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Minister for Community Safety and Legal Affairs

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The Hon Lord Pentland QC
Chair
Scottish Law Commission
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Dear Lord Pentland

As you will no doubt be aware as part of the First Minister's Programme for Government a Succession Bill was announced in November 2014. The Bill is intended to take forward some of the recommendations contained in the Scottish Law Commission's Report on Succession published in 2009, a number of which were carried over from the 1990 Report on Succession.

I appreciate that a little time has passed since the Commission published their latest Succession Report and I am therefore very grateful to your team for taking the time to meet with my officials about various aspects of the Bill.

We consulted on the issues earlier this year and that consultation has further informed the final shape of the legislation. It is our opinion that this Bill will make an ideal second candidate for the Scottish Law Commission Bill Procedure.

In order to qualify for the new Scottish Law Commission Bill procedure, the Bill must meet a number of conditions, including criteria determined by the Presiding Officer. I have therefore set out in **Annex A** the detail of how this Bill fulfils the conditions and as before with the Legal Writings (Scotland) Bill, I will arrange to have this letter laid formally in the Scottish Parliament.

I also attach a near final draft of the Bill which we are confident fulfils the Commission's recommendations. In a few areas, we have departed from the drafting approach taken in the Commission's draft Bill, but these minor and technical changes are not intended to change the legal effect of the provisions. Where recommendations are to be implemented only in part or are to be implemented fully but with the addition of some further related provision, we have outlined the reason for taking this approach, in **Annex B**.



It would be very helpful if after consideration you could indicate whether or not you agree that the draft Bill gives effect to the Commission's recommendations and highlight any concerns that you may have.

Kindest regards

Paul Wheelhouse

PAUL WHEELHOUSE

ASSESSMENT OF THE BILL AGAINST THE CONDITIONS SET OUT IN THE STANDING ORDERS, INCLUDING THE CRITERIA DETERMINED BY THE PRESIDING OFFICER FOR QUALIFICATION AS A 'SCOTTISH LAW COMMISSION BILL'.

The Bill must implement all or part of a report of the Scottish Law Commission.

The Bill will implement recommendations 46-49, 50-52, 54-59, 60-65, 71, 72, 75 and 76 of the Report entitled *Succession*¹, which was published in April 2009 as part of the Scottish Law Commission's Seventh Programme of Law Reform. The Bill will modernise some technical aspects of the law relating to succession and will address a number of anomalies within the current legislative framework so that the law in this area is fairer, clearer and more consistent. In the main, the reforms relate to the rectification of wills; the effect of divorce, dissolution or annulment on a will or special destination; the revival of a revoked will; jurisdiction and choice of law; survivorship; forfeiture; gifts made in contemplation of death and the rights of succession in limited circumstances. A number of these recommendations were carried forward from an earlier Report on succession published in 1990.

There are a few areas in which we have, arguably, made minor modifications of the Commission's proposals. These are matters which have been flushed out in consultation on the Bill as being matters where it is appropriate to resolve particular technical points, or to supplement the Commission's proposals. These differences, along with the reasons for them, are set out in Annex B. Our view though is these differences can be categorised as minor and technical and that a report (or part of a report) should be considered to be implemented, within the meaning of the Standing Orders, despite such minor and technical differences.

The remaining recommendations, which we are not implementing in this Bill, relate to a proposed new scheme for intestacy; protection from disinheritance under a will; and extended rights for cohabitants. We intend to consult on these in June 2015 along with one or two issues consulted on in connection with the proposals for this Bill but on which it was considered that further consultation would be helpful, such as the proposals on bonds of caution.

There must be a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended.

The Commission carried out comprehensive consultation in accordance with their established practice in conducting law reform projects at the time.

The Scottish Government subsequently consulted on a number of the recommendations on 14 August 2014 *Consultation on Technical Issues Relating to Succession*². The analysis of that consultation and the formal Scottish Government response will be published shortly. Where there was a lack of consensus, the Scottish Government will be, where indicated, consulting further. The Bill therefore contains only those recommendations on which there was general agreement.

¹ SLC No 215.

² <http://www.gov.scot/Publications/2014/08/1185>

The final draft of the Bill is the product of the consultation process described above.

The Bill must not relate directly to criminal law reform

The Bill relates to civil law reform and does not relate in any way to criminal law reform.

The Bill must not have significant financial implications.

The provisions in the Bill are intended to bring clarity to the law and to plug some gaps in the law to ensure a consistency of approach. Therefore no significant cost implications are anticipated to result from the commencement of the Bill, other than the costs which will be borne by law firms in making their staff aware of the changes to the law affected by the Bill. These types of cost result from any reform of the law.

The Bill must not have significant European Convention on Human Rights (ECHR) implications.

We consider that the proposals do not have any ECHR implications. The provisions of the Bill are not retrospective, so there is no danger of established rights being affected.

The Scottish Government must not be planning wider work in that particular subject area.

The Scottish Government intends to consult on the remaining recommendations contained in the Report on Succession shortly. That consultation is mainly about a fundamental overhaul of the overarching legislative framework on succession. There is no intention to revisit the particular provisions contained in this Bill however, which effectively stand-alone and will not require further amendment when the wider law on succession is legislated on.

The Bill must not be a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revision Bill

The Bill does not fall into any of these categories.

Implementation of all or part of a Scottish Law Commission Report

Of the recommendations which are to be implemented in this Bill, we have identified 2 which are to be implemented only in part or are to be implemented fully but with the addition of some further related provision. These are recommendations 51 and 75.

Recommendation 51 is about judicial rectification of wills. The recommendation is that—

“(1) Provision should be made for the judicial rectification of a will prepared by someone other than the testator where the court is satisfied that the will is so expressed that it fails to give effect to the testator’s intentions.

(2) The power to rectify should be exercisable by the Court of Session or by the sheriff court.

(3) An application for rectification should be competent only within 6 months from the date of confirmation of an executor or, where there is no confirmation, from the date of death: but the court should have power, on cause shown, to allow a later application.

(4) A court dealing with an application for rectification should be expressly empowered to consider extrinsic evidence.

(5) A trustee or executor should not be personally liable for distributing any property in good faith in accordance with a will which is later rectified.

(6) Provision should be made for a court order rectifying a will to be registrable in the Books of Council and Session or sheriff court books if the will is already registered there or if it is being registered there at the same time.”

It is likely that the Bill will implement the recommendation with the following minor change—

- Property acquired in good faith by a third party will not be recoverable.

This small change is intended to reflect the views of consultees.

Recommendation 75 is that *“Any right at common law to claim the expense of mournings, aliment jure representationis or temporary aliment should be abolished.”*

The Scottish Government’s policy is that the Bill will implement this recommendation in part. The Bill will only abolish the right to claim the expense of mournings.

We are of the view however that this approach fulfils the criterion of meeting part of a Scottish Law Commission report/recommendation.

In addition to those changes, we also intend to take a slightly different approach to the commencement of the legislation. The Commission’s **Recommendation 79** is that *“The Scottish Ministers should appoint, by statutory instrument, a single day for the commencement of the legislation”*.

The Commission’s rationale for this approach was that their Report formed a package which could not sensibly be broken down and that it would for example be unworkable if the provisions on intestate succession were implemented ahead of the provisions on testate

succession. We agree that in this example there is a critical inter-dependency. However, although we expect that a single day will be appointed for commencement of the new legislation, we think it is sensible to provide a degree of flexibility in case there is a reason for commencing certain provisions earlier than others, following amendments to the Bill. The Legal Writings (Counterparts and Delivery) Bill also departed from the draft Commission Bill in this regard.

As was the case with the Legal Writings (Counterparts and Delivery) Bill, a further departure is that the draft Bill includes the full suite of ancillary powers. In common with some other provisions in the draft Bill e.g. section 54 on prescription, the Commission did not make any substantive recommendations on this issue. While the Commission Bill did not include this power, given the technical nature of the Bill and the interaction with property law and trust law, it is considered justifiable for the Bill to contain these powers. This will enable any fine-tuning to ensure the workability in practice of the matters addressed in the Bill.