

SCOTTISH LAW COMMISSION
ELEVENTH PROGRAMME OF LAW REFORM: CONSULTATION

Introduction

1. The Scottish Law Commission is seeking suggestions for suitable law reform projects for our next Programme of Law Reform, our Eleventh Programme. It will commence in 2023.
2. The Commission would greatly value any suggestions or comments that you may have. The consultation period closes on 29 July 2022.
3. The Commission's current Programme, the Tenth Programme of Law Reform (Scot Law Com No 250), was published in February 2018 and runs until the end of 2022. The Programme can be viewed on our website, at the following link: [https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth Programme of Law Reform Scot Law Com No 250.PDF](https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF).
4. We will submit a draft of the Eleventh Programme to Scottish Ministers for approval, and laying before the Scottish Parliament.

The context

5. In preparing for the Eleventh Programme, the Commission will have regard to the Scottish Government's National Performance Framework, which aims to:
 - create a more successful country
 - give opportunities to all people living in Scotland
 - increase the wellbeing of people living in Scotland
 - create sustainable and inclusive growth
 - reduce inequalities and give equal importance to economic, environmental and social progress.
6. The Commission's remit covers all of Scots law, both reserved and devolved areas of the law. Reform may be needed because the law is causing difficulties in practice, for example where the law is unfair, unclear, unduly complex or out-of-date. It may also be desirable in areas where consolidation of existing legislation, or repeal of spent legislation, would be beneficial.

Criteria for selection of topics for the Eleventh Programme

7. The selection criteria for the Eleventh Programme are as follows –

- *Importance*: The extent to which the law is unjust or out of date (for example, unfair, unclear, inaccessible, inefficient, unduly complex or outdated); and the potential benefits likely to arise from reform of the law.
- *Suitability*: Whether the issues concerned are predominantly legal rather than political; and whether there is any other body better placed to examine the topic in question.
- *Resources*: The expertise and experience of Commissioners and legal staff and, in relation to projects where there may be a substantial role for a consultant, the availability of adequate funding; and the need for a mix of projects in terms of scale and timing in order to achieve a balance of workload among Commissioners and facilitate effective management of the Programme.

The Commission will also bear in mind whether a Bill on the topic may be suitable for the special parliamentary law reform processes, in particular the procedure for certain Commission Bills in the Scottish Parliament which is described below.

Projects to be carried forward into the Eleventh Programme

8. A number of projects under the Tenth Programme will be carried forward into the Eleventh Programme in 2023. These are –

- Homicide
- Heritable securities
- Damages for personal injury
- Aspects of family law.

9. Further details of these projects can be found on our website: <http://www.scotlawcom.gov.uk/law-reform-projects/>.

10. Also, in January 2022 the Cabinet Secretary for Social Justice, Housing and Local Government made a reference to the Commission to undertake a review of tenement law in connection with compulsory owners' associations.

11. As regards law reform work with other Law Commissions, the Commission may continue to work on joint law reform projects with the Law Commission for England and Wales.

12. In considering the content of the Eleventh Programme, the Commission needs to take account of our existing workload, together with any joint law reform projects.

Projects intended for special Parliamentary processes for law reform

13. The Commission has worked for a number of years with the Scottish Government and the Scottish Parliament to improve planning for implementation of Commission Reports, and to put in place further mechanisms to improve the rate of implementation.

14. This resulted in the Scottish Parliament introducing a procedure to improve consideration of certain Commission Bills. These can now be dealt with by the Delegated Powers and Law Reform Committee. The criteria set by the Presiding Officer for such a Bill were revised in March 2022 and apply to bills whose primary purpose is to:-

“(a) simplify, modernise or improve the law to—

- (i) ensure it is fit for purpose,
- (ii) respond to developments, or address deficiencies, in the common law, or
- (iii) respond to other developments in the law;

(b) make provision which is not likely to generate substantial controversy among stakeholders.”

15. As part of our business planning and our law reform methodology, the Commission considers that it is important to take account of the procedure and to identify projects that may produce draft legislation suitable for it. We would wish to stress, however, that the procedure will not be suitable for all Commission Bills. We envisage that some Commission Bills will continue to go through the conventional Parliamentary procedures, with the lead committee being the Equalities, Human Rights and Civil Justice Committee, or the Criminal Justice Committee, or one of the other subject committees.

16. In the UK Parliament in Westminster, there is also a special procedure for certain Law Commission Bills, including Scottish Law Commission Bills, in the House of Lords. The procedure is available for uncontroversial law reform measures.

17. The Commission would be grateful for any suggestions by consultees for a law reform project for the Commission Bill process in the Scottish Parliament; and for a project addressing an issue of Scots law reserved to the UK Parliament that may be a suitable candidate for the House of Lords procedure for Commission Bills.

Conclusion

18. The Commission would be grateful for your suggestions and comments on the content of the Eleventh Programme of Law Reform. In particular –

1. Do you have any law reform projects to suggest?
2. Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

19. If suggesting a new project, the Commission would be grateful if you could also provide us with information about:

- the problems and weaknesses with the law that you have identified;
- the impact this is having in practice; and
- the potential benefits of law reform.

A response form is attached below.

THE SCOTTISH LAW COMMISSION

MAY 2022

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?

We suggest that the Scottish Law Commission commences a project to reform Scots law on execution.

2. If suggesting a new project:-

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

The issues with the law on execution which we have identified are set out in the attached paper. They concern aspects of the Requirements of Writing (Scotland) Act 1995, the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and the Electronic Documents (Scotland) Regulations 2014.

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

For the impact this is having in practice, please see our attached paper.

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

Reform of the law on execution, particularly those specific areas we have identified, will help to ensure that:

- (a) business in Scotland can be effected more swiftly and easily than at present;
- (b) the law is not discriminatory and reflects Scotland's multi-cultural and inclusive society;
- (c) the law does not hinder the uptake of electronic signatures, whether that be vis a vis digital conveyancing or more broadly in the economy.

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, we consider that our suggested project to reform of the law on execution would be suitable for the Commission Bill process in the Scottish Parliament because:

- (a) the project's aim would be to modernise and improve Scots law on execution, ensuring that it will be fit for purpose in the 21st century and bringing the benefits we have outlined above in our answer to Question 2(c); and
- (b) we consider that our suggested reform project is unlikely to generate substantial controversy among stakeholders.

Any Other Comments

Pinsent Masons LLP is a multi-national law firm with three offices in Scotland advising national and international clients with property interests in Scotland. We have extensive experience of acting for funders, landowners, developers, and investors in the commercial field.

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.

PAPER APART TO PINSENT MASONS LLP'S RESPONSE TO SCOTTISH LAW COMMISSION CONSULTATION ON THEIR 11th PROGRAMME OF LAW REFORM

We have identified the following issues with the current law on execution:

Requirements of Writing (Scotland) Act 1995

Issue 1: Section 7 of the 1995 Act is too prescriptive about what constitutes a signature:

- (i) section 7(2)(b) caters for the granter of a document (or someone signing on their behalf), if they are an individual natural person, to sign with their surname preceded by at least one forename (or an initial or abbreviation or familiar form of a forename) but does not cater for those who sign in some other way – e.g. those who sign their family name first. Section 7(5) of the 1995 Act contains a similar provision for witnesses;
- (ii) when it is not evident that a signature meets the requirements of sections 7 (2)(a) (i.e. signing with the full name by which they are identified in the document) or 7(2)(b), the document cannot be registered in property registers, such as the Land Register, because section 7(2)(c) does not allow a signatory's usual signature to be regarded as self-proving even when someone has witnessed their signature of the document. Section 7(5) of the 1995 Act contains provisions for witnesses which are similar to sections 7(2)(a) and (b); and
- (iii) section 7 doesn't cater for those signing with non-Latin characters, such as Japanese.

Impact: *We consider that the overly prescriptive and narrow provisions of section 7 of the 1995 Act regarding what constitutes a signature are outdated and inappropriate for a multicultural and inclusive society and for the global nature of business. They frequently cause delays in transactions and cause difficulties in practice. They also create an impression that doing business in Scotland is more difficult than in other jurisdictions. In particular, we would draw attention to these issues:*

- *If a signatory signs a document with their usual signature but it is not clear this complies with the requirements of sections 7(2) (a) or (b) the signatory may be asked to re-sign in a more legible manner. This delays transactions (especially because it is usually close to or at completion of a transaction that the signature is discovered to be “non-compliant”);*
- *it may be more straightforward to forge a “legible” signature than a person's usual signature and so the strict requirements of section 7 may inadvertently make forgery easier;*
- *requiring a signatory to sign with a signature that is not their usual signature could lead to inconsistencies with other documents signed by the same individual; and*
- *Registers of Scotland reject deeds which are signed using non-Latin characters on the basis that it is not possible to know that the signature is that of the granter and so the deed does not “bear to have been” signed by the granter (as required by section 3 of the 1995 Act). In contrast, HM Land*

Registry accepts deeds signed with non-Latin characters provided certain confirmations are given as to the signatory's understanding of the deed.

Issue 2: The 1995 Act does not expressly state that constituent documents of a contract (i.e. where the contract comprises more than one single document) can be signed by a *mix* of electronic and wet ink signatures.

Not expressly catering for contracts to be formed in this way appears to be simply a drafting oversight as:

- the 1995 Act does not expressly exclude a contract being formed in this way - section 2(2) (which caters for contracts comprising more than one wet ink signed document) and section 9B (which caters for contracts comprising more than one electronically signed document) are permissive; and
- the Scottish Government clearly did not intend to exclude contracts being formed in this way since the explanatory notes to Part 10 of the Land Registration etc. (Scotland) Act 2012 suggest that section 9B(3) allows a contract to consist of a mix of electronically signed and wet ink signed documents.

Impact: *The lack of clarity (caused by the absence of an express statement in the 1995 Act that such contracts are permitted) makes some solicitors unwilling to form contracts in this way which, in turn, can result in delay in concluding contracts for the sale of land.*

Issue 3: There are differing opinions as to how companies should sign when: (i) signing as the director or secretary of another company; or (ii) signing as the member of an LLP, or (iii) signing as an authorised signatory, under a power of attorney, of a company or LLP, for the document to be self-proving:

Corporate Directors/Secretaries of Companies and Corporate Members of LLPs¹:

Two approaches to signing can be taken when a company or LLP (the “Main Entity”) is signing a document in a self-proving manner via their corporate director/secretary or member. Either:

- the corporate director/ secretary or member of the Main Entity must validly sign the document, and the Main Entity's signature must be self-proving (the **Valid/Probative** approach); OR

¹ Note: authorised signatories are not referred to here but, depending upon the effect of section 12(2) of the 1995 Act, this issue may also extend to corporate attorneys authorised to sign on behalf of a company or LLP.

- the corporate director/ secretary or member of the Main Entity must sign the document in a self-proving manner, and the Main Entity's signature must also be self-proving (the **Probative/Probative** approach).

For example, if a company, Granter Co. Ltd, has a corporate secretary, Secretary Co Ltd, the document could be signed as follows:

- **Valid/Probative:** a director of Secretary Co. Ltd signs (which is valid signing by Secretary Co. Ltd and therefore is valid signing by Granter Co. Ltd) plus a witness signs to make Granter Co. Ltd's signing self-proving; or
- **Probative/Probative:** a director of Secretary Co. Ltd signs and their signature is witnessed (which is self-proving signing by Secretary Co. Ltd but is not self-proving signing by Granter Co. Ltd). For Granter Co. Ltd's signature to be self-proving, either another witness is required or one of the directors of Granter Co. Ltd must sign too.

Responding to a request from the Property Professional Support Group² for his views on the matter, Professor Reid said:

“The probative/probative approach is obviously safe. I tend to think that the valid/probative approach is OK also. For in the version of s 3 of the 1995 Act which is applied to companies by sch 2 para 3(5), all that is required for probativity of the granter-company is that ‘a document bears to have been subscribed on behalf of a company by a director ...’ (plus a witness). So, the director must sign at the end. Where the director is a company, how does it sign? Arguably the answer is given in sch 2 para 3(1) which provides that where a granter of a document is a company, the document is signed by the company if it is signed on its behalf by a director, or by the secretary, of the company or by a person authorised to sign the document of its behalf.

But the reference in this provision to ‘granter’ gives pause for thought. (Compare s 3(1) where there is no such reference). Strictly, the company which is signing as a director is not the granter of the deed, and so strictly sch 2 para 3(1) does not apply – except by analogy, for there must be some rule as to how a non-granter company signs.

Of course, the whole difficulty is readily avoided by using an authorised person instead of the granter company's director or secretary.”

Corporate Attorneys: Does section 12(2) override the Schedule 2, paragraphs 1 and 3 special cases signing requirements (so that the corporate *attorney* need only apply the same signature as is required for the corporate *granter* to sign) (**Approach 1**)? Or does section 12(2) not override those special cases signing requirements and instead simply apply the presumption in section 3(1) to the corporate *attorney* in place of the corporate *granter* (**Approach 2**)?

² Pinsent Masons are a member of this group.

Under Approach 1, the corporate *granter* will be regarded as having signed in a self-proving manner if the corporate *attorney* appointed by it signs by:

- 2 directors, or a director and the secretary, or two authorised signatories of the corporate *attorney*; OR
- a director, or the secretary, or an authorised signatory of the corporate *attorney* plus, in each case, a witness,

with neither an additional witness nor an additional authorised signatory of the corporate *granter* signing.

Under Approach 2, the corporate *granter* will be regarded as having signed in a self-proving manner if the corporate *attorney* appointed by it signs validly or in a self-proving manner and, in addition, either another authorised signatory of the corporate *granter* signs or another witness signs, to ensure that the requirements of Schedule 2 paragraph 3(5) are met.

Impact: The lack of clarity surrounding the matters set out in Issue 3 above causes uncertainty, different interpretations of the legislation, and so delays in transactions. This casts Scots law in a poor light - clients expect the law to be clear on what is required for the execution of documents.

Issue 4: The ways in which “other bodies corporate” can execute documents in a self-proving manner are too few.

We suggest that Schedule 2, paragraph 5(5) of the 1995 Act should be expanded so that a document signed by such a body corporate can be regarded as self-proving if it bears to have been subscribed on behalf of that body corporate by:

- two members of the body’s governing board or, if there is no governing board, by two members of the body; or
- the secretary and one member of the body’s governing board or, if there is no governing board, the secretary and one member of the body; or
- two persons bearing to have been authorised to subscribe the document on its behalf.

Impact: Given the global nature of business, foreign companies regularly execute documents under the law of Scotland and so the lack of flexibility in Schedule 5(5) can cause delays in transactions and create an impression that doing business in Scotland is more difficult than in other jurisdictions.

Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 (s.1)

Issue 5: When a traditional or electronic document is signed in counterpart, can separate counterparts can be signed/authenticated by each of the signatories signing on behalf of an entity (e.g. two directors signing on behalf of a company) or must those signatories sign/authenticate the same single counterpart?

Professors Gretton and Reid (in *Conveyancing* 5th ed, paragraphs 18-41) explain the issue as follows:

“Different parties can sign different counterparts. But can different signatories “within” the same party do likewise? The issue arises in the context of companies and other juristic persons. So, if, for example, a document is to be signed on behalf of Counterpart (Scotland) Ltd by two of its directors, is it competent for each director to sign a different counterpart? The answer is unclear. On one view there is nothing in s.1(2) of the Act, the key provision, to prevent this practice from taking place. On another view, a potential difficulty is caused by the fact that s.1 turns on the distinction between different “parties” whereas the directors of a company belong to the same party. The safe course is for the directors to sign the same counterpart.

A cautious view would extend this practice even to trustees. Admittedly, the argument is less strong because a trust, unlike a company, is not a separate legal person, and the juridical act represented by the document is performed by the trustees and not by the trust. Nonetheless it is possible to argue that the trustees as a body constitute a single “party”, as demonstrated by the fact that a single trustee could be authorised by a majority to sign for all, and that accordingly all must sign the same counterpart.”

It may be helpful to note that footnote 58 to para 2.46 of [the Scottish Law Commission Report on the Formation of Contract: Execution in Counterpart](#) says this regarding two directors/members signing counterparts:

“...We note that a floating charge of the type mentioned above at footnote 56 above will normally require only a single subscription (of a director, secretary or authorised person for a company, or a member in the case of an LLP) along with that of a witness, and hence cannot be executed in counterpart. However, probativity may also be conferred under the 1995 Act if the document is subscribed by two directors (or members) with no witness, and in this case, counterparts may be used.”

Impact: *The lack of clarity regarding this issue causes uncertainty, different interpretations of the legislation, and so delays in transactions.*

Electronic Documents (Scotland) Regulations 2014

Issue 6: there is a lack of clarity that an electronic document can be authenticated on behalf of an LLP by their appointed attorney.

Regulation 5(3) of the 2014 Regulations states: “where the granter is a limited liability partnership, an electronic signature on behalf of the limited liability partnership must be applied by a member of the limited liability partnership”.

Some regard the use of the word “must” in that Regulation to mean that the *only* way in which an LLP can authenticate an electronic document is for a member of the LLP to apply their e-signature. They point also to the fact that Regulation 5 expressly allows companies and partnerships to authenticate electronic documents via their authorised signatories but does not expressly cater for LLPs to do so. An alternative view is that a combination of:

- a person's common law right to authorise an attorney to sign on their behalf; and
- s.12(3) of the 1995 Requirements of Writing (Scotland) Act (which says: "In a case where a person is authenticating an electronic document on behalf of a granter, any reference in this Act to authentication by a granter of an electronic document shall be construed as a reference to authentication by that person")

means that an attorney can authenticate on behalf of an LLP, notwithstanding that this is not expressly catered for in Regulation 5(3).

Impact: *The lack of clarity regarding Issue 6 causes uncertainty, different interpretations of the legislation, and so delays in transactions.*

Issue 7: The need to print a document in full before wet ink signing it

We would welcome a review of the pros and cons of this requirement. Due to the practical implications (see below) of the need to print documents in full before wet ink signing them, some solicitors consider that Scotland should allow a Mercury Option 1 style of signing, provided that there are procedures put in place to make sure that signatories have read the document before signing it and that it is clear that they intended to sign that document - see [Law Society of England & Wales Practice Note Execution of documents by virtual means](#) for details of what is meant by a Mercury Option 1 style of signing. Those solicitors point out that Scots law (i.e. section 4(2)(b) of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015) already allows electronic delivery of part of a document provided it is "sufficient in all the circumstances to show that it is part of the document and it is, or includes," the signing page. However, others consider that permitting a Mercury Option 1 method of signing could make litigation and fraud more likely.

Impact: *The requirement to print documents in full before they are signed is contrary to the net zero goals of organisations because it is wasteful of paper, electricity and ink. The requirement was particularly problematic during the Covid 19 pandemic lockdowns. In addition, if a signatory returns only the signing page, rather than the whole document, the requirement leads to having to obtain confirmation by the signatory that the whole document was printed before they signed it. However, the impact of the requirement may also be to reduce fraud and litigation.*