



Law Society  
of Scotland

# Consultation Response

Trusts and Succession (Scotland) Bill - Unlawful killer  
as executor to victim's estate

September 2023



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Trust and Succession Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: *Trusts and Succession (Scotland) Bill - Unlawful killer as executor to victim's estate*. The sub-committee has the following comments to put forward for consideration.

## Consultation Questions

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

A careful balance requires to be struck between the presumption of innocence and the practical requirements of administering an estate without undue delay. In general, we consider that the proposals in model 1 strike an appropriate balance.

In [our response to the 2019 consultation](#), we expressed the view that a person should only be removed as executor after an actual relevant conviction and only once any appeal proceedings in respect of their case were exhausted. However, we also acknowledged that- where a relevant person was unwilling or unable to decline or demit office- it is in the interests of fairness for there to be a procedure to apply to the court to remove them or prevent them taking up office. We also noted that, if a relevant person is not convicted after trial, they should then be able to act as executor.

We would highlight that there may be some circumstances where practical difficulties may arise if a relevant person is prevented from acting as executor, and is subsequently acquitted of the charges against them at first instance or on appeal. Those administering the estate may have made decisions which are different to those the relevant person would have made as executor. The relevant person may have missed out on items or assets from the estate which they would have received had they been able to make final decisions as executor. It is possible that a relevant person in this situation may seek to make a claim against those administering the estate, akin to that of a disappointed beneficiary.

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

Yes. We agree that this is desirable in the interests of certainty and predictability. There may well be situations where a relevant person has in fact administered an estate appropriately, and in those cases it would not be justified to void the appointment and undo the administration of the estate—potentially at significant cost to the beneficiaries.

We note that the proposals indicate that a sheriff considering a petition for the appointment of an executor-dative would be **required** to refuse the petition where satisfied that the petitioner is a relevant person [emphasis added]. Our preference would be that the sheriff has the discretion to refuse the appointment on a case-by-case basis, as the sheriff strikes a more appropriate balance. In our previous consultation response, we noted that prosecutions and convictions for culpable homicide could arise in a range of circumstances, including for example so-called ‘mercy killings’. In our previous response, we suggested that refusal could be based on an interests of justice test.

Consideration should be given to how family members and others will be made aware of any changes to the law in this area, and particular of the ability to object to the appointment of a relevant person as executor-dative and the process for doing so. In our previous consultation response, we highlighted that consideration should be given to legal aid being made available for any person, without any means test, to allow them to make an application to the court for removal of the person as an 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?**

As above, we consider that if a relevant person is not convicted after trial, they should then be able to act as executor by resuming office.

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

Yes, subject to there being protections to allow actions taken before exclusion to be ratified where there is no reason not to do so.

## **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?**

We have no reason to disagree with Professor Paisley and Dr MacPherson's analysis of the position at common law.

**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?**

No. We consider that this is a vague requirement which imposes a standard of proof akin to that in civil proceedings, whereas the standard of proof in these particular circumstances should be more closely aligned to the criminal standard for the reasons we have set out above.

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

As above, we consider that the existence of a conviction or live prosecution should be required.

**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 agreed that removal should have the effect of superseding any right or title of the incumbent to the office of executor.

**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?**

We agree that a number of issues would arise in this situation, particularly in relation to prejudice to third parties' dealings with the apparent executor, particularly beneficiaries. Whilst section 24 may provide a

solution in some cases, we would favour an express statutory protection for past actions where removal would prejudice third parties.

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

See our response to question 10, above.

**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?**

See our response to question 10, above.

**Question 13: Do you agree that provisions in this model should be retrospective?**

If these provisions are retrospective, they must include protections for effective and non-prejudicial actions.

**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?**

We support the proposal of clarifying the law in this area in statute, and on balance we prefer model 1.

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