



Scottish Law Commission

promoting law reform

news release • news release

ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
NOT FOR PUBLICATION OR BROADCAST
BEFORE 0001 HOURS 29 MARCH 2018

Modernising contract law in Scotland

Contract law affects daily life for businesses and individuals alike. When you buy something online or in person you are entering into a contract.

Today the Scottish Law Commission publishes a comprehensive report on contract law in Scotland making many recommendations for improvement.

The purpose of the review was to ensure that contract law is clear, accessible and fit for the modern age.

Our review concluded that some parts of contract law are unclear, sometimes difficult to find and in need of modernisation. We consulted widely and examined the law in other parts of the World.

The Commission makes the following main recommendations:

- There should be a new statutory statement setting out the rules on formation of contract. This will make clear key points such as when communications between people making contracts take effect (this is important when so much business is now done by email);
- Abolition of the “postal acceptance rule” (an old rule that a contract is formed when an acceptance of an offer is put in the post, as opposed to received). This dates from the nineteenth century when post was the main means of communication. The rule is out of step with modern business;
- Remedies for breach of contract should be reshaped. The idea is to improve ways of encouraging people to sort out disputes themselves, rather than ending up in court or having to terminate their contract altogether.

Professor Hector MacQueen, who has been the lead Commissioner on this project, said:

“I believe that when implemented this Report will do much to remove current uncertainties as well as simplifying and modernising the law. It will also make the law on formation of contract more accessible than ever before to lawyers and non-lawyers alike.”

The Report makes 35 recommendations in total and contains a draft Bill which would put into effect those recommendations. An outline of the draft Bill is contained in the Appendix to this news release.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Hon Lord Pentland, a Court of Session judge. The other Commissioners are Caroline Drummond, David Johnston QC, Professor Hector L MacQueen, and Dr Andrew J M Steven. The Chief Executive is Malcolm McMillan.
2. Further information can be obtained by contacting Lorraine Stirling, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131; email info@scotlawcom.gsi.gov.uk).
3. The paper will be available on our website at <https://www.scotlawcom.gov.uk> as early as possible on 29 March 2018.
4. Professor Hector MacQueen is available for interviews on 29 March 2018.

APPENDIX

The draft Bill attached to the Report contains a range of proposals to restate and reform the law of formation of contract and to reform the law of remedies for breach of contract in Scotland. In particular:

- the Bill specifies the requirements for the conclusion of a contract (the parties coming to an agreement which they intend to have legal effect, which after taking any relevant enactment or rule of law into consideration, has the essential characteristics of a contract of the kind in question and sufficient content for it to be given legal effect);
- the Bill makes it clear that for a proposal to constitute an “offer”, the offeree must have reasonable grounds to suppose the proposer intends the proposal to result in a contract if accepted, and the proposal must be one which can be given legal effect as a contract if accepted;
- it provides for the lapsing of an offer on a fundamental change of circumstance (such as the death or incapacity of the offeror or offeree, after the offer is made but before the contract is concluded), but makes it clear that insolvency is not an example of a fundamental change of circumstance;
- it specifies what an acceptance of an offer is, what a counter-offer is and what the legal effect is of a rejection of an offer;
- it specifies when a notification such as an offer, acceptance, or counter-offer, takes effect (on reaching the person) and makes it clear that in the case of a notification transmitted by electronic means, it takes effect when it becomes available to be accessed by the person;
- it abolishes the postal acceptance rule, a common law rule which provides that a contract entered into through letter or telegram can be held to be concluded when acceptance of the offer is posted;
- it reforms the law of remedies for breach of contract in relation to mutuality of contract, by abolishing any rule of law to the effect that a party who is in breach of contract is thereby not entitled to exercise any right or pursue any remedy arising from a breach of contract by the other contracting party;
- it reforms the law of remedies for breach in relation to restitution after termination of a contract for a party’s material breach. It provides that where a contract is rescinded for breach and a party to the contract has received any benefit from the performance by another party of an obligation under the contract, the benefit must be returned provided that other party concurrently returns any benefit it has received. It also includes detailed rules on the valuation of non-money benefits, and on (i) compensation for any reduction in the value of a returned benefit and (ii) payment for use or improvement of the benefit by the recipient;
- it reforms the law of remedies for breach in relation to contributory negligence, by amending the Law Reform (Contributory Negligence) Act 1945, to make it clear that the defence of contributory negligence under that Act applies to all claims of damages for breach of contract, and
- the Bill makes it clear that the rules it provides for are default in nature, rather than mandatory. Therefore the rules apply when the parties themselves have not contracted out of them.