

**PE1412/F**

**Justice Directorate**  
Law Reform Division

T: 0131-244 4212 F: 0131-244 2195  
E: frances.macqueen@scotland.gsi.gov.uk



Ms Anne Peat  
Clerk, Public Petitions Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP



4 July 2012

Dear Ms Peat,

### **CONSIDERATION OF PETITION PE1412**

Thank you for your letter of 17 May regarding the petition by Mr 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 asked for a response to the following written questions:

- The Committee draws the Scottish Government's attention to the most recent letter from the petitioner and requests responses to the issues raised.
- When will a decision be taken in relation to bonds of caution?

In terms of the issues raised in Mr McDowell's letter, he asks for information about those who expressed reservations about the abolition of bonds of caution. The reservations were expressed in responses to the Scottish Law Commission's Discussion Paper on Succession - <http://www.scotlawcom.gov.uk/law-reform-projects/completed-projects/succession/>.

The responses are held by the Commission and it would be possible for Mr McDowell to request copies, subject to confidentiality issues, from the body.

The contact details are:

The Chief Executive  
Scottish Law Commission  
140 Causewayside  
Edinburgh EH9 1PR

Tel: 0131 668 2131  
Fax: 0131 662 4900.

Mr McDowell also questions the current requirement for a bond of caution where an executor is the sole beneficiary of the estate. The rationale for this is that a bond of caution indemnifies not only a beneficiary but also a creditor of the estate against loss caused by maladministration, negligence or fraud on the part of the executor.

Mr McDowell refers to the Minister for Community Safety's initial response to the Scottish Law Commission's 2009 Report on Succession and to his comment on 'the impact on the insurance market for Bonds of Caution'. The point of this comment is that there are other limited situations in which bonds of caution are required and the Scottish Government's consideration of bonds of caution for executors dative needs to take account of the wider impact of any changes on these other areas.

Paul Allen's letter of 30 March advised that changes in relation to the law on bonds of caution would require primary legislation. Mr McDowell takes issue with this and is not convinced by the reasons given.

The current rules are contained in primary legislation and can only be repealed (or amended) by way of further primary legislation. The requirement for an executor dative to obtain a bond of caution is contained in the Confirmation of Executors (Scotland) Act 1823. That Act does not include powers to abolish the requirement for caution by subordinate legislation. Without such a power, therefore, changes can only be effected by primary legislation.

Mr McDowell expresses concern that the Scottish Government has not given a firm commitment that bonds of caution will be progressed separately or a timescale. This links to the Committee's second question. Paul Allen's letter of 30 March confirmed that we are looking at all of the recommendations in the 2009 Report to assess which, if any, could be progressed separately. In terms of timing, this work will be progressed when other priorities allow. I attach a number of parliamentary questions recently answered by the Minister for Community Safety and Legal Affairs which set out the Scottish Government's position on progressing the recommendations in the 2009 Report.

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

Yours sincerely

**Frances MacQueen**

## **Parliamentary Questions – asked by Lewis MacDonald MSP (16 May 2012)**

**Q - Lewis Macdonald (North East Scotland) (Scottish Labour):** To ask the Scottish Executive what progress has been made in consulting the relevant parties regarding the recommendations made in the Scottish Law Commission's, Report on Succession.  
**(S4W-7030)**

**A - Roseanna Cunningham:** The Scottish Government is considering options arising from the Scottish Law Commission's Report on Succession. Officials have met with a number of stakeholders because, although a number of the Report's recommendations had significant support, some are controversial. That preparatory dialogue has confirmed that some stakeholders have real concerns about important aspects of the package. Formal consultation will be necessary to inform the way forward.

**Q - Lewis Macdonald (North East Scotland) (Scottish Labour):** To ask the Scottish Executive, in light of the recommendations made in the Scottish Law Commission's, Report on Succession, whether any legal obstacles have been identified that would prevent the law of succession in intestate cases being changed to favour partners and spouses over more distant relatives. **(S4W-7031)**

**A - Roseanna Cunningham:** The Scottish Government's consideration of options arising from the Scottish Law Commission's Report on Succession will include an analysis of whether there are any legal obstacles to prevent the law of succession in intestate cases being changed to favour partners and spouses. Changes to the law of succession would however require primary legislation.

**Q - Lewis Macdonald (North East Scotland) (Scottish Labour):** To ask the Scottish Executive whether it will introduce legislation to meet some of the recommendations made in the Scottish Law Commission's, Report on Succession, earlier than others.  
**(S4W-7032)**

**A - Roseanna Cunningham:** The Scottish Government's consideration of the options arising from the Scottish Law Commission's Report on Succession will include an analysis of whether aspects of the Report might be progressed separately.

**Q - Lewis Macdonald (North East Scotland) (Scottish Labour):** To ask the Scottish Executive when it will launch a consultation on the recommendations made in the Scottish Law Commission 2009's, Report on Succession, and which of the recommendations it plans to consult on.  
**(S4W-7033)**

**A - Roseanna Cunningham:** The Scottish Government's consideration of the options arising from the Scottish Law Commission's Report on Succession and the conclusion of dialogue with stakeholders will determine the content of a consultation. We will consult when other priorities allow.

## **Parliamentary Questions – asked by Neil Findlay MSP (13 June 2012)**

**Q - Neil Findlay (Lothian) (Scottish Labour):** To ask the Scottish Executive , further to the answer to question S4W-07030 by Roseanna Cunningham on 16 May 2012, which of the recommendations in the Scottish Law Commission's Report on Succession it considers controversial.

**(S4W-07664)**

**A - Roseanna Cunningham:** The Scottish Government's preparatory dialogue on the Scottish Law Commission's Report on Succession confirmed that the most divisive issue considered by the Commission was whether adult children should continue to be protected from disinheritance by a parent's will. The Commission did not make a recommendation on this issue but instead offered two options for the Scottish Government to consider – either to afford all children a right to a legal share of a part of the whole of a deceased's estate or to allow only dependent children to make an alimentary claim on the estate. Among other potentially controversial issues is whether protection for cohabitants should be extended to testate estates.

**Q - Neil Findlay (Lothian) (Scottish Labour):** To ask the Scottish Executive , further to the answer to question S4W-07030 by Roseanna Cunningham on 16 May 2012, which stakeholders have real concerns about some of the recommendations in the Scottish Law Commission's Report on Succession.

**(S4W-07665)**

**A - Roseanna Cunningham:** Scottish Government officials have met informally with members of the legal profession. That informal preparatory dialogue revealed that a number have concerns about some of the recommendations in the Scottish Law Commission's Report on succession. Given the informal nature of discussions, it would not be appropriate to name those involved.

**Q - Neil Findlay (Lothian) (Scottish Labour):** To ask the Scottish Executive when the recommendations in the Scottish Law Commission's Report on Succession will be taken forward.

**(S4W-07666)**

**A - Roseanna Cunningham:** The Scottish Government is considering the options arising from the Scottish Law Commission's Report on Succession and will consult formally when other priorities allow.

**Q - Neil Findlay (Lothian) (Scottish Labour):** To ask the Scottish Executive , further to the answer to question S4W-07030 by Roseanna Cunningham on 16 May 2012, when it will consult again on the Scottish Law Commission's Report on Succession.

**(S4W-07667)**

**A - Roseanna Cunningham:** The Scottish Government will consult formally on the Scottish Law Commission's Report on Succession when other priorities allow.

**Q - Neil Findlay (Lothian) (Scottish Labour):** To ask the Scottish Executive , further to the answer to question S4W-07033 by Roseanna Cunningham on 16 May 2012, what the nature is of the "other priorities".

**(S4W-07668)**

**A - Roseanna Cunningham:** The Scottish Government's priorities are set out in our Programme for Government announced by the First Minister on 7 September 2011 – 'Renewing Scotland: The Government's Programme for Scotland 2011-12'.

**Parliamentary Questions – asked by Gordon MacDonald MSP (3 July 2012)**

**Q – Gordon MacDonald (Edinburgh Pentlands) (Scottish National Party):** To ask the Scottish Executive whether it plans to introduce legislation relating to the Scottish Law Commission's Report on Succession.  
**(S4W-08206)**

**A - Roseanna Cunningham:** The Scottish Government is considering the Scottish Law Commission's Report on Succession (SCOT LAW COM No 215) 2009. Officials have met informally with a number of stakeholders because, although some of the report's recommendations had significant support, others are controversial. That preparatory dialogue has confirmed that some stakeholders have real concerns about important aspects of the package. Formal consultation, when other priorities allow, will be necessary to inform the way forward.

**Q - Gordon MacDonald (Edinburgh Pentlands) (Scottish National Party):** To ask the Scottish Executive whether it considers that there are problems relating to special destinations registered before 1990 and, if so, whether it plans to introduce legislation to deal with them.  
**(S4W-08207)**

**A - Roseanna Cunningham:** The Scottish Government is considering the Scottish Law Commission's Report on Succession (SCOT LAW COM No 215) 2009 which followed a review of the law of succession, including special destinations. The 2009 report supersedes the Report on Succession (SCOT LAW COM No 124)1990 and reaches different conclusions in respect of special destinations.

A number of the recommendations of the 2009 report are controversial and we will carry out formal consultation when other priorities allow. That exercise will inform decisions on the way forward on the report's recommendations, including those on special destinations.

**Q - Gordon MacDonald (Edinburgh Pentlands) (Scottish National Party):** To ask the Scottish Executive whether it considers that there are problems relating to evacuations of special destinations registered before 1990 and, if so, whether it plans to introduce legislation to deal with them.  
**(S4W-08208)**

**A - Roseanna Cunningham:** The Scottish Government is considering the Scottish Law Commission's Report on Succession (SCOT LAW COM No 215) 2009 which followed a review of the law of succession, including the evacuation of special destinations. The 2009 report supersedes the Report on Succession (SCOT LAW COM No 124)1990 and reaches different conclusions in respect of the evacuation of special destinations.

A number of the recommendations of the 2009 report are controversial and we will carry out formal consultation when other priorities allow. That exercise will inform decisions on the way forward on the report's recommendations, including those on the evacuation of special destinations.