trustees (but not executors dative; see section 74(1) of the Bill) to assume additional trustees (subsection (1)). It essentially restates the current law, which is in section 3(b) of the 1921 Act. 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 Chapter 7 of Part 1 of the Bill.) This provision applies irrespective of when the trust was created (subsection (4)).

18. Section 4 of the Bill, which implements recommendation 4 in the Report on Trust Law, deals with the situation 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 of the new one. References to a trustee who is incapable or untraceable are to be read with sections 75A and 76 respectively. Subsection (3) addresses the particulars of the appointment of a trustee on the application of an ex officio trustee under section 62. This section applies irrespective of when the trust was created, but only as respects an assumption or an appointment taking place after the section comes into force (subsection (4)).

Resignation and removal

19. Section 5 of the Bill allows trustees (other than executors dative; see section 74(1) of the Bill) to resign office. Section 5 implements recommendation 5 in the Report on Trust Law and is a default provision. Under the present law, in section 3 of the 1921 Act, 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, the trustee is not entitled to resign. These exceptions to the general rule are not re-enacted, meaning that, where this default rule applies, any trustees (other than executors dative) are able to resign. Subsections (2), (2A) and (3) provide for the special case where a sole trustee wishes to resign and stipulate the conditions which must be satisfied before an effective resignation can be given. Subsection (2) also provides that, for instance, where a trustee accepts office as the sole trustee of a trust, they must do so either in writing or impliedly. Subsection (3A) provides for the resignation to be effective from the date when intimation is given to all of the other traceable trustees and the judicial factor (if any). Section

5 applies irrespective of when the trust was created but only as respects resignations given after the section comes into force (subsection (4)).

20. Section 5A of the Bill provides that the resignation power in section 5 may be exercised on an incapable trustee's behalf by their guardian. But it precludes that power being exercised by the guardian if the incapable trustee is the sole trustee or there is no other trustee who is both capable and traceable. The assessment of whether the remaining trustees are incapable or untraceable is to be made by the guardian of the resigning trustee. In such circumstances, the guardian would be able to resign on the trustee's behalf only after an additional trustee is assumed or appointed, or a judicial factor is appointed to administer the trust. Subsection (2)(b)(ii) enables the guardian to appoint an additional trustee in these circumstances. References to a trustee not being capable or traceable are to be read with sections 75A and 76. Section 5A applies irrespective of when the trust was created but only as respects resignations given after the section comes into force (subsection (7)).

21. Section 6 of the Bill implements recommendation 6 in the Report on Trust Law. Replacing the common law (subsection (2)) and section 23 of the 1921 Act (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 75A and 76 respectively. In section 74(1) and (2) "the court" is defined 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 overridden by the trust deed.

22. Section 6A requires a trustee who is either an executor of a deceased person's estate, or a trustee of a testamentary trust, to be regarded as unfit to carry out their duties for the purposes of section 6(1)(a) in certain circumstances. The circumstances are where the trustee has been convicted of, or is being prosecuted for, the murder or culpable homicide of the deceased, or an equivalent offence in a different jurisdiction. This section will apply regardless of whether the person has been convicted before this section comes into force. By virtue of subsection (4), the section does not affect the determination of whether an executor or testamentary trustee is unfit to carry out their duties by reason of any other involvement or suspected involvement in the deceased's death.

23. Section 7 of the Bill implements recommendation 8 in the Report on Trust Law. 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 (1A) and (1B)[5] allow for the removal of a professionally regulated person who was appointed as a trustee to provide professional input in relation to the managing of the trust but has now ceased to be a regulated person (or hold the relevant authorisation to provide professional

[5] Which were added by amendment and do not reflect an SLC recommendation.

services). 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 Chapter 7 of Part 1.) Section 7 applies irrespective of when the trust was created but subsection (4) provides that paragraphs (b) to (d) 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.

24. Section 8 of the Bill implements recommendation 9 in the Report on Trust Law. It enacts what is considered to be an implied part of the current common law rule found in Miller's Trustees[6] and Yuill's Trustees.[7] It provides that a trustee may be removed from office by the beneficiaries provided that (i) the beneficiaries are absolutely entitled to the trust property, all at least 18 years old, capable (as defined in section 75A of the Bill), 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)). Section 8 does not apply to private purpose trusts but applies to other trusts, within the meaning given by section 74(1), irrespective of when they were created (subsection (3)). The exclusion of the provision to private purpose trusts (which are the subject of Chapter 6 of Part 1) 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 44 of the Bill is relevant).

Saving as respects liability of trustees

25. Section 9 of the Bill re-enacts - with modification - the current law, which is in the final sentence of section 3 of the 1921 Act. Under the current law, the resignation or removal of a trustee does not affect any liability which had been incurred prior to that event. Section 9 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

26. Section 10 essentially restates the current law relating to the discharge of trustees in sections 4(1)(g) and 18 of the 1921 Act, which provide a power for trustees who resign - and the representatives of trustees who have died - to be discharged, either by the remaining trustees or by the court. As a former trustee may continue to have trust liabilities arising from the trustee's acts and intromissions (i.e., the trustee's dealings with the trust property) 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 of Session to grant a discharge.

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[6] *Miller's Trustees v Miller* (1890) 18 R 301.
[7] *Yuill's Trs v Thomson* (1902) 4 F 815.

Chapter 2 - Decision-making by trustees

27. Section 11 implements recommendation 13 in the Report on Trust Law. It regulates the administrative procedure to be followed before a valid decision can be taken by trustees. It is a default provision which applies to a trust unless the trust deed provides otherwise. 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 are permitted. Subsection (2) confirms that trustees must be given an opportunity to express an opinion before decisions are taken, but that this does not require to be done at a meeting of the trustees. Alternative means of obtaining the opinions of trustees will therefore be permitted, such as telephone conversations, written communications, or video conferencing. Subsection (2) also confirms that trustees must be given adequate notice of matters to be decided 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 subsection (2).

28. Section 12 of the Bill implements recommendation 14 in the Report on Trust Law. It 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. The provision is a default one which applies to a trust unless the trust deed provides otherwise, but only as regards a decision taken after the section comes into force. Section 12 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 Bill uses 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 75A 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.

29. However, subsection (3A) provides that subsection (2)(a) does not apply where the trust is a public trust and the decision is intended to benefit a section of the public of which a trustee is a member. In those circumstances, the trustee is not to be disqualified from participating in the decision making process solely by reason of being a member of the section of the public which the decision is intended to benefit. For example, a trustee of a public trust for the children of parents from a particular area or profession should not automatically be ruled out of making decisions as part of the trust which may involve funding being allocated to the area or profession of the trustee.

30. This is to be distinguished from where such a trustee has a particular interest, specific to them as individual (rather than in their capacity as a member of the section of the general public which the decision is intended to benefit). That is, where the trustee's personal interest in the decision is greater than, or goes beyond, the trustee's general interest in the decision as a member of the section of the public which the decision is intended to benefit, the trustee is to be discounted in the calculation of what constitutes the majority. To return to the example above, if the trustee

has a child which will directly benefit from the allocation of funding, then the trustee should not participate in the decision.

Chapter 3 - Powers and duties of trustees

Powers: general

31. Section 13 implements recommendation 15 in the Report on Trust Law. Subsection (1) sets out that the trustees have, in relation to the trust property, all the powers of a natural person beneficially entitled to the property. It is a default provision, applying to trustees unless the trust deed expressly provides otherwise, the context requires or implies otherwise in a case where there is no trust deed, 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 1921 Act. Importantly, however, subsection (2) provides 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 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.

32. Section 14 implements recommendation 17 in the Report on Trust Law. It allows the Court of Session to grant trustees additional powers of administration or management of the trust property where satisfied that that would be of benefit to the future administration or management of the trust property. 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 (3) to (5). 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 (6).

33. Section 15 of the Bill implements recommendation 56 in the Report on Trust Law. 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 a trust unless the trust deed provides otherwise.

Investment

34. Sections 16 and 17 of the Bill implement recommendation 18 in the Report on Trust Law.

35. Section 16 of the Bill is based on the investment powers of trustees in section 4 of the 1921 Act, in so far as it was amended by section 93 of the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"). Subsection (1) is a default provision and grants trustees wide powers of investment of trust property. The effect is that trustees will generally have the same powers of

investment as if they were the beneficial owners of the trust estate (for example, they can invest trust property in stocks and shares or in heritable property). By subsection (2) the powers under subsection (1) are subject to statutory restrictions or exclusions and are not available to trustees of authorised unit trusts (which are subject to special statutory provision for investment by trustees) or any other trust whose trustees have separate statutory entitlement to make investments. (Subsection (5) defines the term "authorised unit trust".)

36. Section 17 of the Bill is mandatory, and re-enacts section 4A of the 1921 Act, as inserted by section 94 of the 2005 Act. It applies irrespective of when the trust was 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 of the Bill. Section 17 specifies the particular duty of care which additionally applies when exercising powers of investment. One aspect of that duty, arising from the common law, 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 ("the 1961 Act"), it would nevertheless be prudent for trustees to continue the practice of obtaining written advice for all but the smallest investments.

37. Section 17A of the Bill elaborates on the powers in sections 16 and 17. It is a default provision which applies unless the trust deed, expressly or by implication, provides otherwise. It reflects (and places on a statutory basis) what is understood to be the current legal position, taking account of case law on the exercise of trustees' powers of investment.[8] Fundamentally, whether an investment is "suitable" to the trust must be assessed against the purposes of the trust for the beneficiaries (as set out in the trust deed or as implied or required by the context where there is no trust deed). However, where there is more than one suitable investment, trustees can take into

[8] See, for instance, Martin v City of Edinburgh District Council 1988 SLT 329.

account non-financial considerations when determining which investment to make, provided they also take proper advice on the investment.

38. Ethical, social and environmental considerations (sometimes known as 'ESG' or environmental, social and governance factors) are explicitly stated examples of such non-financial considerations, although these do not exhaust the kinds of non-financial considerations that may be taken into account. For example, if there are two investments which are in line with the trust purposes and both are expected to perform equally well, then this provision gives trustees the flexibility to choose to invest in the investment that has better ESG credentials. This section applies to trusts created after the section comes into force.

Sale of property

39. Section 17B provides that the trustees of a charitable trust are not under a duty to achieve the best value for heritable property (for example, housing) when selling to a separate charitable trust.

Delegation and the appointment of agents and nominees

40. Section 18 of the Bill empowers trustees to appoint agents and to delegate certain of their functions to them. It is a default provision.

41. Section 18(1) implements part of recommendation 19 in the Report on Trust Law 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 out 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.)

42. Section 18(2) and (6) restate section 4C of the 1921 Act. Although covered by the general power in subsection (1), the provision serves to remind trustees of the option of engaging appropriate financial assistance.

43. Section 18(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, the trustees may pay reasonable remuneration to an agent.

44. Section 18(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. The types of power which trustees may not delegate to an agent are (i) powers relating to the distribution of trust assets; (ii) power to decide whether payments due to be made out of the trust funds are to be out of capital or income, (iii) power to appoint a person to be a trustee, and (iv) power under statute, or the trust deed itself, which allow the trustees to delegate any of their functions or to appoint a person to act as a nominee in relation to the trust property (to prevent the

person to whom functions are delegated by a trustee from, in turn, further delegating those functions and passing them on to a third person). This subsection is modelled on section 11(2) of the Trustee Act 2000 in England and Wales.

45. Section 19 of the Bill implements recommendation 21. It is a default provision which applies to a trust unless the trust deed provides otherwise, and is modelled on the current law in section 4B of the 1921 Act. However, while 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. 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 1921 Act. 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

46. Section 20 of the Bill implements recommendations 22-25. The basic power to make advances to beneficiaries from trust capital is contained in subsection (1) and is a default power. The effect of this provision is to allow trustees to make advance payment to beneficiaries of all or part of the trust capital to which the beneficiary is entitled, provided this is for the benefit of the beneficiary. This power may be exercised, for example, to release a payment of trust capital to a beneficiary under 18 to pay for education, or to assist a beneficiary in starting up a business. 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 of Session may authorise an advance in cases where the court is satisfied 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. 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 irrespective of when the trust was created, but only in relation to advances made after commencement of section 20.

Apportionment

47. Section 21 of the Bill implements recommendation 29 in the Report on Trust Law. It relates to a trustee's power to apportion trust assets to beneficiaries as they see fit in accordance with the purposes of the trust. This section re-enacts the Powers of Appointment Act 1874, which allows trustees, if they consider it appropriate to do so and subject always to the trustee's fiduciary duty and duty to give effect to the trust purposes, to exercise their power of apportionment of trust property in such a way that a particular beneficiary receives nothing. The 1874 Act is repealed by section 79 and schedule 2 of the Bill. This provision is of particular relevance in cases where a trust deed provides for a deliberately broad class of beneficiaries including those who have only a remote possibility of ever benefiting.

48. Section 22 of the Bill implements recommendation 28 which relates to section 2 of the Apportionment Act 1870. The 1870 Act changed the common law (under which an instalment of an annuity, rent and interest on heritable bonds did not vest until the time for payment arrived); section 2 of the 1870 Act provides that all rents, annuities, dividends and other periodical payments in the nature of interest are to be considered as accruing from day to day and are therefore apportionable timewise. Time apportionment is of practical importance where a liferent begins or terminates between dates upon which a periodic payment falls due. Such payments may have to be apportioned between the liferenter and those entitled to income before the liferent commenced or after it terminates. Time apportionment at the beginning and end of a liferent can produce the result that liferenters receive little or no income at the start of the liferent (which may be the very time when they are most in need of it). Time apportionment is also relevant to Scottish trust practice on the sale or purchase of income producing investments. The effect of section 22 is that, as a default, trustees are not bound to apply the rules of time apportionment in section 2 of the Apportionment Act 1870 but may instead elect to allow the sums to accrue as they arise. (As its application extends beyond trustees, the 1870 Act is not repealed in this Bill.)

49. Section 23 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 principal rules of equitable apportionment are as follows:

- The rule in *Howe v Earl of Dartmouth* (1802) 7 Ves 137. If a trust is created over moveable property which comprises wasting assets or unauthorised investments (investments which are outwith the trustees' powers), 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.
- The rule in *Re Earl of Chesterfield's Trusts* (1883) 24 Ch 643. This rule applies where a truster is entitled to 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.

- The rule in *Allhusen v Whittell* (1867) 4 Eq 295. 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.

50. The common law rules have 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, 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

51. Section 24 of the Bill implements recommendation 26. It sets out for the first time a statutory power for trustees to make payments to beneficiaries of income which arises from the prospective share of the trust capital to which the beneficiary will become entitled under the trust, provided such payments are for the benefit of the beneficiary. An example of the use of this power might be where payments are made to a child beneficiary out of trust income for reasons of maintenance or education, before the age at which that beneficiary is entitled to receive their share of the trust capital. 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 requirements 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 of Session's authorisation must be obtained in order to exercise the power to pay income to a beneficiary. Subsection (9) provides that the Court of Session's power is exercisable on application by the trustees or any person with an interest. 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 a payment of income is made after the section comes into force.

Duty to provide information

52. Section 25 of the Bill implements recommendations 30 to 36, and 44. It is mandatory, and therefore applies regardless of what the trust deed provides (recommendation 35). It applies to trusts whenever created, including those created before the Bill is enacted and comes into force. It does not generally apply to private purpose trusts, which often do not have any beneficiaries with a personal interest in the trust property. Where there are such beneficiaries under a private purpose trust, section 25 will apply (subsection (7); recommendation 44). This section, together with section 26, 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 that person's beneficial interest in the trust and, in addition, must inform the person 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. 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.

53. Section 26 of the Bill implements recommendations 30, 37 to 40, and 44. There is a grace period of 1 year (beginning with the day on which section 26 comes into force) during which the section shall not apply to trusts which were in existence before it comes into force (subsection (14)). Otherwise section 26 applies to 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. The duty on trustees complements that in section 25 of the Bill, which obliges trustees to inform people of their beneficial interest in the trust. Under section 26, 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 or where a potential beneficiary has only a negligible interest in the trust. This implements recommendation 37. A presumption 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 (i.e. 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 a direction from the Court of Session on the matter, and also for those whose request has been declined to apply to the Court of Session 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 review by the Court of Session; this will guard against attempts to deprive beneficiaries of the basic information to which they should be entitled. This power is not available to potential beneficiaries who have only a negligible interest in the trust. The Court of Session 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 of Session 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. Finally, the duty in section 26 applies to newly created trusts but, for those already in existence when the legislation comes into effect, there is a grace period of a year[9] (subsections (12) to (14) and recommendation 39).

Trustees' duty of care

54. Section 27 specifies the duty of care to be exercised by trustees. 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.

55. Section 27(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 an ordinary degree of care and attention would be expected to 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).

56. Secondly, section 27(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, the trustee is only bound to exercise a duty of care which exceeds the basic one set out in subsection (1) if instructed by or on behalf of the trustees to provide accountancy services or investment advice. The payment of remuneration is not determinative,

[9] Beginning with the day on which section 26 comes into force.

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.

57. Section 27(4) implements recommendations 48 to 50 on immunity clauses restricting trustees' liability. Paragraph (a) provides 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 also be ineffective to the extent that they would indemnify a professional trustee to whom the higher standard of care applies for any liability arising from a failure to exercise that higher standard of care, or that they would indemnify an ordinary trustee for liability arising out of the trustee's gross negligence.

58. By section 27(5) this provision applies irrespective of when the trust was created but only in respect of managing the affairs of a trust after commencement of section 27.

Breach of duty etc.

59. Section 28 of the Bill implements recommendation 57(2), which is that section 31 of the 1921 Act be re-enacted. It provides 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 the beneficiary's written consent, some or all of that beneficiary's interest in the trust property is to be used to make good any loss incurred by the trustee from liability arising out of the breach of trust. This section applies irrespective of when the trust was created but only in relation to breaches of fiduciary duty occurring after commencement of section 28.

60. Section 29 of the Bill implements recommendation 46. It regulates the consequences for a trustee of acting ultra vires (in other words, acting in a way which is outside the trustee's power as set out in the trust deed). For example, a trustee might make a particular type of investment in the reasonable, but mistaken, belief that it is within their powers to do so. The current law is not wholly clear, but in general a trustee who acts beyond the trustee's powers is open to personal liability. By subsection (2), the Court of Session may relieve a trustee of the consequences of ultra vires actings to the extent that the court considers that the trustee, after making appropriate efforts in this regard, believed that the acting in question was within the trustee's power (subsection (3)). 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 irrespective of when the trust was created but only in relation to actings occurring after commencement of section 29.

61. Section 30 of the Bill, in implementation of recommendation 53, renders ineffective a provision in a trust deed which seeks to place a general limitation on a trustee's liability for breach of a fiduciary duty, or to indemnify a trustee for such breach (that is, giving the trustee a right of recovery against the trust property for any claim against the trustee in a personal capacity following such breach). Subsection (2) makes an exception for a provision in the trust deed which authorises a particular transaction, or a particular class of transactions, which would otherwise be in breach of a fiduciary duty (for example, investments in a particular company owned by the trustee). This section applies irrespective of when the trust was created but only in relation to breaches of fiduciary duty occurring after commencement of section 30.

62. Section 31 of the Bill implements recommendation 52. It deals with situations in which a trustee enters into a transaction in breach of the trustee's fiduciary duty (or proposes to do so). For example, a trustee, in their personal capacity, may enter into a commercial agreement with a beneficiary under which the trustee, in their personal capacity, will make a profit. It empowers the Court of Session to relieve a trustee from the consequences of the breach, or the proposed breach, if it considers it just to do so, provided, firstly, 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 commercial transaction between two unrelated parties would have been (or would be). Section 31 applies irrespective of when the trust was created but only in relation to transactions entered into (or to be entered into) after commencement of the section.

Personal liability of trustees

63. Section 32 of the Bill, which implements recommendation 58, re-enacts section 3(d) of the 1921 Act. 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 acts or omissions, but also for any loss to a beneficiary which arises from one of the other trustees' (who can also be referred to as a co-trustee) breach of trust or breach of fiduciary duty in circumstances where the trustee failed to take reasonable steps to ensure that the co-trustee did not commit that breach. For example, trustees who sign a receipt for money due to the trust estate but leave that money in the hands of one trustee for many years without enquiring about it may be liable to make good the loss if it transpires that the trustee has appropriated the funds and subsequently becomes insolvent. (The trustee who appropriated the funds will also be personally liable, but the beneficiary may choose to pursue both.) By subsection (2), the section applies irrespective of when the trust was created, but only in respect of acts, omissions or breaches committed after commencement of section 32.

64. Section 33 of the Bill restates section 29A of the 1921 Act. This section sets out the protections available to trustees where they distribute property, or income of property, in ignorance of certain facts which would affect proper distribution of the property or income. Subsection (1)(b) provides that in order for the trustee not to be personally liable, the distribution requires to be made in good faith after having made reasonable enquiries, or, in accordance with an order of the Court

of Session. What amounts to 'reasonable enquiries' will be dictated by the particular circumstances of each case. There is no express requirement to advertise for beneficiaries. Whether this is appropriate will depend on the circumstances and is a matter for the discretion of the trustees tasked with distributing the property or income. Subsection (2) protects the right of a person, under the law of unjustified enrichment, to seek restitution in respect of the property or income from persons to whom it has been distributed in error. Subsection (3) clarifies that the right to seek recovery in relation to an unlawful distribution under subsection (2) does not affect the protections afforded to persons (under section 24 of the Succession (Scotland) Act 2016) who, may come to purchase, in good faith, property vested in an executor. Section 33(3) makes clear that those protections in the 2016 Act (for the buyer from an executor) hold good, even where there may be a claim to the property in unjustified enrichment from a beneficiary, which results from an erroneous distribution of trust property and for which the trustee is not liable. Subsection (4) provides that section 33 applies only to distributions which occur after the section comes into force (i.e. it does not catch distributions which have already occurred).

Chapter 4 - Contractual rights, damages and the validity of certain transactions and documents

Contractual rights

65. Section 34 of the Bill implements recommendations 60, 61 and 63. It specifies whether a person who has entered into a contract with trustees can enforce their legal rights against the trust or against the trustees personally. 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). Section 34 applies irrespective of when the trust was created but only in relation to a contract entered into after commencement of the section. 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 can enforce their rights against the trust property only. In other words, the trustees will not be held to be personally liable. 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 (i.e. they can seek reimbursement from it). In that situation the other contracting party may elect, under subsection (4), to enforce the right against the trustees' private property, or directly against the trust property, or both. 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 its contractual rights against any or each of the three trustees personally or, alternatively, against the trust property. This maximises the chances of recovery for T. 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 that party contracted in good faith, then that party may seek recovery of any losses from the trustees' private property. 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.)

Damages

66. Section 35 of the Bill 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 of Session is satisfied that a trustee has failed to meet the required duty of care, as specified by section 27 of the Bill, and the delictual act or omission was in any way attributable to that failure, then it may specify that the damages are payable (in whole or in part) from that trustee's personal property to reflect the trustee's personal failure with the balance, if any, coming from trust funds. Section 35 applies irrespective of when the trust was created but only in relation to acts or omissions which occur after commencement of the section (subsection (4)).

67. Section 36 of the Bill 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 (i.e. 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. 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.

68. Section 37 of the Bill 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 can seek to recover the costs from 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 (by which it determines the proportion of the award which each trustee must contribute). Section 37 applies irrespective of when the trust was created but only in relation to liability incurred after commencement of the section (subsection (4)).

69. Section 38 of the Bill 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 where trustees bear such responsibilities as landowners. 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 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. Section 38 applies irrespective of

when the trust was created but only in respect of liability arising after commencement of the section (subsection (4)).

Validity of certain transactions and documents

70. Section 39 of the Bill implements recommendations 62 and 65. The effect of subsections (1) and (2) is that the validity of an onerous transaction (or contract) between the trustees and another party is not subject to challenge on either of two grounds: first, that the purported exercise of the trustees' power conflicted with the actual terms and purposes of the trust or, secondly, that the procedures adopted by the trustees were flawed. This clarifies the current law: section 39(2)(a) replaces section 2(1) of the 1961 Act, whilst section 39(2)(b) is in substitution for section 7 of the 1921 Act. (Both of these provisions are repealed, so far as relating to trustees, by section 79 and schedule 2.) Section 39(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 section 39(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). In line with recommendation 65, 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 (on the basis that the onerous character of the transaction should ensure that the trust property is not prejudiced). Section 39 applies irrespective of when the trust was created, but only to transactions entered into after commencement of the section (subsection (5)).

71. Section 40 of the Bill 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[10]. Subsection (2) indicates that, alternatively, the trustees may authorise an agent to execute a document on their behalf (under section 18(1)(b)). This may be particularly useful where a decision of a majority of trustees under section 12 cannot otherwise be implemented by executing a document where an absolute majority is required due to incapability or being untraceable. By subsection (3) the rule in subsection (1) applies irrespective of when the trust was created but only as respects documents executed after commencement of the section.

[10] This is different from the SLC recommendation 64 which disregarded incapable or untraceable trustees from what constituted the majority. Concerns were raised that such a rule would mean those relying on the signed document would have to look behind the trust deed and inquire as to the traceability and capability of trustees.

Chapter 5 - Duration of trust

72. Section 41 of the Bill repeals or disapplies the statutory and common law restrictions on (i) the period during which trustees may accumulate income and (ii) the creation of future interests. The restrictions in each case date back to the 19th century.

73. 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)) (unless the trust is a non-charitable public trust (see subsection(5)(a)). 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. Subsection (3) repeals a number of provisions which restrict the creation of future interests.

74. 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[11] (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 the fee would be left 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 the repeal of section 8 of the 1921 Act (in schedule 2 of the Bill), which sets out a statutory version of the late 18th century rule in Newlands[12].

75. The effect of the disapplication of the common law by subsection (4) is described in recommendation 97 in the Report on Trust Law: where Charles conveys property to his wife Margaret in liferent and to his great-grandchildren in fee but his great-grandchildren are non-existent or unidentifiable at the time of the conveyance, then Margaret would take a liferent interest (but no more) and the conveyance to the great-grandchildren would fail. Charles would therefore remain the owner of the property. By subsection (5)(a), which partially implements recommendation 98(1)[13], the repeals in this section do not apply to trusts which are already in existence, unless it was specifically anticipated in the trust deed, as there is a risk that otherwise there may be an adverse effect on acquired rights in property.

76. Despite recommendation 93(2), the repeals will apply to charitable trusts to enable such trusts to accumulate income. Other statutory controls (primarily as a matter of charity law) will apply to such accumulations.

[11] *Frog's Creditors v His Children* (1735) Mor 4262.
[12] *Newlands v Newlands' Creditors* (1794) Mor 4289.
[13] This section was adjusted by amendment.

Chapter 6 - Private purpose trusts

General

77. Section 42 of the Bill, which implements recommendation 70(1) as amended, defines a private purpose trust (which the SLC concluded can already be competently established under Scots law, see paragraph 14.3 of the Report on Trust Law). 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 solely for the benefit of a specified or named beneficiary (or potential beneficiary)[14] (by subsection (1)). 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.

78. Subsection (2) clarifies that a private purpose trust may also have beneficiaries; thus an entrepreneur might transfer the shares in the entrepreneur's 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. But in those circumstances the trust is not set up solely for those beneficiaries or potential beneficiaries.

Applications to the Court of Session

79. Section 43 of the Bill implements recommendation 70(3). It allows any person with an interest in the purpose of a private purpose trust to apply to the Court of Session for an order requiring steps to be taken for the fulfilment of that purpose. There is already a right at common law for anyone with an interest in a Scottish public trust to seek enforcement of its purposes, and this section makes clear that the same principle applies to private purpose trusts.

80. Section 44 of the Bill implements recommendation 70(4) and (5). It permits 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. 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.

Supervisors

81. Section 45 of the Bill, 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. 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). Subsection (3) provides that the supervisor must not be a trustee, and vice versa. Importantly, the duties of the supervisor are fiduciary and the

[14] The singular including the plural here by virtue of the Interpretation and Legislative Reform (Scotland) Act 2010.

supervisor 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.

82. Section 46 of the Bill, 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 the supervisor to be able to perform the task properly. Subsections (1) to (3) provide the supervisor with the certain rights which a beneficiary and a trustee would have under the trust. Subsection (4) 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.

83. Section 47 of the Bill provides that the power of a court to remove a trustee (section 6 of the Bill) and the provisions on decision making (sections 11 and 12 of the Bill) apply to supervisors as they apply to trustees. The provisions on decision making will only be relevant where there is more than one supervisor 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.

84. Section 48 of the Bill implements recommendation 71(7) and provides that all supervisors have power to resign office. The resignation must be by notice in writing sent to the trustees, which takes effect on receipt. See section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 for the interpretation rules on the service of documents. The exception to the power of resignation in section 48(1) of the Bill is where a purported resignation is in order to facilitate a breach of trust; in such a case any notice 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.

Chapter 7 – Protectors

85. Section 49 of the Bill, which implements recommendations 41, 42 and 72(1) to (6), allows for the appointment of a protector. In essence, the role 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 the protector 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).

86. Section 50 of the Bill 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, the truster had originally appointed a protector but where no protector now exists or is traceable who is legally capable, and is willing and fit 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 75A 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 existing protector from office (subsection (4)). This provision applies irrespective of when the trust was created (subsection (5)).

87. Section 51 of the Bill provides that the power of a court to remove a trustee (section 6 of the Bill) and the provisions on decision making (sections 11 and 12 of the Bill) apply to protectors. The provisions on decision making will only be relevant where there is more than one protector in office at any given time. In such a situation, protectors' decisions will be regulated in the same way as decisions to be taken by trustees.

88. Section 52 of the Bill implements recommendation 72(7) and provides that all protectors have power to resign office. The resignation must be by notice in writing sent to the trustees and takes effect on receipt. See section 26 of the Interpretation and Legislation Reform (Scotland) Act 2010 for the interpretation rules on the service of documents. 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 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.

89. Section 53 of the Bill 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 49(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 will be liable for any resulting harm. This provision applies irrespective of when the trust was created (subsection (3)).

Chapter 8 - Powers of the court

Variation and termination of private trusts

90. Section 54 of the Bill makes provision for both extra-judicial and judicial approval of arrangements for variation or termination of trusts. It does not apply as respects a public trust and does not apply as respects a private purpose trust (subsection (4)(b)). So far as extra-judicial variation is concerned, subsections (1) and (2) implement recommendation 79. 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 the beneficiary's behalf is necessary: see section 55(4) and (5).

91. Section 55 of the Bill 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.

92. Section 55(1) implements recommendation 89 and continues the regime of the 1961 Act in terms of which, with very minor exceptions, all capable beneficiaries must agree to any variation or termination; the Court of Session's role is restricted to supplying approval on behalf of those from whom agreement cannot be obtained. 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 the beneficiary or potential beneficiary 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.

93. Section 55(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 section 55(5)(b)).

94. Section 55(5)(a) to (d) re-enact the existing provisions in section 1 of the 1961 Act. 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 1961 Act. ("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.

95. Section 55(6) preserves the current legal position that only a trustee or beneficiary may apply to the Court of Session under this section. Section 55(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 (7)(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 application. 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 application but they

must consent themselves. If, however, there are unborn or underage heirs then court approval on their behalf is both competent and necessary.

96. Section 56 of the Bill, in partial implementation of recommendation 79, sets out the general rule that the Court of Session is only to approve an arrangement on behalf of a beneficiary or potential beneficiary who cannot consent for themselves if it thinks that the arrangement would not prejudice that beneficiary. For instance, suppose a trust is set up to benefit James, his spouse, Patricia, and their young child, Fiona. Each is beneficially entitled to one third of the trust property. If James wanted to vary the trust purposes so that he takes a greater share of the trust property, given Fiona's young age, she would be unable to provide her consent and court proceedings would need to be raised to seek the court's approval on Fiona's behalf. The court would have to be satisfied that the proposed new arrangement does not prejudice Fiona, for example, by reducing her share.

97. Section 56(2), which implements recommendation 86, provides an exception to that rule. It states that no court approval on behalf of an unborn or a potential beneficiary who cannot be ascertained will be required if the court is satisfied that there is no reasonable likelihood that the event which would make the person a 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 a potential beneficiary who cannot be ascertained who had only a theoretical possibility of becoming a beneficiary might be the potential spouse of an intermittently incapable 85 year old person. If a person was, against all expectation, born or ascertained after the arrangement was finalised, that person will have no claim against the trustees or the other beneficiaries for any loss sustained as a consequence of the variation.

98. Section 56(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.

99. Section 57 of the Bill, 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 under section 55, 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 56, the effect of the arrangement proceeding without the agreement of, or approval on behalf of, persons with negligible interests is not to remove their entitlement under the trust. However subsection (2) protects the trustees from claims by such beneficiaries; instead, their right of action would lie against those who have benefited from the variation (most likely other beneficiaries under the trust).

100. Section 58 of the Bill substantially re-enacts section 1(4) of the 1961 Act which provides that an alimentary liferent cannot be discharged by the beneficiary, making 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. Use of alimentary liferents in Scots law were, in the past, regularly used to provide protection against a scenario where a wife's property could be squandered by her husband.

101. Section 59 of the Bill applies when the Court of Session is considering whether to agree to a trust variation or termination on behalf of a person under the age of 18 years. Subsection (2) provides that the Court of Session will have to have regard to 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. Subsections (3) to (5) set out the court's duty in relation to the views of persons under 16. 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 person who is incapable, though a guardian or other authorised person may agree to an arrangement on behalf of such a person (section 55(4)) or the Court of Session may approve it (section 55(5)(b)).

102. Section 60 of the Bill 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 the truster happens to be a beneficiary or potential beneficiary, then agreement, or court approval on the truster's 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

103. Section 61 of the Bill creates a new court power by which the purposes of a trust may be varied in certain circumstances. It applies to trusts, within the meaning given by section 74(1), but does not apply to commercial, public or private purpose trusts (see subsection (1)).

104. In partial implementation of recommendations 95 and 98(2), the section permits trust purposes to be altered by the court where there has been a material change in circumstances. The court may only adjust the purposes to the extent it considers necessary to offset or counter the effect of the change in circumstances. The section also enables the truster to prevent the court's power from being exercised for a period of up to 25 years (or, in the case of an inter vivos trust, the lifetime of the truster (if longer)) by making provision in the trust deed to that effect. The broad

aim is to provide a mechanism to counterbalance, where appropriate, the freedom which trusters are to have (under section 41 of the Bill) to set up a trust of any duration.

105. The power is exercisable by the Court of Session, 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 (3)).

106. For an inter vivos trust, the court must be satisfied that there has been a material change in circumstances since the trust was set up, or that such a change is reasonably in prospect. However, subsection (4) provides that the trust deed may provide that no application may be made to the court (either or both) during the lifetime of the truster or up to 25 years from the date of the creation of the trust[15]. By subsection (5), where a truster attempts to prevent alteration for a period longer than 25 years, this is to be read as preventing the alteration until the later of the death of the truster or 25 years from the creation of the trust.

107. In the case of a testamentary trust, the court must again be satisfied that there has been a material change in circumstances since the testamentary writing (i.e. the will or codicil) was executed, or that such a change must be reasonably in prospect. Further, 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) before an application may be made. Subsection (6) provides that the deed constituting the trust may prevent applications for alteration by the court for a period of up to 25 years from the date of death of the testator.

108. Subsection (7) provides a further special rule for certain testamentary trusts, namely, 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 (i.e. was not regarded in law as being able to alter the 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 any exclusionary period (of up to 25 years) provided for in the trust deed is to run not from death of the testator but from the date of the change of circumstances or, if the court thinks fit, the commencement of the testator's incapacity or unawareness.

109. For example, Sam made a will in year 0, with provision for a trust for family members which could not be altered for 20 years, 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 20 year period he specified during which the trust is unchallengeable should not begin to run in year 10 on death but either in

[15] In the original provision in the Report on Trusts, the default was the other way around and the provision set out a maximum period during which the trust was to be immune from alteration with the truster's only options being to reduce that period.

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 specified a period of 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 after death. 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.

110. Subsection (7A) provides that where a truster attempts to prevent alteration of the trust purposes for a period longer than 25 years, that is to be read as preventing the alteration of the trust for 25 years from the date of death of the truster.

111. 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 (1). 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.

112. Subsection (11) states, in effect, that the court power under this section may not be ousted by the truster (except as specifically provided for in the section) and will apply regardless of any contrary provision in the deed.

113. Subsection (12) provides some examples of what is meant by "change in circumstances". 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 life assurance policies, unit trusts, and trusts linked to a partnership agreement.

114. Subsection (15) implements recommendation 98(2) and provides that the section applies to any trust, including those created before the provision comes into force.

115. Subsection (15) also makes clear that this section is in addition to the specific power in section 63 by which the court may remove (with or without replacement) an office from the trust deed where the holder of that office is to be an ex officio trustee.

Powers in relation to ex officio trustees

116. Section 62 of the Bill 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) that trustee 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 the ex officio trustee's place, upon which the court may grant an order whose effect is two-fold: it acts as an appointment of the person nominated (subsection (1)) and a removal of the ex officio trustee (subsection (2)). The appointed person is not 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, in which case the nominating person resumes the role of trustee. The appointed person 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)).

117. Section 63 of the Bill implements recommendation 10(1)(a) and (2). 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 the role of 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, e.g. where the office no longer has the function which made it attractive for inclusion when the truster created the trust.

118. 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)).

Application in respect of defective exercise of fiduciary power etc.

119. Section 64 of the Bill 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, that is, the power is exercised in error such that effect is different from what is intended. This implements recommendation 101.

120. 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 the trustee's fiduciary power or reasonably apprehends 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).

121. The grounds on which the court may grant a remedy derive from the common law and 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)). For example, the ground at subsection (3)(a) (where the trustees have considered the wrong question) applies where the trustees decide to act in a particular way in response to a question which arises under the trust (for example where the payment of a legacy is subject to the trustees being satisfied that a particular condition has been met). 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.

122. Subsection (5A) makes clear that the section does not interfere with the existing power of the court to take into account the purpose (or, in the view of the court, the likely purpose) of making the application. This may be relevant where the application is made to avoid tax as part of a failed tax avoidance scheme or where the motivation for making the application is otherwise inappropriate for some reason.

123. 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 of section 64.

124. Section 64A of the Bill reaffirms the ability for applications to be made to the Court of Session for trustees, protectors or supervisors to obtain directions in respect to the exercise of their powers (as described in subsection (1)) and for executors to obtain directions in respect of the exercise of their powers (described in subsection (2)).

Expenses

125. Section 65 of the Bill 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 be paid out of the trustee's personal patrimony.) This general rule is subject to a number of exceptions.

126. Subsection (3) provides that a trustee may be personally liable (whether wholly or in part) for litigation to which the trust is a party in certain circumstances (including, for example, where the litigation is unnecessary in the court's view). This includes where the trust property is (or is likely to be) insufficient to meet an award of expenses (paragraph (g)). The court's discretion here is such that it may find some or all of the trustees personally liable according to the circumstances of the case.

127. Where a trustee is found personally liable under subsection (3)(a) to (f), 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)).

128. Where a trust is party to litigation which is in progress, by virtue of subsection (5A) a party may apply to the court (which, by section 74(1), means the Court of Session or the appropriate sheriff court) for a determination about the personal liability for certain expenses of the trustees, including those that have not yet been incurred. This allows trustees and parties taking or defending proceedings involving a trust to have more certainty about the likely implications of the action. 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. Equally, if a trust with no or limited funds is used simply as a vehicle for litigation, the court may determine that the trustees will be responsible for any expenses from their personal property.

129. This provision applies irrespective of when the trust was created (subsection (7)).

130. Section 66 of the Bill implements recommendation 78 and re-enacts section 34 of the 1921 Act. 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 Bill and, where it considers it reasonable, to direct that certain expenses are to be met out of trust property.

Miscellaneous powers

131. Section 67 of the Bill allows trustees, or anyone with an interest in the trust, to apply to the Court of Session for authorisation for the trustees 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 (that is, an insurance underwriter) 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.

132. 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. 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.

133. 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.

134. Section 68 of the Bill re-enacts, with modification, section 24 of the 1921 Act. It specifies how a beneficiary may complete title to heritable (such as a house) or incorporeal moveable property (such as shares) which is still in the name of a trustee who has either died or become incapable (within the meaning of section 75). Section 68 provides a mechanism by which a beneficiary (or, by subsection (4), any person deriving a right from a beneficiary) may apply to the court – i.e. the Court of Session or the appropriate sheriff court (section 74(1) and (2)) - to obtain title to heritable property (such as a house) or incorporeal moveable property (such as shares) to which the beneficiary is absolutely entitled but which is in the name of a trustee who has died or become incapable (within the meaning of section 75A) of acting. 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)).

135. Section 69 of the Bill 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 75A). 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 of Session for a warrant for the property to vest in the beneficiary. For example, title to equipment – like computers - vested in the deceased trustee might be required to be delivered to the beneficiary in order to allow them to continue to operate a business. 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 the beneficiary had taken delivery or possession on that date. Subsection (4) provides the same right for any person deriving a right from a beneficiary. This provision applies irrespective of when the trust was created (subsection (5)).

136. Section 70 of the Bill essentially restates section 17 of the 1921 Act. Subsection (1) permits trustees (as a body or any one or more of them) to apply to the Court of Session for an order by which the accountant of court will supervise 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. This provision applies irrespective of when the trust was created (subsection (3)).

Part 2 - Succession

Effect of divorce, dissolution or annulment on special destination

137. Section 71 of the Bill amends section 2 of the Succession (Scotland) Act 2016 ("the 2016 Act").

138. Section 2 of the 2016 Act is in substance a re-enactment of both section 19 of the Family Law (Scotland) Act 2006 ("the 2006 Act") and section 124A of the Civil Partnership Act 2004 (as inserted by paragraph 11 of schedule 1 of the 2006 Act). It is about the effect of a marriage or civil partnership ending through divorce, dissolution or annulment on a special destination. Special destinations, also sometimes known as survivorship destinations, are conditions that commonly appear in the title of property held by more than one person, usually spouses, which provide that on the death of one of the spouses their title automatically passes to the survivor. A special destination might also apply where property such as business premises is held in the name of a couple and a number of other people. Consequently even if one party executed a will leaving their interest to a third party, such a term would be ineffective and the property would still transfer to the survivor on death.

139. The effect of section 2(2) of the 2016 Act is to evacuate (or deprive of any effect) a special destination in favour of a spouse or civil partner where the marriage or civil partnership had been terminated prior to the deceased's death unless the terms of the destination make clear that the destination is to have continued effect notwithstanding the ending of the relationship. Evacuation of the special destination is effected by treating the surviving co-proprietor as having already died before the deceased. The result is that there is deemed to be no survivor in whose favour the destination operates, so the deceased's interest in the property falls instead into their own estate for succession purposes. Section 71 of the Bill amends section 2(2) to make clear that this is only deemed to be the case for the purposes of succession to the deceased's interest in the jointly held property.

Rights of succession to intestate estate

140. Section 72 of the Bill implements recommendation 1 in the Scottish Law Commission Report on Succession[16], which is that where a person dies intestate (without having left a valid

[16] https://www.scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf.

will) and is survived by a spouse or civil partner, but not by any children (or their descendants), the spouse or civil partner should inherit the whole of the net intestate estate.

141. Section 72 amends section 2 of the Succession (Scotland) Act 1964 ("the 1964 Act"), which regulates the ranking of claims on the intestate estate among the deceased's relatives. Section 1(2) of the 1964 Act provides that in Part 1 of that Act any reference to an intestate estate is to be construed as a reference to so much of the net intestate estate as remains after the satisfaction of legal rights or the prior rights of a surviving spouse or civil partner, or the proportion thereof properly attributable to the intestate estate.

142. The approach in section 2 of the 1964 Act is sequential. Each paragraph in subsection (1) identifies a relative or class of relatives starting with the deceased's children. That relative or class of relatives only have a claim on the intestate estate if the deceased is not survived by a relative or class of relatives identified in an earlier paragraph (a "prior relative"). When they have a claim, the claim is to the whole of the intestate estate and relatives or classes of relative identified in subsequent paragraphs are excluded.

143. Section 72 of the Bill changes the order of succession in section 2(1) of the 1964 Act so that what is currently section 2(1)(e) (surviving spouse or civil partner) is moved up the list so that it comes after paragraph (a) (children) and before paragraph (b) (parents and siblings).

144. Section 72A amends section 29(6) of the Family Law (Scotland) Act 2006 to increase from 6 months to 12 months the period following the death of an intestate person within which any application for financial provision by a surviving cohabitant must be made to the court.

Part 3 - Miscellaneous and General

Miscellaneous

145. Section 73 of the Bill amends the Requirements of Writing (Scotland) Act 1995 ("the 1995 Act"), so as to clarify the way in which that Act applies to documents subscribed by trustees. 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.

146. Section 73A inserts a new section 6A into the Confirmation of Executors (Scotland) Act 1858. The inserted section requires a sheriff to refuse a petition for the appointment of a person as executor dative where the sheriff is satisfied that the person has been convicted of, or is being prosecuted for, the murder or culpable homicide of the deceased, or an equivalent offence in a different jurisdiction. Where a person is appointed as executor dative despite such a conviction or prosecution (for example, because relevant facts were not brought to the court's attention), subsection (5) provides that the appointment is not invalid, but that there is no obstacle to the subsequent removal of the person from office by a court on an application under section 6, read with section 6A, of the Bill. Subsection (6) provides that the inserted section does not affect any

power a sheriff may have to refuse a petition for appointment of an executor dative by reason of any other involvement or suspected involvement in the deceased's death.

General

147. Section 74 of the Bill is the interpretation provision. Subsection (1) defines a number of terms used in the Bill, or refers to particular sections which are relevant for that purpose. Note in particular the following terms.

- "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 definition of "the court" explains whether, in relation to individual sections of the Bill, the court means just the Court of Session or whether it also includes the sheriff court. Subsection (2) provides further detail about which sheriff court has jurisdiction (but see also section 74A).
- The definition of "trustee" expressly includes all executors, both nominate (in testate cases) and, except in section 3 (power for trustee to assume an additional trustee) and in section 5 (power of trustee to resign office), dative (in intestate cases).
- The definition of "appropriate person". Paragraph (a) of this definition covers the range of circumstances where a parent, guardian or person with parental responsibilities is to be considered an appropriate person for a beneficiary or potential beneficiary who is under 16. Paragraph (b) covers the circumstances where a guardian is the appropriate person for someone who is incapable for a reason other than non-age (and should be read with the definition of "guardian").

148. Section 74A confers on the Scottish Ministers, by regulations, power to vary the definition of "court" in section 74 of the Bill. This allows Ministers, with the consent of the Lord President of the Court of Session, to change the court that can hear different types of trust application, being either the appropriate sheriff court or the Court of Session. The regulations are subject to the affirmative procedure.

149. Section 75A(1)(a)[17] of the Bill, provides that "incapable" (and related expressions, like incapacity) is to be construed in the same way as it is defined in section 1(6) of the Adults with Incapacity (Scotland) Act 2000, but with the reference to a provision of the 2000 Act being a reference to the provision of the Bill. For ease of reference, section 1(6) provides:

> ""incapable" means incapable of—
>
> (a) acting; or

[17] This departs from recommendation 11 of the Report on Trusts which set out a similar (but slightly different definition in the Bill as introduced.

(b) making decisions; or
(c) communicating decisions; or
(d) understanding decisions; or
(e) retaining the memory of decisions,

as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition 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);"

150. Subsection (1)(b) confirms that a person has capacity where the person is not incapable or otherwise lacks legal capacity (such as where the person is too young).

151. Subsection (2) provides the Scottish Ministers with a power to make regulations to modify the effect of the definition of incapable in the 2000 Act as it applies to the Bill or to modify or replace the definition of incapable in the Bill. This power therefore allows Ministers to keep the definition of incapable aligned should the definition in the 2000 Act change (or be replaced) or should the application of the definition need modified further than is already the case in section 75A(1).

152. Section 76 of the Bill, which implements recommendation 12, defines what is meant by references in specific sections of the Bill to a person who is untraceable. Paragraph (a) sets out the general condition that the person must not have been traced. Paragraph (b) sets out how each of the sections of the Bill which refer to a person who is untraceable are also subject to an additional condition. For instance, for sections 1(1)(b), 6(1)(e), 45(5)(b), 49(3)(k)(v), 55(5)(e), 65(3)(e)(i) or 65(3)(f)(i), the court must be satisfied that reasonable steps must have been taken to trace the person. 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 Bill which is in question, thus allowing appropriate flexibility for individual cases.

153. Section 77 of the Bill introduces schedule 1, which makes provision for the modification of enactments. Note in particular the following modifications.

- Paragraph 1 amends the existing reference to the 1921 Act so that it refers instead to the short title of this Act that will result from this Bill. Similar changes are made in paragraphs 3(a), 4, 5, 7(2) and (4), 9(a), 10(a), 11, 13(a), 14(2), 16, 19(a), 21(b)(i).
- Paragraph 3(a) amends section 16(5)(b) of the National Parks and Access to the Countryside Act 1949 which 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 – section 16(5)(b) of the 1949 Act is amended to refer not to a single provision of the Bill but to Chapter 3 of Part 1 generally, which

deals with powers and duties of trustees. Similar changes are made in paragraphs 9(b), 10(b), 12, 13(b), 19(b), 21(a).

- 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, the Bill repeals the reference to section 30 without replacement.
- Paragraph 17 modifies the Age of Legal Capacity (Scotland) Act 1991, to give further effect to recommendation 82. It inserts 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.
- Paragraph 18 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.
- Paragraph 22 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.

154. Section 78 of the Bill sets out that the Scottish Ministers may, by regulations, make ancillary provision for the purposes of, or in connection with or for giving full effect to the Bill.

155. Section 79 introduces schedule 2, which repeals certain enactments to the extent mentioned in the second column of that schedule. The repeals of the Powers of Appointment Act 1874, the 1921 Act and sections 1, 2(1) and (2) and 6(1) of the Trusts (Scotland) Act 1961 follow from the main provisions of the Bill which replace these existing statutory provisions (see, in particular, the 1921 Act, which is to be repealed in its entirety). The remaining entries are consequential on the repeal of the 1921 Act and the specified provisions of the 1961 Act.

156. Section 80 sets out when the provisions of the Bill will come into force (i.e. have legal effect). Most provisions will be brought into force by regulations as determined by the Scottish Ministers. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure. However, this section, section 78 (ancillary provision) and section 81 (the short title) come into force on the day after Royal Assent, and the provisions in Part 2 (succession) come into force at the end of the period of 3 months beginning with the day of Royal Assent.

157. Section 81 provides for the short title.

TRUSTS AND SUCCESSION (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

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