

RESPONSE FORM

DISCUSSION PAPER ON THIRD PARTY RIGHTS IN CONTRACT

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and 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.

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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 a few of the proposals, 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.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](http://www.scotlawcom.gov.uk/contact-us#sendcomments) 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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| **Name:**  «InsertTextHere» |
| **Organisation:**  «InsertTextHere» |
| **Address:**  «InsertTextHere» |
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**Summary of Proposals**

**Impact assessment**

1. Do consultees know of any information or statistical data, or have any comments on any potential economic impacts of either the current law relating to the third party rights or any proposed reform of that law?

(Paragraph 1.29)

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| **Comments on Proposal 1**  «InsertTextHere» |

**Company groups**

2. Are there other situations involving company groups beyond those identified in paragraphs 3.4-3.19 in which third party rights might be of use to contracting parties?

(Paragraph 3.19)

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| **Comments on Proposal 2**  «InsertTextHere» |

**Construction projects and collateral warranties**

3. Do consultees agree that collateral warranties are currently relied on rather than third party rights in Scots law? If so, is this problematic in practical terms? Would a modern set of rules on third party rights be utilised in place of collateral warranties should such rules be introduced?

(Paragraph 3.28)

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| **Comments on Proposal 3**  «InsertTextHere» |

**Community of interest cases**

4. Do consultees agree that, while parties to “community of interest” transactions should continue to be free to make use of third party rights law, there is no need to make special provision for such cases in any reform of the law?

(Paragraph 3.47)

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| **Comments on Proposal 4**  «InsertTextHere» |

**Concepts and terminology**

5. Should any legislation on third party rights that may follow from this Discussion Paper and any subsequent Report be expressed in terms of rights or benefits or both?

(Paragraph 4.6)

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| **Comments on Proposal 5**  «InsertTextHere» |

6. Do consultees agree with the suggested terminology for the parties and for the right, and that these might be suitable for use in any legislation on third party rights in Scots law? Would these terms be easily understood in practice? Are there better alternatives?

(Paragraph 4.13)

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| **Comments on Proposal 6**  «InsertTextHere» |

7. Do consultees agree it is preferable for any legislation dealing with third party rights to avoid as far as possible any explicit juristic characterisation of the right?

(Paragraph 4.14)

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| **Comments on Proposal 7**  «InsertTextHere» |

8. Is it a correct perception that a requirement that third party rights be constituted in formal writing (ie subscribed by the grantor(s)) is undesirable in the interests of maintaining flexibility?

(Paragraph 4.15)

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| **Comments on Proposal 8**  «InsertTextHere» |

9. Should any legislation on third party rights make clear that formal writing is not required for their constitution?

(Paragraph 4.15)

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| **Comments on Proposal 9**  «InsertTextHere» |

10. Is it useful in the interests of legislative economy to draw analogies as may be appropriate with other legal institutions such as the unilateral promise (eg to define without elaborating the remedies available to the third party)?

(Paragraph 4.18)

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| **Comments on Proposal 10**  «InsertTextHere» |

11. Should there be any general or more specific provision to the effect that a third party right may be conditional upon some performance by the third party or some other uncertain future event?

(Paragraph 4.20)

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| **Comments on Proposal 11**  «InsertTextHere» |

**Identification and intention**

12. Do consultees agree that the third party must be identified by or identifiable from the contract, in particular as a member of a particular class of persons or as a person fulfilling or meeting conditions laid down in the contract?

(Paragraph 5.11)

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| **Comments on Proposal 12**  «InsertTextHere» |

13. Do consultees agree that a right in favour of a third party who is not in existence at the time that the right is set up should continue to be valid and enforceable by any such third party which subsequently comes into existence?

(Paragraph 5.11)

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| **Comments on Proposal 13**  «InsertTextHere» |

14. Should it be provided for the avoidance of doubt that when a third party right is drawn in favour of a class, a person who was in existence at the time the relevant contract is formed, but was not then a member of the intended class, may become so upon joining the class if the contracting parties so intended?

(Paragraph 5.11)

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| **Comments on Proposal 14**  «InsertTextHere» |

15. Subject to the over-arching requirement that the existence of any third party’s right must depend upon the contracting parties’ intention, should the identification or identifiability of the third party come from the contract only, or should it be possible to refer to extra-contractual evidence by which a third party can be identified?

(Paragraph 5.15)

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| **Comments on Proposal 15**  «InsertTextHere» |

16. If so, what kinds of evidence might be allowed?

(Paragraph 5.15)

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| **Comments on Proposal 16**  «InsertTextHere» |

17. Do consultees agree that the current rule in Scots law, that the intention of contracting parties to create a right by their contract for an identified or identifiable third party can be express or implied, should be continued?

(Paragraph 5.21)

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| **Comments on Proposal 17**  «InsertTextHere» |

18. Do consultees agree that it should be expressly provided that an exclusion or limitation of the third party’s liability to one or more of the contracting parties can be an example of a third party right?

(Paragraph 5.25)

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| **Comments on Proposal 18**  «InsertTextHere» |

**Irrevocability**

*NB Respondents may wish to note the discussion in paragraph 6.3 of some of the terms which are used in the questions in this section*

19. Do consultees agree that any requirement that a third party right cannot be constituted in a contract unless the right has first been made irrevocable by the contracting parties should be abolished?

(Paragraph 6.6)

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| **Comments on Proposal 19**  «InsertTextHere» |

20. Do consultees agree that it should be specifically provided that where a contract provides for a third party right while reserving the entitlement of the contracting parties to vary or cancel the right, that entitlement may only be defeated by (i) the fulfilment of any conditions for the third party’s entitlement to enforce the right before any variation or cancellation is completed, or (ii) the operation of personal bar against the contracting parties’ exercise of their entitlements?

(Paragraph 6.9)

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| **Comments on Proposal 20**  «InsertTextHere» |

21. Do consultees agree that an express contractual statement that a third party right conferred by the contract is irrevocable should be given effect, at least if delivered, intimated or otherwise communicated to the third party?

(Paragraph 6.11)

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| **Comments on Proposal 21**  «InsertTextHere» |

22. Do consultees agree that, where a contract sets up a third party right without any provision for an entitlement of the contracting parties to vary or cancel the right, either:

(i) the fulfilment of any conditions for the third party’s entitlement to enforce the right will prevent any variation or cancellation by the contracting parties; or

(ii) representations of irrevocability or unmodifiability made to the third party by the contracting parties (or any one of them?) and detrimentally relied upon by the third party will lead to the operation of a personal bar against any attempt by the contracting parties to revoke or modify the third party’s right?

(Paragraph 6.17)

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| **Comments on Proposal 22**  «InsertTextHere» |

23. Do consultees agree that a post-contract promise to the third party by the contracting parties that a third party right conferred by the contract is irrevocable or unmodifiable should be given effect if the steps needed for the constitution of an enforceable promise have been met by the contracting parties?

(Paragraph 6.18)

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| **Comments on Proposal 23**  «InsertTextHere» |

24. Do consultees agree that where a contract provides for a third party right without any provision about an entitlement of the contracting parties to vary or cancel the right, there will be no such entitlement if the term conferring the right upon the third party has been delivered or intimated to that party?

(Paragraph 6.21)

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| **Comments on Proposal 24**  «InsertTextHere» |

25. Do consultees further agree that the contracting parties may at the time of the delivery or intimation mentioned in the previous question reserve an entitlement to vary or cancel the third party’s right?

(Paragraph 6.21)

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| **Comments on Proposal 25**  «InsertTextHere» |

26. Do consultees also agree that any purported acceptance of the right by the third party should not by itself have the effect of making the right irrevocable or unmodifiable?

(Paragraph 6.21)

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| **Comments on Proposal 26**  «InsertTextHere» |

27. Should registration of a contract conferring a third party right, whether for preservation only or also for execution, make that right irrevocable or unmodifiable unless the contract expressly provides the contracting parties with an entitlement to vary or cancel the right?

(Paragraph 6.23)

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| **Comments on Proposal 27**  «InsertTextHere» |

28. Should the third party’s detrimental reliance (perhaps defined along the lines found in sections 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995), based upon informal knowledge of its right and known to and acquiesced in by the contracting parties, make a third party right irrevocable or unmodifiable?

(Paragraph 6.27)

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| **Comments on Proposal 28**  «InsertTextHere» |

29. In addition, should third party reliance that is reasonably foreseeable by the contracting parties (although they had no actual knowledge of it at the time it happened) have the same effect?

(Paragraph 6.27)

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| **Comments on Proposal 29**  «InsertTextHere» |

30. Do consultees agree that a third party right should not become irrevocable simply because the third party has informally acquired knowledge of the existence of the right?

(Paragraph 6.30)

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| **Comments on Proposal 30**  «InsertTextHere» |

31. Should the third party’s death prior to any cancellation or variation of the contract containing its right have the effect of making the right irrevocable or unmodifiable so that it becomes enforceable by the deceased’s executors?

(Paragraph 6.31)

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| **Comments on Proposal 31**  «InsertTextHere» |

32. Should there be some provision about the effects of assignation in relation to making a third party right irrevocable or unmodifiable? If so, which direction should that provision take on the matter?

(Paragraph 6.37)

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| **Comments on Proposal 32**  «InsertTextHere» |

33. In relation to making a third party right irrevocable or unmodifiable, should there be some provision about the effect of the third party declaring a trust over its right? If so, which direction should that provision take, and, in particular, should it take account of the identity of the trust beneficiary?

(Paragraph 6.38)

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| **Comments on Proposal 33**  «InsertTextHere» |

34. Do consultees agree that there is no need in the present exercise to deal with competing claims between the third party and the contracting parties, and that these should be left as matters for the interpretation of the contract and/or the application of other relevant rules of law such as donation?

(Paragraph 6.43)

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| **Comments on Proposal 34**  «InsertTextHere» |

**Renunciation or rejection of its right by the third party**

35. Would a statutory mechanism allowing third parties to renounce rights conferred in their favour be useful?

(Paragraph 7.8)

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| **Comments on Proposal 35**  «InsertTextHere» |

36. Should it be provided that such renunciation of a third party right may be express or implied from the third party’s conduct?

(Paragraph 7.8)

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| **Comments on Proposal 36**  «InsertTextHere» |

37. Is it necessary to make any provision to protect the contracting parties against unfair exercise of the third party’s power to renounce the right, for example to require the return of any benefit already conferred and reimbursement of expenses incurred by the contracting parties?

(Paragraph 7.8)

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| **Comments on Proposal 37**  «InsertTextHere» |

38. Should it be made possible to renounce a right in part if it is divisible?

(Paragraph 7.8)

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| **Comments on Proposal 38**  «InsertTextHere» |

**Remedies available to the third party**

39. Should it be provided that third parties have at their disposal all remedies which are appropriate to the enforcement of their right? If not, how (if at all) should the issue of remedies be addressed in any legislation on third party rights?

(Paragraph 7.13)

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| **Comments on Proposal 39**  «InsertTextHere» |

40. Would it be useful to make clear in legislation the availability of (i) a damages claim; (ii) a right to a cure in appropriate cases, possibly as an aspect of specific implement; (iii) a right to rescind for material breach?

(Paragraph 7.13)

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| **Comments on Proposal 40**  «InsertTextHere» |

41. Should third parties be entitled to exercise the remedy of rectification in relation to the contract under which rights are claimed?

(Paragraph 7.14)

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| **Comments on Proposal 41**  «InsertTextHere» |

**Defences**

42. Are specific provisions required regarding the enforceability of third party rights arising from contracts which fail as a result of invalidity, illegality, or frustration?

(Paragraph 7.19)

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| **Comments on Proposal 42**  «InsertTextHere» |

43. Would a specific provision, to the effect that compensation under the Compensation Act 1592 arising from or in connection with the contract and relevant to the third party’s right under the same contract could be used in extinction of the third party’s claim if liquid, be appropriate and useful?

(Paragraph 7.24)

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| **Comments on Proposal 43**  «InsertTextHere» |

**Prescription**

44. Should a specific provision be inserted into paragraph 1 of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 to make clear that the short negative prescription applies to third party rights arising from a contract?

(Paragraph 7.26)

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| **Comments on Proposal 44**  «InsertTextHere» |

**Liability of one contracting party if the other defaults on the contract**

45. If one of the contracting parties defaults on the contract so that the other contracting party is unable to perform to the third party as required by the latter’s right under the contract, should the third party have a remedy against the initially defaulting party?

(Paragraph 7.27)

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| **Comments on Proposal 45**  «InsertTextHere» |

**Contracting out of liabilities to third parties**

46. Do consultees agree that no express provision is needed to deal with the possibility that contracting parties may exclude or limit a liability to third parties (such as damages) that would otherwise arise?

(Paragraph 7.30)

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| **Comments on Proposal 46**  «InsertTextHere» |

**Other points arising from the 1999 Act**

47. Do consultees agree that it should be clear on the face of any legislation arising from this Discussion Paper that the third party can enforce only its own rights under the contract?

(Paragraph 7.33)

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| **Comments on Proposal 47**  «InsertTextHere» |

48. Would an equivalent to section 4(1) of the 1999 Act serve any useful purpose in Scotland?

(Paragraph 7.34)

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| **Comments on Proposal 48**  «InsertTextHere» |

49. Do consultees agree that the third party need not involve any of the contracting parties in its action beyond the one from whom it seeks a remedy?

(Paragraph 7.35)

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| **Comments on Proposal 49**  «InsertTextHere» |

50. Do consultees agree that there is no need in Scots law for a provision equivalent to section 5 of the 1999 Act?

(Paragraph 7.38)

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| **Comments on Proposal 50**  «InsertTextHere» |

**Relationship with specific rules**

51. (a) Do consultees agree that, in principle, the general reforms proposed in this Discussion Paper should be without prejudice to the specific third party rights under the current law (for example, in the areas listed in paragraphs 8.3 and 8.4)?

(b) Do consultees consider that any of the specific third party rights should be amended in the light of the general reforms which are proposed? Would it be desirable to provide that those reforms should not extend to employment contracts relating to employees, workers and agency workers?

(Paragraph 8.6)

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| **Comments on Proposal 51**  «InsertTextHere» |

**Methods of reform**

52. (a) Are there advantages in having a comprehensive statutory statement of the law on third party rights?

(b) Alternatively, should any legislation seek only to amend the common law so far as is necessary to achieve the desired reforms?

(Paragraph 9.17)

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| **Comments on Proposal 52**  «InsertTextHere» |

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| **General Comments**  «InsertTextHere» |

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.