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Scottish Parliament  
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By email to:  
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12 December 2023

Dear Convener

### **Trusts and Succession (Scotland) Bill**

This letter provides information in relation to two Stage 3 amendments to be lodged in my name in relation to the Trusts and Succession (Scotland) Bill, in particular in connection with two delegated powers which I propose to add to the Bill at stage 3. These are amendments at **Annex A** below.

I would also take the opportunity to set out for the Committee's information my intention to lodge a number of amendments for consideration of the Bill at Stage 3. For ease, I have set out what these are intended to do in **Annex B** below.

#### **Delegated powers**

The first delegated powers amendment in Annex A is closely related to separate amendments to section 17B providing that the purchaser of heritable property being sold by a charitable trust does not need to take the legal form of a charitable trust (as section 17B(b) is currently drafted) but may instead take any other legal form of charity (for instance, a company or a SCIO). Instead, the purchaser charity must be registered in the Scottish Charity Register or an equivalent in England and Wales or Northern Ireland. The amendment would allow Scottish Ministers to specify further descriptions of person who are a "charity" for the purposes of this section. This might include charities outwith the UK that are registered in an equivalent of the Scottish Charity Register. The regulations would allow the amendment of primary legislation and it is my view that in this case, the affirmative procedure would be appropriate.

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The second delegated powers amendment would insert new subsections into section 19 of the Bill. This is in response to the issue raised by CMS Cameron McKenna Nabarro Olswang LLP and its view that section 19, as drafted, might not go far enough in capturing the ways in which trusts are used in the financial services sector. This is an extremely technical matter involving financial regulatory arrangements and how trustees can use (a) nominee custody structures, and (b) sub-custodians. It has not been possible to reach a conclusion on this issue but I understand that clarification may help to alleviate concerns that trustees will not be complying with trust law where they use custodian arrangements in practice.

Accordingly, amendment this introduces a narrow power to allow Scottish Ministers, by regulations, to specify particular circumstances which may constitute a 'good cause' for the purpose of section 19(8). My view is that the negative procedure is appropriate for making these regulations as they will allow illustrative provision to be provided only as an example of what the court could allow in connection with the delegation of trustee functions.

We appreciate delegated powers should be added earlier in proceedings, but in this case we consider it has regrettably been unavoidable as a result of developments from consultation in the last few weeks with stakeholders. I would be happy to provide more information if that would be of assistance to the Committee, and I would hope the Committee will be able to support these measures.

It is my intention to ask the Scottish Parliament to support these amendments at Stage 3.

**SIQBHIAN BROWN**

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## Annex A – amendments to add delegate powers

### First amendment

In section 17B, page 12, line 2, at end insert—

<(4) The Scottish Ministers may by regulations modify subsection (3) so as to specify further descriptions of person who are a “charity” for the purposes of this section.

(5) Regulations under this section are subject to the affirmative procedure.>

### Second amendment

In section 19, page 14, line 10, at end insert—

<( ) The Scottish Ministers may, by regulations, specify particular circumstances which may constitute a good cause for the purpose of subsection (8).

( ) Regulations under this section are subject to the negative procedure.>

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## Annex B – commentary on other Scottish Government amendments

The Scottish Government amendments are intended to:

- a) *Section 5* – widen how a sole trustee can accept office so that it is not limited to “in writing”, that is, it could be a verbal agreement to accept office.
- b) *Section 12* – clarify further the Government amendment at stage 2 that where a public trust is intended to benefit the public as a whole, a trustee can make decisions which affect the public at large.
- c) *Section 17B* – ground the amendment firmly in trust and charity law and ensure it is of wider benefit to charities across the UK.
- d) *Section 19* – add a regulation-making power to enable the Scottish Ministers to deal with the issue raised by CMS at Stage 1 concerning sub-custodians.
- e) *Section 30* – build on a Law Society amendment voted down at Stage 2 by widening out the section.
- f) *Section 32* – clarifies that trustee’s personal liability is to be read together with the Bill as a whole as there were concerns that the section would be read in isolation.
- g) *Sections 35 & 38* – maintain consistency of drafting following Mr Balfour’s stage 2 amendment.
- h) *Section 41* – adopts drafting more consistent with the language of the Bill.
- i) *Section 49* – ensure a more consistent approach to the list of illustrative powers that may be conferred on a protector by a trust deed, reflecting a point raised by STEP.
- j) *Section 61* – ensure that private purpose trust purposes can be varied by application on a material change of circumstances under this section but public trusts cannot.

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