FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to the Scottish Government's Consultation on

Trusts and Succession (Scotland) Bill

The Faculty of Advocates has considered this draft legislation and the specific questions posed during the consultation process. We have the following comments to make:

QUESTION 1:
What are your views on the proposals contained in Chapter 1?

The Faculty has no observations to make in respect of the draft provisions contained within sections 1 to 5.

Having regard to section 6, the Faculty notes that this provision leaves unaffected the Court of Session's power to sequestrate the trust estate, for it to be managed by a judicial factor, and the suspension of trustees without removing them. This is to be welcomed. Likewise, the Faculty welcomes the extension of the jurisdiction of the sheriff court in relation to the removal of trustees in section 7.

In considering section 10 the Faculty considers that there should be extension of this provision to provide that in cases where a sheriff removes the trustee under section 7, that sheriff should be given the power to grant a discharge under section 10.

QUESTION 2:
What are your views on the proposals contained in Chapter 2?

In respect of section 11, the Faculty would make the following comments:

In s11(2) where there is a trust, but no trust deed, the section provides that the default rules in the section will apply unless, "the context requires or implies otherwise". It is not clear what is meant by these terms. Where there is no trust deed, the court must, consistent with the relevant background behind the establishment of the trust, imply terms into it. These rules for implying terms are well understood. Making "the context" and not just the implied terms grounds for disapplying the default rules might be thought to be innovating beyond the intention of the SLC.

Looking at s11(3) we consider that the use of the word "homologated" is unhelpful. The application of a plainly used and understood expression such as "approves expressly, or by implication" would be a better expression to use. (see Note 11 to Clause 11 in the SLC Report, p 301) .

We consider that section 12 would be strengthened by a definition of "personal interest". It would make it easier for the layperson to understand.

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

Question 3
What are your views on the proposals on advances to beneficiaries?

The Faculty agrees with these proposals in general terms and supports the principle of advancement to capital beneficiaries. We do though consider that the conditions to be applied by the trustees or the Court should be restricted to any period prior to that when the right to capital would vest unconditionally.

Question 4
What are your views on the rest of the proposals contained in Chapter 3?

We consider that this is the section of this legislation which is of most importance within the draft Act.

Looking firstly at s13 and the general powers of trustees we suggest consideration be given to disapplication of this section "where the context requires or implies", regardless of the manner of constitution of the trust. Our concern is that this section is a default provision providing a general power of administration. It applies except where the "trust deed expressly provides otherwise (or, in a case where there is no trust deed, the context requires or implies otherwise)". It is to apply to all trusts regardless of when or how they were created. The present wording suggests that express disapplication of this provision is required for trusts constituted by trust deed. A contextual or implied exclusion is arguably appropriate in all cases, given that trusts can arise unintentionally and/or without full consideration of the consequences. However, the argument for contextual or implied exclusion is even stronger for existing trusts. The new general power replaces statutory provisions providing limited specific powers. In this context, it may be unlikely that specific powers are expressly excluded by an existing trust deed. Where powers were inappropriate or undesired, they would simply have been excluded by grant of limited powers. It may therefore be that such a deed requires or implies that the wide general powers are not appropriate.

It is noted that there is no express reference to for example section 16(1), the powers of which are arguably subsumed by this section (but subject to different rules of disapplication under the current drafting). We suggest that express reference to the specific powers granted by the Act should be added.

Looking then at section 14 we suggest that this section should be available where "expedient for the execution of the trust" rather than where, "additional powers in question would benefit the future administration or management of the trust property" (section 14(2)(b)). This is consistent with the wording currently used by section 5 of the 1921 Act. The use of "expediency" permits consideration by the Court of wider factors beyond the trust property. There may be circumstances where a benefit to the administration of trust property conflicts with a purpose of the trust. It is not clear that these wider considerations are available for a Court to consider in the absence of an objection in the provisions as currently drafted. We consider that the use of additional powers by the Court should not be so restricted in scope

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

and broadened to encompass the potential for expediency relating to the trust purposes rather than a focus upon the trust property.

Looking at section 16 and its power of investment, as noted above, this section could usefully be referred to expressly within section 14.

In section 18 we suggest that the phrase "as they consider" should be deleted where it appears in section 18(4). It is noted that the Trustees are entitled to appoint a Trustee as agent (section 18(3)) and accordingly pay that Trustee "such remuneration as they consider reasonable". The phrase "as they consider" is either superfluous (if reasonableness is to be an objective test) or inappropriate; allowing the matter to be subject to assessment of fellow Trustees without regard to objective reasonableness. The current wording, we consider, provides scope for arguments regarding whether remuneration on a subjectively reasonable scale is acceptable. This represents a potential risk to the proper administration of trusts and increases a prospect for disputes, which might be avoided by the proposed amendment.

Section 25 introduces a requirement for all trustees (defined to include executors) to provide information proactively to beneficiaries. Whilst the intention of this section to promote the promulgation of information to beneficiaries is supported, it is noted that this is a new statutory duty and accordingly one to which both professional and lay trustees alike will be unaccustomed. Standing the absence of a sanction for breach of the obligation, the consequences of breach are perhaps limited but, for the section to meet fully its purpose, lay trustees must become familiar with it. We consider that in promoting this legislation specific attention of the public should be drawn to this innovative provision imposing a new obligation, not least to executors upon confirmation.

We are concerned that in section 27, the interaction between subsections (1) and (3)(b) is not clear as to whether liability under (3)(b) is an application of subsection (1) liability or a standalone provision applying the same standard of care. If the latter, subsection (4)(c) would not apply thereto. This does not seem likely to be the intention. We suggest either the effect of subsection (3)(b) should be clarified and/or subsection (4)(c) should refer expressly to relief under subsection (3)(b) being expressly excluded.

Question 5
What are your views on the proposals on court powers to change trust purposes in Chapter 8?

We agree with the proposals. Chapter 8 is largely an amalgamation and re-statement of existing powers, and as such is uncontroversial. In relation to the individual sections in the Chapter, we would make the following comments:

In section 56, we consider that subsection (2) could be more clearly expressed as follows: "The limitation set out in subsection (1) does not apply where…"

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

Section 59(2) requires the Court to have regard to the views of beneficiaries between the ages of 16 and 18. Whilst this is not an innovation on current law, the manner in which this subsection is drafted is inconsistent with the provisions in respect of those under 16. This provision omits the requirement to ask those in this age range firstly whether or not they wish to express a view and if so, what that view is to be. Thereafter the imposition of regard to be had to that view is appropriate. The provision as currently drafted makes no allowance for a situation in which such a beneficiary is unable (or unwilling) to express such a view and the consequences which would flow from that. As presently drafted, this subsection has no solution to such an occurrence.

Looking at section 61 we make no comment on the policy behind the section (which is a significant innovation on the present law), although we feel bound to note that subsection (7) has the potential to be a significant source of litigation. The imposition of such a lengthy period of 25 years is notable.

We consider that section 62 appears to be a sensible extension of the law relating to ex officio trustees.

Turning to section 64 we question the inclusion of 'rectification' as an appropriate remedy in subsection (6)(a)(i). We consider that it has the potential to allow the Court to take discretionary decisions on behalf of a trustee. This is a very significant innovation on current law.

Question 6:
What are your views on the other court powers in Part 1 of the Bill?

We support in general the provisions of the Bill. However, we consider that it would be appropriate for the Bill to include the ability to confer on the courts an express power to give directions to trustees. These powers should be wide with maximum flexibility as to the court procedure to be followed. In our experience, Trustees not uncommonly face difficult challenges in interpreting trust provisions and the facility to seek directions from the court is a useful means of overcoming such challenges.

Question 7:
Do you have any comment on any other chapter of Part 1 (specifically Chapters 4-7)?

We have no further comments though note that we agree in general terms with the provisions of Chapters 4 -7.

QUESTION 8:
What are your views on the proposals contained in Part 2 of the Bill?

We have no comments to make on this part of the Bill. We note that these provisions appear to meet the intention of the legislation.

QUESTION 9:

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

Is there anything which you would like to have seen in the Bill which has not been included? If so, please provide details.

We consider that Part 2 of this Bill might usefully make provision for extending the time period for applying under section 29 (Application to court by survivor for provision on intestacy) of the Family Law (Scotland) Act 2006. We recognise that the Scottish Law Commission has previously consulted on certain provisions relative to this Act of 2006. We doubt that giving the courts an equitable power to extend the period in which an application may be made would be a controversial measure. As has been noted previously, the six-month time limit imposed by this provision [without the possibility of extension] may be considered harsh and restrictive. This is especially so in circumstances where a grieving cohabitee may struggle within a family dynamic at a difficult and emotionally vulnerable time.

Question 10.
Are there any other comments you would like to make on the Bill more generally? If so, please give details.

We do not consider that there are further comments, beyond those made above, that can usefully be added.

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF