Delegated Powers and Law Reform Committee

Stage 1 Report on the Succession (Scotland) Bill
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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;

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

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.
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Introduction

1. The Succession (Scotland) Bill (“the Bill”) was introduced in the Scottish Parliament on 16 June 2015 by the Cabinet Secretary for Justice, Michael Matheson.

2. The Delegated Powers and Law Reform Committee was designated as lead committee for Stage 1 consideration of the Bill.

3. 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. Accordingly, the Committee considered the delegated powers within the Bill and reported upon them in its 52nd report of 2015.

4. The Finance Committee also considered the Bill. It issued a call for evidence, but on receiving no responses to that call for evidence, agreed not to take any further consideration of the Bill.

Evidence gathering

5. To inform its consideration of the Bill, the Committee issued a call for evidence on the Bill. Six submissions were received (listed at Annexe C).

6. The Committee also held oral evidence sessions on 8, 15, 22 and 29 September 2015. Evidence was taken from law bodies, legal practitioners, academics, the Scottish Law Commission and the Scottish Government.

7. The Committee thanks those who informed the Committee’s consideration of the Bill.
Background

8. The Bill is the second Scottish Law Commission Bill (SLC Bill)\(^1\) to be considered by the Committee following changes to Standing Orders in June 2013 which altered the Committee’s remit, allowing it to take the lead role in considering certain bills emanating from SLC reports.

9. The origin of the proposals in the Bill is a 2009 report\(^1\) of the Scottish Law Commission ("SLC"), which in itself built upon the recommendations of the Commission’s report of 1990 which had yet to be implemented. The 2009 report also contained proposals which would make more wide-ranging reforms to the law of succession. These proposals are being consulted on separately\(^2\), with a view to further legislation in this policy area.

10. In 2014, the Scottish Government consulted\(^3\) on a number of specific proposals for reform to the law of succession. Twenty two written responses were received. Only the proposals which attracted majority support from the respondents addressing them feature in this Bill.

11. It appears to the Committee that the provisions contained within the Bill have been consulted upon extensively with some issues dating as far back as 25 years.

General principles

Bill provisions

12. The law of succession has been subject to substantive review by the SLC. It has published two wide ranging reports, firstly the Report on Succession 1990 (Scottish Law Commission No. 124; January 1990) and secondly, the Report on Succession 2009 (Scottish Law Commission No. 215; April 2009).

13. This Bill implements, in part, the Commission recommendations from its 2009 report which were carried forward from its earlier report in 1990. It should, however, be noted that the 2009 recommendations consist of both comparatively technical recommendations which are to modernise and clarify the law of succession and more substantive recommendations which promote a fundamental overhaul of the law of succession in Scotland.

14. This Bill takes forward mainly technical recommendations relating to jurisdiction and choice of law; wills and survivorship; and rights of succession in limited circumstances. The Bill covers reforms to the following key areas:

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\(^{1}\) The first SLC Bill considered by the Committee was the Legal Writings (Counterparts and Delivery) (Scotland) Bill.
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Stage 1 Report on the Succession (Scotland) Bill, 64th Report, 2015 (Session 4)

- Testamentary Documents and Special Destinations
- Survivorship
- Forfeiture
- Estate Administration
- Miscellaneous reforms.

General views on the Bill

15. The Bill covers a disparate selection of proposals emanating from the SLC’s 2009 report on succession. The common theme, however, is that they are all matters on which there was consensus amongst stakeholders in the responses to the Scottish Government’s consultation.

16. Given the disparate nature of the Bill and the absence of consistent themes; it is difficult for the Committee to offer an overarching view of the Bill.

Has the case been made for reform of succession law?

17. The Committee has received evidence offering support for the reform of succession law and the approach taken in this Bill.

18. In written evidence both the Faculty of Advocates and TrustBar point to improvements that the Bill would bring. The Faculty of Advocates notes that reform is required and that there is a wide degree of consensus on the Bill’s proposals.\(^4\)

19. Alan Barr, a partner at Brodies LLP, suggested to the Committee that “…it is a very good thing that succession is being considered by the Parliament”.\(^5\)

20. The Committee has not received any evidence questioning the need for reform nor has any evidence suggested that this Bill does not contribute to that reform.

In considering the Bill and the current positions as regards succession law, it is clear to the Committee that a case had been made for the reform of succession law and that this Bill contributes to that process.

Consolidation

21. The Bill is only part of the Scottish Government’s programme for reform of succession law. As noted above, this Bill only progresses those SLC recommendations which are of a technical nature and on which there is a broad degree of consensus.
22. Separately to this Bill, the Scottish Government is consulting on the SLC’s more wide-ranging provisions with a view to further legislation being brought forward.

23. The Committee recognises that the matters covered in the wider consultation require further consideration. The Committee also recognises that those matters may not be appropriate for a SLC Bill. The Committee therefore appreciates the necessity of a second bill on succession.

24. Nonetheless, having two bills on succession in such short order may present challenges and in particular may be confusing for the users of the legislation.

25. The Faculty of Advocates described the splitting of a set of reform into two bills as largely “uncharted waters”.

26. The Committee explored with witnesses whether there would be value in consolidating the legislation in the aftermath of the second bill.

27. A number of witnesses expressed support for consolidating the legislation, at least covering the two pieces of new legislation.

28. Professor Carruthers, Professor of Private Law at the University of Glasgow, identified some of the benefits of consolidation—

> Once two bills become two acts, it might be sensible to consolidate them, so that there is not a gap or, worse, some inconsistency between them. In practice it is easier to work from one consolidated act.  

29. Professors Crawford (Honorary Research Fellow at the University of Glasgow School of Law), Carruthers and Paisley (Chair of Scots Law at University of Aberdeen School of Law) all recognised that there would be merit in consolidating the two new pieces of legislation, but questioned the value of consolidating other aspects of succession law. Professor Paisley queried the necessity and practicality of such a wider exercise—

> It would be possible to consolidate the existing statutory material on the law of succession into one act after the two bills are enacted. However, it would be a step too far, as regards getting it done in any timescale, to try to consolidate the entirety of the law of succession because that would bring in a vast amount of the law of trusts and executory administration, much of which works pretty well at common law in any event. That would be unnecessary.

30. In evidence to the Committee, Paul Wheelhouse MSP, the Minister for Community Safety and Legal Affairs (“the Minister”) recognised that progressing two bills in quick succession raised the question of consolidation. He committed the Scottish Government to considering consolidation in the context of a future succession bill.
The Committee considers that there would be value in consolidating succession law in the aftermath of a second succession bill as it would improve the accessibility of the law. The Committee considers that any consolidation exercise should be primarily concerned with the two new bills, recognising that a wider consultation exercise would be time consuming and potentially unnecessary.

Guidance

31. In the course of scrutinising the Bill a clear issue to emerge has been the legal complexity of the issues under consideration. The Bill’s provisions have been interpreted in different ways by legal experts. The Bill’s provisions will, however, impact on members of the public more generally and the Committee therefore explored with the Minister how these complex provisions would be transmitted to the public.

32. The Minister advised the Committee that the Scottish Government would be working with the Scottish Law Commission to update the existing guidance for the public on what to do after a death to reflect the changes provided for by this Bill.

33. It was also suggested to the Minister that the Scottish Government should be working on the development of guidance on what to do before death, so that people are informed about the Bill’s implications before death.\(^9\)

The Committee recognises that the Scottish Government’s guidance on what to do after a death has been generally well received and encourages it to maintain these standards as it develops the guidance to reflect the changes provided for in the Bill.

The Committee also encourages the Scottish Government to provide guidance on what to do before death, so that the public is aware of the Bill’s implications for succession prior to death.

Specific provisions

Section 1 – effect of a divorce or dissolution of a civil partnership on a will

34. Section 1 of the Bill provides that if a (same sex or opposite sex) marriage ends by divorce, or a civil partnership terminates by dissolution, any provision in a will benefiting the testator’s former spouse or civil partner will not take effect.

35. Two specific issues arose in the Committee’s scrutiny of this section.

36. The first issue concerned guardianship. Section 1 applies to provisions in wills appointing the testator’s former spouse or civil partner as a guardian of a child.
(section 1(a)(ii)), meaning that under section 1 a former spouse of civil partner could not become a guardian of a child.

37. The Scottish Law Commission advised the Committee 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 (section 1(3)).

38. However, the Law Society of Scotland and TrustBar argued it might be desirable in some cases for a former spouse or civil partner to become a guardian irrespective of the absence of express provision under section 1(3).

39. John Kerrigan, giving evidence on behalf of the Law Society of Scotland, explained why it could be desirable—

> Our concern was about a situation in which, for example, a couple become divorced but neither person would object to the other, in the event of their death, being the guardian of a child involved in that relationship. I understand the Government’s position, in that section 1 says that the will can provide otherwise. There may be a question as to whether the legal profession gets up to speed on that quickly, but I take the point that if a guardianship provision were revoked by divorce, the surviving party could seek parental rights. There is a question of the time involved in that.”

40. John Kerrigan suggested to the Committee that if it were a defended action, the time involved in seeking parental rights could be a much as a year and a half.

41. In addition to the time involved in obtaining parental rights, witnesses including the Law Society of Scotland, also highlighted the financial costs. John Kerrigan suggested to the Committee that it could cost around £6,000 to the client if they could not obtain legal aid and the action was defended.

42. TrustBar (a group of Scottish advocates who specialise in the areas of trusts, executies, partnership, directors’ duties and agency and other relationships of good faith) also highlighted the inconsistencies that this provision might create between family law and succession law—

> If the appointment of the guardian is made in a will and, subsequent to that will, the person who was appointed as guardian is divorced from the granter, that appointment ceases to have effect. Section 1 does not relate to non-will appointments, but the Children (Scotland) Act 1995 clearly contemplates that there can be non-will appointments—just a document and nothing else can make the appointment. No other legacy is required. It is not testamentary, so it is not a will on any normal understanding of that word. In that case, the divorce would have no effect.”
43. Professor Carruthers agreed with the Law Society of Scotland’s observations, but questioned the necessity of making provision for guardianship—

...although I accept that as an objection I would not hold up the section because of the inclusion of the guardianship issue. It is quite a small issue in the bigger scheme of what section 1 is endeavouring to do.‖

44. The Minister agreed to reflect on the evidence received and to consider further whether the approach taken is appropriate.

45. Subsequently to his appearance before the Committee, the Scottish Government has written to the Committee advising it that it has concluded—

...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.‖

46. The second issue in relation to section 1 concerns the point from which section 1 should take effect.

47. Section 1 would only apply where the deceased dies ‘domiciled’ (permanently resident) in Scotland (section 1(1)(d)).

48. TrustBar, in its written submission to the Committee, called for a re-wording of section 1(1)(d) so instead section 1 would apply as long as the testator was domiciled in Scotland when the marriage or civil partnership ended.

49. TrustBar argued that section 1 was an implied revocation of a will so it should be treated as private international law treats other revocations of wills.

50. Some countries’ rules of domestic succession law treat entering into a marriage as an implied revocation of a will. However, other countries’ rules do not. TrustBar explained that, in an estate with a cross-border element, which country’s law applies to determine the effect of a marriage in a particular instance depends on where the person was domiciled at the time he or she got married. TrustBar argued that its proposed approach was more consistent with this related strand of private international law.
51. TrustBar also said that its suggested approach was less complex in private international law terms, as the distinction between heritable\textsuperscript{ii} and moveable\textsuperscript{iii} property had no significance.\textsuperscript{17}

52. In oral evidence to the Committee, mixed views were expressed on the merits of the alternative approach proposed by TrustBar.

53. Professors Crawford and Carruthers said that, in private international law terms, TrustBar was classifying section 1 as a rule of matrimonial law. Professors Crawford and Carruthers disagreed with this interpretation, preferring to classify it as a matter of succession law. Professor Crawford commented—

\textsuperscript{18} There is a rule...that the question of whether a will is revoked by marriage is a matter of matrimonial law, to be decided by the domicile of the testator immediately after marriage, but I would be inclined to draw a distinction between that and the situation we are looking at now, which is presumably the case where a will is discovered many years after a divorce and nobody thought to alter it. I suggest that the effect of divorce is more clearly put as a matter of succession, and, as drafted, the connecting factor would be the domicile at death of the testator."

54. Professor Carruthers commented that, in any event, section 1(5) requires the divorce to be recognised by the law of Scotland. She described this as “quite neat” as “both bases are covered”.\textsuperscript{19}

55. Professor Crawford agreed that what TrustBar was proposing raised practical issues as well, for example, making it more likely that there would be a need for factual enquiries by a solicitor to ascertain issues including the testator’s domicile at the time of divorce or dissolution of the civil partnership.\textsuperscript{20}

56. The Law Society of Scotland said it could see the arguments in favour of both approaches. However, John Kerrigan (expressing a personal view rather than that of the Society) said he thought the key factor should be domicile at the date of divorce or dissolution.\textsuperscript{21}

57. In this context, John Kerrigan argued there were additional complexities associated with the approach in section 1 in terms of private international law.

58. Under the rules of private international law, where the estate has a connection to more than one country, inheritance to ‘moveable property’ (everything other than land and buildings) is governed by the country where the deceased was domiciled (no matter where the property is situated). However, inheritance to ‘heritable property’ (land and buildings) is governed by the law of the country where the property is situated.

\textsuperscript{ii} Heritable property includes land and buildings
\textsuperscript{iii} Moveable property includes title to property which actually physically moves, which would normally pass only on delivery. Moveable rights also include those to intellectual property, such as patents, trade marks and copyright.
59. As section 1 is currently drafted, this means there are situations where Scots law would apply to an estate (for any land and buildings in Scotland) but section 1 would not apply (because the deceased died domiciled elsewhere). It could be argued that this is a more complex outcome than the alternative approach proposed by TrustBar.

60. The Faculty of Advocates, however, supported the approach taken in section 1, on grounds including that the alternative was more likely to require the executors to undertake a factual enquiry to ascertain issues including the testator’s domicile at the time of divorce or dissolution of the civil partnership.22

61. Alan Barr (Partner with Brodies LLP) also said he could see arguments in favour of both approaches but was “slightly more in favour” of TrustBar’s approach. He also suggested that “death was more certain than divorce” and this might influence both the approach to domicile and the need for factual enquiries on the part of the executors.23

62. The Committee explored these issues with the Minister. The Minister maintained that the position as drafted in the Bill was appropriate.

63. At the same time, however, the Minister suggested that if the Committee was particularly minded to support the approach as proposed by Trustbar then he would reflect on this matter further.24

The Committee is not minded to support the approach proposed by TrustBar. The Committee concurs with Professors Crawford and Carruthers that this is a matter of succession law, not matrimonial law, and accordingly the approach taken in the Bill is appropriate. The Committee considers that greater certainty and clarity is provided in determining domicile at death for the purposes of section 1.

Sections 3 and 4 – court’s power to rectify a will

64. Sections 3 and 4 of the Bill aim to give effect to the Scottish Government’s policy intention that errors in a will which are “simple and obvious”25 should be able to be corrected after the testator’s death.

65. Section 3(1)(b) provides that the provisions only apply where someone other than the testator has prepared the will and there have been instructions from the testator (although these need not be in writing).

66. TrustBar, the Law Society of Scotland and Eilidh Scobie (Private Client Partner with Burnett and Reid) suggested that the scope of the provisions could be broadened to include wills prepared by the testator, such as handwritten wills or wills created using templates found online.
67. Others, however, argued for retention of the approach taken in the Bill. Professor Paisley described an expansion of the scope of the provisions as “disastrous”, leading to lots of challenges by disappointed beneficiaries. He said that the necessary evidence would be hard to find in practice or could be faked by relatives for personal gain.

68. Eliidh Scobie, however, contended that, should the scope of the provision be broadened, there were already sufficient protections in place to avoid misuse of the power of rectification—

> We could permit wills that are created other than by a lawyer to be changed through this route, but that does not mean that they would be changed, and, again, it would be up to the court to decide.”

69. TrustBar recognised, however, that it may be difficult to find evidence of the testator’s intentions when seeking to rectify a “DIY” will.

70. In evidence to the Committee, Alan Barr questioned whether wills created using pro-formas from the internet currently fall within the scope of section 1. Alan Barr queried whether the interaction with software meant that the will in these circumstances was essentially being prepared by a third party.

71. In evidence to the Committee, the Minister indicated that he was not minded to change the approach taken in the Bill. The presence of someone else to verify that the person’s intent was different from what was ultimately expressed in the will was for him the key issue and therefore wills that did not come within this understanding should not be included.

72. He contended that this meant wills prepared using online pro-forma would not come within the scope of section 3—

> Where a testator draws up their own will themselves, whether on paper or online, that provision would not apply, and we are content that that is the right outcome and that the provision itself is clear on that point, because there is no possibility of misinterpretation if the person has filled in the will themselves. We will continue to reflect on whether software could be considered as constituting a third party. Having to think about such issues has brought us firmly into the 21st century, but we think that it is unlikely to be the case. The important factor is the involvement of someone other than the testator.”

73. Both in oral evidence and in subsequent correspondence with the Committee, the Scottish Government undertook to review and amend the Explanatory Notes to provide greater clarity on what kind of wills are captured by this provision.
The Committee agrees with the position taken by the Scottish Government to the extent that the critical factor to consider in terms of section 3 is the presence of another person to verify the person’s intent, irrespective of whether or not that person is a lawyer receiving instructions. The Committee does not therefore consider that on-line pro-forma are captured within this provision.

Moreover, the Committee is not minded to support a broadening of the scope of the provision. The Committee accepts Eilidh Scobie’s argument that it will be for the courts to decide whether rectification should take place, but at the same time the Committee considers that there are risks associated with extending the scope of the provision in the manner proposed by TrustBar, Eilidh Scobie and the Law Society of Scotland.

Who is to be covered by this provision is clearly a complex matter and to that end the Committee welcomes the Scottish Government’s undertaking to review and amend the Explanatory Notes insofar as they relate to this provision.

74. Section 4(1) of the Bill provides that an application for rectification must be made within the period of six months following the grant of confirmation or, in any other case, from the date of the testator’s death. The court has discretion to extend this time limit (section 4(2)).

75. The SLC recommended that the critical aspect of this provision should be that rectification should take place within a reasonable time.  

76. A number of stakeholders, however, (Michael Kusznir; TrustBar; Law Society of Scotland; Professor Paisley) submitting evidence to the Committee said the relevant time limit for applying to the court should run from the date of death, on the basis that a grant of confirmation can take many years.

77. In oral evidence to the Committee John Kerrigan of the Law Society of Scotland expanded on this concern—

In some cases, it can take several years to obtain confirmation. I think that, if someone has difficulty with a will and wants to see it rectified, they should not be allowed to wait until six years has passed. I know that that is an extreme case, but I agree with some of the concerns that have been expressed about time limits.”

78. He further suggested that his personal view was that the time limit for rectification should be one year from death.

79. Eilidh Scobie, however argued that the approach taken in the Bill was preferable. She noted that, until confirmation is granted, the will is not a public record. She argued that, if the relevant period ran from the date of death, the executors could delay the grant of confirmation if it were in their personal interests to do so.
80. Professor Paisley acknowledged the risk that an executor may be incentivised to hide a will or delay bringing it to the attention of beneficiaries. He argued that a long initial time limit, coupled with the court’s discretion to extend the deadline in appropriate circumstances would address this point.

81. Professor Paisley also argued that a will becomes before confirmation is granted—

When someone in Scotland dies, one of the first things that a solicitor will do if the will is in the office is register it in the sheriff court books. At that point, it immediately becomes a public document. Confirmation follows later, but the will becomes a matter of public record when it is registered, which means that anyone can go and look at it. Registering a will is a voluntary act, and it is registered only to ensure that if the original gets lost, a certified copy that is treated as the original can be obtained.\(^30\)

82. In evidence to the Committee, the Minister indicated that the Scottish Government remained content with the approach as initially proposed by the SLC and as given effect to in the Bill.

The Committee is not persuaded by the evidence arguing that the time limit for applying to the court for rectification should run from the date of death rather than confirmation.

Equally, the Committee recognises that there are concerns about the approach taken in the Bill and with that in mind invites the Scottish Government to reflect again on those concerns.

83. The Committee also considered the interaction between sections 3 and 4 and section 19.

84. Section 19 of the Bill protects those who acquire property in good faith and for value directly or indirectly from the executor or a person (such as a legatee) who derived it directly from the executor.

85. Subsection (2) of section 19 makes express provision about factors which cannot be relied on as grounds of challenge. These factors are: where the court has overturned (reduced) the confirmation; where the will has been subject to rectification after the property has been distributed; and where the title was not necessarily "good" title.

86. TrustBar has argued that a deficiency of sections 3–4 (in conjunction with section 19) is the partial protection it offers to third parties acquiring property who might be prejudiced by a subsequent rectification. Instead TrustBar would prefer to apply sections 8 and 9 of the Law Reform (Miscellaneous Provisions)(Scotland) Act.
1985 to wills, which, it argues, would offer better protection in this regard and have the additional benefit of an established body of case law.

87. The Minister, however, indicated that he was content that there were sufficient protections already in place in the Bill, but agreed to follow-up on the following example highlighted by the Convener—

“…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 in business in such a way as to tie up that money, which I would be required 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. Is that the intention?”31

88. In subsequent correspondence to the Committee, the Scottish Government confirmed that in the example set out by the Convener, the individual who received the inheritance would be required to repay the money received and the creditors would not be protected under section 19 as they would not have acquired title to property in good faith or for value, the aim being to ensure that the rightful beneficiary receives the inheritance.

89. The response argues that there are, however, safeguards in the Bill, which mean the circumstances in which rectification can take place are rare—

…there is a limited time period 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.”32

The Committee notes the safeguards in place to avoid the circumstances highlighted by the Convener from arising. The Committee would welcome, however, some assurance as to what guidance is in place to make executors aware of this expectation that they should not distribute the estate for a period of six months from the date of death. If there is not broad awareness of this expectation then this would appear to undermine the strength of the safeguards and increase the likelihood of the circumstances highlighted by the Convener arising.

Sections 6 and 24 – death before legacy vests: the entitlement of children and more remote descendants

90. Section 6 relates to the ‘conditio si institutus sine liberis descesserit’. This is a legal presumption which applies where the testator left a legacy to any of his or
her ‘issue', namely, his or her children or other direct descendants (such as grandchildren or great-grandchildren).

91. The Bill would abolish the common law version of the doctrine (section 24) and re-state and clarify aspects of the doctrine in a statutory form (removing its Latin name) (section 6). Section 6(2) allows the testator to expressly opt out of the scope of the presumption in section 6.

92. TrustBar has made a specific point relating to section 6(2) of the Bill, saying that it needs to be revised to give greater clarity about the effect of a legacy of the residue in certain circumstances.

93. TrustBar set out the nature of its concerns in oral evidence—

> The point that we were concerned with is a situation that commonly occurs in which a legacy is left to person A—this can occur with a homemade will, for example—and there is a residuary provision to person D. In that situation, a layperson might think that they want to leave a particular property to son A, but if they are not leaving it to son A, they want to leave it to “all my children”, because they are leaving the residue—the whole balance—to their children.

In other words, the legacy is specific to son A; otherwise—if he pre-deceases or something—it goes to all of the children. There might be an argument that the testator has made his position clear: if son A does not get the property, everyone else does. However, it seemed to us that that argument should be eliminated.

The overall intention of section 6(2)—as I understand the policy—is that, notwithstanding the legacy to residue, there is to be inheritance by A’s children, in preference to, say, A’s other siblings. That is the policy, but it seems that there could be an argument over the word “clear”.33

94. In addition, TrustBar suggested that section 6(1)(a) should read “a will identifies as a beneficiary” rather than “names as a beneficiary” as there may be circumstances in which in naming a beneficiary an error may occur which would not have arisen if the beneficiary had simply been identified.

95. The Minister indicated that he did not believe that there is any evidence that more cases will be dealt with in the courts or that there will be greater uncertainty caused by these provisions. However, he indicated that the Scottish Government was taking on board the comments that TrustBar made and would give the matter further consideration before Stage 2.
The Committee encourages the Scottish Government to reflect further on the comments of TrustBar. In particular, the Committee strongly encourages the Scottish Government to consider amending the Bill to give effect to TrustBar’s suggestion that 6(1)(a) be amended to “a will identifies as a beneficiary”.

Sections 9 – 11 – survivorship

96. Sections 9–11 of the Bill deal with the law relating to survivorship in the event of common calamity (such as a car accident) where two or more people’s deaths were simultaneous or it is not clear which person lived longer.

97. A number of issues arose in relation to these sections.

98. TrustBar argued that the Bill should address the situation where a family perishes together and, because the order of death is uncertain, the estate falls to the Crown, rather than other relatives.

99. In its written evidence TrustBar highlighted an example where such circumstances had arisen—

> The paradigm example was Drummond’s Judicial Factor v. Her Majesty’s Advocate 1944 S.C. 298 a case in the Clydebank Blitz where a married couple and two children perished. Order of death was unknown. Wife intestate but had savings certificates. She had no blood relatives. Husband’s siblings were unable to claim as no-one could be established as having survived the other. (e.g. the children could not be established as having survived their parents) The Crown succeeded in their claim at the expense of the brothers-in-law/uncles.

This perceived unfairness will recur with the proposal in section 9."34

100. TrustBar suggested an alternative approach to avoid such circumstances arising—

> (2) Where application of the rule in subsection (1) would result in the Crown succeeding to property as ultimus haeres (ultimate heir), the younger person shall be treated as having survived the elder." 35

101. Professor Paisley echoed TrustBar’s concerns and supported its suggested amendment.

102. The Minister indicated that the Scottish Government would give further consideration to this point and would welcome the Committee’s view on this matter. That said, he noted that this set of circumstances will arise very rarely.
The Committee acknowledges that these set of circumstances will arise rarely, but they have before and consequently it is possible that they will arise again at some juncture. The Committee concurs with the position expressed by TrustBar and Professor Paisley - the estate should not fall to the Crown. To that end the Committee invites the Scottish Government to consider the approach proposed by TrustBar.

103. As noted earlier, section 9 of the Bill provides that where two people have died simultaneously or in circumstances where it is uncertain who survived whom, neither is to be treated as having survived the other.

104. TrustBar criticised the use of the word “uncertain”, suggesting it could lead to unnecessary litigation. TrustBar indicated a preference for what was decided in the Lamb case\(^iv\) – that the matter should be decided on the balance of probabilities – to appear on the face of the Bill.

105. However, Laura Dunlop QC, giving evidence on behalf of the Faculty of Advocates, argued that that there was sufficient clarity about the meaning of “uncertainty”—

> I had a look at the case to which TrustBar refers—I think that it is the Lamb case. The first-instance judge in that case found it difficult, but my view, on looking at the appeal decision, is that Lord Wheatley sorted it out. He said—as was alluded to earlier when Mr Kerrigan gave evidence—that, in round 1, we decide whether there is evidence to show on the balance of probabilities who died first. If there is not, we move to whatever the statutory rules are for the situation in which it is uncertain. The use of the word is not in itself problematic.”\(^36\)

106. The Minister indicated that he did not consider that any change is necessary, as no one was, in his view, suggesting that the provisions as drafted did not work legally. He advised that the Bill aligns with the approach that is taken in the Succession (Scotland) Act 1964 and the SLC’s draft bill, and he suggested that the term “uncertain” is explained in the Explanatory Notes, specifically in paragraph 36. He suggested that the reader of the Bill would get the answer to the issue without having to resort to the case in question.

\(^{iv}\) Lamb v Lord Advocate 1976
The Committee is not persuaded that the Bill should be amended to make specific reference to “that the matter should be decided on the balance of probabilities”. As suggested by the Minister this is already set out in paragraph 36 of the Explanatory Notes to the Bill and the Committee considers that a satisfactory exposition is provided there.

107. The Law Society of Scotland and TrustBar both expressed concern with section 10(4), which prevents section 10 from applying when the testator is amongst those who die simultaneously or in an uncertain order. Both respondents suggest that in some circumstances section 9 and 10 should both apply to avoid an estate falling into intestacy.

108. The Minister indicated that the Scottish Government would give further thought to this matter and would consider carefully the Committee’s recommendations.

109. The Committee does not wish to see provisions included within the Bill which are likely to result in an estate falling into intestacy. Nor does the Committee wish to see provisions within the Bill introduced which will increase the likelihood of people having to resort to the courts.

The Committee recommends that the Scottish Government amend section 10(4), so that in some circumstances sections 9 and 10 should both apply and thereby avoid an estate falling into intestacy.

Sections 12 – 17 – forfeiture

110. A person who is otherwise entitled to inherit may forfeit any rights to inherit from a person he or she has unlawfully killed. This area of succession law is often referred to as ‘forfeiture’.

111. In 1990 the SLC view was that the whole of the law of forfeiture should be placed on a statutory footing. By 2009 the SLC had changed its mind (2009 SLC report, para 7.2). This was on the basis that forfeiture is rare in practice and having it in the common law had not created significant difficulties.

112. Professor Paisley strongly criticised the Forfeiture Act 1982. He argued that the Scottish Government should have looked at the Scottish tradition of “personal unworthiness” which, he says, can prevent inheritance in circumstances where a beneficiary would otherwise have been entitled to inherit.

113. No other witnesses expressed a view on this issue.

114. The Minister indicated that the Scottish Government shared the SLC’s position in terms of not placing the common law of forfeiture on a statutory footing. He
suggested that forfeiture was rare in practice, and that having provision for forfeiture in the common law had not created any difficulties to date.

115. The Minister did, however, indicate that the Scottish Government would be giving further consideration to the concept of “personal unworthiness”.

116. In subsequent correspondence with the Committee, the Scottish Government has advised that it is not minded to amend the Bill to incorporate the concept of “personal unworthiness”. The Scottish Government contends that it is content with the approach taken by the SLC which proposes to leave situations which are not covered by the Forfeiture Act 1982 to the common law.

117. The Scottish Government also confirmed it does not intend to abolish the 1982 Act.

The Committee notes the Scottish Government’s response and, while it is content that this matter is not pursued any further in the context of this Bill, the Committee does consider that it is something that the Scottish Government may wish to reflect upon further in the context of a second succession bill.

Section 18 – protection for executors in certain circumstances

118. Section 18 (in conjunction with the schedule to the Bill) would consolidate and extend the existing statutory protection for executors where new beneficiaries appear after the estate has been distributed.

119. Section 18 makes it explicit that, to be protected, the executors must have made reasonable enquiries about the existence of potential beneficiaries. No requirement to advertise for beneficiaries is included. However, it remains to be seen how such a duty would be interpreted in practice.

120. Scottish Government officials advised the Committee that the term “reasonable enquiries” is a commonly used one “which would not involve advertising.” 37

121. Eilidh Scobie and Alan Barr advised the Committee that current practice was not to advertise, but in appropriate cases, to use professionals such as genealogists as well as social media to identify potential beneficiaries.

122. John Kerrigan, representing the Law Society of Scotland did not wish to see this changing this current position and imposing undue burdens on executors—

I would not like it to become standard practice for a solicitor to have to advertise that they held a will by a particular deceased, because they would have to await responses to that advert. 38
123. The Minister indicated that the Scottish Government remained content with the Bill as drafted, but would reflect on how it could be made clear to executors what constituted reasonable enquiries.

124. Subsequently, the Scottish Government has informed the Committee that it intends to expand upon the commentary in this section in the Explanatory Notes and also to provide guidance for executors.

The Committee welcomes this undertaking and in particular encourages the Scottish Government to ensure that the guidance is sufficient to enable lay persons to understand the extent of the requirements being imposed upon them.

Section 20 - gifts made in contemplation of death

125. Under the current law of succession, a ‘donation mortis causa’ is a type of gift which must have certain specific characteristics.

126. Section 20 of the Bill abolishes a donation mortis causa as a distinct legal entity. However, more generally, it does not prevent people from continuing to make gifts on such express conditions as they wish to impose and which the recipient is prepared to accept.

127. Professor Paisley (supported by Professor Carruthers and TrustBar) took issue with the drafting of section 20—

Donatio mortis causa means a donation in contemplation of death. It is a direct Latin translation. A gift in contemplation of death other than a donation mortis causa means a gift mortis causa other than a donation mortis causa. It is just complete nonsense. You are saying that it has to be this but it cannot be that at the same time; it is logically incoherent.”

128. In correspondence with the Committee the Scottish Government offered justification for the approach taken—

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 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).
The Committee welcomes this clarification and it also welcomes the Scottish Government’s commitment to reflect on the drafting further.

Section 22 - Private international law

129. Private international law is the branch of law which regulates legal issues regarding private citizens with a cross-border element.

130. Where there is a legal issue with a cross-border element, private international law determines three main issues:
   - which country’s courts should have ‘jurisdiction’ over any dispute, i.e. legal authority to hear and determine the case;
   - which country’s law should apply to the dispute (‘the applicable law’);
   - how a decision of a court made in one country should be enforced in another country.

131. Section 22 gives the Scottish courts jurisdiction where the executor has obtained confirmation in Scotland, i.e. the legal document giving an executor the authority to gather in, administer and distribute the deceased’s estate.

132. For smaller estates it is sometimes not necessary to obtain confirmation. Accordingly, the SLC’s recommendation 50 of its 2009 report on succession provided two additional grounds of jurisdiction – where the deceased died domiciled in Scotland and when he or she owned land and buildings in Scotland.

133. This recommendation is partially implemented in relation to the specific type of court procedure created by sections 3–4 of the Bill, i.e. the procedure for rectifying a will after someone’s death. However, not all the grounds of jurisdiction suggested by recommendation 50 are reflected in sections 3–4. The focus is only on the deceased’s domicile (section 3(1)(a)) rather than the location of any property owned.

134. Professors Carruthers and Crawford criticised this omission in their oral evidence on the Bill—

I should add that section 22(2) is only a partial implementation of what had been proposed. It provides for a helpful additional ground of jurisdiction, but the earlier recommendation set out additional grounds, and it is not altogether clear to us why those grounds have not been implemented in the bill. In our initial response, we said that we were happy with the additional link based on the situation of immovable property. We are content with the wording of section 22(2), subject to the removal of the parentheses, but we
would have supported a more expansive jurisdiction rule than the one it provides for.”\textsuperscript{41}

135. The Scottish Government advised the Committee that the omission was as a result of recommendation 48 of the SLC report, which specifically referred to those sections, and only applied that application to domicile in respect of heritable property.

The Committee appreciates the Scottish Government’s response, but would welcome further justification as to why recommendation 50 has not been pursued in its entirety.

**Delegated powers provisions**

136. 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.

137. The Committee published its report on the Delegated Powers provisions in the Bill at Stage 1 on 23 September 2015.\textsuperscript{42}

138. In that report the Committee reflected an ongoing concern about the drafting of ancillary powers and why there is no standardisation in their expression.

139. The Committee continues to liaise with the Scottish Government in relation to this matter.

**Financial Memorandum**

140. As noted earlier in this report, the Finance Committee issued a call for evidence on the Bill, but received no responses and did not undertake any further consideration of the Bill.

141. The Financial Memorandum itself does not anticipate any new costs arising from the Bill.

142. In evidence the only potential cost to have been highlighted was the one that may have fallen upon ex spouses or civil partners seeking to obtain parental rights. This cost, however, will be removed by the Scottish Government’s commitment to amend the Bill at Stage 2 to remove the appointment of guardians from the effect of section 1.
Policy Memorandum

143. The Committee is content with the Policy Memorandum provided in support of the Bill.
Conclusions on the general principles of the Bill

144. The Committee recommends to the Parliament that the general principles of the Bill be agreed to.

145. It appears clear to the Committee that the measures contained within the Bill have been generally welcomed by stakeholders.

146. The Committee accepts that, in general, consensus exists around these provisions.

147. In recognising the likelihood of a second bill, and with a view to the accessibility of the law for the end user, the Committee encourages the Scottish Government to consider legislation to consolidate the two bills in the aftermath of the second bill.

148. The Committee also invites the Scottish Government to reflect on the recommendations contained within this report and in particular its recommendations in relation to sections 6, 9 and 10 where the Committee is inviting the Scottish Government to amend the Bill.

149. The Committee welcomes the recognition that the Scottish Government has given to the evidence provided to the Committee so far and its commitments to amend the Bill to respond to concerns raised at Stage 1.

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2 Scottish Government Consultation on the Law of Succession [accessed October 2015]
3 Scottish Government consultation on technical issues relating to the law of succession [accessed October 2015]
40 Correspondence from the Scottish Government to the Committee, 13 October 2105
Annexe A

EXTRACTS FROM MINUTES OF THE DELEGATED POWERS AND LAW REFORM COMMITTEE

22nd Meeting, 2015 (Session 4) Tuesday 23 June 2015

Decision on taking business in private: The Committee agreed to take item 6 in private.

Succession (Scotland) Bill (in private): The Committee agreed its approach to the scrutiny of the Bill at Stage 1 (subject to formal referral of the Bill to the Committee by the Parliament).

23rd Meeting, 2015 (Session 4) Tuesday 1 September 2015

Decision on taking business in private: The Committee agreed to take items 11 and 12 in private.

Succession (Scotland) Bill: The Committee agreed its approach to the delegated powers provisions in this Bill at Stage 1.

Succession (Scotland) Bill (in private): The Committee considered the written evidence received in relation to the Bill.

24th Meeting, 2015 (Session 4) Tuesday 8 September 2015

Decision on taking business in private: The Committee agreed to take items 8 and 9 in private.

Succession (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Jill Clark, Team Leader, Civil Law Reform Unit; Frances MacQueen, Policy Officer, Civil Law Reform Unit; Kathryn MacGregor, Solicitor, Constitutional and Civil Law; Ros Wood, Solicitor, Constitutional and Civil Law, Scottish Government;

and then from—

Caroline Drummond, Commissioner; Charles Garland, Project Manager, Scottish Law Commission.

Succession (Scotland) Bill (in private): The Committee agreed to defer consideration of the evidence it heard earlier in the meeting to a later date.
25th Meeting, 2015 (Session 4) Tuesday 15 September 2015

Decision on taking business in private: The Committee agreed to take items 11 and 12 in private.

Succession (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

John Kerrigan, Partner, Morisons LLP, Member of the Law Society of Scotland;

and then from—

Wojciech Jajdelski; Laura Dunlop QC, Faculty of Advocates;

and then from—

Eilidh Scobbie, Private Client Partner, Burnett & Reid LLP; Alan Barr, Partner, Brodies LLP.

Succession (Scotland) Bill (in private): The Committee agreed to defer consideration of the evidence it has heard to date to a future meeting.

26th Meeting, 2015 (Session 4) Tuesday 22 September 2015

Decision on taking business in private: The Committee agreed to take items 7, 8, 9, 10 and 11 in private.

Succession (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Professor Janeen Carruthers, Professor of Private Law, University of Glasgow; Professor Elizabeth Crawford, Honorary Research Fellow, University of Glasgow; Professor Roderick Paisley, Chair of Scots Law, University of Aberdeen;

and then from—

David Bartos, Former Chairman; Nick Holroyd, Chairman, TrustBar.

Succession (Scotland) Bill (in private): The Committee considered and agreed a draft report on the delegated powers provisions in this Bill at Stage 1.

Succession (Scotland) Bill (in private): The Committee considered the evidence it has heard to date.
27th Meeting, 2015 (Session 4) Tuesday 29 September 2015

Decision on taking business in private: The Committee agreed to take items 7, 8, 9, 10, 11 and 12 in private.

Succession (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Paul Wheelhouse, Minister for Community Safety and Legal Affairs; Jill Clark, Team Leader, Civil Law Reform Unit; Kathryn MacGregor, Solicitor, Constitutional and Civil Law, Scottish Government.

Succession (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

28th Meeting, 2015 (Session 4) Tuesday 6 October 2015

Decision on taking business in private: The Committee agreed to take items 4, 5, 6 and 7 in private.

Succession (Scotland) Bill (in private): The Committee considered a paper on the evidence it has heard to date.

29th Meeting, 2015 (Session 4) Tuesday 27 October 2015

Decision on taking business in private: The Committee agreed to take items 9, 10, 11 and 12 in private.

Succession (Scotland) Bill (in private): The Committee agreed its Stage 1 report.
Annexe B

INDEX OF ORAL EVIDENCE

24th Meeting, 2015 (Session 4) Tuesday 8 September 2015
Jill Clark, Team Leader, Civil Law Reform Unit; Frances MacQueen, Policy Officer, Civil Law Reform Unit; Kathryn MacGregor, Solicitor, Constitutional and Civil Law; Ros Wood, Solicitor, Constitutional and Civil Law, Scottish Government;

Caroline Drummond, Commissioner; Charles Garland, Project Manager, Scottish Law Commission.

25th Meeting, 2015 (Session 4) Tuesday 15 September 2015
John Kerrigan, Partner, Morisons LLP, Member of the Law Society of Scotland;

Wojciech Jajdelski; Laura Dunlop QC, Faculty of Advocates;

Eilidh Scobbie, Private Client Partner, Burnett & Reid LLP; Alan Barr, Partner, Brodies LLP.

26th Meeting, 2015 (Session 4) Tuesday 22 September 2015
Professor Janeen Carruthers, Professor of Private Law, University of Glasgow; Professor Elizabeth Crawford, Honorary Research Fellow, University of Glasgow; Professor Roderick Paisley, Chair of Scots Law, University of Aberdeen;

David Bartos, Former Chairman; Nick Holroyd, Chairman, TrustBar.

27th Meeting, 2015 (Session 4) Tuesday 29 September 2015
Paul Wheelhouse, Minister for Community Safety and Legal Affairs; Jill Clark, Team Leader, Civil Law Reform Unit; Kathryn MacGregor, Solicitor, Constitutional and Civil Law, Scottish Government.
Annexe C

INDEX OF WRITTEN EVIDENCE

Correspondence from the Minister for Community safety and Legal Affairs

Letter from the Minister for Community Safety and Legal Affairs to the Scottish Law Commission (laid before Parliament on 21 May 2015) (2,909KB pdf)

Submissions received on the Succession (Scotland) Bill

Scottish Law Commission (85KB pdf)

Michael Kusznir (12KB pdf)

TrustBar (161KB pdf)

Faculty of Advocates (104KB pdf)

Law Society of Scotland (302KB pdf)

Paul R McGregor (70KB pdf)

Additional correspondence

Letter from the Scottish Government in response to issues raised by the Committee following the evidence session that took place on 8 September 2015 (485KB pdf)

Letter from the Scottish Government following the evidence session with the Minister for Community Safety and Legal Affairs that took place on 29 September 2015 (339KB pdf)