

PE1412/O

Justice Directorate

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By e-mail

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Dear Catherine

CONSIDERATION OF PETITION PE1412

Thank you for your letter of 28 January to Karen McIvor, CLO Learning and Justice, the Scottish Government, regarding the petition by Bill McDowell calling on the Scottish Parliament to urge the Scottish Government to amend the law of succession to end the requirement for a bond of caution by an executor-dative when seeking confirmation of any intestate estate. The Committee has asked the Scottish Government for information about the outcome of the consultation on this issue which ended in September 2015 and whether the Scottish Government is now in a position to set out how it would intend to take forward its intention to remove the requirement to obtain a bond of caution. You asked for a response by 16 February.

I am replying as Civil Law and Legal System Division has policy responsibility for wills and succession.

[Outcome of the consultation which included questions on bonds of caution which ended in September 2015.](#)

As the Committee is aware, this is the second consultation which sought views on the removal of the requirement for an executor dative to obtain a bond of caution and on measures that could be put in place to provide a degree of protection for the estate in its stead. The first consultation ran from August to November 2014. In that a significant majority favoured the removal of the requirement for all executors to obtain a bond of caution.

However, whilst consultees flagged up positive impacts of removing the requirement for an executor dative to obtain caution, concerns were raised about lessening the protection for an estate from fraud and about the increased risk of a beneficiary emerging at a later stage without the checks imposed by bond providers.

In light of this, the Scottish Government consulted further between June and September 2015 and sought views on a number of issues, including:

- Which estates should be subject to the court's discretionary power to refuse to appoint an executor-dative.
- What factors the court might consider when exercising discretion to refuse to appoint an executor-dative.
- What an applicant might need to demonstrate to the court that s/he understands the role of an executor, has the ability and is suitable to be appointed.
- Whether a family tree, scheme of division or other document should be lodged with the petition for appointment as executor-dative.
- The cost and feasibility of personal intimation of the petition. Currently intimation is by posting on the walls of court.
- To whom intimation should be made, for example others who are also eligible to be appointed as executor-dative.
- The cost of such a change to the courts and to individual estates.

In all of this, the Scottish Government does not simply want to replace the burden of a bond of caution with another equally burdensome process. Any safeguard needs to be proportionate both in terms of effort and cost.

The Scottish Government commissioned an independent analysis of the responses to the consultation and is currently considering that Report. The Scottish Government aims to publish the Report of the analysis and its response in spring 2016

As the Committee is aware, the Minister wrote to the Delegated Powers and Law Reform Committee on 14 January alerting them to amendments to the Succession (Scotland) Bill 2015 (now the Succession (Scotland) Act 2016) which the Scottish Government intended to lodge at Stage 3 of the Bill's parliamentary progress. The amendments were a response to the information that one of the two providers of executor caution (Zurich Insurance) were withdrawing from the market with effect from 1 February 2016. The remaining provider stipulates that where they provide a Bond of Caution, a solicitor must be appointed.

The impact of this change could place a new and potentially disproportionate burden on certain small estates (under £36,000) which will face the additional cost of legal fees as a consequence of the remaining provider's stipulation that a solicitor be appointed. These estates currently benefit from a streamlined, supported confirmation process to minimise costs.

The Scottish Government therefore brought forward amendments to remove the requirement for an executor-dative to find caution for estates subject to the 'small estates' confirmation process. Amendments were also brought forward to extend the exemption for spouses from the requirement to obtain caution in certain circumstances to civil partners. Powers were also sought, by way of Regulations, to add to the cases in which caution is not required to be found.

Given that there is now only one provider of caution and to address the uncertainty this creates, the Scottish Government sought further powers, by way of Regulations, to abolish the requirement for caution altogether and to set out conditions which must be met before courts may appoint an executor dative, for example the court being satisfied that the person is suitable for appointment or that the court is to be provided with particular information about the person seeking appointment or about the estate. These Regulations may apply to all executor-dative appointments or to particular types of executors-dative. If the Regulations make provision that requires the court to determine the suitability of an executor-dative, the

Regulations may set out factors or information which courts should have regard to in determining if the person is suitable for appointment; that the court should be satisfied that the individual is suitable if certain conditions are met; or to allow or require the court to impose its own conditions which must be satisfied before a person is suitable for appointment. To provide further flexibility the Regulations may make different provision for different types of executor dative. The powers essentially future proof arrangements against any further changes in the caution market.

The Bill together with these amendments were passed on 28 January 2016. The amendments relating to bonds of caution will come into effect on the day after Royal Assent.

Scottish Government next steps.

At the Stage 3 debate, the Minister for Community Safety and Legal Affairs confirmed that the Scottish Government will turn again to the reform of bonds of caution as part of the wider and more fundamental reform of the law of succession. That exercise will be informed by the analysis of the consultation responses referred to above.

If, as a result of that consideration, it becomes clear how best to take forward changes in relation to bonds of caution, the range of powers contained in the Succession (Scotland) Act 2016, could provide the potential to make changes swiftly without the need to wait for a second Succession Bill, if that was appropriate.

I hope that this information is of assistance to the Committee.

Yours sincerely

Frances MacQueen