**Trusts and Succession (Scotland) Bill – Removal of Unlawful Killers as Executors**

**Consultation Response**

**October 2023**

*This response is provided by Dr Alisdair MacPherson and Prof Roddy Paisley. We are both members of the Centre for Scots Law at the University of Aberdeen.*

We are pleased to have the opportunity to respond to this consultation. As you are aware, we have previously provided written and oral evidence in relation to the matters covered in this consultation.

We have responded to each of the questions below.

**Question 1: Should the measures be engaged where the person is subject to a live prosecution as well as where they have been convicted?** Please state your reasons.

We disagree that the engagement of the measures should be connected to criminal law, whether in the form of a conviction or a live prosecution. The exclusion of a person as executor is a civil law matter and should involve the application of a civil law principle and standard. This would also be more consistent with our view of the common law position. In the event that Model 1 is adopted, we think that there would be particular value in providing that this is without prejudice to the common law.

If a criminal law-oriented model is chosen, we would prefer for a live prosecution and a conviction to engage the relevant measures. If only a conviction triggers the measures, this would lead to very significant delays in many cases and would enable someone to act as executor of their victim’s estate for a period of time, which would no doubt cause distress for the family of the victim.

**Question 2: Do you agree that where a relevant person is appointed as executor-dative their appointment should not be void?** Please provide any reasons.

If Model 1 is adopted, we can see arguments in both directions on this point. We acknowledge the arguments here in support of the appointment not being void. Alternatively, the appointment could be void but with protections for third parties dealing with the party purportedly acting as executor.

**Question 3: Should the appointment of an alternative executor be on a permanent basis or should the person who has been removed be given the right to resume office in defined circumstances?** Please provide any reasons.

If Model 1 is adopted, it would seem logical that if the person is not ultimately convicted, then it should be possible for them to resume office in defined circumstances.

**Question 4: Do you agree that provision deeming a relevant person to be unfit to perform the duties of executor should be retrospective?** Please provide any reasons.

Yes, this is important in providing justice for victims and their families. They have been faced with uncertainty and distress arising from the current position (sometimes for a considerable period of time). Of course, there will need to be protections for third parties who have dealt with the party purportedly acting as executor.

**Question 5: Do you have any views on whether the existing common law of Scotland is as stated by Professor Paisley and Dr MacPherson in their evidence to the Committee?**

Unsurprisingly, we do not depart from our earlier evidence on this and re-emphasise the points we previously made.

**Question 6: Would the existence of ‘reasonable grounds for believing’ that a person has been involved in the unlawful killing of the deceased be sufficient to warrant the refusal to appoint a person otherwise entitled as executor-dative or to remove an otherwise validly appointed executor-nominate?**

This would be an acceptable test in these circumstances. It would be a civil law standard fairly consistent with the common law position.

**Question 7: If a test of ‘reasonable grounds for believing’ were not to apply, what other test could be applied?**

An alternative test would be to require it to be shown that on the balance of probabilities the purported executor unlawfully killed the deceased. However, this would be more onerous for a party seeking to stop a killer becoming an executor and likely to lead to delays.

**Question 8: Where an existing executor is being removed should the order have the effect of superseding any right or title of the incumbent to the office of executor?** If not, why not?

Yes, we agree.

**Question 9: Do you consider there to be an alternative to the superseding of any right or title of the incumbent?**

N/A

**Question 10: In relation to the previous actings of an *ex facie* properly appointed executor in the purported administration of an estate, what difficulties would arise from it being ascertained that the person lacked capacity to act as executor and that any grant of confirmation in their favour was liable to reduction?**

While we note that some issues would arise in this context, an extension of section 24 of the 2016 Act and express provision for the additional circumstances mentioned would be helpful.

**Question 11: To what extent would those difficulties be addressed by section 24 of the Succession (Scotland) Act 2016.**

We have addressed this in our earlier evidence, but we acknowledge the points above and agree it could be helpful to have further express provision if there is any doubt about whether s 24 will cover all relevant circumstances.

**Question 12: Do you consider that disregarding a disqualified person’s lack of capacity for the purpose of determining the legal effect of their actings in the purported administration of the estate would address difficulties that would otherwise be presented by the absence of capacity being an automatic consequence of the person’s unlawful actings?**

Yes, we agree with the points made here and consider this to be a sensible way to proceed.

**Question 13: Do you agree that provisions in this model should be retrospective?** Please provide any reasons.

Yes, we agree. See our response to question 4 above and our earlier evidence.

**Question 14: This paper has described two possible models dealing with circumstances where an unlawful killer has been appointed executor to their victim’s estate or seeks appointment as such. On balance, which of the two models do you think would be the most practical in terms of administering the deceased’s estate?** Please provide any reasons for your choice.

Our preference is for Model 2. The removal of an executor is a civil law matter and should be more closely aligned with civil law principles and standards. It also better reflects our view on the common law position. Both models would involve similar levels of complexity and a number of practical matters would need to be addressed.

**Finally, please let us know if there are any further comments you wish to make about either model that have not already been covered by the questions above. Alternatively, we would also like to hear your views about the issue described in the consultation more generally, including any alternatives you may have to the models outlined above.**

In any event, it is highly desirable for there to be reform in this area as soon as possible. The uncertainty and distress that victims’ families have had to endure where victims’ killers have been acting as executors is highly undesirable and unjustifiable. The Trusts and Succession (Scotland) Bill provides a perfect opportunity to address this promptly.

If there is to be statutory reform, we consider it advisable to provide that the provisions are without prejudice to the common law. This will allow the courts to develop the law in relation to other felonious killing and to fill any gaps not provided for by the legislation.

In addition, we have noted previously that the rules for exclusion of an executor should also extend to a trustee in a mortis causa trust established upon the death of the deceased to deal with the distribution or administration of the deceased’s estate.