

Trusts and Succession (Scotland) Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Trusts and Succession (Scotland) Bill ("the Bill"). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Delegated Powers

Section 74a (1) – Power to amend jurisdiction in relation to trusts

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

4. This section enables Scottish Ministers, by regulations, to make provision conferring or removing powers from the Court of Session or sheriff courts to decide

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particular types of cases relating to trusts under the Bill. In particular this allows the Scottish Ministers to vary the definition of “court” so that either the sheriff court or the Court of Session can consider different types of trust application and to make ancillary provision relating to the jurisdiction of the courts in connection with such changes.

5. Further, the consent of the Lord President of the Court of Session is required, prior to the regulations being made by the Scottish Ministers.

Reason for taking power

6. The Delegated Powers and Law Reform Committee in its Stage 1 consideration of the Bill recommended that it would be desirable to consider flexibility in the Bill to alter which types of trust application that may be considered by the sheriff court and those that may be considered by the Court of Session. The Scottish Government agreed to bring forward a Stage 2 amendment to that effect which is now section 74A.

7. Trust law is a technical and specialised area, requiring considerable expertise at judicial level and among those who present cases in court and those who may be appointed as reporters. While the Bill expands the range of applications that can be made in the sheriff court, other types of application which involve the exercise of substantial discretion will continue to be considered by the Court of Session. Over time, however, it may be considered that some types of application are suitable for the sheriff court (or vice versa) and this power allows for the necessary adjustments to be made to facilitate that.

Choice of procedure

8. As the power is capable of amending the jurisdiction of the court and enables the textual modification of primary legislation across the field of the law of the governance of trusts, the Scottish Government consider the affirmative procedure provides a suitable level of parliamentary scrutiny. In those circumstances, the requirement to consult the Lord President of the Court of Session before making the regulations provides an additional level of assurance.

Section 75a (2) – Meaning of incapable and related expressions

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

9. This section enables Scottish Ministers, by regulations, to modify the definition of “incapable” (and related expressions) used in the Bill.

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Reason for taking power

10. Section 75A (1) of the Bill sets out the circumstances in which a person is to be regarded as incapable for the purposes of the Bill. It aligns the definition in the Bill with wider incapacity legislation in Scotland. There are, however, significant and far-reaching changes recommended to mental health legislation. The precise nature of the changes that may be made in the future cannot be anticipated and this power will ensure that there is sufficient flexibility to allow trust law to keep pace with our evolving understanding of incapacity.

Choice of procedure

11. As this is a power which allows textual modification of primary legislation on incapacity, it is considered appropriate that it be made subject to the affirmative procedure.

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