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The Hon. Lord Pentland
Chairman
Scottish Law Commission
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29 September 2016

Dear Lord Pentland,

REVIEW OF CONTRACT LAW: REPORT ON THIRD PARTY RIGHTS

I would like to thank the Scottish Law Commission for your Report on Third Party Rights, presented to Ministers in July of this year and also to let you know of my plans to take the Report forward.

I very much welcome the thorough and detailed Report. It is clear that this is an area of the law which has benefitted from the consideration that the Commission has brought to bear and I am very supportive of the recommendations contained in the Report.

This Bill will bring some much needed modernisation to the law in this area which is currently dated, unclear and lacking in the necessary flexibility. I am particularly keen that the Bill will ensure that Scots Law in this area remains comprehensive and attractive for Scotland's citizens and business people.

You will no doubt have welcomed the First Minister's announcement on 6 September that this Bill will be taken forward as part of the Scottish Government's legislative programme in her Programme for Government statement.

The new process for allowing certain Scottish Law Commission Bills to be referred to the Delegated Powers and Law Reform Committee is now well established and in my view this is a Bill which would be suitable for that process. That is the position that the Government intends to take when the Parliamentary Bureau considers referral of the for Stage 1 scrutiny in due course. I attach an **Annex** to this letter which sets out the necessary detail. I will therefore arrange to have this letter copied to the Scottish Parliament.



I would be grateful if you would pass on my thanks to those at the Commission who worked on the Report and I look forward to working with the Commission during the parliamentary stages of the Bill.

Yours sincerely,
Annabelle Ewing
ANNABELLE EWING

ASSESSMENT OF THE BILL AGAINST STANDING ORDERS RULE 9.17A AND THE CRITERIA AS DETERMINED BY THE PRESIDING OFFICER FOR QUALIFICATION AS A 'SCOTTISH LAW COMMISSION BILL'.

The Bill must implement all or part of a report of the Scottish Law Commission.

The Bill will implement the recommendations contained in the Report entitled *Review of Contract Law – Report Third Party Rights*¹, which was published on 15 July 2016 as part of the Scottish Law Commission's Ninth Programme of Law Reform. Specifically, it will abolish the existing common law rule which governs the creation, by contract, of an enforceable right in favour of a third party. The law will be reformed and that rule will be replaced with a clearer, comprehensive statutory version.

Where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended.

The SLC has carried out comprehensible consultation in accordance with the SLC's established practice in conducting law reform projects.

The SLC published a *Discussion Paper on Third Party Rights in Contract*² in March 2014 as part of the general review of contract law. Consultation responses were overwhelmingly in favour of statutory clarification of the existing common law on third party rights in Scots law. As part of that process the SLC established an Advisory Group which comprised of members of the legal profession and academics. This was supplemented with a Judicial Advisory Group and additional ad hoc input from a further mix of members of the legal profession and academics.

The SLC released a revised draft of the Bill for further comments in January 2016.³ This draft did not generate as significant a volume of comments as the previous Discussion Paper, but responses again focussed on drafting issues whilst expressing support for the overall concept of the Bill. When commenting on the draft Bill, the Law Society of Scotland's director of law reform said:

"We fully support the intention of the Third Party Rights Bill and believe that the legislation will provided clarity and certainty. It is a significant improvement and development on the current common law."

The Review of Contract Law: Report on Third Party Rights which was published in July 2016 which contained a final draft of the Bill is the product of the consultation process described above. At each stage of this process, members of the legal profession and the public were able to comment on the proposals. At no stage of the consultation process have comments been received to the effect that statutory provision on third party rights would have an adverse effect on Scots law, only the contrary.

¹http://www.scotlawcom.gov.uk/files/2014/6850/9379/Review_of_Contract_Law_-_Report_on_Third_Party_Rights_No_245.pdf

²http://www.scotlawcom.gov.uk/files/8013/9592/4224/DP_TSO.pdf.

³http://www.scotlawcom.gov.uk/files/6514/5252/9147/A9_provisions_2015-12-29.pdf

In completing the Business and Regulatory Impact Assessment (BRIA) the SLC also consulted with a range of business interests.

In addition the Scottish Government is carrying out some targeted consultation on the Report and has invited comments from a number of stakeholders.

Which does not relate directly to criminal law reform

The Bill relates to civil law reform and does not relate in any way to criminal law reform.

Which does not have significant financial implications.

The legislation is intended to modernise the law in this area and provide some much needed flexibility in order to make it better fit for purpose and suitable for contemporary needs. Therefore no significant cost implications are anticipated to result from the commencement of the Bill, other than the costs which will be borne by law firms in making their staff aware of the changes to the law affected by the Bill. These types of cost result from any reform of the law and the BRIA estimates a modest £450 per legal firm one off cost for training and familiarisation.

Which does not have significant European Convention on Human Rights (ECHR) implications.

The Bill will reform the current common law rule of contract law which creates an enforceable right in favour of a third party and replace it with a statutory version. We consider that the proposals do not have any ECHR implications. The provisions contained in the Bill are not retrospective, so there is no danger of established rights being affected. In addition, the creation of third party rights in contracts is not compulsory and it will be possible for contracting parties to exclude the application of the legislation to their contract.

Where the Scottish Government is not planning wider work in that particular subject area.

The SLC are undertaking a significant long term project on contract law in light of the Draft Common Frame of Reference (DCFR). The project is being tackled on a topic by topic basis and Discussion Papers on other contract law topics are likely to be produced over the course of the next few years, together with one or more corresponding Reports. In effect, though, the particular legislative proposals in this Bill form a stand-alone topic and the Scottish Government is not planning wider work in the area of third party rights.

Other

The Bill is not a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revisions Bill.