Delegated Powers and Law Reform Committee

Succession (Scotland) Bill at Stage 1

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The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
Committee Membership

Convener
Nigel Don
Scottish National Party

Deputy Convener
John Mason
Scottish National Party

Richard Baker
Scottish Labour

John Scott
Scottish Conservative and Unionist Party

Stewart Stevenson
Scottish National Party
Introduction

1. At its meetings on 1 and 22 September 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Succession (Scotland) Bill at Stage 1 ("the Bill")\(^1\).

2. As lead committee for the Bill the Delegated Powers and Law Reform Committee will consider and report on the general principles of the Bill. In addition to carrying out the role of lead committee, under rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill which confer power to make subordinate legislation. The Committee may also consider and report on any provision in such a Bill conferring other delegated powers.

3. This report relates solely to the Committee’s consideration of the delegated powers provisions in the Bill.
Overview of the Bill

4. The Bill was introduced on 16 June 2015 by the Cabinet Secretary for Justice.

5. The Bill partly implements recommendations of the Scottish Law Commission in their “Report on Succession 2009”, which were carried forward from an earlier report of 1990. The Bill implements the more technical aspects of the Commission’s recommendations, aimed at addressing a number of anomalies in the current legal framework - rather than the more comprehensive proposals to reform the law of succession in their wider report.

6. The Scottish Government consulted on its recommendations to modernise and clarify the law of succession from August 2014 to 7 November 2014. The principal statute which regulates the law of succession in Scotland is the Succession (Scotland) Act 1964. This Bill however consists of free-standing provisions, and amendment or repeal of certain other enactments. (There is, however, some consequential repeal of a few provisions of the 1964 Act).

7. The Bill contains a series of technical reforms to the law of succession.

8. In outline, the provisions of the Bill:

- reform the effects of divorce, dissolution of a civil partnership or annulment of marriage, upon a will or a “special destination”. By a “special destination”, property may be transferred to a person A, whom failing person B, by way of a destination provision in a will, or in a trust taking effect during the lifetime of the person creating the trust (sections 1 and 2);

- establish a process for rectification of a will in certain circumstances, to give effect to the intentions of a testator. (A testator is a person who makes a will). There is also reform of the law relating to revival of a revoked will (sections 3 to 5);

- close some jurisdictional gaps to ensure that the Scottish courts have jurisdiction where the applicable law is Scots law (section 22);

- reform how testamentary rules on survivorship should operate in Scotland, where there is uncertainty as to the order of the death of persons. There are also other reforms of technical rules related to survivorship, and situations where a person who might otherwise benefit from a will fails to survive the testator (sections 6 to 11, 24);

- reform the law relating to forfeiture. The forfeiture rule is a common law, public policy rule. In certain circumstances, the rule precludes a person who has unlawfully killed another from benefitting as a result of that killing (sections 12 to 17);
• reform estate administration to put in place certain protections for trustees and executors who act in good faith, and for persons acquiring title in good faith (sections 18 and 19); and

• abolish the distinct legal entity known as “donations mortis causa” (gifts made in contemplation of death). The right at common law of a widow and family to claim an allowance for “mournings” for certain items from the estate of the deceased is also abolished (sections 20 and 21).
9. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

10. The Committee considered the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provision:

- Section 26 – Commencement.

11. At its meeting on 1 September, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated power in the Bill, contained in section 25. This correspondence is reproduced at the Annexe. The Committee’s comments and recommendations on this power are detailed below.
Recommendations

12. The Committee comments on the remaining power in the Bill as follows:

Section 25 – Ancillary Provision

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Provision

13. This section confers ancillary powers on the Scottish Ministers, to make supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill.

14. Subsection (2) provides that the regulations may modify any enactment (including provision in the Bill), and may make different provision for different purposes.

Comment

15. The Committee has seen in earlier Bills that there are differences in the wording of ancillary powers in the nature of section 25 of this Bill. The Committee reported in the following terms in relation to the ancillary powers contained in the Tribunals (Scotland) Bill at Stage 1 (the powers now being contained in section 80 of the 2014 Act):

> “The Committee observes that there appears to be a lack of consistency in the formulation of ancillary powers in Government Bills. That may well be justifiable but no explanation has been provided regarding how the Scottish Government selects which formulation to use in each case. Parliament is accordingly being asked to grant powers which are expressed in different ways, and which presumably have different meanings, without a justification for that having been provided.”

16. The wording of section 25(1) of this Bill differs from, for example, that in section 97(1) of the Community Empowerment (Scotland) Bill (as passed). Section 25(1) refers to ancillary provisions “as they consider appropriate”, but section 97(1) refers to ancillary provisions “as they consider necessary or expedient”. Section 25(1) states “in connection with”, but section 97(1) states “in consequence of” any provision of the Bill.

17. The Committee therefore asked the Scottish Government to explain why the different formulation used in section 25(1) is appropriate, and what the effect of the provision is. The Committee also asked if an explanation could be provided of
the principles or considerations which are used currently, in deciding how to frame
the ancillary powers that may be proposed in particular Bills.

18. In its written response to the Committee, the Scottish Government states that
consistency is one of the things it considers desirable in Bills. But the main goal is
achieving certainty of legal effect in the clearest language possible.

19. The Government’s response also confirms that a drafting policy document on
ancillary provision sections is being considered, and whether and to what extent
the drafting of such sections can be standardised remains to be determined. The
view is taken that in the absence of agreed standardised wording, minor variations
of wording “do not necessarily signify differences of legal effect”. The response
comments further that not all ancillary provisions are intended to achieve the same
effect. The extent of the proposed ancillary powers may depend on the proposed
scope or length of a particular Bill.

20. The Committee notes initially that the written response only provides a partial
answer to the Committee’s query as to the principles or considerations which the
Scottish Government has used in proposing the powers in section 25 of this Bill,
and equally to the query as to the particular effect of the section. It is stated that
in respect of this Bill, it is anticipated that use may need to be made of all the
“ancillary elements” of the power, so these are all included.

21. The written response therefore provides an explanation as to why the section
refers to the power to make “supplementary, incidental, consequential,
transitional, transitory or saving provision”. However it does not explain the effect
of the differences in wording which are indicated at paragraph 14 above (for
example as between this Bill and the Community Empowerment (Scotland) Bill) -
or why in that respect particular wording has been chosen for section 25. That
wording concerns the consideration which the Scottish Ministers must undertake
before making any ancillary provision (for example, whether it is considered to be
necessary, or expedient, or appropriate, for the purposes of provision in the Bill).
The wording also concerns how any ancillary provisions which might be proposed
under the Bill must relate, or connect to, or be in consequence of, the provisions
within the Bill.

22. The Committee notes (as a positive aspect) that section 25 of this Bill is on
substantially the same terms as the ancillary provision in section 5 of the Legal
Writings (Counterparts and Delivery) (Scotland) Act 2015. Both that Act and this
Bill implement relatively technical reforms of Scots private law, as recommended
by the Scottish Law Commission. Even on a comparison with section 5 of the
2015 Act however, there are minor differences in the drafting. (Section 25(1)
mentions “the purposes of” twice, and section 5(1) ends differently with “or for
giving full effect to this Act”.)

23. The Committee accepts, in principle, that an ancillary powers provision is
appropriate to this Bill. It is also content that the exercise of the powers is
subject to the affirmative procedure, where the provision would textually
amend primary legislation, and otherwise the negative procedure would apply.

24. In relation to the general issue of the consistency of drafting of ancillary powers provisions however, the view of the Committee remains the same as reported (some time ago) in relation to the ancillary powers in the Tribunal (Scotland) Bill at Stage 1. The Committee acknowledges that there may be reasons, relative to a specific Bill, why the ancillary powers should be framed in a particular way. It may also be appropriate on occasion that there should be differences in the effect of ancillary powers, as between particular Bills. However, where the Parliament is being asked to grant ancillary powers which are expressed in different ways, the effect of the drafting which is proposed ought to be explained, and why that drafting is appropriate for the Bill in question. Where the effect is intended to be the same, there should be consistency in drafting.

25. The Committee welcomes that the Scottish Government is working on a drafting policy document on ancillary powers provisions, and recommends that the work on this document is expedited.
Correspondence with the Scottish Government—

On 2 September 2015, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 1 September and seeks an explanation of the following matters:

Section 25 – Ancillary Provision

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** Regulations
- **Parliamentary procedure:** Affirmative where provision textually amends primary legislation, otherwise negative

2. This section confers ancillary powers on the Ministers, to make supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill.

3. The Committee has seen in some earlier Bills a discrepancy in the wording of the ancillary powers. The differing approach to the drafting of ancillary powers can again be seen, by comparing the powers in this Bill, with those in section 97(1) of the Community Empowerment (Scotland) Bill, as passed. The Delegated Powers Memorandum does not explain why the differing approach is taken.

4. The Committee therefore seeks an explanation from the Scottish Government in relation to the ancillary powers in section 25(1):

5. The Committee reported in the following terms in relation to the ancillary powers contained in the Tribunals (Scotland) Bill at Stage 1 (the powers now being contained in section 80 of the 2014 Act):

   “The Committee observes that there appears to be a lack of consistency in the formulation of ancillary powers in Government Bills. That may well be justifiable but no explanation has been provided regarding how the Scottish Government selects which formulation to use in each case. Parliament is accordingly being asked to grant powers which are expressed in different ways, and which presumably have different meanings, without a justification for that having been provided.”

6. The wording of section 25(1) of this Bill differs from, for example, that in section 97(1) of the Community Empowerment (Scotland) Bill (as passed). Section 25(1) states “as they consider appropriate” but section 97(1) states “as they consider
necessary or expedient”. Section 25(1) states “in connection with”, but section 97(1) states “in consequence of”.

7. The Committee therefore asks the Scottish Government to explain why the different formulation used in section 25(1) is appropriate, and what the effect of the provision is (in comparison with the formulation used in, for example, section 97(1) of the Community Empowerment (Scotland) Bill). The Committee observes that if it is intended that the effect of these ancillary powers is intended to be the same, then the same wording ought to be used, for consistency.

8. The Committee asks the Scottish Government to provide an explanation of the principles or considerations which are used currently, in deciding how to frame the ancillary powers that may be proposed in particular Bills.

On 15 September, the Scottish Government responded as follows:

Thank you for your letter of 2 September.

The Committee raise a question about the consistency of the drafting approach adopted in this section compared with the drafting of similar provisions in other Bills currently before, Parliament and in past Bills.

Consistency is one of the things the Scottish Government considers desirable in Bills. But it is not the only, or even the main, goal - which is achieving certainty of legal effect in the clearest language possible. The importance of consistency is that it can assist in achieving certainty and clarity.

Where possible, the Scottish Government aim to avoid unnecessary differences in the drafting of common provisions. As the Committee may be aware, "drafting policies" on provisions setting out short titles and conferring powers to make subordinate legislation have been prepared and made available to interested parties, including the Parliament’s Non-Government Bills Unit, the Parliament’s own legal advisers and the Scottish Law Commission’s in-house parliamentary counsel. These policies seek to standardise, where appropriate, the drafting of the provisions to which they relate.

A drafting policy on ancillary provision sections is being considered. That work is ongoing, and whether and to what extent the drafting of such sections can be standardised remains to be determined. In the absence of agreed standardised wording, however, minor variations - such as those the Committee identifies in the Bills presently under consideration - do not necessarily signify differences of legal effect.

It is also the case that not all ancillary provision sections are intended to achieve the same effect. The powers in some Bills have been wider or narrower than the powers in other Bills. In other Bills, no ancillary provision is included where it is considered unnecessary. In this Bill, we anticipate that we may need to make use of all the "ancillary" elements of the power, so have included them all.

While powers to make ancillary provisions are commonly included in Bills, the extent of the power conferred in each case depends largely on the rest of the Bill to which the
power is ancillary. In a comparatively short Bill such as the Succession Bill, what can be done is determined by the limited area of law dealt with by the Bill. In the case of a longer Bill such as the Land Reform Bill, more might be done under the power, given the wide number and range of topics in the Bill.

To conclude, we consider the formulation of the power in section 25 to be appropriate in the context of this Bill and we will continue to liaise with interested parties, including the Parliament, to establish the extent to which the drafting of ancillary provisions can be standardised.

I hope this information is of assistance to the Committee.
The Succession (Scotland) Bill as introduced is available at the following website:
http://www.scottish.parliament.uk/S4_Bills/Succession%20(Scotland)%20Bill/b75s4-introd.pdf

The Succession (Scotland) Bill Delegated Powers Memorandum is available at the following website: