Justice Directorate
Civil Law and Legal System Division

T: 0131-244 2196 F: 0131-244 8325
E: Jill.clark@gov.scot

The Scottish Government
Riaghaltas na h-Alba

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XX COMMONWEALTH GAMES SCOTLAND

Ms Deborah Cook
Deputy Clerk
Delegated Powers and Law Reform Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

13 October 2015

Dear Deborah,

SUCCESSION (SCOTLAND) BILL

I write following Mr Wheelhouse the Minister for Community Safety and Legal Affair's appearance before the committee to talk about the Succession (Scotland) Bill at Stage 1 on 28 September. In the course of responding to the Committee's questions, the Minister indicated that we would write on a number of issues which I have set out below.

Section 1 - Effect of divorce, dissolution or annulment on a will

In light of the Stage 1 evidence, we have given further consideration to whether a provision in a will appointing a former spouse as the guardian of a child should be revoked on divorce, dissolution, or annulment. In that event, and if no other provision is made, it will be necessary to apply to the court for a guardian to be appointed. I advised at committee that we share the view of the Scottish Law Commission (SLC) that it must be assumed on divorce that as legal separation severs all ties between the testator and their ex-spouse or civil partner, it was not the testator's intention for them to be appointed as the guardian of the child, unless they have made express provision in their will under section 1(3). This, in our view, provides a more equitable outcome which is more likely to be in line with the testator's wishes.

Having said this, we acknowledge the concerns raised in evidence that as the appointment of a guardian can be made not only in a will but in separate documentation there may be a risk of treating guardians differently according to the documentation that has appointed them.

We advised the Committee that we were continuing to think carefully about the equity of this approach and whether or not in these circumstances the remedy of an application to the court for guardianship is proportionate. We have since concluded that, even though the numbers will be small, it is not appropriate to apply different outcomes to guardianship provisions made in a will as opposed to any other documentation and we will therefore bring

forward an amendment at Stage 2 to remove the appointment of guardians from the effect of Section 1.

Section 3 - Rectification of a will

A number of comments were made in the course of the Stage 1 evidence about the type of wills which may be rectified under this provision. The intention of the provision is that the power to rectify a will should be confined to cases where the will has been prepared by someone other than the testator where a comparison can be made between the testator's instructions and the will itself. The critical point is therefore whether there is evidence that the will does not give effect to the testator's instructions rather, than the "type" of will. We are of the view that no change is therefore necessary to the Bill provisions themselves but we will review and amend the text of the Explanatory Notes.

Section 3 – Rectification of a will – use of the term 'drafted'

The Committee also heard evidence that the term 'drafted' should be changed to 'prepared' – although some witnesses were content with the use of the term 'drafted'. We are giving further consideration to the use of the term "drafted" in the Bill.

Section 3 - Rectification of a will and Section 19 – Protection of persons acquiring title

The Convenor asked whether section 19 was intended to cover the following situation. "*If I inherited and received a significant amount of money from a will that was going to be rectified and the money was going to be taken away, and I set up a business in such a way as to tie up that money, which I would require to give back, that would leave me and my creditors in trouble. I would not have acquired that for value but would have acquired it under the estate. All sorts of houses of cards would fall down because I would have to give the money back but I would no longer have it as I would have dispersed it into a business*".

Section 19 is intended to protect an individual who has acquired property for value. In the above example, the individual who received the inheritance under a will which was subsequently rectified would require to repay the money received. The aim of the measure is to ensure that the rightful beneficiary receives the property.

If that individual had used the inheritance before the will was rectified to set up a business which had a number of creditors the rectification of the will would not affect the creation of the business directly but indirectly may do so as the inheritance which was used to establish the business would require to be repaid. The creditors would not be protected under section 19 as they would not have acquired title to property in good faith or for value. It may be worth noting that the scenario described by the Convenor could occur at present and is not covered by the current law.

There are a number of safeguards in the Bill which ensure that the circumstances in which a will may be rectified are deliberately narrow. As the committee will be aware, there is a limited time in which an application for rectification can be made – 6 months from date of death or from the confirmation and to avoid personal liability, an executor should not distribute the estate for a period of six months from the date of death. The Bill ensures that the rightful beneficiary receives their inheritance under a rectified will and where the property has been distributed, section 19 protects a third party who has acquired the property in good faith and for value from the beneficiary before the will is rectified.

Section 6 - Death before legacy vests; entitlement of issue

The Committee heard evidence about how section 6 would operate where there is a competing residual legacy. Under section 6 direct descendants will be preferred over a residual legatee. However, it was suggested that this policy approach was not clear in terms of the wording of the section. Given the comments which have been made we will give the framing of the provision further consideration.

In evidence it was suggested that in section 6(1)(a) in the context of beneficiaries the word 'names' should be changed so that the section applies where a will does not refer to a beneficiary by name but instead refers to the beneficiary by way of a description of the beneficiary's relationship to the testator (for example, where property is left to a "son" or "daughter". Professor Paisley set out some compelling reasoning for this suggested change. On the basis of that reasoning we are giving consideration to whether the term "names" should be changed.

Section 9 – Uncertainty of survivorship treated as failure to survive and Section 10 – Equal division of property if order of beneficiaries' death uncertain

In evidence there has been some discussion that more estates will fall into intestacy by the operation of these provisions and that if relatives cannot be traced, the estate will 'fall to the Crown'. The Minister highlighted how such estates are administered and that he understood that in many cases relatives are ultimately identified.

We have some sympathy with the proposition that in this situation the estate should not fall to the Crown and are giving the matter some careful consideration.

Again, in evidence, there were mixed views provided as to the clarity of the interaction between sections 9 and 10 and, in particular the operation of section 10(1)(b) and 10(4). We are therefore giving particular consideration to this aspect of the framing of the provisions to ensure that the law is as accessible as possible to lay persons.

Sections 12 – 16 - Forfeiture

The Committee heard Professor Paisley's critical view of the Forfeiture Act 1982 and his proposal that the focus of these provisions should be on 'unworthiness'. The Minister set out why we are not in a position to abolish the 1982 Act. We also note that other respondents have been content with the provisions in the Bill. The Bill does in any case do no more than make a few small adjustments to the 1982 Act.

The SLCconsidered the 'personal unworthiness' rule and noted that the common law principle that someone should not be able to benefit from their crime is based on the English public policy rule and applies in Scotland. The 1990 report considered at paragraph 7.5 the crimes that should result in the disinheritance of an heir. They concluded that "*any new statutory provision on forfeiture should be limited to the murder or culpable homicide of the deceased, or an analogous crime committed abroad. For these crimes there is a direct link between the commission of the crime and the opening of the succession to the criminal which may be lacking in other crimes*". The approach of the 2009 Report, which does not recommend new statutory provisions for convicted killers, leaves the common law to deal with situations which are not covered by the Forfeiture Act 1982. In light of this, we are content the Bill does not require to be amended and that we have given effect to the policy outlined by the SLC as closely as possible.

Section 18 - Errors in distribution: protection of trustees and executors in certain circumstances

There has been a significant amount of discussion at Committee about what is meant by the phrase "*such enquiries as any reasonable and prudent trustee would have made in the circumstances of the case*". The evidence from the legal profession has confirmed that it is a term which is well understood and that there is no implication that advertising needs to be undertaken in order to satisfy the meaning of the phrase.

Having said this, we note the Committee's concern that this term would not be understood by lay persons who are undertaking the role of a trustee or executor and that the Explanatory Notes could be adjusted to add clarity. We are therefore considering the terms of the Explanatory Notes. We will also look at updating our published guidance for executors in due course.

For the avoidance of doubt, we are not minded to define "reasonable enquiries" for the reasons expressed by Stewart Stephenson MSP, if this phrase was defined in the legislation there is a risk that this will quickly become out of date, particularly given the advancement of technology. We are therefore of the view that expanding the Explanatory Notes to assist lay persons and providing guidance for executors is the proportionate approach to the Committee's concerns about the meaning of this phrase.

Section 20 - Gifts made in contemplation of death

We have heard the view that the words 'in contemplation of death' do not appear to be necessary and undertook to reflect on this further. The wording is to make clear that the abolition is of the donation mortis causa as a distinct legal entity. Subsection (2) is merely to make it clear that a gift may still be transferred to a donee on the same terms that a donation mortis causa was. The "in contemplation of death" wording is to make it clear that it is only the legal entity of a *donation mortis causa* that is being abolished and not the ability to make such a gift in these circumstances. For this reason we are of the view that the wording "in contemplation of death" is necessary but we are continuing to reflect on whether any changes could be made to improve the drafting of subsection (2).

Section 25 - Ancillary powers

I understand the Committee would prefer if there were to be a standard form of wording used for Ancillary powers across the Scottish Government legislation. This reflects the views of the committee in their report on the delegated powers provisions of the Bill. This is a matter on which wehave written to you and on which a drafting policy on ancillary provision sections is being considered. We will continue to liaise with interested parties, including the Parliament, to establish the extent to which the drafting of ancillary powers can be standardised.

The above reflects our thinking on these matters to date and I hope this is helpful to the Committee in their Stage 1 deliberations. We will of course be very interested in the Committee's views as set out in the Stage 1 Report and will reflect further on these issues in the light of that Report.

Yours sincerely

J Clark.

Jill Clark