OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 16 May 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 16 May 2023

CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	1
INSTRUMENT SUBJECT TO AFFIRMATIVE PROCEDURE	2
Social Security (Residence Requirements) (Sudan) (Scotland) Regulations 2023 [Draft]	2
INSTRUMENT SUBJECT TO NEGATIVE PROCEDURE	3
Council Tax (Discounts) (Scotland) Amendment (No 2) Order 2023 (SSI 2023/141)	3
INSTRUMENT NOT SUBJECT TO PARLIAMENTARY PROCEDURE	4
Criminal Justice (Scotland) Act 2016 (Commencement No 8) Order 2023 (SSI 2023/139 (C13))	4
TRUSTS AND SUCCESSION (SCOTLAND) BILL: STAGE 1	5

DELEGATED POWERS AND LAW REFORM COMMITTEE

16th Meeting 2023, Session 6

CONVENER

*Stuart McMillan (Greenock and Inverclyde) (SNP)

DEPUTY CONVENER

*Bill Kidd (Glasgow Anniesland) (SNP)

COMMITTEE MEMBERS

Jeremy Balfour (Lothian) (Con)
*Oliver Mundell (Dumfriesshire) (Con)
*Mercedes Villalba (North East Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Ross Anderson (Jones Whyte)
Alan Barr (Law Society of Scotland)
Laura Dunlop KC (Faculty of Advocates)
Sandy Lamb (Lindsays)
Sarah-Jane Macdonald (STEP Scotland)
John McArthur (Gillespie Macandrew)
Caroline Pringle (Anderson Strathern)
Joseph Slane (Turcan Connell)
Ken Swinton (Scottish Law Agents Society)

CLERK TO THE COMMITTEE

Greg Black

LOCATION

The Adam Smith Room (CR5)

Scottish Parliament

Delegated Powers and Law Reform Committee

Tuesday 16 May 2023

[The Convener opened the meeting at 09:04]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Welcome to the 16th meeting in 2023 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch their mobile phones to silent. Apologies have been received from Oliver Mundell MSP.

Agenda item 1 is a decision on taking business in private. Is the committee content to take items 6 and 7 in private?

Members *indicated agreement.*

Instrument subject to Affirmative Procedure

09:05

The Convener: Under item 2, we are considering one instrument subject to the affirmative procedure, on which no points have been raised.

Social Security (Residence Requirements) (Sudan) (Scotland) Regulations 2023 [Draft]

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instrument subject to Negative Procedure

09:05

The Convener: Under item 3, we are considering one instrument subject to the negative procedure, on which no points have been raised.

Council Tax (Discounts) (Scotland) Amendment (No 2) Order 2023 (SSI 2023/141)

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instrument not subject to Parliamentary Procedure

09:05

The Convener: Under item 4, we are considering one instrument that is not subject to parliamentary procedure, on which no points have been raised.

Criminal Justice (Scotland) Act 2016 (Commencement No 8) Order 2023 (SSI 2023/139 (C13))

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Trusts and Succession (Scotland) Bill: Stage 1

09:05

The Convener: Item 5 is evidence on the Trusts and Succession (Scotland) Bill. First, however, Jeremy Balfour would like to make a point.

Jeremy Balfour (Lothian) (Con): For the avoidance of doubt, I just want to say that one of the witnesses today, John McArthur, is a personal friend of mine from many years ago when I was a trainee with Anderson Strathern. Also, Alan Barr, who is on the second panel, was one of my lecturers at university.

The Convener: Thank you, Jeremy.

I welcome to the meeting our first panel: Ross Anderson, partner, Jones Whyte; Sandy Lamb, partner, Lindsays; John McArthur, partner, Gillespie Macandrew; Caroline Pringle, director, Anderson Strathern; and Joseph Slane, associate, Turcan Connell. I should also note that Mercedes Villalba is joining us online.

I remind the witnesses not to worry about turning on the microphones during the session, as they are controlled by broadcasting. If you would like to come in on a question, please raise your hand or indicate as much to the clerks. There is also no need to answer every question; you can simply indicate when a question is not for you to respond to. Please feel free, though, to follow up in writing any question after the meeting, if you so wish.

I will open the questioning. On 2 May, the Scottish Law Commission told the committee that it is important that trust law reforms ultimately apply to pension trusts, too, and the current plan is for that to have effect through a section 104 order agreed between the Scottish and United Kingdom Governments. Do you share the view that the bill should apply to pension trusts in whole or in part? What, for you, would be the practical impact if there were a gap between the legislation coming into force for most trusts and then separately for pension trusts?

John McArthur (Gillespie Macandrew): As I do not deal with pension trusts very often, I cannot comment on that, I am afraid.

Sandy Lamb (Lindsays): I would say the same. I would also simply observe that, if different regimes applied to different types of trusts, it could lead to a degree of confusion. However, that comment does not come from a position of any particular authority on pension trusts.

Ross Anderson (Jones Whyte): I simply echo my colleagues' statements. As we do not deal with pension trusts, it is not something that I can speak to.

Caroline Pringle (Anderson Strathern): I am sorry, but I am in exactly the same position. I have done a little bit of work on pension trusts, though not a huge amount. As an observation, though, I would have similar concerns about two different regimes working in parallel and whether there could be any lacuna in the middle that might cause issues in the future.

Joseph Slane (Turcan Connell): Pension trusts are not an area in which I have experience or have practised. I agree with what Caroline Pringle and Sandy Lamb have said about the situation with having two different regimes at the same time, but that does not come from a position of experience or practice.

The Convener: Notwithstanding what you have said, we heard in evidence last week that it is quite common for different regimes to apply in law. Although it would be beneficial to have one regime—and although people certainly want the section 104 order to be passed as quickly as possible so that that can happen—we heard last week that it would not be a deal breaker and it would not make things overly complicated if two different systems were in operation.

John McArthur: As long as it was well known that there were two systems and as long as there were no surprises, that would be fine. However, one system would be better.

The Convener: Fair enough. Thank you.

Jeremy Balfour: Good morning. I thank all of you for coming to the meeting.

The bill contains some new powers for sheriff courts, but the Court of Session will remain the main court for trusts. Do you think that the balance is about right in that respect, or should more be done—or be allowed to be done—in the sheriff courts instead of things going to the Court of Session?

Caroline Pringle: Ultimately, the only concern that I have is about the cost of going to the Court of Session. We are trying to make things more accessible. Obviously, there needs to be judicial oversight, because the courts would be given quite significant powers, but the concern is whether a better balance could be struck so that these things do not come at the cost of the trust funds, where the expenses would be met from.

Jeremy Balfour: In that case, where would you see the expenses coming from?

Caroline Pringle: I think that they should come from the trust funds, but if we always have to resort to the Court of Session, that, in general,

comes with more costs than taking cases to sheriff courts.

Ross Anderson: My position on the matter is that there are powers that are reserved to the courts that should be delegated to the trustees of the trust, particularly in relation to the removal of trustees. I feel that our legislation could be more aligned with the English position, which grants greater powers to the core trustees in terms of appointing and removing trustees.

I agree with Caroline Pringle that applications should, to a greater extent, be to the sheriff court. However, I also think that there should be a greater tendency to allow the trustees and the truster to make certain decisions instead of having to rely on the court to make those decisions.

Sandy Lamb: Without making any implied or overt criticism of the sheriff courts, I would say that the Court of Session has more experience and perhaps knowledge of complicated trust matters, so I do not necessarily have too much difficulty with certain things being reserved to it. I broadly agree with the notion that the process should be accessible and that the costs should not be insupportable, particularly for smaller trust funds. I am not involved in a great deal of litigation, but I understand that there is often not a huge difference between costs from court to court, depending on what one is doing and whether it is opposed.

John McArthur: Choice is important. The trustees will know the basis of the litigation that they are about to embark on. Depending on how complicated the matter is, if they have the choice between the Court of Session or the sheriff court, it will allow accessibility and let people know that they are going to a court that has the required knowledge to decide on the questions being asked.

Jeremy Balfour: I want to follow up on Mr Lamb's point about the comparative costs between a sheriff court and the Court of Session. We have taken evidence that there is not much difference between them. Is that your experience, too?

Sandy Lamb: As I have said, I am not involved in a great deal of litigation, so my view arises mostly from discussions with my colleagues in the court departments.

Jeremy Balfour: We will move on to sections 7 and 12 of the bill. Under section 12, a trustee does not get to participate in trust decisions when they are incapable, while under section 7, trustees can also remove a fellow trustee from their role on the basis that that trustee is incapable. Is the balance about right in that respect? Are you happy that the definitions are up to date enough? If we could do things differently, how would we?

Joseph Slane: We have some concerns about the ability of trustees to remove one of their own number extrajudicially on the basis of the trustee being incapable. The reason for that is based on the inherent subjective element that comes with assessing capacity.

Capacity is a spectrum; in other words, an individual might have capacity for one act and not another. Although we as solicitors and medical professionals deal with that issue regularly, we can sometimes find it difficult, and putting the onus on trustees who might not be as used to making such assessments could be difficult, create problems and potentially lead to issues for the trustee who is being removed.

09:15

Ross Anderson: Generally, I welcome the provisions. In my firm, we deal with a number of trusts where a client is particularly elderly and could lose capacity. At the moment, that can involve litigation in the form of a court exercise and a court application to remove the trustee; however, I feel that, with the correct legal advice and a solicitor who had adequate experience in assessing capacity, the trustees' being able to make that decision would be advantageous.

John McArthur: Picking up on a point that Ross Anderson made, I note that this is about the ability of the trustees to get the evidence, which is necessarily personal to the individual trustee concerned. I think that the trustees are at a disadvantage here, and I therefore wonder whether section 47 of the Adults with Incapacity (Scotland) Act 2000, which allows a doctor to sign a certificate allowing a treatment, could be extended slightly so that it could be used by the trustees in analysing or assessing the capacity of their fellow trustee.

We could also turn things around slightly. Mr Balfour asked whether we had other suggestions, and I think that one thing that is missing is the ability of the incapable trustee's guardian and power of attorney to sign a minute of resignation. That would take the pressure off the trustees and allow the representatives of the incapable trustee to take the decision, which I think would make things a lot easier.

Sandy Lamb: I would observe that the test of incapacity in section 75 seems a pretty direct version of what one finds in the 2000 act. Of course, that act has been with us for 23 years and, as I think that most would agree, has operated fairly reasonably. If the idea is to align the particular question of what incapacity is in this bill with existing law, that is probably to be welcomed. Of course, if the 2000 act were to be reformed, would there then be reform to the trusts and

succession legislation that follows from these deliberations?

Jeremy Balfour: That tees up another question. The panel of academics who gave evidence last week suggested that, instead of putting exact wording into this bill, it could just refer back to the 2000 act. That would mean that, if there were a change to the 2000 act, it would therefore immediately change the definition in the bill. Is that solution workable in practice rather than as an academic view?

Sandy Lamb: I do not see why not. Of course, as with many things, academics are ahead of us.

Jeremy Balfour: So, in practice, that would work for you on a day-to-day basis.

Sandy Lamb: I see no difficulty with it.

John McArthur: If the legislation were linked to a definition in another act, which could change, it would make sense to link it to the other act. Therefore, as the 2000 act evolved, the trust legislation would evolve, too, without any additional requirement for it to be amended.

Mercedes Villalba (North East Scotland) (Lab): I will move us on to sections 16 and 17 of the bill, which look at trustees' powers of investment. I think that the question will be to the whole panel; perhaps Ross Anderson could start off and we can work our way around.

The Law Society of Scotland and the academic Yvonne Evans have suggested that, in view of Scotland's increasing emphasis on net zero goals, sections 16 and 17 could be amended to allow trusts to adopt environmentally friendly investment policies, particularly when those might underperform compared with other investments. The committee is interested to hear the panel's views on that policy idea. If you support it in principle, do you think that the drafting of sections 16 and 17 would need to be tweaked or amended to make it clear to trustees that they have the power to make such investments, even when they might underperform compared with other investments?

Ross Anderson: From a public policy point of view, I can see the merit in that. However, in real life, when it comes to representing trustees who have to endeavour to look after the best interests of the beneficiaries, if a beneficiary sees that an investment is underperforming, and the trustees have made that decision on the basis of public policy, I can imagine, as a solicitor in practice, the feedback that I would get from those beneficiaries. On balance, therefore, I, personally, would not support that position.

With regard to whether the wording is acceptable if that were to come into effect, I think that it might have to be altered to make it clear that the trustees were acting in line with public policy and that that had been accounted for in the statute.

Sandy Lamb: I do not disagree with Ross Anderson. Section 16, as it is currently drawn, states:

> "trustees have the power to make any kind of investment of trust property, except in so far as ... the trust deed, expressly or by implication, provides otherwise".

Perhaps it ought to be left to the truster—the settlor of the trust—to determine whether there ought to be any particular restrictions on investments or whether particular classes of investment were more suitable. That would certainly get around any difficulties that the trustees might experience from beneficiaries suggesting that what they have done has pauperised or disadvantaged them to whatever degree.

Admittedly, section 17 includes the ability to take proper advice. If that includes taking advice from those who are skilled in investment in greener areas such as renewables—environmental, social and governance, or ESG, stuff—the trustees might well be able to rely on such advice.

John McArthur: To pick up on Sandy Lamb's point, when it comes to investment powers, it is the truster who has put the money in trust—apart from an existing trust. Carbon will be a big issue and, on balance, I would prefer it to be left to the truster to decide, rather than giving the power to the trustees.

There is perhaps one exception. If the trustees could agree with beneficiaries who were of age and could give such agreement, they might agree an investment policy that did not maximise growth from the portfolio, which might be more aligned with greener issues, as it were.

However, at the moment, carbon and carbon investment are quite high risk, from what I hear. I am not an investment manager, so I cannot comment beyond that, but to go into carbon and carbon investment is high risk at the moment. Therefore, trustees put themselves at risk of a claim if those investments do not perform or if they fail.

Mercedes Villalba: Does the bill as drafted allow trustees to make such investments, or does it need to be amended to make it clear that such an option is open to them?

John McArthur: It needs to be amended to make that absolutely clear. If I were advising a trustee on the basis of section 16, I would tell them that there was a risk of them leaving themselves open to a claim by disappointed beneficiaries at some point in the future.

Mercedes Villalba: Do you have a view on what such an amendment should look like? What, specifically, would need to be said to give you that reassurance, when you give advice?

John McArthur: The section allows a wide spectrum of investments, but it would be easier to give advice if it specifically allowed investments in assets that might not perform in line with other asset classes that are invested in.

Caroline Pringle: I agree with all the previous comments. In practice, trustees have an obligation to ensure that they are not breaching their fiduciary duties or their duty to get the best return for the beneficiaries of the trust. I have concerns about the bill as it is currently drafted and would be concerned about advising trustees to go down that path without there being anything more specific in the bill.

I like the idea of working on a case-by-case basis, with some thought being given to the rights of the truster and to what they envisaged about how the fund would be invested. We may need to revisit how the power of investment is exercised. The powers that are set out in section 16 of the bill are quite broad and flexible, but when those powers are exercised, the idea of suitability rests not only on financial performance but on broader public policy and on giving greater protection to the trustees if they decide to go down a higher-risk route.

Mercedes Villalba: Would it be possible to allow a case-by-case approach to be taken but to still be clear in the bill that that is an option for those trustees who are interested?

Caroline Pringle: It would be helpful to have something in the bill to provide additional protection and reassurance. Trustees are already accountable to beneficiaries, as they should be. That would allow them greater discretion to think about their investment policies and about what they should or should not invest in. They would have more freedom to think about what they actually believe in and what the right investment would be. It would be helpful to have that in the bill so that trustees will not be prejudiced as a result of following a line of investment on the basis of public policy grounds or their own personal preferences.

Joseph Slane: I agree with everything that has been said already. The bill could be a bit clearer about whether that kind of investment route is to be permitted in the absence of anything that is expressly provided for in the trust deed that favours such an investment or otherwise.

That might slot into section 17 of the bill, which deals with the exercise of the power of investment and the matters that trustees are to have regard to. Section 17(1)(a) talks about the

"suitability to the trust of the proposed investment"

and the

"need for diversification of investments".

That might be the appropriate place to begin considering other types of investment. That is just a suggestion—there might also be scope for that in section 16.

The issue is one for the drafters to consider, but as John McArthur said, it would be better to put it beyond doubt. Looking at what the bill currently provides for, I would be hesitant to advise on that basis.

Jeremy Balfour: I will develop the idea slightly by asking about clarity for trustees. If a charity has an asset and wants to give that to another charity, the general view is that the trustees have to get the best value that they can for that sale, but trustees who are passing an asset on to another charity with a similar charitable basis might want to sell it at a cheaper price. Is there a need for clarity on that in the bill, or is there already enough clarity to allow trustees to do that?

When I worked for a charity, we talked to another charity and asked whether the trustees could sell us an asset at a discount price so that we could use it for charitable purposes, but they said that they had to get the best price for their beneficiaries. Could some clarity be provided about a situation in which another trust benefits?

John McArthur: I think that we are in danger of mixing up charity law and trust law. I can see the argument for charities agreeing to sell assets below their value because they are going to another charity, but in pure trust law, someone acting as a trustee in a private trust has to get fair value for the benefit of the beneficiaries. I would be slightly concerned that if we go down the route that you are suggesting, there would be a conflict between charity law and trust law.

Ross Anderson: If you were to go down that route, you would have to make it expressly clear in the bill that that exemption would apply. Currently, the bill is not at all clear on that point.

Jeremy Balfour: Would the bill require further amendment?

Ross Anderson: I believe so.

Caroline Pringle: I apologise, because I do not have it in front of me, but that would also involve looking at the Charities and Trustee Investment (Scotland) Act 2005, to see how it interacts with the bill.

09:30

The Convener: We move on to section 19 of the bill, which provides that, unless the trust deed

says otherwise, trustees could use a nominee in respect of any of the trustees' powers. A nominee is someone to whom a trustee transfers ownership of trust property, often for investment purposes. The law firm CMS Cameron McKenna Nabarro Olswang is concerned that, as it is currently drafted, section 19 of the bill on nominees may not go far enough in capturing the ways in which trusts are used in the financial services sector. Specifically, the firm has said that doubt would remain as to whether trustees can use nominee custody structures and sub-custodians.

Do the witnesses have any views on the current scope of section 19 and the risks identified by CMS?

John McArthur: One of the issues with section 19(1)(a) is that it refers to "a person". I checked and could not find any clarification, but "a person" appears to refer to an individual rather than a corporate entity. Commercial trusts and the likes of what CMS is talking about tend to use corporate nominees. I would have concerns about the definition of "person", which should be extended to cover both an individual and a corporate—possibly a limited liability partnership—nominee. I do not specialise in that area of how corporate investments are managed, but I think that that definition needs to be widened to address the concern. CMS's concern certainly replicates a concern that I have about the section as it is currently drafted.

Sandy Lamb: I agree with John McArthur. I have just looked at the interpretation section—section 74—and it does not include "person" as a defined term.

The Convener: Do other witnesses have any comments?

Ross Anderson: I cannot speak to CMS's point. However, in respect of section 19, historically, under the Trusts (Scotland) Act 1921, there has been a great debate around the power of nominees and granting powers to others to act on behalf of trustees. I draw the committee's attention to the English position under the Trustee Act 1925, which grants the trustees the ability to give greater powers to another person in respect of the management of the trust. I have found that provision to be helpful in the past when dealing with those types of trusts.

However, the bill clearly grants powers always under the supervision of the original trustees. My preference would be that the power to grant authority to another person or corporate entity would extend to allow that person to use autonomy in respect of managing the trust. However, that is just my personal opinion.

John McArthur: I have one more point on that. The bill talks about the exercise of "their powers"—for trustees, we talk about administrative powers and dispositive or discretionary powers. The point of nominees is to do with the administration of the trust, rather than making decisions about where the trust ends up or how it is invested. It is the route through which investments can be managed and, for example, land can be held. Therefore, I wonder whether it should perhaps be restricted to administrative powers only, as opposed to the exercise of dispositive or fiduciary powers.

Caroline Pringle: That would replicate the common-law position that you cannot delegate your discretionary functions as a trustee.

Joseph Slane: With regard to the delegation of powers in general, section 19 is necessarily linked to section 18 on delegation and the appointment of agents. Section 18(5) deals with the distinction between dispositive and administrative powers to some degree by talking about what may or may not be delegated. Section 19 deals more with the specific scenario of nominees. On that basis, I do not think that an additional distinction between dispositive and administrative powers needs to be drawn in that section as well, as John McArthur suggested.

The Convener: Thank you.

Bill Kidd (Glasgow Anniesland) (SNP): Good morning, everyone. I will ask about sections 25 and 26.

Section 25 requires trustees to tell a beneficiary that they are a beneficiary and to give them all the trustees' names and correspondence details. That is mandatory for certain types of beneficiary. For potential beneficiaries, trustees have some discretion in what information is provided under section 25.

Section 26 is about what information must be made available to beneficiaries and potential beneficiaries, but a trust deed can override that section, although a court can later review the reasonableness of that override.

There is quite a bit of to-ing and fro-ing there, to make a point on what I have said. Various respondents to the committee's call for views have said that the trustees' duty to provide information to beneficiaries and potential beneficiaries under sections 25 and 26 is too onerous—they have to take into account too many elements. Do you have concerns about that? If you do, how would you amend the sections to address them?

Caroline Pringle: My concern is that sections 25 and 26 are quite woolly. I think that that has been done for a reason, which is that flexibility is needed in the rules. However, from my practice, I would say that the majority of trusts that we set up are discretionary. I completely understand that

levels of accountability and transparency to beneficiaries are needed, but with a broad class of potential beneficiaries the question is where to draw the line on obligation to account to them.

On further reading of the provisions, I can come to a different interpretation, but a lot of what is in sections 25 and 26 is down to trustees' discretion, which could cause problems further down the line. If trustees' obligations are left to trustees' discretion, there could be vast differences in practice and, ultimately, matters would have to go to the court for clarity.

Joseph Slane: I agree. The drafting is a little bit woolly in sections 25 and 26. To follow on from what Caroline Pringle just said, I wonder what would be the impact on trustees—and on trustees' position generally—of a court ruling concerning a trustee's decision to not disclose information. Would they be in breach of trust? Would that be a breach of trust that was sufficient to merit removal? The wide discretion that is afforded to trustees by sections 25 and 26 leaves them in a slightly grey area.

Bill Kidd: I understand exactly what you are talking about and can see how what you have said provides a bit of clarity on sections 25 and 26. However, is not there a wee issue for beneficiaries and potential beneficiaries in terms of trustees having too much power? Trustees might decide to go forward in a way that means that the beneficiary does not get as much from the trust as they otherwise might have had.

Sandy Lamb: There is always a balance to be struck. That is at the core of the advice that we give trustees and beneficiaries. It is sensible to be fairly woolly in sections 25 and 26 because, as Caroline Pringle has said, in a number of discretionary trusts there might be a vast array of potential beneficiaries, some of whom might never have been intended to be beneficiaries.

A lot will be informed by the settlor's letter of wishes, which any sensibly drafted trust will have as a back-up. That being so, and given that the letter of wishes is expressly excluded from what is to be provided under section 26, the trustees have an arguably onerous duty, although being a trustee is an onerous duty anyway.

My observation is that, although trust taxation does not deal with tax all the time, it now often requires registration with the trust registration service at His Majesty's Revenue and Customs, which requires one to gather information on beneficiaries anyway. Given that the trustee, or those who are acting for a trustee, are probably doing the monitoring and are, in essence, holding that information on file for those purposes anyway, it can be argued that it is not an onerous extra duty.

However, I echo what was mentioned earlier, which is that if we are to provide the courts with the ability to remove trustees when they have neglected trustee duties, or have purported to carry out duties but did so in a way that might be inconsistent with the trustee's fiduciary duty, then, clearly, not providing information would be grounds for removal.

Bill Kidd: That makes sense.

I note that a trust deed can, in fact, override section 26, but a court can then later review the reasonableness of that override. I suppose that it would tend to look into whether people are behaving unreasonably towards the beneficiary.

Sandy Lamb: For the trust deed to override section 26 it would require the truster to have specified that point. One would hope that the truster would have a good reason for doing so. That, too, would perhaps be explained in the letter of wishes.

John McArthur: It is important to remember that the truster appoints the trustees because he trusts them to manage the assets on behalf of the appointed beneficiaries. There is always a balance to be struck between the various powers and responsibilities. It depends on which side of the camp you are. If you are advising a beneficiary and you are not getting enough information, you want as much ability to ask for it as possible; however, trustees will—or should—know the wider picture with regard to the whole trust and, therefore, might make a slightly different judgment. Woolliness is probably better than being more prescriptive.

Bearing in mind that the truster appointed the trustees, for the balance to be slightly in favour of the latter is probably better as well, given that if they failed to perform their duties and to invest wisely for everybody else, one would take a slightly different route to challenge them. One might look for their removal, for example, or claim for loss of expected inheritance. One can go down different routes for that. On balance, having the balance in favour of the trustees is better, given the context in which a trust is written.

Bill Kidd: That makes sense. I think that that answer covered just about everything.

Section 49(3)(a) is about domicile. Professor Paisley from the University of Aberdeen has a few issues with it and told us that it would be harder to get information about who controls land and property if the trust were later to be treated as being resident overseas.

In its written submission to the committee, the Law Society of Scotland did not comment on the policy that underpins section 49. However, it did say that it thinks that the drafting of the domicile

subsection is unclear in terms of its scope. The Law Society also said that the scope of the separate power of the protector to "determine" the trust's "administrative centre" is unclear.

Do you agree with the academics' interpretation of section 49 and do you have views on whether protectors should have the power to look at overseas domicile for trusts in order to challenge issues?

Caroline Pringle: I apologise because this will not answer your question, but from a tax point of view, the UK Government decides whether there is UK domicile for tax purposes, so the question ultimately comes down to the domicile of the settlor and of the trustee. I do not think that that would affect the position in this regard. What I am trying to get at is this: surely, the transparency that we need is, in the main, in relation to tax—more than it is in relation to anything else. I do not think that having that power in the bill will change the current law on whether a trust is subject to UK taxation and reporting requirements.

Bill Kidd: That is very clear, considering how woolly my question was. [*Laughter*.]

Ross Anderson, do you have anything to add?

Ross Anderson: I assume that the intention is to allow variations, so that people can benefit from different tax regimes. If that is the intention, it should be clear.

09:45

Jeremy Balfour: A concern among last week's panel, because the domicile rules could be unclear, was about what will happen when a foreign national sets up a trust then disappears to another country. In practice, are you dealing with that issue? The issue is to do with someone who is not domiciled in Scotland setting up a trust then running it from another jurisdiction.

John McArthur: I am sorry to answer a question with a question, but are you talking about a truster creating a Scottish trust and putting assets that sit in Scotland—let us say, Scottish land—into it, then disappearing abroad?

Jeremy Balfour: Yes.

John McArthur: In that situation, the trustees would decide. The truster has set up the trust and appointed trustees. In my experience, normally the trustees or, perhaps, the protector of an offshore trust are able to agree or disagree to a change of what I would call the proper law of the trust—that is, the law that applies to the jurisdiction and how that trust is operated. Certainly, they would be the ones who had to approve it, were they to agree to it. Generally, the trustee would decide that, not the truster. I do not think that the truster preserves the right to change the proper law.

Sandy Lamb: No: I have not seen such a thing.

At the risk of sounding ignorant—which, of course, is always a risk—I would say that section 49 is about protectors. As we have, I think, alluded to, protectors are a feature of offshore trusts and do not have a long and illustrious history in Scots trust law. Section 49 might introduce the agent of the protector into Scots trust law, but it might not. That will depend very much on whether the advice to people who set up trusts in Scotland is that the protector be included. There is no requirement to have one.

Because it could add more control, complication and, potentially, expense, Scottish domiciliaries, residents and citizens who set up trusts for Scottish, English, Northern Irish or Welsh beneficiaries might not use a protector—although they might. What I am saying, in a roundabout way, is that I agree that it is not just up to the protector to say what their domicile is for tax purposes, but I am not sure whether that is something to be overly concerned about.

John McArthur: I think that, on balance, although protectors are not a fixed part of Scottish law, I can see a great use for them, going forward, as a form of protection for beneficiaries, although they slightly negate the overriding decision-making power of trustees. I can see some uses for them in Scots law.

Bill Kidd: I have a question on section 61, which is on the alteration of trust purposes in family trusts, which we have dabbled in slightly already.

Section 61 says that after such a private trust has been in existence for 25 years, the Court of Session will have the power to alter the trust's purposes—its aims, objectives and so on. A shorter minimum period can be specified in the legal document that creates a particular trust.

In the committee's call for views, six of the 12 respondents who commented on section 61 said that they thought that 25 years is too long. I do not want to go too far, but Alice Pringle was one of the respondents who suggested that, as was Anderson Strathern, among a number of others. The Faculty of Advocates said that

"The imposition of such a lengthy period ... is notable."

Section 61 gives the power to apply to the court to alter the trust purposes of a family trust. The views on the 25-year restriction have been mixed and many respondents have said that 25 years is too long. Are you satisfied with that time period?

John McArthur: I think that 25 years is probably too long and that that decision is best left

to the discretion of trustees. They are the people who administer trusts and who run into problems. Trustees' being able to decide at what point section 61's provisions would be useful would be the best route to follow, in my opinion.

Bill Kidd: Thank you.

Caroline Pringle: I understand the need to ensure the wishes of the truster when setting up the trust; to act otherwise would defeat the purposes. However, we cannot foresee changes in tax regimes and things like that, which might later make how a trust is currently set up unsatisfactory. Twenty-five years seems to be a bit prescriptive.

Joseph Slane: Court oversight in that regard gives protection. The courts will look at each case, so rather than the legislation setting a minimum of 25 years, the courts could consider each case on its merits.

Bill Kidd: That makes sense.

Sandy Lamb: A "material change of circumstances" sounds quite dramatic. If something dramatic has happened, why should people have to wait 25 years?

Bill Kidd: If there are no other views, those answers have covered my question. Everyone here seems to be of broadly the same mind. That information will be very useful for us, so I thank you.

Mercedes Villalba: I move us on to sections 65 and 66, on expenses of litigation and application. Although the Law Society is supportive of the bill overall, it seems to be very concerned about the current policy that underpins section 65, which provides principles to determine how legal bills are paid for in trust cases. The Law Society thinks that section 65 will deter people from becoming trustees and might lead trustees to settle unfavourably or to abandon legal proceedings for fear of personal liability. It would be useful for the committee to hear whether you share the concerns of the Law Society or can offer the committee reassurance on that point.

A related question is whether you think that the availability of insurance helps to mitigate the risks that have been identified by the Law Society.

We can start with Ross Anderson again and work round the table. As I am attending remotely, it is not easy for anyone to catch my eye. I can leave it to the convener to bring witnesses in, if that is preferable.

Ross Anderson: I am happy to go first. I think that the wording of the bill could be off-putting to potential trustees. As soon as you say the words "personal liability", people have concerns.

We have looked previously at the point about insurance in relation to various matters that we have come across; I think that it is required as an option in these circumstances. Ultimately, however, from the guidance that was published with the bill, the personal liability of trustees would apply—one hopes—only in cases of fraud or a complete lack of good faith. However, the words "personal liability" could be off-putting, so it would be good to have clarity on the circumstances in which personal liability would apply.

Sandy Lamb: I am not a litigator and do not deal with expenses in such matters—as, I think, I mentioned earlier. However, I certainly echo Ross's comments that any heightened likelihood—or perception of heightened likelihood—of personal liability would undoubtedly put a number of trustees off, notwithstanding their ability to insure against that kind of risk. As I am sure we are all aware, insurance always has conditions, and the cost of premiums for insurance will, I presume, be a trust expense, so that requirement will be a drag on the trust fund, if it stays as it is.

Mercedes Villalba: Are there changes that you would like to be made, based on that concern?

Sandy Lamb: Again, it is about striking a balance. There must be the ability to find trustees personally liable. Some subparagraphs of section 65(3) are fine, but section 65(2) is a little alarming.

Caroline Pringle: I know that I am coming in to answer out of order.

From a professional trustee point of view, the provision is of concern because, quite commonly, either solicitors' firms or our trustee companies might be appointed as trustees, so this is about managing the risk for business requirements and our insurances.

I noticed that there is a power to apply to the court to get personal relief. I do not know how that would work in practice, but I see it as a way of protecting the trustees—to stop them from avoiding taking action—and I think that their position would be covered, in that event. However, where would the costs ultimately fall?

John McArthur: It would be dangerous always to rely on insurance because, in many cases, it cannot be obtained if litigation is being contemplated: that might be the subject of one of the questions that is asked on the application for insurance. If litigation is being contemplated, the premium might be sky high and unaffordable, or the trust will be uninsurable.

This relates to the balance between trustees and beneficiaries that I talked about earlier: it must be quite clear where that balance lies. The concern that I share with Ross Anderson is that we might find ourselves in a situation in which the trustees are looking down the barrel of a gun on personal liability, but are doing their best for the

trust. That would skew their perception and decision making; a decision could be made by trustees that might not be to the best benefit of all the beneficiaries, but only to those who are agitating via the court action. Therefore, section 65 causes me concern in relation to personal liability.

The Convener: Do you wish to come in, Joseph?

Joseph Slane: I have nothing to add. Like Sandy Lamb, I am not a litigator; it would therefore be difficult for me to comment with any certainty, so I am reluctant to provide a view on that.

The Convener: Okay. Thank you. Mercedes, do you have anything else to ask about?

Mercedes Villalba: I am happy to leave it there, convener. Thank you.

Jeremy Balfour: The Faculty of Advocates and others have said that they think that the power in section 67 to give directions to the court needs to be much wider. I would be interested to get your views on that. Does the power need to be wider, or is the provision about right? Are you happy with the position as it is?

John McArthur: On balance, I think that the power should be wider. Ultimately, if the matter goes to court, the court can draw back what is being asked for; however, if it cannot go any further than what is being asked for, that might, in turn, cause a problem. I therefore agree with the Faculty of Advocates that wider powers here would be better, on the basis that, ultimately, the court will decide. It is all about supervision of the trustees and what they are asking for.

The Convener: Is everyone in agreement?

Ross Anderson: Yes.

Sandy Lamb: Yes.

Caroline Pringle: Yes.

Joseph Slane: Yes.

The Convener: Thank you.

Mercedes Villalba: My question is on section 72, which is about the right of a spouse or civil partner to inherit. It features in part 2, which is on succession law, and various stakeholders, including the Law Society, have said that a distinction should be drawn between spouses or civil partners who were living with the deceased person at the time of their death and spouses or civil partners who had previously separated from the deceased person but who had not divorced or had not had the partnership dissolved.

It would be helpful for the committee to hear the witnesses' views on that policy idea and that distinction. For example, do you agree that, with good drafting of the provision, it is possible to describe and define what is and is not separation? Obviously, we are aware of circumstances in which people are still very much together and in a relationship, even though they might be living separately for reasons outwith their control. One of them might be in prison, say, or working overseas. Is it possible to draft a clear distinction to cover those circumstances and would it be helpful to do so?

10:00

Caroline Pringle: It would be extremely helpful to add in such a distinction, specifically as it relates to people who might be in care or something like that. It would cover those eventualities where the relationship had not broken down but people were no longer living together.

Such a change would be welcome, because it would reflect what people probably think happens if they die without a will. I could also see a negative downside, though, if we did not specifically clarify the position in cases where someone who was estranged from their spouse or civil partner was in line to inherit their estate, if that was not what had been intended at all.

Ross Anderson: Drawing a distinction would be helpful, but I do not think that it would be possible. In practice, if there were a distinction with regard to separation or if there were a timescale for being apart, I can imagine a potential beneficiary saying, "That wasn't the case", "That didn't happen" or "We weren't doing those things." It would be really difficult to draw such a distinction.

The position should be that, if you are separated, you have a separation agreement whereby you forfeit certain rights. As I have said, a distinction would be helpful, but I do not think that it would be possible to create one in a way that would give sufficient clarity.

John McArthur: To pick up on Ross Anderson's point, I would say that if people are cohabiting and there is nothing in writing about it, there is unlikely to be anything in writing when they stop cohabiting. Therefore, if we are to proceed with this, we have to come up with some wording that shows the difference between people who are living together—that is, cohabiting—or who are husband and wife and those who are separated. After all, we have that for tax purposes. If we are going to proceed with this, it should be included.

On another minor point, I am slightly concerned about having succession provisions tacked on to the back of a trust bill, and I wonder whether it might be better to separate them. I know that it is a different point, and that it would mean another bill,

but it just seems that these provisions have been tacked on at the back. Instead of that, it would have been nice to have had a full succession bill that covered everything. That is just an observation—it is not a criticism.

The Convener: I note that others around the room—even the folk sitting behind you—are nodding their heads in agreement.

Caroline Pringle: I completely agree—they are two quite separate matters. A lot of change and consolidation is happening in relation to trusts, and putting the two things together is a little bit confusing.

Joseph Slane: Whatever decision is taken with regard to section 72, greater public awareness of how it will operate in practice for those who do not have a will would be beneficial.

Sandy Lamb: Broadly speaking, I would say that, in my experience, what is being proposed as a change is what the general public thinks is the case anyway, and at the moment, telling them that it is not the case can occasionally produce incredulity.

I broadly agree that the move is to be welcomed, subject to what has been stated about there being some kind of provision for separated spouses. I understand Ross Anderson's position, but I fall more into John McArthur's view that there needs to be some kind of provision to take this issue into account, notwithstanding the difficulty of avoiding the situation of those who, through choice or necessity, are living separately but are still married. There must, as John has said, be some way of putting together something that works, because it will be essential.

The situation of people being separated but not divorced is sufficiently common for one to come across it in practice fairly regularly. It therefore needs to be looked at.

Mercedes Villalba: I want to put you all on the spot and ask how that would work in practice. Would it require a formal separation agreement? The sound cut out slightly when Ross Anderson was speaking, but I thought that I heard him say that it would be helpful but impossible. I am interested in understanding how we might be able to make such a distinction work.

Ross Anderson: I think that my point was that it would be helpful, but I am not sure that it would be possible. The waiving or forfeiture of such rights should come by way of a separation agreement so that there is clarity on that point. In practice, if you tell someone that they are not getting something, because that is what the rule says, they will come at us with ways of trying to skirt it. I am not sure that we could draft something in such a way as to avoid all those possibilities, so a separation agreement would be the preference here.

Sandy Lamb: I do not disagree at all that such a move would be ideal, but if someone who is cohabiting does not have a will and has not thought to regularise matters with a cohabitation agreement, it seems unlikely that they will have a formal separation agreement. Some form of attempt to address the position within the law would therefore be desirable.

The Convener: I am going to put you on the spot, too. Is there any form of wording that you think could be useful?

Sandy Lamb: As a matter of fact, I have something in my bag here. [*Laughter.*]

The Convener: It might be worth while to consider the matter. If you were to think of anything after the meeting, you could always send it in.

John McArthur: It is always dangerous to make up wording on the hoof.

The Convener: No—I am certainly not suggesting that.

John McArthur: We would be happy to come back to the committee with suggested wording, but it might not be acceptable. However, we will apply our minds to it.

Sandy Lamb: I am not saying that this would be the wording but when, outside the committee room, I was talking to John McArthur along with Alan Barr, who will appear in the next panel, I was recalling the old concept of marriage by cohabitation with habit and repute. I see the lawyers in the room grinning as they remember that from their legal studies. It is partly to do with how people know someone. Are they known to their friends and family as being in a relationship, or not? Evidence could be led in that respect.

Jeremy Balfour: Can I just clarify a point in that respect? What if, say, one person from a couple goes into a care home for a long period of time? What happens in practice at the moment? In such cases, is any thought given to putting something in writing? If someone has been in a care home for three or four years but the other person is living at home, how do you deal with that in practice so that people do not lose out?

John McArthur: It depends on the circumstances. In the situation that you have outlined the chances are that the partner who is still in their own home will still be visiting their spouse in the care home regularly. It also comes down to capacity. Is the person in the care home incapable? If so, they cannot decide to separate.

We have to be careful here. It comes down to the intention of the parties and the realities of their

lives, which are different for different people. Nevertheless, the legislation should be able to cope with that, and in not too woolly a fashion.

Jeremy Balfour: The other example that academics raised with us last week related to someone going on to a submarine for a long period of service or going away for a long period of time. Do such issues concern you in practice?

John McArthur: Again, it comes down to the intention of the parties. Clearly, a person who is away on a submarine is there because they have to be. They do not intend to leave their spouse—it is just that they are forced to be there as part of their duties. If the parties do not intend to be separated, that will be fine.

As for the other end of the spectrum and those who have separated—and I go back to Sandy Lamb's point about cohabitation with habit and repute—I think that if their friends had accepted that the parties were no longer partners, cohabitees or spouses, there could be a different interpretation and result.

Jeremy Balfour: That was helpful.

Convener, I appreciate that we probably do not want to rewrite the law of succession on a Tuesday morning, but I think that the bill slightly opens a can of worms. Last week, with the academics, we looked at whether there should be a greater restriction on legal rights in this respect. I understand that, in some continental European countries such as Poland and Germany, people can write into their will clauses that do not to get rid of such rights completely but, certainly, dilute them further than we have.

I appreciate that I am again putting the witnesses on the spot by asking them to comment, but is that area worth pursuing, or have we struck the right balance on legal rights?

Ross Anderson: It is certainly an area for discussion, but I could not say today what the rule should be.

It is beneficial to have clarity. I would draw a comparison with the English position on the matter, which at the moment is very vague. If someone can demonstrate that they were dependent on someone and that that person ought to have made provision for them in respect of the estate, they can make a claim; however, it comes down to the discretion of the court, and it can lead to long, drawn-out and protracted litigation that benefits nobody but lawyers.

The fact that we have clarity is beneficial, but the issue is potentially worth exploring. However, at this stage, none of us—and I realise that I do not speak for my colleagues—could say what those rights should be.

Caroline Pringle: I agree. The reform of legal rights has been mooted for many years now, but no one has come up with the ideal scenario. It is all about balancing the freedom of the testator with obligations to other people, and the things that have been mooted include limiting those rights to children who are under the age of 25 in full-time education—in other words, those who are actually dependent on the testator. I do not know the answer, and today is probably not the day to find it, because it would require a whole bill in itself and a lot to consider.

We must also think about the people whom such changes would affect. Currently, a lot of strategies are put in place under the current arrangements, for example to ensure that farms and landed estates can pass to heirs. The area is very tricky to navigate, although we understand why the principle is there in the first place. In addition, 20 years is a long time during which to claim legal rights.

Sandy Lamb: I echo what Caroline Pringle has said. It is a balance: the testator thinks that they have the entire freedom to deal with their estate as they wish and are outraged to find out that they have to leave a portion of their estate to their children or their spouse while, on the other hand, the beneficiary deserves protection from capricious or abusive treatment from those on whom they are perhaps entitled to depend. Both can be true; it is about balancing the two things.

In a way, Scots law has an advantage, because of the degree of certainty with regard to what anyone is due, and one can advise on that. I am keen to avoid the possibility of leaving things up to the court to decide, as Ross Anderson mentioned. Given our certainty, we know, at least, where we are going in administering an estate. I am not convinced that worrying about six months, a year, two years, five years or 20 years of litigation is in anyone's interests.

The Convener: Mercedes, did you want to come in on anything else?

Mercedes Villalba: No, thank you, convener.

The Convener: We move to part 2 of the bill. The committee has heard suggestions of three policy proposals that could be added to part 2. First, last week, Professor Roderick Paisley suggested creating exceptions to legal rights as they currently apply to protect from disinheritance. Secondly, the Faculty of Advocates and Yvonne Evans suggested amending the current strict six-month time limit that applies to a cohabitant's power to apply to the court for a share of the deceased's estate. Thirdly, Professors Roderick Paisley and George Gretton suggested clarifying that the law does not permit an unlawful killer to be an executor of their victim's estate. What are your

views on those three proposals? Should they be added to part 2? Should any other changes be made to part 2?

10:15

Sandy Lamb: Do you mind the order in which we deal with those?

The Convener: No.

Sandy Lamb: On the cohabitation section, I think that six months is a rather short period and I am sure that most practitioners would agree that it ought to be a bit longer. You might find that strange given that I have just said that you do not want to be waiting too long for litigation, but six months is quite short for such matters, given that claims under section 29 of the Family Law (Scotland) Act 2006 can be made only in the case of intestacy. When there is a cohabitant, I do not think that there is any harm in extending the period. It is not as though it is going to be every estate that one deals with.

More broadly, I would welcome root and branch reform of section 29 of the 2006 act. I point the committee to the comments of Lady Smith and Lord Drummond Young in Kerr v Mangan from 2014, in which they said that it needs to be changed so that there is much more clarity about what the court is to take into account when coming to a decision on section 29 matters.

John McArthur: An unlawful killer not being an executor makes sense. There is nothing worse than being a beneficiary of an estate when the person who has killed your beloved spouse, child or whatever is in charge of administering the estate. That would add insult to injury, quite frankly, so that proposal makes sense.

The Convener: Do you have any views on the other two suggestions?

John McArthur: I always view legal rights as being part of public policy. It has been a part of Scots law for ever, so we as the profession look to you as politicians to say what you think is best. We can come back and say that that might be wrong or that it could be done better, but that is our role and the former is your role. I will leave it at that.

Caroline Pringle: I can understand why the six-month period for cohabitants was included when the legislation was drafted. It ties in with when you are ascertaining the debts of the deceased's estate, so that is probably why the figure was reached. However, as Sandy Lamb said, it probably does not apply in every scenario. It is only in intestacy cases and it will occur relatively rarely in practice. To extend that period in those circumstances would therefore seem to be favourable.

Again, I would want to go one step further, although it is probably too much to cover in the bill. My concern is that, with modern family dynamics and situations, so many more people are cohabiting and not marrying or entering into civil partnerships that to restrict this only to matters of intestacy means that how you legislate for the other side presents a whole other problem. The rights of cohabitants remain very limited.

Joseph Slane: I agree with Caroline Pringle about the six-month timeline. I can see the logic in how that links to ascertaining debts on the estate but, in reality, getting an executry started can take a few months depending on what is happening, particularly with intestacy scenarios and ascertaining whether there is a will. Before you know it, you can be a couple of months down the line. Extending that six-month period would therefore be a good start.

As Caroline Pringle also suggested, reviewing the rights of cohabitants generally in line with modern times is also a good idea. I am not sure whether the bill is the right place for this and the other suggestions. As John McArthur said earlier, it feels as though the succession elements of the bill have been more of an add-on and, if there are to be further changes to succession law, it might be beneficial to have a separate bill for clarity's sake.

Ross Anderson: I largely agree. I hope that I have made my point that far greater discussion is needed on the legal rights position. I also agree with Sandy Lamb about the section 29 applications. Changing from six months to 12 months is really just slightly changing what we have at the moment whereas there needs to be a thorough review of that particular policy, because it is not always appropriate for family life as it is at the moment. There can be a situation where someone's will is from 30 years ago and they have cohabited for 30 years. Ultimately, the cohabitant will miss out, but that is not necessarily what the deceased will have intended. By all means, change the time limit, but that does not address the public policy point, which is what the general public want and would expect in those circumstances.

As far as unlawful killers are concerned, it is simply common sense that that does not apply.

The Convener: Do members have any other questions for the panel? As they do not, I thank the witnesses for their helpful evidence this morning. The committee may follow up by letter with additional questions stemming from what has been discussed in the evidence session, and there are a couple of points that the witnesses will come back to us on. That should not be about redrafting a whole section, but any potential hints would be useful.

Would the witnesses like to highlight anything that has not been covered or to add anything to the record?

Ross Anderson: To come back to Caroline Pringle's point, the definition of "beneficiary" could be clearer. The types of trust that my firm primarily deals with are discretionary trusts in which the trustees in effect have unfettered discretion as to how they benefit those beneficiaries. We have had a number of cases where there are discretionary/potential beneficiaries seeking to disrupt the actions of the trustees or the distribution of the trust estate. The powers that are contained in the bill, depending on how it is interpreted, potentially give those beneficiaries powers that the truster may not have intended, so greater clarity around the rights of purely discretionary beneficiaries would be helpful.

Sandy Lamb: Section 8 talks about the removal of a trustee by beneficiaries. Where all beneficiaries are of age, are capable and

"are absolutely entitled to the trust property",

they can remove a trustee. I wonder whether there should there be the ability to add a further trustee if the property needs to be administered and remains in the name of trustees. Section 68 allows completion of title by a beneficiary absolutely entitled to property

"title to which has been taken in the name of a trustee who has died or become incapable without having executed a conveyance".

However, that is not the same as the trustees having been removed by a beneficiary under section 8. If we are going to look at tying up the ability to move property from the name of trustees to beneficiaries, which, presumably is the idea of section 8, does that need to be tied together?

John McArthur: From my perspective, section 40 needs to be looked at. I am slightly concerned. Section 40 particularly deals with the sale of land and the disposition being signed by trustees, which is to be

"executed by a majority of such of the body of trustees as are both capable and traceable."

We will quite rightly face questions from conveyancers, on the other side, acting for people who are buying property. They will say, "Well, prove that the other trustees shouldn't be signing."

Certainly under the existing Trusts (Scotland) Act 1921, the majority of trustees sign, so all the problems are sorted out beforehand; if you have an incapable or untraceable trustee, you sort that out before you sell the land, so at the point of selling there is, in general, a clean decision-making process. There may be advantages, but on balance the other side who are buying will want to make sure that they have a good title, so if you then have to prove that the trustee is incapable or untraceable, that creates more problems than section 40 solves.

Caroline Pringle: I was going to mention accumulation periods and the fact that they will not have retrospective effect. In the majority of my scenarios, it would be welcome to many people who administer trusts if they had retrospective effect, but I would completely understand if it was specifically stipulated in the document at the time. It would give another degree of flexibility to be able to reinvest that sum. That would depend on the type of trust and whether it is subject to the vesting of beneficiaries and things like that, but, where there is a fully discretionary trust, I do not think that we would need to limit that to trusts that come into existence after the passing of the act.

John McArthur: It is surprising that accumulation does not also apply to charities. There might be a situation in which a charity has been going for 21 years and has no power to accumulate. If the charity does not spend all its money one year, the trustees might think that it would be useful to capitalise that and to reinvest it to provide for the future. I am slightly surprised that the accumulation period has not also been abolished for charities, because that would ease charity administration.

Joseph Slane: I agree with what John McArthur and Caroline Pringle said about the accumulation period. It would be beneficial for that to have retrospective effect, particularly when the trust deed itself has wording that is flexible enough to account for changes in lawful accumulation periods. I am also not quite sure why it does not apply to charities. That could be looked at.

Other than that, there are some small drafting and word-specific tweaks that do not merit being discussed in great depth in this forum. They are in our written submission and there will be time to flesh them out in more detail.

I do not think that there is anything glaringly missing that could be added to the bill, except, perhaps, the duty to account to beneficiaries and a note of what information they should receive, which we talked about earlier. This is an opportune time to clarify the duty to provide accounting, specifically the duty to provide trust accounts to beneficiaries. The bill could clarify the parameters of that duty, which could be done either in sections 25 and 26 or elsewhere. That could be added.

The Convener: That is helpful; thank you.

10:26

Meeting suspended.

10:31

On resuming—

The Convener: I welcome our second panel of witnesses: Alan Barr, who is the convener of the trusts and succession law sub-committee of the Law Society of Scotland; Laura Dunlop KC, who is the convener of the law reform committee of the Faculty of Advocates; Sarah-Jane Macdonald, who is a committee member of STEP Scotland; and Ken Swinton, who is a council member of the Scottish Law Agents Society.

I ask Jeremy Balfour whether he has anything to declare.

Jeremy Balfour: I declared my interests before the previous panel of witnesses.

The Convener: I note again that Mercedes Villalba joins us online—she will join us shortly—and that we have received apologies from Oliver Mundell.

I remind the panellists not to worry about turning on microphones during the evidence session as those are controlled by broadcasting. If you would like to come in on a question, please raise your hand or indicate to the clerks. There is no need to answer every question—simply indicate when a question is not for you to respond to. However, please feel free to follow up in writing on any question after the meeting, if you wish.

I will open the questioning. On 2 May, the Scottish Law Commission said to the committee that it is very important that trust law reforms ultimately apply to pension trusts as well. The current plan is for that to have effect through a section 104 order that is agreed by the Scottish and United Kingdom Governments. Do you share the view that the bill should apply to pension trusts in whole or in part? What would the practical impact be for you if there was a gap between the legislation coming into force for most trusts and it then coming into force for pension trusts?

Alan Barr (Law Society of Scotland): It would not be a disaster if there was a gap.

It is important to distinguish between two types of pension trust. The ones that are excluded by the definition in the bill are pension schemes that are established under trust, as opposed to private trusts that contain elements of pension rights, which will be affected by the bill—if it becomes an act—in the normal way, as with other private trusts.

Pension scheme trusts are a large and specialised area. I do not think that it would be a disaster if the bill does not affect such trusts, as I have said. The companies that run them are big, bruising and able to look after themselves, and I suspect that the vast majority of what would be covered as a default by the bill is already covered in such pension scheme trusts. As a matter of consistency, trusts under Scots law will include pension scheme trusts, so they should be covered, but I do not think that it would be absolutely awful if they were not or, indeed, if there was a delay in that coverage happening.

The Convener: Thank you.

Sarah-Jane Macdonald (STEP Scotland): I think that I agree. A distinction is drawn between pension scheme trusts and general trusts that deal with things such as pension pay-outs. For trust registration and anti-money laundering rules that we have, we certainly have registered under the Finance Act 2004 various scheme arrangements that are treated as trusts but are not necessarily trusts in the classic sense. As Alan Barr said, they will have their own rules and regulations. I do not tend to deal with those; I tend to deal more with the classic type of trusts.

The main driver is to get trust law reform. As colleagues said earlier, having the bill dealing with trusts and then dealing with pensions separately is not necessarily a deal breaker.

Laura Dunlop KC (Faculty of Advocates): I would defer to the others on that. The Faculty of Advocates is not involved in the technicalities of those matters, and my colleagues have much more experience of them than I have.

Ken Swinton (Scottish Law Agents Society): I have nothing to add. The last time that I was involved in a pension scheme trust was in the 1970s, so I am well out of touch on them.

The Convener: Fair enough. Thank you.

Jeremy Balfour: Good morning to the panel. You have the advantage of knowing what questions we asked the previous panel. I hope that we can make progress.

You will be aware that I said to the previous panel that the bill has some new powers for sheriff courts, but the main powers predominantly still lie in the Court of Session. Do you have a view on that? I will start with Laura Dunlop, on behalf of the Faculty of Advocates.

Laura Dunlop: I associate myself with the comments that Lord Drummond Young made when he gave evidence. I would not see the Faculty of Advocates differing from what he said about the Court of Session. However, there are plainly pragmatic reasons for having some powers capable of being exercised in the sheriff courts.

The only point that struck me when I was preparing for this session was a drafting point, but it is probably worth mentioning it here. I know that the committee is interested in the provision relating to the expenses of litigation in which trusts

are involved. I listened to the discussion with the previous panel about that. It struck me that the definition of "the court" in section 74 of the bill does not include section 65, which is the new litigation expenses section. I am not sure whether that has been mentioned. I would have thought that, if there is to be a highly nuanced approach to the expenses of litigation, we would want that section to cover litigation involving trusts in the sheriff courts as well as in the Court of Session. I wondered whether it might be a good idea to include section 65 in the definition of "the court" in section 74.

Jeremy Balfour: That is helpful.

Laura Dunlop: I apologise if that has been mentioned already, but that was something that struck me. There may be a reason why that is not included, but I could not think what that would be.

Jeremy Balfour: I do not think that that has been raised before, so that is helpful. We can pursue that.

Do others have a view on that issue?

Sarah-Jane Macdonald: One of the key things that struck me when I was reading and discussing the bill with some of our colleagues related to the ability to obtain a power from the court. Historically, that has been done with the sheriff court rather than the Court of Session. We come across that a lot in practice. If someone does not have a power in a trust deed, they can request it under the 1921 act. The request that I see most often relates to wills that say, "I direct you to hold this house during the lifetime of X." A person would not have the power to sell without going to court, as that would be at variance with the trust deed. Currently, that could be done at a sheriff court, but the bill would put that into the Court of Session.

A point that my colleagues made earlier was that having a choice between the Court of Session and the sheriff court would be useful. It was also said earlier that there is not much of a difference in costs between the two these days. Sometimes people will want a Court of Session case, perhaps to have the more learned judges in the area, but, for ease, sometimes it is swifter to get things done through the sheriff court. I have certainly seen reasons for going to the sheriff court in the scenario of wanting to sell quickly. It would be really useful to have the choice, particularly in such circumstances.

Jeremy Balfour: I will move us on again. A trustee, as you will be aware, does not get to participate in trust decisions under section 12 when they are incapable. Trustees can also remove a fellow trustee from their role on the basis that the trustee is incapable. The risk of abuse of those provisions has been highlighted by the Law Society and other legal stakeholders. The academics who appeared before the committee last week were more relaxed about that possible risk. From more of a practitioner's perspective, are you concerned about that or happy with it? Is there anything that you would want to add to the bill on that?

Alan Barr: The Law Society was among those who were concerned. There is a broader concern that the definition of "incapable", which will perhaps come up again later, is tied to but is not exactly the same as—it certainly does not have the same nuances—the one in the Adults with Incapacity (Scotland) Act 2000. It would be good if it were more closely tied. Picking up on a point that was made earlier, future proofing it for further work that is going on around that definition would be extremely helpful.

There are dangers, particularly in the removal of a trustee deemed by his or her fellow trustees to be incapable, because the bill simply says that if they are incapable other trustees can remove them. That is dangerous because those wishing to remove them have a vested interest in the trust and therefore have a vested interest in defining somebody as incapable. They have the benefit of a definition, but one that is, by its very nature, subjective to a significant extent. The protection for the alleged incapable person seems to me to be somewhat limited, so further thought is needed on that.

I know that Adrian Ward, who may well have written to the committee separately, has concerns about the definition of "incapable"; notably, that it is a kind of free-floating, in limbo definition, whereas in the law more generally on incapacity, it is a question of "incapable of what?". Incapacity is a spectrum rather than an on-off switch, and that needs to be taken account of. In other words, it would need to be incapacity in relation to acting as a trustee, or even to some parts of acting as a trustee. Therefore, I think that further work is required on definition. That may well be through other legislative means that are happening anyway, but that will need to be tied back to this change, because incapacity features on one or two occasions in the bill.

Sarah-Jane Macdonald: I just want to pick up on a couple of things. When I was speaking to various practitioners, one of the issues that came up around the definition of "incapable" was whether it should be in the bill or, as was suggested earlier, refer to the Adults with Incapacity (Scotland) Act 2000. One of suggestions that was made was that, if you tie it to the 2000 act, you are suggesting that Scots law applies to trustees of Scottish trusts even if they are not Scots law jurisdiction persons. That can cause its own problems. Having the definition in

the bill at least means that we are saying that that is the definition of "incapable" that applies to trustees of Scottish trusts.

Otherwise, you would need to say that it applies if the person is incapable in terms of the 2000 act, the Mental Capacity Act 2005 that applies in England and Wales, the Mental Capacity Act (Northern Ireland) 2016, or the act that applies in their own jurisdiction. If you go that far, you will also have to ask what the person's jurisdiction is and whether they are incapable in that jurisdiction, meaning that you would need to get an opinion on law in that jurisdiction, which creates more barriers. If a definition is included in the bill and that is the definition to be used for a Scottish trustee, that circumvents those issues. You can future proof it by reference to external legislation, but you will add barriers to defining what mental capacity is if you do that. There are other practical hoops that you have to jump through.

However, I definitely share Alan Barr's concerns and the Law Society's concerns around the ability for that provision to be abused. The point is that there is a very subjective view as to what incapacity is. The example that I have come across in practice and discussed with various other people is where someone has a mental health issue or similar that gives them difficulties in making decisions: would that prohibit them from being a trustee?

If they are excluded as a trustee on that basis, there is a risk of discrimination claims. They might say, "I have been discriminated against because I have a mental health problem"—or another health issue—"and I have been excluded on that basis". There are also other risks. It could be used in the wrong way in contentious situations. For example, if there are two warring family members, perhaps siblings, and one person thinks that their sibling is incapable for one reason or another, that person could make some sort of minute of trustees that says, "I am now sole trustee because my sibling is incapable". They could then appoint the whole trust fund to members of their family and completely exclude their sibling. There is a lot of risk of abuse there, not just around excluding that person, which they might take issue with, but around having the trust fund paid out to other parties.

10:45

It would be really useful to have some form of protection in the bill. That might just be a requirement to intimate to the person that they are being removed so that they know that that is happening, and if they want to take issue with that or argue it, they can take legal advice on that. At the moment, there is not even a requirement to tell that person that they are being removed. There is nothing in the bill to make that a necessity. The other trustee could remove them, crack on, wind up the trust and the person would never even know that it had happened. That just seems a very risky thing, particularly because the remedy for the other beneficiaries who have potentially lost out would be really difficult to achieve—it would be hard to undo all that.

Laura Dunlop: I wanted to say something about that area, but I am not sure whether we are taking things out of order. Is there an intention to come back to the issue or should I just go for it now that we have started on it?

The Convener: You may as well go ahead.

Laura Dunlop: I was a commissioner at the Scottish Law Commission when the report on trusts was coming to a conclusion. I remember the discussions around this. I was in favour of moving away from the current definition of "incapable" in Scots law, which, as everyone knows, is found in the two pieces of mental health legislation: the Adults with Incapacity (Scotland) Act 2000 and the Mental Health (Care and Treatment) (Scotland) Act 2003.

So far, in Scots law, we have had just one definition of "incapable" and one definition of "mental disorder". There is a nesting phenomenon: someone is incapable, as a result of mental disorder. Both terms are specifically defined and we currently work with one definition across all Scots law. It would be very unusual to have different definitions of the same term in different areas of law, although that happens occasionally. This might be an area in which we could have a different definition of incapacity.

The Law Commission took the then-current definition in English law, in the Mental Health Act 2007, and slightly reworked it—it was not quite copied, but the process was perhaps the opposite of putting a kilt on something. We also dropped the reference to "acting"; the reference in the bill to what someone is incapable of is all decision related and does not add that a person is incapable of acting.

As everyone knows, there is a lot of work going on in relation to the reform of mental health and incapacity law. Last week, I was at a meeting to discuss where that is headed. The bill team is liaising with people who are knowledgeable about that project.

It is certainly possible for the bill to have a definition for the time being and for that definition to be changed as part of the general reform of mental health and incapacity law. There are currently sensitivities around what is included and what is not included in the definition of "mental disorder" in the 2003 act. It is delicate and sensitive work. We talked about future proofing,

and making it flexible would seem to me to be a very important goal. However, we would need something in place for the time being.

Finally, I am not concerned about discrimination claims because, under the Equality Act 2010, there are only claims in relation to specific areas of activity; there is no general prohibition on taking a cognitive impairment into account. There are some situations in which it is necessary to take cognitive impairment into account, but that does not necessarily give rise to any claim for discrimination.

Jeremy Balfour: I will pick up on a couple of those issues. Someone on the first panel made a suggestion about getting medical evidence. Do you think that a requirement to provide medical evidence would be helpful in giving protection to a trustee who has been challenged on that?

Laura Dunlop: Medical evidence is almost always helpful. There would be related questions about what kind of medic you are talking about. There is increasing awareness that it is not only psychiatrists who can give useful medical evidence and you would want to consider whether psychologists could also be involved.

My other comment is that this should not be a question of solely medical evidence. Other professionals and people who are involved can give cogent evidence. I work with the Mental Health Tribunal for Scotland, which frequently receives information from mental health officers, who are specialist social workers. That information is also valuable in assessing capacity.

Alan Barr: Medical evidence is important along with other evidence and may give some comfort, but I entirely agree that it must not be the binding thing, nor is it so in relation to other legal acts that exist now. Capacity is not an on/off switch; we are talking about capacity in relation to a trust. When I draw up a will for someone, it is for me to make a judgment—perhaps after input from medical evidence—about whether the person is capable of understanding the legal act for which I am responsible for providing what you might call the ammunition.

Medical evidence is helpful, but it should not be required and must not, in the end, be binding.

Sarah-Jane Macdonald: We must always keep in mind the need to be practical. Things need to be done and moved on. The reason for having this in the bill was to stop people going to court to remove someone just because of incapacity. In a situation where there are two trustees and one is incapable because of dementia or something like that and is unable to understand or sign documents, going to court to remove that trustee in order to be able to sell a house and to leave one trustee who is able to action that adds a lot of cost. It is key to be practical.

As Alan Barr said, there should not be a requirement to get medical evidence. In cases where it is clear that a trustee is incapable and there is a need to act quickly to get a house on the market, things have to be done swiftly. Requiring a mental health officer's report, or something like that, could add months to the timescale for getting things done.

In probably 90 per cent of scenarios, there is no issue when a trustee is incapable. All parties will know what is happening and will be able to proceed. The cases where there is an opportunity for abuse, and where there might be problems, are few and far between. That is why having a requirement to intimate the intention to remove a trustee would allow that person to argue against that if they want to, but, if they do not want to, things can proceed as normal. That would avoid the requirements for court or for medical evidence that might add delays or create barriers to being able to progress the trust and to do what is necessary.

The Convener: I have a supplementary question for Alan Barr. You indicated that there is a spectrum of incapacity and that trusts might look at excluding people from specific aspects of decision making or from specific aspects of the trust. How easy or difficult would it be to do that?

Alan Barr: If I said that, I apologise. I did not intend to indicate that people should be excluded from specific aspects. All I was saying is that people's capacity for different things that they may do will vary considerably. It may well be that people are capable of managing their own affairs but not the affairs of a trust, with the nuances that that brings and, with it, the interests of third parties. Of course, you are right that, within a trust and in acting in the role of a trustee, there will be things that people are capable of doing and things that they are not capable of doing. That spectrum needs to be taken into account—in other words, capacity needs to be judged on the terms of the juridical or legal act that is intended to be carried out.

Ken Swinton: A person's incapability may not be permanent, so removing a trustee may be a remedy that is a step too far in a situation where there is a prospect that they could recover their capacity following a stroke, for example.

Sarah-Jane Macdonald: Section 12 deals with that, in that it means that a quorum for trustees to make decisions means a majority of those who have capacity. There is not a requirement to remove someone if they do not have capacity for a specific period of time. As Ken Swinton said, I think that removing a trustee may be a step too far

if there is a prospect of them having capacity again in the future. Before we move on, and while we are talking about incapacity, section 5, which deals with the resignation of trustees, says that a trustee cannot resign if they are the sole trustee. I wonder whether that should refer to the sole capable trustee in order to avoid scenarios in which someone resigns and leaves trustees who are incapable, which would mean that the trust cannot be administered.

Jeremy Balfour: How does that then relate—or does it relate at all—to the Charities (Regulation and Administration) (Scotland) Bill, under which the Office of the Scottish Charity Regulator can appoint interim trustees if no trustees are capable of working? If a trustee needed to step down and they were incapable of doing that, would OSCR not temporarily appoint an interim trustee to keep the trust going?

Sarah-Jane Macdonald: I am talking about non-charitable trusts. Section 8 has remedies for incapable trustees to be removed by the court or other beneficiaries in certain situations, if the beneficiary is invested in the trust. However, it is my understanding that there would not be an interim trustee in that situation.

Alan Barr: I think that the big difference is that, with charitable trustees, a third-party body such as OSCR is automatically involved in supervision, whereas in more general trusts, there is only the court or the trustees. There is no third-party supervisor that could appoint an interim trustee.

Mercedes Villalba: We have a similar set of questions for this panel as we had for the previous panel. Sections 16 and 17 relate to trustees' powers of investment. Some of the witnesses will have heard me asking a question about that. Both the Law Society and the academic Yvonne Evans, who we heard from last week, have suggested that, in view of Scotland's increasing emphasis on net zero, sections 16 and 17 could be amended to allow trusts to adopt environmentally friendly investment policies, particularly when those investments might underperform other investments.

As I asked the previous panel, it would be helpful for the committee to hear your views on that idea. Do you support it in principle and do you think that sections 16 and 17 could be amended or tweaked in order to make it clearer to trustees that they have the power to make those sorts of investments?

Alan Barr: The Law Society deliberately said that that would be useful as a confirmation. However, I think that that provision is in the current law and in the bill. After all, section 16 starts by saying:

"The trustees have the power to make any kind of investment of trust property."

That is a pretty broad start. The power is then governed by the trust deed as a kind of fallback or possible restriction. Therefore, I think that the power is there, anyway.

11:00

Possibly in contrast to some of my colleagues, I think that it is already the case that trustees do not have to maximise financial returns. There can be other benefits from purposes, and there is no absolute duty to maximise financial returns. If we could all do that, we would all be marvellous financial advisers, but maximisation is not often the case. Indeed, maximum investment in what might be described as sin investments, such as those in gambling, armaments and tobacco, might well have produced much better returns than others over the years, but I do not think that anybody is suggesting that trustees in particular are always driven to maximise in that way.

As I said, the power is there anyway. As some of my colleagues said earlier, if environmental or climate change-driven investments are thought to be good public policy, it might be welcome that trustees should not be exposed to any form of challenge or criticism on the basis of such investments. I personally think that that would be a step too far and is unnecessary, and that such policies would be defensible in most cases anyway within trusts. However, as a confirmation, if that approach is thought to be good public policy, perhaps the bill would be a good place to put it.

Mercedes Villalba: There have been different views, which makes me question whether there should be clarification or an explicit line in the bill to say that that approach is perfectly permissible and within the powers.

Laura Dunlop: I cannot see a downside to doing that. The only basis on which I can contribute to the discussion is wearing my hat as a trustee of one or two trusts. I agree with Alan Barr that, in practice, the power already exists, to the extent that trustees can regard certain types of investment as not aligning with the nature of the trust of which they are trustees and therefore not appropriate—Alan mentioned gambling and so on. This is not anything that is part of my trusteeship but, for example, with a trust for people who had suffered through gambling addiction or similar issues, you would not expect the trustees to invest in betting companies, no matter how high the expectation of gain might be. Therefore, in practice, people are already doing that, and the expectation of financial gain is not the sole consideration. However, if it were thought to be

helpful to have some kind of clarification that that is permissible, I cannot see a drawback to that.

I suppose that the only counterbalancing point is that you would not want to go so far as saying that the investment decisions can reflect the personal values of the trustees—that is probably where the line needs to be drawn, so that there are not investment policies about things that the trustees are interested in.

Sarah-Jane Macdonald: I was just going to say the same thing. I agree, as long as the approach is not driven by the trustees' personal views but is based on financial advice—trustees are required to take advice—and on what they think is best for the trust fund. As Alan Barr said, that is permitted in the bill already.

There are different ways of looking at ESG-type investments. There is the sort of exclusionary view of saying, "We're not going to invest in gambling, oil, tobacco and that type of thing," but a lot of people take the view that it is more of an activist role—they want to invest in the bad companies, if you will, and try to drive policy changes within them. Different people have different views on what ESG is, so a blanket approach is difficult—it is not one size fits all.

I agree, as long as the approach taken is what is best for the trust fund, whichever route it takes with ESG. As Alan Barr said, that is permissible at the moment. Also, if it is put into the trust deed at the outset that that sort of thing can be done, that will overrule what is in the bill to an extent, anyway. We currently have the ability to say in a trust deed that trustees can invest in a single investment, which the bill would not necessarily allow. There is flexibility in that regard as things stand.

Ken Swinton: I do not think that there is any need to include anything on that; I agree with Alan Barr that section 16(1) is sufficiently broad to allow investment. Given that we are looking back to the 1921 act, we are thinking here about a piece of legislation that will last for perhaps another 100 years. If we start saying that we should include something that relates to policy now, it might look a little odd to our successors in 20, 30 or 50 years' time.

As Laura Dunlop said, there is in fact case law on trustees acting in their own interests in refusing to invest in particular areas but, equally, it is competent—and regular, I think—to give instructions to create a policy as to how you wish to invest when you are instructing advisers. I do not think that there is a problem with having ESG attitudes built into your policy, and specifying no armaments, alcohol or gambling. That is happening already—there is not an issue in that respect, and there is no need to include anything on it in the bill.

Mercedes Villalba: As I understood it, the proposal was not to instruct but to include a clarification, for the avoidance of doubt. Are you saying that you do not think that that would be necessary, or that it would be unhelpful if it was included in the bill?

Ken Swinton: I think that it is completely unnecessary. I do not know how helpful it would be, because trustees can establish their own policies and, in my experience, they are thinking about those things now.

Laura Dunlop: From listening to Ken Swinton, I note that there is a general drafting problem. If you have an apparently unlimited permission to do something, and you go on to say, "And you can do the following things in particular," that necessarily creates uncertainty as to all the stuff that is not specified. There is no such thing as a free extra clause—you create ripples. That might be my only reservation.

Mercedes Villalba: I suppose the argument is that, because it is such a crucial part of future life on the planet, it warrants specification, but I can see your point.

I will hand back to the convener.

The Convener: We move to section 19, on nominees. As I indicated to the previous panel, the law firm CMS is concerned that section 19, on nominees, as drafted, may not go far enough. Specifically, the firm said that "doubt" would remain as to whether trustees can use, first, nominee custody structures and, secondly, sub-custodians. What are the panel members' views on both those aspects, which currently fall under the scope of section 19, and on the risks that CMS has identified?

Ken Swinton: I think that section 19 is drafted in a satisfactory way; I do not see the particular problem there. I must say that I had not considered the point about sub-custodians, but I do not see that there is anything wrong with the drafting.

Sarah-Jane Macdonald: I think that the problem, as John McArthur identified in the previous session, concerns the definition of "person". Although we could say that a corporate perhaps has legal personality, a trust does not have separate legal personality in Scotland. If you are a nominee or something like that, there is a different structure. I think having some form of definition would be useful because, although "person" could potentially be taken to mean a corporate, I do not think that it could mean a trust.

Laura Dunlop: I am going to defer to my colleagues on that question.

Alan Barr: I agree with Ken Swinton that it is okay. In response to Sarah-Jane Macdonald's point, I think that "person" would include a legal person, and therefore a corporation. Although a trust is not a person, trustees are by definition a person, and it is the trustees who are appointed, not the trust. There may be nominal gaps in terminology, but it is only in terminology. I certainly think that "person" would extend to any delegated agent in legal entity form. If confirmation was thought to be necessary, perhaps that would not do any harm.

The problem in that kind of thing, as Laura Dunlop has adverted to, is that in listing the things that are, there is a danger of excluding the things that are not. I am quite happy with "person", as it stands.

The only thing to mention about the section more generally is that one has to be clear about trustees delegating their powers as trustees. The difference between administrative and dispositive powers was adverted to in the earlier session. Although investment management is a classic example—most non-specialist trustees are, quite rightly, not able to carry out their own investment management and therefore not only can, but should, delegate it to those who are more capable of doing so—trustees must not delegate their trustee duties entirely. As long as that is clear, the section as it stands is reasonable.

Sarah-Jane Macdonald: There is a distinction between sections 18 and 19. Section 19 relates to nominees and the delegation to nominees, whereas Alan Barr was alluding to the delegation to agents, which is under section 18. There needs to be some consideration about what can be delegated in those situations.

Under section 18(5), certain things are excluded from being delegated, including the decision as to where a trust fund should go. The start of that subsection provides for "a trust deed" to say "otherwise", which would mean that a truster could say that trustees can actually delegate all powers, including the ones that are excluded in the bill. In that situation, you could potentially see scenarios where trustees could delegate absolutely every power under their position as trustee, which seems to go a lot further than what the bill intends.

Bill Kidd: I move to sections 25 and 26 of the bill. Section 25 requires trustees to tell a beneficiary that they are a beneficiary—that did not really surprise me, but there you go—and to give all the trustees' names and correspondence details. Under section 25, those duties are mandatory for certain types of beneficiaries, while trustees have some discretion as to what information is provided for potential beneficiaries.

Section 26 covers the information that must be made available to beneficiaries. A trust deed can override section 26, but a court can later review the reasonableness of that override. It has been said in various correspondence and by the previous panel that trustees' duties to provide information to beneficiaries and potential beneficiaries under those sections of the bill are too onerous. Do you have any ideas about whether that is the case? Would you amend the sections to address those concerns? Would anyone who is dead interested in the matter like to go first? [*Laughter*.]

Ken Swinton: I will go first on this occasion. A fully discretionary trust might have three generations of potential beneficiaries specified in it. Telling a five-year-old that they are a beneficiary does not particularly add to the situation, so I can see the duties being quite onerous and cascading quite quickly to a significant number of people. However, I do not know how one controls that. It is surely best practice to let potential beneficiaries know that they are potential beneficiaries, but how far do you go when there are long-stop beneficiaries who might never inherit? It is difficult to strike any sort of balance with that question. It is good practice to tell beneficiaries and to give information, but it is difficult to decide how much information to give.

Laura Dunlop: I remember being anxious as I listened to Law Commission discussions on that point. I was already a trustee of various trusts by then and I was wondering how it would impact me and what duties I would have—I remember the discussion from that self-interested perspective.

I refer to what the Faculty of Advocates said about this in its response to the consultation. I hear what colleagues are saying about good practice, and the faculty said that it is probably not as alarming as it might seem because of the absence of a sanction. The final point that the faculty made was about the need to publicise the duty and perhaps provide guidance or something to draw attention to the duties that will be imposed on trustees.

11:15

Alan Barr: It is great that we are getting something because Scots law has absolutely been lacking any clear guidance about what you have to tell, want to tell and need to tell actual or potential beneficiaries. To have something will therefore be an improvement on where we are now.

That said, there are potential difficulties with the provision, both small and large. Some of the smaller difficulties are described in our written submission and we will leave them there. The large difficulty is with the potential beneficiary

situation. There are many trusts in which the potential beneficiaries are the entirety of the world's population because they include anybody who is nominated by the truster after the trust has been set up. Therefore, there must be something to discourage people going on fishing expeditions to ask whether they are potential beneficiaries, because they are; everyone in this room would be a beneficiary if the truster chose to nominate them. Of course, that is not a real potential beneficiary.

Even in family trusts, there are often real but unlikely provisions for fallbacks should generations die out. They can go up the family tree and then back down again when the clear intention is that the actual beneficiaries are immediate family across the family tree, such as siblings, spouses and civil partners or, more commonly, down the family tree, which means children and grandchildren. The core beneficiaries—if I can invent a term—are therefore very clear but the potential beneficiary class is necessarily very wide. The potential beneficiary situation will develop in that it will not be unreasonable for trustees to refuse to supply information to people on fishing expeditions. I note that there is also provision for charging for supplying such information, which would also be useful as a discouragement to fishing expeditions.

As I say, the bill is a very good start for what I call the core beneficiaries, but there is one tiny drafting point. Section 25(2)(a) refers to

"a beneficiary who has a vested interest in the trust property".

I am not sure, however, that beneficiaries ever have interests in the trust property as such. The definition of beneficiary later in the bill makes it clear that they are beneficiaries as against trustees, as it were, but they do not have rights in the trust property. Perhaps that should be clarified. There is a better property lawyer than me on the panel and I hope that they will agree with that point.

Sarah-Jane Macdonald: The only other point in this section that I thought was interesting is that nothing has been put in around the duty to account. Trustees' duty to account to beneficiaries is imprescriptible under the Prescription and Limitation (Scotland) Act 1973, which is a separate piece of legislation. However, there has been various case law about what needs to be provided to beneficiaries along with the accounting and whether any vouching needs to be given or anything like that.

I know that various suggestions were made in the consultation that, in addition to the accounts, the vouching behind the accounts would need to be given for a beneficiary to be able to meaningfully understand the account effectively and to know whether there was anything in it that caused them concern. The duty to provide an account is an absolute duty, but I am asking whether there is a missed opportunity here to clarify what a trustee needs to give a beneficiary.

Alan Barr: I have a couple of other points to add that go to the detail, because this is very new law. If the beneficiary is under the age of 16, the duty is to inform their parent or guardian but it is not made clear whether that changes on the person's 16th birthday and that they are also meant to be informed directly. I have absolutely no doubt that, in some cases, the parents or guardians do not tell their under 16-year-olds or even their 16-year-olds that they are beneficiaries in trusts, so the trustees might be worried that they do not know at that point.

The second point is much more general, in that, as far as I can see, the provision is retrospective in the sense that it applies to existing trusts. Perhaps it also needs to be made clear—this may be explanatory notes territory rather than legislative territory—that, when the bill becomes law, trustees are not obliged to tell all beneficiaries throughout Scotland that they are beneficiaries, if the beneficiaries already know that they are beneficiaries and are aware of their rights under the existing trusts.

Bill Kidd: Following on the back of that, I will ask about the position on section 61—the alteration of trust purposes—when it comes to family trusts. Section 61 gives a power to the beneficiaries and others to apply to the court to alter the trust purposes of a family trust, and sets out the default position that the power cannot be used for 25 years.

You might have heard the previous panel speak somewhat about that. Given that the views on the 25-year restriction have been mixed, as I said, and that it is a default power only, are you satisfied that retaining the 25-year restriction in the bill is the right policy decision?

Sarah-Jane Macdonald: There is a bigger issue: the truster also has to be dead. If a truster sets up a trust when they are 25 and they live to be 100, the period is 75 years—which is much longer than 25—so that possibly needs to come out as well.

Bill Kidd: That is another angle. Thank you very much.

Laura Dunlop: In your list, earlier, you included the Faculty of Advocates as not being in favour of the 25-year period. I did not choose the wording in our response to the call for views, but I was amused when I saw that we had said:

"the imposition of such a lengthy period of 25 years is notable."

That constitutes the faculty sitting on the fence—which we try to do about such policy matters—so I am not going to say that it is too long, too short or whatever. It is a policy point. There are nearly 500 advocates, who might have differing views.

Bill Kidd: That is an interesting angle as well.

Ken Swinton: When our committee discussed the issue, there was an even split on whether 25 years was appropriate.

Bill Kidd: There is a differentiation in view, obviously.

Ken Swinton: If there has been a material change, is 25 years too long—and is it too easy to call something "a material change" and therefore bring an action? What is a material change? The previous panel looked at a change in the tax regime, which is obvious, but there could be a change in a beneficiary's situation—for example, if they had become incapable and a liferent had become irrelevant when they had moved into supported accommodation. That could happen at any stage, which would argue for a shorter period.

It is fairly evenly balanced as to whether 25 years is appropriate to give effect to the truster's wishes. Ten years may be equally appropriate. It is a policy issue rather than a legal issue.

Alan Barr: Twenty-five years is way too long, because of the other protections—for example, there has to be a material change. I see no need for a period of much length at all, if there is a sufficient change and the issue is under the supervision of the court.

I suspect that the point about the truster being dead might involve some kind of misapprehension. The point of the truster being dead is that he or she is no longer in control of the situation—but he or she was not in control anyway. Once the truster has created their trust, it may well be that, if a material change in circumstances occurs, they can do nothing about the trust. They might have thought that they could, but they cannot. Therefore, again, that should not be a relevant consideration.

If that power is to exist, the shorter the period is, the better. I do not think that it will be used frivolously. It would be expensive to do. It would not be done for minor things. However, it is capable of coping not just with material changes in circumstances but, to some extent, with "Oh, I hadn't thought of that" and "Look, that circumstance has occurred; please can we now change it?" That is not a bad thing, under the supervision of the court.

Bill Kidd: There is a range of disagreement and agreement. The issue is wide ranging and is one of policy, rather than being one for the lawyers to sort out. The lawyers can argue about it later, but we will argue about it first.

I have one last thing to talk about, which is the domicile of the trust and where it is based. The academic panel of Professor Paisley, Professor Gretton and Yvonne Evans were all pretty much agreed that a protector should not be able to move the permanent residence of a trust outside Scotland. On that basis, and in relation to section 49 of the bill, were the academics correct when they said that permitting the protector of a trust to move the domicile of a trust outside Scotland was undesirable in policy terms? What are your views on whether protectors should be allowed to do that?

Alan Barr: It is a broader point. Powers to change the domicile or residence of the trust by the trustees are commonly included in deeds as drafted, so there is no particular point about the protector's power to do that; if the trustees can do that under well-drafted—or at least widely drafted—trust deeds, it does not add or take away anything if a protector can do it. There is nothing specific to protectors.

If there is a view that people should not be able to change the domicile of the trust, despite what the deeds say, that is a much broader point. As far as I am aware, there is nothing in the bill that would prevent that already happening in terms of the trust deed. It is not a particular concern in relation to protectors.

Bill Kidd: My next question is for Laura Dunlop. The Law Society did not comment on the policy underpinning section 49. However, it said that the drafting of the domicile subsection was unclear in terms of its scope. The Law Society also said that the scope of the separate power of the protector to determine the trust's "administrative centre" was also unclear. Should work be done on whether that should be continued?

Laura Dunlop: I am not sure. Those comments came from the Law Society.

Bill Kidd: Ah! I beg your pardon. I misread that—and I have already had the response from the Law Society.

What do you think, Laura?

Laura Dunlop: I will pass over to Alan Barr to answer that, as he has the text of the Law Society's response.

Alan Barr: All that has been requested is clarification of exactly how wide the power is. Is it an absolute power of the protector or—to go back to my earlier point—the trustees to determine that the domicile of the trust shall now be Sri Lanka, or wherever they choose? If that is what is intended, that is probably the current situation.

As the earlier panel said, protectors are new beasts in the zoo of Scottish trusts. There is nothing to stop them being appointed now—indeed, I have seen one or two examples where they have, at least reportedly, been appointed in Scottish trusts. The sanction for them to exist provided by the bill will encourage their use—I can see some trusters liking there being a power beyond their trustees. How the powers now sanctified by the bill will be used, including the domicile question, will develop over time—watch this space.

Bill Kidd: Thank you. Sorry for throwing that at you, Laura.

Laura Dunlop: That is okay.

Sarah-Jane Macdonald: I would just add that, as Alan Barr said, protectors are relatively new creatures in Scottish trusts—not many people use them. However, to go back to the discussions that I have had with STEP headquarters, one of the things that is being looked at is making trusts generally more attractive in the UK and Scotland.

Including protectors in the bill is really useful, particularly if you have offshore trusts that are considering making a Scottish trust and moving the jurisdiction to Scotland. At the moment, there is not a lot of law on protectors, so having some clarity and some provision regarding them is useful. It brings us into line with the laws of the other jurisdictions and, as Alan said, will develop in the future. Having something in the bill is good. The question is whether it will evolve as the role of protectors does in the future.

11:30

Bill Kidd: Thank you very much for that. Ken Swinton, do you want to say anything?

Ken Swinton: No, our members have no experience of protectors so we were not concerned with that part of the bill.

Bill Kidd: That is perfectly understandable.

Mercedes Villalba: I will move us on to sections 65 and 66, which cover expenses of litigation. The Law Society has raised concerns about the current policy underpinning section 65, which provides principles to determine how legal bills are paid for in trust cases. It says that section 65 will deter people from becoming trustees and may lead trustees to unfavourably settle or abandon legal proceedings for fear of personal liability.

Some of the witnesses might have heard our discussion about that with the previous panel of witnesses. We would be interested to hear from the witnesses who are not representing the Law Society whether they share the concerns that it has raised with us or can offer the committee any reassurance. We would also be interested to hear from all panel members whether the availability of insurance might help to mitigate the risks that the Law Society identified.

Would Laura Dunlop like to kick us off?

Laura Dunlop: I will be pretty brief on that. When I looked at section 65 in preparation for the meeting, I thought that it was very carefully drafted. It seems to be a case of, "On the one hand, this; on the other hand, that," to an extent that it almost runs out of hands. It seems to me to create the possibility for the courts to do pretty much anything about the expenses of litigation involving a trust. That does not seem inappropriate to me, because the range of practical and factual situations will be wide and, speaking as a litigator, you can trust the court on matters of expenses.

The only other point that I would make is that, in general terms, those of us who have worked in litigation are not particularly enthusiastic about people who can litigate with an absolute guarantee that they are incurring no risk to their own pocket.

The Convener: Would anyone else like to come in?

Ken Swinton: I am not a litigator, so I do not have a view on expenses.

Alan Barr: It was the Law Society that raised the issue so I suppose that I had better defend it, which I will do.

I do not think that the balance is quite as nuanced as Laura Dunlop suggests. That is notably the case in section 65(2), which says that, if the trust, to use a non-personal term, has been found liable for expenses—that could be in unsuccessfully pursuing or defending a case—and has no funds left, the trustees, even ones who have been against it, are personally liable jointly and severally.

That is fundamentally unfair. I appreciate that they can go back to court, which is ironic in the circumstances, and ask not to be found liable. However, that is not the normal case in litigation. If, in a successful litigation, I am unable to recover my expenses from a company because it lacks resources or from an individual because they are bankrupt, the liability does not go to any individual director, other than in extreme circumstances, or to some other individual because they happen to have personal money of their own.

The provision seems to me to go against the notion of the separate patrimony of a trustee's position. Therefore, it is not appropriate that the starting point in unsuccessful litigation where the trust fund has run out should be the different pocket of the trustee as an individual. If that does not stop people in certain circumstances becoming trustees or at least considering it very carefully,

there is a gap in their understanding of what they might find themselves liable for.

Mercedes Villalba: How would you propose to tackle that in the bill, if I can put you on the spot?

Alan Barr: I can absolutely understand Laura Dunlop's point on vexatious litigants. You should not be able to go off with the sure and certain knowledge that you will never be personally liable. However, I think that the courts' control over that would be quite sufficient—courts can already deal with that in relation to personal awards. It is the point about the bankrupt trust that particularly bothers me. Unless there has been an element of gross negligence by the trustee—and I appreciate that there is a difference between negligence and gross negligence—in prosecuting the action, the starting point should be no liability for expenses rather than personal liability for expenses. That means that a successful litigant would not have somebody to recover the money from, but that is not uncommon in such circumstances.

Mercedes Villalba: Thank you very much. I will hand back to the convener.

Ken Swinton: Sorry, can I just come in first? Alan Barr mentioned trustees being liable jointly and severally. If they do not like the decision to go ahead with litigation, they can resign office at that stage. That would be their remedy at that point.

Sarah-Jane Macdonald: That could leave a sole trustee holding the bag, who would then have to pay for all the expenses, so it would not necessarily solve that problem if everybody else got their resignation in first.

The resignation clause under section 5 does not require any intimation to the co-trustees either. On receiving papers saying that a court action has been raised, every trustee could just resign on the same day, which would cause issues as well, so that is not necessarily the answer. However, I agree with Alan Barr that a starting point of trustees being personally liable if there are no funds in the trust seems to go far beyond what we would have anticipated.

Jeremy Balfour: One of the questions was about trustee insurance. If that became mandatory, would that resolve the issue in regard to individual liability?

Sarah-Jane Macdonald: I do not think that you can insure against every possibility in relation to what could come up as litigation. As John McArthur said earlier, where there is pending litigation, it is less likely that a provider will give you insurance or, if they do give you insurance, the premiums could be so excessive that you would not be able to pay them out of the trust fund or it would actually be more economical to litigate or to try to settle.

Alan Barr: Insurance is, to some extent, a bit of a red herring. It is likely that insurance will offer you an umbrella except when it is going to rain, because that is often the case with insurance when it is most wanted.

I think that making trustee insurance compulsory is an interesting idea. Should trustees be insured in their capacity as trustees, as opposed to perhaps some other professional insurance, which fortunately many of us have? However, it is a separate point from the expenses and litigation point.

Ken Swinton: My experience of trustee insurance is that it tends to be called an errors and omissions policy; it does not necessarily cover you for positive acts, where you decide to do something.

Laura Dunlop: I do not envy the committee, because this is one of those situations in which you are choosing between two deserving parties. You have the person who has sued the trust and who has been successful and would normally therefore be recovering expenses, but then you also have the trust that has run out of funds. Such situations are always difficult.

In support of my earlier comments that section 65 seems to be quite flexible, there is also subsection 65(6), which sets out that the court is able to relieve a trustee of personal liability. In the types of situation that are being described, one would imagine that that jurisdiction of the court would be invoked.

Sarah-Jane Macdonald: One other point to mention on that is that the law is generally moving towards forms of alternative dispute resolution such as mediation. Nothing in the bill suggests mediation as a method of resolving a dispute before it goes to court. I know that there is a separate policy on mediation, but was that a missed opportunity for considering other steps before going to court? If the scenario is such that the trust fund will be depleted, it might be useful if a party who would otherwise be successful were to go to a form of resolution such as mediation or arbitration in advance and approach the issue in another way so that matters such as expenses can be dealt with outside court.

Jeremy Balfour: Picking up on that final point, we raised that with the Scottish Law Commission when we took evidence a couple of weeks ago. Its representatives were slightly sceptical of that concept, but it might be worth looking at again.

I will move on to section 67 of the bill. The Faculty of Advocates and others have said that they think that the power in that section to give directions to the court needs to be much wider than the one that currently appears in the bill. Would the other witnesses like to comment on that

assessment? I will then ask Laura Dunlop to defend that position at the end.

Alan Barr: Our committee would be with the Faculty of Advocates on that. A wider power to seek directions—with the dangers on expenses that it would entail—is not a bad thing to have. The section could be interpreted quite narrowly so I would be in favour of a broader power to seek directions.

Sarah-Jane Macdonald: I reiterate what Alan Barr has said. A broader power would not be a bad thing in such a scenario.

Ken Swinton: A broader power would not do any harm, let me put it that way. It could only do good—subject, as Alan said, to the question of expenses.

Jeremy Balfour: Excellent—we almost have consensus.

Mercedes Villalba: I will move us to part 2 of the bill and in particular to section 72, which is on the right of a spouse or civil partner to inherit. We discussed that with the earlier panel as well. Various stakeholders, including the Law Society of Scotland, have said that a distinction should be drawn between spouses or civil partners who were living with the deceased person at the time of their death and those who had previously separated from the deceased person but had not divorced or had their partnership dissolved.

The committee is interested in hearing what other witnesses think of that policy idea. Do you agree with it? Do you think that, with good drafting, it would be possible for the provision to describe what is separation and what is not? It would be helpful if Alan Barr could then come in to add any points of clarification on the Law Society's submission to the committee.

Ken Swinton: I will come in first, then. Under the Succession (Scotland) Act 1964, the rights of succession described in section 2 will apply only after the prior rights covered in sections 8 and 9 and the legal rights at common law have kicked in. Under section 8 of the 1964 act, a spouse or civil partner will have an interest in a dwelling house up to the value of £473,000 provided that they are resident in the property in which they are claiming an interest. They will also receive a cash entitlement of either £58,000 or £75,000 depending on whether or not there are children. They will also get the plenishings in the house.

Section 72 would operate only after that, and the house would pass on the basis of whether or not the claimant was resident. Then the legal rights would kick in, which would be to one third or one half of the moveable estate, depending on whether there are children. It is therefore a long-stop provision that would come in after those other provisions take effect. My view is that we do not need to have a definition of "cohabitation" inserted into section 72.

11:45

Sarah-Jane Macdonald: This point was discussed earlier; in essence, one bit of succession law has been tacked on to the end of a trust bill. There have been various consultations on succession law. The last one in 2019 looked at various things around the rights of cohabitants and legal rights. After that consultation, the Scottish Government said that it was going to legislate on a couple of bits, that point being one, to bring succession law in line with public policy.

If we are to start looking at what the rights of cohabitants should be and go further, we should note that the consultation said, in effect, that the Government was going to carry out further investigation and consultation before legislating on it. To try to do that as part of a trust bill would delay the trust bill in moving forward. I speak for the STEP Scotland committee when I say that we are all very keen to get the trust bill given that it has already been more than 100 years since the last substantive law change in that area.

Looking at that side of things, the driver should be moving the trust bill forward. If anything more is to be done on succession law, that would hopefully be done in a separate bill, and further consultation and views would be taken on that, rather than it being part of the trust bill.

Laura Dunlop: I will make a couple of comments on form and substance. I have seen a lot of proposed reforms over the years where something simple and straightforward is put in early in the process, and then people say, "Oh well, let's wait till we are doing a much bigger piece of reform and do it all then". What happens is that the straightforward and simple things that you could do now get lost sight of and do not come in for years.

On the hypothesis that succession reform has been included because it was thought to be a fairly straightforward consensual change that could be made now, and the bill is not an inappropriate vehicle in which to do it, I do not take any issue with its being included.

However, on the substance, having read comments from previous evidence sessions and listened today, I recognise the merit in having an exception for people who are separated. I am with George Gretton and others, who said that capturing that in a statutory definition is possible.

On the conversation that took place earlier on the previous panel, if you were to suggest that the touchstone of a separated couple would be people

who have a separation agreement, that would be a form of definition. I would not favour that, and Sandy Lamb gave very good practical reasons why that is far too high a touchstone, but I am an optimist—I think that some workable definition could be found.

Alan Barr: I tend to agree that it would be better if succession was returned to more substantially, because there is still a lot about the general law of intestate succession and the balance between spouses, civil partners and cohabitants, and children have to be sorted out. However, I also agree with what Laura Dunlop says; if there is a relatively simple change that can happen quickly and appears to have wide public support, let us do it. We may come back to that in the final part of this evidence session.

I am in favour of it but very definitely with the safeguard of some kind of living together. I do not think that that is as difficult as people have suggested. In tax law, which is the other part of my day job, the concept of a couple living together as husband and wife and receiving certain tax treatment has existed for many years and is dealt with.

To pick up on examples that have been given, to my pretty certain knowledge, that has never caused a problem with a couple who are separated because one lives in a care home. In the earlier evidence session, Mr Balfour's submariner would not have been considered to be separated from his or her spouse or civil partner by means of being necessarily away for that period.

I do not think that it is beyond the wit of a draftsperson to come up with wording that covers separation other than separation because they have intended to get separated. I certainly would not go with the separation agreement being the trigger, because the couples affected are exactly the kind that will not have a separation agreement, because they have not got around to dealing with the will to start with.

This is great news for lawyers in a way; it just adds emphasis to the advice when people separate of, "For goodness' sake, make a new will". That is really crucial in those circumstances, but people do not do it. A majority of people do not make wills, so intestacy is really important here.

It has also been put to me that, really, we are dealing with rights of separated spouses as a matter of family law, not succession law. The bill can deal only with succession law.

In terms of the separated spouse, unless there is some qualification, I think that intestacy is meant to represent what the deceased would have done if they had thought about it. In most cases, 100 per cent going to the continuing spouse or civil partner meets that definition perfectly. Where there has been separation, however, it is a reasonable bet that if the provision comes in as it is, for the separated spouse, intestacy will bring the result least on earth that the deceased person would have wanted. The very last person who they would want to inherit would inherit.

Some attempt at a definition of when spouses or civil partners are still in that almost spiritual state, to extend that, should be included. I do not think that that is that hard to do.

Mercedes Villalba: As the convener said to the previous panel, if any witness has any suggestions, thoughts or ideas that they would like the committee to follow up, we would be very grateful to receive them.

Sarah-Jane Macdonald: On what Laura Dunlop said, I agree that adding the one little bit on to the bill makes sense, just to get it done, since it was one of things that was agreed on in the previous consultation. The point that I was making is that it should be separate from broader rights related to cohabiting and things like that.

On when people are separated, as Alan Barr said, having a separation agreement is not necessarily a good definition in the sense that not everyone will get one. In addition, if someone has started a separation agreement but has not signed it at the time of death, it can cause issues around the question of whether they intended to complete it, or whether it was not finished because the person was considering reconciliation, which can happen in various situations.

A more practical definition would be—I think that Sandy Lamb mentioned this earlier—marriage by cohabitation and repute, in which people would look at whether parties were known as being in a relationship. There might be parties who were married and are now living separately, but are still known as being a married couple, in a civil partnership or whatever their relationship status is. A more practical view would need to be taken.

The Convener: The final question is on part 2. As you will have heard in our previous evidence session, the committee has heard proposals for three policies that could be added to part 2 to improve it. The first is the creation of exceptions to legal rights as they currently apply to protect from disinheritance, which came from Professor Paisley; the second is the amending of the current strict six-month time limit that applies in the context of the cohabitant's power to apply to the court for a share of the deceased's estate, which came from the Faculty of Advocates and Yvonne Evans; and the third is clarifying that the law does not permit an unlawful killer to be an executor of their victim's estate, which came from Professor Paisley and Professor Gretton.

We are keen to hear your views on those three proposals.

Alan Barr: No, yes and yes would be my answer. Legal rights, and the possible restriction of them, are part of the broad, unfinished work on succession. To try to tack something on that on to the bill would be wrong. The other two fit perfectly. There would be no objection to getting rid of the ability of unlawful killers to be executors. That would be a quick win.

The only difficulty about the extension of cohabitants' right to claim under section 29 of the Family Law (Scotland) Act 2006 is possibly the period involved. It has been suggested, I think, that the period should be 12 months rather six months. That would solve many of the problems in practice, but not in principle, in that executors can delay getting themselves appointed. There is perhaps more thought required on that one.

Certainly, the third proposal, on unlawful killer executors, could be readily tacked on to the bill. We will not often get the opportunity, so let us do it.

Laura Dunlop: On legal rights, I agree with Alan Barr's comments. There is much work to be done in the wider area of succession law. In earlier consultations going back several years, I have taken part in writing the Faculty of Advocates' response to two of them. That was a lot of work. There is still unfinished business. I think that the whole legal rights question belongs in that project, whenever it comes along.

I recognise that succession law is a particularly—perhaps uniquely—difficult area in which to reform. I went to an excellent event about consultation in the University of Glasgow's school of law before the pandemic. One of the obvious points that was made was that succession law is an area in which the entire population are the stakeholders. Therefore, it is extremely difficult to consult the people who are affected in any straightforward way. I do not have any answers to that, but the issue is probably worth acknowledging.

My response to issues 2 and 3 will be much shorter. On the question of the appointment of an executor who has been in some way responsible for the death of a person, I looked at the Faculty of Advocates' written submission on that very topic in response to the consultation in 2019. I would simply adopt and repeat our answers to questions 20 to 25; we have not changed our position on that at all. I can include a copy of that in further correspondence to the committee if that would make things more straightforward for you.

We have covered section 29 of the 2006 act in our current response to the bill, and I do not have anything to add to what was said in writing.

Sarah-Jane Macdonald: On extending the limit that is set out in section 29 of the 2006 act, instead of the time limit starting from the date of death, I wonder whether it could start from the date that confirmation is obtained, which would mean that an application could not be made until confirmation is received.

The time limit would not start until confirmation has at least been granted. At that point, the time limit would start. Therefore, if it was six months from confirmation rather than six months from the date of death, that would extend the time available a little bit. You would not then have executors delaying their actions necessarily, because that would simply delay the time limit.

On legal rights, I reiterate what has been said already. That is part of a larger consultation.

On the issue of unlawful killers, my view is that the removal of trustees would also apply to executors. There are provisions in the bill for the removal of trustees who are

"convicted of an offence ... sentenced to imprisonment on conviction of an offence, or ... imprisoned for contempt of court or for not having paid a fine".

Therefore, they can be removed for offences that include unlawful killing. They would be removed by co-trustees or by a beneficiary with a vested interest.

The only question on that issue is whether we would want to extend that to cover any other offences. I think that previous panels discussed that. The only other offence that I had considered in discussion with other colleagues was in relation to people who have been struck off their professional register. For solicitors, that would mean being struck off by the Law Society of Scotland, and, for accountants, that would mean being struck off from their profession by the relevant body. There is a higher bar for professional trustees—that is, for people who are appointed in a professional capacity. Should there be similar provision for removing them?

Ken Swinton: On unlawful killing, I do not see any difficulty in removing the ability of unlawful killers to be executors. That is a sensible reform to adopt. The only slight caveat is that you could get into a situation in which a person confirms to the estate but, at that stage, you are not aware that they are a killer and the executory could be completed before any charges are brought. That possibility exists.

On legal rights, what you are trying to do with the law of succession is a huge policy issue. Do you give people fixed shares, which we have had for hundreds of years? People have an expectation that they will get something out of an estate as a result of legal rights. Therefore, you must change public perceptions if you are to

change the law. What is the purpose of legal rights? Is it to allow some of the estate—the family wealth—to pass down generations, or is it about a principle that people who have need should get more? If you start looking at need, you start looking at discretionary remedies and court actions, which slows down executories and increases the expense.

12:00

There are very difficult policy choices. I note that, in its 2009 "Report on Succession", the Law Commission came up with two different schemes—option A and option B—because it could not reach a single view on the matter. It is quite a difficult thing and not something to embark on in a bill that is already in process.

I think that it is well known that section 29 of the 2006 act is poorly drafted in a number of ways. It would be perfectly acceptable to increase the time limit. Sarah-Jane Macdonald made the point about confirmation, although a number of estates will pass without confirmation being granted, so that proposal would not do anything with the time limit for those cases; smaller estates will certainly be in that situation.

The principal difficulty is that the court is given a vast array of things to take into account in reaching its decision, but it is not given any guidance on what it is giving money for. Is it right or is it future dependants? The tendency in the court decisions is towards future dependants. When the Law Commission suggested in its 2009 report that the provisions of section 29 be redrafted, it suggested in paragraph 4.10 that a cohabitant should have

"to 'earn' her right to a share of an intestate estate",

which seems to me to be entirely inappropriate language to use. It suggests that you look at the length and the interdependence of financial and other relations and the contribution to the household, which, it seems to me, is a very old-fashioned way of looking at cohabitation. I do not think that that sort of formulaic approach resolves matters. The approach that the courts have adopted in relation to section 29—a formula that is based on future needs—is preferable.

The Convener: Thank you.

I thank the witnesses for their helpful evidence. The committee will follow up by letter on any further points or questions that stem from today's evidence. If witnesses would like to highlight any points that have not come up during the meeting, they should please do so in writing—we would greatly appreciate that.

12:02

Meeting continued in private until 12:30.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba