

RESPONSE FORM

PREPARATION OF THE ELEVENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out above in the consultation paper. Respondents who wish to address only some of the questions may do so. The form allows you to enter comments in a box after each one. At the end of the form there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via that email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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Questions

1. Do you have any suitable law reform projects to suggest?

A wholesale review of the law relating to execution of documents under Scots law.

2. If suggesting a new project:-

(a) Please provide us with information about the issues with the law that you have identified:

Electronic signing of documents has increased exponentially since the beginning of 2020 and the enforced public lock-downs as a result of the Covid-19 pandemic. For a number of parties on commercial transactions this method is now the preferred method of signing transaction documents. This has thrown-up a number of issues in practice:

- the incoherence of the current legislative regime (spread piecemeal across the *Requirements of Writing (Scotland) Act 1995*, the *Companies Act 2006*, the *Electronic Communications Act 2000*, the *EU Directive on Electronic Identification and Trust Services for Electronic Transactions*, and various pieces of subordinate legislation);
- the increasing evidence that the *Requirements of Writing (Scotland) Act 1995* is out of date with current practices and expectations;
- the lack of a clear legislative statement that “simple” electronic signatures are valid under Scots law (albeit, it is acknowledged in practice that this is the case);
- the wide categories of “traditional document” under the 1995 Act (coupled with the relative unavailability of Advances or Qualified Electronic signatures currently in the market place) which require large numbers of documents to be printed and signed in “wet ink”;
- the inability to have “simple” electronic signatures witnessed and thereby making them self-proving / probative;
- currently restrictions around electronic witnessing of Scots law documents;
- the current inability of Registers of Scotland to accept electronically signed documents; and
- the inability of a corporate entity (e.g. limited company) to sign transaction documents in counterpart by way of two directors (for example)

(b) Please provide us with information about the impact this is having in practice:

More often than not the impact is that parties to transaction are forced to print and sign documents in wet-ink. This is often done at inconvenience to the parties, for example:

- requiring individuals to attend a particular place or office to print and sign documents;

- requiring individuals to find a witness to execute documents with them;
- requiring (for example) two company directors to attend an office at the same time to counter-sign documents; and
- having to arrange for documents to be printed and transported by courier to signatories at additional expense and time.

During the lockdown periods from 2020 – 2021, on commercial finance transactions we also saw:

- a) a number of parties cease Scottish activity because the signing requirements were not flexible enough to allow them to have Scots law documents signed; and
- b) new-to-market FinTech lenders rule-out Scotland as a jurisdiction in which to conduct certain types of financing transaction because the process of electronic signing was not sufficiently flexible or certain.

(c) Please provide us with information about the potential benefits of law reform:

The benefits would be numerous. A clarified and more flexible electronic signing regime would allow legal transactions to proceed more smoothly, at less inconvenience and expense to parties. It would also reduce existing barriers to commercial transactions and commercial investment in Scotland by providing a legislative framework that assists commercial transactions rather than hindering them (as the current legislation can do). Consolidating and clarifying the legislation would also provide lawyers and transaction parties with clarity on the process.

3. Do you consider that your suggested law reform project would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

As I understand it, execution of documents is a devolved matter and so should not require Westminster approval or procedures (it being acknowledged that the provisions in the *Companies Act*, the *Electronic Communications Act 2000*, the *EU Directive on Electronic Identification and Trust Services for Electronic Transactions* – for example – could not be amended).

The intention of such a review of the law would be to respond to developments in practice following the Covid-19 pandemic; simplify and modernise the law in relation to electronic signing of documents; address deficiencies in the current legislative regime; and ensure that the existing legislation is fit for purpose (which in my view it is currently not). Such a review is unlikely to generate controversy given the increase in electronic signing of documents over the past two years.

Any Other Comments

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Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Eleventh Programme of Law Reform.