

The Hon. Lord Pentland
Chairman
Scottish Law Commission
140 Causewayside
EDINBURGH
EH9 1PR



28th February 2014

Dear Lord Pentland,

REPORT ON FORMATION OF CONTRACT: EXECUTION IN COUNTERPART

I am writing to express my thanks for the Scottish Law Commission's Report on Formation of Contract: Execution in Counterpart, presented to Ministers in April 2013 and to advise you of my plans to take this issue forward.

I very much welcome the thorough and considered Report. I also appreciate the way in which the SLC has responded to the significant support for execution in counterpart expressed by respondents to your earlier Discussion Paper and for further reforming the law by including provision for counterparts and other documents to be exchanged electronically.

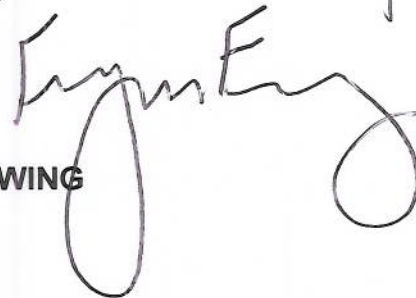
We wholeheartedly support the recommendations in the Report and agree that adopting these provisions would place Scots law in this area on a much stronger footing. By giving certainty to Scots law practitioners it will in turn be particularly helpful to commerce and business in Scotland. That is why the First Minister announced the Conclusion of Contracts etc. (Scotland) Bill as part of the Scottish Government's legislative programme in his Programme for Government statement in September last year.

You will of course be aware that the Parliament decided in May last year to accept recommendations for changes to the Standing Orders to allow certain SLC Bills to be referred to the Subordinate Legislation Committee; and to re-name the Committee the Delegated Powers and Law Reform Committee. This move recognises the valuable role of the SLC in reforming the law of Scotland and is intended to go some way towards improving the implementation rate of SLC reports.

In order to qualify for the new SLC process, the Bill must meet a number of criteria determined by the Presiding Officer. My officials have given this joint consideration with the SLC team responsible for the Bill and have come to the shared conclusion that this Bill fulfils the criteria and the Annex to this letter provides the necessary detail. I will therefore arrange to have this letter laid formally in the Scottish Parliament.

Please accept my thanks to you and the Commissioners and staff at the SLC for the progress on this issue. I look forward to working with the SLC during the parliamentary stages of the Bill.

Yours sincerely



FERGUS EWING

ASSESSMENT OF THE BILL AGAINST THE CRITERIA AS DETERMINED BY THE PRESIDING OFFICER FOR QUALIFICATION AS A 'SCOTTISH LAW COMMISSION BILL'.

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

The Bill will implement recommendations 1- 20 of the Report entitled *Review of Contract Law – Report on Formation of Contract: Execution in Counterpart*¹, which was published on 9 April 2013 as part of the Scottish Law Commission's Eighth Programme of Law Reform. Specifically it will make provision for a clear framework by which parties may "execute a document in counterpart" under Scots law; and provide a new method for the delivery of a signed document, namely by electronic means. The remaining five recommendations are termed "non-legislative recommendations" (in paragraph 4.1 of the Report) and the draft Bill appended to the Report does not contain any provisions in respect of them.

Where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended.

The SLC has carried out extensive and comprehensive consultation in accordance with the SLC's established practice in conducting law reform projects and we share the conclusion of the SLC that "there is a widespread and well-established support, especially amongst Scots lawyers for a clear, concise and certain means of executing documents in counterpart" (in paragraph 1.37 of the Report).

The SLC published a *Discussion Paper on Formation of Contract*² in March 2012 as part of the general review of contract law; Part 3 was devoted to the topic of execution in counterpart. Consultation responses were overwhelmingly in favour of statutory clarification of the validity of documents executed in counterpart in Scots law.

The SLC, in conjunction with the University of Edinburgh's Centres for Private and Commercial Law, hosted a seminar on execution in counterpart on 29 November 2012,³ and the SLC published a draft of the Bill for discussion on its website.⁴ The event attracted around 60 legal practitioners and academics. Views expressed in the seminar were very much in favour of the Bill's initiatives; for example the Chair of the event, Lord Hodge, then a senior Court of Session commercial judge and now a Justice of the UK Supreme Court, stated: "*I welcome this initiative very much. Our commercial law needs modernising; our law of contract needs to be reviewed; and there are measures which will be taken which will make us more user friendly and will address the needs of business. I particularly welcome it at a time when Scots law is under pressure.*" A number of written comments on the Bill were submitted to the SLC following the seminar, and these all expressed support for the Bill.

Following the seminar, the SLC released a revised draft of the Bill for further comments in January 2013,⁵ which coincided with an article published in the Journal of the Law Society of Scotland written by Paul Hally of Shepherd + Wedderburn LLP.⁶ This draft did not generate

¹ SLC No 231.

² DP No 154.

³ <http://www.scotlawcom.gov.uk/news/seminar-on-execution-in-counterpart/>

⁴ <http://www.scotlawcom.gov.uk/news/draft-execution-in-counterpart-scotland-bill/>

⁵ <http://www.scotlawcom.gov.uk/news/execution-in-counterpart-final-chance-to-comment/>

⁶ <http://www.journalonline.co.uk/Magazine/58-1/1012099.aspx>

as significant a volume of comments as the previous draft, but responses again focussed on drafting issues whilst expressing support for the overall concept of the Bill.

The final draft of the Bill is the product of the consultation process described above. At each stage of this process, members of the legal profession and the public were able to comment on the proposals, and a number of legal practitioners were actively encouraged to comment on the draft Bill, either by telephone or email or by way of a bespoke meeting with the SLC team. At no stage of the consultation process have comments been received to the effect that statutory provision on execution in counterpart would have an adverse effects on Scots law.

Which does not relate directly to criminal law reform

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

Which does not have significant financial implications.

The legislation would enable business to be conducted more efficiently: executing a document in counterpart is likely to be cheaper and quicker than existing practices, and delivering a signed document by electronic means will also be quicker and cheaper than existing methods of delivery. Therefore no significant cost implications are anticipated to result from the commencement of the Bill, other than the costs which will borne by law firms in making their staff aware of the changes to the law affected by the Bill. This will also be required of others operating in the legal profession, for example Registers of Scotland staff. However, these types of cost result from any reform of the law. We believe that these costs would be very small and in any event that they will be significantly offset by the financial benefits gained by bringing the Bill's measures into force. We also note that the scheme for the signing of documents created by the Bill is entirely "opt-in". Accordingly, present practices for the signing of documents will remain valid and practitioners will not require to bear any costs of training and raising awareness of the Bill's provisions unless they wish to do so. So far as registration income for Registers of Scotland is concerned, we do not anticipate any significant change in the number of deeds to be registered and therefore in the level of income.

Which does not have significant European Convention on Human Rights (ECHR) implications.

The Bill offers an optional means of validly signing and delivering a document. We consider that the proposals do not have any ECHR implications. The provisions of the Bill are not retrospective, so there is no danger of established rights being affected.

Where the Scottish Government is not planning wider work in that particular subject area.

The SLC are undertaking a significant long term project on contract law in light of the Draft Common Frame of Reference (DCFR). The project is being tackled on a topic by topic basis and Discussion Papers on other contract law topics are likely to be produced over the course of the next few years, together with one or more corresponding Reports. In effect, though, the particular legislative proposals in this Bill form a stand-alone topic and the Scottish Government is not planning wider work in the area of execution in counterpart.

Other

The Bill is not a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revisions Bill.