

SCOTTISH PARLIAMENT PUBLIC PETITIONS COMMITTEE

PETITION PE1412: BOND OF CAUTION

**Comments on Scottish Government's fourth response to Petition PE1412**

The Public Petitions Committee wrote to the Scottish Government on 27 September 2012 asking for a clear response on when a decision will be taken to end the requirement for executors to obtain a Bond of Caution. The Scottish Government sent an unsigned response to the Convener of the committee on 17 October 2012.

It is extremely disappointing that in its response the Scottish Government still cannot offer a timescale as to when, if at all, it will act to end the existing requirement for Bonds of Caution (i.e. insurance bonds) in relation to estate administration. The Scottish Government only refers to the 'possibility' of progressing some aspects of succession law separately, such as the abolition of Bonds of Caution. The Government simply repeats the statement that the reform of succession law in general is 'under consideration', which, of course, it has been for several years.

There appears to be a reluctance to make a change in the law. No general reform of the law of succession or reform of the separate issue of Bonds of Caution has taken place following on from the Scottish Law Commission's 2009 Report on Succession. The fate of the 2009 Report appears to be following a similar pattern to that of the previous Scottish Law Commission's 1990 Report on Succession. Most of the recommendations in the 1990 Report were never implemented. Indeed, the briefing prepared on 15 March 2008 for the Public Petitions Committee noted that 'with the exception of one minor technical recommendation, the report's recommendations were not implemented'.

The case for retention of Bonds of Caution (i.e. financial guarantees) is very weak. The administrative and financial difficulties which executors encounter because of the requirement to obtain these insurance bonds under Scottish law has been highlighted in this petition, in the previous petition PE1134 and in the Scottish Law Commission's 2009 Report on Succession. The Commission stated in its 2007 Discussion Paper on Succession that estates were put to 'needless expense' in having to obtain a Bond of Caution. No similar requirement has existed in England and Wales since January 1972. The Commission considered whether the requirement for executors to find caution should be modified or abolished: its conclusion in 2009 was that Bonds of Caution should be abolished.

Some members of the legal profession whom the Scottish Government consulted may be in favour of retaining the Bond of Caution for estate administration. But they have a vested financial interest in doing so, as do the two large insurance companies which provide these bonds (i.e. Royal & Sun Alliance, and Zurich). However, members of the public who encounter unfair administrative burdens, delays and additional financial expense are very unlikely to be in favour of retaining Bonds of Caution. This does have an impact on a significant number of individuals and families given that most people do not leave a Will, and it is in those particular cases where the insurance bond is still required under Scottish law. Reform of the law is long overdue. As the Scottish Law Commission commented: '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 Scottish Parliament should remove this outdated and unfair legislation. Removal of the Bond of Caution would have no impact on the existence of any insurance bonds covering totally different risks. Abolition would therefore not have a negative impact on the insurance market. Section 20 of the Succession (Scotland) Act of 1964 requires that executors-dative must continue to obtain an insurance bond before confirmation of their role as executors in dealing with an individual's estate will be granted. This primary legislation should be repealed, preferably using secondary legislation, such as a Scottish Statutory Instrument. The Scottish Government has already introduced a Statutory Instrument relating to the 1964 Act but argues that primary legislation would be required in order to remove Bonds of Caution. The Scottish Parliament should therefore clarify with the Scottish Law Commission and/or an independent academic legal expert whether removal of the Bond of Caution can take place using secondary rather than primary legislation.

Progress on reform of succession law has been exceedingly slow and has virtually ceased, as the following sequence of events will confirm: After the failure to implement the recommendations in the 1990 Report on Succession, the issue of succession law was revived by the Scottish Law Commission (SLC) in 2005; in August 2007 the SLC issued a Discussion Paper; in March 2008 a petition was submitted to the Scottish Parliament seeking abolition of the Bond of Caution; the Commission's Report on Succession was submitted to the Scottish Government in April 2009; in July 2009 the Scottish Government Minister agreed that the case for review and reform of the law was a strong one, but no action was taken; the Scottish Government stated in January 2010 that legislation on succession law would emerge after the end of the parliamentary session, but this did not occur; in September 2011 the Scottish Government announced its legislative programme, but excluded reform of succession law; the Government informed the petitioner in September 2011 that there were no immediate plans for any changes to the law on succession; in November 2011 a new petition was submitted to the Scottish Parliament seeking removal of Bonds of Caution; in January 2012 a Scottish Government official stated that it was hoped to progress to formal public consultation on succession law towards the end of 2012, but this has not materialised; and in October 2012, 12 months after this new petition was submitted, the Scottish Government is still unable to provide a timescale about succession law reform or even give any assurance if, or when, it will progress separately the issue of the removal of Bonds of Caution. This is definitely not reassuring.

General reform of succession law is not imminent and so the change in the law which is requested relates to Bonds of Caution and can be expressed as follows:

- (1) The general requirement upon an executor-dative to obtain caution before he or she may be confirmed as executor is abolished; and
- (2) This change applies to all applications for Confirmation submitted on or after the date of implementation of this legislation.

In conclusion, it would now be appropriate for the Public Petitions Committee to consider other options for changing the law given that legislative change by the Scottish Government is not forthcoming. This could include referral of the petition to the Justice Committee or any MSP who was willing to support the abolition of Bonds of Caution.

**BILL McDOWELL**

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