HOUSE OF LORDS

Special Public Bill Committee

Perpetuities and Accumulations Bill [HL]

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The Special Public Bill Committee

The Perpetuities and Accumulations Bill [HL] has been committed to a Special Public Bill Committee in the House of Lords. The Bill, which is based on the Law Commission's recommendations for the reform of the rule against perpetuities and the rule against excessive accumulations (Law Commission Report 251), seeks to simplify and modernise two long-standing and exceptional technical legal rules affecting trusts and property ownership in England and Wales.

Membership

Lord Archer of Sandwell
Lord Bach
Lord Clinton-Davis
Lord Goodhart
Lord Hart of Chilton
Lord Henley
Lord Hodgson of Astley Abbotts
Lord Kingsland
Lord Lloyd of Berwick (Chairman)
Lord Thomas of Gresford
Baroness Whitaker

Publications

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Lord Bach
Lord Clinton-Davis
Lord Goodhart
Lord Hart of Chilton
Lord Henley
Lord Hodgson of Astley Abbotts
Lord Kingsland
Lord Lloyd of Berwick (Chairman)
Lord Thomas of Gresford
Baroness Whitaker

Part I—Evidence

MINUTES OF EVIDENCE TAKEN BEFORE THE SPECIAL PUBLIC BILL COMMITTEE ON THE PERPETUITIES AND ACCUMULATIONS BILL [HL]

WEDNESDAY 20 MAY 2009

Present	Clinton-Davis, L	Hodgson of Astley Abbotts, L
	Goodhart, L	Kingsland, L
	Hart of Chilton, L	Lloyd of Berwick, L (Chairman)
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Memorandum by the Ministry of Justice

INTRODUCTION

1. This memorandum briefly describes the consultations carried out in connection with the reforms in the Perpetuities and Accumulations Bill and the principal resulting changes to the text. These consultations fall into two stages; first, consultation undertaken by the Law Commission in connection with their original provisional recommendations, and second, consultations undertaken by the Government.

A. *Consultation on the Law Commission's original provisional proposals (1993)*

2. The Law Commission published its Consultation Paper (No 133) on the rules against perpetuities and excessive accumulations in 1993. There were 62 responses from persons and organisations following the publication of the consultation paper. The majority of respondents to the Law Commission's consultation paper favoured retaining a rule against perpetuities except in relation to commercial transactions and pension schemes, where they thought the rule should not apply. Following consideration of the responses the Commission published its report in 1998. The report describes the views of consultees on the issues raised in the consultation paper. Broadly the reforms proposed by the Commission reflect the consensus of views from this consultation. The Government's acceptance of these proposals was announced in an answer to a Parliamentary Question on 6 March 2001.

B. *Consultation by Government on the rule against excessive accumulations (2002)*

3. The Government conducted a consultation in 2002 on the reforms proposed by the Law Commission to the rule against excessive accumulations as part of a proposal to implement these reforms by regulatory reform order. In addition to the Law Commission's recommendations, the consultation included a proposal to allow the court and Charity Commission to make orders overriding the 21-year maximum accumulation period for charities, and proposed a power for the Charity Commission to make general derogations from the limitation for classes of charities. The additions followed discussions with the Law Commission and the Charity Commission.

4. Respondents were generally in favour of the proposals. However in the event the proposals were considered to be outside the scope of the regulatory reform order procedure.

C. *Limited consultation by Government (2005–06)*

5. The Government sought views from other government departments, the Charity Commission, the Crown Estate and solicitors for the Crown on the Law Commission's draft Bill, subject to some changes, in 2005. The changes did not alter the fundamental policy of the Bill, and included the proposals supported in the 2002 consultation. In brief, the changes were as follows. The 21-year statutory limit on accumulation for charities would not override an order of the court or Charity Commission. Regulation-making powers would allow for the Secretary of State to make general exemptions to the 21-year limitation of accumulation for charities. A provision containing fertility presumptions was also included in the Bill, which replicated a provision in the Perpetuities and Accumulations Act 1964 concerned with "early vesting". At this stage the Crown application clause was also amended to reflect the uncertainty at common law as to whether the rule against perpetuities applies to the Crown.

D. *Consultation by Government on a draft Law Commission Bill (2008)*

6. In preparation for introduction of the Bill under the new House of Lords procedure[1] for Law Commission Bills, a targeted consultation was undertaken in 2008 with key stakeholders on the draft of a Bill incorporating the changes from the 2005 consultation. Respondents were again overwhelmingly in favour of the proposals. The Government has received representations from the Trust Law Committee, and the Law Society, among others, encouraging the implementation of the reforms. Other departments and groups consulted included:

HM Revenue and Customs, HM Treasury, Department for Work and Pensions, Charity Commission, the Charity Law Association, Cabinet Office, Land Registry; the Crown Estate, the Association of Corporate Trustees; the National Association of Pension Funds; the Society of Trust and Estate Practitioners; the Institute of Professional Willwriters; the Society of Pension Consultants; the Association of Property Support Lawyers; and the Association of British Insurers.

Policy Changes—Effects on Existing Trusts

7. The targeted consultation highlighted concerns about the Bill's application to special powers of appointment. Some consultees expressed concern that the application of the Bill to estates and interests created by special powers of appointment under existing trusts would deviate from the usual treatment of such trusts in new legislation by interfering with existing arrangements. One consultee commented that there could be uncertainty in a revenue context as to whether the exercise of a special power of appointment would result in a resettlement for the purposes of Inheritance Tax and Capital Gains Tax.

8. To address these concerns it was decided that the perpetuity period for the exercise of a special power created before the Bill will be the perpetuity period applicable to the power itself (see clause 5 (perpetuity period)).

9. Concerns about revenue consequences also prompted the amendment of clause 12 (pre-commencement instruments: period difficult to ascertain) to shorten to 100 years the 125 year perpetuity period which trustees of existing trusts will be able to opt into under the clause.

10. The changes to clauses 5 and 12 reflect the intention that the Bill is not to have revenue consequences. If any unintended adverse effects on revenue become apparent the Government will act swiftly to remove them.

Drafting Amendments

11. While consultees generally confirmed their support for the reforms, a number of questions were raised as to whether, in particular points of detail, the Bill as then drafted covered all the cases intended to be covered as a matter of policy. The following are the main substantive drafting changes made to the draft Bill as a result of consideration of the points raised on and following the consultation.

12. Clause 1 (application of the rule) was amended so as expressly to apply the rule against perpetuities to an estate or interest which is subject to a condition precedent and which is not one of successive estates or interests. Clause 1 was also amended to repeal the second limb of section 4(3) of the Law of Property Act 1925 (rights of entry affecting a legal estate).

13. Clause 3 (power to specify exceptions) was amended to make the power more flexible. The clause now allows for exceptions to be made by reference to descriptions of cases as well as to conditions to be satisfied.

14. In clause 20 (interpretation), the definition of a "power of appointment" was amended to bring all discretionary powers (for example, a power of advancement), when exercised with dispositive effect, within the definition.

15. A further minor drafting change, not raised by consultees, was made to clause 15 (application of this Act). As a result of the amendment, trustees of wills executed before the Bill comes into force (whether the will takes effect before or after commencement) will be able to take advantage of the clause 12 opt-in, even though the Bill does not otherwise apply to such wills.

Clauses Added in 2005–06

16. As mentioned in paragraph 5, the 2005 draft Bill included new provisions in relation to regulation-making powers and fertility presumptions. Responses to the 2008 consultation raised questions about the operation of the regulation-making powers. Further enquiry disclosed that these powers would be of very limited practical use. The provisions were therefore omitted. The fertility presumptions were also removed because on further reflection it was concluded that they would be of limited utility.

13 May 2009

[1] See, House of Lords Procedure Committee, First Report of the Session 2007–08 Law Commission Bills, (25 February 2008) Online at http://www.publications.parliament.uk/pa/ld200708/ldselect/ldprohse/63/6302.htm

Memorandum by The Rt Hon Lord Justice Etherton, Chairman of the Law Commission

I set out below some issues relating to the Bill which the Committee may wish to consider, and on which I shall be happy to expand in my oral evidence.

1.1 The Law Commission's Report *The Rules Against Perpetuities and Excessive Accumulations* and its accompanying Bill were published in 1998. The Report and the Bill were produced following an extensive consultation process. 62 consultees provided detailed comments on the Law Commission's proposals for reform of the law. Consultees included several major representative bodies (such as the Charity Law Association, the Chancery Bar Association, the British Bankers' Association, and the Society of Trust and Estate Practitioners), members of the legal profession and the judiciary, and distinguished academics. The 1998 Report and Bill reflect the Commission's desire to improve this technical but important area of the law in a way which reflected the views of a majority of consultees, and which was supported by independent research and analysis.

1.2 The long delay in implementing the recommendations in the Report, notwithstanding their early acceptance by the government, the government's explanation for the delay on the basis of lack of parliamentary time, and the use of the new special House of Lords procedure for their enactment, confirm the importance of the lengthy consultation and that consensual approach. This is realistically the one and only opportunity that will arise to improve the law in this area.

1.3 I outline below some of the issues arising from the Bill that the Committee may wish to address (particularly bearing in mind the matters which were raised by peers at the Second Reading Committee debate on the Bill).

The need for a Rule against Perpetuities

1.4 One of the main questions with which the Commission was concerned was whether the rule against perpetuities should be abolished, retained, or reformed. A clear majority of consultees favoured reform of the current law. This group included all of the members of the Bar who responded, the Society of Trust and Estate Practitioners, the Institute of Legal Conveyancers, and all of the law societies and Bar groupings who responded. Very few consultees considered that the present law was not in need of at least some amendment; but a small but distinguished group of respondents supported outright abolition. The Commission's conclusion, which was strongly guided by the views of consultees, was that there were important policy reasons for retaining the rule, but that its application should be greatly simplified.

1.5 In the context of this broader issue, the question of whether any change should be retrospective was also considered. No consultee favoured a completely retrospective approach. The Law Commission concluded that it would not be feasible to extend the application of the Bill to arrangements that had been put in place on the basis of the law in force at the time. In cases of genuine difficulty, the Bill allows trustees to opt in to a more certain perpetuity period (clause 12).

Length of Perpetuity Period

1.6 The Committee will be aware that clause 5 of the Bill provides for a mandatory perpetuity period of 125 years. The length of this period has been the subject of some discussion, both recently and during the 1993 consultation. In particular, it has been suggested that the period is too long, especially when compared with the 80-year period provided for in the Perpetuities and Accumulations Act 1964 ("the 1964 Act"). The Law Commission gave considerable thought to this issue. It took into account the support from consultees for a 100-year perpetuity period, and also analysed what the maximum length of a life in being plus 21 years could be (that being the common law formulation which remained optional under the 1964 Act).[2]

1.7 The Commission concluded that 125 years was the most appropriate period, having regard to the variety of human circumstances and increasing longevity.[3] It also noted that the mandatory 125-year perpetuity period would simply be an upper limit for vesting; it would be entirely possible for settlors to create a trust instrument which would terminate at an earlier stage. The recommendation of a 125-year perpetuity period was also intended to acknowledge the views of consultees who favoured outright abolition of the rule. Clause 5 therefore achieves a balance between that view, and the preference of the majority of consultees for reform of the rule.

[2] For example, a 125-year perpetuity period could be achieved through the use of a royal lives clause based on the descendants of Queen Victoria.

[3] By way of illustration, in 1981 the average life expectancy at birth for men in the United Kingdom was 70.8 years, and for women was 76.8 years. By 2006 those figures had increased to 77.2 years for men, and 81.5 years for women. (Office for National Statistics, *Period expectation of life (in years) at birth and selected age, 1981 onwards*, 30 October 2008.)

Wait and See

1.8 The Bill continues the "wait and see" approach to vesting which was first adopted in the 1964 Act. This approach is intended to address the problems arising from the common law against perpetuities, by which the validity of a trust must be determined at the outset, irrespective of subsequent events. The common law rule emphasises the fictional possibility that the gift may not vest within the prescribed period over subsequent reality.

1.9 The Commission acknowledged that there was merit in the certainty of the common law approach. However, it concluded that the "wait and see" approach was greatly preferable as it allowed as many gifts as possible to be saved. This, of course, means that the wishes of the testator can more often be given effect. On this basis, the Commission recommended the continuation of the "wait and see" approach. This was given effect in clause 7 of the Bill. Importantly, however, the Commission felt that the requirement under the 1964 Act to apply the common law before using the "wait and see" approach was unnecessarily confusing. It therefore recommended the simple application of "wait and see" without prior recourse to the common law.

Removal of Accumulation Restriction for Non-charitable Trusts

1.10 The Law Commission recommended that there should no longer be a restriction on the accumulation of income by non-charitable trusts. Consideration of this issue was a significant aspect of the Commission's investigations. Hardly any consultees supported retaining the rule in its current form. Although several responses from individuals favoured reform of the rule over abolition, consultees in favour of abolition included the Institute of Conveyancers, the Society of Trust and Estate Practitioners and the Chancery Bar Association, all of whom represented a significant body of members.

1.11 In light of consultees' responses, the Commission returned to the policy origins of the rule against accumulations (arising from the *Thellusson* Case). The Commission acknowledged the views of commentators who had noted the doubtful policy basis for the rule, and concluded that in modern times, the rule does not fulfil any policy objective in respect of non-charitable trusts that is not otherwise met by the law (for example, by the rule against perpetuities).

Retention of a 21-year Limit on Accumulation for Charitable Trusts

1.12 In addition to recommending the abolition of the rule against excessive accumulations for non-charitable trusts, the Commission also recommended that charitable trusts should be subject to a 21-year restriction on the accumulation of income (clause 14 of the Bill). The Commission acknowledged the importance of charities being able to accumulate income for a period of time; for example, to save up for worthwhile projects, or to build up a small initial endowment.

1.13 However, the Commission also noted that special privileges are afforded to charities, particularly in regard to taxation law, because of the fundamental importance of charitable work to society at large. The Commission's view was that in light of the nature of charitable work—that is, work undertaken for the public benefit—it was appropriate to set as a base line a 21-year accumulation period.

1.14 In this way, a balance is achieved between the needs of charities to build up funds from time to time, and the importance of charitable funds being put to use for the public benefit. It is also important to remember that the administrative retention of income (for example, building up a long-term fund to meet future building maintenance and repair needs) is not considered to be accumulation. The Bill also provides that the restriction on accumulation will not apply if the Charity Commission or the court has previously made provision for accumulation by the charity (clause 14(2)).

1.15 I am aware that other matters in relation to the Bill's application to charities were raised in the course of the Second Reading Committee debate; I shall be happy to discuss those issues in the course of my evidence to the Committee.

8 May 2009

Examination of Witnesses

Witnesses: Lord Bach, Parliamentary Under-Secretary of State, Ministry of Justice, and The Rt Hon Lord Justice Etherton, Chairman of the Law Commission, examined.

Q1 ***Chairman:*** Sir Terence, we are very grateful to you for coming to this our first meeting of the Special Public Bill Committee on this Bill. I am sure we will have questions to ask you on the very useful letter which you wrote to us and which we have all read. First, can I ask the Minister to say a few words?

Lord Bach: Thank you very much, my Lord Chairman. Can I begin by congratulating you on your appointment as Chairman and say how much we are looking forward to working with you and with fellow Members of the Committee. I am grateful for the opportunity to give evidence at this session. I do not propose, obviously, to spend any time going over the details of the reforms proposed in the Bill; I will leave this, if I may, to Sir Terence, who will be speaking immediately after me, and, of course, other leading experts on the subject from whom we shall be hearing during the course of our sessions. What I have been asked to do is respond in very general terms to some of the points that were made in the Second Reading debate. Can I, first of all, reiterate our support for the Government's new procedure for Law Commission Bills. It is our hope that once the trial of these two Bills' procedure is completed the House will make it a permanent fixture for uncontentious Law Commission reforms. As to the points raised by noble Lords in Second Reading Committee (and I will just touch on them in passing), on the issue of charities, the noble Lord, Lord Hodgson, who, I am delighted to say, is a Member of the Committee, raised concerns about the possible effect of the Bill on charities. Let me first say that it is not the intent of the Bill to prejudice charities or to discourage philanthropic activity. The noble Lord asked the Government to consider the clause 2 exception from the rule against perpetuities for gifts over from one charity to another. He was concerned that the clause may be a narrowing of the current common law exception. That is not our intention, and we are therefore examining the current law and clause 2 to check that they match. The noble Lords Lord Kingsland and Lord Hodgson expressed concerns about the 21-year limit on accumulation that will be applied to charities. While the Government supports charitable giving and acknowledges its importance, we are not convinced that the 21-year period will deter charitable giving. The proposed period seems to us to strike a reasonable balance between freedom to accumulate and the public interest in ensuring that charitable trusts are properly administered. The noble Lord, Lord Kingsland went on to suggest that the "life of the settlor" could be allowed as an alternative maximum accumulation period for charities to the 21 years now permitted by the Bill. We look forward to discussing that suggestion. It does not immediately attract us. Two alternative periods would, of course, still be an improvement on the present six, but the length of a settlor's life is inherently uncertain and including it, we feel, would go against the general thrust of the Bill which is to remove measurements by lives. Specifying a standard period will give charitable trustees certainty. This will assist them in managing the affairs of the charity efficiently and we do not think will discourage charitable giving. The noble Baroness, Lady Deech, of course, made many points. Her preference was to abolish the rule against perpetuities. The Law Commission considered this possibility, of course, but did not find a consensus favouring the view. The reforms in the Bill, by contrast, are well-supported, and in the face of this consensus, pursuing abolition, we feel, would be a controversial option and would make the Bill unsuitable for the new procedure we are undertaking. On complexity, the noble Baroness pointed out that making the Bill almost entirely prospective will mean that for generations to come there will be three possible perpetuity regimes in force. Of course, we acknowledge that it would, in theory, be possible to design forms that are retrospective, but this would, we feel, greatly increase the risk of interference with existing settlements. We believe the approach taken by the Bill seems reasonable. It will be relatively simple to decide whether the new regime applies, and practitioners appear to have coped with the two present alternatives. Additionally, unlike the 1964 Act provisions, the Bill does not require an analysis of the common law position before the "wait and see" provisions can operate. Both the noble Baroness and the noble Lord, Lord Goodhart expressed the view that a 125-year perpetuity period may be too long. Of course, there is scope for options as to what is the most appropriate length for the new period. The Law Commission chose 125 years as it represented the outer limits of what was currently achievable with a little ingenuity and good fortune under the present "lives in being" system. On this basis, the 125-year period seems to be a reasonable solution. Accordingly, as the Bill, unlike the present law, does not provide any choice in relation to the length of the perpetuity period, it seems to us to be better to err on the side of generosity. Finally, my Lords, abolition of the rule against accumulations. The noble Lord, Lord Goodhart expressed reservations about the abolition of the rule against excessive accumulations for non-charitable trusts. He suggested that it might be better to allow trustees to accumulate for the life of the trust but not to be under a duty to do so. The Law Commission has, here, carefully examined the reasons for retaining the rule against excessive

accumulations and found them wanting, except for in the case of charities. We look forward to discussing this possibility, but we think the Commission's reasoning is persuasive and that removing the rule as proposed in the Bill is the best way forward. My Lord Chairman, that is all I wish to say at this stage. Thank you for giving me the opportunity. I will, obviously, be happy to try to answer any questions that your Lordships might have, although I think it is likely that you may well receive more satisfactory answers to many questions on this very technical Bill from the eminent witnesses to appear before the Committee, who have a far, far greater knowledge of the subject than I do, not least, of course, the Chairman of the Law Commission himself, who, thankfully, is by my side.

Q2 ***Chairman:*** May I thank you, Lord Bach, for that useful summary of the points which were made at the Second Reading. That is very helpful to us all. Could I also thank you for your letter of 13 May which set out the respect in which the Bill now differs from the draft Bill in the Law Commission's report. I am sure there will be some questions for you. Perhaps Sir Terence could now say what he would like to say.

Lord Justice Etherton: My Lord Chairman, thank you very much, and I am very grateful for this opportunity to give evidence to the Committee. All I wanted to say by way of general observation at the beginning is this: first of all, I would like to take this opportunity to thank most sincerely those who have brought about this new procedure which marks such a special milestone in the history of the Law Commission of England and Wales, which is pre-eminent in the world among 60 independent law commissions. In particular, I would like to thank you, my Lord Chairman, Baroness Ashton, Lord Kingsland, Lord Goodhart and Lord Bach, and the other ministers and officials both at the Ministry of Justice and its predecessor the Department for Constitutional Affairs, who brought this about. It is something which Lord Scarman himself hoped more than 40 years ago would happen. It has taken this amount of time to get here but it is a milestone. At a recent meeting of the Commonwealth law reform bodies in Hong Kong, this and the other law reforms passing through Parliament at the moment were of great interest and great admiration to the law commissions in the Commonwealth and elsewhere. I wanted to make that tribute and thanks to everybody as well.

Q3 ***Chairman:*** Thank you very much.

Lord Justice Etherton: Secondly, so far as concerns this Bill, I would like to make the following observation: it is my experience that when we come to reform law for particular technical subjects there is rarely only one answer, but what gives legitimacy to the recommendations and the reports of the Commission is the widespread consultation which it undertakes. It undertakes that consultation not merely by having its own specialist advisory body, in most cases, and by consulting individual interest groups, holding lectures and seminars, but by having at least one full public consultation in the course of the project, which this had. In fact, this particular project, because of the time it has taken to get to this stage, has had no less than three substantive consultations. In 1993, as part of the general consultation for the project, 62 consultees responded (and I will come back to that, in a moment); in 2002, prior to the possibility of the accumulation provisions being implemented by way of regulatory reform, there was a further consultation on the accumulation principle, and, finally, post the production of this Bill in draft, for the purpose of introduction at this stage, there was a further consultation undertaken by the Ministry of Justice. Now, amongst the consultees who have responded are some which represent large numbers of practitioners. So one must not be misled by saying that 62 does not sound so many; there were 27 who responded in 2002; there were 14 who were consulted in 2008. In particular, I would like to mention some of these: the Chancery Bar Association comprises over 1,000 practitioners, most of whom will have some familiarity with this area. STEP (the Society of Trust and Estate Practitioners) comprises over 14,000 specialists in this area worldwide, of whom over 5,000 practise in this country. The Law Society goes without saying. I would like, also, to mention the Trust Law Committee. This is a very eminent committee set up in 1994, chaired by, originally, Sir John Vinelott, after retirement as a Chancery Judge, and is currently chaired by Sir Peter Gibson, a retired Lord Justice of Appeal, and comprises academics and practitioners who are concerned with the development of estate or trust law. What I can say to you is that every one of our principal proposals is supported by STEP and by the Chancery Bar Association. In particular, in relation to this draft Bill, of the 14 consultees who were consulted it has been approved as it stands now by the Chancery Bar Association, by the Trust Law Committee, by STEP and by the Law Society. I think it is important to bear that in mind because there are many people, and I am sure there are eminent Members of this Committee, other peers and Members of the House of Commons, who have individual views, which I do not think do not carry merit but, at the end of the day, something like this must carry a consensus among those who are practising in the field all the time. That, my Lord Chairman, is all I wanted to say by way of general observation.

Chairman: Thank you very much. Firstly, to ask if there are any initial questions you would like to ask of either of our two witnesses.

Q4 ***Lord Clinton-Davis:*** You mentioned, Sir Terence, the Law Society, of which I am a member. Did they have any reservations at all about the Bill? If so, what were they?
Lord Justice Etherton: My understanding, so I am told (and I will be corrected if I am wrong) is that the Law Society had no adverse observations about the Bill as it now stands.
Chairman: Thank you, Lord Clinton-Davis. Do you have any follow-up questions on that?

Q5 ***Lord Hodgson of Astley Abbotts:*** My Lord Chairman, perhaps I should declare, again, an interest in that I am President of the National Council of Voluntary Organisations, but I should also declare that I am not a lawyer, therefore if some of my questions are breathtaking in their naivety I apologise in advance. Could I begin by pressing the Minister on the question of the difference between charitable purposes and charities, I am grateful for his letter to me which said that it is not intended to narrow the clause. He invited me to suggest to him examples of how this clause might work disadvantageously. Rather than try and make this up as if I know it myself perhaps I may just quote briefly from a letter I have received: "It may be objected that the reference in clause 2(2) to an interest vesting in 'a charity' does not appear to cover a trust for charitable purposes rather than for a charitable institution which was in existence in advance of the disposition. In other words, whereas clause 2(2) clearly provides that where there is a gift to (say) the RSPCA with a gift over to the RSPB if the RSPCA should cease to have its head office in West Sussex, the gift to the RSPB can take effect at any time, it is not clear that a trust over for the charitable purpose of conserving bird life would also be excepted from the perpetuity rule." That is the point. The insertion of the few words "or trustees for charitable purposes" in clause 2(2)/2(3) would actually meet the issue. Sir Terence, very properly, reminded us in his opening remarks, that that would make it clear beyond peradventure that the two types of cases were covered.
Lord Bach: All I can say on this, and I will pass over to Sir Terence on this, if Lord Hodgson will forgive me, is, as I said in my opening remarks, that my officials are considering the points made by the noble Lord in his Second Reading speech. I wonder if I could ask Sir Terence, through you, my Lord Chairman, to deal with the quotation that Lord Hodgson used?
Lord Justice Etherton: Yes, my Lord Chairman, if I may. I am not sure who was the originator of the letter but what I can say is that a distinguished Chancery lawyer, Francesca Quint, recently wrote an article in which she raised this very point. The point arose, I am afraid, because of the glossary in the explanatory notes. There is no problem with the Bill, which I have explained; the problem is with the glossary in the explanatory notes. The short answer to the point is that a charity is defined in the Charities Act to include not only an institution but charitable trusts, and it will therefore catch all circumstances. I ought to say that that definition, under the Act, is not restricted, as it were, to the Act itself (the 2006 Charities Act); it applies generally to the law of England and Wales on charities. Accordingly, since charitable gifts must either vest in a charitable corporation or be held on some trust, there is no question but that, as a matter of substantive law, the reference to a charity here will encompass all charitable trusts. Francesca Quint accepts that; she is happy with that. The problem arises because of the definition in the glossary in the explanatory notes which refers to a charitable institution and it was thought, by looking at that, I think, that it therefore did not cover—

Q6 ***Chairman:*** Which page is that?
Lord Justice Etherton: Page 17. It refers to an organisation. So it was thought that, therefore, that might not include a pure trust. The answer is to be found in the Charities Act 2006 itself which defines "charity" for this purpose, as others, as including a charitable trust. So she does accept that. I do not think she is the originator of your letter, but that is the answer, as a matter of law. The answer is to change the glossary.
Chairman: Do you want to follow up on that?

Q7 ***Lord Hodgson of Astley Abbotts:*** Am I permitted to go on and ask another question? If there is now agreement amongst all parties that this issue does cover charitable purposes as well as a charity, then I suspect we have reached a satisfactory outcome. The other question is, again, from a non-legal point of view. I consulted a gerontologist about the perpetuities rule and the application thereof. He had two observations to make about the way perpetuities might work. He pointed out that as of this moment it is a fact that three-quarters of the people who have ever reached the age of 65 are alive and living today, such is the rate of expansion of life expectancy. His second supposition was that there is living today someone who will live to 200. If that were to become a reality, as opposed to a supposition, what would be the implications for this Bill, and would we, if we knew that, wish to make some other changes now?
Lord Justice Etherton: What are the implications for the Bill? There are no implications for the Bill as such—it works perfectly well with the 125 year period—but it is true to say, as was pointed out by Lord Bach in his opening comments, that the period of 125 years was selected as the most appropriate period by the Law Commission on the best estimate that we currently have for the longest period for a

"life in being" plus 21 years today. Various different periods have been suggested (I think, on the Second Reading, Lord Goodhart suggested 100 years might be more appropriate). I should make clear, on the consultation that we had in 1993 there was no majority for any particular period, and they varied from 80 years right up to 125, but we thought it appropriate to follow the principle of the common law, which is to take, effectively, one generation plus more or less a minority. That is the basis of the common law principle: that a settlor should be able to tie up the property for the future, preventing any successor from dealing with it as though it was their own for no longer than one generation plus a minority. The minority has changed from 21 to 18 but that was the principle on which we arrived at 125 years, with a nod to those who thought that the whole thing should be abolished. It was a generous allowance. You could say, following your point, that if we knew people were going to live to 200, we might increase it even further, but I think it is clear, both from the commentators on Second Reading and generally, that there would be no general consensus at all in favour of more than 125 years, and the criticism that has been made is that it is too long, not that it is too short. So I think extending it further would make it very controversial, at this stage. I do not know if that is an adequate answer.

Q8 ***Lord Kingsland:*** Perhaps I should also declare an interest: I am a practising Member of the Bar and occasionally sit as a Crown Court Recorder and Deputy High Court Judge. Nobody has ever instructed me in a perpetuity and accumulation matter—

Lord Bach: There is plenty of time for that to happen!

Q9 ***Lord Kingsland:*** I have a short but not necessarily simple question. It arises out of the powerful speech made by the noble Baroness, Lady Deech, at Second Reading, and concerns the issue of retrospectivity. As Sir Terence has been well aware, Lady Deech lamented the fact that the Bill does not have retrospective effect. This must have been a matter that you thought about hard and long in the interests of simplifying the legislation. I wonder if you would be kind enough to indicate to the Committee, at this stage, in broad terms, what were the factors that persuaded you to make the measures that are in front of us solely prospective?

Lord Justice Etherton: Yes. I will mention, in a moment, that they are, in fact, retrospective in at least a couple of respects (one quite important one), but, broadly speaking, they are prospective. It goes, really, back to one of my opening remarks, which is that if one is trying to get through legislation on this sort of matter it has to be done on a consensual basis. Interfering retrospectively with dispositions of people's property is not, of itself, an uncontroversial matter, not simply in relation to people's feelings on the subject but as a matter of law in terms of, for example, the Human Rights Act (Article 1 Protocol 1) and people's rights to interests in property and taking them away. In this particular case, generations of estates and settlors have made their arrangements on advice as to the perpetuity period. That, equally, applies, of course (as they are called at the moment), to commercial arrangements. If we were to abolish retrospectively, affecting not only private but commercial interests, this could have all kinds of untold effects, and I am afraid it simply would not be an uncontroversial reform; it would be highly controversial to many people. So one is balancing the questions of simplicity against the controversial nature of any kind of retrospective legislation that affects vested interests. That is the point. The second point I would make is that it is not entirely prospective. What we have recognised is that there are some trusts where because of the nature of the common law perpetuity rule—lives in being plus 21 years—there is a genuine difficulty (particularly by reference to the so-called Royal lives clauses) in knowing when the period has come to an end. We recognised that, so we have made specific provision, as you will be aware, in the Bill, in those circumstances, for trustees to opt into the scheme but have provided for a 100-year period rather than 125. I will say immediately why it is 100 rather than 125: it is Her Majesty's Revenue and Customs. They did not like 125 years because they thought that people who might opt in for a longer period than might otherwise exist might be able to defer tax. So that was a compromise. There is another aspect that that raises, which is what are the tax implications of a retrospective change in the perpetuity period thereby affecting vested or non-vested interests? This is a massively complex subject. We have had representations on it, there was no consensus about it, but, as I have said, I think the proof of the pudding is that in the latest consultation all of those major interest groups we have consulted are fully behind the existing proposals. So that is the best answer I can give. One must recall that the noble Baroness's order of priority will be, first of all, total abolition, secondly, it was retrospective reform and thirdly the period is too long—and I think then she said that we might live with the rest of it. The critical point is: how does it affect existing interests? They are very complex; all manner of trusts, commercial interests, and so on and so forth. We could not get it through as an uncontroversial Bill.

Q10 ***Lord Kingsland:*** I am most grateful to the noble Lord, the Lord Chairman, for allowing me to follow this point up; not on the substance of the issue (I think it would be better now to wait for the other

evidence) on the concept of the consensus that you have been advancing. Of course, from the point of view of the Parliamentarians here, the only reason why this Bill is falling within the category of a Special Public Bill Committee is because it has been designated by the three parties as being politically non-controversial. So, in a sense, you could say that there is a different sort of consensus from the one you are talking about; there is a consensus between the political parties. However, I was slightly surprised to hear you say that the Law Commission would not have been prepared to move on this matter had there been no consensus between all those interests that were likely to be affected by it. There have been, in my experience, a number of Law Commission reports which have been really rather controversial but, nevertheless, have been pressed by the Law Commission on Parliament to be converted into law. What is so different about perpetuity and accumulations that the Law Commission, in this case thinks legislation is only appropriate if there is consensus between all those who are affected by its contents. That suggests to me that we might be moving towards legislation which is the lowest common denominator.

Lord Justice Etherton: I must apologise if I gave the impression we would only move on the subject if there was consensus. I would put the contrary point there was no consensus for abolition or retrospectivity, which is not the same thing. The reason that is important is because in this particular case, and I have to say I personally today totally approve of this policy, it is one thing to talk about consensus or absence of it when you are talking about the future, but when you are disturbing existing interests you have to be very, very careful indeed. Just envisage what they all are and they are varied and disparate. The Law Commission consulted on this issue, it consulted on the issue of retrospectivity, and there was not anything like an overwhelming, even if not unanimous, cry for retrospectivity. There were some voices for it but when one is disturbing existing property interests which have been created on the basis of the existing law and advice given, then for the sake of the legislation as a whole my view would be the correct decision was reached in this case. Indeed, if I may say so, if one was going to make it retrospective, it would be highly dangerous to do so without very detailed and further consultation on that point, because there are all manner of interests one might be affecting of which one is unaware.

Q11 ***Lord Hart of Chilton:*** I would register an interest in that I am a solicitor and my wife is a solicitor, although I have never practised in this area although I am an executor. Do we have any idea of how many trusts there are in existence?

Lord Justice Etherton: That is a question I have asked myself and I am afraid the best information we have been able to get is that the Her Majesty's Revenue and Customs are aware of just over 200,000 tax-paying trusts. What is interesting to me, I have to say, is that the register has declined from a figure slightly higher than that in 1991, and this raises a wider issue. First of all, that is likely to be the tip of the iceberg because I am quite clear there are many trusts which will not be paying tax at all—charitable trusts or very small trusts—but what it may well indicate is that the trust industry is very concerned—and this is UK plc—that we are falling substantially behind those other jurisdictions in the world which are offering more flexible, more modern trust arrangements, and for whose corporate business we are competing. That is why you will find organisations like STEP and the Trust Law Committee are so delighted that this Bill is being passed through Parliament to modernise our law on perpetuities. I am sorry that does not answer your question but that is the best information we have got.

Q12 ***Lord Hart of Chilton:*** That leads me to a leading question which is to do with retrospection. If we are talking about that number, or in the order of that number—and I think you are right in thinking it is the tip of the iceberg—then to make anything retrospective means that all of those touched and concerned about that would mean they would have to take fresh advice. That in turn would carry with it a cost of some considerable nature.

Lord Justice Etherton: Absolutely.

Q13 ***Lord Hart of Chilton:*** So from the point of view of the consumer, that would be, would it not, an added reason for not wanting to go into a retrospective area?

Lord Justice Etherton: I totally agree and accept that. I mentioned commercial interests. One of the objectives of this Bill is to take perpetuities out of the commercial arena. You will find in a huge number of cases, particularly for example leases, that rights over other people's land—perhaps rights to walk over them, rights to join up to drainage—are limited to 80 years. That is a very simple case but in commercial terms you are going to have to work out what is the effect of abolition—was it intended or was it not, what arrangements have been made on the basis of that. Options to purchase are subject to a 21 year perpetuity period at the moment. Now if one started to say that that no longer applies, what are the implications for all those cases where there are options to purchase in a commercial context; what plans are being made? If I may say so, I think the idea of retrospectivity is from an academic perspective perhaps rather nice, but from a practitioner's and practical prospect it will be a complete nightmare, I

am afraid. I cannot put it higher than that, though that is very high, but it would.

Q14 ***Lord Clinton-Davis:*** Is it your view that if this Bill is passed the hegemony which Britain used to have will be secured?
Lord Justice Etherton: I think that will be putting it too high, but I think it will help those who are providing trust services in this country to compete more effectively with those in so many other jurisdictions. I have no doubt about that. One of the main reasons why that is so is not necessarily because of perpetuity, though it is true that other jurisdictions have simplified and improved their perpetuity rules. It is for the accumulation point. The ability of settlors to be able to provide for accumulation of income for more than 21 years on the international scene is very, very attractive, and the position here is very unattractive. So that is one of the main issues about the restriction of a settlor's ability to deal with their estates as they would like to do so.

Q15 ***Lord Hodgson of Astley Abbotts:*** Sir Terence, after the Second Reading Debate, your colleague, Professor Elizabeth Cooke, was kind enough to get in touch with me about your publication, *Capital and Income in Trusts: Classification and Apportionment*, which was published on 6 or 7 May. It was for me, at any rate, heavy lifting—146 pages of heavy lifting—but within it there was a particular recommendation you made at 8.80 about the changes in statutory powers, "to enable all charities to resolve that the endowment fund or portion of it ought to be freed from restrictions in respect of expenditure of capital in order to operate a total return on investment approach." If this Bill became law and your other draft Bill followed it, would that recommendation be affected by what we are discussing today? Should we be looking ahead and seeing if we should be amending what we have before us today?
Lord Justice Etherton: The short answer is no. Can I just explain to members of the Committee what total return investment is, because not many people will be familiar with it. The classic way in which trusts are organised is that a distinction is made between capital and income. You may have income beneficiaries or, totally separate, capital beneficiaries. In the case of charities, some of them but not all have permanent endowments, which is capital they cannot spend, but usually charities subject to limitations have to spend their income. The total return investment is an investment technique or principle which seeks to go away from that traditional model by which you invest your assets for a particular amount of income or type of income and instead looks at a total return. So when you are looking at an annual return for distribution or otherwise of a trust, whether a charitable trust or a private trust, you look at capital growth, capital returns and income, and you look at it altogether and you provide in your trust for a division of that total return which might be therefore partly income, partly capital. The object of this is that it frees you as an investor from having to worry about producing a particular amount of income to benefit the income beneficiaries and a particular amount of capital to make sure those ultimately entitled to capital are not left out. In the case of charities, again it is a question of whether they are having to invest to make sure they maximise their income for now rather than concentrate on long-term capital. So that is the object of the investment technique. The short answer to your point is as follows: the Charity Commissioners already have a scheme which will allow for total return investment, and it is always open, subject to Charity Commissioners' approval, for individual charities either to use that scheme or adapt their own. More to the point, this only applies where there are charities which have a permanent endowment; the problem only arises there. Even in those cases, both the Charity Commissioners and the courts can authorise expenditure of capital and accumulation of income; even if existing trusts do not provide for it, there is always a power for the Charity Commissioners and the courts to authorise accumulation of income and expenditure of capital. A final point is that the rule against excessive accumulations is not treated by the Charity Commissioners as applying where what you are doing is accumulating to meet administrative or administrative-like burdens. So, for example, if you are a charity which has property, you are entitled to accumulate in order to pay for replacement lifts, to carry out capital improvements. So the combination of those things, the existing Charity Commissioners' scheme for total return investment, the ability of the courts and the Charity Commissioners to authorise accumulation of income, and the restrictive way in which the Charity Commission view administrative accumulation, means there is no problem with this issue in this Bill.

Q16 ***Lord Hodgson of Astley Abbotts:*** Could I come back on that? There is a concern amongst some charities that your approach relies on a receptive attitude by the Charity Commissioners, which you may or may not be certain of going forward, that there are cases where you move from repairs to replacement and therefore you are on the edge of what is permissive. An example could be where you have a historic care home which no longer meets the space required for each bed under current regulations—the square footage there has to be per bed—and therefore the only alternative is to start again. This requires the charity to have confidence that there will be sympathetic hearings later on. That is the underlying concern here, that you are

dependent on the Charity Commissioners being flexible and taking a positive view which historically as regards permanent endowments has been much more restrictive. Indeed we discussed this at great length during the passage of the 2006 Act.

Lord Justice Etherton: I think the answer to the point is two fold. First of all, you have to decide in the case of charities whether there should be a rule against excessive accumulations at all; you have to decide that issue. The overwhelming response of all the consultees was there should be some restriction. The reason for that restriction, the principle underlying the restriction, is that there should be a balance between the ability of the charity to accumulate and two other matters, one, the tax benefit it obtains by virtue of its charitable activities, in other words to distribute income, and second, the interest and expectation of the public who give money to charities that they will be distributing income. So the 21 year period for restriction reflects the policy in which you are weighing up those different considerations. Once you agree there should in principle be a policy of some kind of restriction on charities accumulating for anything excessively, then the only question really is, is that period appropriate—should it be 21 years, or should it be something else? The consultation responses we had on this varied. We chose 21 years as the best of many different choices. They vary, I think I am right in saying, from 20 years to 100 years; we chose 21 years. But we did provide for the two exit routes which I mentioned. One is the ability to go to the court to get a more extensive period and the other one is the Charity Commissioners. I think we have to assume both the courts and the Charity Commissioners between them are going to do what is in the best interests of the public, which after all is the beneficiary of charitable gifts.

Q17 ***Lord Hodgson of Astley Abbotts:*** If we are sitting here in a year's time with a Capital and Income in Trusts Bill, there is nothing in these proposals where we will say, "Oh dear, we should have looked at this when we were considering the Perpetuities and Accumulations Bill"?

Lord Justice Etherton: No.

Lord Bach: My Lord Chairman, could I just say something on this question?

Q18 ***Chairman:*** Of course.

Lord Bach: It certainly is not on the technical nature of it, but to say that Government and my Department have just received the Law Commission Report that the noble lord, Lord Hodgson referred to, and will be considering it and responding to it in the usual way. Of course our view is that it is quite separate from the Bill which is before the Committee today and we hope to provide an initial response, our response, to that report within six months.

Chairman: Thank you. I think Lord Goodhart may have a question either on the 125 year period or the 21 year period.

Lord Goodhart: I think we can leave the 21 year period aside for the time being. I raised the question of time for the duration of trusts in what I call the Second Reading, even though strictly speaking it was not a Second Reading, and that is why I want to raise it again, although I understand this point has already been raised from a different attitude from mine. I should apologise for being late; I am afraid I got tied up in a critical moment of the Joint Committee giving pre-legislative scrutiny to the Bribery Bill, as indeed did my noble lord, Lord Thomas—

Lord Thomas of Gresford: But for longer!

Q19 ***Lord Goodhart:*** So far as the duration of the time is concerned, I do not think anyone should be entitled to tie up assets in a trust fund into a really more distant and extremely distant future. If we had had a 125 year rule in the past, then we would find ourselves dealing with trusts created in 1884, and the question is therefore what is the justification for putting it up beyond 100 years? I can see with the increasing longevity of people there is a justification for putting it up from 80 to 100 years, but what is the justification for saying that my assets could be put into a trust and can still be there in the same trust 125 years later?

Lord Justice Etherton: The period of 125 years, as is made clear in the report, is based on the best estimate for the longest period equivalent to a life in being plus 21 years today, which was actually taken back in 1998. Advice was taken on that and that was the period in terms of longevity actual and anticipated in the immediate future, and we thought it right to continue to use the principle of the common law, for want of anything else, a life in being plus 21 years, which I was explaining before is based on the concept of one generation plus more or less a minority, bearing in mind the age of minority has changed. That was the principal approach. There is a strong argument for saying that in fact 80 years, which was the 1964 Act provision, was too little. As I said in my opening statement to my Lord Chairman and the Committee, in this area, on this question, like others, there is not one correct answer. Many people have perfectly legitimate different views and we received them from a large number of people—62 consultees on our first consultation—and they varied from 80 years or less to 125. That was the basis. I cannot say that 100 years is definitely wrong. I can say that I think 80 years would certainly not be correct, and that was the advice we received on longevity. As I explained, it was also generous to those who thought there should be no period at all, but that was the principle of the matter. I would add, again as I said in my opening remarks, there is not one correct answer

but what is significant is that when consultation took place on the Bill in its current form certainly on this point, the latest of the three consultations in 2008, it received total support in its current form from the Chancery Bar Association, the Law Society, the Trust Law Committee and STEP, and I think we ought to at least give some note to the vast number of people who are represented by that group of practitioners.

Q20 ***Lord Clinton-Davis:*** Can I refer to paragraph 20 of the Explanatory Notes? I am a little naïve about this because I have never practised in this field at all but it is said in that paragraph, "The rule under the Bill will not apply to future rights outside these categories, such as future easements, options to purchase, and rights of pre-emption." Why not? The last sentence of paragraph 20 on page 5.
Lord Justice Etherton: Because Clause 1 of the present Bill defines the perpetuity rule as essentially applying to successive interests under trusts and only to a certain number of limited non-trust dispositions. So the definition in Clause 1 of the estates or property to which the rule applies, does not encompass any of these three items. That is the short answer.

Q21 ***Lord Goodhart:*** Could I raise one question about accumulations? I think the complication of the present law on accumulations is unacceptable and, having considered it, I now agree with removing the specific limits on them. What does concern me is we might get a Thellusson situation again from time to time, and it may be simply the people who are creating trusts do not realise the problems they are creating when they direct that there should be an accumulation from start to finish of a lengthy trust. Has it been considered there should be some sort of safety valve to this, that it should be possible for trustees perhaps to either have power or at any rate get the authority of the court to allow them to distribute income where that seems to be plainly for the benefit of the people for whom the trust was ultimately designed?
Lord Justice Etherton: We have not consulted specifically on that issue. The consultation over accumulation certainly concerned whether or not the rule should be abolished in whole or in part, and if it was not abolished in whole, what other provisions there should be. I think my answer to you, Lord Goodhart—one with which you will be very familiar yourself—will be that in an appropriate case, of course, the court could order a variation of the trust if it proved to be necessary, but, more to the point, this reflects something which I think we all value: autonomy: the autonomy of the settlor to do what he or she wishes within acceptable limits. Of course, the settlor on advice can always include trust provision, perhaps for the trustees to do whatever is appropriate in the circumstances. I think the principle behind this was to grant autonomy to settlors in the absence of some very good countervailing reason. The original Thellusson Act which followed the Thellusson case was the result of a misconceived view about the likely implications of the Thellusson will. Those misconceptions were as follows. You will recall that it was thought that if property was tied up for generations under his will it might bankrupt the nation at the end of the day, because so much capital was stifled. In the end, when they made the distribution in about 1860, there was exactly the same amount distributed as was in there originally because the lawyers had taken the rest! I am afraid that the advice we received at the time was that in the current state of our national economy it is not conceivable that granting this right on the settlors will in any way affect the national economy. The only other basis for the Thellusson Act, the original Accumulations Act in 1800, was that it was thought to be morally repugnant that a man who left a wife and children should direct that so much of his estate should be accumulated. That is a matter, again, I think we would say nowadays, for different legislation under which they can claim if they are dependants, or, in the case of a wife, by virtue of that status. My answer to you is to say that it is in accordance with the principle of the Act to grant autonomy in this respect to settlors in the absence of any good evidence that this would cause harm to others.

Q22 ***Lord Goodhart:*** I can certainly see circumstances in which the Variation of Trusts Act would have no operation to put things right. I feel slight regret that misguided people can be allowed to put money into a fund which will produce nothing for 125 years to anybody's benefit, but I suppose the answer is that if people are that stupid, while it will not affect them, perhaps their families . . . I do not say that their families would deserve it, but—
Lord Justice Etherton: It seems unlikely that many people will do this. Perhaps I can correct one general misconception, which was, again, I think, a misconception behind the original Act, that if a settlor directs accumulation for a longer period, effectively something is denied to the economy that otherwise would be there; in other words, there is a stultification of the use of money. This is a misconception, because the money has to be invested—you have to buy shares, you have to invest in something—and that money which is invested in whatever it may be is itself forming part of the currency of the economy. Unless it is put in gold bars and diamonds—which may be a good thing to do today—generally speaking, the money is in circulation and is doing something somewhere.

Lord Goodhart: I would entirely accept that, it is just that I was worried about or somewhat unhappy with the idea of an unpleasant settlor being in a position to deprive a family of any benefit for 125 years. But, still, I suppose that is up to them.

Q23 ***Chairman:*** That might be an appropriate moment to thank Sir Terence very much for his evidence. It has been extremely valuable, if I may say so. Is there anything else that Lord Bach would like to add?
Lord Bach: I think only to thank Sir Terence.
Chairman: Thank you very much.

Letter from Lord Bach, Parliamentary Under Secretary of State, Ministry of Justice to The Rt Hon Lord Lloyd of Berwick DL

Perpetuities and Accumulations Bill

As we have now concluded the Committee's oral evidence sessions I thought it would be helpful for me to respond to various points raised in our discussions and the written evidence.

I am very grateful to all the Members of the Committee for their consideration of the Bill and the evidence presented to the Committee.

As Sir Terence Etherton, the Chairman of the Law Commission, indicated in his evidence, the reform of the rules against perpetuities and excessive accumulations is a topic on which there is rarely only one possible answer. The Law Commission's proposals were therefore developed with an eye to achieving as broad a consensus of support as possible. The Government believes that this is the right approach, particularly in the context of the new procedure that has been adopted for the consideration of the Bill. We consider that despite various alternative reforms which have been pressed on us, the approach taken by the Bill represents a sensible one that will be generally supported. It will modernise and simplify the law in this difficult technical area. I am very grateful to the Law Commission for all its work in preparing its Report and in contributing to the preparation of the Bill.

Clause 1—The Rule against Perpetuities

The Committee has heard markedly different views on whether the rule against perpetuities should be maintained. Some witnesses have argued that it is ineffective, serves no useful purpose and should be abolished. The Government remains of the view that abolition of the rule would be a radical reform that does not command a consensus of support. The Bill is a moderate, but beneficial, reform that preserves the rule's function as a "long-stop" for trusts, while reducing the complexities of its future application.

Baroness Deech argued that the Bill is defective or misleading in that it fails to consolidate or codify the existing law. I agree of course that having all the law in the same place on the statute book must make it easier to find. However, experience shows that consolidation and, even more so, codification, are difficult exercises that take a good deal of time to carry out. The Law Commission does, of course, carry out a rolling programe of consolidation. My department will discuss the possibility of consolidating the legislation in this area with the Law Commission.

Clause 2—Gift-over from One Charity to Another

Lord Hodgson has expressed a concern that clause 2(2) and (3) do not adequately replicate the common law exception from the rule against perpetuities for a gift-over from one charity to another. His concern, which was echoed by Francesca Quint in her written evidence, was that the reference to "a charity" as used in the Bill is not broad enough to include a gift on trust for an exclusively charitable purpose.

Our intention is that the Bill should replicate the effect of the present exception, which is set out in case law. The definition of a charity in the Bill is the definition contained in the Charities Act 2006. This definition is broad enough to ensure that a trust for an exclusively charitable purpose will be included within the exception.

As Sir Terence Etherton explained in his oral evidence, the root of the concern appeared to be the definition of a "charity" as an institution in the glossary to the Explanatory Notes. We will therefore be amending the glossary when the notes are reprinted to make clear that it also includes trusts for an exclusively charitable purpose.

Clause 2—Gift over to Charity not existing at the time the Trust is made

In his evidence, Hubert Picarda QC mentioned that the exception in clause 2(2) and (3) may not include a gift-over to a charity that did not exist at the time the gift was made. We do not consider that the definition of a charity applied in the Bill has that limiting effect.

Clause 2—"the Occurence of an Event"

Lord Millett raised a concern that the phrase the "occurence of an event" may not be broad enough to include the entire range of possible "events" that could trigger a gift-over. We consider that "event" is apt to describe the happening of any circumstance that triggers the determination of an interest.

Clause 12—100 Years

Lord Millett argued that the perpetuity period for the clause 12 opt-in should be 125 years rather than 100 years. As Sir Terence explained in his oral evidence the period had been reduced from 125 years during the preparation of the Bill to ensure that the Bill remained revenue neutral from a tax perspective. The particular concern raised by Her Majesty's Revenue and Customs related to the potential deferral of revenue from Capital Gains Tax (CGT).

From the exchequer standpoint, the concern expressed by HMRC and HM Treasury is that some trusts facing a CGT charge at the end of their "old" perpetuity might be able to use the opportunities which clause 12 presents to acquire a longer than otherwise available perpetuity period. This would defer the payment of CGT and potentially have an adverse effect on Exchequer cash-flow. 100 years represented a cautious estimate of the length of period that would not on average adversely affect when tax revenue is paid over.

Lord Millett also argued that 100 years would not be adequate to accommodate some of the longer "lives in being" perpetuity periods under the present law. Clause 12 can only be exercised if there is doubt about the length of the perpetuity period applicable to the trust. If a trustee is certain that the perpetuity period for a trust is to end 117 years after the foundation of the trust, clause 12 is not available. If, however, the trustees are genuinely uncertain when the perpetuity period is to end because it is impossible to identify the last survivor of a class of "lives in being", clause 12 will provide a reasonable and inexpensive alternative to time-consuming and costly research or litigation. In such cases, the period under the present law is unknown and 100 years seems to us to be an acceptable period to provide as an alterntive for this circumstance. It will of course always be for the trustees to decide in the light of their duties to the beneficiaries whether to exercise the opt-in in any particular case.

Clause 14—"Life of the Settlor"

Lord Kingsland and Lord Hodgson have suggested that the "life of the settlor" should be provided as an alternative period for the accumulation of income by charitable trusts. The Bill provides a single period of 21 years, extendable on application to the court or the Charity Commission. We consider that this will give trustees certainty and clarity. We have consulted the Charity Commission and do not consider that the circumstances in which a lifetime power of accumulation would be appropriate are so widespread that they could not be readily accommodated within the approach taken by the Bill.

Clause 15—Application to Wills

In her oral evidence Baroness Deech mentioned that she did not find the provisions relating to its application of the Bill to wills very straightforward. Essentially, the Bill provides that the new rules will only apply to a will that takes effect after the Bill comes into force. Where the new rules do not apply, clause 12 (the opt in to a 100 year period) will apply. This is the effect of clause 15(2). In summary, Clause 15 ensures that the new rules on perpetuities and accumulations will only apply to the wills that were both created and take effect after the commencement of the Bill. We shall consider whether the explanatory notes can make this any clearer.

Clause 15—Prospective Application to "Transitional Powers"

Mr Edward Nugee QC expressed a strong opinion that the new accumulation provisions under the Bill should not apply to the exercise of a special power of appointment created before the Bill comes into force (transitional power). My officials have met with Mr Nugee and have consulted Mr Kessler QC as recommended by Dr Harpum.

We are considering whether the approach taken by the Bill, which applies the benefit of the new rules more widely, is to be preferred to an approach that restricts the application of the new rules to new trusts. We are very grateful to Mr Nugee and Mr Kessler for their advice and assistance.

EXPLANATORY NOTES

Subject to the views of Parliamentary Counsel, we are proposing to amend the explanatory notes to take account of the comments made by members of the Committee. The amendments are all relatively minor.

18 June 2009

Supplementary evidence by The Rt Hon Lord Justice Etherton, Chairman of the Law Commission

During my oral evidence I mentioned the Law Commission's decision, made in the course of formulating its 1998 Report, to recommend a limit on the ability to accumulate income for charitable trusts. I was under the impression that there had been a strong response from consultees to the 1993 consultation on this point in favour of a limit being imposed, and that consultees had provided a variety of suggestions as to the length of any such limit. It has come to my attention, however, that consultees who addressed this issue in their responses were in fact fairly evenly divided on the question of whether charities should continue to be subject to a limit on accumulations, with slightly more in favour of an exemption for charitable trusts. There were few suggestions (from those who favoured a limit) as to the length of any specific accumulation period for charitable trusts. In relation to trusts generally, though, a variety of suggestions were offered as to the length of an accumulation period if a limit were to be placed on accumulations.

As the Committee will be aware, Dr Charles Harpum explained, in his evidence to the Committee on 9 June, that the Law Commission had reached its ultimate decision on this matter as a result of consultations with the Charity Commission. As Dr Harpum was the Commissioner responsible for the 1998 Report, his evidence should be preferred on this point.

The Ministry of Justice consulted on the draft Bill in 2008 in the course of preparation for the introduction of this Bill. Only two consultees expressed any concern about the approach taken in the draft Bill in respect of the limit placed upon charitable trusts.

June 2009

TUESDAY 2 JUNE 2009

Present	Archer of Sandwell, L	Henley, L
	Bach, L	Kingsland, L
	Clinton-Davis, L	Lloyd of Berwick, L, (Chairman)
	Hodgson of Astley Abbots, L	Thomas of Gresford, L
	Goodhart, L	Whitaker, B
	Hart of Chilton, L	

Examination of Witness

Witness: BARONESS DEECH, a Member of the House, examined.

Q24 ***Chairman:*** Lady Deech, may I, on behalf of the Committee thank you very much for coming to give evidence today. I think we all know that this is a subject on which you have specialised knowledge and we look forward to hearing what you have to say. We have, of course, read what you said at the Second Reading of the Bill and I think most of us will also have read your article published in 1984.[1]

Baroness Deech: Thank you, Lord Lloyd, and thank you for inviting me. I should say, first of all, that anything I have to say fades into insignificance compared with what the practitioners say because my knowledge of this was simply really intellectual, academic and actually fun; I found it rather fun. I used to tell students that if they could master this, they could master anything. That was why I kept on doing it, which takes me to one of the points, in no particular order, which may be significant. That is that it is hardly taught any more. What we are talking about here this morning has very little evidence of its use. It has been dropped from nearly every university syllabus. I trawled through the legal practice course of the Law Society Finals and found no mention of it. There are courses on will drafting but, even going into those in detail, I saw no mention of it. I do think that one should take into account in considering reform in the Bill that we may be raising a generation of law students who know next to nothing about this. Moreover, there is a dearth of case law. I did a search to see what effect, if any, the reforms of the Perpetuities and Accumulations Act 1964 had, an Act which scars me because it came in just as I was about to do finals and we had to scurry to re-learn everything. Now, if you search for what effect there has been from that Act, if you search on a case database like BAILII (the British and Irish Legal Information Institute) you come up with next to nothing. There is nothing of substance—a handful of cases where apparently a mistake has been made but there is nothing in the case law really for over half a century that tells us what effect the law is having. We will not know until, I venture to say, all of us or most of us are long since gone because if we are waiting and seeing from 1964, that period will not end until, say, another 30 years from now. We are taking another leap in the dark without really knowing the effect of the previous Act. We are raising a generation who know very little about it. In my brief conversation with the distinguished practitioner who will sit here after me, Mr Nugee, he said to me, and I hope he will not mind my quoting him, that he had hardly ever come across anyone in practice who had had to deal with it. That was one of the reasons that pushed me towards thinking you might as well abolish it. Nevertheless, we are where we are. I welcome the fact that commercial property and pensions will be removed from the rule and that the 21-year accumulation period will apply only to charitable trusts—not that I see much logic in having a 21-year accumulation period because, with all those mentions of 21, going back to the days when the age of majority was 21, there is no logic behind it. You might as well have an accumulation period that fits somebody's life rather than 21; 21 just has nothing going for it really. But, if the aim of the reform is to reduce complexity, I suggest it may not have been so. The rule against perpetuities after this Bill has been enacted will neither be simplified nor modernised nor streamlined. Future legal advice will be more straightforward but there is a missed opportunity to simplify the law retrospectively. I know that doing things in property retrospectively is regarded as a serious breach of principle, but that principle is actually broken in this Bill, albeit to a small extent, because the trustees can decide retrospectively to apply a period of 100 years if they cannot determine whether the lives in being are alive or who they are. I do not blame them; it is an indication of just how complicated the rule is. But we will end up, after this Bill has been passed, with four different sets of rules: pre-1926 common law, which actually had a lot going for it because if you knew it and applied it, you got an immediate answer and you could move on; then you have the provisions of the Law of Property Act 1925; then piled on top of that the Perpetuities and Accumulations Act 1964; and then the new regime to

[1] *The rule against perpetuities abolished*, Oxford Journal of Legal Studies, 1984, at p 454.

be introduced by this Bill. I therefore welcome the undertaking given in the impact assessment that there will be a review of the new law in five years' time. Originally it said three; now it is five, though I suspect a review in 50 years' time might more fruitful. I am not sure how the review will be carried out. There is unlikely to be any litigation, as I said. Such references as you get to the rule tend to be something of a mantra. People say, "I have done this according to the rule against perpetuities", or "We hope that this provision will avoid it". No review in five years' time will be able to discover whether the rule has the deterrent effect that it is supposed to have on testators who would like to benefit a dynasty because the legal advice which is given to them is given in private. So the rationale for the rule, the dead hand effect, will remain unproven, even in five years' time. If there are risks—a number of commentators have said that there are risks in abolishing most of the rule against accumulations – they will not be perceived in five years' time either. That will not be seen for a very long time. So again this is a leap in the dark. In the meantime, a sort of injustice may be done because while we are waiting and seeing for this very long period of 125 years, the income and maybe the capital will be allocated to persons who may, in the end, turn out to be the wrong persons because of the trustees' power of advancement; i.e. they can spend the money in the meantime on the person who looks as if he or she will qualify, even if they do not in the end. Wait and see is based on the premise that the property should go to the testator's intended beneficiary and not to others of his family who might inherit if the testamentary provision were found to be void. So why not abolish it, since the effect of 125 years is virtually to end all restraint, and give the gift every chance of succeeding? I think the period of 125 is very long. I do appreciate that at least one person here has a maiden aunt, and maybe more have maiden aunts, who have lived for over 100 years. It is a well-known statistical effect that unmarried women live for longer, on average, than married women. So it will be the spinster aunt effect. Nevertheless, I do not think that the reform should be driven by the vicissitudes of spinster aunts; 125 years is a very long time for which any lawyer or testator might think that they can foresee the needs of their family, given tax provisions, given immigration and emigration and divorce and so on. I do think it is a very long period. It may be justified but in effect you are saying, "Well, we give up. Pretty much do what you like really" with a period as long as 125. The Law Commission in their first review of this rule—they had two goes at it—consultation paper 133 in 1993, did look at the possibly of abolition and the consensus was that it should not be abolished, but I suppose it is only really afficionados, keen people like me and Mr Nugee, who reply and would be reluctant to see it go. The rule does not apply in Scotland, with apparently no ill effects. According to the Law Commission's own report, there is a natural tendency in Scottish will making to limit dispositions to about 100 years, even though there is no legal requirement, though whether one should in these days rely on Scottish economic plans is open to doubt. Manitoba and a number of American states have abolished the rule and they have found that testators take advantage of the law of the abolition states to exploit tax loopholes, which exist in the States but I do not think exist here. South Australia has abolished the rule but allows for application to the court after 80 years for a winding-up and vesting of interests; in other words, you can bring it to an end after 80 years, even though there is no rule against perpetuities in South Australia. I doubt whether there would be any ill effects from abolition, given that 50% of the population do not make a will and of those who do apparently only 2.5% seek to create future interests; in other words, only about one person in 100 with any money, if they have money worthwhile, would seek to create future interests. The Irish Law Reform Commission recommended abolition of the rule in the year 2000. The Irish said that the rule disrupts perfectly innocent gifts; the problems usually arise because the draftsman was inept. It has often been said that you can always get around it if your drafting is skilled enough. The Irish said that, as here, it is hardly taught in university law courses any more. Taxation and other family circumstances dictate flexibility and the land of course is not tied up; the land is sold. It is capital and income that are subject to restrictions. The rule bites on remoteness of vesting, not on the substance of the will or on possession. Today it is much more important to ensure, for example, in will-making that inheritances reach out to, say, children born out of wedlock, or that arrangements are made in wills to minimise tax liability; in other words, what we ought to be concerned about is the sort of dispositions that people make, not how long in the future they may vest or last. Marriage breakdown and tax liability are more important than the rule in ensuring flexibility, and apparently widows today expect immediate control over their late husband's estate, not a mere life interest. It has been said that when the solicitor knows what he is doing in relation to the rule and is advising the testator, it adds 30 minutes to the consultation, but in the great majority of cases, I would venture to suggest, the rule is ineffective because of ignorance, indifference and caution and its application depends on the skill of the lawyer, and that does not seem to me to be suitable or fair in modern circumstances. Then I have a few short comments on various clauses, if you would like me to give them to you. Clause 1(1) (I think I said to you before) is misleading because it says, "The rule applies only as provided by this section" and that is

simply not true. The rule applies with a whole backlog of previous statutes and, when you get to clause 15, you see that the rule is basically prospective, so it is not comprehensive despite the impression given in clause 1(1). I welcome clause 3 because I rather hope the Lord Chancellor, whoever he or she may be in years to come, will further restrict the application of the rule, so it is good to see that power there. I thought clause 5 (4) was perhaps somewhat regrettable because it says the perpetuity period in sub-clause (1) is 125 years, even if, according to sub-clause (4), the instrument provides for a shorter period. I think that is a shame because, if I have understood it, it makes it longer than it has to be. Clause 7(2), which I have mentioned, is about being able to give away the income and the capital to the wrong person during the period of waiting and seeing. It would be a nonsense really if someone else turned up being entitled but in the meantime much income and capital will have been spent on the person who looks as though they are going to be the winner in the end. Clause 7(1)—sorry but I am going back now—is interesting, wait and see. It is applying wait and see but how would a lawyer know whether to wait and see without knowing all the details of the common law, as amended, about remoteness of vesting? In other words, you cannot jettison the common law, I believe, under this new Bill because the statement in clause 7(1) says you have got to know whether an estate or interest would have been void on the ground that it might not become vested until a remote time. In order to interpret that, before moving on to wait and see in sub-clause (2), you have to know all the old law. If I were to leave money to the first of my grandchildren to become an MP, which would be void at common-law, you would need to know the common law to appreciate that. A lawyer who has not done a course in the rule against perpetuities might find clause 7 difficult. Waiting and seeing is easy enough but how would you know whether or not to wait and see under 7(1) if you did not know the common law? That is why I say it will not really simplify matters. Then finally, clauses 15 to 16: it may just be me but I read this and a re-read this and I could not clear my head over this. As far as I can make out, a will executed before the commencement date, even though the testator dies later, has the old law applied to it, but then there is another clause that says none of this applies unless the person making the will dies after the commencement date. I am sorry, it is just me but it might be worth someone having a look to see. I simply could not give a clear answer myself as to what law applied if a will was executed, say today but this law came into force in 12 months' time. As I said, it may just be me but I tried and tried and I could not really get my head around it. I am sure Mr Nugee will be able to.

Q25 ***Chairman:*** He may need notice of the question before he answers.

Baroness Deech: I am sure others round the table will be able to give me the answer. In other words, as you know, I think rationally it would be right to abolish it, but if that is not the case, of course I am very glad that the Law Commission programme is pushing forward, that is much to be welcomed; and obviously one hopes this new procedure will work and everything will be fine and there is a consensus, so I am in a minority over abolition. But if the law goes forward, I do think that some consolidation, some attempt to try and collapse all these different systems into one or two, would be a help given that in the future we will not know how it is working out and there will be a generation of lawyers who will not have been educated in the rule, who will not have sat through the eight one-hour lectures that I used to give at Oxford.

Chairman: Thank you very much indeed, Lady Deech. I feel we almost ought to clap at that brilliant exposition, if I may say so, of your views. Now I must ask whether any members of the committee would like to speak.

Q26 ***Lord Clinton-Davis:*** You did say that there was nothing in the syllabus about this issue. Nothing appeared in the Law Society syllabus when I took the finals in 1953. When was the last time it appeared? That is not very important. The issue which I want to raise with you is this. Lord Justice Etherton said that it was important for the competitive ability of this country to retain the law about perpetuities and accumulation in order to compete more effectively with those in so many other jurisdictions. He added, "I have no doubt about that". What do you have to say about that?

Baroness Deech: I would be interested to know why he said that. It may be that it is in the Law Commission report and I missed it, but I read articles about Canada and the States where the opposite was said to be true and those states that had abolished the rule found that more people were going to the jurisdiction of that state, the abolitionist state, to make their wills and settlements because there was some tax loophole that could be exploited. That is what I have read. I do not know what Lord Justice Etherton's reasons were. I cannot think offhand what they might be but I am sure he will tell you, or it may well be in the Law Commission report on this topic and I just have not spotted it recently.

Q27 ***Lord Hodgson of Astley Abbots:*** I wonder if I could ask you about your closing comments on consolidation. My life was scarred for 18 months of the Company Law Reform Bill leading to the Companies Act 2006, I think the largest Act that has passed through their Lordships' House, with 1300

clauses when we finished. The reason that we were pressing for this to be done was to make it accessible to as wide a range of people as possible. It seems to me that though this is a specialist area, increasingly it is going to be more specialist, for the reasons you made clear, because people will not have learnt about it separately at university and elsewhere. When I reviewed the 1964 Act, I found it a modest piece of paper though it may not be modest in extent. Is consolidation difficult to achieve? With a bit of effort, could we do it now and get this out of the way?
Baroness Deech: I find drafting terribly difficult and far be it from me to impose a burden like that on the highly skilled draftsmen. Whoever did this really has done a wonderful job. Maybe I could set your question in a slightly broader context which is: it is high time that in this House and the other House we had computerised legislation on screen where the old law is slotted in to the new law. It cannot be beyond the wit of man to put it all together. We must surely be moving towards that, not just here but elsewhere. If you could combine the whole lot with the aid of a computer in a way that you can see it all on screen, without necessarily sitting someone down to consolidate the whole thing in one Bill that has to be passed, that would take us quite a way along. Are people working on that? The cry has gone up, has it not, over the years: let us see the whole law, not just in bits, having to refer back to an amending clause from a previous Bill. If someone could put it all together by using a computer without necessarily enacting it, slotting in bits here and there, that would be a help. I do not see any way that a regular lawyer could deal with this new Bill without knowing the common law because of what I said about clause 7. So they read this, they put it down and then it have to go back to, say, Megarry and Wade, the full-size version, or Maudsley or Barton Leach or any of the other books on it, to study the common law.

Q28 ***Lord Goodhart:*** Do you think that the rule against perpetuities is in fact causing much of a problem nowadays? Is not the absence of much litigation since the 1964 Act came into force a sign that it is working really reasonably well and it does not need to be abolished; it only needs to be simplified?
Baroness Deech: Well, Lord Goodhart, we just do not know, do we, because no-one has done an economic study of it? We simply do not know. My guess has always been that a lot of people go ahead and do things in ignorance of the rule or they will carry out something not knowing that it should apply. We have absolutely no evidence and it would be enormously interesting for an academic to do a survey but there is not time. We just do not know. I personally believe in law as a statement of principle, even if it is not always evident that it is working; for example, do not drop litter. This is broken every day. Nevertheless, the law is a good statement of principle but we simply do not know whether this works or not. If this committee believes that the dead hand rationale is sound and should be continued, then it should be continued, but I do not know of any evidence either way.

Q29 ***Lord Goodhart:*** Can you imagine any circumstances in which it would give any benefit to anybody if some testator or settlor puts money into a trust which is to last for 1,000 years?
Baroness Deech: I suppose the testator would feel good about it, yes. What I suspect is that it may be that people are trying to do this sort of thing now and it escapes without notice. Also, our ability to cope with the future, whether it is 1,000 years or 125, is much more limited than it was. In trying to run a trust for 1,000 years, all the systems that we know will no doubt have collapsed and been overtaken by then that whatever it was would be swept into some revolution or computer crash or whatever, so I think in practice these things probably do not run for very long, but I see 125 as almost as bad, as it were. If the rule is known and taught and if this committee were to recommend that there be a campaign to persuade law schools and professional courses to reinstate it, then that would have a good effect because whatever the rule that emerges from this committee in the Bill, then to have the effect that is desired, it needs to be known about, whether it is 125 years or 80. As long as you make sure people know about it, then it could have a good effect, which you are clearly suggesting.

Q30 ***Lord Archer of Sandwell:*** May I ask an emperor's clothes question? What is the magic of 125 years? Do you know why they arrived at that figure and not something different?
Baroness Deech: The Law Commission said that it represented a sort of calculation of the longest period that might equate to a life in being plus 21 years. We often hear of people who live to 104—the spinster aunts and so on; add on 21 and you get to 125. That is how they reached that particular sum—longevity plus the former age of majority.

Q31 ***Lord Hart of Chilton:*** Baroness Deech, I asked Lord Justice Etherton whether he knew how many trusts there were in existence and he said that he did not know the answer to that but that as far as the Revenue and Customs were concerned, there were about 200,000 tax-paying trusts. When one considers the question of whether or not something should be retrospective, the immediate thought comes to mind that if there is such a large number, the problem of having to ask lawyers about the effect of retrospective legislation would lead to a large amount of money having to be spent on legal fees and that, from a

consumer's point of view, is not a very good thing. Would you agree with that?

Baroness Deech: Certainly from a consumer's point of view, any extra spent on litigation or even legal advice is of course a bad thing but I imagine that retrospectivity would probably save and clarify those trusts. In other words, when looking at them, one would say, "Right, we can let this run for 125 years" and that it would be quite simple.

Lord Hart of Chilton: That leads to the second question. You probably might not have seen Mr Harpum's evidence that will be given because he has not come here yet. He says on page 9, and this is about retrospectivity, "However, the real concern must be that any such retrospective legislation could lead to the divesting of contingent and possibly even vested proprietary interests, which would in all probability fall foul of Article 1 of the first Protocol of the European Convention on Human Rights", and that would inevitably lead to fresh legal challenge.

Q32 ***Chairman:*** Would you like to have a copy of his evidence?

Baroness Deech: I would, yes. That may well be true and I am not a practitioner but of course any time you change land law, any time you extend a lease, even when the landlord thought he was getting it back or something like that, you are, arguably, infringing Article 1 of Protocol 1 of the European Convention. No-one seems to have been too worried about that in the past. Certainly I yield to practitioners who fear that that may be the case, but again we do not know, do we? One would have to look at a sample of those trusts and ask: what would actually happen if we changed it? I do not believe that work has been done. That has always been something that bothers me. These days, people always talk of everything being evidence based but in this field we really have very little. It is speculation. It would be nice if there were time, I am sure there is not, for some graduate student to take 20 trusts and have a look and see what would happen if they were to be affected retrospectively. I am sure there is not time for that. I will take away obviously Dr Harpum's statement and read it. As you are well aware, it is the views of the practitioners that count. I have been given it now and I see what he says. I am glad to see he has some sympathy with my criticisms. I do not know whether I would worry too much about the European Convention on Human Rights because there have been other I think rather more gross instances, but clearly one would not want people to lose interests that they already have, but we have no evidence of that. I would have thought that one ought to have a look and see if that is the case. Moreover, there is one element of retrospectivity in this Bill, which is the substitution of 100 years, so clearly that principle is not totally sacrosanct.

Q33 ***Lord Bach:*** I do not intend, my Lord Chairman, to ask many questions as the Government Minister on the bill. I hope you will forgive me, Baroness Deech, if I just follow on from what Lord Hart has asked you and going back to retrospection. Just to remind you what Lord Justice Etherton said in response to what Lord Hart himself admitted was a leading question at our last session, Lord Hart's question was: "That leads me to a leading question which is to do with retrospection. If we are talking about that number, or in the order of that number"—that is the 200,000 tax-paying trusts and there will be others as well—"then to make anything retrospective means that all of those touched and concerned about that would mean they would have to take fresh advice. That in turn would carry with it a cost of some considerable nature." "Absolutely" was the reply. It is the next question and answer I just want to put to you and see your comments on. Lord Hart: "So from the point of view of the consumer, that would be, would it not, an added reason for not wanting to go into a retrospective area? Lord Justice Etherton: I totally agree and accept that." He went on to say: "I mentioned the commercial interests; one of the objectives of this Bill is to take perpetuities out of the commercial arena." He went on: "You will find in a huge number of cases, particularly for example leases, that rights over other people's land—perhaps rights to walk over them, rights to join up to drainage—are limited to 80 years. That is a very simple case but in commercial terms you are going to have to work out what is the effect of abolition—was it intended or was it not, what arrangements have been made on the basis of that—and options to purchase are subject to a 21 year perpetuity period at the moment." This is the bit I particularly want to put to you: "Now if one started to say that that no longer applies, what are the implications for all those cases where there are options to purchase in a commercial context; what plans are being made." Then in what I think can be described as quite strong language, he said: "If I may say so, I think the idea of retrospectivity is from an academic perspective perhaps rather nice, but from a practitioner's and practical prospect it will be a complete nightmare, I am afraid. I cannot put it higher than that, though that is very high . . . " said the Chairman of the Commission. I hope it is fair to put to you your response to that. I am sorry, my Lord Chairman, to have quoted at length but I think it is an important point.

Baroness Deech: We academics always get a bad press in these things but were it not for our work, none of these changes I think would be soundly thought out in the first place. So I am not ashamed of that. Of course, remember that my point really is abolition for the future. I have been bothered about this because it is simply so complex but if the view is it cannot be

retrospective, then that is fair enough, albeit when sweeping tax changes are made to our law, nobody seems too bothered about the effect that that will have on existing trusts. If there was some swingeing new tax on trusts, that would no doubt be retrospective, would it not, and everyone would have to seek legal advice. One does not want more of that but it does happen from time to time.

Q34 ***Lord Kingsland:*** I would like to come to the defence of Lady Deech on this matter. The question of retrospectivity was put to the Chairman of the Law Commission during our last session and he was opposed to it for the reasons that I think become clear as a result of what the noble Lord, Lord Bach, has said to you just now. There is particular concern expressed in Mr Charles Harpum's memorandum about the consequences of retrospection with respect to the first Protocol of the Human Rights Convention; but I think I am right in saying—you would know this much better than I—that there have been successive Acts of Parliament over the last 30 years changing the balance of power between lessor and lessee. That matter was taken before the European Court of Human Rights several decades ago by, I think, the Duke of Westminster; and the conclusion reached by the court was that, even though, effectively, the lessees' rights were improved enormously at the expense of the lessor, nevertheless this was not a breach of the European Convention on Human Rights. If one assumes that the European Convention on Human Rights is unlikely to be amended with respect to any adverse effects on contingent or, in some cases vested interests, can you see any other problem about retrospection that could not be cured by statutory drafting?
Baroness Deech: It depends what is made retrospective. I think I was envisaging the retrospectivity being in relation to 125 years and wait and see, so everything will be resolved by that. I do not think I can envisage any other problem except that it would be useful, would it not, to look at some samples—wills or trusts—to see what that effect might be. I find it hard to conjure up the sort of situation that would be grievously affected were there to be retrospectivity. It is often said that none of us really has an entitlement to any sort of expectation from parents or grandparents. You have to take what you are allowed to take in view of the law as it exists at the time. If you lose everything because of inheritance tax, you cannot really complain, can you, because that is the way it is. Even though something was set up 50 years ago, if tax comes along and takes it away from you, you cannot complain and say "I have lost it". The answer is you have to abide by the law of the land as seems fair to those who make it at the time when you are affected. So I do not see any sort of absolute entitlement there that anyone can complain about. There are no doubt sections of society who say that you should not get anything at all when your parents die, let alone expect it, so I do not think that is the case, but I do think there would be benefits. If we cannot achieve retrospectivity, some benefits from slotting together all those different bits of law in one manageable document might help, as I said. I just worry about the student, the solicitor or the barrister (who does not have the experience and talent that Mr Nugee behind me has or did not go to my lectures) who is having to cope with this. The law is not a good law if it cannot be understood by those who make it, by those who apply it, by those who are affected by it. They may not be convinced by it but they need to be able to understand it and apply it. I am worried about that bit.

Q35 ***Lord Kingsland:*** This Bill is in a Special Public Bill Committee because the three main political parties have decreed that it is politically uncontroversial. However, the depth of your thinking and the cogency of your analysis have made this measure controversial in a different sense and I very much welcome that fact.
Baroness Deech: I would not say it was political.

Q36 ***Lord Kingsland:*** Absolutely not.
Baroness Deech: I am just an academic.

Q37 ***Lord Kingsland:*** If you reached that conclusion from what I have just said then, clearly, I did not express myself properly. I wanted to underline the fact that it is not politically controversial; but it has, in my view, anyway as a result of this morning's exchanges, become more controversial than I thought it was as a legal measure in relation to society. I meant controversial in that sense. There is no reason why this committee should not be capable of grappling with that issue. If I can just ask you a second and final question. Broadening this matter out, you have contemplated total abolition and expressed a not unfavourable view about it. You have also contemplated less dramatic but, nevertheless, fairly far-reaching approaches. One of them is retrospectivity; we have just been talking about that. The other is wait and see. Supposing that abolition were not a feasible option—I am not saying it is not but supposing we concluded it was not a feasible option; supposing also retrospectivity was not a feasible option, what about the position of wait and see? You pointed out that the powers of advancement, effectively, made wait and see almost an irrelevance, or certainly a very minor element in the overall picture. Would you consider the abolition of wait and see as being a good second best solution?
Baroness Deech: That is a very interesting point, Lord Kingsland. I am not alone in having said occasionally in the past that the common law with its certainty is

more attractive and more practical than wait and see. I am imagining that if you wait and see, you will be attracting more legal costs, not such a good deal for the consumer, because the whole apparatus of the trust and the giving out of income and capital has to keep running until such time as it is apparent that, yes, the interest will vest or no, it will not. The attraction of the common law was that the lawyer, opening and reading the will or settlement, would know immediately, assuming he knew his rule, whether the gift was good or bad, and then you could move on. Wait and see proved very attractive because of the persuasive powers of Professor Barton Leach who got everybody thinking that it is a bit like a game where you really want the grandchild, or whoever it is the testator said, to get the money. You want the testator to get his way. There was always a feeling I think of a failure if the gift did not work. Wait and see was a way of achieving that, but if you take the view that there is no particular right of anyone to inherit or benefit from their family and if the gift fails, it means it will go maybe to the widow instead of the son, it will go to somebody else in the family, and then maybe the common law is quite attractive in certainty, more so than wait and see, but I have not contemplated the abolition of wait and see because it has been so popular and we do not know the effect. We have no cases on the difficulty of it because it only started in 1964, which is as but yesterday in the rule against perpetuities.

Q38 ***Chairman:*** I think we have probably covered all the main points that you dealt with in your opening statement. Is there anything else you would like to add overall?
Baroness Deech: No, just that I wish you well and I expect this Bill will go through and then you will only really be interested in a few comments I make at the end about particular clauses, but it is very welcome to have a chance to return to one of my favourite topics, which actually has some interesting social and societal consequences, as Lord Kingsland pointed out. Thank you for inviting me.
Chairman: First of all, we thank you very much. Secondly, we are hoping to see you at all future meetings of our committee. I am sure you will give the committee much assistance. I hope you will stay now.

Memorandum by Mr Edward Nugee TD QC

Experience

I read Law at Oxford University 1949–1952. I first came across the Rule Against Perpetuities, I suppose, in 1951, when I attended a course of lectures on the Rule at Magdalen given by Professor Barton Leach, Story Professor of Law at Harvard, who was on an exchange visit for, I think, a term with John Morris. He was an entertaining character, with a vigorous lecturing style. One of my lasting memories of him was playing against him in the annual cricket match between the University Law Society and the Law Dons on the Worcester ground. He came in carrying his bat like a baseball bat, smote the first ball he received over the boundary, was out to the second, and left with a broad grin on his face.

Ever since then (and not only because of his inspiration) I have found the Rule Against Perpetuities one of the most intellectually satisfying branches of the law. It is the one area in which, in at least 95% of cases in which a perpetuity point arises, one can be 100% certain whether a limitation is valid or is void for perpetuity—I am talking of the Common Law, before the 1964 Act was passed; and I heartily agree with Baroness Deech's point in the Second Reading Debate that the common law had a lot to be said for it, because if a gift was bad you knew it right away, and you could often make other provision by agreement which would give effect to the settlor's or testator's intentions and be valid in place of the void limitation. The 1964 Act, like much legislation, though it has its good points, in an attempt to make the law fairer has made the legal position of trust limitations more uncertain, and it is now less easy to cure a potentially perpetuitous limitation. That, however, is water under the bridge.

I wrote a 25-page detailed response to the Law Commission's Consultation Paper No 133, which Charles Harpum, the Law Commissioner in charge of the work on the Rule, was kind enough to say was the most useful response of all those that they received. He showed me a draft of the Report, Law Com No 251, and in particular of the draft Bill annexed to it, before it was published, and he was kind enough to say that my comments on the draft Bill were "exceptionally helpful—we had missed a number of tricky points". As a result the draft Bill was amended in a number of respects, and I like to think that it was significantly improved. The present Bill, as your Lordships will know, is in most respects identical with the draft Bill annexed to Law Com No 251.

During the past year, when it appeared that at last a slot might be found for the Bill to be introduced, debated and, it is to be hoped, enacted, I have been privileged to be asked by the Law Commission (Professor Elizabeth Cooke) for advice on it, and more particularly on the Explanatory Notes which were to accompany it. I have

to say that the first draft of the Explanatory Notes was appalling, and clearly written by someone who had no understanding of the Rule whatever, and I wrote quite a detailed and very critical commentary on it for the Law Commission. I understand that it was prepared some five years ago when there appeared to be a possibility of the Bill being introduced, and was not, I believe, the work of anyone currently in the Ministry of Justice, and certainly not of anyone currently or at any time in the Law Commission. The current Explanatory Notes which your Lordships have are a vast improvement, and I have only noticed one mistake in them (in the statement of the common law position with regard to determinable fees in paragraph 59, which has anyway been overtaken by s12 of the 1964 Act).

The Bill

I have read the *Hansard* Report of the Second Reading debate, and many of the points I would have made were made in it, so I will not repeat them at any length.

I think it is fair to say that there are three main points in the Bill, though there are, of course, other matters of less importance.

1. First, the application of the Rule Against Perpetuities is henceforth to be confined to instruments (usually settlements or wills) which create trusts of a broadly traditional family type. It is no longer to apply to commercial transactions such as the grant of options or future easements. This will, I think, be universally welcomed. The current position makes some perfectly sensible commercial arrangements which may last for more than 21 years impossible to draft. The rule was developed to control family settlements, and should be confined to them.

2. The Bill introduces a single perpetuity period of 125 years in place of the common law lives in being plus 21 years, or the 1964 alternative of 80 years. Assuming that the common law period is to be replaced (though in fact it fitted well with all human possibilities as they then existed), the question which may need to be considered is whether 125 years is the right period. Baroness Deech and Lord Goodhart expressed doubts on this in the Second Reading Debate. In my opinion 125 years is right, and 100 years (as in Jersey) would be too short.

I can illustrate this from my own experience. My spinster (and dearly loved) aunt died in July 1991 at the age of 102.5. Suppose her father had died in 1890, leaving her a life interest in a share of his residuary estate with, in default of issue, a general testamentary power of appointment, and in default of and subject to any exercise of the power for the other issue of her father living at her death who attained 21 in equal shares per stirpes—a fairly common set of limitations in a 19th century will or settlement. What would the position have been in 1990 if the perpetuity period had been 100 years? It could not have been right that her life interest should come to an end. It could not have been right that she should become entitled to the capital of her share, thereby defeating the interests of her nephews and nieces or their issue. It could not have been right that she should be deprived of the right to appoint by her will that her share, or part of it, should go to the charity for which she had worked for many years. No doubt the gift in default of appointment could have been made to vest in interest on the expiration of the 100 years even if the issue had not attained 21, but that would not have been very sensible from the family point of view, and anyway it would have deprived her of the freedom of testamentary disposition which her father intended her to have. 125 years is really the minimum period to ensure that these perfectly reasonable limitations should not be defeated by the Rule. Charles Harpum wrote to me before Law Com No 251 was published:

> "The 125 year perpetuity period was supported on consultation and also reflects the fact that a significant (and highly distinguished) minority of those who responded were in favour of the complete abolition of the perpetuity rule. You will be pleased to know that we had your aunt (whom you used as an example in your response) very much in mind when deciding on 125 years. Lady Coxen, who recently died at the age of 107, did make us wonder if 125 years was long enough!"

If a single perpetuity period is to be enacted, I should be strongly opposed to its being less than 125 years.

3. The Bill removes all restrictions on the period for which a trust or power to accumulate income can be created, leaving the only restriction that the trust in default must vest at or before the end of the 125 year perpetuity period (except in the case of charities, where accumulation is limited to 21 years). In other words a testator like Peter Thellusson or Timothy Forsyte could direct that the whole of the income of his estate should be accumulated for 125 years. Peter Thellusson's trust for accumulation endured for little more than half of this time, since he limited it to the lifetime of his descendants living at his death and did not add on 21 years, as *Cadell v Palmer*, sanctioning a period of lives in being plus 21 years whether or not the 21 years had any relevance to actual lives, was not decided until 1833. Law Com No 251 paras 9.4 to 9.9 contains an entertaining account of the outrage which Peter Thellusson's will caused, which led to the speedy enactment of the Accumulations Act 1800 to prevent accumulation being directed for more than a much more limited

period, most commonly the minority of beneficiaries who would be entitled to the income directed to be accumulated, 21 years from the death of the settlor or testator, or (in the case of inter vivos instruments) the life of the settlor.

There are, I think, three distinct points to consider on this proposal:

(i) Lord Goodhart, in the Second Reading debate, expressed doubts about "the complete abolition of the rule against accumulations". I share those doubts. I have had clients who, I think, would have been willing, indeed keen, to take advantage of the possibility of directing accumulation for 125 years, as Peter Thellusson would have been. Lord Goodhart suggests that a power to accumulate exercisable during the 125 years might be acceptable. It would certainly be an improvement on allowing a trust to accumulate, and I can see that it could be useful for trustees of a discretionary trust to be able from time to time to accumulate without their being under an obligation to do so. Presumably this would be the only restriction, so that a trust to accumulate could not be directed, even for the existing periods. It would however be contrary to such principles as there are in this field to allow a power to last for 125 years but not a trust, though I have not given thought to the drafting amendment which would be required. There was quite a lot to be said for the permitted periods in the 1800 Act (repeated in s.164 of the Law of Property Act 1925), though rather less for the straight 21-year period introduced by the 1964 Act (tax lawyers saw this as a godsend because it made it much easier to avoid estate duty under the law in force in 1964—one MP said to me, Why did no one tell us that it was going to have such an effect on liability for estate duty?!) If the existing restrictions are to go, there does not seem to be an alternative to the 125 year period, unless Lord Goodhart's suggestion can be woven into the Bill. The tax consequences would make it less likely than 200 years ago that income would in fact be accumulated for long periods without good family reasons. On the whole I would, with some hesitation, support the existing proposal, which is given effect in simple terms by clause 13.

(ii) As regards the accumulation of the income of a charity, Lord Kingsland wondered whether it would have been wiser to permit, as an alternative to 21 years, the life of the settlor. There is something to be said for this. The life of the settlor has always been regarded as a sensible period during which to permit accumulations, since the settlor could have kept the capital in his own name and accumulated the income himself until his death. Tax again makes this argument a little unrealistic; but I do not see any strong argument against a settlor being permitted to direct accumulation of income for 21 years or the remainder of his life, whichever is the longer; and some settlors would value this possibility so as to enable them to support the charity by donations during their lifetime while enabling it to build up a larger capital fund to take the place of their inter vivos donations on their death. I do not feel strongly on the point.

(iii) I do feel quite strongly on the third point. It is well settled that an appointment made under a special power of appointment must be read back into the settlement creating the power, with the perpetuity period running from the date of the settlement but account being permitted to be taken of events that have happened up to the date of the appointment. The effect of the Bill is that a special power of appointment created by a pre-Act settlement, if its terms are wide enough (and at any rate in the case of most discretionary trusts they are) will be able to be exercised so as to create a trust for accumulation for the remainder of the perpetuity period applicable to the settlement (not, as was originally the case in the draft Bill annexed to Law Com No 251, for 125 years from the date of the settlement—this is the consequence of clause 5(2), which is one of the few points at which the Bill differs from the draft Bill in Law Com No 251). An example will illustrate the point. Suppose a settlement made in 1980 settles property on such trusts and with such powers etc for the benefit of the issue of the settlor as the trustees should appoint, and subject to any appointment on trust to pay the income to the children of the settlor who attain 21; and suppose the settlor had only one child, A, who is now 21. Under the pre-Act law the trustees could not now appoint that the income be accumulated—there is no available period. A would be absolutely entitled to the income until he had a child to whom the trustees could appoint. Under the Bill, if it becomes law, the trustees will be able to appoint that the income which would otherwise be payable as of right to A shall be accumulated for the remainder of the perpetuity period applicable to the settlement—perhaps 80 years, perhaps royal lives plus 21 years—and deprive A of any right to the income for the rest of that period—there will be no restriction on the period for which accumulation can be directed because all restrictions will have been abolished by clause 13.

It may be said that this is all a little theoretical; but it was this particular point that enabled me (and possibly others) to persuade the relevant Department that the changes recommended in Law Com No 251 could not be made by an order under the Regulatory Reform Act 2001, as was at one time proposed, because the

Minister could not be satisfied that the order would not "prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise" (RRA s.3(1)(b)). I think it was a bit far-fetched to suppose that the restrictions imposed by the rules against perpetuities and excessive accumulations could be amended by an order under the Act at all; but the above example demonstrates that to give effect in an order to the recommendations in Law Com No 251 could certainly have the effect of preventing A from continuing to enjoy the right to income which he had under the existing law.

I still feel that this particular feature of the Bill should be rejected. I do not think there would be any difficulty in providing in clause 5(2) that the perpetuity period and the restrictions on accumulating income applicable to the appointment should be those applicable to the instrument creating the power. If it is felt to be untidy to have a reference to accumulation in clause 5, a similar provision could be made, at rather greater length, in clause 13.

4. I shall be happy to try to answer any questions the Committee may put to me, either on the above points or on any other points in the Bill, but it will be appreciated that answers off the cuff may not be quite as I might have expressed them given a little time to word them in the way I should like.

22 May 2009

Examination of Witness

Witness: Mr Edward Nugee TD QC, gave evidence.

Q39 ***Chairman:*** Mr Nugee, we are very grateful to you for coming to give evidence to this committee this morning. We are particularly grateful for the memorandum which you have sent us in advance. I suspect I am not speaking only for myself that when you come obviously to the important point you make on the last page of the memorandum, I hope you will go quite slowly because it takes quite a bit of understanding. Would you like to start by addressing us generally?

Mr Nugee: My Lord, I have set out in the memorandum certain points that occur to me on the Bill. May I say I agree very largely with what Baroness Deech has said in her opening statement. I am not quite so sure about some of the later observations. On the question "does the rule actually have much effect today?" it is there in the background to every settlement. The sorts of settlements that one tends to see in Lincoln's Inn concern large estates and trusts which may last for a generation or two and the rule against perpetuities is something everybody has more or less in the background of their mind in drafting settlements, trusts and advising on them. Baroness Deech quite rightly said there have been virtually no cases on it because the law is clear. The common law is absolutely clear and with the 1964 Act, in so far as it changed the common law, it is going to be another 30 or 40 years before any real questions arise on it with the 80 year period and the wait and see. In the past I have seen quite a number of large landed estates which have been held in trust and it is simply part of the background that the rule against perpetuities limits the extent to which the settlor or testator can direct the way in which properly is to be held by the family in the future. It is something where, as Baroness Deech said, if there is a case, it is usually because somebody has made a mistake. I have heard Lord Justice Danckwerts say that he has drafted a settlement that was void for perpetuity. There was an eminent conveyancer in the chambers where I was pupil with Lord Brightman and Lord Templeman who came to me in a bit of a panic one day and said, "Have I drafted something that is void for perpetuity?" and I had to tell him he had, but it is rare. If the rule is breached, if that is the right word, there is no doubt about it at common law and not much doubt about it under the 1964 Act until you come to the wait and see, which is going to last for a good many years to come. So the fact that there are very few cases you might say is a commendation of the law as it stands.

On the principle whether there should be a restriction on the way in which people can direct that their property be held for an indefinite period in the future, I think the common law got it right. The next generation and the minority of the generation afterwards is about as far as I think the ordinary owner of properly ought to be allowed to restrict the devolution of it. I think it was Lord Hart who asked is there any objection to something going on indefinitely. Well, I believe that of course the actual fact that the property is held in trust does not prevent it being dealt with by the trustees commercially, they can invest and so on, but they tend to be, quite rightly, rather prudent in what they do and perhaps there is a case for saying that after a generation and a half, it is not unreasonable that you should have somebody who actually has some capital at hand and he can spend it on something mad, like climbing Mount Everest or building a fancy yacht or something like that. It is not necessarily for the good of society I think that property should always be held in trust by trustees who have to act prudently. I am in favour of saying that after a generation and a minority of the next generation, it is sensible that somebody should be able to say: "That is my capital, that is my property and I can deal with it in a way which is free from the restrictions that trustees rightly feel

themselves subject to." I am in favour in principle of the rule.

On the period of 125 years, Baroness Deech has explained that. I hope I have explained it in my example of my own. The period of 125 years, if you are going to have one period alone, has got to be long enough to cover the sorts of trusts that are in fact created. With 200,000 trusts, the hypothetical example of my aunt, which your Lordships have seen. is going to come up from time to time and there will be cases in which, if you had a period of 100 years, as they do I think in Jersey, at the end of 100 years, what is the position to be with somebody still alive and drawing the income with a testamentary power of appointment? Is she to cease to have the income? Is she to cease to be able to exercise the testamentary power of appointment? There is not an answer and 125 years is designed to cover that possibility, as I hope I explained. I think it is the right period. If you had a shorter period than that, perfectly reasonable and not all that uncommon trusts might fall foul of it and you would not get the quite sensible wishes of the settlor or testator given effect to. That was the reason it was chosen. You saw what Dr Harpum said in his letter to me; he wondered whether it as actually long enough when you have Lady Coxen dying at 107. On the period, I think 125 years is one that I would endorse and say that that is right.

On the accumulations, I think Lord Goodhart's idea of trustees having a power to accumulate but not being able to direct a trust to accumulate has something to be said for it but it does rather go contrary to principle that trusts and powers are both subject to the rule in much the same way. I do not feel very strongly on that one, as I said. Accumulation for charities: as Baroness Deech said, the 21 years really has no relation to charity at all. What would be sensible—and this was suggested at the Second Reading debate—would be a power for the charity to accumulate income during the settlor's lifetime. I can see and I have experienced cases where the settlor has said, "During my lifetime, out of my income, I can make regular donations to charity. I have set aside some capital for them. They can live on my donations during my lifetime but meanwhile the capital accumulates until a rather larger sum, which will enable them to continue after I have died." That is a much more sensible period, I think, than the 21-year period and it is not allowed for in the Bill as it stands.

You have asked me about the point on page 4 about powers of appointment.

Q40 ***Chairman:*** Before we come to that, perhaps a technical point: do you want to say anything about retrospection?

Mr Nugee: I am not in favour of retrospection in dealing with property rights. It is all very well as an academic theory that you can straighten out the law retrospectively but what you are going to do is take away from somebody who has an interest, maybe a vested interest, but certainly an expectation of inheriting, and give it to somebody else. That is something that this House in particular and Parliament in general has generally not approved. There are very few instances of really retrospective legislation. I think it would be contrary to principle that one should enact legislation which retrospectively alters the destination of funds that are held in trust. That is my simple view as a matter of principle. I do not know quite what element of retrospection one would put in or how it would be worded but in practice, if it is going to have any effect at all, it is going to defeat reasonable expectations in some cases in favour of other people who at the moment do not have those expectations. It seems to me that is not something that Parliament has normally agreed to, and so I would not want retrospection at all.

As for consolidation, I do not think consolidation is quite the right word; it is codification really because there is not a common law act to consolidate. The rule itself can be stated, and Gray states it, in 27 words. It is very simple. I can read them out to you if you like. The common law could be stated in section 1 of the Act in 27 words as Gray states it and on top of that you could have a little bit about how powers of appointment operate and appointments are read back into the original settlement and you can take account of the facts that have occurred up to the date of the appointment in a way that is not possible at the date of the settlement. There would be a little bit more complication to an Act than simply stating the rule, and then you would have to bring in the 1964 Act, and if you are going simply to consolidate or codify the existing law, you are going to have to say that for settlements made before 1964, this is the law; for settlements made between 1964 and today, this is the law; and for settlements made after today, it is going to be a different law. You have three sets of law and you cannot get away from that unless you are going to alter existing rights. As I say, my fundamental objection would be to the alteration of existing rights. It is individuals who would be affected. It may look tidy in the textbook but it is actual individuals who are going to be affected if you retrospectively alter their rights.

Chairman: I am looking around to see if there are any questions.

Q41 ***Lord Goodhart:*** I would like to start by saying that I have been persuaded by the arguments for having it as 125 years rather than 100 years, and I will not take that up any further. I am still somewhat

worried about the accumulations, because the "dead hand" problem does seem to me to be involved there. I accept that the economic arguments against Thellusson are no longer really significant, but from the point of view of the individuals, for somebody to say that this is going to be put into accumulations for 50 or 80 or 100 years, nobody will benefit, or somebody will benefit but only in 100 years time. Is there not a case for saying that that kind of dead hand is undesirable and, given that we do have now a law against accumulations, the case would be for modifying it rather than abolishing it?
Mr Nugee: I think there is certainly a case for saying that. It may be the rare owner of a property who wants to take that line, but when Peter Thellusson did that—and he died in 1797—there was absolute outrage in the country. Here was a large estate—£600,000 before 1800 was worth a lot—and it was going to roll up income for ever, or at least for the whole life of the last survivor of his descendants living at his death, and the country was outraged and passed the Accumulations Act within three years. I have had clients who I think would not be averse to accumulating for a good deal longer than they are allowed to under the present law. The 21 years, as I explained, is really a bit of an aberration. It has nothing to do with the human lives for which the accumulations period, as in the Accumulations Act 1800 and the Law of Property Act 1925, provided. Those are all related to actual events, the settlor's lifetime, the minority of children and so on. They were quite sensibly chosen. There is a slight doubt sometimes, if the draftsman has not put his mind to it, as to which period applies, but not very often. I have had one case in which I have had to advise on that. I certainly have doubts about the wisdom of allowing accumulation for as long a period as 125 years. If one is not going to have that, the existing section 164 periods are sensible, having regard to the way in which families live. It seems to me that the alternative is to keep the accumulations period as it is at the present time, with or without the 21 years change. There was in the Law Commission—we did discuss this—a feeling that there was no need for restrictions on accumulations and that the perpetuity period would be the only restriction that was sensible. Certainly it is simpler if we do it in that way. Whether in fact it is more beneficial, I have doubts, as you do. There are a very few people, I accept, but I think there are some who would rather like the idea of a vast fortune for their youngest grandchild or great-grandchild.

Q42 ***Lord Goodhart:*** I think you were somewhat unhappy with my suggestion. Can you think of any way which would simplify the 1964 rules?
Mr Nugee: They are not that complicated, in fact. You can generally tell without any difficulty which period is applicable. There are occasions where you cannot and the draftsman has not made it clear. That is a minor error. You can generally work it out. I think there has been one case possibly in which that came up, which of the two periods was the one that applied. The life of the settlor is sensible enough, because a settlor could have accumulated it in his own hands, subject to tax implications. The minority of children, who would otherwise be entitled to income is sensible. They cannot spend it themselves and the trustees would need to be able to accumulate during that period—but no longer. The minority of other beneficiaries, the other periods of section 164, are quite reasonable periods, I think. The alternative of saying you cannot impose a trust to accumulate for longer than the section 164 periods but you can give the trustees a power to accumulate for the whole of 125 year perpetuity period does have certain attractions, but, as I say, I do not think it is really compatible with the sort of principles on which the Act works.

Q43 ***Lord Kingsland:*** Good morning, Mr Nugee. I have been looking at paragraph 3 of your statement. Actually there are two paragraphs 3, but perhaps the final paragraph 3 in which you address the question of the consequences of clause 5(2) of the Bill. I think I can best make my point by quoting from your extraordinarily clear exposition in that paragraph. You say towards the end, "Under the Bill, if it becomes law, the trustees will be able to appoint that the income which would otherwise be payable as of right to A, shall be accumulated for the remainder of the perpetuity period applicable to the settlement." 'A' would be the only child.
Mr Nugee: Yes.

Q44 ***Lord Kingsland:*** That flowed from a trust which a settlor designated for any of his children. He only had the one child and so he, in your example, is 'A'. You point out that 5(2) is one of the few parts of the Bill which is not part of the Law Commission's draft Bill.
Mr Nugee: Yes.

Q45 ***Lord Kingsland:*** I would be interested to know what your view was of the Government's thinking behind this change, and, thereafter, what weight you would give to that view, in the context of your own view, which is that this can all be expunged.
Mr Nugee: The original thinking was that an appointment under a power which was created before the Act in a pre-Act settlement could take advantage of the 125-year period if the appointment was made after the Act. It seemed to me that that was rather contrary to principle, because the appointment is

part of the original settlement. You read back into the settlement what is appointed and you find that it goes back to, in my example, 1980. You could not direct an accumulation for the rest of 125 years. What has changed is that it has been reduced from 125 years to the perpetuity period applicable to the settlement, which is what, in general, the law is at the moment, but what has been left is that there is a power to appoint that income be accumulated, provided your power is wide enough—which in many cases today it would be—for the remainder of the perpetuity period applicable to the settlement. So suppose the settlement is in 1980 and suppose you take the straight 80-year period which is then possible, make an appointment in 2010 and you could direct that, instead of the income going to A as the only present beneficiary until he has a child, the income be accumulated for the rest of the 80-year period starting from 1980.

Q46 ***Lord Kingsland:*** Which would defeat entirely the purpose of the settlor?
Mr Nugee: Yes. That I think is something to which I do take objection, because you are altering an existing settlement and existing powers of appointment in a way which I do not believe is justified. It is an element of retrospectivity, if you like. It is very easy to correct, as I have suggested—you only have to add about five or six words. It may not be elegant to put accumulations into section 5, but if you added five or six words to section 5 you could do it. Alternatively, you could put about a dozen words in section 13 and produce the same effect. It seems to me that you set-up a settlement in 1980, you know what the perpetuity period is applicable to that settlement and to any appointments made under the powers you give to the trustees or to the eldest son, and you do not expect that the trustees will be able to say, "I am going to take away the income from the family for the next 50 years and accumulate it." That is what I find rather objectionable, even if, contrary to Lord Goodhart's idea, you keep the 125 years of accumulation generally. That is an element of retrospectivity that I would not like.

Q47 ***Chairman:*** Can I ask you perhaps to have a look at the reasons why the change was made which you find some difficulty with. It is in fact contained in the letter from the Ministry of Justice of 13 May on page 2—and I have a copy here if nobody else has one.
Mr Nugee: I do not know what the reason was.

Q48 ***Chairman:*** I think you should look at it.
Mr Nugee: I would be very interested to see it.

Q49 ***Chairman:*** I am afraid my copy is marked.
Mr Nugee: I think I did object to the possibility of the balance of 125 years being available for accumulation. If they have cut it down to a balance of the original perpetuity period, it is an improvement, but it is still, in my view, giving trustees power to take income away from someone who would otherwise be entitled to it. This is paragraph 7. (Reading document) An appointment does not result in a resettlement. (Reading document) " . . . it was decided the perpetuity period for the exercise of a special power created before the Bill will be the perpetuity period applicable to the power itself." That is what they have done, and that is absolutely right, I think. What they have not done is to decide that the pre-Act restrictions on accumulation are to take effect in relation to the appointments under a pre-Act power, as I understand it; so that the restrictions which would apply under the existing law have been abolished and therefore you can appoint an accumulation for the balance of the pre-Act perpetuity period. What is said in paragraph 8 goes part of the way. I would certainly approve of that. What is not said is that, nevertheless, the restrictions on accumulation are abolished absolutely for appointments as well as for future settlements.
Chairman: Thank you very much. Are there any other questions?

Q50 ***Lord Thomas of Gresford:*** I think we have heard from Lady Deech this morning that this issue applies only to a very limited section of the population and, also, that the training of lawyers in this has really fallen by the wayside. Therefore, the advice that was given in this area is to a very narrow sector of the population by a very narrow section of people who have been qualified to give that advice. Do you think that this Bill, looked at as a whole, makes it easier for you to give that advice to that narrow section of the population or does it make it more difficult? Is this a simplification? We have in front of us a paper by Trevor Aldridge QC, solicitor, Law Commissioner, who says: "Any reform of the law should aim at simplification, and this is a topic which needs that more than most. However, as the Bill only applies prospectively (clause 15), it is adding to the complexity." His view is that this Bill adds to the complexity. Is that your view too?
Mr Nugee: It certainly adds to the complexity, in the sense that, instead of pre-1964 and post-1964 settlements or wills, you will also have post-Act wills and settlements which will be governed by a different set of rules. So you have three sets of rules instead of two. In a sense it is easier. 125 years sounds quite simple. Of course, in most cases, the trusts which will be drafted will be ones which will vest absolutely well within the 125 years and it will not make any difference anyway. What you are dealing with is the possibility that trusts, which could under the common law fail, are preserved, because you can wait and see whether they take effect. What has been done is to extend the period of wait and see from the

existing period, which is either 80 years (if you specify that as the perpetuity period—it does not apply generally) or lives in being and 21 years, to a straight 125 years. In one sense it is a simplification, but it adds to the complexity as you now have three sets of rules to consider according to when the settlement or will took effect. With all respect to the Law Commission—like Lady Deech, I have always found this a fascinating area of law and it is fascinating to see what is proposed and why it is proposed—I would not myself have thought that it was of highest importance. I am not suggesting that it should be rejected, but it is not going to make a great deal of difference in most cases. Most people draft their trusts in a form in which they are going to vest absolutely well within the 125 years. It is only in the rare case in which that period is going to be taken account of and the rare settlor/testator who is going to want to take into consideration the long period. When you say it is a limited number of people, My Lord, who are affected, yes, it may be that there are only 200,000 trusts that the Revenue know of, but quite a number of them are large estates, large assets. It is not 200,000 out of the 60 million worth of the country as a whole; it is 200,000 out of the top half million or so landowners who may have their property in trust. It has always been the case that the chancery lawyers deal mainly with large estates and large trusts, and it is they who are going to be affected most by this Bill if it is passed. It is not just 200,000; it is 200,000 many of whom include ducal estates or large trusts holding shares in mainly large companies and so on. If you take the actual worth of the 200,000 trusts, it is a good deal more than the proportionate value of the assets in the country. It does affect quite a significant number of people who do control quite a significant part of the assets of the country.

Q51 ***Lord Hodgson of Astley Abbotts:*** I thought you were going to take us down a very interesting path but at the last minute you sheered away.
Mr Nugee: I am sorry.

Q52 ***Lord Hodgson of Astley Abbotts:*** You tell us that we are now going to have a third set of laws: pre-1964, 1964-today, and today onwards. We have heard from Lady Deech that we really do not know what the effects of the 1964 Act are yet and will not know for another 30 or 40 years. You have very properly brought to our attention one or two improvements that this Bill brings but one or two disadvantages that it brings as well. Are we straining at a gnat to swallow a camel? Should we wait 15/20 years to see the full effect of the 1964 Act before making further changes?
Mr Nugee: No, I do not think so. I think the Law Commission are justified in reviewing parts of the law under their continuing programme, parts of the law which have given rise to adverse comment in some areas in some people's minds. Lady Deech herself has comments about the existing law as being at any rate less satisfactory than the common law, and perhaps not necessary at all, so I think it is absolutely right that the Law Commission should take into consideration this sort of lawyers' law. It is not just of academic interest; it is of real interest to a substantial number of people with considerable assets. I do not think it is necessarily right to delay to see how "wait and see" operates. It seems to me it is possible under the Law Commission's continuing programme to improve the law, if it does, before any ill effects are shown. I would not think that all this effort is being wasted. It is quite substantial, both the report and the consultation paper. I think that is all I can say. I must not speak for the Law Commission executive on this, but I am on their side on this.

Q53 ***Lord Bach:*** My Lord Chairman, perhaps I might come back to clause 5(2) and really try to wrap up comment in a question. We are, on behalf of the government, extremely grateful for your analysis of this particular sub-clause and the question is: Would you be prepared to meet with my officials briefly at some stage after this hearing in order to vent and discuss the issue that you raise? We think it may be of some assistance to the Committee later on in its deliberations. We of course accept the logic and the consistency of your suggestion but I would be grateful if you would be prepared just to have a word with them about it. I thought I should make this clear to the Committee at this stage.
Mr Nugee: I am very happy to give any assistance that you think I may be able to give. I do not think it is very difficult to restrict the power to direct a power or trust to accumulate to what is possible under the law applicable at the date of the settlement creating the power. I have suggested adding five or six words in clause 5(2) or even putting it, as I say, in clause 13. I would be very happy if they think that I can help. That seems one of the less difficult points if the Committee were in favour of restricting the power to appoint accumulations for a much longer period than they can at the present time.

Q54 ***Chairman:*** As I understand it, although it is in one sense a small point, it is a point to which you attach importance.
Mr Nugee: Yes, I do. I think it is wrong that you should alter the powers under an existing settlement in a way which could—and in the circumstances it is somewhat hypothetical, but it certainly could—deprive people of income to which they are currently entitled. I think that is wrong in principle.

Q55 ***Chairman:*** I have a glimmering that I understand it now, if I may say so.

Mr Nugee: If there is anything more I can do to explain it, I would be happy to.
Chairman: I am grateful and I am sure all the Members of the Committee are too.

Q56 ***Lord Hart of Chilton:*** I have a question which has occurred to me in listening to this. It has been suggested that the universities do not teach this subject any more, and that, in a way, you may be a sort of dinosaur, on the way to extinction. I assume, though, that the Chancery Bar is alive and well and the specialists in this area are still up to snuff and doing well.
Mr Nugee: I think so. I must say I was surprised to find that the universities were no longer teaching what is quite a basic part of the law, both of real property and of trusts. It is not evident in the same way that the taxation consequences are evident, but it is at the back of every draftsman's mind, "Oh, of course, you have to keep within 'lives in being' and 21 years". It is also known that if you fail to do that, there is a possibility of saving it by waiting and seeing, and the Bill will make it possible to wait and see for even longer. I do not think it is a dinosaur. I think it is more like a sleeping dog.

Q57 ***Chairman:*** May I, on behalf of the Committee, thank you very much indeed for all the trouble you have taken and for your evidence. You will, I hope, keep in touch with the powers that be about the future progress.
Mr Nugee: It has been a pleasure, my Lord Chairman. If there is anything further that I can do, as Lord Bach suggests, I would be only too pleased to.
Chairman: Thank you.

TUESDAY 9 JUNE 2009

Present	Archer of Sandwell, L	Hart of Chilton, L
	Bach, L	Kingsland, L
	Clinton-Davis, L	Lloyd of Berwick, L (Chairman)
	Goodhart, L	Whitaker, B

Memorandum by Dr Charles Harpum, LL.D

1. This statement is provided to assist the Special Public Bill Committee, which has invited me to give evidence to it on Tuesday, 9 June 2009. References to "the 1964 Act" are to the Perpetuities and Accumulations Act 1964.

Background

2. The Perpetuities and Accumulations Bill derives from a draft Bill that was prepared at the Law Commission during the period of my Commissionership. I was Law Commissioner from 1 January 1994 until 1 June 2001, and headed the Property and Trust Law Team at the Commission.[4]

3. At the Commission, I had responsibility for the projects that led to the Land Registration Acts of 1997 and 2002 and the Trustee Act 2000, as well as the present Bill. I also assisted with the implementation of a number of projects that had been completed by my predecessor, Mr Trevor Aldridge.[5]

4. A draft Perpetuities and Accumulations Bill was annexed to the Law Commission's Report, *The Rules against Perpetuities and Excessive Accumulations* (1998) Law Com No 251 ("the Report"). The Report explains in great detail the reasons for the approach that was taken by the Commission and will no doubt inform the decisions of the Special Bill Committee. The Report was drafted by the Property and Trust Law Team at the Commission. It was primarily the work of an outstanding Research Assistant, Mr Michael Dougan,[6] and myself. The Team also instructed Parliamentary Counsel at the Commission, Mr (now Sir) Geoffrey Bowman, on the drafting of the Bill. It was a project that I had inherited from Mr Aldridge. The consultation paper ("the Consultation Paper") prepared under his Commissionership had been published by the Law Commission in 1993 (Law Commission Consultation Paper No 133). The responses to the Consultation Paper were analysed by the Team and the results of that analysis are set out in the Report. The draft Bill reflects the views of the majority of those who responded to the Consultation Paper: see para 2.26 of the Report.

5. Since the Report was published, there have been a number of further rounds of consultation undertaken by the Ministry of Justice and its various earlier incarnations, and amendments have been made to the draft Bill annexed to the Report. However, the essentials of the Law Commission's scheme, which necessarily reflected the views expressed on consultation, remain unchanged. I have been delighted to assist the Ministry of Justice so far as I have been able to in their preparation for the implementation of the Bill. I have at their request considered drafting and other issues and have attended meetings at the Law Commission and the Ministry of Justice. I also attended the Second Reading Committee on 28 April 2009 and my comments are intended to address some of the issues that were then raised.

Why do we have a Rule Against Perpetuities?

6. The justification for the Rule against Perpetuities is to stop property owners from tying up their property either for ever or for a very long period into the future so that its devolution cannot be changed: see the Report at paras 1.9 and 1.11. The questions posed in para 1.1 of the Report show that this "dead hand rationale" must be the reason for the Rule. English law has always attempted to limit the extent to which the dead hand of a deceased settlor can control devolution of his or her property. The law on perpetuities is not the only mechanism it has used. For example, medieval lawyers developed a type of estate in land called an entail, by

[4] Prior to my Commissionership I had been an academic lawyer. I was a Fellow of Downing College, Cambridge from 1977 until 2001, and a University Lecturer in Law for most of that time. I taught all aspects of land law, conveyancing law, trusts and legal history, and I published extensively in those fields. Amongst other publications, I was the sole editor of the 6th edition of *Megarry and Wade's Law of Real Property* (2000) and co-editor of the 7th edition (2008). I was called to the Bar in 1976 and was elected a Bencher of Lincoln's Inn in 2001. Since leaving the Commission, I have practised full time at the Bar in Falcon Chambers, which is a specialist land law set.

[5] These included the Law of Property (Miscellaneous Provisions) Act 1994, the Landlord and Tenant (Covenants) Act 1995, the Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Delegation Act 1999. In the case of the Landlord and Tenant (Covenants) Act 1995 in particular this involved a substantial input on my part.

[6] He had recently graduated from Cambridge with the highest honours. Dr Dougan is now Professor of European Law at Liverpool University.

which the land descended lineally to the settlor's descendants. Such estates could endure in perpetuity, but skilful lawyers crafted ingenious devices by which an entail could be "barred" and converted into an ordinary freehold. It ceased to be possible to create entails after 1996 when they were prospectively abolished by the Trusts of Land and Appointment of Trustees Act 1996.[7] One of the main reasons for their abolition was their anomalous tendency to perpetuity.

7. Put shortly, the Rule against Perpetuities exists to prevent both those who are over-enthusiastic in their attempts to keep property in their families and the downright eccentric from trying to control forever the property that was theirs during their lifetimes. It is a rule against what might be described as a form of megalomania and selfishness and it involves striking a balance between the interests of the living and the dead. Most common law legal systems have such principles in some shape or form.[8] The fact that some states have abolished any controls on the dead hand is not in any sense conclusive.[9] The social attitudes towards property within given states are not necessarily the same. In England and Wales it has been traditional for centuries to wish to keep land and other property in the family. There may be no comparable traditions in Manitoba, which abolished the Rule in 1983.[10] In the United States, where a number of states have abolished the Rule to attract trust business, concerns have also been raised because of the potential cost and unwieldy nature of so-called dynasty trusts.[11]

8. The sort of situation that, in my opinion, the law should not countenance would include:

(i) A gift "to the first of my lineal descendants to reach 18 after 1 January 3000", with the income accumulated until that date.[12] While it would be comforting to think that nobody would make such a disposition, the pages of the Law Reports do not inspire such confidence.

(ii) A gift in perpetuity of successive life estates in perpetuity to the lineal descendants of the settlor. This would in effect create a new type of entail but one which could not be barred. Parliament's good work in abolishing entails in the Trusts of Land Act 1996 would be undone.

9. At the time when the Bill was being prepared, I had lengthy discussions with Professor John Langbein of Yale Law School who was very active in the preparation of the American Law Institute's Restatement (Third) of the Law of Property: Wills and Other Donative Transfers.[13] We had both reached the same conclusion that the Rule against Perpetuities was needed to place curbs on over-enthusiastic settlors, but that it should do no more than that. That is indeed the philosophy of the Report, which describes the proper role of the Rule as "no more than a long stop to prevent unreasonable dispositions": para 7.24.[14] A similar facilitative approach was adopted in preparing the Trustee Act 2000 upon which the Property and Trust Law Team at the Law Commission were working prior to and at the same time as the project on perpetuities. There is at least a respectable view that the state should permit its citizens as much freedom as possible to deal with their property as they see fit, intervening only where it is necessary to ensure that a fair balance is retained between competing interests.

10. The Consultation Paper invited readers to say whether or not the Rule against Perpetuities should be abolished. The responses are summarised at paras 2.22–2.28 of the Report. A majority were against its abolition and a variety of reasons were given for its retention: see para 2.25 of the Report. For example, there was a concern that paid trustees might try to keep trusts alive indefinitely to protect their remuneration, which would not be in the best interests of the beneficiaries: see para 2.25 of the Report at fn 48. Cf para 7 above.

11. At the Second Reading Committee, Baroness Deech was critical of the fact that the Law Commission provided no economic analysis of the consequences of the changes proposed in the Bill (though that was not through want of trying). It is not easy to see how a reliable analysis could be undertaken because there is no data available as to the amounts of property held in trust and for how long.[15] Nor could it be anything other than guesswork to ascertain how many settlors would create settlements that were intended to endure for the longer perpetuity period. Baroness Deech described the proposals as a leap in the dark. With great respect,

[7] Judging from what I have seen in my own practice, there are clearly many entails still in existence. In the last two years I have had to advise on the drafting of two "disentailing assurances" (the mechanism for barring an entail *inter vivos*).

[8] Scotland has no Rule against Perpetuities, but achieves the same objective by imposing restrictions on the power to accumulate: see the Report at paras 2.33 *et seq*. Scotland is therefore very different from those states that have neither the Rule nor limitations on accumulations.

[9] Appendix D of the Report contains a comparative analysis.

[10] See the article by Ruth Deech in (1984) 4 Oxford Journal of Legal Studies 454.

[11] I found the following comment on one US website: "Over time, the administration of such trusts is likely to become unwieldy and very costly. Government statistics indicate that the average married couple has 2.1 children. Under this assumption, the average settlor will have more than 100 descendants (who are beneficiaries of the trust) 150 years after the trust is created, around 2500 beneficiaries 250 years after the trust is created and 45,000 beneficiaries 350 years after the trust is created."

[12] This example was given to me by Lord Justice Nourse as to why he considered that the retention of some constraint on perpetuity was essential.

[13] Professor Langbein was the Arthur Goodhart Visiting Professor of Legal Science in Cambridge 1997–98.

[14] See too para 2.37.

[15] See generally paras 2.30–2.32 of the Report.

that is hardly the case. With some care it is possible under the present law to set up a trust with a perpetuity period of specified lives in being and 21 years that will exceed 100 years and, with luck, may last for something close to the 125 years proposed in the Bill.[16] The old restrictive rules on trustee investment, which undoubtedly could have had adverse economic consequences, were swept away by the Trustee Act 2000 which gave trustees beneficial owner powers of investment.

The Scheme of the Bill: Perpetuities

12. I do not intend to comment in detail on the provisions of the Bill in so far as they relate to perpetuities, but it may be helpful if I comment on its essential architecture.[17] There are three main features of the Bill that call for comment:

(i) the circumstances in which the Rule against Perpetuities applies;

(ii) the 125 year perpetuity period; and

(iii) the prospective nature of the proposals.

There is, however, one general point that should be stressed. The new law will be infinitely simpler to apply and understand than the immensely complicated law that it prospectively replaces and there will be far less risk of practitioners "getting it wrong". The high street solicitor was rightly mentioned in the Second Reading Committee. He or she will, at least as regards future dispositions, be spared the difficulties that apply under the present law.

The circumstances in which the Rule against Perpetuities applies

13. Clause 1 sets out the circumstances in which the Rule against Perpetuities is to apply and then disapplies it in any other circumstances. The Rule against Perpetuities was originally created to deal with dispositions in settlements, trusts and wills. However, by judicial decision, the Rule has been extended into commercial transactions, and in particular the creation of future easements, options, rights of pre-emption and other contracts for the sale or disposition of land. The principal area in which the Rule causes problems for practitioners is in relation to these commercial transactions, and this was made clear on consultation.[18] Furthermore, some of the provisions of the 1964 Act on contracts are almost incomprehensible: see particularly section 10. Unsurprisingly, it was not possible to define "commercial transactions" so as to exclude the Rule from applying to them. The matter had to be addressed positively by identifying the situations in which the Rule should apply, which is (broadly speaking) in relation to wills and trusts and similar instruments.[19]

The 125 year perpetuity period

14. The second main feature of the Bill is that it provides a mandatory statutory perpetuity period of 125 years. The comments at the Second Reading Committee indicate that the purpose of this has not been understood.

15. By way of introduction, a fixed perpetuity period of years must now be essential. The old rules based upon lives in being plus 21 years have become meaningless with advances in reproductive technology (many of which have occurred since the date of the Report). A gift will be valid if it vests within the statutory period of 125 years. This requires the application of the principle of "wait and see" for that period. "Wait and see" was first introduced by the Perpetuities and Accumulations Act 1964. Prior to that Act, a gift would fail if it was merely possible that it might vest outside the perpetuity period. The purpose of wait and see was to try to validate gifts which would otherwise fail. If a gift fails for perpetuity, whether at the outset as used to happen at common law or after the expiry of the wait and see period under the 1964 Act, the gift will either fall into residue (if it is a specific gift or if the gift was contained in an inter vivos settlement) and pass to those who will take under the settlor's residuary estate, or it will pass on a partial intestacy (if it is a residuary gift). The latter is particularly unfortunate. The rules of devolution on intestacy, which are found in section 46 of the Administration of Estates Act 1925, were inserted by the Intestates' Estates Act 1952. They were based upon an analysis of numerous wills and were intended to be a code of what the average testator did. I cannot believe that what the average testator does in 2009 is the same as it was in 1952.

[16] It would involve a judicious choice of lives in being. If a number of the relevant lives were small infants, the chances that at least one of them would live to be at least 100 are quite high: see below, para 17(3).
[17] I address the rule against excessive accumulations below at para 20.
[18] In practice, I encounter these problems myself two or three times every year. Other members of my Chambers evidently do as well, as they regularly ask me for my view on them.
[19] On this, see paras 7.20–7.28 of the Report.

16. In the Second Reading Committee, Baroness Deech was critical of the uncertainty caused by the application of wait and see. She suggested that "By helping gifts to vest, as this Bill will do, one helps one member of the family at the expense of another". There are three points that I would make in response to that.

(i) First, "wait and see" has been broadly accepted as a desirable principle since the 1964 Act. The certainty and convenience of the common law "was bought at too high a price. The rule defeated many gifts which might well have been vested within the permitted period".[20] I am not aware that "wait and see" causes difficulties in any save the tiniest handful of cases.[21] So far as I can recall there were few if any criticisms of the workings of "wait and see" on consultation. Certainly none are recorded in the Report as they would have been had it been regarded as a significant issue.

(ii) Secondly, so much has "wait and see" been taken as a given, that the Consultation paper did not ask whether it should be abolished: see the Report at para 2.21. The question asked was whether it was right that the common law should have to be applied first before applying "wait and see" (as required by the 1964 Act).

(iii) Thirdly, it has always been thought desirable hitherto to help gifts vest as the settlor intended for the reasons set out above at para 15. Why should persons benefit whom the settlor had not chosen to benefit? He/she might for wholly legitimate reasons not wish his/her family to benefit,[22] particularly if they were distant relatives and did so by reason of the seriously outmoded intestacy rules. In present times the person or persons whom the settlor wishes to benefit may not even be his/her relatives at all. The rationale for the 125-year period under the Bill was explicitly stated in the Report at para 8.25: "It enables more dispositions to be upheld as valid and therefore accords more closely with the wishes of the disponor".

17. It was suggested in the Second Reading Committee by Lord Goodhart and others that 125 years is too long. With great respect, I consider that view to be incorrect.

(i) First, it misses the fundamental point of the reforms contained in the Bill. Under the Bill, it is intended that the Rule against Perpetuities "should operate as no more than a long stop to prevent unreasonable dispositions in a similar way to other rules of law which are intended to prevent capricious provisions": see para 2.37 of the Report. It is intended to prevent the sort of dispositions that I have set out above at para 8. With all due respect, it is not therefore correct to say, as Baroness Deech did in the Second Reading Committee, that the 125-year period "effectively removes any constraint on a testator when coupled with 'wait and see'."

(ii) Secondly, a 125-year perpetuity period may be achieved under the present law with a mixture of skill and luck: see above, para 11. Persons should not be put in a worse position than they are under the present law, particularly as there will be just one mandatory perpetuity period under the Bill.

(iii) Thirdly, not only has the average life expectancy risen dramatically over the last century, as Lord Justice Etherton has pointed out in para 1.7 of his statement to the Committee,[23] but also more people are living to a great age. I have found figures on a website devoted to centenarians,[24] apparently from the Office of National Statistics,[25] which shows the following:

(a) there are around 9,000 centenarians today in the United Kingdom, a 90-fold increase since 1911;

(b) there has been a 7% increase in centenarians since 2005;

(c) at the current rate of expansion, the United Kingdom's centenarian population could reach over 40,000 by 2031;

(d) as in other parts of the industrialized world people over 90 are the fastest growing segment of the population in the United Kingdom.

(iv) Fourthly, given that perpetuities legislation only comes round every half century, it is prudent to legislate having regard to the fact that life expectancy and the incidence of longevity will significantly increase during that period. Too short a perpetuity period could defeat perfectly reasonable gifts; and

(v) Finally, I am informed that a long perpetuity period is now used quite overtly by a number of off-shore jurisdictions to attract trust business. Parliament may decide that England and Wales should

[20] *Megarry and Wade's Law of Real Property*, 7th ed, 2008, p 324, para 9-030. This sentence has not been altered during my editorship of that book and stands as it was written by Sir Robert Megarry and Sir William Wade.

[21] Baroness Deech referred to *Re Green's Will Trusts* [1985] 3 All ER 455, where the testatrix's son had gone missing in action in 1943, a fact the testatrix could not accept. The difficulty in that case was overcome by the court's declaration that the son was dead, so that the gift over was accelerated.

[22] He/she may have provided for them during his/her lifetime by other means, or they may not be in any kind of need.

[23] Although I have not verified it, I suspect that the 80-year fixed perpetuity period in the 1964 Act equated to the length of an average life at that date plus 21 years. In 1900, average life expectancy was less than 50 years.

[24] See http://www.thecentenarian.co.uk/how-many-people-live-to-hundred-across-the-globe.html

[25] I have not verified them.

not be seeking to attract trust business. I consider that would be unfortunate. I hope that this Committee will heed the views of bodies such as STEP and the Chancery Bar Association whose members are actively involved in trust law.

The prospective nature of the proposals

18. With one comparatively minor exception, the reforms in the Bill will be prospective only. This was a matter of concern to the Law Commission: see para 1.20 of the Report.[26] This is especially so given the needless complexity of the 1964 Act. I have much sympathy with Baroness Deech's criticisms of that Act.[27] It would, for example, be very tempting in those cases where section 3(4) and (5) of the 1964 Act applied to specify the lives in being for "wait and see" purposes, to substitute a fixed period of say, 100 years for the statutory life/lives in being plus 21 years. However, the real concern must be that any such retrospective legislation could lead to the divesting of contingent and possibly even vested proprietary interests, which would in all probability fall foul of Article 1 of the First Protocol of the European Convention on Human Rights as that has been interpreted by the Court of Human Rights.[28] Somebody would be bound to challenge the changes in the law.

19. The fact that the Bill will be largely prospective should in most cases cause little difficulty in practice. The practitioner will need to know that the legislation applies to an instrument taking effect on after the commencement date. However, from that date, the law will be infinitely easier for him or her to understand and apply.

Excessive Accumulations

20. Under the Bill, the Rule against Excessive Accumulations would be abolished. I do not wish to repeat what is in the Report which speaks for itself: see Part X (pp 123 and following). The Rule has always had greater detractors than the Rule against Perpetuities. There is a well known critique in Morris and Barton Leach's *The Rule Against Perpetuities* (2nd ed, 1962) at 303–306. The need for the Rule is not proven by any means[29] and the question has to be asked whether the state has any business in restricting what a settlor may do with his or her property in the absence of clear evidence as to the deleterious effect of accumulations. In the Second Reading Committee, Lord Goodhart stated that "it is still plainly undesirable that property should be locked up so that it cannot be applied for the benefit of anybody over a long period". Whether it is objectively undesirable may depend very much upon why the settlor is directing an accumulation in any given case.

21. What I found interesting about Lord Goodhart's speech was his suggested cure for the problem which he perceives. He did not reject the Law Commission's proposed abolition of the Rule. He suggested instead that the law should "allow the accumulation of income throughout a trust period but only as a power for the trustees to implement, not as an obligation imposed on them by the settler or the testator". My recollection is that this was not an option that was put forward in the Consultation Paper. It is an idea for which I have some sympathy and it will no doubt receive consideration in this Committee. I note from para 10.14 of the Report that the Law Commission was informed on consultation that the overwhelming majority of directions to accumulate take the form of a discretionary power rather than a duty of the kind that was in issue in the Thellusson case. Lord Goodhart's proposal would bring all trusts within the normal practice.

22. There are many other points upon which it would be possible to comment, some of which were raised in debate. No doubt members of the Committee will have their own questions and I shall obviously do my best to assist the Committee. However, there is the obvious *caveat* that it is now 11 years since the Report was published and my recollection of events is necessarily limited.

26 May 2009

[26] After 11 years I cannot recall all the details, but I do recall a lengthy consideration of the issue.

[27] I respectfully disagree with her comment in the Second Reading Committee that Clause 1(1) is misleading because "this clause suggests that the Bill contains the entire law of perpetuities". There is a strong and well-known presumption against giving legislation retrospective effect and therefore the natural assumption on reading Clause 1 would be that it could only apply prospectively.

[28] Protection of Property: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[29] See para 10.11 of the Report.

Examination of Witness

Witness: Dr Charles Harpum LLD, examined.

Q58 ***Chairman:*** Dr Harpum, first of all, may I thank you on behalf of the Committee for coming to give evidence today. You are in many senses a key witness since you were in charge of the Property and Trust Law team at the Commission at the time the report was published, succeeding, I think I am right in saying, Trevor Aldridge, who will also be giving evidence later today. We have read your valuable written memorandum but first perhaps you might like to add something in general in the light of any other evidence we may have received on which you would like to comment.
Dr Harpum: My Lord Chairman, thank you very much, and thank you for the privilege of giving evidence to this Committee. All I want to say by way of introduction is that, going through the evidence, which I have done as best I can, there did seem to me to be five issues on which I might possibly be able to give some assistance to the Committee. Obviously, that does not preclude the Committee asking me other matters but the five issues that I identified were, first of all, the issue of complexity and whether you need to know the common law, the point raised by Baroness Deech; the issue of complexity, because we will have three different regimes rather than two, which I think is a point raised by Mr Aldridge and was also raised in the Committee; the very difficult question raised by Mr Nugee's evidence about retrospectivity in relation to trusts created under a special power of appointment; the fourth point, whether we need to impose any restrictions on accumulations; and the fifth point, accumulations and charities. Those did seem to me the five points where I might be able to shed some light on where we are at and why we are there. I do not know how you would wish me to proceed, Lord Chairman.

Q59 ***Chairman:*** I am not sure I took down all your points. Retrospectivity in relation to powers of appointment. That was your point two, was it?
Dr Harpum: That is point three. Point two was the issue of complexity.

Q60 ***Chairman:*** I have that as point one.
Dr Harpum: There were two issues of complexity: the first one was a point raised by Baroness Deech in her evidence, which was whether you needed to know the common law to understand the Bill, and I wanted to try and clarify that and show you that you actually did not. It was simply a point of clarification on that one, Lord Chairman. Then the issue of complexity because you have three regimes rather than two, retrospectivity, restrictions on accumulations, and then accumulations and charities.

Q61 ***Chairman:*** Thank you.
Dr Harpum: Shall I proceed on the first issue?

Q62 ***Chairman:*** Yes, please.
Dr Harpum: What is actually going to happen under this Bill is that you are not going to have to worry about perpetuities at all in almost all situations. You are just not going to have to think about it because you will not have to specify a perpetuity period in any trust or will that you create because there will be one, and it will be a very long one, long enough to accommodate almost all conceivable situations that any ordinary person would want to make provision for. The only reason you have one there is, as I explained in the paper, to stop what I might call eccentric gifts, gifts which really are undesirable intrinsically. You will not have to worry about them any more in relation to commercial transactions, which is where I encounter them and where they are a real problem. They are a trap for the unwary and they cause problems to solicitors every day because they do not realise the rule applies and they get themselves into deep water. That will go. There is no justification for the rule being there at all. Baroness Deech commented in her evidence that, as a result of clause 7(1), it will be necessary to go on having recourse to the common law. I think, with all due respect to the learned Baroness, that is a misapprehension. The effect of clause 7 is that you do not have to know the common law at all because the way clause 7 operates is this. It makes it clear that if you have a gift, it will only become void for perpetuity when it becomes clear that it must vest after the 125 years statutory period. Only then will it become void. That might happen quite early on—one can think of examples where that could—but that is all it does, and it therefore creates this system of "wait and see" in sub-clause (2). In waiting and seeing, you ignore whether the gift would be void at common law, so by definition, you do not need to know the common law. By definition you do not. These provisions are actually very closely modelled on what is already in the Perpetuities and Accumulations Act 1964 and they operate in exactly the same way in relation to what would now be the statutory period of 125 years. So there really is not a problem about knowing the common law here. The Bill is self-contained and it is not necessary to have recourse to the common law rules to understand it. So I think there may have been a misapprehension there. I hope that clarifies it.
The second point was about there being three regimes. It seems to me that when Mr Aldridge embarked on this project, he was inevitably opening up a situation where there would have to be three regimes. Even if we were to go down the route which I know he personally favours of the abolition of the rule against perpetuities, you would still have a third

regime because you would have to put in place provisions that would make the abolition workable. In particular, you would have to think very carefully about variation of trust powers. I have hinted in my evidence at the problems that are arising in the United States of America under these so-called dynasty trusts, which are set up to take advantage of tax loopholes in America, where states are falling over themselves to give extended perpetuity periods, and suddenly people are getting very worried about these dynasty trusts and saying "Hey, in 300 years time there could be 40,000 beneficiaries for these trusts." Do we really want to go down that route? I do not personally think we should but I do not see that there is any way to avoid having three regimes, because retrospectivity, subject to a point we will come to in a minute, is largely ruled out by considerations of the European Convention on Human Rights, because there is a grave risk of retrospective legislation affecting vested or contingent property rights and Article 1 of the first protocol says that you cannot take away people's property rights, at least without compensation. I think retrospectivity has to be looked at very carefully, and I know Lord Justice Etherton addressed this in his evidence to this Committee. So it seems to me that the three regimes are inevitable. I am sorry; I would love to sweep away the 1964 Act regime in particular because it is hateful—I dislike it intensely. It is quite unnecessarily complicated—but I do not think we can. I do not think it will create too many problems for practitioners because, as I have indicated, with the new regime you just do not have to think about perpetuities. Unless you want to do something pretty odd, you are just not going to have to think about it. You do not have to put it in a trust instrument, you do not have to worry about future dispositions, granting easements, and things like that. It has all gone away. You do not have to worry about it. So the existence of a third regime is really not going to be a problem. All you are going to need to know is the date of the instrument. "That is the new regime. We do not need to worry about perpetuities." That is the way we want it to be. That is what I wanted to say on the second issue.

The third issue is much more difficult and members of this Committee will already be familiar with this from Mr Nugee's evidence, which he very kindly sent to me in advance. Mr Nugee was very helpful to the Law Commission when we were preparing the Bill and he is of course an extremely eminent member of the Chancery Bar. If I may put it this way with no disrespect, he personifies the kind of old-school Chancery Bar, in the very best sense. The points he has raised, which I am not going to repeat, are very powerful points. My position on them is going to be one of neutrality. What I think you do need to know is a bit of the background to these provisions and how it came about that we are where we are. I think that might be helpful to you to know. When the Bill was originally drafted, it passed, obviously, through a number of different stages but what we were originally proposing to do was, where you have got an existing trust now, and there is a power of appointment under which you create a new trust, we were going to allow the new perpetuity period to apply to that new trust but retrospective to the date of the trust out of which it was created. I wish we could have done that, personally, but we cannot do it because Her Majesty's Revenue and Customs said, "If you do that, the Bill will not be revenue-neutral." It is essential that the Bill be revenue-neutral. That is a *sine qua non*. That is why we have the position now whereby under clause 5(2) the perpetuity period applicable to a special power of appointment is the one under the trust which creates it. Mr Nugee's point is "Well, hang on, you will in those circumstances bring in all the rest of the new law and in particular the abolition of the rule against excessive accumulations," and he gives an example where he thinks that might work hardship. The reason we are in this position is because, when we ran the Bill in front of a very eminent Chancery practitioner, Mr James Kessler QC, who is a leading light in what I regard as the principal body in this area, the Society of Trust and Estate Practitioners, he wrote to me and said the transitional arrangements, as he called them, are governed by the new perpetuity period but the transitional rules on accumulations are the old rules. Can I read, Lord Chairman, what he actually said? I have given a copy to the clerk.

Q63 ***Chairman:*** We have in fact got a written statement from Mr Kessler. Have you seen that?
Dr Harpum: I have seen it but it does not address this point. I am going to respectfully suggest that Mr Nugee's point should be run in front of Mr Kessler.

Q64 ***Chairman:*** Would you like us to have what is said before us?
Dr Harpum: I have given it to Mr Mohan in advance. I brought one copy.

Q65 ***Chairman:*** I think we have all got it. It is our paper PA/08-09/17.
Dr Harpum: I do not think it is that paper. It is the letter that I wanted to refer to.

Q66 ***Chairman:*** That we do not have.
Dr Harpum: No, you do not have that, my Lord Chairman. I only brought one copy, I am afraid, but may I, with your permission, read it to the Committee?

Q67 ***Chairman:*** Yes, of course.
Dr Harpum: What Mr Kessler said was this. "The abolition of the statutory rule against accumulation is, from a practical point of view, far and away the most important reform of the Bill. However, as the Bill is now drafted, practitioners will need to know the old accumulation rules and apply them in drafting appointments for the next 50 years or so. This is, firstly, a burden on the draftsman which will be reflected in costs for the client. It prevents trustees benefiting beneficiaries in the most sensible way. The absurdities of the present laws were set out in STEP representations"—a copy of which he annexed—"Most practitioners do not in practice know the rules. They are not taught in universities in any detail at present, as far as I am aware, and certainly will not be taught except in passing after the new Act since they will be regarded as obsolete, such is the pressure on the syllabus. I suggest that it would be far better to say that transitional appointments are governed by the new rules." So that is why we are where we are, Lord Chairman. What I would suggest is that there are actually counter-arguments to what Mr Nugee says. I think it would be helpful to this Committee if Mr Kessler's views on Mr Nugee's point were taken. I respectfully suggest it is worth writing to him and asking him for those views so that he can comment on what Mr Nugee says. He may say, "Hands up, Mr Nugee is right" or he may say, "I don't agree because . . . "

Q68 ***Chairman:*** Would you give me a moment? We might have that letter copied so that members of the Committee can see it.
Dr Harpum: I will play devil's advocate just lightly, and I will leave Mr Kessler to put in the real points. I do not think this is a problem that is actually going to arise very much in practice because settlors can always make their wishes known to their trustees and trustees have to have a reason to exercise a power to accumulate. If that exercise deprived someone of income that he or she had been receiving and had expected to continue to receive, you would expect them to think long and hard before they exercised that power and to have good reasons for doing so. So in practice, I doubt that it is a problem, unless you have antipathy between trustees and beneficiaries—which you sometimes do.
Secondly, I am not convinced that this is a case which raises human rights issues. I am playing devil's advocate here. The only reason at present why the power of accumulation cannot be used for the duration of the perpetuity period is because of the artificial restrictions on accumulations which are imposed by the Law of Property Act and by the Perpetuities and Accumulations Act, and I would have thought there is at least a respectable argument that a removal of a restriction on a testator's wishes does not amount to a deprivation of a property right. The removal simply gives the trustees the powers that the trust instrument said they had. I think there is at least a case for saying that that is not a deprivation of a vested property. It may deprive someone of an expectation but that is another matter.
The third point I would make is that Mr Kessler has already identified a number of benefits that will accrue from going down this particular course. They are in that little document that I passed to you, Lord Chairman, and no doubt he will wish to amplify those points. So those are my comments on that. The fourth issue concerns powers of accumulation or maybe duties to accumulate should the perpetuities rule apply. I would say that I have much sympathy with Lord Goodhart's point, which I think goes some way to meeting a lot of the concerns about this, that trusts' duties to accumulate should become powers, either immediately or after particular period of years. I think Lord Millett is going to have something to say about that. I have a lot of sympathy with that but, subject to that, I do not myself see anything objectionable in removing restrictions on accumulations. I am going to give you an example which is taken from real life. It involves people I know and the sort of case which I am concerned about. Not everyone is going to agree with what I say on this. I accept that but it is a case that I have in mind because it involves people I know. There is a grandfather, a son and two children. The grandfather is called Tom. He is actually a retired solicitor. He is 90. He has a son, David, and David will be 50 this year—he happens to be my closest friend. David has two children: Alf, who is six and Ted, who is three. Now, Ted is 87 years younger than his grandfather. Suppose that after David had left university in 1981 Tom had wanted to set up a trust for the benefit of any grandchildren he might have who reached the age of majority. There would be income perhaps to be accumulated until then. He clearly could not have done that. The law would not permit him to do that. None of the relevant accumulation periods would apply in relation to these grandchildren. However, I would suggest that it is not a particularly terrible thing for grandparents to want to make provision for their grandchildren, for example, to meet the costs of their university education or to put a deposit on a house. These are things which greatly concern grandparents, in my experience. I know my grandparents were very concerned that I should be able to buy a house. I think it would be unfair if people could not at least have the power to accumulate over a period, to enable property to be accumulated for that purpose. That is not some dreadful purpose but the accumulation would have been quite long in that case. I think in the case of Ted it would be 43 years by the time he comes of age, but perhaps that is quite a good thing because you need

a lot of money to put you through university and to buy you a house nowadays. So I do not think these are outrageous things to want, and I think many people like me feel it is right that you should be able to do that. That is subject to Lord Goodhart's point, which I fully take and I see the force of that point. I would also point out that although the rule against accumulations will be abolished under the Bill as it stands, there is no reason why settlors cannot themselves limit periods of accumulation if they want to. They are perfectly entitled to do that.

My last point is to pick up the limit on accumulations on charities, which stands at 21 years under the Bill. If anyone has been assiduous enough to read the Law Commission's report, they would be able to read between the lines and infer that this was not something that the Law Commission was violently enthusiastic about. Like everything else, you have to negotiate when you are a commissioner because you have to find a consensus and you have to find something that is acceptable and in accordance with the consultation. We had very protracted negotiations with the Charity Commission on this and we had a number of meetings at the Charity Commission with them and what is there at the moment reflects the views of the Charity Commission. Clearly, you have to have some limit on charitable trusts' power to accumulate. They are there to use charitable money, which has many privileges, particularly fiscal, for the benefit of the public, and that is as it should be. If charities go on accumulating and accumulating that is not in the public interest, so I think one accepts that there has to be some limitation upon it. Whether you go for 21 years or whether you go for lifetime is, in a sense, a matter for this Committee but that is why we are where we are, and that is how it came about. The Charity Commission said, "We think 21 years is long enough" but there are other powers that they have, powers of administrative retention, which are explained in the report. The Charity Commission will give charities permission to make administrative retentions for specific projects if they ask them and justify it. So there are other powers which mean that, if a charity does need to accumulate money for a particular project—to build a new building or something like that—they can go to the Charity Commission and they can get it authorised. Anyway, that is why we are where we are and I thought that perhaps needed to be explained to the Committee because there was some view that we had plucked 21 years out of the sky. We did in a way, but it was given to us by the Charity Commission. My Lord Chairman, I will be very delighted to answer any questions that members of this Committee may have.

Chairman: We are very grateful to you for your clear evidence, if I may say so. Now I think there may be some questions for you.

Q69 ***Lord Goodhart:*** Dr Harpum, I very much take your point about providing for grandchildren but, equally, I think one does not want to have a situation where you can have a trust set up for 125 years to accumulate and then hand it over "to my ancestors living at that date". What can you see as a compromise between the two which would allow the provision for grandchildren to continue to accumulate but not to give complete freedom from any power of accumulation?

Dr Harpum: I am not sure that I am in favour of a compromise, other than the one which you have suggested, which would be putting a limit by providing that a direction to accumulate either operated as a power from the start or that it operated as a power after a number of years. Other than that, I am afraid I am rather a bloody-minded person, Lord Goodhart. I take the view that, if I want to be bloody-minded about what I do with my money, I have a right to do that. I know that is not a universally shared view and people say, "Shouldn't the money go to the family in the meantime?" Suppose I do not like my family. I do not have to like my family. I do not have any choice about my family. They are there. I do not think I would necessarily seek a compromise there, other than the one which you have suggested. If there is a power to accumulate, either from the start, notwithstanding a direction, or only after a period of years, in some ways surely that does deal with your main concerns, and it would certainly enable the grandchildren case to be met.

Q70 ***Lord Goodhart:*** As for the power to do what you like, of course, a testator, subject to the various existing restrictions on what he or she can do, is free to distribute assets as he or she likes, and I do not think anyone is suggesting that that should be a problem but it becomes a little more complicated, does it not, when you have a situation where trustees who are holding this property under a settlement are required by the terms of the settlement to do things which are patently unfair?

Dr Harpum: How do you judge unfairness?

Q71 ***Lord Goodhart:*** I think unfairness has a great width and scope, does it not? There must be some cases at least where the trustees would be extremely reluctant to take on a trust on particular terms.

Dr Harpum: That is fine. No-one has to act as a trustee and, on the whole, I advise people not to.

Q72 ***Chairman:*** On that point, can I just ask this question: I think in your paper you say that the question whether it could be a power rather than an obligation to accumulate is not something on which you have actually consulted.

Dr Harpum: That is correct.

Q73 ***Chairman:*** Is that something which worries you?
Dr Harpum: I do not think so because it is not a massive step. It is too late to consult now other than to seek the views of those who are giving evidence.

Q74 ***Chairman:*** Perhaps I should put the question the other way round: would the adoption of Lord Goodhart's suggestion, in the absence of consultation, be something that would worry you?
Dr Harpum: No.

Q75 ***Lord Kingsland:*** I apologise that my question does not arise directly from your excellent evidence this morning. I think you are aware that during our last session we had an exchange towards the end about the desirability or otherwise of codifying the legislation.
Dr Harpum: Yes.

Q76 ***Lord Kingsland:*** Taking the common law together with the 1964 Act and blending it into the Bill that is before us, *prima facie*, I find this a very attractive option, particularly since a number of witnesses have expressed the view that the topic is shrouded in obscurity. Is this a practical thing for the Committee to propose at this stage or would the imponderables be too many?
Dr Harpum: Thank you very much for your question. One of the first things I learned when I became Law Commissioner and was inducted into the mysteries of instructing Parliamentary Counsel was to be told in no uncertain terms that the purpose of legislation is to change the law. On the whole, I am against codifying the law, the common law, because doubts always arise as to whether you have done it properly. I am very much against that. As regards a possible consolidation of this legislation with the Perpetuities and Accumulations Act, I do not think that could be done as part of this exercise. I think it would be a difficult task to do. There is a long list of candidates for legislation requiring consolidation. I would put this quite near the bottom of that list. There are things which cry out for consolidation, such as the legislation on enfranchisement of leaseholds; that desperately needs rethinking and consolidating and clarifying. The absence of authority on the 1964 Act suggests that, on the whole, it does not create problems. The areas where it does create problems this Bill addresses in getting rid of its application to commercial interests. I can see the attractions of this but, on the whole, I do not think it would be a good use of parliamentary draftsmen's time and I do not think this Committee could do it. I think it is a difficult job which would take quite some time for Parliamentary Counsel to bring about through a proper consolidation exercise.

Q77 ***Chairman:*** Thank you. Any other questions? Could you just go back again briefly over what one might call Mr Nugee's suggestion for an amendment either to clause 5(2) or the second part of that. I think you started by saying your position in the end on that is neutral, although you gave the arguments both ways, as I understand it.
Dr Harpum: Yes. What I feel, my Lord Chairman, is that this Committee needs to be fully informed of the arguments on both sides. My reading of the proceedings hitherto suggested that everyone was assuming that Mr Nugee's voice was the right one. It may be the right one but I do think, before you go there, you need to understand how we got to where we have got, which I was trying to explain and to hear the counter-proposition. You may well decide that in the end you do not want any retrospectivity other than clause 12, and that is a perfectly logical and coherent view but it does mean we will have to live with the 1964 Act rather more than I would personally like, but that is immaterial.
Chairman: Thank you very much indeed on behalf of the Committee for all the trouble you have taken.

Comments by Lord Millett

My views can be summarised as follows:

1. The Rule against Perpetuities should not be abolished but reformed.

2. I am of opinion that 125 years is too long, and would opt for 100 years; but do not feel strongly about this.

3. I am firmly of the view that, with the exceptions provided for, the Bill should not be retrospective.

4. I respectfully disagree with Baroness Deech in regard to Clauses 1 and 7. Clause 1 must be read with Clause 15(1) and is true: Clause 7 does not require one to have regard to the common law in order to wait and see; one simply waits for up to 125 years to see if the interest in question has vested in time.

5. I have two proposals for improvement. First, the period specified in Clause 12 should not be less than 125 years (even if the perpetuity period itself is less than that). The Clause operates restrospectively and is intended to deal with existing Royal Lives clauses and the like. Suppose 125 years after the settlement was created the

trustees have no idea whether the period has come to an end. It probably has, because even if the youngest life in being was a baby at the date of the settlement, he or she would have to have lived to 104 for the period to be continuing. There are long odds against anyone being divested of an interest if the trust period is now brought to an end. But suppose a beneficiary had previously attained the age of 79? To substitute a period of 100 years under Clause 12(2)(a) would, unknown to the trustees, divest his or her estate of a previously vested interest.

6. My second proposal concerns non-charitable purpose trusts, which the Law Commission excluded from consideration because the problem is caused by the Rule against Inalienability, not by the Rule against Perpetuity. But the Rule against Inalienability provides that such trusts may not endure for longer than the perpetuity period. So they are in effect governed by all the old law. I would wish the Bill to provide that for this purpose also the Perpetuity period should be 125 years. It does not seem to do so at present.

7. I am firmly of the view that the Rule against Excessive Accumulations should not be completely abolished. It would be objectionable if a settlement could direct that the income be accumulated for 125 years and for the capital and income to be divided (say) among all the descendants of the settlor then living. The Variation of Trusts Act does not provide a solution. I have no objection to a power to accumulate for 125 years, but a mandatory obligation to do so is very different. I would suggest that any obligation to accumulate should be restricted to 21 years, and thereafter should have effect as power only.

8. In this connection I should say that I agree with Nugee that, as the Bill stands, Clause 5(2) requires to be amended; but that if my proposal above (para 7) is adopted no such amendment would be needed.

June 2009

Examination of Witness

Witness: Lord Millett, a Member of the House, examined.

Q78 ***Chairman:*** Lord Millett, can I first of all on behalf of the Committee thank you very much coming to give evidence to us today, and apologise that you did not have slightly longer notice of today's hearing. I do hope that the exercise of refreshing your mind about what this is all about has been a not disagreeable experience.

Lord Millett: It has been very agreeable. I do apologise to the Committee for the lateness and brevity of my comments that I put in but it was, as my Lord has observed, because my own communication system is somewhat defective. I have mail sent to the House forwarded to me about once a week or every ten days. It is forwarded to me in chambers and I only go into chambers about once a fortnight, so it is not ideal. That is my apology. I also should make a disclaimer. I do not claim to be an expert in this branch of the law. I was once, I have to say, 50 years ago. When I first joined the Chancery Bar, I joined as a conveyancer, and I eked out a precarious livelihood for some years by lecturing in law, and one of the subjects I did a series of lectures on was the Perpetuities and Accumulations law, which was all common law at that time, before the 1964 Act. So I knew all about it then but my long-term memory, fortunately, is better than my short-term one, so perhaps I can dredge a little back. In 28 years at the bar, I never had a case on perpetuities. Of course, I frequently drafted settlements and wills as a junior counsel but drafting them was not a problem because, provided one knew of the existence of the rule and roughly what it was and what the pitfalls were at common law, it was straightforward and after 1964 it was extremely easy: you simply took 80 years if you were worried about it. So I never had a problem drafting and I never had a case on an old settlement or will where there was a perpetuities problem, and that was in a period of 28 years as a junior and as a silk. In eight years on the bench in the Chancery Division I only had one case which involved perpetuities, and that, fascinatingly enough, was *re Villers*, which came before the Court of Appeal in 1924, when the Court of Appeal upheld the royal lives clause. Seventy years later the same trust came before me as a judge under the Variation of Trusts Act. I cannot remember how long had passed since the settlement was created—it was probably about 120 or 125 years. It was virtually certain that the trust period had come to an end but it was by no means certain. The royal lives were numerous and, worse, not only was it impossible to know whether the period had come to an end, it was impossible to know when it had come to an end. That is the difficulty. The trust was, as so often, "for all my descendants living at the termination of the period," at the 21 years after the death of the last living survivor of Queen Victoria, and it matters whether the period came to an end in 1994 or in 1996, because a numerous class is changing all the time—people are born, people die—and the likelihood was that the period had come to an end but they were quite likely to get the Act of Distribution wrong and would probably never know. We could cope with it under the Variation of Trusts Act but only by setting up an insurance policy to compensate anybody who was wrongly excluded or wrongly got too little. That is not inexpensive, and it is sheer bonus profit for the insurance company, of course, because almost certainly nobody will ever come

forward. In another ten years as an appellate judge in the Court of Appeal and the House of Lords I had one case on perpetuities, which is, I think, well known, though not mentioned, for good reasons, in the Law Commission's report, which came before me, that in about 2002 or 2003, in a case called *re Air Jamaica*, a Privy Council case, we had to deal with a pension fund where there was no perpetuity period specified, as normal, but unfortunately Jamaica, as most ex-colonial territories, had not troubled to legislate on perpetuities at all. They had not implemented anything corresponding to the 1964 Act and, worse, they had not excluded pension funds from the operation of the common law perpetuity period, as this country largely had done 50 years ago or more. So I had to consider how on earth the perpetuities rule operated in relation to a pension fund, and I came to the same conclusion which the Law Commission did in their paper, to the effect that a pension fund in fact is not a single trust; it is a vast number of individual trusts for each member, and the lives in being are the individual members and the period starts when an individual joins the scheme. So it operates separately for each individual. There was no doubt that the trust had come to an end because it had been wound up, and the problem was to deal with the surplus: after everybody had had their money, what did you do with the surplus? That was a common problem in the 1990s. It is not a problem now, when the problem is one of deficits, and I suspect it will rarely be a problem in the future in this country simply because of the closure of defined pension rights schemes. Anyway, there is now actually reasonably high authority, even though it be my own, that that is the way a pension fund works. I am glad to see in fact that the Law Commission and the Bill are going to abolish the rule in relation to all pension funds. Whether they are approved or not approved is of course completely irrelevant from this point of view.

All I can do, apart from that, is, if I may, take the points that I tried to summarise in my paper and expand on them very slightly. I agree with almost everyone, I think, that the rule should not be abolished but should be reformed. The most popular kinds of trusts these days and for a long time past have been discretionary trusts. The old-fashioned kind of trust—"to my children for life and then to their children for life"—that is all pretty ancient stuff. There may still be some about and there may still be some new ones created but the vast majority of modern trusts, I suspect, are discretionary trusts. I personally would find very objectionable a trust under which the settlor directed accumulation of the income for 125 years and then distribution to his descendants then living at the end of that period. Even if you did not have accumulation, I still think it is too long—for ever, I suppose, if there is no perpetuity rule—simply directing distribution at the trustees' discretion "to those of my descendants who are living" for ever. It seems to me what you are doing there is you are keeping family money within the family but you are taking control of the funds out of the hands of family members, putting it into the hands probably of professional trustees, maybe a solicitor, maybe an accountant, maybe a bank, and that is fine even for a long period but not for ever. There must come a time when you have to say enough is enough. So I am against perpetual discretionary trusts, even apart from the problem of accumulation. I am also of the opinion that 125 years is too long and I personally would opt for 100 years. I understand the arguments and I know that Dr Harpum is vehemently in favour of 125 years but, with respect, all his views are vehemently held. I have never known him be diffident on anything. In fact, I have known him shake his fists at a seminar. However, my problem is, I think that the methodology adopted by the Law Commission is simply wrong. What they did was to calculate approximately the longest possible period you had under the existing rules, royal lives clause, for example, work out that it was probably about 125 years, and then take that as the new period—but why? If this is not a retrospective Bill, so long as it is not going to be retrospective, we are making a clean sweep. The old law has gone. What we should be doing is choosing a new period. It does not have to be as long as the old one. It could be longer, it could be shorter. I happen to agree that 80 years is probably too short but, if you are going to pluck a new period out of the air, you should not start with the maximum possible period under the old law, unless you are dealing with something which is retrospective, and there clause 12 is retrospective, takes 100 years, and I think that is wrong; that should be 125 years. I will come to that in a moment but it seems to me those two periods are the wrong way round. For the future, I would say 100 years, a century, is enough but, for retrospective operation, you do have to consider the maximum period under the existing law, and I accept that that is about 125 years. Of course, I agree with almost everyone that the Bill should not be retrospective except in relation to the two matters in which it is retrospective, where there are very strong reasons for making it retrospective. There is the European Convention but there is also our own tradition; we do not operate retrospectively in order to undo vested interests, and I would imagine it would make the passage of the Bill through the House more difficult. This is exactly the kind of point which they would seize on in debate and I suspect the Bill might be not exactly derailed but much of the argument would be derailed by long, passionate speeches on retrospectivity which are really not necessary. Let us not make it retrospective. Like Dr Harpum, I am afraid I disagree with

Baroness Deech in relation to clauses 1 and 7. She said clause 1 was untrue. It is not if you read it with clause 15, the date when the Bill comes into operation. If you read the two together, it is perfectly accurate. Clause 7, as he pointed out, does not require one to have regard to the common law in order to wait and see. You wait and see whether the interest will vest in time, and what is the time—125 or 100 years, and you wait for the expiry of that period. In the meantime, you probably will find out; you probably never will have to wait that long but that is the maximum period you have to wait. You certainly do not have to take into account the old perpetuity rules. My only query is a matter of drafting—and it may be a niggling point but it is clause 1 and the definition of the operation of the Act. It talks about the occurrence of an event taking place beyond the period. I wonder whether that actually extends to the determination of a period or the coming of a date. It is quite common, in fact, to have trusts determined on a particular date: "On the expiry of 125 years the trust shall be distributable." Well, I think a reasonably liberal-minded judge would say, "Yes, it does." I think a 19th-century judge would probably say it does not. I do not see any reason why we should leave it in the least open to argument, so that in the future you see in a textbook a little footnote to section 1 saying "The occurrence of an event includes the determination of a fixed period. See *re Buffins Trusts*." Why should you go to that length? We are legislating now; let us make it clear. I have myself two proposals for what I suggest is improvement. First, the period specified in clause 12 should not be less than the new perpetuity period; 125 years, in fact. Even if the perpetuity period is reduced to 100 years, we should make clause 12 substitute 125 years. That is because it is retrospective. What we have are trustees who are worried that they do not know whether the royal lives clause has come in. It is an old settlement, it has a royal lives clause, it is *re Villers* again. They are not sure whether it came to an end, they are not sure when it came to an end, so they are allowed now to execute a deed saying that they are content that it must have done. They are not quite sure when but they are going to distribute on a particular footing. They have to be very careful when they do that that they are not going to be divesting possibly vested interests. If they are going to substitute 100 years, and they have to under the Bill as it stands, they may well divest vested interests. They may wait for 125 years before they do it but they have to put in the 100-year period. That seems to me to be wrong. They should substitute 125 years whatever the new perpetuity period is, because they are substituting their period for the common-law period in an old settlement and they should not make it shorter. That is my view on that. I have not considered the Revenue's objections. I have my doubts about it.

Q79 ***Chairman:*** I think that is in fact the reason given for having the period of 100 years.
Lord Millett: Yes.

Q80 ***Chairman:*** It is not said to be revenue-neutral.
Lord Millett: I cannot understand why it should be. They are going to have to argue that it is or might be. I have some doubt about it, I must say. All they are doing is substituting a period which approximates in terms of years to the existing period, and nothing more, so I do not myself understand the argument but I have actually not seen it. The other suggestion I would make is in fact a bit of a hobby horse of mine, because I came across it in my non-professional life. I would like to see something done about non-charitable purpose trusts. The reason the Law Commission did not deal with that is, as I said, they are not affected by the rule against perpetuities. They are affected by the rule against inalienability. That is, you cannot have a trust which goes on too long, that goes on for ever, and never comes to an end. What happens is it is brought to an end on the expiry of the perpetuity period so, although it is not affected by the rule against perpetuities directly, it is affected by the length of the perpetuity period, and if you are going to change that to 125 years, you ought to change it for non-charitable purpose trusts. The trust I actually have in mind, because I came across it in my capacity as treasurer of my synagogue, was that a member of the committee unwisely opened up an old cupboard and out fell a lot of old trust deeds. Foolishly, they looked through them, and they came across a trust of about £30,000 established in the mid-19th century for the upkeep of the cemetery. Because of the rule against inalienability, they put in a royal lives clause and, for once, they were able to determine that this had come to an end, about 20 years before I was told about it. When I said, "You should never have opened the cupboard," they said, "Should we put it back?" and I had to say, "No, I cannot give that advice." "What shall we do about it?" Well, we were able to solve it but only because the trust in default was to all the members of the council of the synagogue living at the expiry of the period. We found out who they were. There were then about 20 members; it happened 20 years before; by the time I looked at it, there were only three of them still alive. We wrote to those three, pointed out that under the original trust the fund had now vested in them but that it was obviously not the wish of the original settlor or purpose of the trust, and would they have any objection to signing the enclosed slip, which said "I hereby resettle the fund on the original trusts but the resettlement is subject to the rule against perpetuity for 80 years," or whatever, and they all did it. I have to admit, we did not tell them that they were going to be getting £10,000 if they did not but, anyway, they did. I do not see why that sort of trust

should not go on for 125 years or indeed for ever. What on earth is wrong with a trust of that kind? It may be that it needs looking at. I would not want a trust for a cat and dog to go on for ever but a trust for the upkeep of a cemetery ought to be charitable. Unfortunately, it is not. I think that is the only other matter on the rule against perpetuity. So far as excessive accumulations is concerned, I had actually, independently of Lord Goodhart, for a long time concluded that a direction to accumulate was bad if it went on too long but a power to regulate was okay because the courts can do something about it if the trustees are behaving unreasonably and the beneficiaries complain. I myself would, for the future, scrap the old rules, which are complicated, substitute a single period of 21 years from the date of the settlement for a direction to accumulate, and if the direction to accumulate is for longer, convert it into a power. I do not see any need to go the whole hog, as Dr Harpum would, and convert all directions to accumulate into powers. I think that interferes just too much with the power of a settlor to determine what his trustee should do but I do not see why they should not be allowed, obligated, to accumulate for 21 years with a power to accumulate thereafter and, if the direction is too long, turn it into a power. I think that is all I would say, except that I did add at the end of my passage on Mr Nugee's proposal that I agree with him that, as the Bill stands, clause 5(2) does need to be amended because I think it is wrong in principle. An appointment under a special power of appointment is really an old trust, not a new one, and one should not change the perpetuity rule or the rule against accumulations there. On the other hand, I think if my proposal were to increase the period to 125 years, I do not think you need the amendment.

Q81 ***Chairman:*** I follow that. Thank you very much. Are there any questions around the table? Could I ask you this? You say "Why 125 years?" One could put the question back to you and say "Why not 125 years?" bearing in mind that it was intended to be simply a longstop, as I understand it?
Lord Millett: Yes.

Q82 ***Chairman:*** Is that not in fact quite a good answer to your point that it should be no longer than 100 years?
Lord Millett: My own view is that clause 12 must have 125 years. It is retrospective. You must not cut the existing period down because, if you do, you are not only retrospective but you are altering vested rights, potentially vested rights. Clause 12 must be 125 years, in my view, not because the period in the Bill is 125 years elsewhere but simply because the royal lives clause probably goes on for up to 125 years. That is about the earliest period at which you could reasonably say it is pretty unlikely that there is anybody still alive and it is pretty unlikely that the trust is still continuing. One hundred years I think the judge would have to say, "There are quite a lot of people in there and they only have to live to 79 or 80 or whatever. The trust period probably has not determined." So I would go for 125 years in clause 12. The other one I do not feel strongly about whether it is 125 or 100. It might be easier for the Revenue to accept it over 125 but I have no feel for that. It is simply that it seems to me the methodology adopted by the Law Commission was wrong. You are just taking a longstop but you are taking a new longstop and you should really put in the period there that you would put in if we had not had a perpetuity period before, if, like Manitoba, I understand, one had had no perpetuity period at all, and one would simply say, "We do not think discretionary trusts should go on for too long. We just had one that went on for 300 years. We do not think that is right. Let us put one in," what would you put in? Would you put in 100 or 125? My gut feeling is you would say a century is about right but I do not feel strongly about it at all. It is just a matter how you feel about it.

Q83 ***Lord Kingsland:*** It is a point that, I must say, had not occurred to me before but if one looks back at the 1964 Bill, a period of 80 years, it is a considerable reassessment—
Lord Millett: Yes.

Q84 ***Lord Kingsland:*** — politically, to add on another 55 years, since there is nothing that has happened since 1964 which suggests that 80 is either too long or too short a period.
Lord Millett: No.

Q85 ***Lord Kingsland:*** You said the 1964 Act had not generated much litigation.
Lord Millett: No, it has not—well, not that I know of. It may have generated some difficulties but I am going back a long way in my memory, and in the days when I did draft trusts and settlements and put in 80 years under the 1964 Act, I do not remember anybody saying "Can't we make it longer?"
Chairman: Thank you very much, Lord Millett, and please do stay, if you would like to, to hear our next and last witness this morning, Professor Aldridge.

Supplementary memorandum by Lord Millett

Following his appearance before the Committee on Tuesday 9 June, Lord Millett wrote as follows:

I would like to illustrate my evidence on the effect of Clause 12(2) of the Bill as it stands by a hypothetical (but realistic) example.

Suppose a settlement created in 1900. The trust fund to be distributed among all the descendants of the settlor living at the end of a trust period defined by reference to a Royal lives clause.

In 2000 it is discovered that the last known survivor of the Royal lives died in 1995, though there may be others whose existence is unknown. It is therefore known that the trust fund will not be distributable until 2016 at the earliest, but may not be distributable until later.

In 2000 there were only four descendants of the settlor living, one of whom (Aunt Jemima) was a spinster aged 80, and the others were all young. Between 2000 and 2016 Aunt Jemima died leaving her entire estate by will to the dogs' home, and four children were born to the other descendants.

The trustees cannot distribute the fund in 2016 (to the beneficiaries then living and excluding Aunt Jemima who has dies) because they cannot be certain that the trust period has yet determined. This is the situation for which Clause 12(2) is intended; but it would be quite wrong for the trustees to exercise their powers under the clause, since the trust fund would then become distributable among the beneficiaries who were living in 2000. Not only would the four later born children be excluded, but the dogs' home would take under Aunt Jemima's will.

9 June 2009

Memorandum by Trevor Aldridge QC (hon), solicitor, Law Commissioner 1984–1993

What I have to say is confined to the rule against perpetuities, and leaves aside the rule against excessive accumulations.

Reform Proposals

It is a disappointment that the Bill, following the Law Commission's recommendations, does not recommend the total abolition of the rule against perpetuities.

The major justification for the rule is to prevent the undesirable long term ("dead hand") control of property following the wishes of a settlor or testator. This will not be achieved by the proposed 125-year perpetuity period. I may illustrate this by my own position, having a number of grand-daughters, the eldest of whom is 13. The traditional "life in being plus 21 years" period (ignoring the possibility of a royal lives clause) would probably allow me successfully to divide my estate between my great-grandchildren (or some of them, depending on the effect of the class closing rules). The current alternative 80-year period could justify dividing it between by great-great-great-great-grandchildren. The proposed extension of the period to 125 years could allow me to benefit my great-great-great-great-great-great-grandchildren! Could there be a more graphic illustration of the dead hand?

Any reform of the law should aim at simplification, and this is a topic which needs that more than most. However, as the Bill only applies prospectively (clause 15), it is adding to the complexity. The current law would remain relevant until at least 2089.

Two effects of the reform proposals are welcome (albeit that their impact is reduced by the lack of retrospective effect):

— First, the outlawing of royal lives clauses eliminates an obvious artificial device designed specifically to avoid the straightforward application of the law. Their effect of which can be difficult to ascertain. (On 25 September 1994, Prince Louis Ferdinand of Prussia died, aged 86. He was the great-great-grandson of Queen Victoria. Who is to say whether he was the last "life in being" for the purpose of many a will or settlement made when he was a young man?)

— Secondly, excluding the operation of the rule on easements over land (reversing Dunn v Blackdown Properties Ltd [1961] Ch 633) halts an unnecessary and artificial curb on property development.

Case for Abolition

The early justification for a rule against perpetuities was to prevent land being settled in such a way that it was inalienable for a long period or permanently. The inalienability of large tracts of land has clear social disadvantages, inhibiting flexibility of land use and preventing satisfactory maintenance.

However, inalienability was later directly addressed, much more effectively than by the rule against perpetuities, by the Settled Land Acts. They gave alienation rights to tenants for life, while preserving the rights of beneficiaries. In new cases, the powers have now been transferred to the trustees, but the principle is the same. It is true that the powers can be excluded in the case of private trusts (Trusts of Land and Appointment of Trustees Act 1996, s8), but if that is thought to be unsatisfactory, that is the provision which should be amended. In addition, the Variation of Trusts Act gives powers which can be used to counter the effects of excessive settlor control.

The other justification for a rule against perpetuities is to avoid "dead hand control". It is debatable whether that control produces any adverse social consequences. But in practical terms it is now so rare that it cannot justify legislation.

Modern wills and settlements favour flexibility rather than rigidity, if only to ensure that it will be possible to counter the demands of changing tax rules. There is, however, also recognition that unforeseeable changes in circumstances make a rigid adherence to the status quo undesirable, such matters as illness, divorce, changes in planning policy, emigration. Professional advice will normally be against any attempt at long-term control.

There are few people now who have both the wish to set up long term dead hand control arrangements and the size of fortune to justify it. I was in private practice as a solicitor in London from 1960 to 1984 doing a lot of private client work. In taking instructions for many wills and settlements over those years, I never encountered a client who wished to make arrangements that would or might have contravened the rule against perpetuities.

Lady Deech pointed out in the Second Reading debate that the complicated law relating to the rule against perpetuities is now only rarely taught to law students. I understand that those taking courses for the solicitors' professional qualification do not learn about it.

This accords with my experience. When the Law Commission was working on the Consultation Paper, we recruited research assistants each year, usually from those who had just graduated or who had just attained their professional qualification. It soon became apparent that very few of them had any acquaintance at all with this rule.

This shows the limited practical effect that the rule now has. Everyday property transactions are carried out, and wills drafted, by solicitors throughout the country in ignorance of the rule. Doing this successfully is possible, and has no adverse consequences, because there is no public appetite to seek to impose dead hand control.

June 2009

Examination of Witness

Witness: Mr Trevor Aldridge QC, Law Commissioner 1984-1993, examined.

Q86 ***Chairman:*** Mr Aldridge, can we thank you very much for coming to give evidence before the Committee today. We are very grateful for the short paper which you have prepared, from which we see that you are one of those who really think it is time that we got rid of the rule altogether. We very much look forward to hearing you on that subject.

Mr Aldridge: May I say, my Lord Chairman, that I feel privileged to be able to give evidence to the Committee; and, as I did in the very brief paper that I submitted, I should like to concentrate on the rule against perpetuities and leave the rule against excessive accumulation on one side. I believe that there are two basic questions which need to be addressed. First, do we need a rule against perpetuities? Secondly, if the answer to the first question is yes are the suggested reforms appropriate? I readily admit that I am not a legal historian but, as I understand it, it is agreed that the rule against perpetuities originated in attempts to combat arrangements which made land inalienable; but over the years inalienability was tackled and actually tackled more successfully in various other ways—by the Settled Land Act, by the ability to bar entails; and perhaps, ironically, by the law of mortmain. The justification for the rule, the whole basis has now changed and concentrates on the need, as it is seen, to curb what I might call post-mortem control of the destiny of property. The Law Commission refers to it as "dead hand", so the dead hand is revived, as it were. This change of justification in the rule is clearly a radical change. Making land inalienable had definite detrimental effects, even creating circumstances which allowed the land to deteriorate

physically. On the other hand, I am not at all sure that the post-mortem control creates any obvious social evil; but if it does, if it is seen to, and if you consider that it does, I think it is now on such a scale that it does not justify statutory intervention. The rule against perpetuities is clearly a restriction on the settlor's or the testator's power of alienation. The power of alienation is an inherent feature of property ownership. I do not consider that it should be restricted unless there is strong reason to do so; if post-mortem control is a problem, the scope of that problem has been severely reduced. I think this is the effect of taxation, the ability to vary the terms of trusts in certain circumstances and the dilution of the concentration of wealth. Lady Deech highlighted the disappearance of the rule against perpetuities from the syllabus in universities and in professional legal training, and that accords with my experience in recruiting in the Law Commission, and this necessarily leads to an increasing number of lawyers with no knowledge of the rule at all. I think the trend of disappearance from the legal syllabi has been the case for at least 20 years and the Solicitors' Regulation Authority has told me that during those 20 years some 85,000 of the solicitors who are still qualified today were admitted, and that is 75 per cent of today's solicitors—actually 75 per cent of last year's solicitors; I could not find the figure for this year's roll, but I guess it must be similar. So that proportion of solicitors, 75 per cent or coming up to that, had no knowledge of the rule against perpetuities. The result is that a large number of wills and settlements are now being drawn by lawyers who are totally ignorant of this rule. But the position appears to be satisfactory; there is no avalanche of invalid gifts as far as I am aware. The fundamental reason why knowledge of the rule is not needed is that there is very little demand from clients to make dispositions which would contravene the rule. In my own 25 years in private practice as a solicitor I was never even asked to draw up a document which would have contravened the rule. I can identify three reasons why I think settlors and testators do not want to make multi-generational dispositions: first, only a very small percentage of people have a fortune large enough to justify such an arrangement; secondly, taxation seriously discourages it; thirdly, there is a growing awareness of the later changes in family circumstances which can render long term dispositions inappropriate. If in fact there were an appetite for multi-generational dispositions and they were being drawn by lawyers with no knowledge of the rule against perpetuities it is likely that such dispositions would regularly be struck down because they would have contravened the rule in some way or another, and I am not aware of any evidence that there are gifts which are failing for this reason. Perhaps I should add that my own experience suggests that many of these lawyers with no knowledge of the rule have no knowledge that the rule exists; it is not, "There is this rule of which I do not know the details", it is "What rule?" Abolishing the rule was one of the options which the Law Commission considered—it was one of the options set out in the consultation paper—and so I think it is pertinent to ask why they rejected it. The report does little more than to rely on the need, if it be a need, to curb the dead hand. Indeed, the very tentative view of Professor Vickers that, as an economist, he was inclined to favour the removal of restrictions on disposition was swept aside without real consideration on the face of the report. The Commission's consultation demonstrates a weakness in this consultation methodology. They received 62 responses from a range of interested persons and bodies and those professionally involved in trust matters featured strongly. Experts who had focused on the rule against perpetuities for the whole of their professional life were not likely to suggest abandoning it totally and those who knew nothing about it and even did not know of its existence were pretty unlikely to respond, so you do get a slight bias. However much ignorance of the law is no excuse I think there is clearly a danger for society in enacting a law on which the majority of the population and a majority of the legal profession have turned their backs. I have made clear, I hope, my strong preference for abolishing the rule against perpetuities. There is very little I want to actually add about the reform proposals themselves and I am really, I think, supporting representations of others simply on two points. The first: the proposed single perpetuity period of 125 years seems to me to be far too long to provide any realistic control on post-mortem control of dispositions and if you are not really imposing any control why erect a whole strategy to seek to control it? Secondly, as the current law is not completely replaced then simplification, which should be one of the primary aims of reform, is not achieved. It may well be true—and I accept what Dr Harpum said—that for the future there is a simplification, but we have to live for a very long time with two parallel systems, so simplification is not really there. I think, my Lord Chairman, that is really all I wish to say in my remarks to you.

Q87 ***Chairman:*** Mr Aldridge, we are very grateful for that. I should have mentioned earlier: am I right in thinking that you were Commissioner at the time that the consultation paper was distributed?
Mr Aldridge: Yes.

Q88 ***Chairman:*** And in charge of the same property and trust department?

Mr Aldridge: Yes, my Lord Chairman. Having had responsibility for the consultation paper it seemed to me to be, if not improper, it might be eccentric to respond to it having left the Commission; so I do not appear on the list of responders.

Chairman: Thank you very much. It was important that we should hear what you had to say. Are there any questions around the table?

Q89 ***Lord Goodhart:*** Mr Aldridge, I think you have presented an extremely good case for saying why if there was no rule against perpetuities now one should not be created; but that of course is not the position. We have a rule against perpetuities and since it is clear that it does not cause any substantial number of public complaints is there therefore not a good reason that we should retain a revised, simplified rule against perpetuities rather than scrap it altogether and give rise to the possibility that dynastic trusts might come into existence?

Mr Aldridge: There are two points there, my Lord. The fact that there are no complaints from a population and a profession which is overwhelmingly ignorant of the whole matter seems to me not a recommendation for any legislative action one way or the other. One could have complete freedom and that would of course allow enormously long multi-generational trusts, but it seems to me that such evidence as there is of what people are now doing demonstrates that they would be very, very few and far between. The question is really should one maintain a structure which controls what I believe to be the activities of a tiny minority of people?

Q90 ***Lord Goodhart:*** Of course, trusts are something that only affect a fairly small proportion of the people. We have been told that what used to be called the Inland Revenue has records of some 200,000 trusts—and there may be some more that do not. But there are a considerable number of experts in the field; the membership of STEP—the Society of Trust and Estate Practitioners—none of them seem to have complained about the continuance of, in a simplified form, the rule against perpetuities.

Mr Aldridge: I think it is the experience of the Law Commission that there are generally, in almost any field one goes into, a collection of people who say, "We understand this; we have lived and worked with this for some considerable time, why change it? And if you must change it certainly do not abolish it." I think this is the division between the experts and the non-experts. I think there may be quite a number of trusts which have not—or not yet—come to the Revenue's attention, in terms of divorce arrangements and other things; but I do not know—maybe there has been evidence—how many long trusts they are aware of.

Q91 ***Lord Archer of Sandwell:*** There are two possibilities here, are there not? If the majority of solicitors simply do not know about the rule most of them will produce their settlements or their rules in ignorance of the thing and presumably in most cases nothing untoward will happen. The other possibility is that one day a potential beneficiary will instruct a solicitor who does happen to know about the rule and then the walls of the temple will come crashing down. Is not the real danger that there is an unsuspected trap there for the unwary and that we should not be in the business of leaving traps?

Mr Aldridge: I would agree, my Lord. The way to remove the trap is to remove the rule.

Q92 ***Lord Thomas of Gresford:*** Presumably if a solicitor who had no training or knowledge of the rule drafted a trust which offended it then he would be open to an action by a potential beneficiary and his insurance company would be involved. Is there not a public interest in that aspect of it all? We have heard from Baroness Deech and from Mr Nugee that they find the rule against perpetuities intellectually stimulating and satisfying, but I do not know that that is a great reason for keeping it. What would you say is the public interest in having the trap to which Lord Archer referred there with the possible consequences of litigation and insurance and so on?

Mr Aldridge: I would agree that as things stand at the moment if a solicitor simply from ignorance of the law purports to create an interest for a beneficiary which turns out to be invalid, clearly there is a potential of negligence there. Significant, I think, is that the majority of people are not asking the solicitors to do this and this is why there are not the contraventions. However, I would respectfully agree that there is a public interest in not creating this elephant trap, or rather abolishing this elephant trap bearing in mind that one has to perhaps go a little further and say is there a public interest in not having settlements which can last a considerable time? The practicality of today's world is that there are extremely few people who want those sorts of settlements. So the question really is: is there a public interest in preventing the very few people who do want those settlements in having them, and I would suggest that this is not a public interest.

Lord Thomas of Gresford: If I were to go down to my local pub and say that I have made my will and somebody said to me, "Look, what about the rule of perpetuities?" I would then have to go and get some very expensive advice to make sure that my will or my settlement had not offended against the rule of perpetuities about which I know nothing, and I might have to go from solicitor to solicitor. A solicitor might say, "I know nothing about it; let us look at who knows something about it amongst the ranks of counsel," and in the end I am faced with a huge bill

for the opinion of counsel who tells me, "You have not offended the rule of perpetuities." So it seems to me that there is a public interest there; and maybe a professional interest to those who are skilled and deep in that sort of area to keep the rule going, and I am a little wary of it.

Q93 ***Lord Clinton-Davis:*** How important is it, in your view, that we retain this rule for international competitive purposes?
Mr Aldridge: I do not see, my Lord, exactly what advantage we gain from it, from an international point of view.

Q94 ***Lord Clinton-Davis:*** It has been so argued.
Mr Aldridge: I suppose one might say that some of the wealthiest people in the world might set up English trusts if they were allowed a greater latitude in England than they were elsewhere. Rather colloquially I would be prepared to say, "So what?" If their money came with their dispositions into this country it could be an advantage.

Q95 ***Lord Goodhart:*** Are you aware of any cases that have attracted any publicity or any general public interest about the operation of the rule against perpetuities because of litigation problems? Certainly I am not aware that there has been any such problem.
Mr Aldridge: No.

Q96 ***Lord Goodhart:*** The lawyers, the draftsmen who do it, of course, are only normally a limited section of any firm of solicitors, are they not? You have your wills and trusts section if it is a firm of any size and they presumably know about the rule against perpetuities.
Mr Aldridge: This is one of these proving a negative things in a sense. Were there a solicitor in the high street—one of our ignorant solicitors in the high street—who was approached with the proposal to draw a will with considerable lengthy dispositions which might contravene, is actually not going to know that he needs assistance. The assistance is available to him from the Bar, undoubtedly, but he will not know that he needs it. Really the burden of my song, I suppose, is that I am happy to say that there are not the clients going to the solicitors asking for dispositions which a well informed solicitor would know were dispositions he should not make. And bearing in mind seemingly a preponderance of people not seeking to break the rule it seems absurd to have a rule.

Q97 ***Chairman:*** Mr Aldridge, it only remains for me to thank you on behalf of the Committee very much indeed for the evidence that you have given this morning.
Mr Aldridge: Thank you, my Lord Chairman.
Chairman: That completes the evidence for this morning.

Written Evidence

Memorandum by Francis Barlow QC, Gregory Hill and Richard Wallington, all of 10 Old Square, Lincoln's Inn

We are all practitioners at the Chancery Bar with many years experience of questions arising from the rule against perpetuities, and the prohibitions on excessive accumulations. Francis Barlow was called to the Bar in 1965, and Gregory Hill and Richard Wallington in 1972.

These notes are in four parts: 1 Perpetuities—policy aspects; 2 Perpetuities—technical and drafting aspects; 3 Accumulations—policy aspects, 4 Accumulations—technical and drafting aspects. "The 1964 Act" = Perpetuities and Accumulations Act 1964.

1. Perpetuities—Policy Aspects

1.1 *Interests excluded from the perpetuity rule: possible elements of "dead hand control".*

1.1.1 The Law Commission's Report concludes that the perpetuity rule ought not to apply to "bargains that have been freely negotiated", paragraph 7.35, and that "commercial" transactions are outside the mischief of the perpetuity rule because the need to control the "dead hand" does not arise in the commercial context, paragraph 7.42. With all diffidence, it is respectfully suggested that this is an oversimplification.

1.1.2 It is indisputable that options and rights of pre-emption, and future easements and covenants, are not the type of interest for which the perpetuity rule was developed, and restrictions in time calculated by reference to lives (and periods of gestation) are not particularly appropriate.

1.1.3 However, it does not necessarily follow that no control at all is required:

(i) A contingent easement or covenant capable of coming into existence at any future time, however distant, will tend to inhibit the development, and to depress the value, of the land affected. It is suggested, however, that for these interests, a revised version of Law of Property Act 1925 section 84 (which enables the Lands Tribunal to vary restrictive covenants) is likely to be the appropriate control technique.

(ii) An option or a right of pre-emption would also be capable of having similar effects, if exercisable over an extended period and at a price less than the current market value of the land at the time of exercise. Even if such an option is granted in consideration of a substantial initial payment, and is perfectly fair as between the original parties, the landowner's successor will in one sense feel the weight of the dead hand, and will have little incentive to turn the land to account in any way which requires the expenditure of money, if he takes it burdened by an option under which it may be taken from him at a substantial undervalue.

(iii) An option or right of pre-emption could be used for the purpose of inhibiting change of use, for example if it were made contingent on the property being used for any purpose other than (say) a single residence of not more than a specified size, and the price payable were limited to (say) 20 years' purchase of the rent which could be obtained under an assured tenancy of such a residence when the option was exercised: a landowner subject to such a provision would as a practical matter have to do a deal with the option-holder in order to gain any benefit from any development which might become possible.

1.1.4 It does not necessarily follow that any such exercises, if they became possible, would in fact be undertaken on any significant scale, but the possibility would be there; it is a political and economic judgment, not a legal one, what if any restrictions should be placed on any of the transactions which clause 1(1) of the Bill would free from the rule against perpetuities.

1.2 *Perpetuity rule inapplicable to a legal estate subject to a right of re-entry on breach of a condition subsequent, clause 1(4): "if an instrument limits property in trust so as to create an estate . . . subject to a condition subsequent . . .".*

1.2.1 The main innovation of the Report and the Bill is the specification in clause 1 of an exhaustive list of interests to which the perpetuity rule is to apply; the intention is to confine it, speaking broadly, to "family" rather than "commercial" interests, and this objective is achieved principally by restricting it to situations where an instrument "limits property in trust . . .": clause 1(2)-(4), in particular, for present purposes, clause 1(4), adopting this technique in relation to an interest subject to a condition subsequent.

1.2.2 It is possible for an interest in land to be subject to a condition subsequent without the land being subject to a trust or the condition being created by means of a trust: Law of Property Act 1925 section 7(1) provides, as amended by LP (Amendment) Act 1926, inter alia that "a fee simple subject to a legal or equitable right of entry or re-entry is for the purposes of this Act a fee simple absolute", and so an estate in land can subsist as a legal estate under section 1(1) of the 1925 Act even though subject to a right of entry or re-entry. See also Megarry and Wade on Real Property, 7th edition paragraphs 3-056 to 3-062, 6-014 and 9-089. The effect of clause 1(1) of the Bill will be that rights of re-entry for breach of condition subsequent will not be subject to the perpetuity rule where the condition is attached to an estate which remains a legal estate under the 1925 Act; and this will be the case whether the disposition (and the condition) is a "family" or a "commercial" matter.

1.2.3 Thus, for example, the condition considered in *Shiloh Spinners v Harding* [1973] AC 691, set out at 694G-695A, which was imposed by what appears to have been an arm's-length commercial assignment of leasehold property, and provided for re-entry on non-compliance with certain covenants, including positive covenants for fencing and repair, could be made exercisable without limit of time instead of being confined to a perpetuity period, and could be made applicable to a freehold as well as to a leasehold interest. That result is in accordance with the Law Commission's recommendation of policy that only future interests under wills and trusts ought to be controlled by the perpetuity rule (Report, paragraph 7.31).[1]

1.2.4 However, there is no reason in principle why a condition subsequent attached to a legal estate should not also be used in a "family" context and in such a way as to raise an issue of "dead hand control". *Sifton v Sifton* [1938] AC 656 (decided on a question of uncertainty) was such a condition: the testator attempted to make a gift to his daughter determinable if she did not "reside in Canada". Of course a condition attached to a gift to a living person, and relating only to his or her personal acts or omissions, would not fail for remoteness if the rule against perpetuities did apply to it, and there are distinct rules limiting the validity of conditions subsequent, particularly if they restrain alienation: see Megarry and Wade paragraphs 3-063 to 3-066.

1.2.5 Nevertheless, if the Bill were enacted as it stands, it would appear to enable rights of re-entry to be attached to legal estates, so as to be enforceable for longer than the perpetuity rule would allow, in at least some "family", rather than "commercial", dispositions. For example of a right of re-entry could be made exercisable:

(i) if a particular grave or monument, outside the restricted class the maintenance of which is a charitable purpose, should fall into (carefully defined) disrepair; or

(ii) if there should not be in existence a male person tracing his descent exclusively through males born or conceived in wedlock from a specified ancestor—the result would be an interest closely resembling a "base fee", freely alienable but liable to come to an end on failure of male issue of a particular person, and therefore significantly less valuable than a fee simple.

1.2.6 It follows that applying the perpetuity rule to a condition subsequent created under a trust, but not to such a condition imposed directly on a legal estate, means that the validity and period of continuing validity of such a condition will be determined by form rather than by substance. It is suggested that neither the rule that a condition subsequent is strictly construed, nor a prediction that there would be tax disadvantages in any structure which attempted to impose a condition subsequent for an extended period in a "family" context, would necessarily be a restraint on advantage being taken of the confinement of the perpetuity rule to interests under trusts.

[1] The particular case of a condition subsequent imposed to ensure that positive obligations are complied with, such as that in Shiloh, raises the distinct questions whether such a structure should be permitted to continue, or to be set up, in parallel with the Commission's suggested positive "Land Obligation" (by whatever name called), and if so whether it ought to be subject to an extended version of the jurisdiction under the LPA 1925 section 84 to vary or modify restrictive covenants (on which see also 1.1.3(1) above): these, it is suggested, are issues for the Commission's consideration in the course of its project on Easements and Covenants (Consultation Paper 186, 2008).

2. Perpetuities—Technical and drafting Aspects

2.1 *Instrument executed after commencement pursuant to a contract made before commencement: do the amended rules apply?*

It is common practice for a property transaction to be effected by means of a contract which is to be completed by the subsequent execution of an instrument—or, in complex cases, a number of instruments—in agreed terms; often a draft or drafts will be annexed to the contract. It is understood that contracts are being negotiated, and will be concluded, which will provide for completion to be deferred for a significant period, such that it will take place after the time at which the new legislation is likely to come into force; and further that in some such cases it would be useful to the parties to be able to make use of the disapplication of the perpetuity rule to commercial interests—for instance by including a repurchase option to be exercisable at the end of an extended project. It is believed that, for example, energy supply and mineral extraction projects are capable of lasting a number of decades, certainly longer than the 21 years applicable to call options over land under the 1964 Act, section 9(2). If an instrument conferring a repurchase option at a distant date is executed after the new legislation comes into force, without any previous contract, no problem will arise. But if such an instrument is entered into, post-commencement, by way of completion of a pre-commencement contract, it appears that there will be, at least, a strongly arguable contention that the parties' rights are defined by and date from the contract, so that the old law applies. It is suggested that there is no objection of policy to allowing parties to contract, pre-commencement, to enter post-commencement into a transaction one or more aspects of which will derive its validity from the new law. If in principle that is accepted, the effect of the Bill could usefully be clarified in that sense, perhaps by amending clause 15(1) to read:

> " . . . taking effect on or after the commencement day, including an instrument made pursuant to a contract entered into before that day, unless it is . . .".

2.2 *Perpetuity period for appointment under a pre-commencement special power, clause 5(2): where an instrument limiting property in trust so as to create successive interests, or interests subject to conditions precedent or subsequent, is made in the exercise of a special power of appointment, "the perpetuity period is the same as that applicable to the power . . .".*

2.2.1 Summary of this point: the amendment of the Law Commission's original draft Bill so as to exclude the new perpetuity rules from applying to exercises of special powers made after the Bill commences to have effect where the power was created before it had effect has two seriously unsatisfactory aspects which in our view it is important to rectify:

(i) It imposes a narrower restriction on the exercise of such special powers than exists before the Bill takes effect by providing in Clause 5(2) that the perpetuity period is "the same as that applicable to the power", and in Clause 5(4) that the specification of a perpetuity period in any instrument is ineffective. The point here is that, under the existing law it is almost certainly the case that when a power of appointment is exercised and the instrument which created it did not specify a fixed period of years as the perpetuity period in accordance with s 1 of the 1964 Act, it is possible to choose any perpetuity period by reference to a life or lives plus up to 21 years provided the life or lives are of person(s) living when the power was created.

(ii) There has been insufficient consequential amendment of the amendments to the 1964 Act in Clause 16, with the consequence that the 1964 Act appears to be totally disapplied to exercises of special powers made after the Bill takes effect where the power was created after the 1964 Act came into force but before this Bill does so.

2.2.2 Clause 5(2) was not in the Bill as annexed to the Law Commission's Report and as circulated for consultation on the Bill's suitability for the new Parliamentary procedure for uncontroversial Law Commission proposals: the Commission's recommendation, in paragraph 8.23 of the Report, was that the perpetuity period for future exercises even of special powers of appointment conferred by instruments which took effect before the new legislation comes into force should be 125 years from the effective date of the instrument creating the power.

2.2.3 This recommendation would have effectively resolved, in a facilitative sense, the question (considered at paragraph 4.30 of the Report) whether it is permissible for an appointment under a special power to adopt a new perpetuity period by making an express selection of additional "lives in being", not mentioned in the original instrument, provided they were in being when that instrument took effect. It is widely considered that this procedure is permissible,[2] and many such appointments have been made, but there is no actual authority

[2] It is suggested that this is in principle a perfectly acceptable application of the "second look" doctrine: even at common law, it is permissible to test the validity of an appointment under a special power by reference to facts actually existing when the appointment is made, even if it could not be said, at the time the power was created, that they were certain to come about.

on the point; it would be useful to put the question beyond doubt for the future, and indeed probably unobjectionable (even though it would be in a sense "retrospective" legislation) expressly to confirm that such appointments are not invalidated by "new lives" having been specified.

2.2.4 However it was suggested in response to the 2008 consultation that a blanket adoption of the new 125 year perpetuity period for appointments under existing special powers potentially raised issues of expropriation and Article 1 of Protocol 1 to the European Human Rights Convention, because it would be capable of enabling appointors to defeat—for example—interests which would have vested (and been expected by the settlor to vest) at the end of an 80-year period specified under the 1964 Act, such defeasance operating for the benefit of beneficiaries who could not have taken vested interests within that period (because they were only born after it had expired).

2.2.5 Clause 5(2) has, and may be inferred to have been intended to have, the effect of meeting this expropriation issue. However the technique adopted, of referring to the perpetuity period "applicable to the power", appears to raise other difficulties. It is suggested that further consequential amendments could usefully be considered.

2.2.6 There appear to be three issues concerning the perpetuity rules as they will apply to an exercise after the Bill becomes law of a special power created before the Bill becomes law: under the Bill as it stands:

(i) Would it be permissible to specify new "lives in being" who were not mentioned in the disposition creating the power, but were in fact alive when that disposition took effect? (Report, paragraph 4.30.) We submit that this should be permissible, and believe that it is permissible under the law as it now stands.

(ii) Where the original disposition was made before the commencement of the 1964 Act, are the relevant "common law" lives only those who validate the disposition, or do they also include others who are in some way connected with the vesting of the gift? (Report, paragraphs 4.16-17 and 4.40 note 46.) Again we submit that the latter should be the case, and believe that it is under the law as it now stands.

(iii) Where the original disposition was subject to the 1964 Act, would the disapplication of that Act in relation to future instruments, by new section 15(5A) inserted by clause 16 of the Bill, have an unduly restrictive effect on the provisions which could be validly included in a future appointment? This seems to us to be the case.

2.2.7 Assume a simple disposition to A, an adult male who already has children (and is not traceably a descendant of any English monarch), for his life, and thereafter for such of his children or remoter issue at such ages or times and on such trusts as he shall by deed or will appoint and in default of appointment for his children in equal shares at the age of 21. If that disposition was made in 1960, the common law applies; if it was made in 1970, the 1964 Act must also be taken into account. On either basis, the power is clearly valid, but there are potential difficulties relating to its exercise.

2.2.8 Assume, first, that the original disposition was made before the 1964 Act, so that only the common law rules apply:

(i) It seems clear that for the purposes of clause 5(2) of the Bill, the perpetuity period applicable to the power is not measured by reference to the lives of descendants of, say, HM King George V who were living at the date of the original disposition; and it must follow that A could not, under the Bill, make an appointment by reference to those or any other "unconnected" lives apart from his own. Clause 5(4) reinforces this conclusion: it provides that "a specification of a perpetuity period in" the instrument exercising the power "is ineffective", and there would be a very real possibility of "specification of a perpetuity period" being held to include the limitation of interests to vest within a period defined by reference to lives other than A's being ineffective: even if that were not called the perpetuity period, the limitation would only be valid, because it would only be certain to vest in time, if that period had in fact been made the applicable perpetuity period.

(ii) In relation to the question, Who are the relevant lives at common law?, the power itself is clearly valid because only A can exercise it and he was a life in being. However, it may well matter for the purposes of the validity of interests appointed in exercise of the power whether A's children who were alive at the date of the disposition also "count": if they do, A can (for example) appoint interests to such of those children's children as attain the age of 21, irrespective of when he himself dies, but if they do not, all interests must vest within 21 years of A's death.

2.2.9 Assume, alternatively, that the disposition creating the power was subject to the 1964 Act. In that case, clause 5(2) of the Bill provides that the period applicable to the appointment is the same as that applicable to the power, which at first sight will be either (a) a fixed period of years specified in the original disposition as provided by section 1 of the 1964 Act, or (b) "common law lives"—whoever they may be—if (as in the example

given) the power itself is clearly valid without resort to "wait and see", or (c) "section 3 lives" if the power itself depends on "wait and see".

(ii) There is an apparent conflict between clause 5(2) of the Bill, which in effect requires the use of 1964 Act periods in cases (a) and (c) above, and new section 15(5A) of that Act (inserted by clause 16 of the Bill) which in terms disapplies inter alia sections 1 and 3 in relation to all instruments made after the new law comes into force—including instruments exercising powers of appointment to which those sections apply. If clause 5(2) had to be applied on the basis that sections 1 and 3 of the 1964 Act were not available, the result would apparently be that an appointment under a power created whilst the 1964 Act was in force would nevertheless have to create interests which were certain to vest by reference to "common law" lives. It seems likely that the conflict would be resolved the other way, on the basis that clause 5(2) is a specific provision which is not adversely affected by the more general terms of new section 15(5A); but the better course, it is suggested, would be to amend the Bill to stop the conflict arising.

(ii) The issues outlined in 2.2.8 above would arise in case (b), a 1964 Act power which is intrinsically valid independently of section 1 of the 1964 Act and of "wait and see".

(iii) Even if the apparent conflict between clause 5.2 and new section 15(5A) were resolved as suggested above, the "perpetuity period applicable to the power" in case (b) would be defined by "common law" lives rather than "section 3" lives, and it appears to follow that "wait and see" would not be available.

2.2.10 None of these issues arose under the 1964 Act, because the transitional provision in section 15(5) prevented that Act applying to exercises after its commencement of special powers of appointment previously created. The problem has arisen in the case of the present Bill because the original draft of the Bill was drafted so as to apply the new law of perpetuity to exercises of special powers under pre-Act instruments. Adopting a similar drafting technique to that in the 1964 Act would be a possible way of avoiding the conflict between clause 5(2) and new section 15(5A), described in 2.2.9(1) above. It is suggested that this might be done as follows:

— leave out clauses 5(2) and 5(3) of the Bill; re-number 5(4) and amend it to refer only to 5(1);

— amend clause 15(1) to read:

"Sections 1, 2, 4 to 11 and 14 apply in relation to an instrument taking effect on or after the commencement day, unless it is either—

(a) a will executed before that day, or

(b) an instrument exercising a special power of appointment created by a disposition which took effect before that day, other than an instrument within paragraph (a) or (b) of section 6(3) above.";

— insert a new clause 15(2) to read:

"Section 13 applies in relation to an instrument taking effect on or after the commencement day, unless it is a will executed before that day"

— renumber subclauses (2) to (4) of clause 15 and the reference to "subsection (3)" in subclause (2).

— in clause 16, amend new section 15(5A) of the 1964 Act to read:

The foregoing sections of this Act shall not apply in relation to an instrument taking effect on or after the day on which the Perpetuities and Accumulations Act 2009 comes into force; but this shall not prevent those sections applying in relation to an instrument so taking effect if it is either—

(a) a will executed before that day or

(b) an instrument exercising a special power of appointment created by a disposition which took effect before that day, other than an instrument within paragraph (a) or (b) of section 6(3) of that Act."

2.3 *An ambiguity in references to the commencement of the Act*

Clause 15 of the Bill provides that the changes made apply in relation to instruments taking effect on or after the "commencement day", apart from clause 12 which only applies to instruments before the commencement day. The commencement date is defined in clause 15(4) as the day on which the Act comes into force. The commencement provisions of clause 22 are that clauses 22, 23, and 24 will come into force on the day the Act

is passed, and that the remainder will come into force on the day appointed by statutory instrument. It is fairly obvious which is the relevant date of commencement for the purposes of clause 15, but the matter could be clarified by the definition in clause 15(4) referring to the date appointed under clause 22(2).

2.4 *Republication of wills*

Clause 15(1) and (2), commencement, make the pre-Act law apply to any will executed before the commencement day, even if taking effect on or after the commencement day, ie because the testator dies on or after it. There is a rule of law that if a codicil is made to a will which makes some reference to the will, the will is 'republished', with the consequence that it is treated as made at the date of the codicil unless that would defeat the testator's intentions (see the useful summary of the law, with reference to most if not all relevant decisions, in *Re Heath's Will Trusts* [1949] Ch 170). How the case law would apply to a will made before this Act comes into force but republished after the Act does so, is not entirely clear, and would be better clarified expressly. Useful existing examples are the Family Law Reform Acts of 1969 s 15(8) and 1987 s 19(7), which having provided that the changes they introduced did not apply to wills executed before they came into force, provided also that a disposition made by will or codicil executed before the date of commencement should not be treated as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date. The 1964 Act, incidentally, applied to the wills of persons dying after the commencement of it, so that there was no issue about republication.

2.5 *Something wrong with the definition of special power*

Subclause (6) of Clause 11 (the definition of special power) seems to us to be contrary to principle. It has the consequence that if a power is exercisable by one person throughout his or her life so as to be able to transfer to himself or herself the property subject to the power, and is also exercisable by will, but by will only in favour of a limited class not including the person's own personal representatives, it will be treated by Clause 11(6) as a special power. It is contrary to principle that such a power should be a special power when a power exercisable in the person's own favour during his life, but not exercisable by will at all, would not be a special power. We suggest that the definition in section 7 of the 1964 Act, which avoids this anomaly, should be carried forward as it stands.

3. Accumulations—Policy Aspects

3.1 Whether the new freedom to accumulate should be available in relation to exercises of special powers of appointment where the powers arise under pre-Act instruments

3.1.1 We note that Mr Edward Nugee QC has questioned whether the new unrestricted law of accumulation should apply to exercises of special powers of appointment after the Bill becomes law, where the power was created before the Bill becomes law. He provides an example of this enabling trustees to deprive someone of income that he would be entitled to under the law as it now stands before the Bill passes into law.

3.1.2 Our opinion on this is that there is a theoretical argument here, but that in practice the kind of situation where the change in the law would enable someone to be deprived of income which he would otherwise be entitled to receive is an unusual one. Usually a discretionary trust has a wide enough class of objects for it never to occur that there is only one living beneficiary to whom income must be paid. It is usually the case that where someone is receiving the income for the time being under a discretionary trust it is being received at the discretion of the trustees, and that even without power to go on accumulating the income the person receiving that income could be deprived of it at any point by exercise of the trustees' powers. In other words, in most cases where the trustees have run out of power to accumulate because of the limits now imposed by law on power to accumulate, but where, on the removal of the restrictions imposed by law, they could start accumulating income, it is very unlikely that there would be vested and indefeasible rights to the income which could not have been overridden before the Bill becomes law by a further exercise of the trustees' powers.

3.1.3 In addition, there are in our view sound practical reasons favouring retention of the Bill as it is now structured. In the case of settlements with wide enough powers to be able to take advantage of the abolition of the restrictions on accumulation, but where the permitted periods of accumulation under the present law have expired or are not available, it could assist the trustees in the efficient and beneficial administration of trusts to be able to accumulate income. For example, the changes made to the structure of inheritance tax on settled property by the Finance Act 2006 mean that more and more settlements will have to find cash to pay the "periodic charges" to inheritance tax which will arise every 10 years. Many settlements lack capital cash with which to pay this tax, and being able to accumulate income with which to pay it will be a great advantage in trust administration. Another example is that many settlements contain land and buildings where it would be advantageous to use income to carry out improvements. This is often done in practice without power to accumulate, but strictly speaking it is an accumulation of income.

3.2 *Whether the restrictions on accumulation should be retained for trusts (as opposed to powers) to accumulate*

Lord Goodhart in the second reading debate expressed concern that a new Peter Thellusson might arise who directed the income of a fund to be accumulated for 125 years. He suggested that the abolition of the restrictions on accumulation should only apply to powers to accumulate as opposed to trusts to accumulate. We favour total abolition as provided in the Bill as it now stands for two reasons:

(i) If Lord Goodhart's suggestion were to be adopted, there would be a technical problem about defining what would and would not be within the scope of the abolition of the restrictions. It is not unusual for trustees to have a power to apply income at their discretion in favour of one or more beneficiaries and then a trust to accumulate any income they do not so distribute (the provisions concerning income during a minority in section 31 of the Trustee Act 1925 are of this type). Such an arrangement is as a practical matter indistinguishable from a simple power to accumulate, and should be treated in the same way in relation to restrictions, or the lack of restrictions, on accumulation. However, defining matters so that this kind of case is derestricted, but an obligation to accumulate for a fixed period without any power to apply the income is not derestricted, would be difficult.

(ii) The Law Commission did go into the question of whether there was a significant adverse risk of people making Peter Thellusson type dispositions if the restrictions on accumulation were abolished. They found that the English-type restrictions on accumulations were unusual in other common law jurisdictions where trusts are accepted and permitted, and that no significant problem had arisen in them (see paras 10.2, 10.13, and 10.14 of the Report). It is worth noting that neither part of Ireland has ever had restrictions on accumulation, apart from the rather specialised restrictions on accumulation to purchase land now (in the case of England) in Law of Property Act 1925 section 166, and there does not seem to be any evidence of widespread Peter Thellussonism there.

4. Accumulations—Technical and drafting Aspects

4.1 *Ambiguity in references to the commencement of the Act, and Republication of wills*

The points made in paras 2.3 and 2.4 above apply also in relation to the abolition of the restrictions on accumulations (see Clauses 13 and 15(1) of the Bill).

Memorandum by Robert Ham QC

1. I should like to make some comments on this Bill, and Lord Justice Etherton has suggested that I should send them to you. I know that the time for evidence has expired, but I hope that the Committee will nevertheless be prepared to consider them, particularly as they relate to a possible change to the Bill as presented to Parliament, and I should be grateful if you could pass this letter on to the Committee.

2. I am a Chancery silk, most of whose work involves trusts in one form or another. I have been in practice for more than 30 years. I am a member of the UK Technical Committee of STEP and the Committee of the Chancery Bar Association, though I have not had any great input into the views that those Committees have expressed on the Bill.

3. I have read the evidence of Baroness Deech, James Kessler, QC, Christopher McCall, QC, Lord Millett and Edward Nugee, QC. The particular question on which I wish to comment is whether it should be possible for existing trusts to escape from the restrictions on the accumulation of income imposed by the present law by means of the exercise of a special power of appointment or other special power (eg the statutory power of advancement) made after the Act comes into force. I am strongly in favour of this being possible, as provided in the Bill.

4. The nature of a special power is not in doubt. As Lord Romer explained in *Muir v Muir* [1943] AC the holder of such a power has no interest in the property. He has merely been given the power of saying on behalf of the settlor which of the objects of the power shall take the property under the settlement and in what proportions. *"It is"* he said *"as though the settlor had left a blank in the settlement which [the appointor] fills up for him if and when the power of appointment is exercised"*.

5. The statutory restrictions on accumulations are a limitation on "freedom of trust". Assuming that Parliament accepts that there is no continuing justification for that limitation and decides to abolish the restrictions on accumulations in England, I would suggest that there is no good reason why they should continue to apply where the settlor has conferred power to change the trusts. Freedom of trust should prevail even though it means that income may be diverted away from the person ("A") to whom it would otherwise have been payable. Since the interest of A is *ex hypothesi* defeasible by an exercise of the special power relatively little weight should in my view be attached to A's expectation.

6. Indeed, even as the law stands A's income interest can be taken away and the income accumulated if there is another beneficiary under 18 (B) in existence. This can be achieved by means of a revocable appointment to B, which is revoked shortly before B attains full age. On the basis of B's interest, income can then be accumulated under the statutory provisions for maintenance and accumulation in section 31 of the Trustee Act 1925, which is outside the statutory restrictions on accumulation. This device has frequently been used in practice. But its availability depends on whether or not there happens to be a beneficiary under 18. It may mean that the youngest child gets the right to income at 18 while his or her elder siblings have had to wait until 21 or 25.

7. I would suggest that there should be no need for such a device after the law is reformed.

8. There is a precedent for a statute altering how income is dealt with where an appointment is made under a pre-existing settlement in the case of the statutory power of maintenance in section 31 of the Trustee Act 1925: see *Re Dickinson's Settlement* [1939] Ch 27. In that case, Crossman J held that the power was exercisable in favour of contingent beneficiaries under a post-1925 appointment in whose favour there was no power of maintenance under the prior law.

9. The point is one of real practical importance. There are often cases where it is desirable to be able to accumulate after 18. Parental concerns about their children taking income at 18 are sometimes exaggerated, but there are many cases where it is not in the best interests of a young person to come into a large income at that age. Where the amounts at stake warrant it, it may be possible to deal with the point by an application under the Variation of Trusts Act 1958. But that is an expensive remedy that will not be available in many cases.

10. In my experience, this is a common problem. Indeed, I would go so far as to say that this may be the biggest practical problem under the present law. It would be very disappointing if the Bill were amended so as to make the outmoded restrictions on accumulation under the present law continue to apply to appointments after the Act comes into effect.

11. I have shown this letter in draft to a number of other practitioners in this field at the bar and Francis Barlow, QC, Judith Bryant, Michael Furness, QC, Brian Green, QC, and William Massey, QC, have all asked me to say that they agree with the views expressed above.

26 June 2009

Memorandum by James Kessler QC

1. I am a practitioner at the Revenue Bar with a particular interest in trusts. I am the author of Drafting Trusts and Will Trusts (9th edition 2008) and a founder member of the Society of Trusts and Estate Practitioners ("STEP"). I submit this statement to the House of Lords Special Public Bill Committee on the Perpetuities and Accumulations Bill, at the invitation of the Clerk to the Committee, on my own behalf and also on behalf of STEP.

General Comments

2. I am delighted that the Perpetuities and Accumulations Bill is at last on its way to being enacted, after the long delay which followed the Law Commission report on the subject in 1998.

3. The bill should be uncontroversial and attract a broad consensus of support.

4. I would like to address some points which were made in debate in the House of Lords 2nd Reading Committee and in written submissions to the Committee, but these points should be seen in the context of that support. In a matter of this kind, issues are bound to arise which could be resolved one way or another with no single answer obviously right. The points below are in that category. Whichever way they are resolved (whether adopting the solution of the Bill or some other solution) the Bill will represent a significant improvement and simplification of the law. The speakers in the debate who raised the specific points discussed below did so in the context of general support for the Bill.

Restriction on Accumulation by Charitable Trust

5. Clause 14 of the Bill restricts accumulation by a charitable trust to a period of 21 years (subject to a power for the charity commission or the court to extend that period.)

6. In the debate on 28 April 2009, Lord Hodgson and Lord Kingsland expressed the view that a longer period might be appropriate (specifically, the longer of the lifetime of the settlor and 21 years).[3]

[3] I would reject as unsatisfactory an alternative approach allowing accumulation either during the lifetime of the settlor or 21 years, but not the longer of the two periods.

7. I have some sympathy with the view that a 21 year restriction on accumulation by charitable trusts is unduly restrictive. In preparing STEP's submissions on the Law Commission original consultation paper in 1993 I argued for a similar but wider view, that charities should at all times have a power to accumulate income (as would a charitable company or a charitable incorporated organisation under the Charities Act 2006.)

8. However I would say that the Bill's more cautious approach, which restricts charitable trusts to a 21 year accumulation period, will not in my view cause significant difficulties. It effectively preserves the current position (with the improvement that the Charity Commission may authorise further accumulation). The main reason that no problem has arisen is that it is accepted that charities may retain income may if they need to, without formally accumulating it.[4]

Whether a 125 Perpetuity Period is too Long

9. In the debate on 28 April 2009, Lord Goodhart suggested that the proposed 125 perpetuity period is too long. I consider that the Bill sets out a satisfactory length of period and anything less would be most unsatisfactory, for the following reasons.

10. Under the present law one can obtain a period of:

(i) lives in being of a class of individuals; and

(ii) 21 years, from the death of the last to die in that class.

This period is more complex and less certain, but it amounts to nearly 125 years, because if one selects a large class including young individuals, on the balance of probabilities one of that class will live to about 100.

11. If a shorter period (say, 80 or 100 years) was required, testators could not use a simple and common and reasonable form of will, such as a will to my children for their lives with remainder to their widows/widowers for their lives, with remainder to such of their own children as survive the child or as the child shall appoint; because the testator's child might well survive more than 80 years or even 100 years from the death of the testator. 100 years might not be enough, particularly with increasing life expectancies, but 125 years is sufficient.

12. Lastly, if a shorter period were required, testators and settlors would use a foreign proper law to obtain the benefit of a longer period.[5]

13. I have some sympathy with the view of Trevor Aldridge QC that there should be no perpetuity rule whatsoever, but concede that this view would not command general and widespread support.

Whether the Abolition of the Statutory Restriction on Accumulation is Wise

14. In the debate on 28 April 2009, Lord Goodhart suggested that there should be a restriction on a trust (ie a duty) to accumulate income while permitting powers to accumulate at any time during the trust period. This is to prevent a testator making a will like that of Peter Thelluson, directing accumulation for an entire perpetuity period of 125 years or so.

15. I support the less restrictive approach of the Bill for various reasons.

16. Firstly, I do not consider that there is much if any of a problem in practice. In practice testators do not direct accumulation even for 21 years which would be permitted under current English law. This restriction would be unnecessary because it would prohibit a behaviour which rarely if ever happens.

17. Secondly, the rule would complicate the law considerably and (if my first point is right) unnecessarily. The cure is worse than the disease.

18. Thirdly if there were a problem this reform would not solve it because the exceptional settlor or testator (if there was one) who wanted to emulate Peter Thelluson and accumulate income for a century could do so by using a foreign law. There are few trust law jurisdictions left in the world which impose any statutory restriction on accumulation. Half the common law world has never had the restriction (eg the Republic of Ireland, and Northern Ireland) and the other half have gradually repealed it (eg all the states of Australia). The absence of the statutory restriction on accumulation has evidently not given rise to difficulties in practice.

[4] Explanatory Notes para 14.

[5] I respectfully agree with the similar arguments put forward in the written evidence to the committee from Edward Nugee QC (section 2) from Charles Harpum (para 17) and from Christopher McCall QC (para 6).

19. I am personally aware of two occasions in the last couple of years where trusts (reaching their 21st anniversary) have had to apply to the court for a variation under the Variation of Trusts Act, to permit them to continue to accumulate income. The costs, as the impact assessment notes, must have been at least £50,000 on each occasion. Very few trust jurisdictions now have a statutory restriction on accumulation. Had these two trusts been governed by a proper law other than English law, (for instance, had the law of Northern Ireland applied) that would not have been necessary. I strongly support the approach of the Bill which would allow most existing trusts to solve the problem if it arises by appropriate exercise of a power of appointment.

8 June 2009

Supplementary memorandum by James Kessler QC

1. I submit this additional statement to the House of Lords Special Public Bill Committee on the Perpetuities and Accumulations Bill, at the invitation of the Clerk to the Committee, on my own behalf and also on behalf of the Society of Trust and Estate Practitioners ("STEP").

The issue

2. This statement concerns an aspect of the transitional rules for the PAA Bill which is narrow but important.

3. We are concerned with trusts made in exercise of a power of appointment in the following circumstances:

(1) A trust was made before the commencement of the PAA Bill; I refer to this as "a pre-commencement day trust".

(2) The pre-commencement day trust contains a power of appointment which is exercised after the commencement day. I refer to this as a "Transitional Appointment".

(3) The transitional appointment creates new trusts.

4. The PAA bill abolishes the statutory restriction on accumulations. There are various ways to deal with transitional appointments, and different views have been expressed.

(1) The first view is that transitional appointments should be governed by the *new* rules on accumulations (that is, they will not be subject to the existing statutory restriction on accumulation). This is the view taken by the Law Commission, following its consultation paper in which views on this specific issue were sought.[6] It is therefore the view taken in the published PAA bill. I refer to it as "the Law Commission view". This is the view of Robert Ham QC who mentions in his letter to the Clerk of this Committee dated 26 June 2009 that he has discussed the matter with Francis Barlow, QC, Judith Bryant, Michael Furness, QC, Brian Green, QC, and William Massey, QC who all agree. It is the unanimous view of the technical committee of STEP. It is the view of Christopher McCall QC.[7] I believe that it is the generally held view in the Chancery Bar. I strongly support this view, for reasons that I will elaborate in this statement.

(2) The opposite view is that transitional appointments should be governed by the existing restriction on accumulation. This is the view of Edward Nugee QC. Lord Bach has proposed an amendment to clause 15 of the Bill (amendment no.12 in the marshalled list of amendments at 26 June 2009) which would give effect to this view.

(3) A compromise view (which some trust law jurisdictions have adopted, and which I return to below) is that transitional appointments should be governed by the new rules but with protection for vested interests.

5. A similar issue arises for wills made before the commencement of the PAA bill and coming into effect (on the death of the testator) after the commencement ("transitional wills").

Arguments in favour of the Law Commission view

6. The starting point is to note that:

(1) The proposed abolition of the statutory restriction on accumulation is a highly beneficial, deregulatory change. Indeed, from the point of view of trusts in practice, it is the most important of the various reforms in the PAA Bill.

[6] Law Commission Consultation Paper no. 133 (the Rules against Perpetuities and Excessive Accumulations) para 6.2.
[7] Note dated 18 June 2009 (qualifying the view on this topic expressed previously.)

(2) The current statutory restriction on accumulation causes serious complications and problems in practice:

(a) It prevents trustees using their power of appointment to benefit beneficiaries in the most sensible way.

(b) It is a burden on trustees and their advisors to understand the very complex drafting which the law presently requires (which is reflected in costs for the beneficiaries).

(c) Lawyers who are not trust specialists do not know the rules. They are not taught in Universities in any detail at present, as far as I am aware; and they certainly will not be taught (except mentioned in passing) after the PAA Bill becomes an Act, since they will be obsolescent. Such is the pressure on the syllabus. In practice the rules will increasingly be disregarded (as indeed already happens at present not infrequently) except in rare cases where the trust is big enough or cautious enough to obtain what will become increasingly esoteric and specialist advice.

7. I do not think it is necessary to elaborate these points. The case for abolition of the statutory restriction on accumulation is set out in the Law Commission report and has been generally accepted. It is sufficient to note that the statutory restriction on accumulations has been totally abolished (that is, wholly abolished rather than just being replaced by more lenient statutory rules)[8] in almost every trust law jurisdiction which has ever had the restriction.[9]

8. If the Bill is amended as proposed in Lord Bach's amendment, to retain the existing restriction on accumulations for transitional appointments, then trust practitioners will need to know the old accumulation rules and apply them in drafting and understanding deeds of appointment for the next 60 years or so.[10] The current law will apply not only to existing trusts but also to transitional wills (made before the commencement day where the testator dies after the commencement day); see clause 15(1). Such wills may come into effect many years in the future and create trusts taking effect for more than one generation. So it will be 70 years or more before the full advantage of the sensible, deregulatory and simplification effects of the PAA bill would be achieved.

9. If I may for a moment be anecdotal: A couple of years ago I advised a discretionary trust which was coming up to its 21 year anniversary, so the trustees were faced with losing their power of accumulation. The trustees wished to accumulate surplus income for future born beneficiaries. The adult beneficiaries consented to that. The trustees had to apply to the Court under the Variation of Trusts Act 1958 to vary the trusts so as to allow another 21 years accumulation. A further application might be necessary in another 21 years. Such applications are routinely made and routinely succeed. Nevertheless, the costs were considerable—it must have been at least £50,000—and the exercise did no-one any good at all. We all lamented at the time that the PAA bill had not yet been enacted, as it would (in its then form) have made the Court application unnecessary. It would be more than a pity (except perhaps for the lawyers concerned) if trust money has to continue to be wasted on applications of this kind, in relation to any pre-commencement day trusts and transitional wills.

10. I do not consider that the Law Commission view is likely to defeat the purposes of settlors or testators. It is much more likely to *give effect* to the purpose of the settlor, which is that the person who exercises the power of appointment should be able to benefit the beneficiaries in the most appropriate way – something to which the current law is an obstacle.

Foreign Precedents of Accumulation Reform

11. The problem discussed in this Statement is not a new one. It has arisen in every jurisdiction when the statutory restriction on accumulation was abolished. I have reviewed the relevant statutory law so far as I have been able to in the short time available. In almost no case has the transitional rule for transitional appointment been quite as restrictive as that proposed in Lord Bach's amendment to the PAA bill[11] and in no case has that approach applied to transitional wills. There are two broad approaches.

[8] There is no jurisdiction where the statutory restriction on accumulation has have been replaced with more lenient rules (as opposed to being totally abolished.)

[9] The Law Commission report provides a long list of jurisdictions which inherited the statutory restriction on accumulations and have abolished it (Law Com 251, 1998, p.123 fn 2.) Since that was written, the restrictions have also been abolished in South Australia (the last of the Australian states to repeal the rule) and in Singapore (2004). Many other jurisdictions never had the statutory restrictions (eg the Republic of Ireland and Northern Ireland) and none of those have introduced and retained a statutory restriction on accumulations.

[10] It could of course be much longer, but in practice it is not usual for trusts to last more than about 60 years, they usually come to an end or are wound up well within that time.

[11] An exception being the state of Victoria: see s.3 Perpetuities & Accumulations Act 1968.

Jurisdictions adopting the Law Commission view

12. In the majority of jurisdictions I have reviewed, the Law Commission's approach has been adopted, allowing pre-commencement trusts the fullest benefit of the beneficial and deregulatory measure of abolition of the statutory rule against accumulations. New Zealand set the precedent for this in its Perpetuities Act 1964. This applies the new law to transitional appointments.[12] New South Wales followed this in its Perpetuities Act 1984.[13] Similarly Tasmania in its Perpetuities and Accumulations Act 1992.[14] Similarly in Delaware.[15]

Jurisdictions adopting an alternative approach

13. There are jurisdictions which make provision to protect vested interests, but they do not deal with the matter in the wide way proposed by Lord Bach's amendment. Thus Alberta for instance provides protection targeted only at vested interests in its Perpetuities Act 2000.[16] The British Columbia Perpetuity Act 1996 is similar.[17] Where no vested interest is affected, the transitional appointment is governed by the new law and free from the statutory restriction on accumulation.

14. There is some sense in this but note that the issue of transitional appointments does not concern beneficiaries of trusts who have a vested *and indefeasible* interest. We are concerned with trusts where beneficiaries only have interests which are subject to a power of appointment. The extension of the power of appointment to allow further accumulation of income will not in principle materially affect the position of beneficiaries under such trusts or wills.

15. I favour the Law Commission's approach, because I think one could say with certainty that such cases if they exist at all will be a drop in the ocean compared with the vast numbers of beneficiaries of pre-commencement trusts who will benefit very substantially from a reform of the kind proposed in the draft Bill and that looking at the matter as a whole, the solution proposed in the Bill is the right one.

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[12] Section 4 Perpetuities Act 1964 provides:
(1) Except where otherwise expressly provided in this Act, every provision of this Act,—
(a) In so far as it applies to wills, shall apply only to the wills of testators who die after the commencement of this Act; and
(b) In so far as it applies to instruments other than wills, shall apply only to instruments executed after the commencement of this Act.
(2) Where a provision of this Act so applies to a will or other instrument that exercises a power of appointment, that provision shall apply in relation to that exercise, whether or not it applies to the will or other instrument creating the power.
(3) All wills of testators who have died before the commencement of this Act, and all other instruments executed before the commencement of this Act, shall, except where otherwise expressly provided in this Act, be governed by the enactments and rules of law which would have applied to them if this Act had not been passed.

[13] Section 4(2) Perpetuities Act 1984 provides:
(2) This Act applies in relation to a settlement exercising a power of appointment, whether general or special, and taking effect on or after the appointed day, whether or not it applies in relation to the settlement creating the power of appointment.

[14] Section 4 Perpetuities and Accumulations Act 1992 provides:
(1) Except as provided in this Act—
(a) this Act, so far as it applies to wills, applies only to wills of testators who die after the commencement of this Act; and
(b) this Act, so far as it applies to instruments other than wills, applies only to instruments executed after the commencement of this Act.
(2) Where a provision of this Act applies to a will or other instrument by which a power of appointment is exercised, that provision so applies in relation to the exercise of that power, whether or not it applies to the will or other instrument creating the power.

[15] 10 Art. 501 of chapter 25 of the Delaware code (Property) provides:
§501. Powers of appointment; effect of rule against perpetuities.
Every estate or interest in property, real or personal, created through the exercise, by will, deed or other instrument, of a power of appointment, irrespective of:
(1) Whether such power is limited or unlimited as to appointees;
(2) The manner in which such power was created or may be exercised;
(3) Whether such power was created before or after the passage of this section,
shall, for the purpose of any rule of law against perpetuities, remoteness in vesting, restraint upon the power of alienation or accumulations now in effect or hereafter enacted be deemed to have been created at the time of the exercise and not at the time of the creation of such power of appointment. No such estate or interest shall be void on account of any such rule unless the estate or interest would have been void had it been created at the date of the exercise of such power of appointment otherwise than through the exercise of a power of appointment.

[16] Section 24(4) provides:
This section applies to instruments taking effect before or after July 1, 1973 except when the period of accumulation permitted by the Accumulations Act, 1800 has expired before July 1, 1973 and as a result a beneficiary has acquired a vested right to receive income from property.

[17] Section 25 provides:
25 (1) If property is settled or disposed of in such manner that all or part of the income of it may or must be accumulated, the power or direction to accumulate that income is valid if the disposition of the accumulated income is or may be valid, but not otherwise.
…
(5) Nothing in this section operates to divest or otherwise affect any interest which had become vested as a result of the expiration before January 1, 1979 of a period of accumulation previously permitted or in force.

16. If this compromise approach is nevertheless adopted, the following (drafted by Robert Ham QC) would be suitable:

> Where the period of accumulation permitted by section 164 of the Law of Property Act 1925 has expired before [commencement day] and a person has as a result become entitled to a vested right to receive income, section 13 shall not operate to enable that income to be accumulated so long as that right continues.

Comparable Precedents of UK Trust Reform

17. The Law of Property Act 1925 relaxed the statutory rule against accumulations by adding s.165 LPA 1925, which allowed accumulation to be made under s. 31 Trustee Act 1925. This new rule applied to transitional appointments (ie appointments made after the 1925 legislation took effect even though the trust conferring the power of appointment was made before the legislation took effect.)

18. The Family Law Reform Act 1969 reduced the age of majority from 21 to 18. This had a knock-on effect of reducing some of the permitted accumulation periods. This new rule applied to transitional appointments (ie appointments made after the 1969 legislation took effect even though the trust conferring the power of appointment was made before the legislation took effect.)

Transitional Wills

19. The same question arises where a will is made before the commencement day but takes effect (on the death of the testator) after the commencement day (a transitional will). Should the will be governed by the new rules or the old rules? I consider that they should clearly be governed by the new rules, and am not aware of any other jurisdictions which have legislated otherwise. But that is the effect of the proposed amendment. The result will be that:

(1) Well advised testators would have to make new wills once the PAA comes into effect, in order to take advantage of the new rules.

(2) Those considering making new wills would wish (if they safely could) to wait until the new law takes effect, in order not to have to make another will after it takes effect.

That would be highly regrettable.

Comparison of Transitional Rules for Perpetuities and for Accumulations

20. The position as the Bill stands is that:

(1) A transitional appointment will be governed by the old perpetuity period applicable to the pre-commencement day trust: clause 5(2) and 6(2).

(2) The transitional appointment will be governed by the new rules on accumulations (that is, there will be no statutory restrictions on accumulation): See cl 15(5).

21. Under an earlier version of the Bill, a transitional appointment would have been governed by the new rule against perpetuities. This has been changed in the current draft to the position as set out above.

22. My own preferred solution would have been to apply to transitional appointments the new (and more beneficial) rule against perpetuities, and not to retain the old rules. However the current law relating to perpetuities does not cause the practical problems of the kind which arise for accumulations, so I do not think the change is of very great importance.

Conclusion

23. The arguments of the best way to arrange the transitional aspects of a technical trust law reform are themselves technical and the Law Commission was well placed to assess them. They reached the right conclusion, with widespread (though not universal) support, and the Bill should not be amended on this point.

29 June 2009

Memorandum by Mr Christopher McCall QC

1. I am a practising member of the Chancery Bar specializing in trust law. I am a member of the Committee of the Association of Contentious Trust and Probate Specialists and the Executive Committee of the Trust Law Committee which latter body has a specific remit by way of assisting the Law Commission in considering projects and making recommendations for the reform of trust law. I have prepared this evidence with the assistance of colleagues on both these Committees which have expressly authorized me to put in evidence to

Your Lordships' House on their behalf. It is, I believe, their common concern that the smooth running of the new procedure for non-contentious law reform bills is a matter of enormous importance in terms of its potential impact on the scope to reform technical areas of the law, and thus in particular trust law, and I believe both very much welcome this particular Bill.

2. So far as concerns my background I was called to the Bar in 1966 and spent my pupillage with two trust specialists at 7 New Square Lincoln's Inn, John Bradburn and John Vinelott (later Mr Justice Vinelott, who then in retirement held office for many years as chairman of the Trust Law Committee). I practised at 7 New Square from 1967 till the chambers (of which I was then Head) amalgamated with another set in 1993; since then I have been a member of what is now known as Maitland Chambers of 7 Stone Buildings, Lincoln's Inn. I took silk in 1987. Over the years my practice has been almost entirely in the field of private and public trusts and the tax exposure of such trusts; I was from 1977 to 1987 Second Junior Counsel to the Inland Revenue in chancery matters and from 1981 to 1987 Junior Counsel to the Attorney General in charity matters.

3. For my part I regard the Perpetuities and Accumulations Bill as potentially of considerable technical importance, and as such (like any technical measure) open to different views as to whether the reform it achieves is precisely the right reform or not, and if not whether it goes too far or not far enough. I regard it as the right reform and non-controversial in the sense that what it does is merely to simplify the law without making great changes in its practical effects.

4. So analyzed I see the Bill as having two principal strands.

— First is the introduction of a specified term of years as a perpetuity period for all trusts, that term of years being one which is on present day expectations of life the best available approximation to the existing periods, but which is obviously a much easier period to operate than those for which the law presently provides; in so doing the Bill thus as I see it seeks to preserve the essence but not the technicality of the existing law as to remoteness of vesting in a way which reflects an existing pattern of law which has not so far as I am aware in any sense been discredited in its practical effects.

— Second is the removal of restrictions on accumulation which could in most cases as the law now stands by careful but somewhat technical drafting be circumvented and have to my knowledge in many cases been so circumvented without any apparent mischief emerging; thus again in so doing the Bill seeks that the law be simplified without a change in its basic practical effect.

5. So far as the first of these two strands is concerned I would regard it as potentially highly controversial to propose that the perpetuity period be shortened (at the one extreme) or that the law should do away with the requirement that there be a perpetuity period at all (at the other); the one would be a serious attack on the trust as a viable property holding structure within English law in circumstances where I believe that it is of very great social value, and where other systems of law could be used by those so minded to achieve their ambitions if English law did not assist them; the other would be a step into an unknown which might open the way to abuse. The present proposals are thus to my mind a case of taking an essentially non-controversial but highly advantageous step by way of a middle course between controversial extremes, and in so doing upholding the advantageous essence and disposing of some of the most important disadvantageous technicalities of the status quo.

6. I understand that it has been suggested that it is inappropriate to think in terms of trusts lasting more than 120 years and that one would not expect a trust set up in 1885 still to be running now. But I am not entirely sure that it is so very surprising to find trusts lasting this long even under the present law; it would be no more than the effect of applying to modern circumstances and modern life expectancies the old principle that whatever the objections to indefinite and perpetual trusts there is no objection to a trust which spans a normal lifespan and the early years of the youngest generation living when that lifespan comes to an end—for that seems to be the thinking which is at the heart of the existing law. I cannot see what is wrong with such thinking; a shorter period of trusts is inconsistent with the old concept of the trust as combing a life interest for one beneficiary and a remainder to another designed to take effect when he is old enough to take advantage of it, and I therefore cannot see what is wrong with introducing a term of years which is the best equivalent to the more complex formulae which are called for under the present law.

7. The reason why I think the proposed period is the best equivalent of the existing perpetuity period is this. It is of course now common for individuals to live to their nineties; it may soon (but also within the lifespan of existing lives in being) be expected to become common for people to live till they are over 100. So I regard a period of 125 years as a good and indeed the best approximation to the duration of what the law now lays down by way of a period measured by reference to the period of 21 years after the death of the last survivor of a class of lives in being (since that class can normally be expected to include persons in their infancy in the case of any trust where thought has been given to the operation of the perpetuity rules).

8. To see the social importance of making sure that a new perpetuity period is not shorter than this it is enough to take a simple and not at all far fetched example. Any new period needs to reflect the fact that it is by no means improbable that trusts will have to be set up (for example in respect of compensation awards made or inheritances set aside) for the support of incapacitated or disabled persons who are at the time in question young minors; they can be expected to have a long expectation of life during which they will need the support of their trustees and after their deaths it will be necessary to have a period in which to wind up the trusts and make suitable arrangements for the distribution of any surplus to their heirs, who may themselves be under age. So a period of well over 100 years is needed. The Committee will be aware that the social importance of such trusts is reflected in the fact that the Inheritance Tax Act 1984 makes specific provision for concessionary tax treatment of such trusts.

9. So far as concerns the second of the two critical strands of the Bill to which I refer in paragraph 4 above namely the removal of restrictions on accumulation of income, many trusts have over recent years been administered on the basis that it is effectively possible to achieve this objective by a process of successive revocable appointments to minors (or more unusually by making the trust subject to the laws of Northern Ireland, which system of law has never had a limit on accumulation of income). I have never heard it suggested that any perceptible social mischief has followed from arrangements to this effect and so far as I am aware they have never been challenged. I have never come across a trust in which the desirability of making accumulations has been allowed to dominate over the interests of the beneficiaries and one might think that few trustees would wish to take the risk of holding office in a trust in which they were asked so to do. But at the same time to have scope to accumulate income over a long period has become increasingly necessary as a result of the move to tax capital on a periodic basis; many trusts are set up for the dominant purpose of preserving the independence and integrity of a business venture (the best known example is of course the so-called Scott Trust which protects the independence of the Guardian and Observer newspapers, but in the experience of practitioners it is a commonplace to find that entrepreneurs regard the trust as a preeminent vehicle with which to achieve that long term stability for their enterprises which economic well-being requires, and regard the use of the trust for that purpose as a very good way of ensuring the future well-being and stability of those for whom they wish to make provision), and if accumulation is not permissible through the length of a trust it is likely to become extremely difficult to maintain trusts achieving this sort of long term economic protection because of the need to raise capital to pay tax every few years.

10. The trust is in my experience and despite the perception of both politicians and what is usually an uninformed public opinion increasingly emerging not as a tax avoidance device but as a structure through which it is sought to make a contribution to long term economic good and family and business continuity; and it would be a tragedy if the tightening of tax law and the tightening of rules against accumulation of income were together allowed to operate so as to militate against this sort of use of trusts, one which I submit to reveal the trust as the sort of property-owning structure which wise law-makers would encourage and not try to destroy.

11. I should add that I understand that it has been suggested that it might be preferable to retain the barrier against trusts requiring open ended accumulation of income and simply to permit open-ended powers of accumulation. To a technician this alternative reform of the law would doubtless in theory be entirely acceptable but it is not clear what advantage it would secure since it would make no difference in terms of the scope to achieve accumulations through the life of a trust; it would however be technically unfortunate in the sense that it would or might raise new areas in which it would be necessary to pursue the sometimes highly refined arguments which arise where distinctions have to be drawn between the treatment of trusts and powers. It is notorious amongst members of the Chancery Bar that for a time in the 1960s and 1970s trust law became (in the context of the supposed need for certainty of a beneficiary class) bogged down in a series of cases in which it was argued backwards and forwards at all levels of the Courts whether provisions created trusts or powers or something in between the two extremes, and although it may be said with truth that in the case of a provision for the accumulation of income it should not normally be hard to work out whether one has a trust or a power it is only necessary to imagine a trust in which the trustees are required "either to distribute income amongst the Beneficiaries or to accumulate it" to see the scope for argument whether one has a trust or a power. For myself I cannot help sympathizing with those tempted to say that such distinctions serve no practical purpose and tend only to benefit members of the Chancery Bar fortunate enough to be called upon to argue what are in truth, if academically fascinating, practically sterile points of law on which there is a mass of learning and endless scope for the sort of debate which even those judges who were used to having to deal with this type of issues seem to have felt (with some impatience) a little reminiscent of debating how many angels can stand on the head of a pin.

12. However if the aim of limiting accumulation in this way is to make sure that beneficiaries can say that their needs should never be subordinated to a blanket commitment to accumulate then though I have not come across trusts designed to do this I would have no objection to a ban on perpetual trusts to accumulate without

power to use income; but I think that that is the most that could be required—it is important to bear in mind that statute has long said that where for example a minor is prospectively entitled it is right to have a trust to accumulate what the minor does not need, and not merely a power to accumulate.

13. The solution then would seem to be for the Bill to be modified so that powers and trusts to accumulate would in each case be valid beyond 21 years only:

(i) if coupled with trusts or powers requiring or permitting the distribution of income to one or more persons in existence;

(ii) the trustees were under a fiduciary duty to consider the making of such distributions; and

(iii) some person or persons were in existence and aware of their right to hold the trustees to account for the discharge of their duties.

This would be designed to use of open-ended "black hole" trusts (which are trusts which I regard as thoroughly unacceptable) namely trusts which appear to be intended, normally for tax purposes, to make property effectively ownerless for the time being, on the footing that there is a future power to nominate beneficiaries and a power to appoint in their favour, a current provision requiring income to be accumulated, and an ultimate trust for a charity, say the Red Cross, which conveniently is left unaware of its interest so that no-one is left who can supervise the trust. But if those trusts are considered to be objectionable it must be borne in mind that the fact that a trust to accumulate can already be created for 21 years without further restriction does mean that there is a need for a much more extensive change in the law before they cease to have some scope to exist under English law.

14. I ask the Committee to bear in mind that if shorter perpetuity periods or more stringent restrictions on the accumulation of income are made part of English law then the consequence can be expected to be that the larger and more international type of trust will be established outside the ambit of English trust law and under systems of law which offer a more accommodating regime. I for my part would think it highly undesirable to allow English trust law to gain the reputation of now being unfriendly to those who see the value of what is regarded by many lawyers throughout the common law world as one of the greatest creations of the English law. Certainly this is likely at the very least to lead to the loss of international work to foreign lawyers on a scale which can only weaken the legal profession in this jurisdiction; and I believe that it is not too much to say that this could lead to a substantial loss of potential export business.

15. For all these reasons my basic proposition is that the present Bill is well contrived to simplify and rationalize what are as matters stand notoriously areas of difficulty in trust law. If the new procedure cannot be used to facilitate the passage of a Bill to this end it is in my opinion all too likely that it will prove to be still-born.

16. I can quite see however that at the margins of this Bill there may be areas in which it could be thought open to improvement whether by extension or limitation.

17. Thus I have myself felt some difficulty about its operation on existing trusts. In an earlier draft it seemed to be intended that the reform of the law might allow trustees exercising discretionary powers under existing settlements like powers of appointment or advancement to come within the new law (admittedly only on the basis that the 125 year period should be measured from the date of the original settlement). This was controversial, and an approach which differed from that taken in the past when technical reforms of trust law had been introduced, for example as to the question whether adopted legitimate or illegitimate children could benefit under class gifts to children; normally the thinking had been that it is wrong to intrude on that which has already been laid down by a settlor. But many welcomed it under the impression (which may have been optimistic) that it would enable trustees to do things which they might have wanted to do but could not otherwise have been contemplated

18. However the Bill as presented to Parliament now makes plain that the old approach is sought to be applied, and in the circumstances it is unnecessary to say more about this. Although inevitably as I have said there were some including some members of the Committees I represent who welcomed the more expansive attitude revealed by the Bill as originally drafted for consideration, there were in fact considerable difficulties about that approach, as it might have led to a mismatch between the period of years applicable to appointed trusts and the periods assumed or indeed expressed in the instrument creating the power to govern its use, and there is no doubt that (short of making the new period applicable to all trusts whensoever created and grappling with the need to resolve any resultant conflicts between the terms of existing trust instruments and the new law) the approach revealed in the Bill as it now stands is the form least likely to cause difficulty to those who have to run existing trusts which were set up by settlors who were bound by the old law while enabling new settlors to take advantage of a better system.

19. I should add that I agree with the Law Commission in saying that the difficulty of dealing with existing settlements, such as it is, is no reason whatsoever for not trying to simplify the law for the future. No law reform can ever be introduced if it is felt that it is invalidated by the fact that it cannot apply in the same way to things that are in whole or in part matters of past history as it is intended to apply to things that are purely a matter of the future.

20. It has been questioned whether charitable trusts should be subject to the limit that they can only permit accumulation of income for 21 years, and of course it can be said with perfect truth that there is no magic about this period in the case of a charitable trust which does not have to satisfy the requirements of a rule against remoteness of vesting. However I regard this as a minor objection to the Bill, if indeed it is a valid objection at all. Any trust in which it is shown that the interests of charity have been advanced by allowing a limited period of accumulation could be so varied as to enable accumulation to go on after the initial period under a scheme; I cannot think that any well-intentioned charitable donor would be put off from making a gift which he would otherwise have contemplated for the true benefit of charity by the mere fact that he cannot ask for an openended accumulation since it is obvious that rolling up income postpones the date at which charity benefits and indefinite postponement would simply put in question the settlor's motive in making the gift.

21. I certainly would not recommend one thing which has been suggested for charitable giving namely that accumulation could be permitted during the lifetime of a charitable donor; many charities have more than one donor and the outcome could well be that charities would be overwhelmed by the need to keep an eye on the survival of multiple donors. It seems to me in any event that to permit accumulation during lifetime is even more arbitrary than to allow accumulation only during 21 years; there is no magic about the period of 21 years but it is at least a predictable period whereas the lifetime of the settlor is wholly unpredictable. Those who for valid reasons really wish to have accumulations during their lifetimes even if they live more than 21 years can of course express in their gifts the wish that the trustees seek power to continue the accumulation after the 21 year period has elapsed.

22. Questions have been raised about the need to temper the law to take account of the possibility of posthumous births or births to women who in earlier generations would have been thought past the age of childbearing. These possibilities remain highly unusual and it seems to me that the generality of the law should not be shaped by such exceptional cases. But I agree that in disregarding the possibilities the law might be thought to be out of date. I would have no objection to a provision to the effect that:

— no trust shall be invalidated merely by virtue of such possibilities; and

— no trustee should be in breach of trust nor should any devolution of property be put in question nor shall any Order of the Court be invalidated by the occurrence or possibility of the occurrence of such events after the taking of action not taking account of such possibilities at a time when the trustees had no reason to think that such possibilities were realistic in the case of their own beneficiary class;

and I think that this might well be a sensible approach to adopt. If so it would be important that it be framed in a way which makes sure that trustees do not have to ask of their beneficiaries the sort of questions which could well be regarded as invasions of privacy, and I would therefore urge that there be no requirement on trustees to make inquiries.

23. I understand that doubts have been expressed about clause 12 of the Bill and the attempt to assist existing trusts with scope to use a wait and see facility. I myself cannot see anything wrong with it except that I do not quite understand the logic of saying that 100 years is the right period for this provision when it is accepted that 125 years is the closest approximation to the common law period. I would therefore suggest that it would be more logical that a 125 year period be applied here as in the rest of the Bill.

24. I would in conclusion like to make one final comment. This Bill represents the fruit of extensive consideration on the part of the Law Commission after extensive discussions with practitioners and others. It seems to be a general view that it will do much to assist practitioners and through them those who really matter namely those who set up operate and benefit from the legitimate use of trusts. It thus represents an opportunity to move the law forward and the two Committees whom I represent share the view of the Law Commission that it would be a very valuable contribution to the processes of law reform. The fact that this is an area of law which is ceasing to be a major subject of academic interest might be thought to suggest it does not much matter; on the contrary, it matters greatly to practitioners, though probably rather less to academics whose concern is the theory rather than the practical operation of the law. It has also been the subject of reform of one sort or another in almost all the major trust jurisdictions of the world, beginning with the 1964 Act in this country which opened the door to the idea that things did not always have to be as they had been just because they had a history of several hundred years. There are some trust lawyers, and I myself feel this very strongly, who say that trust law is now at the opening of a third generation, after a first generation of fixed trusts mainly

of land which lasted some 500 years, and a second generation of mainly discretionary trusts but of semi-traditional form which has lasted some seventy five years or so while practitioners have grappled with the problems thrown up by this new type of trust; now the new type of trust is being seen as a vastly advantageous construct, not as I have said for inappropriate tax considerations, as is so often suggested, but for much wider and wholly legitimate reasons relating to the requirements of business endeavours, the interests of families (not least those who grow ever more international in their relationships, and may be subject to several systems of law such that a combined property ownership in one family trust is needed to resolve what might otherwise be very complex and damaging personal conflict), and simply the changing nature of wealth. Practitioners round the world are moving forward into this third generation in a way which could leave English law far behind if we do not take care to keep pace, or as some of us would like to do show the way forward. English law traditionally has looked back, and indeed it is part of its strength. But I think this is a time when the trust practitioner has to look forward and I think this Bill will help greatly in that behalf.

4 June 2009

Supplementary memorandum by Christopher McCall

Since sending in my evidence I have had the chance to consider the evidence lodged by Mr Edward Nugee QC, and would like to echo what he has said about the illogicality—and arguably worse—of allowing appointments in exercise of special powers of appointment under pre-enactment settlements to adopt the unlimited scope to accumulate provided for by the Bill while not allowing them (as Clause 5(2) is in my view correctly formulated so to do) to adopt the new perpetuity period provided for by the Bill. I agree with him wholeheartedly that provision needs to be made to avoid this potential element of retrospectivity in the Bill. I think it could be done by adding in Clause 15(1) at the end the words "or an instrument within section 5(2) of this Act".

8 June 2009

Memorandum by Paul Matthews

1. I have been asked to give evidence in writing concerning the Perpetuities and Accumulations Bill currently before the House of Lords. I am very happy to do so.

Background

2. First of all I set out the relevant aspects of my own background. These comprise both academic and practitioner elements.

3. After taking the LLB degree at University College London and the BCL degree at Oxford University, I began my career as a full-time lecturer in law at University College London. There I ran the undergraduate trust law course, and trust law was my main research interest. I also taught trust and land law part-time at the City University and at St Edmund Hall Oxford. I am currently a part-time professor at King's College London, where I teach trust and property law to undergraduates, in the LLB programme, and also to postgraduates, in the LLM programme. In the latter programme I devised and now teach courses on International and Comparative Trust Law, International and Comparative Property Law, and International and Comparative Inheritance Law, which are, so far as I know, the first of their kind in the world. I also supervise PhD students in trust and property law.

4. I have written and published extensively in the field of trust law, including articles in learned journals and books such as *The Jersey Law of Trusts* (joint author), *Trusts: Migration and Change of Proper Law, Trust and Estate Disputes*, and Underhill and Hayton's *Law of Trusts and Trustees* (joint editor). In 1995 the University of London examined certain of my published work, and on that basis awarded me the degree of Doctor of Laws (LLD). I lecture frequently on trust law to lawyers both here and abroad, and in particular to lawyers from civil law jurisdictions, such as Italy, France and Switzerland. I have recently been appointed as a visiting professor by the newly created Institute of Law in Jersey, with responsibility for the teaching there of trust law.

5. Turning to the matter of legal practice, I originally qualified as a barrister, having been the pupil of Robert Ham QC and Edward Davidson QC (both eminent trust practitioners). I later cross-qualified as a solicitor, and (after having been a partner in another firm) since 1996 have been in practice as a consultant to Withers LLP, where I specialise in contentious and non-contentious work relating to trusts, both domestic and international. Withers LLP is one of the biggest and most experienced English law firms specialising in trust law.

6. I am a solicitor advocate, with higher court rights of audience, sit part-time as a deputy master in the Chancery Division of the High Court, and also hold the (part-time) office of Coroner for the City of London. In addition I am an Academician of the International Academy of Estate and Trust Law, and a member of the Society of Trust and Estate Practitioners, of the Association of Contentious Trust and Probate Specialists, and of the executive committee of the Trust Law Committee, of which I am also the deputy chairman.

Main Position

7. I have had the opportunity to read the written evidence submitted by Trevor Aldridge QC, Dr Charles Harpum, and Christopher McCall QC, and to read the uncorrected transcripts of the evidence given to the Committee by Lord Bach, Lord Justice Etherton, Baroness Deech and Edward Nugee QC. I can I hope save the Committee's time by saying that I agree in substance with everything that Mr McCall has said in his written evidence, both on the new procedure for dealing with Law Commission Bills and on the merits of this particular Bill. It seems to me overall that the enactment of this Bill will improve the position of English law in this area and better enable it to compete with other systems of law in the world today.

8. But I hope that I can add a little value by making a few further relevant comments, as follows.

The Teaching of Perpetuities Law

9. First of all, although some fears have been expressed about the teaching nowadays of the law relating to perpetuities and accumulations in English universities, I am happy to confirm that it is still taught at my own institution, King's College London. Indeed, not only does it form part of the undergraduate (LLB) trust law course, but it is also taught (by me) as part of the LLM course in International and Comparative Trust Law, where the English position is compared with that obtaining in other jurisdictions. I do not see why the solicitors' Legal Practice Course needs to teach this subject if students have already studied it as part of their qualifying law degree or non-law degree diploma course.

Comparative Perpetuities Law

10. The second matter is a comparative law point. Every developed legal system which has a system of property rights has to make up its mind as to how far it is going to permit owners of such rights to tie up those rights for the future, whether by controlling their future devolution or indeed by rendering them inalienable. It is not just a problem for the common law states of the world. Roman law too had to make policy choices, just as English law has done. Eventually Justinian settled the matter by stipulating that ties could last only until the fourth generation, which had to be free to deal with the property as they wished. He rightly saw that a rich Roman paterfamilias might well wish to protect the son or the grandson that he knew against the risks of unfettered control over capital (such as speculation, profligacy, or even gold-digging). But he reasoned that no Roman alive would be likely ever to know his great-grandchild, and would therefore probably not mind so much if the law did not let him tie up the fourth generation too.

11. To come to more modern times, let us take the specific example of France, a civil law country. The Norman jurist Basnage railed at the vanity of rich men attempting to control their wealth after their death, by means of "instituting heirs, and perpetual substitutions, fideicommissa, and all the other means which men have invented to be able to go on controlling their family after their death". French kings issued Ordonnances which limited ties to two generations, before Napoleon's Code of 1804 purported to abolish the power of the "dead hand" altogether. I say 'purported', because Napoleon almost immediately reintroduced substitutions in 1806, though called majorats, for the benefit of the new nobility of the Empire; more curiously still, they were kept on after the Restoration, but abolished for the future by laws of 1835 and 1849, and any still remaining were bought out by the French State only in 1905. But only two years ago they were reintroduced into French law, under the new name of libéralités graduelles. There have been similar experiences in other legal systems.

12. The point that I am tying to make is that seeking to tie up property for the future is a universal problem, and not particularly one for English law, or even for the common law. It so happens that, because of the relative sophistication of the English property system, as compared to that found in civil law countries, and because of the simplification of property law carried out in England in 1925, the principal way in which property is tied up in England today is through the trust, rather than by means of any other legal institution. The choice made by this Bill, like that of the existing rules, is to limit the tie that lawfully may be made to a period corresponding approximately to the combined lives (from the birth of one to the death of the other) of two generations, pretty much in line with other systems.

The Effect of the Rules in Practice Today

13. The third point is to echo and support something said by Edward Nugee QC in his evidence. Every lawyer practising in this area of the law must take account of the rules relating to perpetuities and accumulations. They are, as Mr Nugee said, "there in the background to every settlement". It is therefore nothing to the point that there are few cases concerned with them that ever come to court. On the contrary, it shows that practitioners understand the complex backdrop against which they operate. This is why it is still necessary for the rules to be studied and to be taught. If (as I consider it will) this Bill simplifies the position for the future, then so much the better.

The Economic Arguments

14. The final point which I wish to make concerns the underlying policy of the rules against tying up property for too long a period. In the common law judges invented these rules, as a matter of public policy, because they considered that there were dangers to the national economy if they did not do so. In modern times, we can see that, because trustees are expected to be prudent in how they invest trust funds, every trust fund essentially amounts to a withdrawal pro tem of risk capital from the market. Whether that does indeed pose any dangers for the economy is a difficult matter, one perhaps for an economist rather than for a lawyer. But in truth the only way to find out is to try it and see.

15. Learned commentators have pointed out that many common law jurisdictions have in recent times relaxed their rules in this area, and indeed some of them now permit trusts to exist without any limits of time at all. They, therefore, constitute a living laboratory in which—in some several generations' time, naturally—we shall be able to tell whether and how far it is deleterious to the national economy to allow risk capital to be withdrawn for too long a period. But at present the jury must be regarded as still out. From the practical point of view, therefore, the sensible course is to ensure that the existing rules are made simpler if possible, and rendered less likely to do harm, pending the results of the experiments currently in train. This is, as I apprehend, what the present Bill seeks to achieve.

16. These are all the comments that I have at present. If any matters arise on what I have written, I should of course be happy to try to assist further.

Memorandum by Hubert Picarda QC

The memorandum is drawn partly from my forthcoming book. (*Law and Practice Relating to Charities* published by Tottel)

The book alludes to the reform movement since the articles written by Baroness Deech in 1981 and 1984 and since the 1998 Law Commission Report.

The subject on which I would like to give evidence relates to my concerns about the following matters in respect of which clarificatory drafting may be necessary:

1. The extent to which the common law exception in *Christ's Hospital v Grainger* survives the statutory wording and enables the exception to apply to an initial gift which in an identified contingency may vest in a subsequent charitable entity (trust or company) which may not be in existence at the time of the original gift.

2. The desirability of continuing to provide an alternative accumulations period during the lifetime of the settlor.

8 June 2009

Charity to-charity exception

Justification The justification for the charity to charity exception under the common law has been variously interpreted. by the judiciary as well as by contesting theorists. If the rule is a rule against remoteness of vesting the creation of successive interests for charity with the trigger for change dependent on contingency the reality may be described as one in which the subject matter of the gift is throughout in effect "vested in charity".[18] The point is aptly made in the transatlantic case of *Storrs Agricultural School v Whitney* [19] decided in the State of Connecticut:

> As one charitable use may be perpetual, the gift to two in succession can be of no longer duration nor of greater evil. The property is taken out of commerce (but it instantly goes in perpetual servitude to charity. the effect is practically the same as if the gift had been made to a specified charitable use during

[18] See the reference to this point at Picarda 3rd ed 288-289. Others use the terminology of permanent devotion to charity: *Oosterhoof on Trusts;Text Commentary and Materials* (6th ed Carswell 2004) 408; *Ontario Law Reform Commission on the Law of Charities* (Toronto 1997) 409.

[19] 54 Conn 342, 8 Atl 141(1887)

the pleasure of the trustee, then to another charitable use, both by the ministration of the same trustees or their successors."

Some commentators have in the past sought to draw nice distinctions between trusts for charitable purposes and gifts to charitable corporations.[20] Others argue that the structure of the gift is irrelevant. The exception satisfies the principle of leaning in favour of charity and promoting the public benefit; and settlor control of successive interests can legitimately be accepted as encouragement to charitable giving which successive governments of differing political complexions have been keen to promote. In contrast the wording of the 2009 Bill is perhaps more problematic The rule does not apply to an estate or interest created so as to vest in a charity on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity.[21]

Ambit of exception: charitable trusts and charitable corporations Do the words "a charity" in this context connote a charitable trust for charitable purposes or do they include a charitable corporation? And in either case does the institution trust or corporation have to be "established" at the date when the instrument creates the relevant interests? The glossary to the Perpetuities and Accumulations Bill 2009 defines "a charity" in terms derived from Local Government and Finance Act 1988 The last mentioned Act defined "a charity" as "an institution or other organisation established for charitable purposes only or any persons administering a trust established for charitable purposes only"[22] The glossary to the 2009 Bill simply defines "a charity" as "an organisation established for charitable purposes only". It is now clear that under the 2006 legislation "charity" for the purposes of the law of England and Wales and not merely for the purposes of the charities legislation means an "institution" which is established for charitable purposes only and falls to be subject to the control of the High Court in the exercise of the jurisdiction with respect to charities.[23] Moreover the term "institution" in the 2006 Act has been extended by the 2009 Act and now "means an institution whether incorporated or not and includes any trust or undertaking"[24] Thus, subject to one point, the term "a charity" for the purposes of the charity to charity exception includes both trusts and corporations.[25] The one remaining doubt is whether the language of the section is apt exclude from the operation of the rule the case of a future contingent vesting in a charitable trust or corporation that was not already "established"[26] at the time of the original instrument purporting to create the future interest in question. That doubt could be removed by a provision declaring that for the avoidance of doubt the relevant trust or corporation is to be treated for all relevant purposes as established if in existence or in immediate contemplation at the time of the occurrence triggering the relevant vesting.[27]

Reform of the Rule against Excessive Accumulations in relation to Charities

The abolition of the existing alternative possibility of accumulations during the life of the settlor appeared to some unnecessary. That option was encompassed by the common law rule and its continuance is again consonant with the policy of successive governments to encourage charitable giving. The ability of a settlor to specify that income be accumulated until his death enables income accumulations to be made so as to add to the initial capital available when the accumulations period ends[28]. A modest amendment to the proposed section 14 incorporating an alternative period of accumulation during the life of the settlor seems in principle unexceptionable.

Memorandum by Francesca Quint, Radcliffe Chambers

I am grateful for the opportunity of providing evidence to assist the Committee in its deliberations on this Bill.

Introduction

I am a practising barrister specialising in charities, trusts and wills. The first half of my career was spent as a legal officer in the Charity Commission, and most of my current work is concerned directly or indirectly with charities, including charitable trusts.

[20] See Parachin *Charities and the Rule Against Perpetuities* (2006) The Philanthropist—vol. 21 No. 3 256
[21] PAAA2009, s2(2)
[22] LGFA 1988 s 67(10)
[23] CA 2006 s1(1) (a)-(b).
[24] CA 1993, s97(1) The words "means an institution whether incorporated or not and" were inserted by CA 2006, s75(1) Sch 8 paras 96, 174©.
[25] See the judgment of Lord Cohen in *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631,HL. See also the Canadian decisions *Re Mountain* (1912) 4DLR 737 (*Int CA and Re Short Estate*) (1914) 7 OWN 535 OHC summarised in D Waters et al *Waters' Law of Trusts in Canada* (3rd edn 2005) 650.
[26] The adjectival use of the verb in the passive voice indicates a body already "founded" in the formal sense.
[27] See Parachin *Charities and the Rule Against Perpetuities* (2006) The Philanthropist 1–32. The cases where gifts to non-existent corporations or societies have been sustained or struck down are discussed in Gray: *The Rule Against Perpetuities* (4th ed 1942) paras 604 et seq; and see *First National Bank v Collins* 114 NJ Eq 59,168 A 275(E&A 1933) (gift to a charitable corporation to be organised).
[28] For a cognate example of in effect settlor control see *Re Laing (JW) Trust* [1984] Ch 143.

I have taken a special interest in this Bill for five reasons:

— I am interested in the subject, having been inspired by the late Professor R H Maudsley at King's College London, who later wrote the textbook "The Modern Law of Perpetuities" (Butterworths, 1979)).

— As a member of the Executive Committee of the Charity Law Association (from which I am standing down when my term expires on 4 June) I chaired working parties of the Association which responded both to the Law Commission's original Consultation paper of 1998 and to the more recent, targeted consultation in the summer of 2008, which concerned a previous draft of the Bill.

— I was later asked to write articles about the draft Bill for "Private Client Business" (Sweet & Maxwell) and "Probate Solicitor" (The Law Society).

— Since 1987 until this year I have been a member of the Council of the Statute Law Society, a charity which encourages improvements in the drafting of statutes and statutory instruments.

— Over the years I have had to consider the application of the law relating to perpetuities and accumulations on a number of occasions when advising clients and drafting documents.

Scope of paper

The Bill as currently drawn is a significant improvement on the draft Bill and this paper is concerned only with those features which affect charities and those wishing to establish charities, benefit existing charities or promote charitable objects and in my view merit further scrutiny by the Committee.

Rule against Excessive Accumulations

The Bill removes the current limits on the various periods for which income may be accumulated to create further capital in the case of all private trusts, and as such gives settlors a great deal more freedom (see clause 13). At the same time it imposes a maximum of 21 years in the case of charitable trusts and thus removes some of the freedoms currently available to for settlors of trusts for charitable purposes (see clause 14).

The harshness of the new rule for charities is tempered by the exceptions for provisions made by the Charity Commission or the court (clause 14(2)). What still concerns me in my capacity as an adviser and draftsman to those wishing to establish charitable trusts, is the position of a settlor who wishes to establish a charity now with a modest sum with a view to its growing through the accumulation of income over the course of his lifetime so that on his death, when he may wish to leave a further gift by will, it will be of a reasonable size and capable of making an effective contribution to his chosen charitable purpose. For example, two of my clients who wish to leave their residence and collection of art works to the public on their deaths have decided to establish a Foundation now so that there will be an established charity already operating in accordance with their wishes to receive them. At present, one of the permitted accumulation periods is the remaining lifetime of the settlor, and this obviously may be longer than 21 years. The change in the law brought about by the Bill would tend to have the effect of discouraging younger, less affluent settlors to set aside assets for charity. It seems unlikely that the Charity Commission would be willing to make an order or scheme to enable a newly established charity to adopt an accumulation period longer than 21 years simply to accommodate the natural desire of a potential settlor to establish a charity before his death with a view to its accumulating a reasonable amount of capital by the end of his life. This situation has not often arisen (in my experience) but when it does it is important to the person concerned.

Charitable Exception to the Rule against Perpetuities

The Bill seeks to replace the existing case law regarding gifts over from one charity or charitable purpose to another with a new statutory provision now set out in clause 2(2) and (3). I have had the advantage of discussing these provisions with Professor Elizabeth Cooke of the Law Commission, and I am assured that there is no intention to change the law. As a result, I consider that those reading the clause could be seriously misled as to the new law unless either the clause is amended or the Explanatory Notes significantly altered.

The typical situation which the sub-clauses envisage is where a settlor or testator gives money or property to a named charity with a provision that if at any future date a specified condition is fulfilled (eg his grandmother's grave is not maintained or a school is taken over by the state) the gift will pass to another named charity. What the clause does not appear to cover, because "charity" is defined in the Glossary within the Explanatory Notes as an "organisation", is that the donor may direct that in the specified event the gift will be held on trust for a charitable purpose rather than a named charity. It is routine for private documents such as charitable trust deeds to draw a distinction between "charities" and "charitable purposes".

Were it not for the Explanatory Notes there would be an argument that the word "charity" in clause 2 includes an express or implied trust for charitable purposes. The argument, which in my view is not entirely watertight, is as follows:

1 The definition of "charity" and "institution" in sections 1 and 78(5) of the Charities Act 2006 applies to all legislation applying to England and Wales in which the word "charity" is not otherwise defined.

2 The effect of that definition is that "charity" includes a trust established for charitable purposes.

3 A trust for charitable purposes arises, and could therefore be said in some sense to have been "established", when property is received or becomes held by trustees for charitable purposes, even if there is no express declaration of trust or any trust machinery.

4 When a gift over for charitable purposes takes effect a charitable trust normally comes into being.

5 Therefore "charity" in clause 2(2) extends to the implied trust in which the subject matter of the gift vests on the occurrence of the relevant event.

6 In clause 2(3) the term "charity" can also be applied, with a certain strain on the concepts involved, to an implied trust for charitable purposes of the "right exercisable by a charity".

7 Where a gift is structured in such a way that there are successive charitable gifts there must of necessity be trustees to hold the assets and therefore there will always be a trust of sorts, but where the gift over is to charitable purposes and there is no proper trustee body capable of enforcing the relevant right under clause 2(3) the Attorney General, on behalf of the Crown as protector of charity, would be able to represent the charitable interest.

Amending the Explanatory Notes

In order to make this solution possible, the definition of "charity" in the Glossary in the Explanatory Notes would need to be amended so as to be consistent with the statutory definition in the Charities Act 2006, and in addition paragraphs 38 and 39 would need to be expanded to make it clear that gifts for charitable purposes as well as gifts to previously identifiable charities were covered. I would also think it highly desirable for there to be some ministerial statement putting the interpretation beyond argument, and thereby helping to avoid any false hopes being raised on the part of those who would stand to inherit if a secondary charitable gift were to fail.

Amending the Bill

I recognise of course that the drafting of statutes differs from the drafting of private documents but I am also aware, and welcome, the move towards greater clarity and simplicity in legislative drafting which has been apparent over recent years. In this case it cannot be said that clause 2 is easy to understand and apply, especially given the background whereby private documents (eg charitable trust deeds) referring to the same concepts routinely draw a distinction between the application of funds "to charities" and "for charitable purposes". I would make the point that this distinction is also observed in other legislation, eg Inheritance Tax Act 1984 s 23(6) "For the purposes of this section property is given to charities if it becomes the property of charities or is held on trust for charitable purposes only . . ."

I hesitate to suggest any actual amendment to clause 2 but if pressed would suggest that the deletion of "a" before "charity" in clause 2(2) (line 1) would serve to clarify the intention of that sub-clause and the insertion of the words "or on behalf of charity" after "charity" in clause 2(3) (line 1) would suffice to clarify that sub-clause.

The alternative would be to amend the Bill by introducing a comprehensive definition of "charity".

Possible loss of Bill

The current political situation suggests that there is a risk that the Bill will be lost if delayed. I do not think it would be worth risking the success of the Bill for the sake of improving its clarity if the amendment of the Explanatory Notes, coupled with a clear ministerial statement which would be regarded as definitive under the *Pepper v Hart* rule would provide a less risky solution.

I will be happy to attend the House to amplify this evidence in person if it would be helpful to the Committee.

5 June 2009

Special Public Bill Committee

Tuesday, 30 June 2009.

Perpetuities and Accumulations Bill [HL]

Committee

11 am

The Chairman of Committees (Lord Brabazon of Tara): Before the start of proceedings on the Perpetuities and Accumulations Bill, it may be helpful if I say a word about the procedure that we will follow today.

In nearly all respects, our proceedings will be identical to those in a Grand Committee. Any Member of the House may attend and speak. As we are in Committee, Members may speak more than once to each amendment or Motion.

The main difference from Grand Committee procedure is that the Committee may vote on amendments or on the Question that clauses stand part of the Bill. If, when I collect the voices, it is clear that there is no agreement, I will announce that a Division will be held. Only the named Members of the Special Public Bill Committee are entitled to vote in the Division. If all of the Members are present, we will proceed to the Division immediately. If, however, Members are absent, there will be a pause of eight minutes to allow Members time to reach the Moses Room. The Division will be announced in Peers' Lobby before the doors are locked at eight minutes.

The procedure for Divisions will be that the Clerk will read out the names in alphabetical order. Members should reply "content", "not content" or "abstain". I will then announce the results of the Division and we will proceed with the next amendment or Motion. I hope all that is clear.

Title postponed.

Clause 1 agreed.

Clause 2 : Exceptions to the rule's application

Amendment 1

Moved by ***Lord Hodgson of Astley Abbotts***

1: Page 2, line 10, at end insert "or trustees for charitable purposes"

Lord Hodgson of Astley Abbotts: I shall speak at the same time to Amendments 2, 3 and 4, which are part of the same issue. Before I do so, since this involves charities in particular, I should remind the Committee that I am president of the National Council for Voluntary Organisations—an honorary post that is shown on the Register of Interests.

About 30 seconds ago I was handed a letter from the Minister, which I tried to read before rising, but if I may proceed, I shall try to take in some of the points that he has covered at the last minute.

This is about the rule against perpetuities as they apply to charities. Charities, of course, last for many years and have a life of their own. The concern is that the exception in Clause 2 as drafted will apply only to situations involving named charities. So, if money is left in trust to Barnardo's, say, to assist children in the urban West Midlands, and in the event of Barnardo's ceasing to operate in the West Midlands and closing its office, it shall go to the NSPCC, that is covered. But it is less clear, according to the experts, if the money is left in trust to assist children in the urban West Midlands without a named charity through which the work will be carried out. This is a charitable purpose, not a charity. Clause 2 as drafted refers to "a charity". My amendment is intended to make it clear beyond peradventure that this deals with charitable purposes as well as a charity.

The Government's case is that the definition of "charity" in the Charities Act 2006 is sufficiently wide. It says that charity means:

> "an institution which—
>
> (a) is established for charitable purposes only, and
>
> (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities".

The Government believe that that is sufficiently wide to encompass both categories that I have referred to.

Secondly, the difficulties arise out of some unfortunate initial drafting in the Explanatory Notes. On page 17, a charity is defined as:

> "An organisation established for charitable purposes only".

The Minister's letter, which was sent to us all, referred to this issue and said that it was the Government's intention to remedy this. The evidence we had from Sir Terence Etherton earlier was that these concerns had now been dealt with. I do not have the precise words that he used, because I do not have a copy of the transcript, but he said that the issue had now been covered.

It was not quite as clear as Sir Terence may have led us to believe. The evidence from Francesca Quint QC, seen by the Committee, suggests that this line of reasoning is "not entirely watertight". She further made the point that if we were to follow this line, it would be a question not just of changing the definition on page 17 of the Explanatory Notes but also of redrafting paragraphs 38 and 39 of the Explanatory Notes, which cover Clause 2. The

Minister's letter, which we have just received, accepts that point and there is some redrafting of those paragraphs.

In ascending order of importance, the options before the Committee are, first, to amend the definition of "charity" in the glossary to make it clear that it involves not just an organisation but charitable purposes, and to amend paragraphs 38 and 39. I have no doubt that what the Minister has put in here meets that point, but I will not pretend that I have read it completely. The advantage of this, clearly, is that it is very easy to do; the disadvantage is that, as with all Explanatory Notes, they say that they do not form part of the Bill and have not been endorsed by Parliament. So they are helpful, but not conclusive. The second option is for the Minister to place on the record what the Government's intention is—he has partially done that during the evidence sessions already—so that in the event of this issue arising there is *Pepper v Hart*-type guidance to Parliament's thinking on the issue. The third option is to accept these amendments and make everything absolutely clear. I am not sure why the Government cannot see the advantage of this and have set their face against it quite so resolutely.

In his earlier letter to us, the Minister said that there is rarely only one possible answer on these matters. I accept that, but there is disagreement among the experts. We should, as a country, be interested in encouraging charitable endeavour. This whole question could be closed off so easily. No loophole is created by my amendments. There are no long, elaborate additions with complex drafting. They add half a dozen words only, which make everything clear beyond peradventure and avoid any difficulties that may have arisen in the conflicts between experts on this narrow and technical point. I beg to move.

Lord Lloyd of Berwick: I fully understand the reasons that lie behind the amendment, but it seems to me that the definition contained in the Charities Act is clearly wide enough to cover the problem. The problem, such as it is, has been created largely by the Explanatory Notes. They will be amended to cover the point and make it absolutely clear, removing the cause of the problem. Once that has been done, I am happy to leave the clause as it stands.

The Parliamentary Under-Secretary of State, Ministry of Justice (Lord Bach): We are grateful to the noble Lord, Lord Hodgson, for having raised this matter during proceedings. It certainly had an effect, if only in relation to the Explanatory Notes. Subsections (2) and (3) of Clause 2 are intended to replicate the effect of existing common law exceptions to the rule against perpetuities for gifts over from one charity to another. A concern has been raised by the noble Lord that, as currently drafted, the exception does not include trust property held by trustees for charitable purposes. We do not think that view is well founded.

As there is no definition of "charity" in the Bill, the meaning is therefore as defined by Section 1 of the Charities Act 2006. It provides that a charity is,

> "an institution which—
>
> (a) is established for charitable purposes only, and
>
> (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities".

Section 78 of the same Act says that "institution" means,

> "an institution whether incorporated or not, and includes a trust or undertaking."

Trustees for charitable purposes are therefore included within the scope of the exception. We feel that adding the phrase "trustees for charitable purposes" to these subsections will perhaps cause unnecessary uncertainty.

The amendment does not, for example, appear to restrict the exception to trustees for exclusively charitable purposes, which is a key element of the 2006 Act's definition of "charity". Such an extension would create significant uncertainty, as the scope of the exception could be wider than under the present law. The amendment might also cast doubt on other statutes referring to "charity" that do not have a similar addition.

As the noble Lord, Lord Hodgson, said, part of the problem has been the definition of "charity" in the glossary of the Explanatory Notes. The noble and learned Lord, Lord Lloyd, also referred to this. As he said, the Explanatory Notes will be amended to reflect that the 2006 Act definition of a charity as applied in the Bill includes a trust for charitable purposes. I apologise that the letter that I sent to the noble and learned Lord, Lord Lloyd of Berwick, has only just arrived in his hands, and within seconds in the hands of noble Lords sitting around the Committee. That letter sets out the definition that will be in the Explanatory Notes.

I hope that, for the reasons I have attempted to give and with this reassurance, the noble Lord will see fit to withdraw his amendment.

Lord Hodgson of Astley Abbotts: I am grateful to the Minister for that very full explanation and for having tabled the redrafting of paragraph 38 of the Explanatory Notes. I look forward to seeing the redrafting of the definition of "charity" in the glossary. I accept the arguments about consequential damage and, while within my wicked soul I have a sort of wish to try the new procedure, never having voted that way before, I think that would be an abuse of my position and I therefore beg leave to withdraw the amendment.

Amendment 1 withdrawn.

Amendments 2 to 4 not moved.

Clause 2 agreed.

Clauses 3 and 4 agreed.

Clause 5 : Perpetuity period

Amendment 5

Moved by ***Lord Bach***

5: Page 3, line 9, leave out "; but this is subject to subsection (2)"

Lord Bach: In speaking to Amendment 5, I shall also speak to Amendments 6, 7, 12 and 14, which are grouped with it. These amendments all relate to the application of the Bill. As all members of the Committee will agree, we have received evidence of the highest quality from several leading lawyers on this topic and on many others. I think the whole Committee will be very grateful for the trouble that busy practitioners have taken to inform us. Sadly for us, perhaps, they did not all agree on the solution.

On the one hand there are experts who favour applying the new law on accumulations to the exercise of existing special powers of appointment in order to achieve a greater flexibility in the management of trusts. This pragmatic argument is countered by the principled approach, championed by Mr Nugee QC—perhaps we can call it the Nugee principle—who argued persuasively, as far as the Government are concerned, for the principle of keeping existing special powers of appointment subject to the present law even when exercised after the Bill comes into force.

It seemed to us that the consensus of opinion within the Committee was to favour the principled over the pragmatic approach. This will be a disappointment to some, but the outcome of applying the Nugee principle is to produce a Bill that will be simpler to apply and will avoid the need to revisit the terms of existing trusts.

The aim of the amendments in this group is to make the Bill apply prospectively, except for Clause 12. The provisions of the Bill as originally drafted would have applied to an instrument created by the exercise of a special power of appointment even if the power was created pre-commencement. These amendments will exclude such instruments from the application of the Bill. This will mean that the law that applies to the master trust will continue to apply to the exercise of the special power. I commend these amendments to the Committee. I beg to move.

Lord Goodhart: I note what the Minister has said. I am somewhat concerned about Amendment 12 in the context of two examples: a will that is made before the commencement of the Act, although the death does not occur until afterwards; and where there is a special power of appointment, with the instrument creating the power taking effect on or after that day when the Act comes into effect.

I find persuasive the two very recent documents, which have only arrived today. One is the letter from Robert Ham QC and the other is the further statement by James Kessler QC. They both put forward a powerful case that the rule against accumulations should not apply in either of the examples I have mentioned. There is a strong case for saying that the new law should apply to both of those. In the simplest case of a death that occurs after the Act comes into force but the will was made before it, there is a good case for saying that no rules about accumulation should apply. The same is true on the special power case.

Mr Kessler, in particular, makes out a very arguable case that this would be a matter of considerable convenience in a number of cases and would do no damage. I find that persuasive. I would be reluctant to press this matter to a vote, because I am anxious that the Bill as a whole should go through, but it is very unfortunate that this matter has arisen at so late a stage. I wonder whether there is any chance that the Government might be prepared to reconsider this very minor issue that is dealt with by Amendment 12. Otherwise, I have no objections to this group.

Lord Kingsland: For my part, I should like to thank the Government for amending the Bill to incorporate the Nugee principle—an approach that we wholly endorse.

Lord Bach: I can agree with the noble Lord, Lord Goodhart, in so far as it is unfortunate that this powerful counterargument has entered the arena at a very late stage indeed. The best I can do today is to say that the Bill will, of course, go to another place after it has completed its activity in this House. I have no doubt that in another place, whether for good or bad, the important issues that the noble Lord mentions can be raised in the procedure that will be used in that House.

The answer that I have to the noble Lord's point—I doubt that it is entirely satisfactory for him—is to point out that the same principles should apply to accumulations as to perpetuities. There are pragmatic arguments, but they are balanced by what we—and, I think, the balance of the Committee—consider to be the principled advantage of adopting the Nugee principle. So, in spite of what the noble Lord has argued, I wish to press the amendments.

Amendment 5 agreed.

Amendments 6 and 7

Moved by ***Lord Bach***

6: Page 3, line 11, leave out subsections (2) and (3)

7: Page 3, line 18, leave out "Subsections (1) and (2) apply" and insert "Subsection (1) applies"

Amendments 6 and 7 agreed.

Clause 5, as amended, agreed.

Clauses 6 to 13 agreed.

Clause 14 : Restriction on accumulation for charitable trusts

Amendment 8

Moved by ***Lord Bach***

8: Page 6, line 38, at end insert "unless subsection (4A) applies"

Lord Bach: In speaking to Amendment 8, I will also speak to Amendments 9, 10, and 11. We are grateful for Amendments 9 and 10, tabled by the noble Lord, Lord Kingsland, on this matter.

Government Amendments 8 and 11 create an alternative accumulation period. They provide that a settlor can choose an accumulation period that ends upon the death of the settlor, or one of the settlors. This settlor can be a named settlor, or a settlor chosen by the order of their death. Amendments 9 and 10 would also create an alternative accumulation period of the remainder of the life of the settlor. Our only problem with those amendments is that they do not make clear which period is to apply if the instrument is silent, or which settlor should be the relevant life if there is more than one settlor.

As I have already said, we are grateful to the noble Lord for drawing this issue to our attention. We of course agree that it is important to encourage charitable giving. Amendments 8 and 11 will allow "the life of the settlor" as an alternative accumulation period, yet provide legal certainty.

I hope that in view of Amendments 8 and 11, which I commend to the Committee, the concerns behind the amendments of the noble Lord, Lord Kingsland, will be allayed and that he may in due course not press them. I beg to move.

Lord Kingsland: I am most grateful to the Minister for taking all the trouble that he has over these amendments. It is not often that an amendment that I table in your Lordships' House is accepted by the Government, at least in substance; so it is indeed a moment for rejoicing. I accept, of course, the superior wisdom of the parliamentary draftsmen.

I had, of course, prepared a fairly lengthy speech in support of my humble efforts at drafting. Your Lordships will be relieved to know that I have absolutely no intention of delivering it.

Lord Bach: I am very grateful to the noble Lord, but I am afraid that what he has just said is the first point of real dissent today. The Government are extremely generous to the noble Lord on other Bills. Indeed, I remember just the other day, late at night, agreeing—or partially agreeing, at least—to something that he was suggesting. I am very grateful to him.

Amendment 8 agreed.

Amendments 9 to 10 not moved.

Amendment 11

Moved by ***Lord Bach***

11: Page 6, line 40, at end insert—

"(4A) This subsection applies if the instrument provides for the duty or power to cease to have effect—

(a) on the death of the settlor, or

(b) on the death of one of the settlors (determined by name or by the order of their deaths)."

Amendment 11 agreed.

Clause 14, as amended, agreed.

Clause 15 : Application of this Act

Amendment 12

Moved by ***Lord Bach***

12: Page 7, line 10, leave out from first "day" to end and insert ", except that—

(a) those sections do not apply in relation to a will executed before that day, and

(b) those sections apply in relation to an instrument made in the exercise of a special power of appointment only if the instrument creating the power takes effect on or after that day."

Amendment 12 agreed.

Amendment 13

Moved by ***Lord Bach***

13: Page 7, line 19, leave out "on which this Act comes into force" and insert "appointed under section 22(2)"

Lord Bach: I can be very short on this. Before I move the amendment I should like to say how grateful I am, and I hope the Committee is too, for the work of the officials behind me; they have worked extremely hard to make sure that this procedure works and that an ex-criminal practitioner can begin

to understand, or just have the faintest idea, what perpetuities and accumulations are about. I express my gratitude to them, and I hope that of the Committee, too.

Amendment 13 is a technical drafting amendment suggested, apparently, by Francis Barlow QC to bring the commencement provision into line with current drafting conventions. I beg to move.

Lord Henley: I should like to make one very brief intervention. As a result of the amendment, the Act will come into force when the Lord Chancellor so decrees. Could the Minister give us some indication of when that might be? He might remember that quite a lot of legislation has emerged from the Home Office and from his own department that we are still waiting to see brought into effect. It would be interesting to know the Government's plans for this Bill.

Lord Hodgson of Astley Abbotts: I support what my noble friend has just said. There are large chunks of charities legislation that have never been brought into effect and are standing there waiting to move to the starting grid. It would be helpful if the Minister could enlighten us.

Lord Bach: I am advised that it is thought that it would take about a year before the Lord Chancellor would start the Act. There is apparently still quite a lot of technical work to do before people understand what the new law will be. It is a matter that can be raised in another place, presumably after the Summer Recess. We may then have a better idea of when it is intended that the Bill will come into effect. My best guess is that it will be in about a year's time.

Amendment 13 agreed.
Clause 15, as amended, agreed.

Clause 16 : Limitation of 1964 Act to existing instruments

Amendment 14

Moved by ***Lord Bach***

Page 7, leave out lines 24 to 28 and insert—

"(5A) The foregoing sections of this Act shall not apply in relation to an instrument taking effect on or after the day appointed under section 22(2) of the Perpetuities and Accumulations Act 2009 (commencement), but this shall not prevent those sections applying in relation to an instrument so taking effect if—

(a) it is a will executed before that day, or

(b) it is an instrument made in the exercise of a special power of appointment, and the instrument creating the power took effect before that day."

Amendment 14 agreed.

Remaining clauses and schedule agreed; title agreed.

Lord Lloyd of Berwick: Could I simply add to the congratulations, if it is in order, that the Minister offered to those behind him? It has been a marvellous example of how this new procedure can work, given goodwill all round. I hope the procedure will be repeated on other occasions.

Bill reported with amendments.

Committee adjourned at 11.30 am.

Perpetuities and Accumulations Bill [HL]

[AS AMENDED IN THE SPECIAL PUBLIC BILL COMMITTEE]

CONTENTS

A

B I L L

[AS AMENDED IN THE SPECIAL PUBLIC BILL COMMITTEE]

TO

Amend the law relating to the avoidance of future interests on grounds of remoteness and the law relating to accumulations of income.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Application of rule against perpetuities

1 Application of the rule

(1) The rule against perpetuities applies (and applies only) as provided by this section.

(2) If an instrument limits property in trust so as to create successive estates or interests the rule applies to each of the estates or interests.

(3) If an instrument limits property in trust so as to create an estate or interest which is subject to a condition precedent and which is not one of successive estates or interests, the rule applies to the estate or interest.

(4) If an instrument limits property in trust so as to create an estate or interest subject to a condition subsequent the rule applies to—

(a) any right of re-entry exercisable if the condition is broken, or

(b) any equivalent right exercisable in the case of property other than land if the condition is broken.

(5) If an instrument which is a will limits personal property so as to create successive interests under the doctrine of executory bequests, the rule applies to each of the interests.

(6) If an instrument creates a power of appointment the rule applies to the power.

(7) For the purposes of subsection (2) an estate or interest includes an estate or interest—

(a) which arises under a right of reverter on the determination of a determinable fee simple, or

(b) which arises under a resulting trust on the determination of a determinable interest.

(8) This section has effect subject to the exceptions made by section 2 and to any exceptions made under section 3.

(9) In section 4(3) of the Law of Property Act 1925 (c. 20) (rights of entry affecting a legal estate) omit the words from "but" to the end.

2 Exceptions to rule's application

(1) This section contains exceptions to the application of the rule against perpetuities.

(2) The rule does not apply to an estate or interest created so as to vest in a charity on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity.

(3) The rule does not apply to a right exercisable by a charity on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity.

(4) The rule does not apply to an interest or right arising under a relevant pension scheme.

(5) The exception in subsection (4) does not apply if the interest or right arises under—

(a) an instrument nominating benefits under the scheme, or

(b) an instrument made in the exercise of a power of advancement arising under the scheme.

3 Power to specify exceptions

(1) The Lord Chancellor may by order provide that the rule against perpetuities is not to apply—

(a) in cases of a specified description, or

(b) if specified conditions are fulfilled.

(2) Different descriptions and conditions may be specified for different purposes.

(3) Any order under this section may include such supplementary, incidental, consequential or transitional provisions as appear to the Lord Chancellor to be necessary or expedient.

(4) In this section "specified" means specified in the order.

(5) The power to make an order under this section is exercisable by statutory instrument.

(6) A statutory instrument containing an order under this section may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

4 Abolition of existing exceptions

These provisions cease to have effect—

(a) section 121(6) of the Law of Property Act 1925 (c. 20) (rule against perpetuities not to apply to certain powers and remedies);

(b) section 162 of that Act (declaration that rule does not apply in certain cases);

(c) section 163 of the Pension Schemes Act 1993 (c. 48) (rule not to apply to trusts and dispositions concerning certain pension schemes).

Perpetuity period

5 Perpetuity period

(1) The perpetuity period is 125 years (and no other period).

(2) Subsection (1) applies whether or not the instrument referred to in section 1(2) to (6) specifies a perpetuity period; and a specification of a perpetuity period in that instrument is ineffective.

Perpetuities: miscellaneous

6 Start of perpetuity period

(1) The perpetuity period starts when the instrument referred to in section 1(2) to (6) takes effect; but this is subject to subsections (2) and (3).

(2) If section 1(2), (3) or (4) applies and the instrument is made in the exercise of a special power of appointment the perpetuity period starts when the instrument creating the power takes effect; but this is subject to subsection (3).

(3) If section 1(2), (3) or (4) applies and—

(a) the instrument nominates benefits under a relevant pension scheme, or

(b) the instrument is made in the exercise of a power of advancement arising under a relevant pension scheme,

the perpetuity period starts when the member concerned became a member of the scheme.

(4) The member concerned is the member in respect of whose interest in the scheme the instrument is made.

7 Wait and see rule

(1) Subsection (2) applies if (apart from this section and section 8) an estate or interest would be void on the ground that it might not become vested until too remote a time.

(2) In such a case—

(a) until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period the estate or interest must be treated as if it were not subject to the rule against perpetuities, and

(b) if it becomes so established, that does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the estate or interest.

(3) Subsection (4) applies if (apart from this section) any of the following would be void on the ground that it might be exercised at too remote a time—

(a) a right of re-entry exercisable if a condition subsequent is broken;

(b) an equivalent right exercisable in the case of property other than land if a condition subsequent is broken;

(c) a special power of appointment.

(4) In such a case—

(a) the right or power must be treated as regards any exercise of it within the perpetuity period as if it were not subject to the rule against perpetuities, and

(b) the right or power must be treated as void for remoteness only if and so far as it is not fully exercised within the perpetuity period.

(5) Subsection (6) applies if (apart from this section) a general power of appointment would be void on the ground that it might not become exercisable until too remote a time.

(6) Until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, it must be treated as if it were not subject to the rule against perpetuities.

8 Exclusion of class members to avoid remoteness

(1) This section applies if—

(a) it is apparent at the time an instrument takes effect or becomes apparent at a later time that (apart from this section) the inclusion of certain persons as members of a class would cause an estate or interest to be treated as void for remoteness, and

(b) those persons are potential members of the class or unborn persons who at birth would become members or potential members of the class.

(2) From the time it is or becomes so apparent those persons must be treated for all the purposes of the instrument as excluded from the class unless their exclusion would exhaust the class.

(3) If this section applies in relation to an estate or interest to which section 7 applies, this section does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the estate or interest.

(4) For the purposes of this section—

(a) a person is a member of a class if in that person's case all the conditions identifying a member of the class are satisfied, and

(b) a person is a potential member of a class if in that person's case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

9 Saving and acceleration of expectant interests

(1) An estate or interest is not void for remoteness by reason only that it is ulterior to and dependent on an estate or interest which is so void.

(2) The vesting of an estate or interest is not prevented from being accelerated on the failure of a prior estate or interest by reason only that the failure arises because of remoteness.

10 Determinable interests becoming absolute

(1) If an estate arising under a right of reverter on the determination of a determinable fee simple is void for remoteness the determinable fee simple becomes absolute.

(2) If an interest arising under a resulting trust on the determination of a determinable interest is void for remoteness the determinable interest becomes absolute.

11 Powers of appointment

(1) Subsection (2) applies to a power of appointment exercisable otherwise than by will (whether or not it is also exercisable by will).

(2) For the purposes of the rule against perpetuities the power is a special power unless—

(a) the instrument creating it expresses it to be exercisable by one person only, and

(b) at all times during its currency when that person is of full age and capacity it could be exercised by that person so as immediately to transfer to that person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition (ignoring a formal condition relating only to the mode of exercise of the power).

(3) Subsection (4) applies to a power of appointment exercisable by will (whether or not it is also exercisable otherwise than by will).

(4) For the purposes of the rule against perpetuities the power is a special power unless—

(a) the instrument creating it expresses it to be exercisable by one person only, and

(b) that person could exercise it so as to transfer to that person's personal representatives the whole of the estate or interest to which it relates.

(5) Subsection (6) applies to a power of appointment exercisable by will or otherwise.

(6) If for the purposes of the rule against perpetuities the power would be a special power under one but not both of subsections (2) and (4), for the purposes of the rule it is a special power.

12 Pre-commencement instruments: period difficult to ascertain

(1) If—

(a) an instrument specifies for the purposes of property limited in trust a perpetuity period by reference to the lives of persons in being when the instrument takes effect,

(b) the trustees believe that it is difficult or not reasonably practicable for them to ascertain whether the lives have ended and therefore whether the perpetuity period has ended, and

(c) they execute a deed stating that they so believe and that subsection (2) is to apply to the instrument,

that subsection applies to the instrument.

(2) If this subsection applies to an instrument—

(a) the instrument has effect as if it specified a perpetuity period of 100 years (and no other period);

(b) the rule against perpetuities has effect as if the only perpetuity period applicable to the instrument were 100 years;

(c) sections 6 to 11 of this Act are to be treated as if they applied (and always applied) in relation to the instrument;

(d) sections 1 to 12 of the Perpetuities and Accumulations Act 1964 (c. 55) are to be treated as if they did not apply (and never applied) in relation to the instrument.

(3) A deed executed under this section cannot be revoked.

Accumulations

13 Abolition of restrictions

These provisions cease to have effect—

(a) sections 164 to 166 of the Law of Property Act 1925 (c. 20) (which impose restrictions on accumulating income, subject to qualifications);

(b) section 13 of the Perpetuities and Accumulations Act 1964 (which amends section 164 of the 1925 Act).

14 Restriction on accumulation for charitable trusts

(1) This section applies to an instrument to the extent that it provides for property to be held on trust for charitable purposes.

(2) But it does not apply where the provision is made by a court or the Charity Commission for England and Wales.

(3) If the instrument imposes or confers on the trustees a duty or power to accumulate income, and apart from this section the duty or power would last beyond the end of the statutory period, it ceases to have effect at the end of that period unless subsection (5) applies.

(4) The statutory period is a period of 21 years starting with the first day when the income must or may be accumulated (as the case may be).

(5) This subsection applies if the instrument provides for the duty or power to cease to have effect—

(a) on the death of the settlor, or

(b) on the death of one of the settlors, determined by name or by the order of their deaths.

(6) If a duty or power ceases to have effect under this section the income to which the duty or power would have applied apart from this section must—

(a) go to the person who would have been entitled to it if there had been no duty or power to accumulate, or

(b) be applied for the purposes for which it would have had to be applied if there had been no such duty or power.

(7) This section applies whether or not the duty or power to accumulate extends to income produced by the investment of income previously accumulated.

Application of statutory provisions

15 Application of this Act

(1) Sections 1, 2, 4 to 11, 13 and 14 apply in relation to an instrument taking effect on or after the commencement day, except that—

(a) those sections do not apply in relation to a will executed before that day, and

(b) those sections apply in relation to an instrument made in the exercise of a special power of appointment only if the instrument creating the power takes effect on or after that day.

(2) Section 12 applies (except as provided by subsection (3)) in relation to—

(a) a will executed before the commencement day (whether or not it takes effect before that day);

(b) an instrument, other than a will, taking effect before that day.

(3) Section 12 does not apply if—

(a) the terms of the trust were exhausted before the commencement day, or

(b) before that day the property became held on trust for charitable purposes by way of a final disposition of the property.

(4) The commencement day is the day appointed under section 22(2).

16 Limitation of 1964 Act to existing instruments

In section 15 of the Perpetuities and Accumulations Act 1964 (c. 55) the following subsections are inserted after subsection (5) (which makes provision as to the instruments to which the Act applies)—

"(5A) The foregoing sections of this Act shall not apply in relation to an instrument taking effect on or after the day appointed under section 22(2) of the Perpetuities and Accumulations Act 2009 (commencement), but this shall not prevent those sections applying in relation to an instrument so taking effect if—

(a) it is a will executed before that day, or

(b) it is an instrument made in the exercise of a special power of appointment, and the instrument creating the power took effect before that day.

(5B) Subsection (5A) above shall not affect the operation of sections 4(6) and 11(2) above."

General

17 The Crown

(1) This Act does not extend the application of the rule against perpetuities in relation to the Crown.

(2) Subject to that, this Act binds the Crown.

18 Rule as to duration not affected

This Act does not affect the rule of law which limits the duration of non-charitable purpose trusts.

19 Provision made otherwise than by instrument

If provision is made in relation to property otherwise than by an instrument, this Act applies as if the provision were contained in an instrument taking effect on the making of the provision.

20 Interpretation

(1) For the purposes of this Act this section contains provisions relating to the interpretation of these expressions—

(a) power of appointment, general power of appointment and special power of appointment;

(b) relevant pension scheme;

(c) taking effect (in relation to a will);

(d) will.

(2) A power of appointment includes—

(a) a discretionary power to create a beneficial interest in property without the provision of valuable consideration;

(b) a discretionary power to transfer a beneficial interest in property without the provision of valuable consideration.

(3) Section 11 applies to interpret references to a general or special power of appointment.

(4) Each of these is a relevant pension scheme—

(a) an occupational pension scheme;

(b) a personal pension scheme;

(c) a public service pension scheme.

(5) The expressions in subsection (4)(a) to (c) have the meanings given by sections 1 and 181(1) of the Pension Schemes Act 1993 (c. 48).

(6) An instrument which is a will takes effect at the testator's death.

(7) A reference to a will includes a reference to a codicil.

21 Repeals

The enactments mentioned in the Schedule are repealed to the extent specified, but subject to the provision at the end of the Schedule.

22 Commencement

(1) This section and sections 23 and 24 come into force on the day on which this Act is passed.

(2) The other provisions of this Act come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument.

23 Extent

This Act extends to England and Wales only.

24 Short title

This Act may be cited as the Perpetuities and Accumulations Act 2009.

SCHEDULE

Section 21

REPEALS

Short title and chapter	*Extent of repeal*
Law of Property Act 1925 (c. 20)	In section 4(3), the words from "but" to the end.
	Section 121(6).
	Section 162.
	Sections 164 to 166.
Perpetuities and Accumulations Act 1964 (c. 55)	Section 13.
Pension Schemes Act 1993 (c. 48)	Section 163.

These repeals have effect in accordance with section 15 of this Act.

Perpetuities and Accumulations Bill [HL]

A

B I L L

[AS AMENDED IN THE SPECIAL PUBLIC BILL COMMITTEE]

To amend the law relating to the avoidance of future interests on grounds of remoteness and the law relating to accumulations of income.

Lord Bach

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