Scottish Law Commission
promoting law reform

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?

Reforming the law of execution of documents to reflect the needs of modern finance transactions.

2. If suggesting a new project:-

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

Developments in the world of finance since the passing of the Requirements of Writing (Scotland) Act 1995 mean that the law of execution of documents in Scotland is widely regarded as outdated and in need of reform. The changes introduced by the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 to facilitate counterpart execution and electronic delivery of traditional documents have removed a number of legal impediments previously faced by commercial parties when entering into paper-based transactions under Scots law. However, for many commercial parties, electronic documents (rather than traditional documents) are now the preferred method of entering into finance transactions. Most finance transactions between commercial parties are now negotiated, agreed and settled by electronic communication as far as possible. While the formal requirements for writing can in theory be satisfied by electronic documents under the changes introduced by Part 10 of the Land Registration etc. (Scotland) Act 2012, the legal framework for the use of electronic documents in finance transactions is currently inadequate. In particular, commercial parties are often excluded from using electronic documents for their finance transactions because of the stipulation that, in order to be probative, electronic documents must be authenticated by qualified electronic signatures (which remain relatively inaccessible to most commercial parties). Although probativity is not a legal requirement for many types of finance documents, it is of great commercial utility in allocating the legal risks associated with evidencing valid execution. Reforming the law of execution of documents in order to enable probativity to be conferred on electronic documents otherwise than by means of a qualified electronic signature would

remove an unnecessary legal impediment which prevents commercial parties making fuller use of electronic documents in finance transactions.

In addition to amending the rules on probativity, reforming the following aspects would further improve the legal framework for execution of documents:

1. **Double probativity:** The 1995 Act does not provide any clear rules to address the relatively common scenario where a legal person executes a document acting by one of its officers which is itself a legal person, e.g. a company acting by a corporate director; a limited partnership acting by a general partner which is a limited liability partnership. Academic commentary on the 1995 Act has led to the adoption in some quarters of "double probativity" in such a scenario, i.e. when the signature of the individual subscribing on behalf of a corporate director is attested by a witnessed, with such attestation in turn being attested by a further witness. In more highly structured arrangements, such as investment fund structures, the party to the document may be connected to the individual signatory through a chain of legal persons, with the result that the "double probativity" approach would mandate multiple witnesses for a single individual signatory.
2. **Attorneys for LLPs:** Another lacuna in the 1995 Act is position of attorneys and other authorised signatories for limited liability partnerships. Sch. 2, para. 3A permits a member to sign on behalf of an LLP, but there is no explicit rule permitting attorneys and other authorised signatories to do so (other than perhaps an interpretation provision in s.12(2)).
3. **Foreign entities acting by two signatories:** In contrast to the position for domestic companies and LLPs, a document subscribed on behalf of a foreign entity by two signatories is not probative, unless it is also witnessed or sealed. There is no obvious rationale for applying different requirements to domestic and foreign entities.
4. **Counterparts within counterparts:** The terminology used in the 2015 Act, in particular the references in s.1 to "party" and "parties" (rather than "signatory" and "signatories"), has led some legal practitioners to conclude that where a company executes a counterpart acting by two signatories (e.g. two directors), it is not permissible for each signatory to sign a separate counterpart (referred to as "counterparts within counterparts"). For paper-based transactions where the signatories are not in the same place, the practice of having both signatories sign the same counterpart often presents practical difficulties while conferring no obvious benefit.
5. **Annexations relating to land:** For documents relating to land, the 1995 Act requires that any annexation describing or showing the land must be signed. Similar (but more confusing) requirements apply to annexations to electronic documents relating to land under the Electronic Documents (Scotland) Regulations 2014. These requirements are inconvenient in practice and of limited value in safeguarding against fraud. They also give rise to uncertainties in the context of counterpart execution, as s. 1(4)(b) of the 2015 Act does not appear to require all counterpart versions of signed annexations to be included in a collated counterpart document.
6. **Floating charges:** There is some uncertainty as to whether formal writing is required in order to create a floating charge given the current wording in section 462 of the Companies Act 1985 and section 1(2) of the 1995 Act, in particular where land would or might be within the scope of the floating charge. Any requirement for a floating

charge, whether or not extending to land in Scotland, to be constituted by probative writing (such as the unimplemented provisions of the Bankruptcy and Diligence etc. (Scotland) Act 2007) may present practical difficulties in the context of cross-border financings.

7. **Consumer credit:** There is a paucity of clear authority in Scotland on whether a simple electronic signature satisfies the requirement under the Consumer Credit (Agreements) Regulations 2010 that a consumer credit agreement must be "signed".

8. **Mixed media:** The 1995 Act does not expressly permit the use of mixed media, e.g. where one part of a document is in physical form and another part is in electronic form. There would be practical advantages in the legal framework allowing traditional documents to have annexations in electronic form, particularly for schedules specifying large pools of assets.

9. **Subscription:** The requirement that the signature of the granter of a traditional document must appear at the end of the page containing the last operative clause is unnecessarily formalistic and inconvenient in practice, particularly on cross-border transactions. In other English-speaking jurisdictions, it is common for signatures to be adhibited to a separate execution page appearing at the end of the document after any annexations. Where a document is intended to satisfy the formal requirements for validity under the laws of multiple jurisdictions (e.g. where a party is assigning or creating a trust over a pool of cross-border assets), the Scottish requirement of signing at the end of the page containing the last operative clause is incompatible with the approach adopted in other jurisdictions of having signatures appear on a separate execution page. As the last operative clauses of a finance document are typically relatively uncontroversial boilerplate provisions, such as choice of law and choice of forum, the current Scottish requirement is of limited value in safeguarding against fraud in the context of modern word-processed documents. The earlier Scottish rule (of late medieval law) that every page must be signed was dropped for non-testimentary documents in the 1970s without any obvious problems. Removing the last vestiges of this anachromism by allowing signatures to appear on a separate execution page would facilitate easier use of Scottish assets in cross-border financings.

10. **The *Mercury* case:** Protocols for virtual signings and closings developed in England following the *Mercury* case allow parties to execute and deliver English law documents by printing out and signing the execution page only and then returning by email the entire electronic document together with a scanned copy of the wet-ink signed execution page. It is generally accepted that the *Mercury* protocols do not satisfy the requirements of the 1995 Act in Scotland. There would be significant practical advantages in embracing in Scotland the aspects of the *Mercury* protocols that are applicable to deeds in England, particularly in the context of increased remote working, as signatories often find it impractical to print out lengthy finance documents in full using home printing facilities.

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

The issues described in our answer to question 2(a) above generally cause practical inconvenience to commercial parties and delay and impede the completion of finance transactions under Scots law. There is also a lack of legal certainty in various aspects of the law of execution leading to additional cost and risk to businesses, as well as a generally

negative perception of the unduly formalistic and outdated requirements for signing in Scotland.

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

The reforms proposed above would make it easier to do business in Scotland and help to cast a more positive light on Scotland as a commercially friendly jurisdiction. They would ensure that our law of execution of documents reflects the needs of modern finance transactions. They would reduce businesses' risks associated with legal uncertainty and may also lower businesses' costs by allowing greater and more flexible use of digital technologies, in particular electronic signatures and electronic documents. There may also be marginal environmental benefits through the avoidance of unnecessary physical signing and closing meetings and the replacement of certain paper-based transactions with electronic documentation.

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?

Yes. The proposed reforms are non-political, technical changes which would simplify, modernise and improve the law. Their purpose is to ensure that the law is fit for purpose and to respond to developments in legal and commercial practice since the passing of the 1995 Act. We would expect the proposed reforms to be regarded as uncontroversial and strongly supported by stakeholders.

Any Other Comments

None.

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.