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**In depth**

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# Private purpose trusts in England and Wales following the trusts and succession (Scotland) Act 2024: a sign of things to come?

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## ABSTRACT

The Trusts and Succession (Scotland) Act 2024 introduces a codified scheme for private purpose trusts into Scots law—a bold and novel development, especially for an 'onshore' jurisdiction. This article, intrigued by this legislative innovation, evaluates the 2024 Act's relevant provisions and considers whether this might signal a broader trend for England and Wales. It is argued that, despite England's strict approach to the beneficiary principle, orthodox common law does not and need not prohibit similar statutory reforms. There exists both conceptual and doctrinal flexibility to move beyond current orthodoxies, alongside compelling commercial and practical reasons to do so.

## INTRODUCTION

This article evaluates the legal treatment of private purpose trusts in England and Wales following the Trusts and Succession (Scotland) Act 2024 (TSSA 2024).[1] The Act marks a significant development in Scots trust law, revitalising many aspects of the country's legal framework. Scotland's introduction of a regulatory framework for enforcing private purpose trusts prompts consideration of whether this could signal a change for English common law. As writing on Scotland's nascent legislation remains limited, it is timely to assess what its provisions might mean for trust law in England and Wales. This article therefore adds to the research landscape through its comparative analysis of the TSSA 2024.

In laying the groundwork for the extensive reforms to Scottish trusts law that culminated in the enactment of the TSSA 2024, the Scottish Law Commission (SLC) and the devolved Scottish Parliament have stolen a march on the rest of the UK. It is possible to contrast the position in Scotland with that in England and Wales in the following terms: The Law Commission of England and Wales announced with some fanfare in 2017 that it would be embarking on a project on the 'Modernisation of Trusts Law for a Global Britain' as part of its 13th Programme of Law Reform.[2] The Commission noted in this connection that 'many other "onshore" and "offshore" jurisdictions—including Scotland, Jersey, New Zealand and Singapore—have updated their trust law and been creative in maintaining a healthy trust market'.[3] It also took particular cognisance of 'the development of alternative, flexible trust and trust-like structures' in other jurisdictions such as Jersey and the Cayman Islands, which have both enthusiastically embraced private purpose trusts and suggested that 'there is a strong argument that their advantages and disadvantages should be evaluated'.[4] Even though this project was subsequently rolled over into the Commission's 14th Programme of Law Reform, the scoping study intended to provide the initial impetus for the modernisation process has not yet been undertaken. As a result, the entire reform agenda is currently in abeyance, with no indication as to whether—or when—it will be revived.

Expanding private purpose trusts would unlock economic and commercial opportunities that are currently constrained

[1] Trusts and Succession (Scotland) Act 2024 (TSSA 2024).
[2] Law Commission, *Thirteenth Programme of Law Reform: Modernising Trust Law for a Global Britain* (Law Com No 372, 13 December 2017) https://assets.publishing.service.gov.uk/media/5a82f0c740f0b6230269d7e6/13th-Programme-of-Law-Reform.pdf accessed 12 May 2024.
[3] ibid, para 2.24.
[4] ibid.

by the existing legal position. It is clear that the commercial and estate planning benefits that may stem from the enforcement of private purpose trusts were a key motivation for the SLC in proposing the codification of private purpose trusts.[5] Not only is it commercially expedient to expand such trusts, but, thematically speaking, much of the academic literature supports a move towards a more relaxed approach within the onshore jurisdictions.[6] As early as 2001, Hayton argued that: 'In the twenty-first century it seems likely that the English trust concept will be seen to be a more flexible obligation than is currently considered to be the case so that out-dated descriptions or definitions of the trust will need to be re-cast.'[7]

Nonetheless, this issue remains contentious due to the longstanding judicial hostility towards private purpose trusts in England and Wales, where a strict approach to the 'beneficiary principle' is clearly present.[8] For regulatory reform to occur, the English law's 'orthodox' beneficiary principle must be relaxed.[9] Opponents to the codification and expansion of private purpose trusts suggest that such a paradigm shift has the potential to undermine legal certainty and public policy, while also raising moral and ethical concerns.[10]

To address the question, the article begins by outlining the current law on private purpose trusts in England and Wales. It then turns to consider the TSSA 2024's provisions relating to private purpose trusts, before concluding with the authors' analysis of how the law in England and Wales might respond to its enactment. Ultimately, the authors advance a case for codification.

## THE BENEFICIARY PRINCIPLE: AN 'ORTHODOX' APPROACH

In English common law, the beneficiary principle was first articulated in *Morice v The Bishop of Durham* (1804), where the court held that trusts for non-charitable purposes are generally void for usurping the court's control and undermining the beneficiary's equitable right to enforce.[11] Smith explains that 'the principle is part of the mandatory core of trust law that a private, non-charitable trust must benefit the beneficiaries'.[12] Thus, a trust without identifiable beneficiaries is impermissible under the orthodox approach. While Hayton does not support this restriction of private purpose trusts, he nonetheless well encapsulates the orthodox view with the following observation: 'Just as a car needs an engine, so a trust needs a beneficiary.'[13]

In *Morice*, the court held that a bequest for purposes of "benevolence and liberality" was void because it lacked charitable intent.[14] The court concluded that the trust must be 'of such a nature, that it can be under the Court's control', meaning that 'the administration of it can be reviewed by the Court' and a remedy ordered for maladministration.[15] Where a trust fails for whatever reason, the trust property is to go to the next of kin under a resulting trust.[16] Therefore, retaining the control and enforceability of trusts are vital arguments for adopting the orthodox approach.[17]

*Morice's* judgment was later reaffirmed in *Re Astor's Settlement Trusts* [1952] Ch 534, where the stated purposes were held invalid for offending the beneficiary principle.[18] Citing the dicta of Lord Parker in *Bowman v Secular Society Ltd* [1917] AC 406,[19] Roxburgh J opined in *Re Astor's* that there must be 'somebody who could enforce a correlative equitable right' to the property.[20] The orthodox position sees the enforcer of the *correlative equitable right* to be the beneficiary of the trust.[21] This reasoning is significantly damning for the ability to create private purpose trusts, which do not have the legal beneficiaries to enforce the trust. At the same time, however, the vital role played by the Attorney-General in giving effect to charitable trusts vividly demonstrates that the enforcement of purpose trusts does not always have to stem from the beneficiary's right in equity.

## CONSULTATION AND CRITICISM

The main reasons for codifying private purpose trusts in Scotland are outlined in this section. The 2014 SLC *Report on*

[5] The commercial benefits accruing to the UK Trust industry has also been acknowledged by the Law Commission of England and Wales, which has described the trust as 'an important legal export bringing a range of business to the UK for lawyers, accountants, banks and trust companies.' [13th Programme of Law Reform, para 2.23]. See also the Law Commission/STEP webinar on the Modernising Trusts Law Project (Modernising trust law for a global Britain: a scoping study. 19 May 2021 | STEP), where Charlotte Black of the Law Commission indicated that many stakeholders in the UK Trusts industry had expressed concerns that 'aspects of trusts law in England and Wales were in danger of being outperformed by trusts law in other jurisdictions'. She suggested that this was not entirely surprising because many other jurisdictions offshore and onshore 'had introduced innovations which allowed their Trust industries to function in ways which currently English and Wales trusts law cannot.' Such innovations are epitomised by the enactment of legislation in these jurisdictions, providing for the enforcement of private purpose trusts, in circumstances where such trusts are invalidated by the beneficiary principle in England and Wales (as highlighted in the next paragraph).

[6] David Hayton, 'Developing the obligation characteristic of the trust' (2001) 117(Jan) LQR 96 ('Hayton, Obligation Article').

[7] ibid.

[8] *Morice v The Bishop of Durham* (1804) 32 ER 656.

[9] Hayton, Obligation Article (n 6).

[10] Alexandra Braun, 'Private Purpose Trusts: Good for Scotland?' (Edinburgh Law School Research Paper No 2023/03, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4444542 accessed 12 May 2025.

[11] *Morice* (1804) (n 8) 657.

[12] Lionel Smith, 'Give the People What They Want: The Onshoring of the Offshore' (2018) 103 Iowa L Rev 2155, 2158.

[13] Hayton, Obligation Article (n 6) 96.

[14] *Morice* (1804) (n 8) 658–659.

[15] *Morice v The Bishop of Durham* (1805) 32 ER 947, 954.

[16] ibid.

[17] See *Re Shaw, decd* [1957] 1 WLR 729, 745 (Ch), where a bequest by George Berhard Shaw to establish a 40-letter alphabet failed for neither being charitable nor for identifiable beneficiaries.

[18] *Re Astor's Settlement Trusts* [1952] Ch 534, 549.

[19] *Bowan v Secular Society* [1917] AC 406.

[20] *Re Astor's* (n 18) 541 (Roxburgh J).

[21] ibid, 456 (Roxburgh J).

*Trust Law*[22]—which underpins the TSSA 2024[23]—builds on its earlier Discussion Paper (DB No. 148, 2011)[24] and is central to understanding the reforms. To provide a fuller picture of the debate surrounding this recent codification, the section also draws extensively on Braun's critique of the Trust and Succession (Scotland) Bill.[25] This section is key to understanding the wider context and rationale behind the codification of private purpose trusts in Scotland.

### Scotland's historical acceptance of purpose trusts

The SLC aims to give 'unequivocal recognition' to private purpose trusts in Scots law.[26] Its report observed that while such trusts are 'probably already competent', statutory clarity is needed.[27] Historically, Scots Law has recognised *mortifications*—public trusts not found in England and Wales.[28] Though the term has fallen out of use and judicial engagement is limited,[29] it reflects a tradition of purpose trusts in Scotland.[30] The report acknowledges the English case of *Morice*, but explicitly rejects its applicability to the Scottish context.[31] Interestingly, Gretton questions whether Scottish public and private trusts share a common origin.[32] This raises the possibility that the SLC's reliance on mortifications is analogical rather than doctrinal. On this point, Braun cautions that the SLC's reasoning should be taken 'with a pinch of salt'.[33]

### Adopting the offshore model

The SLC's report states: 'Express provision is made for private purpose trusts'.[34] While not recognised in England and Wales,[35] such trusts have been accommodated in other jurisdictions.[36] The report notes, for example, that '[i]t is apparent from those other jurisdictions that there is *considerable demand* for such trusts'.[37] A key driver for the development of private purpose trust legislation has been the Cayman's Special Trusts (Alternative Regime) Law 1997 (STAR), which adopts an enforcer approach.[38] As such, the SLC has stated that there was no reason why beneficiaries in Scotland should not be treated similarly to those under STAR.[39]

Indeed, the DB No. 148 paper likens the enforcer role to that of the Scottish Lord Advocate in public purpose trusts.[40] However, some have drawn attention to the distinction between onshore and offshore jurisdictions.[41] Braun observes: 'Except for the US, onshore things look rather different as most jurisdictions that have legislated in the area in recent years have not regulated private purpose trusts.'[42] She suggests that regimes in Singapore, Hong Kong, and New Zealand have largely avoided regulation.[43] Scotland's codification thus marks a significant departure from the onshore norm. But the situation is more nuanced, as onshore jurisdictions have considered adopting the offshore model. For instance, in May 2021, the Singapore Academy of Law Reform Committee (which, *inter alia*, makes recommendations to the authorities on the need for legislation in any area or subject of law) published a comprehensive report on the Enactment of Non-Charitable Purpose Trusts. There, it recommended the enactment of a statutory regime authorising the creation and enforcement of NCPTs under Singapore law.[44] Similarly, in February 2022, Hong Kong's Law Society recommended that legislation should be introduced in Hong Kong to recognise the validity of purpose trusts.[45] Yet, based on current research and as of the time of writing, neither Singapore nor Hong Kong have enacted legislation authorising private purpose trusts.

### Practical uses

The SLC considers private purpose trusts to have 'very useful' practical significance, notably in commercial and estate planning contexts, and believes they will be 'attractive to a wide range of potential trusters'.[46] The report notes that many existing commercial trusts in Scotland may, in fact, be more

[22] Scottish Law Commission, *Report on Trust Law* (Scot Law Com No 239, 2014) https://www.scotlawcom.gov.uk/files/4014/0904/0426/Report_on_Trust_Law_SLC_239.pdf accessed 12 May 2025 ('SLC Trust Report').
[23] Braun (n 10) 4.
[24] Scottish Law Commission, *Discussion Paper on Supplementary and Miscellaneous Issues Relating to Trust Law* (Discussion Paper No 148, 2011) https://www.scotlawcom.gov.uk/files/4713/0157/0158/dp148.pdf accessed 12 May 2025 ('SLC Discussion Paper').
[25] Braun (n 10). It is important to note here that Braun has also published her findings in the *Edinburgh Law Review*, though this version offers a more concise treatment of the topic: see Alexandra Braun, 'Private Purpose Trusts in Scotland' (2023) 27 Edin LR 397. As such, this work relies on the former, more detailed source throughout.
[26] SLC Trust Report (n 22), para 11.7. Incidentally, Scotland is not the only civil law jurisdiction that has accorded such unequivocal recognition to private purpose trusts. For instance, the Canadian Province of Quebec, which is steeped in the French civil law tradition, has enacted in Article 1260 of its Civil Code that 'A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to *a particular purpose* and which a trustee undertakes, by his acceptance, to hold and administer.' (emphasis added). See further James Penner, 'Purposes and Rights in the Common Law of Trusts' (2014) 48 RJTUM 579; Lionel Smith, 'Scottish Trusts in the Common Law' (2013) 17 Edinburgh L Rev 283.
[27] ibid, para 2.25.
[28] George Gretton, 'Trusts' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland*, vol 2 (OUP 2000) 508–509.
[29] ibid, 509.
[30] SLC Trust Report (n 22), para 14.2.
[31] ibid.
[32] Gretton (n 28) 509.
[33] Braun (n 10) 7.
[34] SLC Trust Report (n 22), para 2.25.
[35] ibid, para 14.1.
[36] ibid, para 2.25; SLC Discussion Paper (n 24), para 1.18.
[37] ibid, para 2.25 (emphasis added).
[38] ibid, para 14.1. See also, Special Trusts (Alternative Regime) Law 1997, pt VIII (as amended).
[39] SLC Discussion Paper (n 24), para 10.22.I.
[40] ibid, para 1.18. In this context, the Lord Advocate occupies the same position as the Attorney-General in England and Wales.
[41] Braun (n 10) 4.
[42] ibid.
[43] ibid.
[44] Singapore Academy of Law, Report on the Enactment of Non-Charitable Purpose Trusts (Law Reform Committee, May 2021) https://sal.org.sg/wp-content/uploads/2025/02/Report-on-the-Enactment-of-Non-Charitable-Purpose-Trusts.pdf accessed 12 May 2025.
[45] The Law Society of Hong Kong, A Review of the Trust Regime in Hong Kong SAR, paras 31-32 https://www.hklawsoc.org.hk/-/media/HKLS/pub_c/news/submissions/20220211b.PDF?rev=4771d809ee1a47d2af2f3fe044b327b2 accessed 28 May 2025.
[46] SLC Trust Report (n 22), para 14.18.

appropriately characterised as private purpose trusts.[47] DP No. 148 illustrates how trusts with private purposes may be employed in project finance—e.g., to hold collateral in financial transactions—or in the securitisation of loans and stakeholder arrangements.[48] In estate planning, private purpose trusts offer increased flexibility and can circumvent complications arising from the rule in *Saunders v Vautier* (1841) 49 ER 282.[49] The SLC highlights their use in supporting the long-term continuation of family businesses.[50] Braun offers an important counterpoint, cautioning against the adoption of 'a novel and permissive scheme' that diverges from the onshore paradigm and may weaken traditional fiduciary principles.[51]

## Managing objections

The SLC report deals with 'four principal objections' to the non-recognition of private purpose trusts: (i) perpetuities; (ii) uncertainty; (iii) public policy; and (iv) enforcement.[52] These, along with Braun's criticism, are considered below. It is noteworthy that objections (ii) and (iii) are considered jointly in this section, as they overlap.

### *Perpetuities*

The rule against perpetuities has long been regarded as a principal objection to private purpose trusts, since such a trust could last for an excessively long period of time without a beneficiary to enforce. Hence, the rule against perpetuities is closely linked to the issue of enforcement, which is addressed below. With respect to this principal objection, the SLC considers it 'easily dealt with', noting that Scots law has never formally recognised the rule against perpetuities.[53] While it is true that the perpetuities doctrine is not recognised, Scotland nevertheless retained limits on excessive accumulation and successive liferents,[54] and the Act removes these restrictions to enhance Scotland's appeal as a trust jurisdiction.[55] Braun regards this development as a 'significant concern', warning that it may undermine policy safeguards by rendering assets inalienable and administratively unworkable.[56] In contrast, the rule against perpetuities is firmly entrenched in England and Wales. For instance, the Perpetuities and Accumulations Act 2009 codifies the rule and enforces a 125-year limit for most trusts;[57] this ultimately means that any reform in England and Wales would require a statutory override of both the rule against perpetuities and the beneficiary principle.

### *Uncertainty and public policy*

The SLC rejects the notion that the absence of a human beneficiary creates uncertainty, placing the onus on the truster to ensure that the purposes are clear and definite.[58] It argues that both private and public trusts must have identifiable, executable purposes,[59] and that the English law position under *Morice* should not constrain Scots law.[60] Regarding public policy, the SLC holds that a trust must confer an 'identifiable benefit',[61] stressing that this requirement is not unique to private purpose trusts.[62] It maintains that purposes must be lawful and not otherwise contrary to public policy—a standard consistent across trust types.[63] Braun critiques this, arguing that the concept of 'benefit' lacks clarity.[64] She warns of diminished accountability and oversight, given that the regime does not specify a mechanism to resolve uncertainty.[65] Codifying this area, she suggests, risks creating a 'beneficial vacuum'.[66] Under the current legislation, private purpose trusts could be used to create 'funds of property that are unowned for they are unavailable to creditors of the truster and trustee as well as beneficiaries for there are no beneficiaries'.[67] Inevitably, this raises moral and ethical issues around whether trust law should be used in such a way. However, this may be mitigated by the fact that trusts are invalid in Scotland if they are illegal or contrary to public policy.[68] Moreover, it seems that the force of Braun's criticism is diminished somewhat by the provision in the TSSA that when property is held on trust for a specific private purpose and executing the trust becomes impossible, impracticable, unlawful, contrary to public policy or inappropriate, the court may direct the trust property to be held for some other purpose considered to be consistent with the spirit of the truster's direction.[69] This may arguably afford some scope to the court, when confronted with a private trust for a purpose which confers no demonstrable or appreciable benefit to invoke this *cy-près* like power to direct the trust fund to be applied towards some other purpose whose benefits are more obvious or tangible.

[47] ibid, paras 3.17 and 14.3.
[48] SLC Discussion Paper (n 24), para 12.34
[49] ibid, para 12.35.
[50] ibid, para 12.35.
[51] Braun (n 10) 8–9.
[52] SLC Trust Report (n 22), para 14.4.
[53] ibid, para 14.5.
[54] Braun (n 10) 19.
[55] ibid.
[56] ibid.
[57] Perpetuities and Accumulation Act 2009, s 5. The statutory period does not apply to private purpose trusts. Section 18 states: 'This Act does not affect the rule of law which limits the duration of non-charitable purpose trusts.' Accordingly, private purpose trusts remain governed by the common law perpetuity period of 'a life in being plus twenty-one years'.
[58] SLC Trust Report (n 22), para 14.6.
[59] ibid, para 14.6.
[60] SLC Discussion Paper (n 24), para 12.8.
[61] SLC Trust Report (n 22), para 14.8.
[62] ibid.
[63] ibid.
[64] Braun (n 10) 13.
[65] ibid, 14.
[66] ibid, 22–23.
[67] ibid, 23.
[68] ibid. cf SLC Trust Report (n 22), para. 14.8.
[69] TSSA 2024, s.48.

### *Enforcement*

The DP No. 148 paper likens the enforcer to the Lord Advocate's role in public purpose trusts.[70] Accordingly, the SLC models its regime on the STAR, where an enforcer ensures the trust purposes are carried out.[71] While Scots trust law allows anyone with an interest in a public trust to sue for enforcement (*popularis actio*),[72] the SLC still found it desirable to provide a tailored mechanism for private purpose trusts.[73] In response to adverse consultation feedback, the SLC opted to replace the term 'enforcer' with 'supervisor',[74] distinguishing this from that of the 'protector'.[75] The SLC states:

> The function of a supervisor is to ensure that the trust purposes are properly implemented, from the standpoint of those who may benefit from the trust. The function of a protector, by contrast, is to ensure that the interests and wishes of the truster are property taken into account. There is no reason why the two should not co-exist.[76]

Braun, however, is more circumspect. She opines that the general right to sue under *popularis actio* is not equivalent to the supervisor's function, as the former is discretionary and imposes no duty to act.[77] Her scepticism also centres on the conceptual imprecision and potential for accountability vacuums that are inherent in enforcer-style models.[78] A central concern with the TSSA 2024, therefore, is the absence of statutory penalties or incentives on supervisors—what happens if they fail to act? Is there a fallback mechanism, or does the trust lapse into a legal limbo? Further complexity arises in relation to the fiduciary character of the supervisor's role. Under section 49(2) TSSA 2024, supervisors are fiduciaries, but it is not self-evident to whom these duties are owed in the absence of beneficiaries. While the Scottish model borrows considerable from Cayman's STAR, it arguably establishes a hybrid supervisory role, leaving its coherence and efficacy open to challenge.

## THE TRUSTS AND SUCCESSION (SCOTLAND) ACT 2024

This work is specifically interested in Chapters 6 and 7 of the Act, as they address the introduction and regulation of private purpose trusts.[79] Of particular relevance are the provisions that define and acknowledge the validity of such trusts, those that enable specified parties to apply to the court for enforcement purposes, and the sections detailing the roles of 'supervisor' and 'protector'. Naturally, the significance of these provisions lies in their codification of private purpose trusts in Scots law—an important legislative development that reflects a marked departure from the traditional position.

### Definition of 'private purpose trust'

Section 46 defines 'private purpose trusts' in Scotland.[80] This provision applies to all such trusts, irrespective of their date of creation.[81] These trusts arise where property is held or vested in a trustee for a specific private purpose,[82] and should not be constituted for a specific beneficiary or potential beneficiary.[83] However, a private purpose can coexist with beneficiaries.[84] Moreover, the trust should not be for *charitable* or other *public* purposes, which are treated separately.[85] Section 46 is significant not only because it codifies private purpose trusts, but also because it affirms them as a distinct category of trusts, separate from other purpose trust concepts.

### Applications to the court

The TSSA 2024 states that a person with an interest in the purpose, or a supervisor,[86] can make an application to the court for an order requiring fulfilment of that purpose.[87] An application can also be made to reform the trust,[88] and can be utilised where the trust's execution becomes: (a) impossible or impracticable; (b) unlawful or contrary to public policy; or (c) inappropriate due to changed circumstances, such that continued performance would no longer reflect the general intent of the truster.[89] The court is empowered to direct that the trust property, wholly or in part, be applied to a purpose it deems consistent with the spirit of the truster's original instructions.[90] This power bears similarity to the *cy-près* doctrine in charity law, which is also recognised in England and Wales.[91]

### Supervisors

To obviate enforcement issues linked to private purpose trusts, section 49 governs the appointment and role of 'supervisors'.[92] Even though this provision echoes other enforcer mechanisms found in offshore jurisdictions such as the

[70] SLC Discussion Paper (n 24), para 12.10.
[71] SLC Trust Report (n 22), para 14.9. Further, under the STAR Law 1997, s 95(1) the 'enforcer' is defined as 'a person who has standing to enforce a special trust.'
[72] ibid.
[73] ibid, para 14.10.
[74] ibid.
[75] ibid.
[76] ibid.
[77] Braun (n 10) 401.
[78] ibid, 402.
[79] TSSA 2024, chs 6 and 7.
[80] ibid, s 46.
[81] ibid, s 46(3).
[82] ibid, s 46(1)(a).
[83] ibid, s 46(1)(b).
[84] ibid, s 46(2).
[85] ibid, s 46(1)(a).
[86] ibid, s 48(2).
[87] ibid, s 47(1).
[88] ibid, s 48(1).
[89] ibid, s 48(2)(a)–(c).
[90] ibid, s 48(3)(a).
[91] SLC Trust Report (n 22), para 14.13. See also, Hayton, Obligation Article (n 6).
[92] TSSA 2024, s 49.

Cayman Islands, the legal position of supervisors may not be entirely analogous to other types of enforcers. Section 49 comes with some conceptual ambiguity. This is evident for instance in subsection (1) which allows the truster of a private purpose trust to *make provision* for the appointment of a supervisor in the trust deed.[93] It is not entirely clear from this formulation whether it is incumbent of the truster to name the supervisor himself or whether it will suffice for the truster to specify the process through which supervisors may be appointed, while leaving such appointments to be made by others designated in the trust deed. Again, subsection 8 provides that this section applies *irrespective of when the trust deed was created*.[94] It is not entirely clear whether this provision contemplates that effect will be given retrospectively to private purpose trusts in cases where the relevant trust deed was executed before the enactment of this statute.

Unless otherwise stated, more than one supervisor may be appointed.[95] The supervisor is distinct from a trustee: while trustees administer the trust *ex officio*, the supervisor provides specialised oversight ensuring that the trust's specific purpose is fulfilled.[96] Although supervisors are not trustees, they nonetheless owe fiduciary duties under the trust.[97] This aligns with Pawlowski's 2019 proposal advocating for a statutory regime for purpose trusts in England.[98] Given the role's specialist nature, which may involve resolving conflicts, a person cannot act simultaneously as both supervisor and trustee.[99] Additionally, the court has the authority to appoint a person to be a supervisor.[100]

Section 50 further strengthens the supervisory role by conferring upon the office of the same rights as beneficiaries,[101] including the right to make an application to the court,[102] to ensure proper administration,[103] and to receive trust information.[104] They may inspect and make copies of trust documents,[105] and enjoy the same rights as a trustee when performing their duties, such as protection and indemnity.[106] As such, supervisors may pursue remedies against trustees or third parties, paralleling the enforcement options reserved for beneficiaries.[107]

### Protectors

A further way that the nascent legislation has tried to resolve enforcement issues is through the introduction of the role of 'protector'. Section 53 outlines the framework for this role.[108] Under section 53(1), the truster may by the trust deed:

a) make provision for the appointment of a person (referred to as a 'protector') to oversee the exercise by the trustees of their functions; and
b) require the trustees to obtain the consent of the protector before exercising specified functions.

The protector may be conferred with powers,[109] subject to the limitations of section 53(3)(a)–(g).[110] These include directing trustees,[111] applying to the court,[112] and representing the interests of individuals connected to the trust.[113] Protectors also have rights of access to trust documents, unless otherwise restricted by the trust deed.[114] Like supervisors, protectors are fiduciaries and must act with due care.[115] Multiple protectors may be appointed.[116] Although the truster can appoint their own self to be the protector,[117] it is not competent to appoint a trustee into this office,[118] and *vice versa*.[119] Importantly, section 54 allows the truster to remove and appoint protectors.[120]

It must be reiterated that the question remains as to whether the boundaries between the roles of *supervisor* and *protector* are sufficiently well-delineated by the TSSA 2024. If these boundaries prove too porous in practice, conflicts may arise. Consequently, a careful doctrinal and practical examination of these roles is warranted. For instance, a significant question to ask is: how will conflicts between the two roles be resolved? This is perhaps an issue to examine in future research, particularly when considering a possible legal framework for England and Wales.

## IS THE TSSA 2024 A SIGN OF THINGS TO COME IN ENGLAND AND WALES?

The TSSA 2024 not only illustrates that the codification of private purpose trusts is achievable in onshore jurisdictions

[93] ibid, s 49(1) (emphasis added).
[94] ibid, s 49(8) (emphasis added).
[95] ibid, s 49(4).
[96] SLC Trust Report (n 22), paras 11.67–11.68.
[97] TSSA 2024, s 49(2).
[98] Mark Pawlowski, 'Private purpose trusts—a statutory scheme of validation' (2019) 25(4) Trusts & Trustees 391, 393. In this 2019 article, Pawlowski builds upon his previous work titled Mark Pawlowski and Jo Summers, 'Private Purpose Trusts—a Reform Proposal' (2007) 21 Trust Law International 48.
[99] TSSA 2024, s 49(3)(a)–(b).
[100] The circumstances in which such a judicial appointment may be made are set out in s 49(5) and (6).
[101] ibid, s 50(1).
[102] ibid, s 50(1)(a).
[103] ibid, s 50(1)(c).
[104] ibid, s 50(1)(b).
[105] ibid, s 50(1)(d).
[106] ibid, s 50(3)(a).
[107] ibid, s 50(4).
[108] ibid, s 53.
[109] ibid, s 53(2).
[110] ibid, s 53(3)(a)–(g).
[111] ibid, s 53(a)–(b).
[112] ibid, s 53(d)–(e).
[113] ibid, s 53(g)(i)–(v).
[114] ibid, s 53(4).
[115] ibid, s 53(5).
[116] ibid, s 53(8).
[117] ibid, s 53(7).
[118] ibid, s 53(6)(a).
[119] ibid, s 53(6)(b).
[120] ibid, s 54(2) and (4).

but also highlights the commercial and estate planning opportunities that emerge when the constraints of the traditional beneficiary principle are relaxed. Nonetheless, this analysis has revealed that codifying private purpose trusts introduces both conceptual and practical complexities and raises significant moral and ethical questions that may prove contentious in jurisdictions where the beneficiary principle is deeply entrenched. Despite these challenges, the article supports the codification—and concomitantly the expansion—of private purpose trusts. This position is adopted with full awareness of the legal and political obstacles that any such legislation would face in England and Wales. Accordingly, this section explores the potential for reforming private purpose trusts in this jurisdiction, beginning by arguing that the relevant concepts and doctrines in are sufficiently malleable to accommodate a statutory scheme.

## Conceptual and doctrinal malleability

The scholarship does not unanimously show support for relaxing the beneficiary principle, as demonstrated by Braun's critique of the SLC's justifications for the TSSA 2024. Given the extent to which this article has already evaluated Braun's position, it is unnecessary to repeat her arguments here. Nonetheless, this section contends that there is sufficient conceptual and doctrinal malleability within the English legal system to permit their codification. This argument is not novel; for example, Pawlowski has long advocated the adoption of a 'statutory scheme of validation' for private purpose trusts.[121] He notes: 'It is apparent from even a cursory review of the English law that there is little in the way of a sound basis for understanding why some private purpose trusts have been upheld and others have not.'[122] As such, he calls for a 'more robust approach to the reform' of this area, modelled on developments in offshore jurisdictions.[123]

At one time, Langbein famously provided a 'contractarian basis' for the trust, likening the concept to contracts and demonstrating its flexibility as a concept.[124] However, as Morris, referencing Matthews, points out, trusts are not contracts because, conceptually, they create a right-duty relationship.[125] Smith, however, suggests that in his later work Langbein 'explored the limits of the trust's flexibility and what might be called the mandatory part of trust law'.[126] The mandatory limits of trusts are commonly referred to as 'the irreducible core'.[127] This idea was famously outlined in *Armitage v Nurse* [1998] Ch 241 (CA), where Millett LJ ruled that 'there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust'.[128]

According to Smith, a trust will be void if the irreducible core is missing. As he puts it, 'Professor Langbein takes the view that a trust must benefit the beneficiaries, or it is not a trust'.[129] Ultimately, there must be someone who can enforce the *res*.[130] In Smith's view, the irreducible core explains why *pure* purpose trusts are invalid.[131] In that vein, he fully understands why the old, strict rules surrounding the need for beneficiaries and perpetuities have been instigated.[132] Smith recognises what he terms as the "benign" view of private purpose trusts, in that they offer 'a benevolent way to give people what they want'.[133] But, at the same time, he acknowledges the 'deeper problems' with such trusts—*viz*., that they are morally and ethically questionable because the possibility of technical issues and property shielding.[134] Another proponent of the strict beneficiary principle is Hudson.[135] He argues that the beneficiary principle 'should not be forgotten' and cautions against the enforcer approach, warning that it may represent an excessive delegation of power.[136]

In contrast, Hayton has long advocated for the adoption of the enforcer principle as a mechanism of oversight and enforceability.[137] He argues that private purpose trusts need not rely on identifiable beneficiaries; rather, all that is required is an individual, designated by the settlor, to enforce the trust's terms.[138] As Sir William Grant MR stated in *Morice v Bishop of Durham*, what is required is that 'there [is] somebody in whose favour the court can decree performance'.[139] Conceptually, Hayton contends that the Master of the Rolls' judgment in *Morice* leaves room for interpretation and, in particular, the application of an enforcer principle: ultimately, there must only be *somebody* to enforce—not necessarily a *beneficiary* holding a countervailing right *in rem*.[140] Hayton's interpretation of *Morice* demonstrates that there is conceptual/doctrinal malleability to codify and expand private purpose trusts at common law.

Matthews tempers Hayton's point somewhat by suggesting that *Morice* was primarily concerned with object certainty, rather than the nature of beneficiaries *per se*.[141] He argues that the rule encompassing beneficiaries is more properly seen in

[121] Pawlowski (n 97) 391.
[122] ibid, 392.
[123] ibid.
[124] John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625; cf P Matthews, 'From Obligation to Property and Back Again?' in David J Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwe Law International 2002) 241.
[125] Alec J Morris, 'Private Purpose Trusts and the Re Denley Trust 50 Years On' (2020) 3 Trust Law International 165.
[126] Smith (n 12) 2156.
[127] David Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* 47, 47–49 (Clarendon Press 1996) 47. ('Hayton, Irreducible Core').
[128] *Armitage v Nurse* [1998] Ch 241, 253 (Millett LJ).
[129] Smith (n 12) 2157.
[130] ibid.
[131] ibid, 2157–2158.
[132] ibid, 2167.
[133] ibid, 2174.
[134] ibid.
[135] Alastair Hudson, *Equity and Trusts* (9th edn, Routledge 2016) 188.
[136] ibid.
[137] Hayton, Obligation Article (n 6) 96.
[138] ibid, 97.
[139] ibid.
[140] ibid.
[141] Matthews (n 123) 248.

cases such as *Re Wood* [1949] Ch 498,[142] where Harman J held that: '[a] gift on trust must have a *cestui que trust*'.[143] Yet it is important to recognise that many of these concepts exist in a fluid state and remain open to interpretation, contestation, and revision.[144] Indeed, some scholars have questioned whether it is right to describe private purpose trusts as trusts at all, i.e. should they be more appropriately defined as non-obligatory powers.[145]

The potential for expanding private purpose trusts lies in rethinking how the concept is understood and applied in practice. Harding challenges existing restrictions and advances a position for more inclusive conceptualisation.[146] He suggests that purpose trusts are merely a "dispositive arrangement", and that legal interpretation is required to understand whether a given arrangement is 'purpose-oriented' based on what the circumstances may be.[147] Drawing on Dagan and Samet,[148] Harding argues that purpose trusts represent a 'distinctive mode of governance' that may be essential to any 'liberal property regime'.[149] He explains: 'For Dagan and Samet, trusts serve the autonomy-enhancing objects of such a regime to the extent that they enable settlors to craft bespoke arrangements (within limits) under which they and others may enjoy the benefits of property in a multitude of ways.'[150]

Harding uses this thesis in facilitative private law to argue that purpose trusts reinforce the law's liberal commitment by enhancing personal autonomy.[151] From a conceptual viewpoint, he distinguishes between 'fiduciary service' and 'purpose-based governance',[152] with the latter being a broader concept that is more closely aligned with settlors' intentions in creating purpose trusts.[153] He further contends that the modality and conceptual framework for purpose trusts differ from those of beneficiary trusts, and this deserves recognition.[154] While the orthodox approach remains normatively valuable—particularly in preserving the 'jural relationship' between judge and trustee—Harding notes that some scholars have proposed analysing purpose trusts through the lens of governance arrangements.[155] He concludes by asserting that: 'there is a *prima facie* liberal argument for purpose trusts of all types given the distinctive mode of governance they entail'.[156]

However, there is clear contention in the literature on this point. Morris passionately remarks: 'To permit the enforcer principle would be to substantially undermine centuries' worth of caselaw and affect the processes such as that concerning insolvency.'[157] He argues that it would be antithetical to the trust concept, which is fashioned on and binds the conscience.[158] However, it must be remembered that equity and trusts historically came about to offer greater autonomy and liberality with a view to counteracting the rigours common law. Moreover, it is worth contrasting Morris' stance on the sanctity and longevity of the beneficiary principle with Pawlowski and Summers research. Pawlowski and Summers acknowledge that a host of English cases have upheld the requirement that there must be for a *cestui que trust* in order for the trust to be valid.[159] They however emphasise that these authorities 'are relatively recent in terms of trust law', even though at least one writer (Morris) has argued that the cases merely confirmed a rule that had been in existence 'for centuries'.[160] Indeed, Pawlowski and Summers clearly suggest that the beneficiary principle might not be as sacrosanct and venerable in English law as it is often portrayed:

> [T]here are many early decisions where non-charitable purpose trusts have been upheld despite the absence of a human beneficiary to enforce them. Baxendale-Walker, in his seminal book, lists 65 cases where purpose trusts have been upheld by the English courts, of which 52 were decisions of the higher courts. So how can these cases be reconciled with the statements of principle set out above?[161]

English law has the conceptual and doctrinal flexibility to reposition itself and, where desirable, relax the beneficiary principle. This view is not merely abstract; the literature shows that private purpose trusts can be conceptually extended. A decade ago, the enforcer concept was seen as radical, but it has since gained momentum and broader acceptance. This article aligns with the growing view that private purpose trusts are sufficiently malleable to accommodate the enforcer model.

## Existing mechanisms and analogues

The courts have entertained exceptions to the beneficiary principle, suggesting that the English law is not entirely inflexible. Though limited, existing mechanisms and analogues indicate the potential for legal evolution. Many authors, whether they are in favour of an enforcer model or not, acknowledge these exceptions.[162]

[142] *Re Wood* [1949] Ch 498, 501
[143] Matthews (n 123), citing Harman J in *Re Wood* [1949] Ch 498, 248.
[144] Matthew Harding, 'A Fresh Look at Purpose Trusts' in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (OUP 2023) 202.
[145] Matthews (n 123); this point is acknowledged in Smith (n 12) 2168, fn 82.
[146] Harding (n 143) 201.
[147] ibid, 202.
[148] See Hanoch Dagan and Irit Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime' in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations of the Law of Express Trusts* (OUP 2023) ch 6, 139–175.
[149] Harding (n 143) 205.
[150] ibid.
[151] ibid, 210. See also, S Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011) 31-32.
[152] Harding (n 143) 206.
[153] ibid, 210.
[154] ibid, 206.
[155] ibid, 217.
[156] ibid, 218.
[157] Morris (n 124) 184.
[158] ibid.
[159] Pawlowski and Summers (n 97).
[160] ibid.
[161] ibid. The seminal book cited here is Paul Baxendale-Walker, *Purpose Trusts*, (Bloomsbury Professional 1999) (currently out of print).
[162] James Brown, 'What are we to do with testamentary trusts of imperfect obligation?' (2007) Mar/Apr Conv 148.

In *Bowman v Secular Society* [1917] AC 406, Lord Parker emphasised that a trust is valid only if it is for identifiable beneficiaries or is recognised as charitable.[163] Thus, a starting point for a court is to determine if the purpose is, at first blush, charitable.[164] The reason why charities are treated differently to private purposes is because the equitable jurisdiction is assured despite the lack of beneficiaries: the state may indeed intervene *parens patriae*—typically through the Attorney-General[165] or Charity Commissioners—to enforce the trust, where there is evidence of a trustee's maladroit administration or breach of trust.[166] Matthews has emphasised that charity is different from other trusts because it developed from the ecclesiastical jurisdiction,[167] and that '[a]part from charity, however, the judges have made almost no inroads on the no-purpose trust rule'.[168] This is perhaps why Waters uses the metaphor 'new wine in old bottles' to describe the concept of a trust enforcer.[169] By this, he suggests that it may be unwise to impose a novel device, developed by off shore jurisdictions, to the traditional trust framework without re-evaluating its legal and conceptual foundations.[170]

The most notable exception are the so-called 'trusts of imperfect obligation'. These trusts form four categories, being trusts for: (a) private animals; (b) the saying of private masses; and (c) the maintenance of monuments and graves.[171] The most well-known example of such a trust is when North J upheld a bequest for an annuity to maintain a testator's horses and hounds for a period of fifty years.[172] In spite of their practical utility,[173] judges have generally viewed these unfavourably and *Re Endacott* [1960] Ch 232 rejected any further expansion of such trusts. Indeed, Harman LJ described the extant categories as 'troublesome and anomalous', arising because 'Homer has nodded'—implying flawed legal reasoning and, more damningly, 'concessions of human weakness'.[174] This decision reaffirmed the orthodox approach and closed the door on any further judicial expansion.

Despite this, some academics have argued for reform. Virgo, for example, sees no reason to restrict the trusts of imperfect obligation.[175] He contends that a non-charitable purpose should be valid if it satisfies the perpetuity rule, the purpose is certain, and the trustee has undertaken to apply the funds accordingly.[176] Virgo suggests that any surplus or failure would trigger an automatic resulting trust for the testator's estate, preventing property inalienability.[177]

In other areas, too, the courts have developed mechanisms to uphold transfers for seemingly non-charitable purposes. As Pawloski and Summers explain, this has been the case for instance, in a variety of situations involving 'factual beneficiaries'.[178] While a full discussion lies beyond the article's scope, some examples are worth noting. In *Re Andrew's Trust* (1857) 7 De G M & G 373, the court treated a stated purpose as a mere moral motive for giving, allowing a gift to pass absolutely without being impugned.[179] Moreover, in *Re Denley's Trust Deed* [1969] 1 Ch 373, Cross J upheld a trust where the purpose conferred a 'direct or indirect benefit' on identifiable individuals, thereby, to his mind, not falling within the principle's mischief.[180] Morris provides a detailed analysis of *Re Denley*, showing that while it is a controversial judgment, it nonetheless remains 'good law'.[181] That said, he believes that the case should not be seen as *sui generis*, as it was a novel and dubious decision that stretched judicial creativity.[182] Other authors (notably Brown) refer to *Re Denley* as an exception to the beneficiary principle.[183] Similarly, the case law on gifts to unincorporated associations reflects further judicial attempts to circumvent the strictures of the beneficiary principle, by adopting an approach based in contract rather than trust law.[184]

Finally, the type of purpose trust created in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 may be seen as creating a type of quasi-enforcer situation for a private purpose.[185] Pawlowski claims that the beneficiary principle is 'not absolute', noting that there are recognised exceptions that give rise to valid purpose trusts despite an absence of an equitable beneficial owner.[186] Referencing Hayton, he highlights the concept of the enforcer as already being present in English law, albeit in a limited form, through the so-called Quistclose purpose trust.[187] For clarity, the Quistclose trust allows a lender to make a loan with a specific condition attached.[188] If the specified purpose is breached by the borrower, the loan

[163] *Bowman v Secular Society Ltd* [1917] AC 406 (HL) 422 (Lord Parker).
[164] *Leahy v Attorney-General for New South Wales* [1959] AC 457, 479 (Viscount Simonds).
[165] The Rt Hon Lord Hermer KC, Attorney General for England and Wales (appointed 5 July 2024).
[166] Hayton, Obligation Article (n 6) 96.
[167] Matthews (n 123) 204.
[168] ibid, 205.
[169] Donovan Waters, 'The Protector: New Wine in Old Bottles?' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press 1996) 63.
[170] ibid.
[171] See *Re Thompson* [1934] Ch 342, where a trust for the promotion of fox hunting was recognised as a valid fourth category for a trust of imperfect obligation; cf the Hunting Act 2004, s 1(1), which now prohibits hunting "wild mammals" with dogs in England and Wales. A good overview of these and the other exceptions is given by Brown (n 161).
[172] See *Re Dean* (1889) 41 Ch D 552, where North J did not consider it neither 'illegal or obnoxious' to establish private trusts for the maintenance of animals.
[173] Brown (n 161).
[174] *Re Endacott* [1960] Ch 232, 251 (CA) (Harman LJ).
[175] Graham Virgo, *The Principles of Equity and Trusts* (5th edn, OUP 2022) 99–102.
[176] ibid.
[177] ibid.
[178] Pawlowski and Summers (n 97) 443–445.
[179] *Re Andrew's Trust* (1857) 7 De G M & G 373.
[180] *Re Denley's Trust Deed* [1969] 1 Ch 373.
[181] Morris (n 124) 183.
[182] ibid, 184.
[183] Brown (n 161) 149.
[184] See *Neville Estates Ltd v Madden* [1962] Ch 832 (Ch); *Re Recher's Will Trusts* [1972] Ch 526 (CA); *Re Lipinski's Will Trusts* [1976] Ch 235 (Ch).
[185] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).
[186] Mark Pawlowski, 'Purpose trusts: obligations without beneficiaries?' (2002) 9(1) Trusts & Trustees 10. See also his treatment of Quistclose trusts *vis-à-vis* private purpose trusts in Pawlowski (n 97) 392.
[187] ibid, 13.
[188] *Quistclose* (n 179).

ends and the lender can enforce to reclaim their property.[189] Pawlowski also adopts a pragmatic stance, recognising Quistclose's financial utility.[190] He concludes his article with a clear call for reform:

> Inevitably, therefore, the beneficiary principle will need to make way for a broader principle in equity which justifies the enforcement of trust obligations by means of a wider class of persons who have been conferred (either expressly or by statute) with powers of supervision and control of the trust.[191]

Codification remains possible in England and Wales despite the current position. A person akin to an 'enforcer' can be formally recognised to enhance the practical utility of private purpose trusts. An enforcement mechanism already exists in the context of charitable trusts, where the Attorney General acts to protect charitable interests. By analogy with other jurisdictions, the *cy-près* doctrine could be extended to private purpose trusts to ensure continued administration when the original purpose fails.

## The rule against perpetuities

The legal framework in England and Wales differs significantly from that of Scotland, in large part due to the former jurisdiction's deeply entrenched rule against perpetuities. Nevertheless, this article contends that the existence of such a rule should not preclude reform aimed at expanding the scope of private purpose trusts. As Pawlowski observes: 'Certain jurisdictions (eg, Isle of Man) have chosen to subject purpose trusts to their usual trust perpetuity period. Others (eg, Bermuda, Jersey, BVI, and Cayman) have opted to exempt purpose trusts from the perpetuity rule altogether.'[192]

In England and Wales, two perpetuity rules operate concurrently: one grounded in the common law, and another codified in statute.[193] At present, the common law perpetuity rule—'a life in being plus twenty-one years'—applies to the trusts of imperfect obligation.[194] The phrase 'a life in being' has been subject to judicial interpretation.[195] In *Re Kelly* [1932] IR 255, for instance, it was held to refer to 'human lives',[196] in contrast to *Re Dean* [1889] LR 41 Ch D which included animal lives within the period.[197] In the same year as *Re Kelly*, another court did not think that the phrase 'so far as the trustees could legally do so' offended the rule.[198] Since a private purpose is not a human, the term of twenty-one years is imposed.[199] Notwithstanding interpretative differences, falling foul of the rule will invalidate the trust.[200]

Wilde observes that 'the basic aim of the rule against perpetual trusts is to prevent settlors determining the use of wealth too long after their deaths'.[201] This is to promote 'inter-generational fairness' and to free up wealth.[202] However, Wilde notes an inconsistency in how perpetuity rules are currently being applied: the common law rule requires 'certainty' that a non-charitable trust will terminate within the period, whereas the vesting of interests is assessed on the basis of 'probability'.[203] This asymmetry is problematic but is subject to change.[204]

Smith suggests that one way that offshore innovations can come into contact with the onshore is by the onshore making comparable reforms to their laws.[205] He says that '[o]ne of the most well-established of these is the decision in several jurisdictions in Canada and the U.S. to abolish the rule against perpetuities'.[206] This was not an issue for Scotland as it did not recognise the perpetuity rule. Yet England's perpetuity period does not render reform impossible. Future legislative developments could retain the existing rules, abolish them, or modify their application. Given the rule's historical and doctrinal entrenchment in English law, targeted modification—rather than abolition—is likely to be the most feasible approach.

## Other fundamental differences

It could be argued that the foundations of English and Scottish trusts law are materially different in certain fundamental respects which makes it difficult for the legislature to replicate or reproduce current Scottish approach to private purpose trusts within the English legal system. Two major differences will be considered here.

### *The civil law origins of Scots trusts law vs. common law origins of English trusts law*

The fundamentals of Scots trusts law evolved within a civil law tradition which was much more amenable to the creation of trusts for purposes than the common law tradition within which the English trust was conceived and developed. As Lord Briggs of the UK Supreme Court has pointed out extrajudicially, the trust exists in various civil law jurisdictions which, unlike England and other common law jurisdictions, 'do not recognise equity at all, let alone the division of proprietary rights in the same property into legal and beneficial interests'.[207] He notes that:

189 ibid.
190 Pawlowski (n 185) 13.
191 ibid, 14.
192 Pawlowski (n 97) 394; Pawlowski and Summers (n 97) 452.
193 Virgo (n 170) 217.
194 Brown (n 161) 154.
195 Virgo (n 170) 223.
196 Brown (n 161) 154, citing *Re Kelly* [1932] IR 255. See in particular fn 42.
197 ibid, citing *Re Dean* [1889] LR 41 Ch D.
198 *Re Hooper* [1932] 1 Ch 38.
199 Morris (n 124).
200 D Wilde, 'The rule against perpetual trusts: part 1—trusts for non-charitable purposes' (2021) 35(3) Trusts Law International 149.
201 ibid, 150.
202 ibid.
203 ibid.
204 ibid.
205 Smith (n 12) 2166.
206 ibid.
207 Lord Briggs of Westbourne, 'Does England need a Trusts Act?' (2019) Butterworths Journal of International and Financial Law 359.

> [The] civil law of Scotland has recognised and encouraged the use of trusts since at least the 17th century, without recognising any equitable proprietary interest of the beneficiaries (if there are any) in the trust property. In principle, all Scottish trusts are, in essence, purpose trusts, even when their purpose is in many cases to benefit a defined class of beneficiaries.[208]

A key attribute of the civil law approach to trusts is the existence of dual patrimonies. This is reflected for instance in Art 1260 of the Quebecois Civil Code which provides that a trust entails the transfer of property by a settlor from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose.[209] In keeping with this civil law tradition, it is not entirely surprising that modern Scottish trusts law has shown itself to be fairly comfortable with the prospect of recognising and enforcing trusts for purposes. Significantly however, even though it is steeped in the civil law tradition of dual patrimonies, the Scots approach is not entirely alien to English law and has found expression for instance archetypally English institutions such as the administration of estates and in the distribution of assets on insolvency among other spheres.[210]

### *The recognition of public non-charitable purpose trusts under Scots law but not under English law*

It can be discerned from the reasoning advanced by the SLC that the fact that Scottish trusts law was prepared to give effect to trusts for public purposes, where such purposes were not charitable in nature, made it easier to justify the legal recognition and enforcement of non-charitable trusts for private purposes. In contrast, the conventional position under English trusts law is that trusts for public purposes will only be accorded legal recognition if such purposes are also charitable in nature. It therefore appears at first sight that under English law trusts for non-charitable purposes are generally invalid whether such purposes are public or private in nature.

Upon further reflection, however, there are indications that in the realm of statutory trusts at least, trusts for public non-charitable purposes have been upheld by the English courts. This is evident from the recent UK Supreme Court decision in *R (Day) v Shropshire Council* (2023) 10 JPL 1314-1339 which was analysed by Lee and Yip.[211] Within the broader common law tradition, in the case of *Duke Unley Pty Ltd v The Corporation of the City of Unley*,[212] the South Australian Court of Appeal asserted at para [52] that:

> [I]n addition to equitable trusts, statutes can create statutory trusts. If a statute evinces the requisite intention, a statutory trust need not be subject to the same constraints as equitable trusts. For example, the legislature could create a trust for a purpose other than a charitable purpose or other eligible purpose recognised by equity [such as the establishment of a car park].[213]

This judicial endorsement of trusts for public purposes of a non-charitable nature within the statutory sphere in these common law jurisdictions provides some justification for the view that there should also be some scope for the recognition and enforcement of non-charitable trusts for private purposes.

### Public policy and practical considerations

The SLC maintains that public policy concerns do not diminish the case for reform, as such concerns apply to all trusts. In contrast, Braun highlights potential public policy risks associated with statutory purpose trust legislation. Hudson strongly defends the strict application of the beneficiary principle, viewing it as essential to maintaining a robust public policy framework.[214] He cautions that offshore trusts services are used 'primarily for tax avoidance purposes or to partition assets off from other entities', arguing that enforcer trust legislation in such jurisdictions is often designed solely to enable overseas investors to circumvent taxation.[215] Similarly, Morris questions enforcer accountability, asking, 'who watches the watchmen?'.[216] The Scottish legislation obviates this by making supervisors and protectors subject to fiduciary duties. Any reform in England and Wales would need to handle these issues carefully. While these concerns are valid and reflect legitimate public policy anxieties around relaxing the beneficiary principle, they should not preclude the introduction of purpose trust legislation.

Matthews adopts a more pragmatic stance, suggesting that the international offshore trust jurisdictions saw a lacuna in the vehicles that were available for commercial transactions, which led to the establishment of the statutory purpose trust.[217] While he expresses serious doubts about some of the justifications offered by offshore jurisdictions for introducing statutory purpose trusts, he acknowledges the changing landscape of the offshore financial services industry.[218] He notes that increased global competition and the rapid expansion of offshore trust centres have shifted the context.[219] To his mind, the risks associated with offshore statutory purpose trust regimes are now largely tempered by sophisticated anti-avoidance legislation and stringent money-laundering rules.[220]

[208] ibid.
[209] See further, n 26.
[210] Smith (n 26) 288–295, 303.Smith asserts (ibid 295) that, 'Every estate of a deceased person in the common law follows the logic, not of the common law trust, but of the Scottish trust.' See also Penner (n 26) who remarks that 'the English estate upon death has remarkable structural similarities with the concept of a trust as a separate patrimony.'
[211] James Lee and Man Yip, 'Statutory Trusts and Trusty Statutes' (2024) 35(1) King's Law Journal 5, 14-16. See also, Lloyd Brown, 'Statutory trusts, planning law and open spaces: *R (on the application of Day) v Shropshire Council*' (2025) 31 Trusts & Trustees 68–72.
[212] *Duke Unley Pty Ltd v The Corporation of the City of Unley* [2021] SASCA 91; also cited by Lee and Yip (ibid) 17.
[213] ibid, 52.
[214] Hudson (n 134) 188.
[215] ibid.
[216] Morris (n 124).
[217] Matthews (n 123) 28.
[218] ibid, 29.
[219] ibid, 29.
[220] ibid, 29.

Nevertheless, Smith has expressed concerns with US law reforms that have been driven by 'interjurisdictional competition'.[221] On this point, he advances a cautionary approach, viewing it as a 'race to the bottom'.[222]

The use of private purpose trusts has important practical applications. The SLC has noted such trusts carry significant commercial and estate planning implications, as has been shown. This also aligns with Harding's view that private purpose trusts can contribute to a liberal legal regime by enhancing individual autonomy. For instance, they may be especially useful in contexts such as environmental management and protection. Consider a situation where land is contaminated and requires remediation: in such a case, a fund could be established specifically for the purpose of undertaking remediation works, without the need to identify named beneficiaries.

Brown conducted empirical research to examine the extent to which testamentary private purpose trusts are used and employed in everyday probate practice.[223] His survey offers a valuable "snapshot" of contemporary practice, revealing that requests for such trusts have been made to fifty-three per cent of the solicitors surveyed.[224] Moreover, 37.5% of the respondents affirmed that the trusts were created.[225] Brown recommends creating "a small statutory reform" to permit private purpose trusts, provided they are subject to 'a system of "supervision and enforcement" by an interested party.'[226] By adopting the orthodox approach, the English law is missing out on valuable opportunities to permit greater autonomy and commercial opportunities within the system.

## CONCLUSION

This article has examined the implications of the TSSA 2024 and considered whether it signals a broader shift in the treatment of private purpose trusts in the UK. While space limits a detailed legislative proposal for England and Wales, the analysis has demonstrated that the current orthodoxy may no longer suit the modern commercial context. Aside from narrow exceptions, the current approach dictates that a trust will fail unless its objects are charitable or for identifiable beneficiaries. Thus, England and Wales should consider following Scotland's compelling lead in codifying private purpose trusts. While acknowledging the counterarguments, this work has shown that there is conceptual and practical merit for enacting codifying legislation. Such legislation could unlock commercial opportunities that are currently constrained by the rigid legal framework in place.

More meaningful progress might have been made towards the attainment of this goal, if the wide-ranging reforms contemplated by the Law Commission of England and Wales in its project on *Modernising Trust Law for a Global Britain*,[227] had not ground to an abrupt halt in 2023. In the prevailing circumstances, the fact that English law has not yet embraced the Scottish approach to private purpose trusts is not due to any principled objections by the Law Commission to the enforceability of such trusts. Rather, it is because the Commission, in response to competing demands for its limited resources, has chosen as a matter of practical expediency to prioritise other areas of law reform, for the time being at least. It is thus conceivable that in the not too distant future, the Commission may be in a position to resume its quest to reform the English law of trusts, including private purpose trusts, or that even without embarking on the sort of wholesale reforms envisaged by the modernisation project, it may choose to pursue a more limited reform agenda within the specific area of private purpose trust.

## AUTHOR BIOGRAPHY

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[221] Smith (n 12) 2174.
[222] ibid, 2173.
[223] Brown (n 161) 154–155.
[224] Brown (n 161) 155–156.
[225] ibid, 156.
[226] ibid, 158.
[227] Law Commission (n 2).

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