

Trusts and Succession (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Trusts and Succession (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 21–EN);
 - a Financial Memorandum (SP Bill 21–FM);
 - a Policy Memorandum (SP Bill 21–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 21–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill Provisions

4. The Trusts and Succession (Scotland) Bill implements the Scottish Law Commission's *Report on Trust Law* which was published in 2014 and a recommendation from its *Report on Succession* published in 2009. It brings together trust legislation within a single, coherent statute, drafted in modern form and with regard to modern conditions. The Bill is comprised of three parts and two schedules.
 - Part 1 – Trusts: makes provision on aspects of trusts including the appointment, assumption, resignation, removal and discharge of trustees; decision-making by trustees; powers and duties of trustees; contractual rights, damages and the validity of certain transactions and documents; the duration of trust; private purpose trusts; protectors; and powers of the court;
 - Part 2 – Succession: sets out to clarify the effect of divorce, dissolution or annulment on special destination; and the rights of succession to intestate estate;

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- Part 3 – details miscellaneous and general provisions relating to Parts 1 and 2.

Rationale for Subordinate Legislation

5. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

Delegated Powers

Section 78(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if modifying primary legislation;
otherwise negative

Provision

7. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill.

Reason for taking power

8. This power is necessary to allow flexibility when commencing provisions in the Bill or otherwise to address unforeseen circumstances which may arise. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes are able to be dealt with effectively so as the purpose of the Bill is not

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inadvertently obstructed. The power is restricted in that it can only be used for the purposes of, or in connection with the Bill, or for the purposes of giving full effect to, any provision of the Bill.

Choice of procedure

9. Regulations made under this section which contain a provision which adds to, replaces or omits any part of primary legislation are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type and provides the necessary safeguards with regard to the type of legislation which can be made.

Section 80(3) – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no further procedure

Provision

10. This section enables Scottish Ministers, by regulations, to appoint the day or days on which the provisions of the Act (other than sections 71, 72, 78, 80 and 81) come into force.

Reason for taking power

11. The Scottish Government considers it appropriate for the substantive provisions of the Bill to be commenced at such a date as Ministers appoint to be suitable. It is usual procedure for such commencement provisions to be dealt with by subordinate legislation.

12. The coming into force of the Bill's substantive provisions will have implications for trustees involved in the administration of a trust and the beneficiaries of a trust. Certain of the Bill provisions, for instance, provide that the new law is apply to all trusts but only in relation to future events while other provisions apply only to particular types of trust. In order to allow trustees and beneficiaries time to manage their affairs, it is important for the Scottish Ministers to have power to allow for the planning of orderly implementation and to commence the substantive changes when they consider it appropriate to do so. It is preferable to ensure there is flexibility in the commencement power in case it transpires that there is a need for staged commencement of the Bill's provisions. The Scottish Government therefore considers that, in accordance with usual practice, the regulations should be capable of making different provision for different purposes.

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Choice of procedure

13. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.

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