



Law Society
of Scotland

Scottish Law Commission

Eleventh Programme of Law Reform Consultation

29 July 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Public Policy Committee and sub-committees welcome the opportunity to consider and respond to the Scottish Law Commission's (SLC) Eleventh Programme of Law Reform Consultation¹. We note a number of proposals for projects below, as set out in the index.

In addition, we note that a number of completed SLC projects remain unimplemented, including recommendations relating to unincorporated associations². We would take this opportunity to reiterate our support for these particular recommendations, and hope that they can be progressed in early course.

We also note that there are a number of current law reform initiatives underway which may have the potential to result in references to the SLC in the coming years, and we trust that the Commission's law reform programme will be designed to include sufficient flexibility to accommodate such references as they arise. For example, within the remit of our Mental Health and Disability Sub-Committee, we would request that the SLC allow for giving prompt attention to any references to it to address any matters following upon (a) the Final Report of the Scottish Mental Health Law Review, and/or (b) proposals to address intra-UK Private International Law issues relating to powers of attorney and Part 6 Orders.

Index

1. Consolidation of environmental law
2. Digital assets
3. Breach of Contract Claims in the Employment Tribunal
4. Execution
5. Executry law
6. Obligations law
7. Statutory debt solutions
8. Water and sewage law

¹ <https://www.scotlawcom.gov.uk/news/consultation-on-our-eleventh-programme-of-law-reform/>

² <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/unincorporated-associations/>

1. Consolidation of environmental law

We consider that a project to consolidate areas of environmental law could usefully be undertaken.

1. Please provide us with information about the issues with the law

Environmental law is fragmented over a considerable number of statutes, often themselves amended on multiple occasions, some of which combine elements from other fields and most of which require the implementation of secondary legislation to make them effective. In many instances the role of provisions based on EU law – either through direct reference or as the basis for domestic provisions – adds further complexity. The result of this is that in key areas, such as noise law, wildlife and air quality, the law has become fragmented and overly complex, while in other areas such as town and country planning, the overall pattern of key legislative documents may in theory be simpler but these have been amended so many times that a clean set of provisions would be of great benefit to all who need to use the law. There is a need for consolidation in environmental law in order to make the law clearer and provide certainty. Noise law could usefully be included as a key aspect of this.

2. Please provide us with information about the impact this is having in practice

The fragmented nature of the statute book makes it very hard to be clear what the law is and to use it with confidence. Even with access to electronic databases that incorporate amendments, it is difficult to be sure that one is working with the relevant version of the statutory provisions, while piecing together the complex jigsaw of overlapping and related provisions is a difficult and time-consuming task, even for those with relevant expertise. This adds costs to all of those who have to engage with the law, makes it difficult for members of the public to understand the legal position and their rights, and may discourage reliance on formal legal obligations and entitlements. It is also difficult to work out the current baseline against which any proposals for reform and their impact should be measured.

3. Please provide us with information about the potential benefits of law reform

It is a clear principle of the rule of law that laws must be accessible, intelligible, clear and consistent. Consolidation of environmental law would make the law clearer and more operable which would be of benefit to the public at large as well as legal practitioners and organisations working in this area.

4. 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 a consolidation project focusing on aspects environmental law would likely be suitable for the relevant process in the Scottish Parliament. Some areas may be rejected as requiring policy choices to be clarified in a way that renders the topics unsuitable, or as areas where current policy discussions render a “pure” consolidation exercise inappropriate, but there are areas, such as noise law, where the process would not involve changes to the law but rather the bringing together of several pieces of existing legislation with the aim of tidying up the statute book.

2. Digital assets

The Law Commission (England & Wales) is currently undertaking a project on Digital Assets and we suggest that there should be a joined-up approach with the SLC to look at private law and private international law aspects of digital assets.

1. Please provide us with information about the issues with the law

It would be an appropriate time for the SLC to examine digital assets due to their growing significance and to ensure consistency across jurisdictions in respect of this important area of the digital economy. There are elements of uncertainty regarding how digital assets could and should be dealt with in private law and private international law.

2. Please provide us with information about the impact this is having in practice

Providing a coherent approach between English and Scots law will minimise transaction costs between English and Scots law, and thus any perceived competitive disadvantage in utilising Scots law in respect of digital assets. The uncertainty regarding how such assets are to be treated in law may also be negatively impacting upon how parties transact with such property, including through increasing transaction costs or causing parties not to engage in certain transactions.

3. Please provide us with information about the potential benefits of law reform

The benefits of clarifying and reforming the law of digital assets are resolving the uncertainty that currently exists and the positive consequences of this and providing a consistent approach between Scots and English law, making it more likely that Scots law is used for digital assets.

It should be noted that the work already done by the Scottish Government's Expert Reference Group on Digital Assets may minimise or expedite further work on digital assets that the SLC may consider undertaking.

4. 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?

We consider that a joined-up project on the reform of digital assets can proceed in a number of ways and are agnostic as to which route should be adopted.

Any other comments

We consider that there should be a joined-up approach between The Law Commission (England & Wales) project on Digital Assets and the SLC, particularly with reference to private law and private international law matters.

3. Breach of Contract Claims in the Employment Tribunal

We consider that there is merit in considering reform of the upper limit on damages available in a breach of contract claim pursued in the Employment Tribunal. Fuller details of the proposed law reform project, including its potential benefits, are included below in answer to question 2. We note that this issue was considered by the Law Commission in the context of their project on Employment Law Hearing Structures³ and that the UK Government Department for Business, Energy & Industrial Strategy have noted the Law Commission's recommendations in this area.⁴ However, our view is that this is an important issue which is worthy of further consideration.

1. Please provide us with information about the issues with the law

Breach of contract complaints arising or outstanding on termination of employment can be brought in the Employment Tribunals or in the civil courts. The upper limit in award available in a breach of contract claim pursued in the Employment Tribunal is £25,000. There is no upper limit in award available in a breach of contract claim pursued in the civil courts.

The opportunity to pursue a breach of contract complaint arising or outstanding on termination of employment in the Employment Tribunal is governed by the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (SI 1996/1624)/ Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (SI 1996/1623). Article 10 of the relevant Order provides that an Employment Tribunal shall not in proceedings in respect of a contract claim, or in respect of a number of contract claims relating to the same contract, order the payment of an amount exceeding £25,000. This aggregate limit of £25,000 has been applied since the Orders first came into force on 12 July 1994.

The limits on awards made under most employment protection legislation are increased on an annual basis. Compensatory awards for unfair dismissal pursuant to the Employment Rights Act 1996 (the '1996 Act'), for example, are increased on an annual basis: the limit for a compensatory award under the 1996 Act is currently the lower of £93,878 or a week's pay, as compared to £11,300, which was the statutory limit on the award when the 1996 Act was enacted. By comparison, the statutory limit on awards in breach of contract claims in the Employment Tribunal has remained constant for 28 years.

The £25,000 limit on breach of contract awards in the Employment Tribunal is out-of-date and not in keeping with the rise in salaries and inflation over the past 28 years. The practical impact of this is outlined in answer to question 2(b) below.

2. Please provide us with information about the impact this is having in practice

Many individuals with a breach of contract complaint arising or outstanding on termination of employment face a difficult decision when determining in which forum to pursue their complaint. If

³ [Employment Law Hearing Structures | Law Commission](#)

⁴⁴ Government Response to Employment Law Hearing Structures review, available at: [20210429 - Annex A - Law Commission - BEIS Response](#)

there is a possibility that their breach of contract claim might, if successful, lead to an award in excess of £25,000 (which is quite likely in, e.g. a complaint involving a senior executive dismissed without notice in circumstances where notice was due), then they may be advised to bring their complaint in the civil courts where there is no upper limit in the awards which can be made for a successful breach of contract complaint. However, the same individual may have other complaints arising out of or outstanding on the termination of their employment (e.g. unfair dismissal; discrimination) which must be pursued in the Employment Tribunal. An individual, then, with a high-value breach of contract claim in addition to, e.g. an unfair dismissal complaint, may need to pursue his/her complaints concurrently in separate forums to maximise chances of recovery. This, of course, can lead to inefficiencies in the justice system, for example where evidence in one proceeding is also relevant to the determination of the other. It may also lead to delays for the parties involved where one proceeding is sisted pending determination of the other. The alternative option is for the individual to pursue all complaints in the Employment Tribunal, and forfeit any award in their breach of contract complaint in excess of £25,000.

3. Please provide us with information about the potential benefits of law reform

If the upper limit in award for a breach of contract complaint in the Employment Tribunal was raised, it is likely that more litigants would plead their breach of contract complaints arising out of or outstanding on termination of employment alongside related employment tribunal claims in the Employment Tribunal. Not only is this more efficient and cost effective for litigants, respondents and the tribunal/court system, it may also assist in addressing the current tribunal and court backlog by avoiding the need to litigate in two forums.

4. 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?

As Employment Law is a reserved matter, and given the suggested law reform project (designed to address an aspect of the law which is out-of-date) is likely uncontroversial, it is considered that the suggested project would be suited to the House of Lords procedure for Commission Bills.

4. Execution

We suggest that a project considering a number of matters in connection with the law on execution could usefully be included as a project for law reform.

1. Please provide us with information about the issues with the law

We have identified a number of matters requiring consideration and possible legislative change in connection with the Requirements of Writing (Scotland) Act 1995, the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and the Electronic Documents (Scotland) Regulations 2014 – these matters are set out in full in the attached paper.

2. Please provide us with information about the impact this is having in practice

When our Electronic Signatures Working Party were drafting the Guide to Electronic Signatures, it became clear that there are some ‘grey’ areas in the law of execution which (i) create barriers to the uptake of electronic signatures/documents, (ii) cause practical issues for practitioners wishing to use them and (iii) can cause delays in transactions. A number of other issues with the law in this area have also been identified by practitioners dealing with transactions requiring the execution of documents. The increased use of counterpart signing, initially driven by Covid-19 restrictions and continuing since, has highlighted problems with the law in this area and in many cases, transactional delays caused by the lack of clarity in the legislation and the resultant different interpretations of the legislation.

3. Please provide us with information about the potential benefits of law reform

There are a number of areas of uncertainty in the law of execution. Clarity in the law would not only encourage the uptake of electronic signatures and documents, but it would also help to progress digital conveyancing and make Scotland a more digitally-enabled economy, where business can be conducted swiftly and easily.

4. 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 a project reviewing a number of defined 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 would likely be suitable for the relevant process in the Scottish Parliament. It is expected that a Bill coming from such a project would be framed so as to simplify, modernise and improve the law and is unlikely to generate substantial controversy among stakeholders.

Additional comments

Annex attached

5. Executry law

We consider that executry law could usefully be reviewed as a project for law reform.

1. Please provide us with information about the issues with the law

The law in this area is of some considerable age, for example, contained in the Confirmation of Executors (Scotland) Act 1823, Confirmation of Executors (Scotland) Act 1858 and Executors (Scotland) Act 1900. We consider it appropriate that the law in this area is reviewed as it may be out of step with the needs of the public, practitioners and the modern world and could be usefully improved.

There are many areas to consider, including such vital matters as the ownership of, and rights and duties in relation to, property between death and confirmation being obtained (where such is the case); the legal position in the hugely increasing number of estates where confirmation is not obtained; duties of executors specific to executries (as opposed to other trusts), such as in relation to legal rights; discharge of executors; the continued existence of executries (as explored in recent case law); rights against beneficiaries where necessary; the order of right to the office of executor where multiple possibilities and duties in relation to other possible applicants; and perhaps further exploration of bonds of caution and alternatives, if new law is not commenced; clarification of the position in relation to insolvent and possibly insolvent estates (particularly the latter, as the position often does not become clear until possibly expensive investigation has taken place); intra-executry disputes and inertia where majority action is not possible.

This work could also present an opportunity to consider the potential for all or part of the executry process to be simplified by the use of technology including online processes.

We anticipate that there may be other significant issues which may be raised via consultation.

2. Please provide us with information about the impact this is having in practice

It is a clear principle of the rule of law that laws must be accessible, intelligible, clear and consistent. In relation to a number of aspects, the law in this area lacks clarity and certainty. This has a practical impact for practitioners and members of the public who may have to work around this uncertainty or with outdated provisions. As highlighted above, in some cases, this can give rise to litigation and/or additional costs.

3. Please provide us with information about the potential benefits of law reform

We consider that changes to the law in this area could improve and simplify processes for the appointment of executors and administration of estates. This would be of benefit to the public at large and practitioners working in this area, as well as potentially improving court processes in this area, to the wider benefit of the justice system.

In addition, given the work undertaken by the SLC in trust law reform and anticipated legislative change in this area in early course, it would be appropriate for executry law also to be reviewed in early course.

4. 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?

We consider that an executry law reform project could be suitable for the relevant process in the Scottish Parliament. It is expected that a Bill coming from such a project would be framed so as to simplify, modernise and improve the law and is therefore unlikely to generate substantial controversy among stakeholders.

6. Obligations law

The inability to seek a contribution from a third party where decree of absolvitor has passed following an extra-judicial settlement could usefully be reviewed.

1. Please provide us with information about the issues with the law

We consider that the inability to seek a contribution from a third party where decree of absolvitor has passed following an extra-judicial settlement, per the outcome in *Loretto v Cruden*⁵ is suitable for consideration as a law reform project.

The 1959 decision in *National Coal Board v Thomson* established that no right of relief against a third party is available where the party seeking a contribution has settled a claim without decree passing against it.

Loretto illustrates the ease at which a defender who may have a right of relief against a third party could fall foul of this principle when reaching an extra-judicial settlement, with serious financial consequences.

In *Loretto*, Lord Braid concludes that he is bound by the decision in *Thomson*. Lord Braid considered the question of whether *Thomson* is correctly decided. Reference is made to McBryde's categorisation of the decision as "unfortunate", as well as two Inner House decisions which suggest that the decision may have to be revisited. Lord Braid canvases the advantages and disadvantages of the approach in *Thomson*, indicating that it "may or may not have been wrongly decided".

It is unsatisfactory to leave this as the last word on the matter, as actions involving several potential wrongdoers are very common.

2. Please provide us with information about the impact this is having in practice

The impact is likely to be an occasional rather than regular issue, although one with serious consequences when it arises. The current position, and uncertainty over whether the current approach is correct or not, does not however present Scots law in a good light.

3. Please provide us with information about the potential benefits of law reform

It would be helpful for the profession if the SLC reviewed whether the decisions in *Thomson* and *Loretto* best serve the interest of parties litigating in Scotland and made proposals for reform if that is considered to be appropriate.

⁵ [2021] CSOH 127, accessed at https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2021csoh127.pdf?sfvrsn=44481aab_1



4. 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 a project concerning the inability to seek a contribution from a third party where decree of absolvitor has passed following an extra-judicial settlement would likely to be suitable for law reform process in the Scottish Parliament if the SLC's conclusion was in favour of reform.

7. Statutory Debt Solutions

The Scottish Government has been reviewing statutory debt solutions and this could be combined in a SLC project with consideration of aspects of the law diligence, particularly those elements recently reviewed by the AIB including land attachment.

1. Please provide us with information about the issues with the law

The law relating to statutory debt solutions has been a matter of controversy for some time. Personal debt solutions are being looked at in England, and by the Scottish Government in relation to Scots law and diligence has recently been reviewed by the AIB. The SLC is the appropriate body to holistically look at personal debt solutions in combination with diligence to propose an optimum Scots law in this regard.

2. Please provide us with information about the impact this is having in practice

It is difficult for practitioners and the public to understand and interact with the law in this area given its fragmented nature and the law regarding debt solutions and diligence is beset with difficulties

3. Please provide us with information about the potential benefits of law reform

It is a clear principle of the rule of law that laws must be accessible, intelligible, clear and consistent. Reforming statutory debt solutions and aspects of the law of diligence would make the law clearer and more operable which would be of benefit to the public at large as well as legal practitioners and organisations working in this area.

4. 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?

We consider that a project focusing on statutory debt solutions and aspects of diligence would be suitable for legislation in the Scottish Parliament. The suitability of the project for the law reform process in the Scottish Parliament will depend upon exactly what reforms are proposed.

Any other comments

The Scottish Government has been reviewing statutory debt solutions and this could be combined with the recent work on diligence by the AIB regarding diligence in a SLC project.

8. Water and sewage regulation

We consider that water law and sewerage regulation could usefully be reviewed as a project for law reform.

1. Please provide us with information about the issues with the law

2. Please provide us with information about the impact this is having in practice

We consider that it would be an appropriate time for consideration to be given as to what changes are needed in the law in this area for it to be able to continue to work effectively as water becomes an increasingly scarce commodity in the future. Sewerage regulation (particularly in the context of emissions to water) is primarily based on legislation which is now 30-40 years old such as the Sewerage (Scotland) Act 1968 and the Water (Scotland) Act 1980.

While more recent interventions have sought to address these issues to some degree (such as the Water Environment and Water Services (Scotland) Act 2003), these only go so far and we consider that more could usefully be done to improve the law in this area. For example, the question of wastewater discharge into rivers and seas has attracted increasing public attention in recent years with Scottish Water itself reporting in August 2021 that the number of recorded sewerage discharges had increased by 40% over the preceding five years. Given Scottish Water's restricted reporting requirements, this data may well cover only a part of the discharge problem.

The impacts of climate change appear likely to exacerbate such conditions and, given the current issues of phosphate and nitrogen nutrient pollution in England and Wales arising in part from such discharges and the effects that these have on bringing forward essential new development (such as new homes) in a sustainable manner, it is important for the law in Scotland to provide an effective and robust framework through which such matters may be tackled and prevented.

3. Please provide us with information about the potential benefits of law reform

Scotland has previously been seen to be leading in terms of water law (for example, by introduction of the Controlled Activity Regulations regime and implementation of the Water Framework Directive before other states) but reform of the law is needed to modernise the law if we are to continue leading in this area. Now is an opportune time for Scotland to take stock and examine these interconnected issues in holistic fashion.

In addition, while section 12(3) of the Sewerage (Scotland) Act 1968 governs the right of connection to public sewers and expressly entitles Scottish Water to impose requirements as to the mode and point of connection (in effect, a public interest protection to safeguard the operation of existing sewerage infrastructure), this is not well co-ordinated with other regulatory regimes such as the system of town and country planning which has the potential to, and in some cases does, give rise to competing requirements across the regimes which are mutually incompatible. Examination of the interaction of the two regimes, including the potential to align the statutory appeal processes to the Scottish Ministers,

would provide useful clarification and efficiencies.

4. 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 a project concerning water law and sewerage regulation would likely be suitable for the relevant process in the Scottish Parliament. It is expected that a Bill coming from such a project would be framed so as to simplify, modernise and improve the law and is unlikely to generate substantial controversy among stakeholders.

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ANNEX (per proposal 4)

Proposed legislative changes – Requirements of Writing (Scotland) Act 1995, Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and Electronic Documents (Scotland) Regulations 2014 (May 2022)

We take this opportunity to provide a note of suggested changes and matters for consideration in the context of the Requirements of Writing (Scotland) Act 1995, the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 and the Electronic Documents (Scotland) Regulations 2014.

1) Section 9B (3) and section 2(2) of the Requirements of Writing (Scotland) Act 1995

Change: To clarify that a *traditional* (i.e. hard copy) offer can be accepted by means of an *electronic* acceptance (and vice versa). It is our view that primary legislation would be required to make this change.

Analysis: The 1995 Act does not expressly refer to a contract signed by a combination of traditional and electronic signatures. Section 2(2) only refers to traditional documents and section 9B only refers to electronic documents. While both of these sections may be regarded as permissive and a mixture of signing types is not expressly excluded in the 1995 Act, there is concern expressed by many in the legal profession that a lack of specific provision casts the competence of 'mixed media' signing into doubt.

We consider that it is clear that it was the policy intention of Scottish Government to permit this. The Explanatory Notes to Part 10 of the Land Registration etc. (Scotland) Act 2012 (which introduced the sections dealing with electronic signatures) states: "Subsection (3) [of section 9B] allows a contract mentioned in section 1(2)(a) of the 1995 Act to be constituted by a mix of electronic and traditional documents." However, since section 9B(3) makes no mention of traditional documents, the conservative approach is that section 2(2) only permits a contract to be constituted by one or more *traditional* documents and section 9B only permits a contract to be constituted by one or more *electronic* documents.

We consider that the wording in sections 2(2) and 9B respectively is causing this issue, each appearing to be self-contained provisions that do not cross refer to the other.

Support for the argument that mixed media contracts are permitted can be found in section 1(2)(a) of the 1995 Act which states "a written document which is a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for the constitution of a contract ... for the creation, transfer, variation or extinction of a real right in land". The rules on interpretation of statutes contained in section 6(c) of the Interpretation Act 1978 and section 22(a) of the Interpretation and Legislative Reform (Scotland) Act 2010 both provide that in any Act words in the singular include the plural, meaning that section 1(2)(a) of the 1995 Act has to be read as if it says "a written document *or documents* which is *or are* a traditional document complying with section 2 or an electronic document complying with section 9B of this Act shall be required for the constitution of a contract ... for the creation, transfer, variation or extinction of a real right in land". Many contracts for the sale of land consist of more than one document

(i.e. missives) and the application of the rules of statutory interpretation would therefore mean that section 1(2) does authorise mixed media contracts. However, the absence of an express statement in the words of the Act is causing reluctance to accept mixed media contracts.

2) Section 12(2) and Schedule 2, paras 3 and 3A of the Requirements of Writing (Scotland) Act 1995

Change:

- (a) To clarify the effect of section 12(2) of the 1995 Act (and so how a company which has been appointed by another company, via a power of attorney, to sign on its behalf should sign).

It has been suggested that the effect of section 12(2) is to apply the 1995 Act rules governing how the *granter* must sign to the attorney, so that the same type of signature as is needed for the granter is all that is required for the attorney when they sign (the “substitution approach”). The alternative view is that the effect of section 12(2) is not to override the special cases signing requirements for the granter set out in Schedule 2 but is simply to apply the presumption in section 3(1) of the 1995 Act to the attorney in place of the granter (the “effect approach”).

- (b) To clarify that a document being executed by a corporate director or corporate secretary of a company (or by a corporate member of an LLP) will be presumed to have been subscribed by that company/LLP (i.e., will be self-proving) if the Valid/Probative approach referred to below is used. This issue arises where a company or LLP is required to execute a document and the director or secretary of that company (or member of that LLP) is itself a corporate body. This change would apply only to traditional documents.

Note: depending upon item 2 (a) above, this issue 2(b) may also extend to corporate attorneys authorised to sign on behalf of a company or LLP.

It is our view that secondary legislation would be required to amend Schedule 2, para 3A of the 1995 Act (subject to the affirmative procedure) - see the Limited Liability Partnerships Act 2000 (ss. 16 and 17(1) and (3)).⁶ We consider that it may be possible to amend Section 12(2) and Schedule 2, para 3 of the 1995 Act by primary legislation.

Analysis of item 2(a): By way of example if, say, a company (Granter Co. Limited) has authorised another company as its attorney (Attorney Co. Ltd) to sign on its behalf and the document being signed is to be signed probatively:

⁶ The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 as read with section 19(3) of the Limited Liability Partnership Act 2000 (“the 2000 Act”) which deemed the 2000 Act to be a pre-commencement enactment within the meaning of the Scotland Act 1998.

- (i) adopting the *substitution approach*, Schedule 2, paragraphs 1 and 3 of the 1995 Act are overridden by section 12(2) because that approach regards a document as having been signed probatively by Granter Co. Ltd, if Attorney Co. Ltd executes it:
- (1) either by a director of, or by the secretary of, or by an authorised signatory of Attorney Co. Ltd plus, in each case, a witness; or
- (2) by 2 directors of, by a director and secretary of, or by 2 authorised signatories of Attorney Co. Ltd (without the need for any additional witness or an additional authorised signatory of Granter Co. Ltd to sign).
- (ii) adopting the *effect approach*, Schedule 2, paragraphs 1 and 3 of the 1995 Act are not overridden by section 12(2) because that approach regards a document as only having been signed probatively by Granter Co. Ltd if their corporate attorney (authorised signatory) signs validly or probatively for that corporate attorney but then, to comply with Schedule 2 paragraph 3(5), either another authorised signatory or another witness is required.

Analysis of item 2(b): For a traditional document granted by a company or LLP to be self-proving, there are two possible approaches where the director or secretary of the company/LLP is itself a company (note: for corporate attorneys see the analysis at (a) above – references below to authorised signatories are therefore in square brackets):

- The company that is a director/the secretary[/an authorised signatory] or a member of the granter must execute probatively. Then the execution of the company (or LLP) that is the granter must also be self-proving (e.g., another witness is required) (the Probative/Probative approach); or
- The company that is a director/ the secretary[/an authorised signatory] or a member must execute validly, and then the execution of the company (or LLP) that is the granter must be self-proving e.g., by witnessing (the Valid/Probative approach).

For example:

- adopting the Probative/Probative approach, a director of Director Company Limited signs and their signature is witnessed. That is probative for Director Company Limited but, to be probative for Granter Company Limited, either a further witness is required, or one of the other directors or the secretary of Granter Company Limited has to sign too.
- adopting the Valid/Probative approach, a director of Director Company Limited signs - that is valid for Director Company Limited and therefore a valid execution by Granter Company Limited - and then a witness signs to render the document self-proving for Granter Company Limited.

Several years ago, the Property Professional Support Group asked Professor Kenneth Reid for his thoughts on this issue regarding companies (not LLPs). His reply is set out below:

“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.”

Ideally, Schedule 2, paras 3 and 3A of the 1995 would be amended to make it clear that the Valid/Probative approach is sufficient for the document to be self-proving.

The 2014 Regulations do not require to be amended in a similar vein because, for electronic documents, there is no need for a witness or for two signatories in order to achieve self-proving status:

- **Validity:** Regulation 5 states that where the granter is a company, an electronic signature on behalf of the company must be applied by the secretary/a director/ or an authorised person. It also states that where the granter is an LLP, an electronic signature on behalf of the LLP must be applied by a member of the LLP (see item 5 below re authentication on behalf of an LLP by an authorised person); and
- **Probativity:** Regulation 3 states that for an electronic document to be presumed authenticated by a granter the electronic signature incorporated into or logically associated with that document must be a qualified electronic signature.

The only way to achieve self- proving status therefore is for the electronic signature of a corporate director, corporate secretary or corporate authorised signatory of the granter - company (or of a corporate member of, or dependent upon item 5 possibly of a corporate authorised signatory of, the granter - LLP) to be a qualified electronic signature.

3) Section 1 of Legal Writings (Counterparts and Delivery) (Scotland) Act 2015

Change: To clarify that two or more signatories signing on behalf of one single entity (e.g., two directors signing on behalf of a company, or a director and secretary signing on behalf of a company; or two trustees

signing for a trust) can each sign a separate counterpart (as opposed to both signatories needing to sign the same counterpart). This change would apply to both traditional and electronic documents.⁷

We consider that secondary legislation would be required to make this change (subject to the affirmative procedure) - see section 5(1) of the 2015 Act.

Analysis: Sections 1(1) - (3) inclusive of the 2015 Act provide:

- “(1) A document may be executed in counterpart.
- (2) A document is executed in counterpart if –
 - (a) it is executed in two or more duplicate, interchangeable, parts, and
 - (b) no part is subscribed by both or all parties.
- (3) On such execution, the counterparts are to be treated as a single document.”

Uncertainty stems from the fact that the word “parties” is not defined and so is open to different interpretations. Are the signatories “parties” or are they simply signatories of a single “party”? If they are the latter, does this prevent them from each signing separate counterparts?

Professors Gretton & Reid (in *Conveyancing* 5th ed, para 18-41) explore the latter interpretation 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.”

⁷ By virtue of section 3 of the 2015 Act.

Footnote 58 to para 2.46 of the [SLC Report on Formation of Contract: Execution in Counterpart \(2013\)](#) (our emphasis below) shows that the Scottish Law Commission entertained the concept of split counterparts for directors of a company and for members of a LLP (and by extension, for trustees).

“Delivery – unilateral documents

2.46 Before leaving the topic of delivery, there is an aspect of the current law on delivery in relation to unilateral documents which needs a brief mention. At present, it is well-known that such documents, for instance bonds of caution, guarantees or dispositions, are only effective when delivered to the party who may rely on them.⁵⁶ A notorious example is in the *Stamfield's Creditors* case mentioned earlier.⁵⁷ Where there are two (or more) granters of a unilateral document we envisage that, if desired, it may be executed in counterpart.⁵⁸ However, we intend no departure from the current requirement that the unilateral document so executed cannot be effective until delivered to the party who is to be the creditor under it. (This is additional to the requirement already discussed that the counterparts of any document executed in counterpart must all be delivered between each of the subscribing parties before the document can come into effect.) To make the position clear, a general statement should be included in the legislation to the effect that the document executed in counterpart and delivered between the various subscribers must also meet any other requirement of the law (such as delivery to its creditor) for such a document to become effective. We therefore recommend:

A document executed in counterpart must, in addition to the counterparts being delivered between the subscribing parties, meet any other requirement of the law before it can become effective. (Draft Bill, section 1(6)(b))”

Footnote 58:

“58 There is no need for a specific recommendation to this effect as recommendation 1 (in para 2.13) embraces all documents, whether unilateral or otherwise. 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.”

4) Section 7 of the Requirements of Writing (Scotland) Act 1995

Changes: To make section 7 of the 1995 Act less prescriptive about what constitutes a signature, including:

- a) Amending section 7(2)(b) of the 1995 Act so that it no longer potentially discriminates against those whose custom it is to sign their name by a means other than a surname preceded by at least one

forename (or an initial or abbreviation or familiar form of a forename). For example, it is the custom for some to sign their family name first.

b) Amending section 7(2)(c) of the 1995 Act to address these two specific problems:

- i. where a signatory signs in accordance with section 7(2) (a) or (b) but their signature is insufficiently legible to determine that they have signed in accordance with section 7 (a) or (b), parties must then rely on section 7(2)(c) which cannot be used to confer a presumption of validity under section 3 of the 1995 Act This means that the document in question cannot be registered in the Sasine Register, Land Register, Books of Council & Session or Sheriff Court books;
- ii. signatures using non-Roman characters, such as Chinese or Arabic characters, are not expressly dealt with.

Analysis of item 4(a): section 7(2)(b) of the 1995 Act as currently drafted states that a traditional document (or alteration to such document) is signed by an individual natural person as a granter or on behalf of a granter of it if it is signed by him “with his surname preceded by at least one forename (or an initial or abbreviation or familiar form of a forename)”. This may discriminate against those whose custom it is to sign in some other manner. It may therefore be regarded as inappropriate in a multi-cultural and inclusive society.

Analysis of item 4(b)(i): It is not always possible for a solicitor to know whether someone’s signature will meet the requirements of s.7(2) (a) or (b) until the signed document is returned or delivered to them. If the signatory’s signature is judged to be insufficiently legible to be clear that these requirements have been met, this can lead to the signatory being asked to re-execute in a manner that clearly meets those requirements. On a very simple level this causes issues for transactions relating to timings and generally makes Scottish signing requirements more onerous than other jurisdictions. Signatories (and their solicitors) in other jurisdictions are surprised to learn that they cannot use their usual signature to sign the document where it could be or has been judged to be insufficiently legible to meet the requirements of section 7(2) (a) or (b).

In some situations, it will be important that it is the granter’s usual signature and if their usual signature is not acceptable, and they have to re-sign in a more legible way, this could lead to other issues including i) inconsistency with other documents signed, and ii) inconsistency with specimen signatures. Moreover, forgery can potentially be made easier by requiring a person to sign in way which is not their “usual signature” as it is likely to be simpler to forge a signature using a “legible” signature rather than a signature which others would find difficult to replicate.

In addition, if the granter’s usual signature cannot benefit from the presumption of validity under section 3 of the 1995 Act, this would seem to undermine the purpose of having a witness to attest to their signature.

Analysis of item 4(b)(ii): It would be useful for the 1995 Act to expressly permit signatures using foreign (i.e., non-Roman) characters, such as Arabic or Chinese characters, especially given the global nature of work undertaken in Scotland. Registers of Scotland will reject deeds which have been signed using foreign characters on the basis that these are unacceptable because the deed must bear to be signed by the signatory and if that signature is not in Roman characters, then the deed is not capable of bearing to have

been so signed, as RoS cannot determine that the signature is that of the named party. We are aware that some take the view that signatures using a foreign alphabet are acceptable if the granter's name is narrated that way in the document/testing clause (i.e., satisfying section 7(2) (a)), but this does not solve the issues relating to registration. By contrast, in England, HM Land Registry's PG 8 says:

"A signature in foreign characters still constitutes a signature complying with the requirements for a valid deed. However, where any instrument is executed in foreign (i.e., non-Roman) characters, such as Arabic or Chinese characters, we will require either:

- The words of execution to be expanded to confirm that the signatory understands English or that the signatory has familiarised themselves with its contents (perhaps by having had it read out to them in their native language)
- A separate certificate to that effect given by the conveyancer acting for the signatory."

Similar issues arise in respect of witness signatures under section 7(5).

5. Regulation 5(3) of the Electronic Documents (Scotland) Regulations 2014 and section 12(3) of the 1995 Act

Change: To clarify that a document can be authenticated by an attorney appointed by an LLP by adding the words "or a person authorised to sign by the limited liability partnership" to the end of regulation 5(3) of the 2014 Regulations.

Analysis: At common law, a legal person can grant authority to an attorney to sign documents.

While paragraph 3A of Schedule 2 of the 1995 Act provides that a traditional document "is signed" by an LLP if signed on its behalf by a member, attorneys regularly sign traditional documents on behalf of LLPs, under the auspices of section 12(2) of the 1995 Act:

"Any reference in this Act to subscription or signing by a granter of a document or an alteration made to a document, in a case where a person is subscribing or signing under a power of attorney on behalf of the granter, shall be construed as a reference to subscription or signing by that person of the document or alteration."

When it comes to electronic documents, however, a combination of section 9B(1) of the 1995 Act and regulation 5(3) of the 2014 Regulations could suggest, on the face of it, that LLPs can only execute electronic documents if the electronic signature is applied by a member. This is because of the use of the word "must" in regulation 5(3) which some practitioners interpret as meaning that this is the **only** way that LLPs can apply an e-signature:

"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."

However, regulation 5(3) should be read in conjunction with section 12(3) of the 1995 Act which provides that:

"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."

Some practitioners take the view that section 12(3) is the equivalent of section 12(2) and thus the common law on appointment of agents or attorneys to sign is preserved for LLPs signing both traditional and electronic documents. However, other practitioners' view is that LLPs can only sign electronically if a member signs because of the reference to "must" in regulation 5(3).

If an attorney cannot e-sign for an LLP, then section 12(3) appears meaningless for LLPs and the intention of the 1995 Act to preserve a juristic person's ability at common law to appoint attorneys is defeated.

The same issue does not arise for partnerships or companies because the parts of regulation 5 relevant to those entities refer to "person authorised to sign". It would be clearer if the words "or a person authorised to sign by the limited liability partnership" were added to the end of regulation 5(3).

6. Scots law requirement to print the full document before signing and issues around counterpart execution

Change: There is a body of opinion among solicitors that it would be helpful if Scots law permitted:

(a) A 'Mercury' Option 1 type (see [Law Society of England & Wales Practice Note Execution of documents by virtual means](#)) signing/completion mechanism, coupled with suitable processes for ensuring that the signatories have read and understood the document they are signing; and

(b) the electronic dated copy circulated at completion to be considered as the "document" rather than waiting for the principals to be delivered and dated and circulating again.

Not all solicitors are in favour of this change. For example, they are concerned that item (a) above could increase the potential for mistakes, fraud, and litigation.

We suggest that consideration should be given to the viability and advisability of items at (a) and (b) above.

Analysis: This concerns the requirement to print Scots law traditional documents in full before being signed, whereas the 2015 Act permits electronic delivery of part only of the document – including the signature pages provided what is delivered "is sufficient in all the circumstances to show that it is part of the document".

Some consider that this is not ideal from a practical perspective. For example: during lockdown having to print one signing page compared to all the pages of a document would have been much easier for

signatories; and it often leads to solicitors having to ask clients and intermediaries whether full documents were printed prior to execution, when only signature pages are scanned back. When they confirm that the full documents were printed, this gives a paper trail to confirm that the full documents were printed.

The requirement to print documents before they are signed is also not ideal from a climate change perspective.

7. Operative text requirement in section 7(1) of the Requirements of Writing (Scotland) Act 1995

Change: Could section 7(1) be clarified to explain what is meant by "the last page"? Must it include any operative text; or could it comprise all or part of the testing clause only? There are varying views among solicitors as to the most suitable approach here.

Analysis: The requirement in section 7(1) of the 1995 Act for the granter to sign at the end of the last page (excluding annexations) is interpreted by many as requiring the signature to appear on a page which contains some operative text (and not just some or all of the testing clause). This requirement is a common pitfall particularly in cross-border/multi-jurisdictional transactions and, if it is not complied with, may necessitate re-signing of the document.

8. Remote witnessing of wills as relative to section 3 of the Requirements of Writing (Scotland) Act 1995

Change: To clarify the arrangements for execution of wills, particularly in relation to the remote witnessing of wills and the meaning of "one continuous process" in section 3 of the 1995 Act.

Analysis: For a traditional document to be self-proving, section 3(4)(e) of the 1995 Act requires that the granter's subscription or, as the case may be, acknowledgement of their subscription, and the person's signature as witness of that subscription are "one continuous process". Clarification in legislation about what is meant by "one continuous process" would be of assistance, particularly in the context of wills being 'remotely' witnessed where the signature of the granter is observed ("witnessed") over a video link, but the actual signature of the witness is added at some time after the subscription of the granter or acknowledgement of their subscription.

9. Schedule 2, paragraph 5(5) of the 1995 Act - Execution by other bodies corporate

Change: To increase the routes by which documents signed on behalf of other bodies corporate can achieve self-proving status by adding the provision set out below:

“Where a document neither:

- bears to have been signed by a person as a witness of the subscription of the member, secretary or other person signing on behalf of the body; nor*
- bears to have been sealed with the common seal of the body,*

it shall be presumed to have been subscribed by the body corporate if it bears to have been subscribed on behalf of the 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 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.”*

Analysis: Allowing these proposed additional methods of signing to benefit from the presumption of validity under section 3 of the 1995 Act would particularly assist those dealing with execution by foreign companies, which is a regular occurrence given the global nature of work undertaken in Scotland. It seems illogical (and other jurisdictions are surprised to learn) that, for example, even if 2 or more members of the body corporate (or of governing board of the body) sign on behalf of the body, Scots law still requires there to be a witness for the document to be self-proving.

For further information, please contact:

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