

SCOTTISH PARLIAMENT PUBLIC PETITIONS COMMITTEE

PETITION PE1412: BOND OF CAUTION

Comments on Scottish Government response to Petition PE1412

The Public Petitions Committee asked the Scottish Government on 5 December 2011 to provide a response to two aspects of Public Petition PE1412. The Scottish Government responded on 6 January 2012. The following comments are provided in answer to the response provided by the Scottish Government.

The timeframe for the formal consultation on succession law

Progress on reform of succession law has been excessively slow. Consultation on succession law has extended over several years but little action in the form of legislative change has emerged. The Scottish Law Commission, which offers the Scottish Government independent advice on law reform, has examined the law of succession. The recommendations of a previous Report on succession in 1990 by the Commission were never implemented. The issue of succession law was revived in 2005 and since 2009 the Scottish Government has been considering the recommendations of the current Report on succession law, published in April 2009. In response to the enquiry by the Public Petitions Committee, the Scottish Government was unable to give a precise timeframe when it expects to act on the recommendations of the 2009 Report. As regards the specific issue of the abolition of the requirement for Bonds of Caution, the most promising way forward would be for the Scottish Government to deal with this matter separately using a Scottish Statutory Instrument rather than delay matters until an updated law of succession emerges.

Separate consideration of the abolition of the requirement for Bonds of Caution

The Scottish Government states that preparatory dialogue has confirmed that some stakeholders have real concerns about important aspects of the package of recommendations proposed by the Scottish Law Commission. However, it does not identify those stakeholders or specify precise concerns about abolishing Bonds of Caution in relation to estate administration. The Scottish Government also states that formal public consultation will be required in order to inform the way forward. However, there has already been an extensive period of consultation by the Scottish Law Commission prior to 2009 and by the Scottish Government since April 2009. The Commission received submissions on the specific issue of Bonds of Caution and concluded that the requirement for such Bonds should be abolished. The Scottish Government could and should act on this recommendation by introducing a Statutory Instrument because it is unable to provide a realistic estimate when, if at all, general reform of succession law will take place.

On 13 July 2009 the Scottish Government published its initial response to the Report on succession. The Minister for Community Safety stated at the time that the case for review and reform of succession law was a strong one in order to meet the needs of the citizens of a modern Scotland. The Minister noted that the recommendation that Bonds of Caution should no longer be required had been positively received. But he went on to state that the impact on the insurance market for Bonds of Caution would need to be considered further. There was no mention of the administrative and financial burdens which the legal requirement for Bonds of Caution places on executors in Scotland.

The perception is that the interests of the public are being made subservient to the interests of two large insurance companies who offer these bonds, Royal & Sun Alliance and Zurich Global Corporate UK. Both companies have a vested interest in maintaining the requirement for Bonds of Caution. There are very few instances where the existence of a Bond of Caution has been found to be necessary in order to compensate individuals for the maladministration of any estate by an executor. Bonds of Caution are a lucrative additional source of revenue for insurance companies because few claims are made and the premiums can be excessive. Moreover, if an executor wishes to apply for Confirmation without using the services of a solicitor then that individual can only apply for a Bond of Caution from Zurich, which is in a monopoly position with freedom to charge whatever premium it deems appropriate. The fee charged to provide a Bond of Caution can be substantial if an estate includes property.

For the past 40 years there has been no similar requirement in England and Wales for a Bond of Caution, yet this has not caused unforeseen difficulties. It is therefore unfair that citizens in Scotland should continue to be subject to this requirement under Scottish law. It took until 1824 for Caution to be no longer required for executors-nominate, yet it is still required for executors-dative. The Bond of Caution represents outdated legislation which in parts is illogical, not fit for purpose in the 21st century and should therefore be abolished. This would be a welcome and progressive change in the law. It has the support of the Scottish Law Commission who state that outdated or unnecessarily complex law makes for injustice and inefficiency and leads to the law being out of step with the needs of ordinary people. The Commission reported that there had been an overwhelming response supportive of the abolition of Bonds of Caution. A Scottish Statutory Instrument covering Bonds of Caution would have no adverse impact on the wider reform of succession law. Indeed, the Scottish Law Commission has acknowledged that Bonds of Caution do not, in any case, form part of the law of succession but instead relate to the way in which an estate is administered.

The Scottish Government's response seems to imply that abolition of the requirement for Bonds of Caution in relation to estate administration might not be straightforward. This assessment is somewhat flawed. The requirement for a Bond of Caution was intended to cover a very specific perceived risk, albeit in practice a very low risk. The abolition of one type of Bond intended for one specific purpose would not impact on the existence of other Bonds which cover other risks. Finally, as outlined in Public Petition PE1412, it is fairer and more sensible that changes in the law should apply not only to deaths occurring on or after the introduction of new legislation, but also in relation to applications for Confirmation submitted on or after the date on which implementing legislation abolishing Bonds of Caution is commenced.

In summary, I am asking the Scottish Parliament's Public Petitions Committee to explore further with the Scottish Government and the Justice Committee the option of introducing a Scottish Statutory Instrument to abolish Bonds of Caution in relation to estate administration; and ensure that new legislation will apply to all applications for Confirmation submitted on or after the date of the implementation of the Statutory Instrument.

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